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COURT OF KING'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE	REGINA
APPLICANTS	SABRINA DYKSTRA, a minor by her litigation guardian CLAIRE DYKSTRA, JILL FORRESTER, RYAN HEISE, KAYLA HOPKINS, LYNN OLIPHANT, HAROLD PEXA, AMY SNIDER, and CLIMATE JUSTICE SASKATOON ORGANIZATION INC.
RESPONDENTS	SASKATCHEWAN POWER CORPORATION, CROWN INVESTMENTS CORPORATION OF SASKATCHEWAN, and THE GOVERNMENT OF SASKATCHEWAN

REPLY BRIEF OF LAW TO APPLICATIONS TO STRIKE
ON BEHALF OF SABRINA DYKSTRA ET AL

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REPLY BRIEF OF LAW TO APPLICATIONS TO STRIKE

I. INTRODUCTION

1. The history of proceedings is as follows:
   a) The main applicants ("Applicants") filed their Originating Application March 31, 2023, amended on July 14, 2023 (correction to name of one party only), and substantively amended on May 31, 2024 ("Application").
   b) The Respondent Government of Saskatchewan ("Government") and Respondents the Saskatchewan Power Corporation ("SaskPower") and the Crown Investments Corporation of Saskatchewan ("CIC") (collectively the "Crown") filed applications to strike in September 2023 ("Strike Applications").
   c) On October 27, 2023, the parties consented to setting the Strike Applications for a special hearing on April 5, 2024, which was delayed and is now tentatively set to be heard October 4, 2024.
   d) The Respondent Government and Respondents Crown filed and served their briefs dated February 4, 2024, and February 5th, 2024, respectively.
   e) The Saskatchewan Environmental Society applied to intervene in the Strike Applications and a hearing was conducted on April 5, 2024. Justice Chow denied the application to intervene in his decision dated August 8, 2024.
   f) The Applicants filed and served an amended Application dated May 31, 2024.
   g) The Applicants applied for a case management conference dated June 27, 2024 (decision pending).
2. This Application claims that the Respondents have violated rights protected by the *Canadian Charter of Rights and Freedoms* ("*Charter*") by their actions to construct new unabated fossil-fuel fired electrical generation that causes and exacerbates the harm and intensity of dangerous climate change.[1]

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11 [*Charter*].

3. Climate litigation is growing in frequency within Canada and globally. Notably, the Supreme Court of Canada ("SCC") recently stated:

> The essential factual backdrop to these appeals is uncontested. **Climate change is real**. It is caused by greenhouse gas emissions resulting from human activities, **and it poses a grave threat to humanity's future**. The only way to address the threat of climate change is to reduce greenhouse gas emissions.[2] [Emphasis added]

4. Furthermore, as stated by the Saskatchewan Court of Appeal ("SKCA"):

> The factual record presented to the Court confirms that **climate change caused by anthropogenic greenhouse gas [GHG] emissions is one of the great existential issues of our time. The pressing importance of limiting such emissions is accepted by all of the participants in these proceedings**.[3] [Emphasis added]

5. The Strike Applications must be dismissed. The Respondents cannot meet the high standard that would justify barring public citizens from having a court fully consider the allegations that the state has violated their *Charter* rights by exacerbating an already deadly and impending threat.

II. ISSUES

6. This reply brief covers the following points:
   i. Novelty is not a reason to strike the claims
   ii. Jurisprudence alone does not justify striking the claim
   iii. International law/obligations must be considered
   iv. The pleadings are sufficient:
      a. The Applicants pinpoint specific actions and legislation
      b. The Applicants sufficiently claim that the state's actions breach s. 7, s. 15, and common law rights
      c. The Applicants pled that the violation of s. 7 is not in line with the principles of fundamental justice
      d. The Applicants claim that the state's actions cause the alleged harm
   v. The claims are justiciable
   vi. The statutory and common law duties of care are also properly pled

[2] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 2 [*GGPPA SCC*].
[3] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at para 4 [*GGPPA SKCA*].

III. PRELIMINARY NOTES

7. The Respondents' Strike Applications rely on Rule 7-9 of *The King's Bench Rules ("The Rules").* The Respondent Crown also seek costs pursuant to Rules 11-1, 11-7, and 11-8.

8. The proper approach to determining a motion to strike is settled and follows these main principles: [4]

   i. The test is whether, **beyond doubt**,[5] the claim has "no reasonable prospect of success" or it is "plain and obvious the action cannot succeed" - this threshold is high and applies to determinations of fact, law, and mixed fact and law. If an applicant cannot meet this threshold, the matter should proceed to trial;[6]
   ii. The party bringing the motion to strike has the burden to meet this threshold;[7]
   iii. The facts as pled are assumed to be true "unless they are manifestly incapable of being proven";[8]
   iv. The pleadings should be read as generously as possible and should not be defeated because of drafting deficiencies;[9] and,
   v. The court may consider the pleadings as they stand OR as they may be reasonably be amended.[10]

9. When applying these principles, the court:

   i. can consider the statement of claim, including documents referred to within, and any responses to a request for particulars;[11]
   ii. does not consider affidavits or "extraneous evidence";[12]

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[4] *Reed v Dobson*, 2021 SKQB 252 at para 59, based on the SCC's guidance in *Atlantic Lottery Corp. Inc. v Babstock,* 2020 SCC 19, [2020] 2 SCR 420 [*Babstock*].
[5] *J.L. v Shewchuk*, 2023 SKKB 253 at para 7 [*Shewchuk*].
[6] *Babstock*, *supra* note 4 at paras 14, 87, and 90 citing *R v Imperial Tobacco Canada Ltd.,* 2011 SCC 42, [2011] 3 SCR 45 [*Imperial Tobacco*], and *Hunt v Carey Canada Inc*., [1990] 2 SCR 959.
[7] *Barnes v Canada (His Majesty the King)*, 2024 FC 212 quoting *Turnbull v Canada,* 2019 FC 224 at para 15.
[8] *Babstock, supra* note 4 at para 87 quoting *Imperial Tobacco.*
[9] *Ibid* at para 88.
[10] *Ibid* at para 90.
[11] *Canada (Attorney General) v Merchant Law Group LLP*, 2017 SKCA 62 at para 19.
[12] *Ibid.*

iii. can permit amendments, with or without an application, to cure deficiencies;[13] and,

iv. can strike all or portion of a claim.[14]

10. The basic question at this stage is, "Can the trial court determine the outcome of the application, and should they?" In other words, if the court can apply law to a set of facts to decide a question put before it and doing so would be a good use of court resources, the application should proceed. We must answer this question without also pre-determining the substantive issues, a real risk that can be difficult to avoid. To mitigate the risk, we must remember that we consider a motion to strike from a procedural mindset, not a substantive one. This stage is not an assessment of the merits of the claims.[15]

11. The stakes of striking an application are high, which is why the standard is ***beyond doubt***, a burden that is higher to meet than the already difficult bar set for Crown prosecutors who must prove criminal convictions beyond a *reasonable* doubt. The Crown's burden exists because we value *Charter* protections. Just as a court must be diligent to protect a member of the public's right to a fair and robust process for a criminal prosecution, so too must a court be diligent to protect a member of the public's right to seek justice from the courts for redress from harmful state conduct.

IV. CAUTIONARY NOTES

12. Striking an application is not a formulaic exercise. Pleadings should not be struck simply based on generalized concerns about "policy", "politics", "speculation" [16], "complexities" or because case law (or lack thereof) may seem to have already

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[13] The SKCA has also emphasized that, where feasible, plaintiffs "should be given an opportunity to amend their pleadings to correct deficiencies before those pleadings are struck" (*Yashcheshen v Teva Canada Ltd.*, 2022 SKCA 49 at para 43 [*Yashcheshen*]). A court may permit amendments to cure defective pleadings in the absence of an application to do so. The SKCA recently stated that "as a rule, an order permitting such an amendment should be made if it is apparent that it would correct the defect" (*Wilson v Saskatchewan Water Security Agency*, 2023 SKCA 16 at para 20). This flows from the principle that an application to strike pleadings should only occur in "plain and obvious cases" (*Yashcheshen* at para 42).

[14] *Shewchuk, supra* note 5 at para 7.

[15] *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261 at paras 4 and 95 [*Elder*].

[16] *Government's Brief* dated 4 February 2024 at para 22 referencing *Operation Dismantle* [*Government Brief*]. This is not what *Operation Dismantle* said. A plaintiff *can* speculate if such statements can be proven.

concluded on the matter. To strike an application simply because of an apparent similarity to previous unsuccessful litigation or because of uncertainty over whether a court should adjudicate a novel issue would be a determination of the issues. To do so would turn this motion into an expedited trial without evidence, which must be avoided.

13. A strike application must be resolved based on a full appreciation of the facts/pleadings at issue, the spirit and intent of the rule for striking pleadings, and a proper contextual understanding of the case law. Upon taking these into account, the threshold to strike is much higher than the Respondents suggest. The Respondents have not only erred by debating the merits of the issues, but they have also failed to meet the burden to prove the Application must be struck.

Novelty is not a reason to strike

14. Applications that ask a court to rule in a manner not done previously is not a valid reason to strike. Doing so predetermines the novel claims in place of an actual hearing on the merits, which is not appropriate. Understandably, novel claims may cause more uncertainty when deliberating whether an application has a reasonable chance of success. However, the threshold to strike an application is not doubt or uncertainty about a claim's outcome. We cannot ask, "How would a court treat the application at issue? Should the jurisprudence be followed or departed from?" Rather, we ask, "Can the court resolve the questions raised in the application to strike without offending the administration of justice?"

15. Also, is an action novel because it asks the court to create new law or is it just because the issue itself is novel? With the latter, applications can appear novel, but it is really just existing law encompassing a new issue. This Application falls more so under the latter category.

16. Regardless, creating new law or applying law in a novel manner is still not a reason a claim should fail. Claimants can make applications based on a novel interpretation or extension of existing jurisprudence. The claim needs to be arguable on a procedural

basis. Novel claims, even doubtful ones, are nonetheless allowed to stand and have their validity tested at trial:

> A claim should not be struck unless it is "hopeless" or… has a radical defect. The plaintiff need not show that it will succeed. The question is whether there is some chance of success… There are many questions which have not been clearly asked or answered by the courts, and even where the answer seems clear, the law will sometimes evolve.[17]

17. The SCC has also recognized that application asking the court to create new law is not the basis for striking:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*… introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd*…, a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim… The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.[18] [Emphasis added]

18. The generous and permissive approach to novel claims in applications to strike applies generally but takes on even greater importance in public interest litigation under the *Charter*. The SCC has long insisted that constitutional interpretation must be consistent with the "living tree" doctrine, which recognizes that the law may need to adjust and evolve to give the court the flexibility to address the realities of modern life and societal change.[19] Such societal shifts can be social, political, and legislative. These shifts are increasingly subject to global influence as Canada ratifies international legal instruments while courts and tribunals from all around the world grapple with similar questions

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[17] *Venture Construction Inc. v Saskatchewan (Highways and Infrastructure)*, 2015 SKQB 70 at para 11; see also: *Domenic Construction Ltd v Primewest Capital Corp*, 2020 ABCA 265 at paras 35, citing *Imperial Tobacco, supra* note 6 at para 21.

[18] *Imperial Tobacco, supra* note 6 at para 21.

[19] *Grassroots v His Majesty the King*, 2023 ONSC 3722 at para 33, citing *Reference Re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698 at para 22 [*Grassroots*]; see also Gerald Kennedy and Lorne Sossin, "Justiciability, Access to Justice and the Development of Constitutional Law in Canada" (2017) 45 Federal Law Review 707 at 723 (calling for greater caution before rejecting novel constitutional arguments based on pleadings alone).

related to climate change.[20] Globally, the law on this topic is rapidly evolving.[21] The emergence and development of this body of law should not be pre-emptively stifled based on novelty alone.[22]

19. Climate litigation is becoming less "novel" as courts around the world are coming to the shared conclusion that the rule of law has an important role to play in determining the legality of state action with respect to climate change. International courts and tribunals are finding states liable for breaching the rights of their citizens in relation to the existential threats associated with human-caused climate change, and have determined to resolve the issues brought before them by:

    i. Ensuring that governments use adequate data[23] and justify[24] their proposed actions to meet 2050 net-zero targets;

    ii. Determining the legal limits of government actions and inactions that contribute to climate change based on adverse impacts on human rights;[25]

[20] *Grassroots, supra* note 19 at para 202.

[21] See, e.g. the recent discussion of climate litigation across the world in Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2024 Snapshot* (London: Grantham Research Institute on Climate Change and the Environment, 2024).

[22] *Henry v British Columbia (Attorney General),* 2015 SCC 24 at para 35.

[23] See e.g. *(Friends of the Earth Ltd et al) v Secretary of State for Business, Energy and Industrial Strategy*, [2022] EWHC 1841 (Admin) [United Kingdom]; *(Friends of the Earth et al) v Secretary of State for Energy Security and Net Zero*, [2024] EWHC 995 (Admin) [United Kingdom].

[24] *Friends of the Irish Environment CLG v the Government of Ireland, Ireland and the Attorney General*, [2020] IESC 49 [*Friends of the Irish*].

[25] *Held v Montana,* No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023) [United States] [*Montana*]; *Verein KlimaSeniorinnen Schweiz and Others v Switzerland,* No 53600/200, [2024] ECHR 304 [European Court of Human Rights] [*Verein*]; *Human Rights Committee, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning Communication No. 3624/2019,* 135th sess, UN Doc CCPR/C/135/D/3624/2019 (22 September 2022) [United Nations]; *Urgenda v Netherlands,* ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, 20 December 2019), English translation in (2020) 59 ILM 811 [*Urgenda*].

iii. Finding that governments have a legal obligation to mitigate greenhouse gas emissions and participate in global efforts to address this existential crisis in coordination with other governments across the world;[26]

iv. Recognizing that the state's failure to consider the impact of their actions on the future, given the scientific projections that the climate crisis will intensify as time passes, is an infringement of the future generation's freedom and rights and a violation of the principle of equality between current and future generations;[27]

v. Rejecting a strike application despite the opposing party trying to argue that the court was not equipped to handle the case in recognition of the notion that the "common law must develop, if at all, in the fertile fields of trial, not on the barren rocks of a strike out application"; [28] and,

vi. Finding climate litigation justiciable.[29]

20. From these international cases, we learn that courts do not need to dramatically depart from the histories and precedents that have long guided them to address the illegality of state action that exacerbates climate change and causes harm to the public. In these actions, as is the case here, opponents are quick to categorize such claims as "too novel", but that argument did not deter the judges, nor should it. Similarly, Saskatchewan courts have the capacity to consider the issues raised in this Application, especially given the vast number of decisions we can now reference thanks to other jurisdictions who have embraced such discussions.

21. What is novel in all these cases is the reality of ever-worsening human-caused climate change: it is "one of the great existential issues of our time."[30] However, this does not

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[26] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law,* Advisory Opinion, 21 May 2024 (International Tribunal for the Law of the Sea), online: https://itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf (21 August 2024).

[27] Decision of The National Human Rights Commission of the Republic of Korea, dated 12 June 2023, online: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230823_19961_opinion-1.pdf (21 August 2024).

[28] *Smith v Fonterra Co-operative Group Limited*, 2024 NZSC 5 (New Zealand) at para 131.

[29] *Montana, supra* note 25.

[30] *GGPPA SKCA, supra* note 3 at para 4.

make the application of existing laws to address climate change an inappropriate use of court resources. The Application does not stretch the jurisprudence nearly as far as the Respondents imply. And even if it does require some evolution in the law, this fact alone would not be a valid reason to strike the Application.

Jurisprudence not a reason to strike

22. The Respondents rely heavily on three Canadian cases dealing with a similar problem (*Charter* rights guaranteeing a level of protection against governments that fail to address the dangerous impacts of climate change): *La Rose*, *Misdzi Yikh*, and *Mathur*.[31] All three are in some ways comparable to this litigation and they have played an important role in helping shape the role of litigation in combating climate change in Canada.

23. However, we must avoid examining particular phrases from these cases in isolation or over-generalizing rulings without keeping the court's surrounding rationale in mind. Otherwise, we risk misapplying the jurisprudence as the Respondents have done. Notably, **each of these cases survived preliminary applications to strike and proceeded to a full hearing on its merits**, and the final results still have yet to come for all three cases.[32]

24. This Application is distinct from these cases when we truly understand the reasoning of those courts. This brief will explain the analogies and distinctions between this Application and the claims in *La Rose*, *Misdzi Yikh*, and *Mathur* throughout. Regardless of any jurisprudence and its similarities, the court must still find that, ***beyond doubt***, *this claim alone*, with its own unique place in time, geography, and facts, cannot proceed to trial.

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[31] *La Rose v Canada*, 2023 FCA 241 [*La Rose*]; *Misdzi Yikh v Canada*, 2020 FC 1059 [*Misdzi Yikh*]; *Mathur v Ontario*, 2020 ONSC 6918 [*Mathur*].

[32] See, respectively*: La Rose* (jointly addressing appeals from first-instance decisions in *La Rose* and *Misdzi Yikh)* and *Mathur*. While the *Mathur* decision was later dismissed on its merits (*Mathur v His Majesty the King in Right of Ontario,* 2023 ONSC 2316), an appeal hearing was conducted and the decision of the Ontario Court of Appeal in that matter remains under reserve. The *La Rose* and *Misdzi Yikh* cases are now set to proceed to trial before the Federal Courts as well.

Preliminary note about International Obligations

25. Climate change is a particularly unique problem: the threat is fundamentally global. Nobody can choose not to play a role in the issue; parties contribute to or feel the effects of the problem simply by existing. Fortunately, the core science behind anthropogenic climate change does not differ across borders. This makes solutions and cooperation possible, which the SCC has already recognized. [33]

26. The Respondents have a history of suggesting that Saskatchewan is or should be an exception, but the SCC has already discounted this harmful view:

> I reject the notion that because climate change is 'an inherently global problem', each individual province's GHG emissions cause no 'measurable harm'… Each province's emissions are clearly measurable and contribute to climate change. The underlying logic of this argument would apply equally to all individual sources of emissions everywhere, so it must fail. I note that similar arguments have been rejected by courts around the world.[34]

27. Just as individual states share in the causes and impacts of human-caused climate change, so too must they share in determining solutions relying on both international and *intranational* coordination in the judicial and legislative realms. The Applicants are joining public citizens from around the world who are no longer satisfied with continued ignorance of climate science and a "business-as-usual" approach to development. People are now turning to courts for redress.

28. The Respondents suggest that international obligations should have little to no relevance to this case, primarily because only the Government of Canada was a signatory to the *International Covenant on Civil and Political Rights* ("ICCPR")[35] and Saskatchewan was not.[36] With respect, this is either a disingenuous argument or a mistaken one. International norms play an important role in the growth and evolution of Canada's domestic *Charter* jurisprudence.

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[33] *GGPPA SCC, supra* note 2 at para 190.

[34] *Ibid.*

[35] International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47.

[36] *Crown's Brief of Law,* dated 5 February 2024, at paras 59 – 60 [*Crown's Brief*].

29. The Respondents conflate two distinct aspects of Canadian law. On the one hand, we have federalism: when the federal government enters into international treaties or implements them via statute, the terms of those treaties do not bind provincial legislatures unless the federal government imposes such using a proper head of power.[37] On the other hand, we have the presumption of conformity: governments of all levels must still interpret domestic legislation or use statutory discretion in line with Canada's obligations under international law, including the *Charter*.[38] For example, the SCC recently unanimously confirmed that Canadian law presumptively conforms with the ICCPR because Canada ratified it.[39] The SCC even took interpretive guidance from the preamble, which was not binding.[40] The SCC continued to draw from international courts, including practices and jurisprudence of the International Criminal Court and the Grand Chamber of the European Court of Human Rights, in its contextual interpretation of s. 12 of the *Charter*.[41]

30. As the SCC majority held in *Nevsun Resources Ltd.*, "Canadian courts, like all courts, play an important role in the ongoing development of international law".[42] The majority cited with approval the following apposite quote from La Forest J., writing extra-judicially, in support of this proposition:

> … in the field of human rights, and of other laws impinging on the individual, our courts are assisting in developing general and coherent principles that apply in very significant portions of the globe. These principles are applied consistently, with an international vision and on the basis of international experience. Thus our courts – and many other national courts – are truly becoming international courts in many areas involving the rule of law. They will become all the more so as they continue to rely on and benefit from one another's experience. Consequently, it is important that, in dealing with interstate issues, national courts fully perceive their role in the international order and national judges adopt an international perspective.[43]

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[37] *Attorney-General for Canada v Attorney-General for Ontario,* 1937 Canlii 362 (UK LJPC), [1937] AC 326 (PC) as cited and discussed in *GGPPA SCC, supra* note 2 at para 149.

[38] *R v Hape*, 2007 SCC 26 at para 53; *R v Vavilov*, 2019 SCC 65 at para 114. See also: *Michel v Graydon*, 2020 SCC 24 at para 103.

[39] *R v Bissonnette,* 2022 SCC 23 at para 100 [*Bissonnette*].

[40] *Ibid* at para 99.

[41] *Ibid* at paras 101-108.

[42] *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at para 70.

[43] *Ibid*, citing the Honourable Justice Gérard V. La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996), 34 Canadian Yearbook of International Law 89 at 100-1.

31. In contrast, the Respondents promote a constrained, isolationist understanding of international law's relevance to the interpretation of the *Charter,* and do so by relying on one lower court decision that was overturned on appeal to the SCC.[44] The Saskatchewan Court of Queen's Bench (as it was at the time) did indeed remark on the fact that there was no implementing legislation in Saskatchewan for either the ICCPR or the *International Covenant on Economic, Social and Cultural Rights* (the "IESCR") that were invoked by the plaintiffs in support of the interpretation of s. 2(d) of the *Charter*.[45] However, the Court went on to clarify that this submission from the Government of Saskatchewan was "inconsistent with many judicial authorities [...] which treat international norms as highly important to *Charter* interpretation".[46] Contrary to Saskatchewan's position, the Court concluded that these international instruments "are relevant and persuasive sources for the interpretation of the *Charter*, which should generally be presumed to provide protection at least as great as Canada has undertaken to provide internationally"; and this is true irrespective of "[w]hether or not Canada's international obligations directly bind the Government of Saskatchewan".[47]

32. Upon further appeal, the SCC re-emphasized this notion and went on to consider not only the IESCR and the ICCPR, but also provisions from various other international charters.[48] Upon this review, the SCC aligned its interpretation of the *Charter* with the "emerging international consensus" that if collective bargaining is to be meaningful, it must include a right to strike.[49] While two justices dissented on this ultimate conclusion, they merely doubted the existence of an international consensus on the specific question in dispute, while still accepting that binding treaties invoke the presumption of

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[44] *Saskatchewan v Saskatchewan Federation of Labour,* 2012 SKQB 62.

[45] *Ibid* at para 32.

[46] *Ibid* at para 107.

[47] *Ibid* at para 114.

[48] *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 64 citing *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para. 23 and at paras 65-74 where the Court references other international instruments: the Charter of the Organization of American States, the Convention of the International Labour Organization, international jurisprudence from the Committee on Freedom of Association and the European Court of Human Rights, domestic jurisprudence from Germany and Israel, the constitutions of France, Portugal, Spain and South Africa, and the European Social Charter.

[49] *Ibid* at para 75.

conformity for interpretation of *Charter* rights and non-binding international law has persuasive value in appropriate circumstances.[50]

33. The Respondents' argument that the ICCPR has no relevance to the interpretation of *Charter* rights in the absence of domestic provincial legislation is flawed for a further reason: if accepted, this would logically open the door to divergent interpretations of *Charter* rights as between provinces. With respect, there is no authority for the argument that *Charter* rights can apply differently in Saskatchewan than in other provinces because of the province's idiosyncratic perspectives on international law.

34. An additional flaw in the Respondents' arguments with respect to international law comes from the unsupported assertion that only the text of international treaties that predate the enactment of the *Charter* in 1982 can play a role in the interpretation of *Charter* rights. More specifically, the Respondents imply that only "the text of the ICCPR, not interpretive tools released at a later date" can be taken into account when interpreting the scope and content of s. 7 of the *Charter* in line with international legal standards.[51] There is simply no authority for this narrow form of originalism in *Charter* interpretation in Canada. For instance, the SCC did not hesitate to consider the *Rome Statute of the International Criminal Court* – an international instrument that was created in 1998, that was ratified by Canada in 2000 and came into effect in 2002 – as relevant to the interpretation of s. 12 of the *Charter*.[52] Likewise, in *Health Services and Support*, the SCC expressly stated that the emergence of a global consensus on the meaning of freedom of association, as reflected in a non-binding Declaration, was useful for the interpretation of s. 2(d) of the *Charter* regardless of the fact that it may have only crystallized in 1998.[53]

35. The Respondents make oblique, unelaborated references to the SCC's decisions in *Carter* and *Bedford* in support of their argument that only a narrow textual and originalist reading of the ICCPR is relevant to *Charter* interpretation. Notably, neither of these cases

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[50] *Ibid* at paras 150 - 160.

[51] *Crown's Brief , supra* note 36 at para 61.

[52] *Bissonnette, supra* note 39 at para 101.

[53] *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia,* 2007 SCC 27 at para 78 [*Health Services and Support*].

reference the ICCPR, nor do either of these decisions grapple with the presumption of conformity for *Charter* interpretation or the topic of international law more generally. However, *Carter* does speak to the need to provide an evolving interpretation of the *Charter* that accounts for legal developments elsewhere across the world (considering the "matrix of legislative and social facts" both domestically and internationally).[54] Contrary to what the Respondents suggest, *Carter* speaks to the need to approach the *Charter* as a living document that co-evolves with the changing legislative and jurisprudential landscape across the globe rather than remaining as an historic artifact.

V. DISCUSSION OF ISSUES

36. Applications may not be able to proceed if the claims are, ***beyond doubt***, (1) factually/legally insufficient, or (2) the application has no reasonable chance of success.

37. In a motion to strike, the court is making sure that the facts pleaded in the application are sufficient for the court to complete a proper analysis based on this pattern at trial. If the courts do not have facts, either because they simply do not exist in the statement of claim or they cannot be proven, the court will not be able to apply the law and there is no purpose to go to trial.

The Charter claims are sufficient as plead

38. *Charter* claims generally follow a consistent pattern where applicants must demonstrate the facts/evidence to establish the following:

    i. An action(s) at issue (impugned action);
    ii. Harms; and,
    iii. Causation (link between the impugned action and the harm).

39. This Application contains the following essential facts, which are sufficient to complete the above *Charter* analysis:

    i. Burning fossil fuels such as "natural gas" (fossil-gas) in unabated thermal electricity generators produces anthropogenic GHGs;

[54] *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 33 at paras 47 and 108-112 [*Carter*].

ii. GHGs trap heat in the atmosphere causing dangerous climate change;

iii. Climate change causes harm to a myriad of places and people, including to the Applicants. These harms are increasing in scope and severity every year and are detailed in the Applicants' affidavits referred to within the Application.

iv. The Respondents continue to build, develop and/or promote the expansion of new unabated fossil-gas based electricity generation assets, such as the Great Plains Power plant near Moose Jaw and the Aspen Power Plant proposed near Lanigan, despite Saskatchewan having an abundance of alternative means for generating clean electricity ("**Impugned Actions**").

v. Legislation permits these actions as outlined in the Application including, *inter alia, The Power Corporation Act*, R.S.S. 1978, c. P-19, and *The Management and Reduction of Greenhouse Gases (General and Electricity Producer) Regulations,* Sask Reg, 2018, c. M-2.01 Reg 1;

vi. Existing legislation that regulates the reduction of GHGs in Saskatchewan is permissive, discretionary, and ineffective, and the Premier of Saskatchewan has repeatedly stated he "does not care" about Saskatchewan having the highest per capital emissions in the country;[55]

vii. *The Management and Reduction of Greenhouse Gases (General and Electricity Producer) Regulations* allow SaskPower to *increase* emissions in the short-term compliance period from 2020-2024;

viii. The Crown directors have statutory and common law duties of care to balance the objectives of reliable, cost-effective, and sustainable power generation for Saskatchewan customers and communities the Crown corporations serve.

40. In other words, the factual pleadings include the following, which are sufficient to survive an application to strike:

[55] David Shield, "Premier Moe defends 'I don't care' comments on per capita carbon emissions in Sask" (12 Apr 2022), *CBC News*, online: <https://www.cbc.ca/news/canada/saskatoon/premier-moe-care-comments-carbon-emissions-1.6416828> (August 25, 2024).

i. Section 7: The ***Impugned Actions*** of building unabated fossil fuel electricity generation assets based on legislative powers exacerbates climate change and climate change-related harms that ***deprive*** the Applicants of their rights to life, liberty, and security in a manner that is not in accordance with the Principles of Fundamental Justice.

ii. Section 15: The ***Impugned Actions*** of building unabated fossil fuel electricity generation assets based on legislative powers exacerbates climate change and creates harm that ***disproportionately impacts*** groups based on race, age, gender, and immutable grounds, which is a ***distinction*** that contributes to a burden or denies a benefit in a way that reinforces, perpetuates, or exacerbates a disadvantage.[56]

41. The Crown does not argue that the Applicants' pleadings are insufficient. The Government of Saskatchewan, on the other hand, focuses a significant portion of its brief on this issue. They may disagree with the facts or their classification (*i.e*., whether a particular fact is an impugnable action or something else), but at this stage, we must take them as true. All that matters for the Strike Applications is whether they were pled. The Respondents try to suggest that vital facts are missing from the pleadings, but this cannot be so as they themselves discuss the alleged "missing" pleadings in their briefs when attempting to determine their merits, as shown below.

The Impugned Actions

42. The **Impugned Actions** in the pleadings are the Respondents building, developing, and/or promoting the expansion of ***new unabated fossil-fuel based generation assets.***

43. The Application also references several Saskatchewan statutes that provide the legal authority for the Respondents to take the **Impugned Actions**:

i. *The Power Corporation Act*;

ii. *The Crown Corporations Act, 1993;* and

iii. *The Management and Reduction of Greenhouse Gases Act* (the "*MRGHG Act*") and *The Management and Reduction of Greenhouse Gases (General and Electricity Producer) Regulations* (the *"MRGHG Regulations*").

[56] *R v Sharma*, 2022 SCC 39 at para 28 [*Sharma*].

44. The Respondents attempt to convolute the Application by incorrectly and arbitrarily listing a number of statements and calling them the impugned actions. [57] The Respondents then try to suggest that the Application will suffer the same fate as *La Rose*, in which the court found that the impugned actions were *too* broad for a proper analysis to be done: "the pleadings effectively put the entirety of Canada's response to climate change up for scrutiny".[58] If the court does accept the Respondent's argument on this point, the proper remedy would be to allow the Applicants to amend and clarify their pleadings, which is what the court ordered in the *La Rose* appeal. The Federal Court of Appeal ("FCA") essentially stated that because the s. 7 claim was justiciable, it should not be struck just because the impugned actions were too broad/diffuse.[59]

45. The important point is that neither Respondent can deny that the Application pleads the **Impugned Actions,** as they cite them in their own briefs:

    i. "The Climate Applicants allege that SaskPower continues to invest in developing unabated fossil fuel-based generation assets ("UFFGA's") ... SaskPower does not dispute that it is involved in providing electricity to Saskatchewan and that doing so involves the use of some UFFGA's."[60]

    ii. The Government of Saskatchewan contradicts itself when they state, "The Application does not identify what laws or Government decisions are impugned", as they mention the **Impugned Actions:** "The nature of the proposed impugned conduct can also be inferred from paragraphs throughout the Application, including… building, development, or promoting the expansion of electrical generation assets".[61]

46. The Respondents may seek to say that the Application lists too many impugned actions such that an analysis cannot be completed; in which case, the Applicant should be granted leave to narrow/clarify their pleadings. The Respondents cannot, however, say

[57] *Government's Brief*, *supra* note 16.
[58] *La Rose, supra* note 31 at para 128.
[59] *La Rose, supra* note 31 at paras 133-134.
[60] *Crown's Brief*, *supra* note 36 at paras 16 – 17.
[61] *Government's Brief*, *supra* note 16 at para 30.

that the Application does not even identify the Impugned Actions in the first place, as they mention them in their own briefs.

Section 7

a) The Application Pleads an Impugned Action

47. The Impugned Action is the Respondents building, developing, and/or promoting the expansion of new unabated fossil-fuel based generation assets.

b) The Application Pleads a s. 7 Deprivation/Harm

48. Section 7 *Charter* rights protect the following:

i. Right to Life - The SCC has determined that the right to life includes a right to physically exist; in other words, protection against the indirect or direct threat of death or an increased risk of death.[62] The SCC stated, "The sanctity of life is one of our most fundamental societal values… rooted in a profound respect for the value of human life."[63] The Applicants are also of the position that the right to life in s. 7 must also include a right to a healthy environment to bring its interpretation into compliance with international law.

ii. Liberty - The right to liberty provides protection for the quality of life - specifically, individual autonomy and dignity. Liberty means protecting a person's right to make "fundamental personal choices free from state interference."[64] "Body" includes both the physical and psychological.[65] The SCC has acknowledged that not being able to live a life with dignity causes emotional distress, which violates s. 7.[66]

iii. Security - security increases the quality of a person's life. Security refers to someone's autonomy, their "control over one's bodily integrity free from state interference." This also includes both physical and psychological security.[67]

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[62] *Carter, supra* note 54 at para 62.
[63] *Ibid* at para 63.
[64] *Ibid* at para 64.
[65] *Ibid.*
[66] *Ibid* at para 67.
[67] *Ibid* at para 64.

49. The Applicants do not need to prove a breach at this stage, but the Application must claim deprivation or harm. The Amended Originating Application (May 31, 2024) does so by pinpointing the following provable harms which breach section 7 rights: increased fatalities and serious illness, an unhealthier environment due to extreme weather, unnatural fire activity, increased air pollution, water and food insecurity, mental distress, financial instability, and physical displacement.[68]

50. The Respondents do not dispute that the Application properly claims the breaches. As stated in their briefs:

    i. "The Application identifies a number of harms, and future harms, that have been caused, and will allegedly be caused, by climate instability."[69]
    ii. The "Application identifies a number of communities that, it claims are vulnerable, have experienced, and will endure, more acute impacts from climate change, including youth, future generations, women, farmers, the elderly, those with eco-anxiety, depression, helplessness, preexisting health issues, and indigenous peoples."[70]
    iii. "In this case, the Climate Applicants state that their security of the person is infringed by action that increases GHG emissions using UFFGA's."[71]
    iv. "This is where it is alleged that the impugned legislation, while neutral on its face, creates a disproportionate impact on the claimant group based on a protected ground."[72]
    v. "The Climate Applicants also claim that the ICCPR provides a minimum level of protection with respect to the Charter, effectively arguing that the protections afforded by the ICCPR should be read into the Charter rights. The rights include the right to life, and the United Nations Human Rights Committee has confirmed that the interpretation of right to life should include a healthy environment… Even if the right to a healthy environment is included in the right to life under s. 7 of the Charter, the

[68] See the Amended Originating Application, dated 31 May 2024, at paras 36 – 37 [*Amended Originating Application*].
[69] *Government's Brief*, *supra* note 16 at para 35.
[70] *Ibid* at para 37 (on s. 15).
[71] *Crown's Brief*, *supra* note 36 para 53.
[72] *Ibid* at para 71.

Climate Applicants cannot establish that the actions of SaskPower and CIC infringe this right."[73]

c) The Application Pleads that the Impugned Action causes the Deprivation/Harm

51. The Applicants clearly state that the Impugned Action exacerbates climate change, which causes the harms outlined above such that there is a breach of their Charter rights.[74] The Applicants do not need to prove this cause, but merely claim it. As the court in *La Rose* stated, proving the nexus between the action and the harm is an issue for trial.[75]

d) The Amended Originating Application pleads that the Breach is not Aligned with the Principles of Fundamental Justice

52. The substantive additions to the Amended Originating Application were paragraphs 64-82 which address the principles of fundamental justice ("PFJs").[76]

53. Impugned actions that breach s. 7 rights can still proceed if in accordance with the PFJs. To do so, the Court must clearly determine the objective of the challenged state conduct and assess whether a deprivation of the PFJs has occurred.

54. The purpose and powers of SaskPower are articulated in section 8 of *The Power Corporations Act*. In addition, the annual reports of SaskPower articulate the mission and vision of SaskPower: "ensuring reliable, sustainable and cost-effective power for our customers and the communities we serve." Furthermore, SaskPower claims the objectives of the Impugned State Actions are, *inter alia*, to:

    a. Deliver reliable power, while keeping rates as low as possible; and,
    b. Support renewable power generation and the transition away from conventional coal[77] ("Objectives").

55. The Applicants assert that the Impugned Actions violate the principle of arbitrariness because the harms caused by GHG emissions violate the Applicants' *Charter* rights for no valid reason. There is no rational connection between expanding unabated fossil gas

[73] *Ibid* at paras 61 and 62.
[74] Amended Originating Application, *supra* note 68 at paras 36 - 37.
[75] *La Rose, supra* note 31 at para 134.
[76] Amended Originating Application, *supra* note 688.
[77] SaskPower, "Aspen Power Station" (2024) Online: https://www.saskpower.com/our-power-future/infrastructure-projects/construction-projects/planning-and-construction-projects/aspen-power-station (May 25, 2024).

electricity generation to the objective of providing reliable, sustainable and cost-effective electricity to Saskatchewan residents. In fact, these actions are directly contrary to this objective and undermine clean electricity generation by diverting funds away from renewable projects to harmful GHG-emitting power stations. The Respondents have not demonstrated that the Impugned Actions are necessary to achieve the objective of "support[ing] renewable power generation."

56. Furthermore, the Respondents have many other options to achieve the Objectives that would cause less harm to the Applicants. Developing new unabated fossil fuel electrical generation in the absence of adequate legislative and policy measures to reduce emissions is arbitrary and causes unnecessary mental and physical harm that is grossly disproportionate and contrary to the purpose and objectives of the Respondents' policies.

57. The Applicants also assert that the *MRGHG Act* and *Regulations* are not in accordance with the PFJs. Section 7(2) of the *MRGHG Act* describes the powers of the Minister with permissive language, such as the Minister "may (f) promote the reduction of greenhouse gas emissions and the sequestration of greenhouse gases." Furthermore, section 8 of the *MRGHG Act* states that the powers and responsibilities pursuant to this Act include "greenhouse gas emissions, climate change and adaptation to climate change." Although the *MRGHG Act* and the *MRGHG Regulations* do not explicitly outline their objectives and purpose within either piece of legislation, the shared titles of "Management and Reduction of Greenhouse Gases" plainly and obviously shows that the objective and purpose is **management and reduction of GHGs**.

58. The Application also claims that the *MRGHG Act* and *Regulations* also offend the PFJs for being overbroad. The laws allow GHG emissions that go too far and harms the Applicants in ways that bear no relation to the objective of reducing GHG emissions and adapting to climate change.

59. The Application further claims that the statute is overbroad and arbitrary in that the *MRGHG Act* gives the Minister the power and responsibility to reduce Saskatchewan's GHG emissions but the discretion to do nothing, while the *MRGHG Regulations* allow GHG emissions to increase in the 2020-2024 compliance period for no valid reason.

60. To summarise, the Applicants have claimed that the Respondents' breaches of the Applicants' s. 7 *Charter* rights are not in accordance with the Principles of Fundamental Justice. Adjudication of whether the breaches accord with the PFJs is a matter for trial and should not be determined on a preliminary motion to strike.

Section 15

a) The Application Pleads an Impugned Actions

61. The Impugned Action is the Respondents building, developing, and/or promoting the expansion of new unabated fossil-fuel based generation assets.

b) The Application Pleads s. 15 distinction/harm with disproportionate impacts

62. For a section 15 claim, the Applicants are to plead a distinction that produces a particular harm that disproportionately impacts certain protected groups. Such groups and the associated enumerated/analogous grounds are claimed in paragraph 53 of the Amended Originating Application, specifically:

    i. Indigenous people on the enumerated grounds of race;
    ii. Young people on the enumerated grounds of age;
    iii. Citizens living with ecoanxiety, which constitutes an immutable physical or mental disability;
    iv. Women on the enumerated grounds of gender; and,
    v. Farmers on the analogous grounds of occupation.

63. Each group, when analyzed individually, experiences disproportionate harms relative to the general Saskatchewan public. The courts have already agreed that northern and Indigenous communities and youth disproportionately face the impacts of climate change.[78] The Applicants will provide this evidence at trial based on the affidavits of the seven personal applicants and through the expert witness affidavits of Dr. Katherine Arbuthnott, Dr. Amber Fletcher, and Dr. Lindsay Galway.

64. The Applicants further identify the following provable distinctions causing disadvantages: Youth and future generations disproportionately feel the harms claimed

[78] *La Rose, supra* note 31 at para 76.

above - these impacts can be proven, just as impacts can be proven now. Just because such impacts have yet to materialize does not preclude *Charter* determination and the court has jurisdiction to make this finding to prevent future harm.[79]

65. The Respondent Government of Saskatchewan recognizes these pleadings in their brief: "In terms of who will bear the impacts of climate instability, the Application identifies a number of communities that, it claims are vulnerable, have experienced, and will endure, more acute impacts from climate change, including youth, future generations, women, farmers, the elderly, those with eco-anxiety, depression, helplessness, preexisting health issues, and indigenous peoples."[80]

c) The Application Pleads the Impugned Action causes the s. 15 distinction/harm

66. The Applicants submit the provable facts as outlined at paragraph 39 of this brief.

67. The Respondents also cannot deny that the Application properly pleads these as well; as stated in their briefs:

    i. "... building, development, or promoting the expansion of electrical generation assets that ***exacerbate climate change***" (emphasis added)[81]

    ii. "The Claim focuses on the contribution of greenhouse gas emissions to climate change… it seems to be based on the Climate Applicants' view that… operation and development of these power plants is negatively impacting climate change."[82]

68. The Applicants have pled the facts, outlined the impugned actions, including the disproportionate harms affecting those of enumerated or analogous grounds, and linked causation of those harms to the impugned actions.

69. Therefore, the Strike Applications ought to be dismissed because there is a reasonable prospect of success and pleadings are to be read generously when considering an application to strike, as the threshold to strike a pleading is high.

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[79] *United States v Kwok,* 2001 SCC 18 at para 66.
[80] *Government's Brief, supra* note 16 at para 36.
[81] *Ibid* at para 30.
[82] *Crown's Brief, supra* note 36 at paras 2 and 47.

The Charter claims are not bound to fail

70. The principles underlying this stage are primarily of a housekeeping nature regarding the administration of justice. Courts want to achieve the following:

    i. Avoid wasting both court and litigant resources on a claim that would not have succeeded; and,
    ii. Improving the overall quality of court decisions ("good" decisions from the court are complete and informed; this can only occur if litigants are capable of providing comprehensive evidence/arguments).[83]

71. Cases are only bound to fail when ***beyond doubt*** there is no reasonable cause of action or prospect for success. As previously mentioned in this brief, we must approach these issues from a mostly procedural mindset and not a substantive one.

Section 7

72. The Respondents argue that the Applicants' s. 7 claims must fail because there is no free-standing right to life, liberty, and security of the person. It is unclear on what basis this Application, which grounds its claim in a specific state action flowing from specific legislation, is asking for a positive obligation. Even if that were the case, whether s. 7 should encompass a positive obligation is an issue that should be dealt with at trial. The Respondents are making substantive arguments. They fail to show how this issue is inappropriate for the Court to address.

73. The Respondents also argue that the Application is bound to fail because of insufficient pleadings, however, as outlined above, they acknowledge the Impugned Actions that form the basis of the pleadings.

74. The Respondents also challenge s. 7 including a right to a healthy environment by arguing that the ICCPR does not apply, and if it did, the Applicants cannot prove an infringement. Claiming that s. 7 includes a right to a healthy environment involves the interpretation of the *Charter*. Clearly, interpretation of the *Charter* is completely within the capability of the Court.

[83] *Imperial Tobacco, supra* note 6 at para 19.

75. As indicated above when discussing the presumption of conformity and international jurisprudence, it is at least arguable that the Canadian *Charter* encompasses a right to a healthy environment as an incident of the right to life, liberty, and security of the person. Article 6 of the ICCPR states, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[84] The *International Human Rights Commission* then clarified that the Article 6 right to life includes the ability of individuals to enjoy life with dignity which requires protection from environmental harm and pollution.[85] The addition also states that climate change is a "pressing and serious threat" to present and future generations' right to life.[86] Similarly, a universal human right to a clean, healthy, and sustainable environment within international law has been endorsed in an Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights;[87] a Resolution adopted by the United Nations Human Rights Council in 2021;[88] and a Resolution adopted by the General Assembly of the United Nations in 2022;[89] in addition to international jurisprudence and other key documents on this topic.[90] *Charter* interpretation may be properly supported by any and all of these international legal instruments, in addition to others. Whether such an argument succeeds or not should be

[84] *International Covenant on Civil and Political Rights*, United Nations General Assembly, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*] online: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights (22 August 2024).

[85] United Nations International Covenant on Civil and Political Rights, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, UN Human Rights Committee OR, 124th Sess, CCPR/C/GC/36 (2018) at para 62, online: https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-36-article-6-right-life (22 August 2024).

[86] *Ibid.*

[87] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", adopted on 17 November 1988 and entered into force on 16 November 1999, OAS Treaty Series No. 69.

[88] United Nations Human Rights Council, *Resolution adopted by the Human Rights Council*, 18 October 2021, A/HRC/RES/48/13, online: https://digitallibrary.un.org/record/3945636/files/A_HRC_RES_48_13-EN.pdf (25 August 2024).

[89] United Nations General Assembly, *Resolution 76-300 The human right to a clean, healthy, and sustainable environment*, 1 August 2022, A/RES/76/300, online: https://digitallibrary.un.org/record/3983329/files/A_RES_76_300-EN.pdf?ln=en (25 August 2024).

[90] For a recent, detailed summary of relevant legal instruments, documents, and decisions, see *Verein, supra* note 25 at paras 144-176.

determined on its merits after full argument at trial rather than in the abstract through a motion to strike.

76. The Respondents do not show how such a claim is bound to fail on this basis. Further, they attempt to argue that the Applicants cannot prove an infringement because they have not challenged a law or application of law. This argument is untenable as the Respondents themselves admit such pleadings in their briefs, which, at this stage, must be taken as true. The only way the Respondents can strike at this stage is to show that such factual claims cannot be proven. They have not done so. The FCA in *La Rose* confirms the court's capability of adjudicating the facts related to climate change so that a complete *Charter* application can be achieved:

> [109] … The claim of a right to a healthy and livable environment, and the legislative sanctioning of something less, explores the scope of section 7 and tests its boundaries. The argument is novel, but it is not doomed to fail. …
>
> [110] The necessary element of deprivation in section 7 has been found in circumstances where legislation or executive actions create or exacerbate a risk to life, liberty or security of the person. … The appellants argue that the legislation and Orders in Council, permitting, as they do, GHG emissions, deprive them of their section 7 interests. …
>
> [113] The Federal Court erred in presumptively concluding that a causal relationship between the legislation and the deprivation of a section 7 interest is "manifestly incapable of being proven." As the *Mathur* 2023 decision demonstrates, the arguments are not fanciful or incapable of being assessed against a body of evidence. …
>
> [114] There is no reason to conclude that harms flowing from climate change and climate-related legislation are manifestly incapable of proof, as did the Federal Court. …
>
> [116] Climate change's current and potential effects are widespread and grave, they include loss of land and culture, food insecurity, injury and death. …
>
> [117] Subject to what follows, there is, nevertheless, a sufficient pleading of a section 7 violation in its orthodox understanding to survive a motion to strike. Where novel Charter claims test the boundaries of a right, such claims may require a trial in order to understand the nature of the legislation, executive action or regulation and the harm experienced by claimants.[91]

77. Even if a claim of a breach of a right to a healthy environment were to fail at this stage, the pleadings suggest a variety of other harms that breach s. 7 rights that should go on to a trial for full consideration.

[91] *La Rose, supra* note 311 at paras as indicated.

Section 15:

78. The Respondents suggest that the Applicants fail to identify *distinct* impacts, in part because the Applicants say that climate change affects nearly everyone.[92] The Respondents have conflated the need to plead the facts and prove the claim. Claiming that certain groups disproportionately face impacts, based on enumerated grounds, due to being in certain vulnerable circumstances, is sufficient. The court must accept the pled facts that the identified groups face a disproportionate harm for determining the application to strike. It is only if, ***beyond doubt***, those claims cannot be proven, that it should fail. The Respondents do not show the latter.

79. The Respondents say again that the s. 15 argument is bound to fail because the court has already struck a claim based on intergenerational equality in *La Rose*; but again, the court likely felt more comfortable doing so due to the more broadly framed impugned actions in *La Rose*. The FCA nonetheless did so only after a full hearing and left the door open for the law to possibly change in this regard.[93]

80. Similarly, the Respondents argue that, like *Mathur*, this claim should fail because the court determined that the discriminating impacts come from climate change itself, not operating power plants. This is factually incorrect and self-contradictory as they say otherwise elsewhere in their briefs, and not an equivalent or accurate comparison to *Mathur*. In *Mathur*, the court struggled not to see their application as imposing a positive obligation because the target itself did not cause the harm. In that case, the target was GHG emission reduction legislation. The legislation may have been insufficient to adequately reduce emissions, but the target did not "cause" climate change like GHGs do. The Respondents try to argue that the court held there was something about the nature of climate change that made a s. 15 claims not possible, but this is not what the court in *Mathur* was saying. Rather, the issue was with the nature of the impugned action.

81. In this case, the Application is specifically talking about actions that ***cause*** climate change because of the actions' GHG emissions - a fact that has been recognized by the SCC and the SKCA, and which is not in dispute. It is otherwise simply factually incorrect

[92] *Government's Brief, supra* note 16 at para 77.
[93] *La Rose, supra* note 31 at para 83.

to say that the operation of power plants that burn fossil fuels for electricity does not exacerbate climate change and cause harm to the Applicants.

Justiciability

82. Justiciability concerns the appropriateness and ability of a court to deal with an issue before it, either because it falls outside the court's legal expertise/capabilities or because the question is so political that adjudicating it would undermine the division of powers.[94] The latter situation is a rarity for Canadian law, which accommodates robust judicial scrutiny of the legality of government action.[95]

83. Furthermore, we must also keep this crucial point in mind: justiciability is still an issue that is meant for trial. The Respondents are conducting a merits assessment of justiciability when justiciability should not be determined at this stage. If this were the case, we would be essentially expanding the threshold test on a motion to strike. Instead of a claimant just having to sufficiently plead legal and factual elements, they would have to now ***prove*** them (without using evidence).

84. For instance, in *Cape Breton (Regional Municipality) v Nova Scotia (Attorney General)*, a regional municipality challenged the Government of Nova Scotia for failing to alleviate their disparity pursuant to a legislative commitment. Parties raised justiciability as an issue, but the Nova Scotia Court of Appeal did not uphold the strike for that reason. The Nova Scotia Court of Appeal concluded that the claim before them could be justiciable or non-justiciable; that was an issue for a trial judge to conclude with evidence.[96] Rather, the court found that the applicant did not have the ability to bring such an action in the first place (the provision at issue did not apply to the applicant) - therefore, the application must be struck.

85. One might wonder how a *Charter* claim could be non-justiciable on a motion to strike except in the very rarest of cases because a *Charter* claim is, by its nature, a *legal*

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[94] *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at para 62 [*Hupacasath*]; and also *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 34.

[95] *Hupacasath supra* note 94 at paras 66-67.

[96] *Cape Breton (Regional Municipality) v Nova Scotia (Attorney General),* 2009 NSCA 44 at paras 20-21.

question. This is why an appeal from the Federal Court's decision to strike the *La Rose* pleadings succeeded. The FCA explained that climate litigation premised on *Charter* rights cannot be categorically dismissed as non-justiciable for being complex, political, or controversial.[97] Canadian courts frequently grapple with cases "addressing controversial issues that raise many layered and complex policy questions", such as *Charter* challenges related to private health care, sex work, abortion, supervised injection sites, and medical assistance in dying.[98] The FCA accepted that the question of climate change is complex and that legislation enacted in response to climate change "reflects a political choice on how to address the problem".[99] However, this did not and could not in and of itself lead to the conclusion that the *Charter* questions in that case were non-justiciable. The court rejected the motion judge's conclusion that the claims were not justiciable because (1) the courts would have to deliberate on broad and diffuse aspects of government conduct, and (2) the remedies might cause the courts to overreach.[100]

86. The SCC has acknowledged that public interest litigation, which aims to use law to effect change in social policy in the public interest, has a valid role to play in constitutional democracies like Canada with our *Charter*.[101] Much more is required than to simply point to the fact that an impugned government action or legislation is "motivated by economic considerations and other difficult public interest concerns" before a dispute will be found to fall afoul of the boundaries of justiciability for *Charter* litigation.[102] It would be misleading to rely on principles derived from private law litigation in this context, such as those setting the outer boundaries for tort claims.[103] When courts are asked to determine whether specific government action or legislation has breached a litigant's *constitutional rights*, regardless of the extra-legal factors that might have prompted the impugned action or legislation, "[a]ssessing whether or not legal rights exist on the facts

[97] *La Rose, supra* note 31 at para 29.
[98] *Ibid* at para 30.
[99] *Ibid* at para 32.
[100] *Ibid* at paras 45 - 51.
[101] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 22.
[102] *Hupacasath, supra* note 94 at para 67.
[103] *Crown's Brief, supra* note 36 at paras 28-30, citing *Nelson (City) v Marchi*, 2021 SCC 41.

of a case lies at the core of what courts do".[104] While constitutional principles like the separation of powers are still just as fundamental, the courts consistently recognize that legislative autonomy must always be balanced with legislative accountability through the courts. [105] The SCC recently affirmed that "[i]t is a fundamental principle of our constitutional order that courts have a *duty* to protect the rights guaranteed by the *Canadian Charter of Rights and Freedoms* from infringement by the state".[106] Declining to allow the alleged breaches of *Charter* rights to proceed to a hearing on their merits in this matter solely based on their potential implications for legislative autonomy would not only fail to balance the relevant constitutional principles in this case, it would risk setting a precedent for abrogation of the judicial duty to protect *Charter* rights in future cases as well.

87. The separation of powers between the legislative and judicial branches of government is often likened to a "constitutional dialogue" between the two when it comes to *Charter* litigation. Whereas "[l]egislatures enact laws based on policy choices elected representatives make", the "[c]ourts ensure those choices conform to constitutional norms".[107] The courts have a *duty* to ensure the laws enacted by legislatures are constitutional, yet they must also give legislatures "reasonable room to manoeuvre" when scrutinizing the constitutionality of government action involving social policy and conflicting social pressures.[108] This constitutional tension is often navigated by the courts defining "constitutional minimums" that still allow legislatures to balance competing interests and social and economic pressures "within their constitutional boundaries".[109] These constitutional minimums reflect the fact that "the Constitution protects a floor, not a ceiling", and legislatures can and often do choose to enact policy and law that builds upon and moves beyond constitutional minimum standards.[110] A constitutional floor inevitably limits the legislative branch's freedom to implement its own political and

[104] *Hupacasath, supra* note 94 at para 70.
[105] *Ibid* at para 83.
[106] *Canada (Attorney General) v Power*, 2024 SCC 26 at para 1 [emphasis added].
[107] *Manitoba Federation of Labour et al v The Government of Manitoba*, 2021 MBCA 85 at para 4.
[108] *Ibid* at para 106 citing *R v Chouhan*, 2021 SCC 26 at para 84.
[109] *Ibid* at paras 108 - 109.
[110] *Ibid* at para 110 citing *R v Chouhan*, 2021 SCC 26 at para 134.

policy choices by setting a floor below which they cannot sink. However, it does so without falling afoul of the separation of powers by ensuring ample legislative freedom to build on that floor.

88. A similarly careful consideration of the legitimacy of courts when adjudicating challenges to climate law and policy has guided courts and tribunals in climate litigation in other jurisdictions. For example, in *State of the Netherlands v Stichting Urgenda*, one of the most influential climate litigation cases in the world, the Supreme Court of the Netherlands upheld a lower court's order that directed the State of the Netherlands to reduce its national greenhouse gas emissions by the end of 2020 by at least 25% compared to 1990.[111] This was based on a consensus in climate science and the international community that the *minimum* contribution required of developed countries for a limit of global warming to a maximum 2°C increase would be between 25% and 40% during this same time period.[112] Rather than attempting to dictate the ideal form and content of climate policy for the Netherlands, the Supreme Court found that the 25% bottom of that range was "an absolute minimum" for the State of the Netherlands to meet in order to uphold its obligations under the European Convention on Human Rights, thus making it an appropriate minimum *legal* standard for greenhouse gas reductions.[113] The Supreme Court rejected challenges to this order on the basis that it amounted to an impermissible judicial requirement to create legislation or an intrusion into the political domain, finding that the order fell well within the legitimate sphere of the courts to determine the limits of the law while leaving it to the State to determine the measures that need to be taken to achieve the minimum reduction required of it.[114]

89. For a common law example, in *Friends of the Irish Environment*, the Supreme Court of Ireland quashed the Irish government's 2017 national climate change mitigation plan on the basis that it violated Ireland's legislative framework for climate emissions reductions and fell short of the steps required by the Paris Agreement.[115] Irish legislation required a

[111] *Urgenda, supra* note 25.
[112] *Ibid* at paras 7.1 to 7.6.2.
[113] *Ibid* at para. 7.5.1.
[114] *Ibid* at paras 8.1 to 8.4.
[115] *Friends of the Irish Environment, supra* note 24.

sufficient level of specificity as to what measures would be taken to meet a national target for carbon emission reductions by 2050 so that a reasonable and interested person could form an opinion about the merits of the government's response. The government's plan was quashed for failing to provide adequate transparency.[116] The Irish government characterized the case as a "merits based disagreement with government policies".[117] While the Supreme Court of Ireland accepted that justiciability issues could arise in a challenge to an inadequate policy that lacked any statutory backing, it found that since obligations were specified in legislation for the preparation of the impugned plan, "the question of whether a plan actually does comply with the statute in such regard is a matter of law rather than a matter of public policy".[118]

90. While the Supreme Court of Ireland refused to adjudicate parallel arguments involving constitutional rights under the European Convention on Human Rights due to a lack of standing for the non-governmental organization applicant, and the lack of jurisprudence from the European Court of Human Rights on climate change's implications for these rights (at the time), it nevertheless accepted that there may be future cases where Irish courts must "consider the circumstances in which climate change measures (or a lack thereof) might be said to interfere with the right to life or the right to bodily integrity".[119] In the Court's view, such an argument, if backed by proper standing, would mean the courts can and indeed *must* act to vindicate those rights and uphold the Constitution:[120]

> …even if an assessment of whether rights have been breached or constitutional obligations not met may involve complex matters which can also involve policy. Constitutional rights and matters of policy do not fall into hermetically sealed boxes. There are undoubtedly matters which can clearly be assigned to one or other. However, there are also matters which may involve policy, but where that policy has been incorporated into law or may arguably impinge rights guaranteed under the Constitution, where the courts do have a role.

91. In *Verein Klimaseniorinnen Schweiz and Others v Switzerland*, which post-dates *Friends of the Irish Environment*, the European Court of Human Rights addressed the relationship

[116] *Ibid* at paras 6.33 to 6.49.
[117] *Ibid* at para 5.22.
[118] *Ibid* at para 6.27.
[119] *Friends of the Irish Environment, supra* note *24* at para 8.14.
[120] *Ibid* at para 8.16.

between climate change and the European Convention on Human Rights.[121] It found the Government of Switzerland has breached its obligations under the Convention by, among other things, failing to quantify its national greenhouse gas limitations, failing to meet its own past greenhouse gas emission reduction targets, and failing to act in good time and in an appropriate and consistent manner regarding the devising, development, and implementation of a legislative and administrative framework to address greenhouse gas reductions. The European Court of Human Rights was attentive to the need to provide Switzerland with a margin of appreciation to determine for itself how best to secure the rights and freedoms of its citizens under the Convention. However, the Court found that this margin of appreciation should be reduced when assessing a State's failure to set requisite aims and objectives in line with global commitments to achieve carbon neutrality, whereas a State's choice of means, in terms of how to meet internationally anchored targets and commitments in light of its priorities and resources, should be accorded a wide margin of appreciation.[122]

92. The role of the court is to determine the minimum standards required to ensure meaningful protection of the human rights threatened by climate change. However, this is not analogous to courts taking on the role of a legislator or policymaker in articulating how best to meet or exceed these minimum standards. Cases from other common law jurisdictions that this brief has raised similarly indicates this nuanced perspective on the justiciability of climate litigation.

93. While it may be tempting to dismiss an application on a preliminary basis when it raises complex questions with implications for public policy, there is no sound jurisprudential basis for doing so. The question is whether there is a sufficient legal element to the claim for the courts to adjudicate it, not whether the claim raises issues that are purely legal in nature, hermetically sealed from matters of policy. In other words, it is the absence of a legal element, and not the presence of a policy element, that allows a court to dismiss a claim as non-justiciable. The courts have therefore distinguished between politicized laws and "pure policy"; whereas the former is subject to constitutional review, the latter is not.

[121] *Verein supra* note 25.

[122] *Ibid* at para 543.

94. Unless the court finds that, ***beyond doubt***, the impugned actions are plainly and obviously matters of pure policy and there is no legal element whatsoever, then the motion to strike must be dismissed. If there is a reasonable chance that with further consideration of the evidence, the impugned actions could have "a sufficient legal component upon which a court can adjudicate", then the application must proceed to trial for a full determination.[123]

95. In light of the persuasive Canadian jurisprudence, the Respondents have a steep hill to climb in this regard. The Respondents attempt to prove non-justiciability by showing how the Application targets legislative policymaking. Avoiding second-guessing the legislature's choices is valid, but doing so raises concerns over blurring the separation of powers between the legislative and judicial branches of government. As the FCA stated in *La Rose*, "[t]he wisdom of political and policy choices made by [the legislative branch] in response to social, economic and environmental problems is separate and apart from their constitutionality" and courts must be mindful of the boundaries between second-guessing the wisdom of legislative choices and assessing the constitutional validity of resulting laws and their application.[124]

96. The Respondent cannot deny that the Application constitutes proper pleadings. The Respondents spend much of their briefs looking in-depth at the merits of the claims. Not only is this not the stage to do that, but they could only do such an analysis because the Application claimed the necessary facts. Despite their briefs that say otherwise, the sufficiency of the factual pleadings is not contested. As such, on this basis, the Application must go ahead to a hearing.

97. The Respondents rely heavily on the case law to suggest that this application should fail, but they are not properly appreciating the reasoning in these cases. *La Rose* did not initially fail because it involved issues of climate change, a positive obligation, or intergenerational equity. Rather, the Court did not feel it could determine the issues

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[123] *La Rose, supra* note 31 at para 28. See also *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525 at 545-546: "In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch."

[124] *Ibid* at para 26.

because of the lack of ***identifiable impugned action***. By claiming the impugned actions in this Application are the government's insufficient approach to climate change, the Respondents argue for such conclusions similar to those in *La Rose* or *Sharma*. However, if we refocus on the actual Impugned Actions claimed in the Application, which is the building, developing, or expanding of new unabated fossil-fuel based generation, the analysis diverges from these cases. The Respondents have failed to show that this particular action is not suitable for court analysis.

Statutory and Common law duties

Are the pleadings sufficient?

98. The Applicants also pled breaches of statutory and common law duties of care, which involve establishing that (1) there was a duty of care, and (2) there was a breach of that duty of care. In summary, the Application pleads the following:

    i. The Respondents owe a duty of care to the Applicants based on common law and statutory duties of care, including fiduciary duties.
    ii. The Respondents breach those duties of care by the Impugned Actions, which contribute to climate change harms.

Are the claims bound to fail?

99. The Applicants also claim that the Impugned Actions violated both common law and statutory duties of care.[125] The Respondents also do not dispute that this was properly claimed: "The Climate Applicants argue that ongoing development of UFFGA's constitutes a breach of the duties of care owed by SaskPower directors under s. 46 of the *CCA* and s. 117 of the *SBCA*."[126]

Duty of Care

100. Breaches and remedies can also come from violations of statute and common law duties of care. The Applicants rely on the following legislation and common law to establish the basis for the claim:

[125] Amended Originating Application, *supra* note 688 at paras 24 - 25.
[126] *Crown's Brief, supra* note 36 at para 79.

i. Section 46 of *The Crown Corporations Act*, *1993;*
ii. Section 9-23 of *The Business Corporations Act, 2021;*
iii. Common law fiduciary duty owed (as per s. 48 of the CCA); and,
iv. Section 8 of *The Power Corporations Act.*

101. *The Power Corporations Act* clearly denotes SaskPower's purposes to include using their powers for the efficient operation of the business ***"for the public good***". The Applicants assert that this power establishes a direct duty of care to which the state must oblige. Neither Respondent comments on this provision. They rely only on s. 46 of *The Crown Corporations Act* to suggest that there is no duty of care.

Fiduciary Duty

102. To establish a fiduciary duty, the court will typically find the following:

i. The alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary, which can include an imposition from statute;[127]
ii. The duty must be owed to a defined person or class of persons who are vulnerable in the sense that the fiduciary has a discretionary power over them; and,
iii. Claimants must show that alleged fiduciary's power may affect the legal/substantial practical interests of the beneficiary (such as an interest in property).

103. The Respondents suggest that there cannot be a fiduciary duty, which is typically private, because of how such a relationship undermines the public-facing nature of a Crown corporation.

104. The Respondents incorrectly state that the Applicants are pursuing the protection of a group/class of people over the interests of others. Climate change is unique from the other issues in previous cases seeking to establish a fiduciary duty on the part of a Crown Corporation. In those cases, individuals are typically trying to protect themselves regarding an issue that affects them in particular. The courts then struggled to find that the Crown had an obligation to cater to these interests, which would be at the expense of others.

[127] *Elder, supra* note 15 at paras 30 – 32.

105. Climate change, on the other hand, affects everyone. The issue is inherently public. While climate change can cause more harm to some than others, mitigating the climate disaster will benefit the whole of society. In this sense, there are no real "competing interests" and finding a fiduciary duty here would not undermine the Crown's public-facing nature.

106. As such, a fiduciary duty can apply here using the same reasoning:

    i. The alleged fiduciary clearly established an undertaking in the Respondents' legislation;
    ii. The duty is for the residents of Saskatchewan, as the vulnerable group; and
    iii. The fiduciary's power has the potential to cause or alleviate harm to the public's private interests in property and their own well-being (*e.g.* dignity).

107. The Respondents argue that there is no fiduciary duty but they come to this conclusion by failing to recognize the proper vulnerable group. They mention that the marketing of grain is equivalent to the generation of power, but these are not the same types of actions because of the scope of impact. Decisions over the marketing of grain will not directly impact most individuals, but generating electricity from burning fossil fuels does. It seems appropriate that when considering a fiduciary duty in the context of Crown corporations, the vulnerable group would simply be the public.

108. The Respondents further err in their understanding of fiduciary duties. They argue that the Applicants must identify a legal or substantial protected interest at stake, and that general impacts on a person's well-being and property are insufficient, as stated by the SCC. However, the SCC goes on to say that sufficient interests include property rights and fundamental human/personal interests.[128]

109. Alternatively, and additionally, the court can establish another fiduciary duty towards Indigenous peoples and farmers, due to the private interests in land use. The SCC has already acknowledged the private duty Crowns owe to Indigenous peoples.[129]

[128] *Elder*, *supra* note 15 at paras 35 and 51.
[129] *Ibid* at para 25.

110. With further evidence, this is an issue that has some chance of success and should proceed to full deliberation.

Breach of the Duty of Care

111. The factual description of the Respondent's breaches is outlined in paragraphs 25-26 of the Amended Originating Application. The Respondent raises concerns about the Applicants failing to demonstrate how the Crown's actions fail to meet the fiduciary duty, but this again conflates making the claim and proving it. The Applicants do not have to prove that the Respondents breached the standards rather, they merely must claim it. Establishing a breach of a duty of care requires full consideration of the evidentiary record. The Applicants allege that the Respondents failure to pursue reliable and sustainable power generation, despite climate science and international obligations flowing from treaties and other legal instruments, is a breach of the duty of care, and these acts are not in the best interests of Saskatchewan citizens. Given that the Respondents have failed to show how there is no reasonable cause of action, this claim must be allowed to proceed.

VI. CONCLUSION

112. The Respondent Government of Saskatchewan incorrectly characterizes the *Charter* issue of climate change mitigation and impacts in general. While one could argue with their points about the breadth, complexity, and the political nature of their framing of the issues, that is not what this Application puts forward as the impugned actions.

113. Previous courts have already made it clear that applications do not necessarily get struck for involving policy, novel claims, contrary jurisprudence, or complexity:

> … claims are not justiciable simply because the question of climate change is complex or because the legislation reflects a political choice on how to address the problem…[130]
>
> The law cannot remain stagnant. Doctrines of law that are now well-established were, at their inception, the targets of motions to strike… Neither the length and complexity of the issues nor the potential for the defendant to raise a strong defence should prevent the plaintiff from having its case tried.[131]

[130] *La Rose, supra* note 31 at para 32.

[131] *Ibid* at para 119.

The only issue is whether, **beyond doubt**, the court cannot adjudicate the issues.

114. The climate crisis cannot be treated like other issues that normally come before the court. As a result, it is necessary to ask whether the laws and principles of justice we rely on are adequate to deal with climate change. We must embrace that they may not be; in which case, we should encourage our doctrines to grow and evolve in this area.

115. This Court should dismiss the Strike Applications and allow the Applicants to have their claims heard in a full hearing on the merits. Courts can deal with problems that have far-reaching and significant impacts, and no other issue goes deeper or is more pressing than climate change, "the great existential issue of our time."[132]

116. The Applicants seek an order of costs in the amount of $2,500.00 against the Crown on a joint and several basis. As the Respondent Government of Saskatchewan did not seek any order for costs in its strike application, the Applicants will not seek a reciprocal order for costs from them.

All of which is respectfully submitted this 28th day of August, 2024.

PROCIDO LLP



Per: _____
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[132] *GGPPA SKCA, supra* note 3 at para 4.

VII. TABLE OF AUTHORITIES

Statutes

Citation	**Section(s)**	**Legal Principle**
Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c 11	s. 7; s. 15	Right to life, liberty and security of person Right to equality
Saskatchewan, The King's Bench Rules	r. 7-9, r. 11-1, r. 11-7, r 11-8	Rules regarding applications to strike pleadings Rules regarding court costs
The Power Corporation Act, RSS 1978, c P-19.	s. 8	Purposes and Powers
The Crown Corporations Act, 1993, SS 1993, c C-50.101.	ss. 46, 48	Duty of care, Indemnification and insurance
The Management and Reduction of Greenhouse Gases Act, SS 2010, c M-2.01.		Mentioned in the Respondents briefs of law
The Management and Reduction of Greenhouse Gases (General and Electricity Producer) Regulations, RRS c M-2.01 Reg 1.	s. 16	Mentioned in the Respondents briefs of law – part of the Impugned Actions – emissions reduction obligations allow emissions to *increase*
The Business Corporations Act, 2021, SS 2021, c 6.	s. 9-23	Duty of care Directors and Officers

Case Law

Citation	Paragraph(s)	Legal Principle
References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11	2, 149, 188-190	Climate change is real and it poses a grave threat to humanity's future. It is also an inherently global problem that only be addressed via international efforts.
Reference re Greenhouse Gas Pollution Pricing Act, 2019 SKCA 40	4	Climate change caused by anthropogenic greenhouse gas [GHG] emissions is one of the great existential issues of our time. Limiting such emissions is accepted by all of the participants in these proceedings.
Reed v Dobson, 2021 SKQB 252	59	The principles governing applications to strike pleadings.
J.L. v Shewchuk, 2023 SKKB 253	7	The standard to strike applications is that **beyond doubt** there is no reasonable chance of success.
Atlantic Lottery Corp. Inc. v Babstock, 2020 SCC 19	14, 87 - 90	The principles governing applications to strike pleadings.
Canada (Attorney General) v Merchant Law Group LLP, 2017 SKCA 62	19	Court can consider the statement of claim, including documents referred to within, and any responses to a request for particulars but not extraneous evidence when considering an application to strike pleadings.
Yashcheshen v Teva Canada Ltd., 2022 SKCA 49	42, 43	Court should allow amendments to the pleadings to correct defects before striking the pleadings.
Alberta v. Elder Advocates of Alberta Society, 2011 SCC 24, [2011] 2 SCR 261	4, 95 25, 30-32, 35, 51	application to strike is procedural- not considering the merits of the claim. Fiduciary duties - sufficient interests include property rights and fundamental human/personal interests

Case Law (continued)

Citation	**Paragraph(s)**	**Legal Principle**
Barnes v. Canada (His Majesty the King), 2024 FC 212		The respondents bear the burden to prove that the pleadings should be struck.
Venture Construction Inc. v Saskatchewan (Highways and Infrastructure), 2015 SKQB 70	11	"reasonable chance of success" must be interpreted generously. A claim should not be struck unless it is "hopeless" or… has a radical defect. The threshold for a claim to survive is low. There are many questions which have not been clearly asked or answered by the courts, and even where the answer seems clear, the law will sometimes evolve.
R v Imperial Tobacco Canada Ltd, 2011 SCC 42	19, 21	Housekeeping nature of striking claims - on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial
Grassroots v His Majesty the King, 2023 ONSC 3722 citing *Reference Re Same-Sex Marriage*, 2004 SCC 79	33, 202	Interpret Constitution of Canada with "living tree" doctrine - flexibility allows the law to change and evolve over time through "progressive interpretation" that accommodates and addresses the realities of modern life and societal shifts. societal shifts can include social, political, and legislative changes that transpire after the Constitution's drafting, including international legal instruments

Case Law (continued)

Citation	Paragraph(s)	Legal Principle
Henry v British Columbia (Attorney General), 2015 SCC 24	35	The development of *Charter* cases should not be pre-emptively stifled on the basis of pleadings alone
(Friends of the Earth Ltd et al) v Secretary of State for Business, Energy and Industrial Strategy, 2022 EWHC 1841 (Admin) (United Kingdom) *(Friends of the Earth et al) v Secretary of State for Energy Security and Net Zero,* 2024 EWHC 995 (Admin) (United Kingdom)		International precedents requiring governments use adequate data for their proposed actions towards meeting a 2050 target for net zero emissions
R v Hape, 2007 SCC 26 *R v Vavilov*, 2019 SCC 65	53 114	Federal and provincial legislatures and administrative decision-makers alike are presumed to act in conformity with Canada's obligations under international law when Canadian courts set about interpreting ambiguous legislation or reviewing exercises of discretion pursuant to statute
Michel v Graydon, 2020 SCC 24	103	interpretation of Ontario's *Family Law Act* (a provincial statute) must be informed by Canada's international obligations under treaties entered into by the federal government

Case Law (continued)

Citation	**Paragraph(s)**	**Legal Principle**
R v Bissonnette, 2022 SCC 23	99-108	The *International Covenant on Civil and Political Rights* and other international legal instruments are relevant to the interpretation of the *Charter*'s provisions
Nevsun Resources Ltd. v Araya, 2020 SCC 5	70	Canadian Courts play an important role in the development of international law
Saskatchewan v Saskatchewan Federation of Labour, 2012 SKQB 62	32, 107, 114	international instruments are relevant sources for interpretation of the Charter, which should be presumed to provide protection at least as great as Canada provides internationally, regardless if they directly bind the province or not
Saskatchewan Federation of Labour v Saskatchewan, 2015 SCC 4	64-75 150-160	the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified (dissenting – but agreeing on this principle) binding treaties invoke the presumption of conformity for interpretation of *Charter* rights and non-binding international law has persuasive value in appropriate circumstances

Case Law (continued)

Citation	**Paragraph(s)**	**Legal Principle**
Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia, 2007 SCC 27	78	the *Charter*, as a living document, grows with society and speaks to the current situations and needs of Canadians. Thus Canada's current international law commitments and the *current* state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*
Carter v Canada (Attorney General), 2015 SCC 5	47, 108-112 62 – 64, 67	need an evolving interpretation of the *Charter* that accounts for legal developments elsewhere across the world (considering the "matrix of legislative and social facts" both domestically and internationally) S.7 rights and their protection defined (Life, Liberty, SoP).
R v Sharma, 2022 SCC 39	28	two-step test for assessing a s. 15(1) claim
Held v Montana, No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023) [United States]		climate litigation is justiciable

Case Law (continued)

Citation	**Paragraph(s)**	**Legal Principle**
La Rose v Canada, 2023 FCA 241	26, 28, 29, 32, 76, 83, 109-110, 113-114, 116-117, 119, 128, 133-134	Courts must assess constitutional validity of resulting laws and their application. applications do not necessarily get struck when it involves policy; novel claims; contrary jurisprudence; or complexity climate litigation premised on *Charter* rights cannot be categorically dismissed as non-justiciable for being complex, political, or controversial The claim of a right to a healthy and livable environment is novel, but it is not doomed to fail There is no reason to conclude that harms flowing from climate change and climate-related legislation are manifestly incapable of proof Where novel Charter claims test the boundaries of a right, such claims may require a trial in order to understand the nature of the legislation, executive action or regulation and the harm experienced by claimants

Case Law (continued)

Citation	Paragraph(s)	Legal Principle
Canada (Attorney General) v Bedford, 2013 SCC 72	97	PFJs like arbitrariness, overbreadth, and gross disproportionality "evolved organically as courts were faced with novel Charter claims
United States of America v Kwok, 2001 SCC 18	66	Remedial action by the courts for future violations is not precluded as a matter of law despite the use of a past tense in the language of s. 24(1).
Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada), 2015 FCA 4	62, 66-67, 70	Justiciability concerns the appropriateness and ability of a court to deal with an issue before it, either because it falls outside the court's legal expertise/capabilities or the question is so political that adjudicating it would undermine the division of powers
Cape Breton (Regional Municipality) v Nova Scotia (Attorney General), 2009 NSCA 44	20- 21	Whether issues are justiciable or not is an issue for trial judge to conclude with evidence
Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45	22	public interest litigation, which aims to use law to effect change in social policy in the public interest, has a valid role to play in constitutional democracies like Canada with our *Charter*
Manitoba Federation of Labour et al v The Government of Manitoba, 2021 MBCA 85	4, 106, 108-110	courts have a *duty* to ensure the laws enacted by legislatures are constitutional, yet they must also give legislatures "reasonable room to manoeuvre" – "constitutional minimums"

Case Law (continued)

Citation	Paragraph(s)	Legal Principle
Canada (Attorney General) v Power, 2024 SCC 26	1, 82-83	courts have a duty to protect the rights guaranteed by the *Canadian Charter of Rights and Freedoms* from infringement by the state the separation of powers demands a core of legislative autonomy, it also demands legislative accountability through the role of the courts
Urgenda v Netherlands, ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, 20 December 2019), English translation in (2020) 59 ILM 811	7.1 to 7.6.2 8.1 to 8.4	International precedent for "constitutional minimum"
Friends of the Irish Environment CLG v the Government of Ireland, Ireland and the Attorney General, 2020 IESC 49 (Ireland)	5.22, 6.33 to 6.49, 8.14, 8.16	International precedent - Irish courts must "consider the circumstances in which climate change measures (or a lack of them) might be said to interfere with the right to life or the right to bodily integrity
Verein KlimaSeniorinnen Schweiz and Others v Switzerland, No 53600/200, 2024 ECHR 304 (European Court of Human Rights)	144-176 543	detailed summary of relevant legal international instruments, documents, and decisions related the right to life and how to interpret same International precedent for "constitutional minimum" - role of the court is to determine the minimum standards required for protection of the human rights threatened by climate change

Case Law (continued)

Citation	Paragraph(s)	Legal Principle
Smith v Fonterra Co-operative Group Limited, 2024 NZSC 5 (New Zealand)	131, 173	Climate litigation is justiciable and should develop in the context of full trials and not be dismissed in preliminary motions to strike

Secondary Sources

Citation	Paragraph(s)	Legal Principle
International Covenant on Civil and Political Rights, United Nations General Assembly, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*] online: International Covenant on Civil and Political Rights | OHCHR (22 August 2024).	Article 6	Every human has an inherent right to life that shall be protected by law. No one shall be arbitrarily deprived of the right to life.
United Nations International Covenant on Civil and Political Rights, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Human Rights Committee OR, 124th Sess, CCPR/C/GC/36 (2018), online: General comment No. 36 - Article 6: right to life | OHCHR (22 August 2024).	Para 62	States must prevent environmental degradation, climate change, and unsustainable development to protect the right to life. States must pay due regard to the precautionary principle.

Secondary Sources (continued)

Citation	Paragraph(s)	Legal Principle
United Nations General Assembly, Resolution 76-300 *The human right to a clean, healthy, and sustainable environment*, 1 August 2022, A/RES/76/300	all	The right to life includes a right to a clean and sustainable environment
Human Rights Committee, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning Communication No. 3624/2019, 135th sess, UN Doc CCPR/C/135/D/3624/2019 (22 September 2022)		Discussing the legal limits of government actions and inactions that contribute to climate change based on adverse impacts on human rights
Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", adopted on 17 November 1988 and entered into force on 16 November 1999, OAS Treaty Series No. 69.	Article 11	universal human right to a clean, healthy, and sustainable environment within international law
Decision of The National Human Rights Commission of the Republic of Korea, dated 12 June 2023, online: 20230823_19961_opinion-1.pdf (climatecasechart.com) (21 August 2024).		A state's failure to consider the impact of its actions on the future, given the scientific projections that the climate crisis will intensify as time passes, is an infringement of the future generation's freedom and rights and a violation of the principle of equality between current and future generations

Secondary Sources (continued)

Citation	**Paragraph(s)**	**Legal Principle**
Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2024 Snapshot* (London: Grantham Research Institute on Climate Change and the Environment, 2024).		Discussion of climate litigation around the world.
Gerald J Kennedy & Lorne Sossin, *Justiciability, Access to Justice and the Development of Constitutional Law in Canada* (2017) 45 Federal Law Review 707	723	The living tree doctrine and how the law changes and evolves over time through "progressive interpretation"

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Urgenda v Netherlands, ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, 20 December 2019), English translation in (2020) 59 ILM 811	Tab D
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TAB A

Neutral Citation Number: [2022] EWHC 1841 (Admin)

Case No: CO/126/2022
CO/163/2022
CO/199/2022

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 July 2022

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

THE QUEEN **on the application of** **(1) FRIENDS OF THE EARTH LIMITED** **(2) CLIENTEARTH** **(3) GOOD LAW PROJECT AND JOANNA WHEATLEY**	**Claimants**
- and -	
SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY	**Defendant**

- -
- -

David Wolfe QC, Catherine Dobson and Nina Pindham (instructed by **Leigh Day**) for the **First Claimant**
Jessica Simor QC and Emma Foubister (instructed by **ClientEarth**) for the **Second Claimant**
Jason Coppel QC and Peter Lockley (instructed by **Baker McKenzie**) for the **Third Claimants**
Richard Honey QC, Ned Westaway and Flora Curtis (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 8 and 9 June and 15 July 2022

- -

Approved Judgment

Mr Justice Holgate:

Introduction

1. Climate change is a global problem. In *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 the Divisional Court gave a summary of some of the main issues involved at [558]-[563].

2. In 1992 the United Nations adopted the United Nations Framework Convention on Climate Change ("UNFCCC"). Following the 21st Conference of the parties to the Convention, the text of the Paris Agreement on Climate Change was agreed and adopted on 12 December 2015. The United Kingdom ratified the Agreement on 17 November 2016.

3. Article 2 of the Agreement seeks to strengthen the global response to climate change by holding the increase in global average temperature to 2°C above pre-industrial levels, and by pursuing efforts to limit that increase to 1.5°C. Article 4(1) lays down the objective of achieving "a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases ["GHGs"] in the second half of this century." That objective forms the basis for what is often referred to as the "net zero target", which will be satisfied if the global level of any residual GHG emissions (after measures to reduce such emissions) is at least balanced by sinks, such as forests, which remove carbon from the atmosphere.

4. Article 4(2) requires each party "to prepare, communicate and maintain successive nationally determined contributions ["NDCs"] that it intends to achieve". Each party's NDC is to represent a progression beyond its current contribution and reflect its "highest possible ambition" reflecting *inter alia* "respective capabilities" and "different national characteristics" (article 4(3)).

5. The UK responded to the Paris Agreement in two ways. First, section 1 of the Climate Change Act 2008 ("CCA 2008") was amended so that it became the obligation of the Secretary of State for Business, Energy and Industrial Strategy to ensure that "the net UK carbon account" for 2050 is at least 100% lower than the baseline in 1990 for CO_2 and other GHGs, in substitution for the 80% reduction originally enacted (see the Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019 No.1056)). That change came into effect on 27 June 2019. Second, on 12 December 2020 the UK communicated its NDC to the UNFCCC to reduce national GHG emissions by 2030 by at least 68% compared to 1990 levels, replacing an earlier EU based figure of 53% for the same year.

6. According to the Net Zero Strategy ("NZS"), the UK currently accounts for less than 1% of global GHG emissions (p.54 para. 31).

7. Section 4 of the CCA 2008 imposes a duty on the Secretary of State to set an amount for the net UK carbon account, referred to as a carbon budget, for successive 5 year periods beginning with 2008 to 2012 ("CB1"). Each carbon budget must be set "with a view to meeting" the 2050 target in s.1. The ninth period, CB9, will cover the period 2048-2052 for which 2050 is the middle year. Section 4(1)(b) imposes a duty on the Secretary of State to ensure that the net UK carbon account for a budgetary period does

not exceed the relevant carbon budget. Thus, the CCA 2008 has established a framework by which the UK may progress towards meeting its 2050 net zero target.

8. The net UK carbon account referred to in s.1 and s.4 relates to carbon dioxide and the other "targeted" GHGs listed in s.24 (methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride). GHG emissions are expressed for the purposes of the Act in tonnes of "carbon dioxide equivalent" (s.93(1)). That term refers to either a tonne of CO_2 or an amount of another GHG with "an equivalent global warming potential" ("GWP").

9. The Secretary of State has set the first 6 carbon budgets. Each has been the subject of affirmative resolution by Parliament. CB6 came into force on 24 June 2021 (The Carbon Budget Order 2021 – SI 2021 No. 750) and sets a carbon budget of 965 Mt CO_2e (million tonnes of carbon dioxide equivalent) for the period 2033 – 2037.

10. The six carbon budgets and their relationship to the 1990 baseline are summarised below:

Carbon budget	Period	Target emissions Mt CO_2e	Percentage reduction from 1990 level
1	2008 – 2012	3,018	25%
2	2013 – 2017	2,782	31%
3	2018 – 2022	2,544	41%
4	2023 – 2027	1,950	55%
5	2028 – 2032	1,725	60%
6	2033 - 2037	965	78%

Sources: NZS: p. 306 para.5 and p. 310 Table 1; *R (Transport Action Network Ltd) v Secretary of State for Transport* [2022] PTSR 31 at [50].

11. The UK overachieved CB1 by 36 Mt CO_2e and CB2 by 384 Mt CO_2e. It is on track to meet CB3 (NZS p.306 para.5 and endnote 4).

12. CB6 is the first carbon budget to be based on the net zero target in the amended s.1 of the CCA 2008. The previous budgets were based on the former 80% target for 2050. CB6 is also the first carbon budget to include emissions from international aviation and

shipping attributable to the UK. It is common ground that the target in CB6 is substantially more challenging than those previously set.

13. These three claims for judicial review do not involve any legal challenge to the setting of the net zero target in s.1 or to the setting of any carbon budget (including CB6). Instead, it is alleged that the defendant has failed to comply with s.13 and/or s.14 of the CCA 2008.

14. In summary, s.13 imposes a duty on the Secretary of State to "prepare such proposals and policies" as he considers will enable the carbon budgets which have been set under the CCA 2008 to be met. It is common ground that this is a continuing obligation. Section 14 provides that "as soon as is reasonably practicable" after setting a carbon budget, the Secretary of State must lay before Parliament a report setting out proposals and policies for meeting the current and future "budgetary periods" up to and including that budget.

15. Following the setting of CB6, the Secretary of State laid the NZS before Parliament on 19 October 2021 as a report under s.14 of the CCA 2008.

16. The claimants apply for judicial review in relation to the decisions on 17 October 2021 (a) to approve the proposals and policies prepared under s.13 (as set out in the NZS) and (b) to publish the NZS as a report under s.14. In summary, the grounds which they pursued at the hearing were as follows:-

Ground 1: the Section 13 ground

The defendant erred in law regarding his obligation under s.13 of the CCA 2008, in that:

(i) On a proper interpretation of s.13, he was not entitled to reach the conclusion that the proposals and policies in the NZS would enable the carbon budgets to be met where the quantified effects of those measures were estimated to deliver less than 100% (i.e. around 95%) of the emissions reductions required to meet CB6;

(ii) Through insufficiencies in the briefing material with which he was supplied, the defendant failed to take into account relevant considerations which were "obviously material", and therefore matters he had to consider under s.13 of the CCA 2008, namely:

(a) the time-scales over which the proposals and policies were expected to take effect;
(b) the contribution which each quantifiable proposal or policy would make to meeting the carbon budgets; and
(c) in relation to his qualitative judgment, which proposals and policies would enable the 5% shortfall for CB6 to be met.

Ground 2: the Section 14 ground

The defendant failed to include in the NZS the information legally required to discharge his reporting obligations under s.14 CCA, namely:

(i) an explanation for his conclusion that the proposals and policies within the NZS will enable the carbon budgets to be met;

(ii) an estimate of the contribution each of those proposals and policies is expected to make to required emissions reductions in so far as they are judged to be quantifiable; and

(iii) the time-scales over which those proposals and policies are expected to have that effect.

Ground 3: the Human Rights ground

In the alternative, ss.13 and 14 of the CCA 2008 have the effect for which the Claimants contend applying s.3 of the Human Rights Act 1998 ("the HRA 1998"), because to construe them in the way for which the defendant contends would contravene or risk contravention of Convention rights.

17. Friends of the Earth Limited is a not-for-profit organisation which undertakes campaigning and other environmental work in pursuit of environmental objectives. It includes over 300 community groups and has over 300,000 supporters. It was involved in campaigns contributing to the enactment of the CCA 2008. It is now concerned with what it describes as the pressing need for action to be taken on climate change, to ensure a safe and just outcome to the problem for current and future generations.

18. ClientEarth is an environmental law charity. Its charitable objects include the enhancement, restoration, conservation and protection of the environment, including the protection of human health for the public benefit.

19. Good Law Project is a not-for-profit campaign organisation that relies upon the law to protect the interests of the public. One of its three priority areas of work is the protection of the environment. Because the defendant contended that Good Law Project could not rely upon s.3 of the HRA 1998 in relation to ground 3, being a party not affected by any breach of a human right, a successful application was made to join Ms. Joanna Wheatley as a second claimant in CO/199/2022. It is submitted that her witness statement shows that she has sufficient status as a "victim" for the purposes of the human rights claim, in so far as that may be necessary for ground 3.

20. The claimants acknowledge that much of the content of the NZS is commendable. Accordingly, they do not ask the court to quash the NZS. Instead, in the event of one or more of the grounds succeeding, they ask the court to grant declaratory relief.

21. On 1 March 2022 Cotter J granted permission to apply for judicial review in each of the claims. He ordered that they be heard together because of the significant overlap between the grounds. He indicated that the submissions in all three proceedings should be presented in a single skeleton on each side of the argument. The parties did so in an exemplary manner. Likewise, through good co-operation, they were able to agree reduced bundles containing only material necessary for the legal argument and a timetable dividing responsibility for different subjects between counsel. I am very grateful to all counsel and their respective teams for this assistance.

22. The courts are well aware of the profound concerns which many members of the public have about climate change and the steps being taken to address the problem. So it is necessary to repeat what was said by the Divisional Court in *R (Rights: Community: Action) v Secretary of State for Housing Communities and Local Government* [2021] PTSR 553 at [6]: -

> "It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully."

23. The remainder of this judgment is set out under the following headings:

Heading	Paragraph numbers
The challenge to the Heat and Buildings Strategy	[24] – [27]
The statutory framework	[28] – [59]
The setting of CB6	[60] – [68]
The Net Zero Strategy	[69] – [99]
The defendant's evidence on the process leading to the Net Zero Strategy	[100] – [146]
The assessment of the Net Zero Strategy by the Committee on Climate Change	[147] – [154]
Ground 1	[155] – [222]

Ground 2	[223] – [260]
Ground 3	[261] – [275]
Section 31(2A) of the Senior Courts Act 1981	[276] – [278]

The challenge to the Heat and Buildings Strategy

24. On the same day as it published the NZS, the Government also issued related policy documents including its Heat and Buildings Strategy ("HBS"), Net Zero Research and Innovation Framework and HM Treasury's Net Zero Review. In its Statement of Facts and Grounds, Friends of the Earth also challenged the HBS because of a failure to comply with the public sector equality duty under s.149 of the Equality Act 2010. Here again, the claimant did not ask for the Strategy to be quashed, rather that a declaration be granted that the defendant had failed to comply with s.149.

25. The parties have submitted a draft consent order in which the defendant accepts that ground 4 is made out. He agrees that no Equality Impact Assessment was carried out for the HBS and that one should now be carried out.

26. The parties also agree that: -

    (i) The defendant did comply with s.149 of the 2010 Act in relation to the NZS;

    (ii) That compliance does not overcome the failure to comply with s.149 in relation to the HBS;

    (iii) That failure in respect of the HBS does not taint the NZS or the process followed in relation to that document.

27. Accordingly, it is agreed between the parties, and I accept, that the Court should declare that the defendant did not comply with s.149 of the 2010 Act in relation to the HBS. There is support in the authorities for the approach which the parties have agreed to take (see e.g. *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] 1 WLR 3923 at [86] – [88]; *R (BAPIO Action Limited) v Secretary of State for the Home Department* [2007] EWHC 199 (Admin) at [64] – [70]; *(R (Cushnie) v Secretary of State for Health* [2015] PTSR 384 at [95] – [117]).

The statutory framework

Climate Change Act 2008

28. Part 1 of the Act deals with "carbon target and budgeting". Section 1(1) provides: -

> "It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline."

The "1990 baseline" is the aggregate of net UK emissions of CO_2 for that year, plus the net UK emissions of each of the other targeted GHG in the base years specified in s.25. "Net UK emissions" means the emissions of a GHG from a source in the UK less the removals of that gas from the atmosphere over the same period through land use, land-use change or forestry activities in the UK (s.29(1)). That amount must be determined in accordance with "international carbon reporting practice" (as defined in s.94).

29. The target in s.1(1) is set by reference to the "net UK carbon account". The account shows the amount of net UK emissions of targeted GHGs over a period (see s.29), less the amount of "carbon units" credited plus the amount of carbon units debited to that account during the same period (s.27(1)). Carbon units and carbon accounting are dealt with in s.26.

30. Regulations made by the Secretary of State under s.26 define carbon units. These include GHG emissions controlled by a cap-and-trade scheme. This is a market-based pricing mechanism to incentivise the reduction of emissions in a cost-effective way. A cap is set on the total amount of GHG which may be emitted over a period by those sectors which fall within the scheme. The cap is divided into allowances which may be bought and sold. The cap is reduced over time so as to provide a long-term market signal to encourage business to plan and invest in abatement.

31. Following the departure of the UK from the EU, the UK Emissions Trading Scheme ("UKETS") was introduced on 1 January 2021. UK businesses are not trading emissions allowances with operators outside the UK. It is common ground that the NZS does not rely upon carbon trading for meeting the approved carbon budgets. Consequently, the NZS focuses on "net UK emissions".

32. Section 4 imposes duties on the Secretary of State to set carbon budgets and to ensure that the UK carbon account does not exceed those budgets:-

> " (1) It is the duty of the Secretary of State—
>
> > (a) to set for each succeeding period of five years beginning with the period 2008–2012 ("budgetary periods") an amount for the net UK carbon account (the "carbon budget"), and
> >
> > (b) to ensure that the net UK carbon account for a budgetary period does not exceed the carbon budget.
>
> (2) The carbon budget for a budgetary period may be set at any time after this Part comes into force, and must be set—
>
> > (a) for the periods 2008–2012, 2013–2017 and 2018–2022, before 1 June 2009;
> >
> > (b) for any later period, not later than 30th June in the 12th year before the beginning of the period in question."

33. Accordingly, for the carbon budgets beginning with CB4 the Secretary of State is obliged to set the budget 11½ years before the beginning and 16½ years before the end of the relevant 5 year budgetary period. As we have seen, s.4 involves the setting of a net amount for the whole of any such period. Additionally s.5 requires that the annual equivalent of the figure set for CB3 is at least 34% lower than the 1990 baseline and that for CB9 (which includes 2050) is lower than that baseline by at least 100% (i.e. net zero). Section 5(1)(c) enables the Secretary of State to specify by order annual equivalent levels for budgets after CB9.

34. Section 8 deals with the setting of a carbon budget:

> "(1) The Secretary of State must set the carbon budget for a budgetary period by order.
>
> (2) The carbon budget for a period must be set with a view to meeting—
>
> > (a) the target in section 1 (the target for 2050), and
> >
> > (b) the requirements of section 5 (requirements as to level of carbon budgets) and complying with the European and international obligations of the United Kingdom.
>
> (3) An order setting a carbon budget is subject to affirmative resolution procedure."

35. Prior to laying a draft order before Parliament setting a carbon budget, under s. 9(1) and (2) the Secretary of State must take into account the advice provided by the Committee on Climate Change ("CCC") under s.34 (see below) and any duly made representations made by the other national authorities[1]. If the draft order would set a budget at a different level from that recommended by the CCC the Secretary of State must publish a statement setting out the reasons for that decision (s.9(4)).

36. Section 10(2) sets out matters which must be taken into account by the CCC in giving its advice under s.34 and by the Secretary of State in making any decision under Part 1 of the Act in relation to carbon budgets: -

> "(2) The matters to be taken into account are—
>
> > (a) scientific knowledge about climate change;
> >
> > (b) technology relevant to climate change;
> >
> > (c) economic circumstances, and in particular the likely impact of the decision on the economy and the competitiveness of particular sectors of the economy;

[1] By s.95 "national authorities" refers to the Secretary of State and the devolved administrations.

> (d) fiscal circumstances, and in particular the likely impact of the decision on taxation, public spending and public borrowing;
>
> (e) social circumstances, and in particular the likely impact of the decision on fuel poverty;
>
> (f) energy policy, and in particular the likely impact of the decision on energy supplies and the carbon and energy intensity of the economy;
>
> (g) differences in circumstances between England, Wales, Scotland and Northern Ireland;
>
> (h) circumstances at European and international level;
>
> (i) the estimated amount of reportable emissions from international aviation and international shipping for the budgetary period or periods in question"

Thus, the setting of a carbon budget for the UK involves decision-making at a high strategic level involving a wide range of environmental, socio-economic, fiscal, political, scientific and technological considerations.

37. Under s.2 the Secretary of State may by order alter the 2050 target percentage in s.1. By s.6 the Secretary of State may alter the target levels under s.5 for CB3 and budgets after CB9. Those powers may only be exercised in limited circumstances, which include significant developments in scientific knowledge about climate change or in international law or policy. They reflect the evolving nature of the science, international law and policy, and the predictive judgments which fall to be made. The procedures are subject to requirements for consultation with the CCC and the other national authorities (ss.3 and 7). Where the Secretary of State's draft order differs from a recommendation of the CCC, he must publish a statement setting out the reasons for that decision (s.3(6) and s.7(6)). The Secretary of State is required to lay an order under ss.2 or 6 before Parliament for approval by the affirmative resolution procedure.

38. An order setting a carbon budget may not be revoked after the date by which it was required to be set (s.21(1)). But it may be amended after that date, provided that the Secretary of State is satisfied that since the budget was set (or previously altered) there have been "significant changes affecting the basis on which the previous decision was made" (s.21(2)). Once a budgetary period has begun, those changes must postdate that commencement and once it has ended, the budget may not be amended (s.21(3) and (4)). An order under s.21 is subject to similar consultation requirements (s.22) and the affirmative resolution procedure in Parliament (s.21(5)). If the draft order differs from a recommendation made by the CCC then the Secretary must publish a statement setting out the reasons for that decision (s. 22(7)).

39. Sections 16 to 20 deal with the determination of whether the objectives of carbon budgeting have been met.

40. Section 16 requires the Secretary of State to lay an annual report before Parliament stating for the year in question the amount of UK emissions, removals and net emissions for each GHG and aggregate amounts for all GHGs, along with the total amounts and details of the number and type of carbon units credited to or debited from the UK carbon account. The statement must be laid before Parliament no later than 31 March in the second year following that to which it relates (s.16(10)).

41. Section 17(1) and (2) allows the Secretary of State to carry back up to 1% of a carbon budget to the preceding budgetary period. Section 17(3) allows the Secretary of State to carry forward the whole or part of any overachievement in relation to a carbon budget to the next budgetary period.

42. By s.18 the Secretary of State must lay before Parliament a final statement for each budgetary period no later than 31 May in the second year following the end of that period. The statement must state the final amount for each GHG of UK emissions, removals, net emissions, the final amount of the carbon units credited to or debited from the net UK carbon account, and the final amount of that account. The report must state whether the powers under s.17 have been used. By s.18(7) the figures laid before Parliament in a final statement are determinative as to whether the carbon budget for the relevant period (and the duty under s.4(1)(b)) have been met. Section 18(8) provides that: -

> "If the carbon budget for the period has not been met, the statement must explain why it has not been met".

43. Section 19 provides that where according to the s.18 statement, the net UK carbon account has exceeded the carbon budget, the Secretary of State must lay before Parliament "a report setting out proposals and policies to compensate in future periods for the excess emissions". Thus, the CCA 2008 provides mechanisms to assist Parliament in holding the Secretary of State to account in relation to his duty under s.4.

44. Section 20 requires the Secretary of State to lay before Parliament no later than 31 May 2052 a final statement for the year 2050 setting out for that year essentially the information required under s.16. The issue of whether the target in s.1 for 2050 is met will be determined by that final statement. If the 2050 target is not met, the statement must explain why that is so (s.20(6)).

45. Sections 13 and 14 deal with the Secretary of State's duties to prepare proposals and policies for meeting the carbon budgets and to report on those matters to Parliament after each carbon budget is set, once every five years. These provisions lie at the heart of the claims for judicial review.

46. Section 13 provides: -

> "**Duty to prepare proposals and policies for meeting carbon budgets**
>
> (1) The Secretary of State must prepare such proposals and policies as the Secretary of State considers will enable the carbon budgets that have been set under this Act to be met.

> (2) The proposals and policies must be prepared with a view to meeting—
>
> > (a) the target in section 1 (the target for 2050), and
> >
> > (b) any target set under section 5(1)(c) (power to set targets for later years).
>
> (3) The proposals and policies, taken as a whole, must be such as to contribute to sustainable development.
>
> (4) In preparing the proposals and policies, the Secretary of State may take into account the proposals and policies the Secretary of State considers may be prepared by other national authorities."

47. Section 14 provides: -

> "**Duty to report on proposals and policies for meeting carbon budgets**
>
> (1) As soon as is reasonably practicable after making an order setting the carbon budget for a budgetary period, the Secretary of State must lay before Parliament a report setting out proposals and policies for meeting the carbon budgets for the current and future budgetary periods up to and including that period.
>
> (2) The report must, in particular, set out—
>
> > (a) the Secretary of State's current proposals and policies under section 13, and
> >
> > (b) the time-scales over which those proposals and policies are expected to take effect.
>
> (3) The report must explain how the proposals and policies set out in the report affect different sectors of the economy.
>
> (4) The report must outline the implications of the proposals and policies as regards the crediting of carbon units to the net UK carbon account for each budgetary period covered by the report.
>
> (5) So far as the report relates to proposals and policies of the Scottish Ministers, the Welsh Ministers or a Northern Ireland department, it must be prepared in consultation with that authority.
>
> (6) The Secretary of State must send a copy of the report to those authorities"

The NZS was laid before Parliament as the Secretary of State's report under s.14 following the setting of CB6.

48. In addition, s.12 imposes a duty on the Secretary of State to lay a report before Parliament after a carbon budget is set giving "indicative annual ranges" for the net UK carbon account for each year falling within that period. Section 12 provides: -

> "(1) As soon as is reasonably practicable after making an order setting the carbon budget for a budgetary period, the Secretary of State must lay before Parliament a report setting out an indicative annual range for the net UK carbon account for each year within the period.
>
> (2) An "indicative annual range", in relation to a year, is a range within which the Secretary of State expects the amount of the net UK carbon account for the year to fall.
>
> (3) Before laying a report under this section before Parliament, the Secretary of State must consult the other national authorities on the indicative annual ranges set out in the report.
>
> (4) The Secretary of State must send a copy of the report to those authorities."

49. The statute expresses the time limit for the laying of a report under s.12 and s.14 in the same language: -

> "as soon as is reasonably practicable after making an order setting the carbon budget for a budgetary period"

It appears that for earlier carbon budgets the Secretary of State has laid a single report before Parliament under ss.12 and 14. However, the s.12 report for CB6 was not laid until 14 December 2021. The Court has not seen this document, but was told that the information provided was in substance the same as that set out in the Technical Annex to the NZS at table 7 on p.322 (see below).

50. Part 2 of the CCA 2008 deals with the CCC. Section 32 and schedule 1 establish the Committee. It comprises the chairman and up to 8 other members appointed by the national authorities. The appointments must have regard to the desirability of securing that the Committee as a whole has experience in, or knowledge of, the areas set out in para.1(3) of schedule 1: -

> "(a) business competitiveness;
>
> (b) climate change policy at national and international level, and in particular the social impacts of such policy;
>
> (c) climate science, and other branches of environmental science;
>
> (d) differences in circumstances between England, Wales, Scotland and Northern Ireland and the capacity of national authorities to take action in relation to climate change;
>
> (e) economic analysis and forecasting;

(f) emissions trading;

(g) energy production and supply;

(h) financial investment;

(i) technology development and diffusion."

That list reflects the matters set out in s.10(2) which the CCC are required to advise upon and the Secretary of State is required to take into account (s.10(1)).

51. Under s.33 the CCC is under a duty to advise the Secretary of State on whether the percentage target for 2050 in s.1(1) should be amended and to publish that advice (s.33(5)). It did so following the Paris Agreement.

52. Under s.34 the CCC is under a duty to advise the Secretary of State not later than 6 months before the last date for setting a carbon budget for CB4 onwards on the matters set out in s.34(1). They include the level of the budget, the extent to which the budget should be met by reduction in emissions or by carbon units credited to the UK carbon account, and the contributions that should be made by sectors of the economy covered by carbon trading schemes under Part 3 of the Act and by sectors outside those schemes. The advice must be published (s.34(6)).

53. The CCC must lay before Parliament each year a report setting out its views on the progress made towards meeting carbon budgets that have been set and the 2050 target, and whether those budgets and target "are likely to be met" (s.36(1)). The CCC's report in the second year after a budgetary period has ended must also give the Committee's views on the way in which the budget was or was not met and on action taken during the period to reduce UK net emissions (s.36(2)).

54. Section 37 obliges the Secretary of State to lay before Parliament a response to the points raised by each of the CCC's annual reports under s.36.

55. Section 38(1) requires the CCC to provide advice or other assistance requested by a national authority in connection with its functions under the CCA 2008, progress towards meeting the objectives set by the statute, and any other matter relating to climate change. Section 39 gives the CCC a general ancillary power to do anything that appears to it necessary or appropriate for or in connection with its functions. I accept the submission made by Mr Honey QC, on behalf of the Secretary of State, that ss. 38 and 39 enable the CCC to engage in ongoing dialogue with the Secretary of State and to respond publicly to documents he publishes, such as the NZS.

Human Rights Act 1998

56. Section 3(1) of the Act provides: -

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

57. Article 2(1) of the ECHR provides: -

> "**Right to Life**
>
> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law"

58. Article 8 of the ECHR provides: -

> "**Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

59. Article 1 of the First Protocol to the ECHR provides: -

> "**Protection of property**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"

The setting of CB6

60. On 9 December 2020 the CCC published its advice under s.34 on the setting of CB6. In a detailed and lengthy report the Committee explained why it was recommending that net UK GHG emissions for 2033-2037 be set at 965 Mt CO_2e, an implied reduction of 78% from the 1990 baseline. As the Chairman said in his foreword, this effectively brought forward the UK's previous 80% target for 2050 by nearly 15 years. This required *inter alia* the "scaling up" of new policy development and of low carbon investment.

61. In their discussion of how CB6 can be met (p.24) the CCC explained that at the core of their advice were the multiple "scenarios" they had developed exploring the actions required in each sector of the economy to reach the net zero target by 2050. The scenarios explored uncertainties, particularly over how far people will change

behaviour, how quickly technology will be developed and the balance between alternative options. The scenarios were "ambitious", but bounded by "realistic assumptions" over the speed at which low carbon technologies could be developed and rolled out, and allowed time for supply chains, markets and infrastructure to scale up. The scenarios also recognised other priorities, such as maintaining security of energy supply.

62. The CCC used the insights they gained from this analysis to develop a "Balanced Pathway" as the basis for their recommendations for CB6 and the UK's NDC. The CCC then summarised actions required in four key areas in line with that pathway, giving a broad indication of the scale of change envisaged and key "phase out dates", such as the sale of diesel vehicles and gas boilers (pps.25-28).

63. These matters were explained in more detail in chapters 1 and 2. The CCC recognised that while many choices can be made now "over the broad shape of the transition, there remain some decision points for the Government in the coming decade" (p.83). Two "critical decision points" were identified. First, a decision will be required in the mid-2020s on the balance between the use of electrification and hydrogen in decarbonising the heating of buildings. Electrification may reach limits of cost-effectiveness and feasibility in certain parts of industry and the heating of buildings. Second, decisions will be needed in the second half of the 2020s on whether HGVs should be decarbonised through hydrogen or electrification, or a combination of the two (p.83).

64. In chapter 3 of its advice the CCC presented its analysis of future scenarios at a sectoral level, setting out options and impacts for each sector separately. In chapter 5 the Committee assessed the impacts, costs and benefits of its advice across the UK economy.

65. The CCC recommended that in the first half of 2021 the Government should set CB6 and publish its net zero plans and policies to deliver the budget in full, noting that many had been in the course of development since 2019 (pp. 15 and 440). The Committee advised that "the expected impact of policies, including those in early planning, should be quantified and in sum should be enough to meet [CB6] and [the NDC]" (p.15).

66. The CCC expressed their view that sections 13 and 14 of the CCA 2008 required the Government to demonstrate clearly and quantitatively how its proposals will deliver CB6 (p.440). The Government's response should set out a "quantified set of policy proposals" to deliver CB6 and the 2050 target. CCC referred to the Government's Energy and Emissions Projections ("EEP") where the impact of "implemented, adopted and agreed" policies had been quantified. The latest projection to 2035 fell short of the reduction recommended for CB6.

67. The CCC noted that many other policies had been announced or were being developed. They advised the Government to set out the intended effect of these policies and the time-scales over which they are expected to take effect. If "the proposals in sum are insufficient to deliver [CB6] the Government should set out the areas where it will develop further and stronger policies to deliver deeper emissions reductions, and quantify the expected effect of those". If as individual policies are progressed their expected effect is lower, then the impacts of other policies would need to be increased to fill the gap. Accordingly, the Government's response should set out "an approach to

its own tracking of policy development and progress to ensure that it stays on track to the Sixth Carbon Budget as circumstances and expectations change" (pp. 440-1).

68. Ms. Sarah James is the Co-Director of the Net Zero Strategy Directorate in the Department for Business, Energy and Industrial Strategy ("BEIS"). In her witness statement she explains that Ministers began to consider the setting of CB6 in early 2021. In March 2021 they agreed that CB6 should be set at the level recommended by the CCC and began discussions about the development of NZS policies with other Ministers across Government, including the Treasury. The Secretary of State made the final decision to set CB6 in April 2021 when he laid the relevant order before Parliament. That order was accompanied by an impact assessment which considered *inter alia* the measures which might be put in place to meet the proposed CB6 level and alternatives. However, no specific proposals or policies were considered or put forward in the impact assessment (WS paras. 15 to 17).

The Net Zero Strategy

69. The NZS states at p. 17: -

> "We have hit all of our carbon budgets to date. This document sets out clear policies and proposals for keeping us on track for our coming carbon budgets, our ambitious Nationally Determined Contribution (NDC), and then sets out our vision for a decarbonised economy in 2050.
>
> Whilst there are a range of ways in which net zero could be achieved in the UK, we set out a delivery pathway showing indicative emissions reductions across sectors to meet our targets up to the sixth carbon budget (2033-2037). *This is based on our current understanding of each sector's potential*, and a whole system view of where abatement is most effective. But we must be adaptable over time, as innovation will increase our understanding of the challenges, bring forward new technologies and drive down the costs of existing ones." (emphasis added)

70. In para. 40(b) of her witness statement Ms. James explains the use of the word "indicative" in the NZS. The Government's approach to meeting carbon budgets needs to adapt in response to changes over time, such as developments in technology or markets, which may result in a different "optimal distribution of policy effort". Accordingly, the "delivery pathway" is described as "indicative" rather than as a fixed target trajectory with emission limits for sectors.

71. Page 39 of the NZS states that decarbonisation measures will not cause emissions to fall to "absolute zero" for all sectors. Some sectors, such as industry, agriculture and aviation, are difficult to decarbonise completely. Accordingly, techniques for removal of GHGs, such as afforestation and carbon capture and storage, are essential to compensate for residual emissions so that net zero can be reached by 2050. That approach accords with the concept of net UK emissions upon which the CCA 2008 is based (see e.g. s.29).

72. Chapter 2 of the NZS sets a framework for the policies which follow. Page 62 explains that the Government has taken a "systems approach" which acknowledges firstly, that society, the environment and the economy are interrelated such that changes in one area may impact on others and secondly, that policy-making needs to be dynamic, responding to technological innovation and continuing to update assumptions which have previously been made. The systems approach also helps to identify interdependencies between policies.

73. There are a range of ways in which net zero may be achieved in the UK by 2050, but the exact technology and energy mix cannot be known as it will depend on how new technologies evolve in future (pp. 68-9). However, the Government expects to rely on the following green technologies and energy carriers: -

    - *Electricity* from low carbon generation;
    - *Hydrogen* to complement the electricity system, especially in harder to electrify areas e.g. parts of industry, heating, aviation and shipping;
    - *Carbon capture use and storage* ("CCUS") which can capture CO_2 from power generation, hydrogen production and industrial processes, and then store it underground or use it;
    - *Biomass* combined with CCUS which can support low carbon electricity, hydrogen generation and low carbon fuels.

74. BEIS used a similar approach to that of the CCC. It developed three modelled scenarios up to 2050 to explore possible energy and technology solutions (pp. 70-73). These are further explained in the Technical Annex (pp. 315-320). Scenario 1 ("High Electrification") assumes a widespread use of electrification to support decarbonisation of transport, heating and industry, with "deep decarbonisation" of electricity supply relying on renewables, nuclear power and gas combined with CCUS. Scenario 2 ("High Resource") uses hydrogen to a greater extent than in Scenario 1, particularly for decarbonising buildings, power and heavy vehicles. Both Scenarios 1 and 2 balance residual emissions by relying upon carbon removal, through afforestation and engineered measures, with Scenario 2 assuming a higher level of tree-planting. Scenario 3 ("High Innovation") assumes greater reliance upon innovation, such as the development of carbon capture, sustainable fuels and zero-emission aircraft. The electricity and hydrogen generation requirements for Scenario 3 fall between those assumed for Scenarios 1 and 2.

75. The NZS states that a key decision on the relative roles of hydrogen and electrification for heating will be taken in 2026 (pp.22, 80, 88, 132 and 136-146). The importance of this decision had been acknowledged in the CCC's s.34 advice given in December 2020. It goes directly to a major difference between scenarios 1 and 2 and reinforces the explanation given by Ms. James that any pathway produced by a Government at this stage is "indicative". The decisions which the UK Government and other governments are having to make involve issues of this nature and some unavoidable, substantial uncertainty in making future projections.

76. BEIS used its conclusions from analysing the three 2050 scenarios to develop an "indicative delivery pathway", or trajectory, of emissions reductions to meet targets up

to and including CB6. This was broadly consistent with the scenarios. The pathway was "designed only to provide an indicative basis on which to make policy and plan to deliver on our whole-economy emissions targets":-

> "The exact path we take is likely to differ and must respond flexibly to changes that arise over time." (p.74)

77. The delivery pathway was based upon the Department's understanding of each sector's potential to reduce emissions up to 2037 (p.74). The pathway prioritised emission reductions where known technologies and solutions exist and minimised the use of GHG "removals" to meet the targets (p.75). The claimants criticise the use of the expression "theoretical potential" in one part of the NZS. But I see nothing objectionable in that. Inevitably, the making of national policy on climate change depends upon modelling future circumstances. That involves a number of judgmental assumptions, variables, interactions and uncertainty. It is not a matter of simply making empirical measurements.

78. The NZS distributes the indicative delivery pathway between sectors (figure 13, p.77). The Strategy explains (para. 20 on p.77):-

> "Broken down by sector, our indicative delivery pathway *implies* the reduction in emissions up to 2037. These indicative sector pathways, presented as ranges for residual emissions to reflect the inherent uncertainty, help to drive change and *to plan how we can remain on track to meet our targets*. Given the interdependencies and interactions within and between sectors, the exact areas for emissions savings may shift, as our understanding increases. *These pathways are therefore not predictions* or targets: the emissions savings ultimately contributed by each sector are likely to differ as we respond to real-world changes." (emphasis added)

79. The NZS summarises key requirements for each sector assumed in the work on the delivery pathway, together with a level of reduction by 2035 from UK emissions in 1990 (pp. 78-79). So for the power sector, all electricity will need to come from low-carbon sources by 2035 (subject to security of supply) whilst meeting a 40-60% increase in demand. Based on the technology assumed, it is expected that GHG emissions from the power sector "could fall" by 80-85% by 2035 (pp.78 and 96).

80. The NZS explains at p.82 that meeting the increased demand for low carbon energy relies upon significant scaling-up of *inter alia* new green technologies The Strategy then sets out the capacities which low carbon electricity generation, hydrogen production, carbon capture and biomass will need to reach over the next 15 years (p.82). Figure 15 (p.83) gives an overview of "the scale and pace" of some of the changes required, according to assumptions used in the pathway (pp.82-3). The Strategy recognises that "new innovations may emerge, enabling the market to move more quickly or at lower cost than expected, while in other areas progress may be hindered by unexpected deployment challenges as technologies are brought to scale." Accordingly, the document puts forward a pathway "which maintains flexibility in the future, while ensuring we do not delay action we know is needed in the near-term" (p.84).

81. The NZS refers to the "critical activities" driving decarbonisation across the economy in figure 16 (p.87). This focuses on the new technologies which need to be developed and deployed over the next decade. Figure 16 identifies the year in which milestones are expected to occur and the periods over which activities are expected to start and finish. The NZS states that policies and proposals for achieving these activities are presented in subsequent chapters.

82. Chapter 3 sets out policies and proposals for seven different sectors: -

    - Power
    - Fuel supply and hydrogen
    - Industry
    - Heat and buildings
    - Transport
    - Natural resources, waste and fluorinated gases
    - Greenhouse gas removals.

    The NZS states (at p.253) that:

    > "Sector chapters set out policies and proposals in line with this indicative pathway to ensure we are on track for net zero. While it is impossible to predict every path to net zero, this pathway sets out the decisive action we know is needed and acts as the best plan we have to measure progress against."

83. The NZS adopts the same structure for each sector. I take as an example the first section of chapter 3, dealing with "power". The NZS first summarises progress made to date (paras. 1-3). It then summarises how the sector needs to change so as to contribute to the net zero target. Using "whole system modelling" to 2050, the strategy quantifies by how much emissions in this sector "could need to drop" by 2050 and then states by how much emissions "could fall" by 2030 and by 2035 (paras. 4-6 on p.96). Figure 17 shows for the power sector an indicative pathway to 2035 and a "range" for the position in 2050. The diagram enables a comparison to be made between two projections: first, the delivery pathway and second, a projection taking into account polices *before* the NZS and Energy White Paper (see [91] below).

84. Paragraphs 7 to 21 describe the challenges and opportunities in the power sector. Electricity generation must be further decarbonised whilst at the same time increasing supply substantially to meet demand in other sectors e.g. from increased electrification. The trajectory or delivery pathway for CB6 suggests that low carbon technologies will need to be built "at, or close to, their maximum technical limit", which is "a considerable delivery challenge" (paras. 11-12). Unabated gas generation currently plays a critical role in maintaining a secure and stable electrical system, but will be used less frequently in the future, running only when most needed for security of supply. Low carbon technologies capable of replicating that role are to be brought forward,

such as CCUS, and hydrogen-fired generation. There will also be measures to ensure that any new combustion power stations, including gas, can be converted to clean alternatives in the future. The NZS also summarises the public and private investment that will be required: £280 to £400 billion on electricity generation, of which £150 to £270 billion relates to CB6, and £20 to £30 billion on transmission and distribution networks by 2037 (para.18).

85. Paragraphs 22 to 43 on pp. 100-105 of the NZS describe the policies and proposals for the power sector to address the needs and opportunities previously identified. This needs to be read together with the milestones and activities shown in figure 16. Some of the matters discussed, such as CCUS and hydrogen generation, also feature in the subsequent treatment of other sectors.

86. The NZS applies the same approach to other sectors in turn. Inevitably, the level of detail and certainty varies, for example, in relation to technologies yet to be developed.

87. Chapter 4 sets out "cross-cutting" policies and proposals which affect more than one sector, or the economy as a whole. They include Government-funded programmes for research and innovation, public funding and private investment (including leveraged investment) in green finance, labour supply with skills for net zero schemes, net zero in government decision-making and regulation, and international collaboration (e.g. through COP26, G7 and G20).

88. The Technical Annex of the NZS is set out at pp. 306-359.

89. At [8] above I referred to the use of the GWP of GHGs other than CO_2 to express the emissions of those gases as a CO_2 equivalent for setting and monitoring compliance with carbon budgets and the 2050 target. The UK follows international conventions set by the Intergovernmental Panel on Climate Change ("IPCC") (see NZS at pp. 308-9). At the time the NZS was issued it had been agreed internationally that the reporting of GHG emissions under the Paris Agreement would use 100-year GWPs in the IPCC's Fifth Assessment Report ("AR5"). But that report published two sets of values for 100-year GWPs, one with "climate carbon feedbacks", reflecting more indirect effects of GHG on the climate and the other without. The "with feedback" GWPs give higher values for GHG emissions. In October 2021 no decision had yet been taken on which GWPs should be used and so the pathways in the NZS were based on the higher, more conservative GWPs "with feedback". The NZS states at p.309: -

> "The use of AR5 GWPs without feedback results in a lower CO_2-equivalent value for UK GHG emissions compared to AR5 GWPs with feedback, meaning that less abatement would be required to meet the same carbon budget. As a result, it may appear that the policies and proposals in this strategy overachieve on our carbon budgets when based on AR5 GWPs without feedback. *However, these provide additional headroom with which the Government could seek to manage uncertainty in emissions projections. We would review the cost effectiveness of maintaining this headroom as the necessary policies and proposals are implemented.*" (emphasis added)

It will be noted that this headroom was to be "maintained" until a future "review" during the implementation of the polices and proposals in the NZS. I return to this subject under ground 1.

90. The Technical Annex to the NZS deals with "meeting the carbon budgets" at pp. 321-327.

91. The baselines for the indicative delivery pathways in the NZS took into account policies implemented, adopted or planned as at August 2019, so that the additional emissions reductions required to meet the carbon budgets could be identified (NZS p.311 para.25 and James WS para. 38). BEIS's EEP 2019 projections were adjusted for a range of changes which had occurred, such as GDP projections, the GWPs in AR5, technological improvements and more recent projections from other government departments and agencies (pp 312-3).

92. The NZS says (para. 43 on p.321) that the section between pages 321-327 shows *inter alia* the "future performance implied by the delivery pathway" together with some deployment assumptions that illustrate some of the real-world changes required to meet carbon budgets."

93. Table 6 (p.321) shows projections of UK emissions "implied" by the delivery pathway: -

	CB3	CB4	CB5	CB6 (incl. IAS)[2]
Years covered	2018-2022	2023-2027	2028-2032	2033-2037
Baseline	2,499	2,052	1,889	2,029
Budget limit	2,544	1,950	1,725	965
NZS emissions pathway	2,499	1,854	1,312	962
Performance against carbon budget	-45	-96	-413	-3

The figures are given in Mt CO_2e. The figure of 962 Mt CO_2e for CB6 is 3 Mt CO_2e less than the budgetary limit set for that period.

94. Table 7 of the Technical Annex shows the indicative *range* of the UK's carbon account for each of the 5 years of CB6. The same figures were subsequently published in

[2] "IAS" refers to international aviation and shipping

December 2021 as the Secretary of State's report under s.12 of the CCA 2008. The implied performance of the delivery pathway for CB6 (962 Mt CO_2e shown in Table 6) corresponds to the "central estimate" given in table 7. Table 7 also shows the upper and lower estimates which are said "to represent the best evidence of the uncertainty in the projections for the sixth carbon budget period" (para.45). The range is quite wide. The upper projection is 1217 Mt CO_2e and the lower 763 Mt CO_2e. The NZS acknowledges that "the [delivery] pathway is highly ambitious". Downside risks to estimated policy savings include, for example, delays to delivery (para.47 p.322).

95. Table 8 of the Technical Annex (p.323), like tables 6 and 7, is taken from the modelling for the delivery pathway. The implied performance of the pathway is shown as UK emissions by sector for CB4, 2030 (the NDC year), and CB6. The CB estimates are annual figures averaged over the 5 years of the relevant budgetary period. The estimates are given using AR5 GWPs "with feedback", the basis selected for the NZS. The annual figure for total emissions in CB6 is 192 Mt CO_2e which (allowing for rounding) equates to the 5 year figure of 962 Mt CO_2e in table 6.

96. Table 9 of the Technical Annex (p.324) is comparable to table 8 but uses instead the "without feedback" GWPs in AR5. Here the annual figure for total emissions in CB6 reduces to 182 Mt CO_2e, or 910 Mt CO_2e over the 5 year budgetary period. By comparing tables 8 and 9 it appears that the use of the higher "with feedback" GWPs increases the projected emissions by about 52 Mt CO_2e[3] for the whole 5 year period of CB6.

97. Paragraph 52 of the Technical Annex explains that table 10 shows some of the "real world deployment assumptions" for each sector underpinning the pathway analysis. "Not all of the policies and proposals underlying the delivery pathway are represented by [the assumptions shown in table 10]." Ranges are given, for example, where values differ between the electrification and hydrogen scenarios. The NZS acknowledges that some of the deployment assumptions are early "assessments" based on "maximum technical potential". Because of ongoing uncertainties, the policy mix that will meet carbon budgets, and related deployment assumptions, are subject to change. In that sense table 10 is said to be "illustrative".

98. The figures in tables 6-8 of the Technical Annex were a puzzling feature during the hearing because they appeared to imply that the defendant had produced projections showing that the *quantified* effects of his proposals and policies would enable CB6 to be met. If so, ground 1(i) of the challenge simply would not arise on the facts. But Mr Honey accepted that that was not the case.

99. The explanation in the NZS of those tables and the delivery pathways is far from clear. It certainly did not explain the basis upon which the defendant decided to approve the NZS. It was therefore necessary for Ms James to explain in her witness statement the work carried out in preparing the NZS and why it was approved by the Minister. However, that evidence was also unclear on certain important points. Ultimately those

[3] However, para. 51 on p.323 of the NZS states that the exercise in table 9 has been carried out on an assumption that it would be "optimal in cost and non-cost terms to implement the same set of policies and proposals modelled in the AR5 with feedback pathways".

matters were clarified at the hearing on 15 July 2022 by reference to the evidence already before the court.

The defendant's evidence on the process leading to the Net Zero Strategy

100. Ms. James and her team worked on developing the proposals, policies and supporting analysis from early 2020 until publication in October 2021. They were assisted by a team of analysts responsible for modelling and analysis of pathways, proposals and policies (WS para. 24). The pathways and scenarios were developed in close collaboration with sector teams across Government (WS para. 29).

101. The team used previous s.14 reports as examples of what such a report should contain: the UK Low Carbon Transition Plan (2009) covering CB1 to CB3, The Carbon Plan: Delivering our low carbon future (2011), covering also CB4, and The Clean Growth Strategy (2017) covering also CB5 (WS para. 25). The NZS was also to address the 2030 NDC and the 2050 target.

102. The NZS built upon a number of recent, sectoral decarbonisation plans, including the Energy White Paper, the Transport Decarbonisation Plan and the Industrial Decarbonisation Strategy, but did not duplicate their level of detail, instead leaving them to be read as complementary documents. (WS paras. 26-27 and 65). Many of the policies had been developed by other Government departments and so their officials worked closely with BEIS between November 2020 and October 2021 on the development of measures for the NZS and on analysing their effects to enable the 2037 pathway to be met (WS paras. 65-69).

103. During the spring and summer of 2021 BEIS Ministers worked with Ministers across Government to reinforce this process. Over the same period BEIS Ministers met regularly with Ms. James and her team to review successive drafts of the NZS. The Secretary of State held monthly sessions to direct the development of policies for the Strategy, including the package of measures for each individual chapter. Officials also collaborated with the devolved administrations to identify and include their emissions reduction proposals and policies in the NZS (WS paras. 70-72).

104. The three 2050 scenarios presented in Chapter 2 of the NZS were developed and refined between March and September 2021. They were used to explore different ways in which CB6 and 2050 targets could be met (WS para. 32-33). The design of the scenarios was influenced by key strategic policy decisions and technological dependencies provided by the cross-Government sector teams and then brought together so as to be compatible with net zero (WS para. 34). An iterative process was carried out involving about 200 modelling runs. This said to have produced coherent *scenarios* to match the carbon budgets (WS para. 35).

105. Ms James and her team drew several "key insights" from that work (WS para. 36), which they used to prepare and model a delivery pathway to meet emission targets up to 2037 (WS para. 37).

106. The delivery pathway was developed in stages. In March and April 2021, BEIS gathered "initial evidence" from the sector teams across Government on how much each sector could decarbonise by 2037. The analysts combined this material with evidence from the CCC's advice on CB6, the Department's model and further

modelling work by cross-Government sector analysts showing how emissions reductions could be pushed further and where. This resulted in the production of an "initial pathway", which served as a basis for developing proposals and policies, including the scale of the emissions reductions needing to be found in each sector (WS paras. 39-40).

107. The modelling for the delivery pathway was developed with the input and collaboration of policy officials and analysts from several Government Departments. BEIS also discussed with the Department's group of external experts the insights drawn from the work on the 2050 scenarios, the "systems" approach and the testing of policy proposals (WS paras. 41 and 74-76).

108. Ms. James explained the "multifaceted and complex" relationship between the 2037 delivery pathway and the NZS proposals and policies (WS paras. 45, 63-72 and 123). In summary she said:-

(i) The 2037 delivery pathway represented the analysts' assessment of how each sector could best decarbonise in a feasible, credible and cost-effective way (see also [76]-[81] above);

(ii) Early versions of the pathway were used as a benchmark for driving the development of proposals and policies across Government from April 2021 through to October 2021;

(iii) Once a draft package of NZS proposals and policies had been developed by September 2021, Ms James's team and the analysts "assessed them against a final version of the 2037 pathway derived from updated sectoral modelling (including of (sic) the proposed proposals and policies" to determine whether the Department could be confident that the NZS would enable the carbon budgets to be met (see WS paras.45c and 123-125); and

(iv) The 2037 pathway presents a clear set of trajectories for UK climate change targets against which the Department will monitor performance of proposals and policies over the budgetary periods.

109. Mr Honey explained that in addition to the modelling work carried out in order to develop the delivery pathway, officials also carried out modelling specifically to quantify the predicted effects of the proposals and policies being prepared for the NZS, in so far as those measures were quantifiable.

110. On quantitative prediction of policy effects, Ms James explains at WS para. 59 that the NZS contains two broad categories of proposals and policies: -

(i) Sectoral proposals and policies which will deliver *direct* emissions reductions in particular economic sectors, set out in chapter 3 of the Strategy; and

(ii) Enabling proposals and policies, most of which do not deliver direct emissions savings, but are designed to support transition across the economy.

Category (ii) is divided into two subsets. The first comprises "cross-cutting" measures which apply to all or multiple sectors and meet several policy objectives. They are all set out in chapter 4 of the NZS. The second are "sectoral enabling" measures which enable the decarbonisation of a specific sector. Most of these are set out in chapter 3 (WS paras. 59 and 61-62).

111. The quantification was largely done through the use of sectoral models and evidence bases, by which estimates were produced of emissions reductions resulting from policy measures. There is a direct relationship between sectoral proposals and policies and the activities which they incentivise or regulate. Many of the measures in the NZS were expressed in terms of the actions or deployment they would deliver, and so these could be directly quantified (WS para. 83).

112. However, cross-cutting measures are less directly linked to emissions reductions. They enable sectoral measures to achieve such reductions, but more often than not they do not themselves have a direct effect (WS para. 84). Some cross-cutting measures considered necessary for the delivery of quantified emission reductions from sectoral measures were indirectly accounted for through that sectoral quantification. The effects of other cross-cutting measures could not be quantified (WS paras. 85 and 86). The fact that some quantifiable measures may be developed over time makes it inherently difficult to quantify reductions from such a proposal "with certainty". (WS para. 88).

113. As a result Ms. James and her team judged that it would be appropriate for the Strategy to rely upon "a mix of quantified proposals and policies, which delivered a very substantial portion of the required emission reductions, combined with some emerging proposals and policies which were at earlier stages of development", especially as the budgetary period for CB6 was some 12-16 years away (WS para. 89). A similar approach had been taken for the Clean Growth Strategy in 2017, where quantified measures were projected to deliver 94% of required emissions reductions for CB4 and 93% for CB5 (WS para. 91).

114. The analysts in BEIS produced a dataset comprising the figures and analysis which underpinned (a) the NZS delivery pathway to 2037 and (b) "all quantified proposals and policies in the emerging draft NZS". The dataset included inputs from sector analysts and policy leads across Government. Ms. James's team also collected data on "the time-scales over which NZS proposals and policies would be delivered and take effect" for inclusion in the dataset (WS paras. 77-78).

115. In para. 79 of her witness statement Ms James explains that the dataset contained the following quantitative metrics:-

> "a. annual emission reductions in CO_2e against each quantified policy or proposal, split between both traded and non-traded sectors, with further breakdowns for particular constituent gases (methane and nitrous oxide), with totals expressed in both with and without feedback GWP values (as described in paragraphs 48-55 above);
>
> b. a mapping of the emissions reductions from each quantified proposal and policy to the particular emissions pathways included in the NZS (such as the electrification scenario or the

> high hydrogen scenario), to reflect that some proposals and policies would contribute different emissions reductions under different scenarios;
>
> c. assumptions about potential contributions to UK totals through policy delivery outside of England (including through policy taken by the Scottish Government, Welsh Government and Northern Ireland Executive) for policies or proposals that the UK Government could not otherwise quantify for Scotland, Wales, or Northern Ireland, generally based on UK Government or CCC estimates of technical potential; and
>
> d. totals of emission reductions by sector derived from the underlying data, expressed as an average or per annum figure for each carbon budget period and for our NDC, and conducted for both global warming potentials (AR5 with and without feedback)."

116. In para. 80 she describes the detailed qualitative data in the dataset:-

> "The dataset also included detailed qualitative data on the characteristics of proposals and policies, such as the mechanisms by which they would achieve their intended outcomes (e.g. funding incentives, regulations, tax incentives, engagement with the public or businesses); which sector(s) of the economy they would affect; which central Government department would be responsible for delivering them; and whether they required joint working with local authorities to be delivered."

117. This dataset enabled officials in BEIS to assess the pathways, proposals and policies in the NZS so that they could advise Ministers that the Strategy would enable the carbon budgets to be met (WS para. 81).

118. The modelling to quantify emissions reductions from those proposals and policies which were quantifiable was updated to take into account more recent decisions approving policy and the spending review. As a result officials produced quantitative estimates that the emissions reductions expected from quantifiable proposals and policies would deliver about 95% of the reduction required by CB6. They then compared this estimate to the modelling of the performance of the delivery pathway (see [93]-[95] above). They concluded that the quantified emissions reductions from the proposals and policies were "not materially different from", or were "consistent with", the modelling for the pathway. Those emissions reductions were within the margins of uncertainty identified for the pathway estimates (WS paras. 123-125 and table 7 of the Technical Annex: see [94] above).

119. This comparison exercise formed one important part of the briefing given to the Minister on 15 October 2021 and thus the basis of his decision (see [131]-[132] below). Mr Honey confirmed this to be the case at the hearing on 15 July 2022.

120. The final decision to approve the NZS had to be taken by the Minister of State on behalf of the Secretary of State. The Minister had been appointed on 16 September

2021, only a month before the publication of the NZS. COP26 began on 31 October 2021. Plainly, as Mr. Honey acknowledged, Ministers and officials had to work under a great deal of pressure in the run up to the publication of the Strategy.

121. The Minister was provided with an initial briefing pack on his new responsibilities, the CCA 2008 and the NZS. He was given a more detailed verbal briefing on 22 September 2021. The target publication date was 19 October 2021, timed to coincide with the Global Investment Summit. There were ongoing processes for clearing the proposals and policies in the NZS with No.10, the Cabinet Office, HM Treasury and responsible Ministers in other departments. Some measures were subject to the public spending review, which took place during the summer and autumn of 2021 (WS paras. 102-105).

122. On 29 September 2021 officials submitted to the Secretary of State and the Minister a briefing package for the clearance of policies remaining to be considered by other Ministers, but which did not involve significant policy changes or the spending review. The Minister approved the package on 1 October and the Secretary of State on 5 October 2021. This clearance process was completed before the Minister was given further briefing for his approval of the NZS for publication (WS paras. 113-116).

123. Ms. James describes the complex and intense process relating to clearance of other policies. This involved daily meetings between 4 and 18 October 2021 and advice on certain matters being given to the Prime Minister and the Chancellor of the Exchequer. Some textual changes were being made until shortly before publication to ensure consistency with confirmed policy positions. The Minister was kept abreast of developments (WS paras. 118-122).

124. In the evening of Friday 15 October 2021 officials provided the Minister with their advice to enable him to consider approving the publication of the NZS. He was provided with a "near final" draft of the Strategy. The Minister was advised that his approval was required by 10am on 18 October if the document were to be published the following day.

125. Paragraph 8 of the submission to the Minister stated: -

> "Drawing from net zero scenarios in 2050, the Net Zero Strategy presents a modelled indicative pathway to CB6, broken down by sector based on their potential to decarbonise. While the exact areas for emissions savings may shift in response to real-world changes and as our understanding increases – we use ranges for each sector to reflect this uncertainty – the pathway provides a sound basis on which to plan how we meet our emissions targets. The indicative pathways are supported by specific policies and proposals. If delivered in full, the specific policies and proposals outlined in Annex C are projected to overachieve CB4 by 11Mt p.a. and CB5 by 72Mt p.a. We need to aim to overachieve on CB4 and 5 in order to stay on track for our NDC and CB6 (which were set after we increased our ambition to meet net zero by 2050). They are also projected to achieve our 2030 NDC. The strategy provides a strong foundation for decarbonising in the 2030s, *with the stated policies and proposals projected to*

directly deliver ~95% of emissions reductions required for CB6." (emphasis added)

126. Paragraph 8 referred to Annex C, a 42-page list of a great many policies. The list merely told the Minister whether an individual policy had been "quantified" (because it had a direct effect on emissions) or remained "unquantified". If the effect of a policy on emissions had been quantified, that effect had been taken into account in the quantitative assessment of the extent to which policies in the NZS were expected to meet the limits in CB4, CB5 and CB6. However, Annex C did not give any indication to the Minister about the scale of any reduction attributable to any specific policy, or even any group of interacting policies, although the information was available to officials. I return to this point under ground 1(ii).

127. Paragraph 8 also stated that the quantified policies were projected to deliver 95% of the emissions reductions required to meet the budget of 965 Mt CO_2e set for CB6. However, no breakdown of that figure of any kind was provided.

128. The briefing to the Minister also included the following table: -

Residual emissions, Mt CO_2e/year	Mid 2020s	Late 2020s and Early 2030s		Mid 2030s
	CB4	CB5	NDC	CB6 (incl. IAS)
Emissions after savings (with SR estimates)	379	273		202
Budget	390	345	275	193
Position Against Budget				
… including indicative SR impact	-11	-72	-2	9
… including further capability (from NZS pathways)	-19	-83	-13	-1

"SR" referred to the spending review.

129. The only explanation in the ministerial submission of that table is contained in para. 10: -

> "Although our ambitious SR bid for NZS policies did not result in all the funding requested, we advise that the NZS package of policies and proposals credibly enables us to be on track for all our legislated carbon budgets, and therefore fulfils our duty under sections 13 and 14 of the CCA (see Annex F). This is based on current modelling and planned policy work to identify further options over the coming years to deliver CB6 in full, taking advantage of technological progress, innovation and societal trends. It is not necessary for the policies and proposals included on the face of the NZS to deliver 100% of the emissions reductions required for CB6, providing they are sufficient to keep the targets in reach and that we continue to develop further policies and proposals as required in coming years (see paras. 15 and 16, and Annex F, for legal risks associated with this position). It is also worth noting that the Strategy uses conservative assumptions on Global Warming Potentials which will be reviewed in 2022, taking into account any relevant outcomes from COP26 which are likely to improve our performance on our carbon budgets."

130. The table in [128] gives annual figures. The first line estimates annual emissions during CB6 of 202 Mt CO_2e, which is 5% short of the annual level required to meet CB6, 193 Mt CO_2e in the second line. That first line takes into account emissions reductions from NZS policies, but only those with quantifiable effects (WS para. 141). The annual shortfall is expressed as 9 Mt CO_2e in the fourth line. The fifth line, "including further capability (from NZS pathways)", shows an annual figure of -1 Mt CO_2e. The reference to NZS pathways is solely to the modelling work carried out on the delivery pathway (WS para. 142). At the hearing there was no dispute that this modelling represents the "implied performance" of the delivery pathway for CB6, resulting in annual emissions of 192 Mt CO_2e (shown in table 8 of the Technical Annex) compared to the annual figure required for that budgetary period of 193 Mt CO_2e (set out in table 1 and effectively also in tables 6-8). In other words, it indicated that the delivery pathway was projected to satisfy CB6. But that raised the question what did the modelling of the "delivery pathway" take into account?

131. The advice given in para. 10 of the ministerial submission was that the NZS package of proposals and policies credibly enables the UK to be on track for all the carbon budgets which have been set based on (a) current modelling and (b) "*planned policy work* to identify *further options* over the coming years to deliver 100% of the emissions reductions required for CB6". On 15 July 2022 Mr Honey accepted that this was a reference to the same kind of comparison as had been described by Ms James (WS paras. 123-125 and see [118] above) between the modelling of the effects of those NZS policies which were quantifiable (delivering 95% of the reductions required to satisfy CB6) and the estimates of the "implied performance" of the delivery pathway. But here it will be noted that the briefing referred to an additional factor in that comparison, the "planned policy work".

132. A straightforward description of the advice given in the briefing would have been (a) the quantitative estimates of the emissions reductions from policies with quantifiable effects would deliver 95% of the reduction required by CB6 and (b) as a matter of

judgment, the unspecified policies referred to in para. 10 of the ministerial submission would enable that quantitative shortfall and the target in CB6 to be met. During the hearing the judgment in (b) was referred to as a "qualitative" judgment or analysis, as distinct from quantitative analysis. I will use the same terminology.

133. The defendant's skeleton did not set out this position at all clearly. Paragraphs 69-70 stated that the delivery pathway was not "merely modelling" of what it would be feasible to achieve (cf. para. 26 of the claimants' skeleton). Instead, as proposals and policies were developed the pathway reflected the expected impact of those measures: "they were fed back (sic) into the delivery pathway." Indeed, paragraph 70 tried to have it both ways:

> "The proposals and policies fed into the pathway, and were also assessed to be consistent with the emissions savings required by the pathway."

134. Because of the lack of transparency on this subject, both in the defendant's case and in the NZS, much time was spent trying to find out whether the modelled results of the delivery pathway for CB6 in tables 6-8 of the NZS, or the figure of -1 Mt CO_2e in the table given to the Minister, represented a freestanding quantification of emissions reductions resulting from NZS policies or whether the quantification of all emissions reductions resulting from the "quantifiable" policies ("the 95%") was input into the modelling for the delivery pathway. At the hearing on 15 July 2022, Mr Honey said that the evidence before the court did *not* indicate that either exercise had been carried out. If it had, that assessment would have been of a very different kind to that described, for example, at p.17 of the NZS (see [69] above) and the defendant would no doubt have said so in clear terms both in the NZS and in the evidence.

135. Instead, Mr Honey confirmed that the defendant's case rested on the comparison described in [118] and [132] above between the quantitative analysis that policies would deliver 95% of the emissions reductions required by CB6 and the estimate for the delivery pathway of 192 Mt CO_2e of annual GHG emissions during CB6, together with the exercise of judgment to conclude that the policies in the NZS will enable that carbon budget to be met.

136. It follows, and Mr Honey also confirmed, that the modelling on the delivery pathway did not include or provide any quantification of the effects of the "planned policy work" referred to in paragraph 10 of the ministerial submission. This, of course, is relevant to the issue under ground 1(i) of whether the defendant could lawfully have been satisfied that the NZS would enable CB6 to be met in accordance with s.13(1) of the CCA 2008.

137. The claimants criticised the statement in para. 10 of the ministerial submission (see [129] above) that the policies and proposals did not need to deliver 100% of the emissions reductions required for CB6 "providing that they are sufficient to keep the targets in reach and that we continue to develop further policies and proposals as required in coming years…". The claimants suggested that the Minister could not have been satisfied in accordance with s.13 of the CCA 2008 that the proposals and policies would enable the emission reductions required by CB6 to be met. In my view that statement was simply referring to the quantifiable policies which were predicted to achieve 95% of the CB6 requirement. The officials judged that other policies would

meet the shortfall and accordingly the shortfall was "in reach". Again the real question is whether the defendant erred in his interpretation of s.13 (see ground 1(i)).

138. I have to say that the defendant's position could and should have been explained in a clear and straightforward manner both in the evidence and in the skeleton. The court is entitled to such an explanation, particularly in a case of this nature (see [192] below). It would have saved a good deal of court time and resource.

139. One important point to emerge from all this, as the claimants rightly submitted, is that the first time that the Government revealed that it expected its quantified proposals and policies to achieve only 95% of the emissions reductions required to meet CB6 was when the defendant served his Summary Grounds of Defence in response to these challenges (see paras. 31-35). Neither Parliament nor the public would have been aware of the point from the NZS, nor indeed of the way in which the defendant relied upon further "planned policy work" to be satisfied that the NZS would enable CB6 to be met.

140. In the absence of any explanation in the ministerial submission about which policies would or could be the subject of further work, Mr. Wolfe QC, on behalf of Friends of the Earth Limited, submitted that officials were referring to proposals and policies not referred to in the NZS at all and therefore irrelevant to satisfying the duty in s. 13. He based himself upon the penultimate sentence of para. 10 of the submission.

141. However, the court has to keep in mind that it is not construing a legal instrument, but seeking to understand advice given to a minister who had previously been briefed on the subject (WS para. 102). Furthermore, in this instance, the advice was given under great pressure. In judicial review the court does not award marks for draftsmanship, or use infelicities of expression as a basis for inferring unlawfulness. Instead, it looks at the substance of the matter. Read in the context of the material provided to the Minister and his earlier briefing, the sentence criticised was simply referring to the "95% estimate" in relation to quantifiable policies and to the judgmental comparison with the modelling work on the delivery pathway and its margins of uncertainty ([118] above).

142. It is also relevant that the advice in para. 10 was given in the context of a high level strategy and set out the position at a particular point in time in relation to a wide range of policies. Some policies were more detailed or specific than others because, for example, they had previously been adopted and were in the process of being, or about to be, implemented. Other policies were in the course of development or intended for development in a few years' time. In this context "planned policy work" should be understood to indicate policies and proposals referred to in the NZS which are to be developed in future, or developed further, and not to matters which were not mentioned in the NZS at all.

143. The unquantifiable cross-cutting measures identified in chapter 4 represent one obvious category of proposals in the NZS intended to produce additional substantial reductions in emissions. The importance of those measures for meeting the carbon budgets was emphasised in para. 12 of the ministerial submission.

144. Ms James says that para. 10 of the ministerial submission referred to the further development of some policies which had not been quantified in the modelling work and other policies which had (WS para. 142). Ms. James has given a number of examples of those measures (WS para 143). For example, it is proposed that substantial public

investment be made in research and development and in green finance in order to stimulate and promote "further options". Subsequent s.14 documents can be expected to include more details on such matters as they are developed.

145. Accordingly, I do not accept Mr. Wolfe's submission that paras. 142 and 143 of Ms. James's witness statement sought to put an impermissible gloss on para. 10 of the submission to the Minister. That advice, read fairly and in context, referred to unquantified proposals and policies in the NZS of the kind identified by Ms. James and to quantified proposals and policies in the NZS which may be developed further.

146. The final version of the NZS was approved by the Minister on 17 October 2021. On 27 October 2021 he was given further advice that subsequent editing changes and decisions on the spending review had not materially altered the NZS or the predicted emissions savings for the carbon budgets. No point is taken on those aspects.

The assessment of the Net Zero Strategy by the Committee on Climate Change

147. The CCC produced its "Independent Assessment" of the NZS one week after its publication, on 26 October 2021.

148. The CCC was positive about a good deal of the NZS. The Strategy followed the approach it had recommended in relation to the analysis and modelling of scenarios and the use of an indicative delivery pathway.

149. On p. 3 the CCC said: -

> "Our overall assessment is that it is an ambitious and comprehensive strategy that marks a significant step forward for UK climate policy, setting a globally leading benchmark to take to COP26. Further steps will need to follow quickly to implement the policies and proposals mapped out in the Net Zero Strategy if it is to be a success.
>
> We welcome the Government's recognition that reaching Net Zero and tackling climate change is not only achievable and affordable but essential to the UK's long-term prosperity and can bring wider benefits for society, the economy and the environment.
>
> The pathways for emissions and technologies, and the associated investment, outlined in the Strategy are broadly aligned to those set out by the Climate Change Committee in its advice on the Sixth Carbon Budget. They are accompanied by proposals for credible delivery mechanisms across the economy.
>
> The targets cover all the UK's territorial emissions, including international aviation and shipping, and the plans aim to deliver the targets fully in the UK, without recourse to international carbon credits, while avoiding carbon leakage from industry or agriculture. The strategy as a whole is based on cautious

> assumptions over the lasting impacts of the Covid-19 pandemic and rules for emissions accounting.
>
> The Net Zero Strategy, with its many supporting publications, is an example of a deliverable sector-based strategy for rapid emissions reductions. Following three decades of sustained emissions reduction in the UK, the Strategy sets the path for future decarbonisation consistent with targets for both the near term and the long term that meet the demands of the Paris Agreement."

150. In the view of the CCC "the Net Zero Strategy fulfils the requirement in the Act for the Government to present policies and proposals to meet the UK's emission targets" (p.7).

151. Mr. Honey also points to the following statement at p.11 of the Assessment:-

> "The overall and sectoral ambitions that the Government has proposed align well to those proposed by the Committee in its advice on the Sixth Carbon Budget (figures 1 and 2). The ranges identified by the Government are intended to reflect uncertainty around a central delivery path that aims to keep in play multiple possible scenarios for meeting the Net Zero target in 2050. This is a sensible approach in the face of uncertainty and aligns to the Committee's approach in its advice".

But the CCC went on to point out the Government's range is "somewhat asymmetric: overall emissions will have to be in the lower half of these ranges to deliver CB6".

152. In its "conclusion on proposals for policies to deliver the plans" the CCC said at p.27: -

> "Together, the proposals represent a strong foundation for policy to reduce emissions across the economy. In most areas, the Government has set goals aligned to the path to Net Zero and put forward credible policy packages to deliver them. Funding and incentives appear to be being set at around the level required and generally plans involve a balanced mix of the possible solutions.
> …….
>
> *However, the Government has not quantified the effect of each policy and proposal on emissions. So while the Government has proposed a set of ambitions that align well to the emissions targets, it is not clear how the mix of policies will deliver on those ambitions – albeit in theory they could. This makes it hard to assess the risks attached to the plans and how best to manage these.* The Committee will return to these questions in the coming months, and we encourage the Government to increase the transparency of how the policies will support the plans." (emphasis added)

153. On 11 April 2022 Friends of the Earth wrote to the Chief Executive of the CCC to ask the following questions: -

> "1. Do you have any comment on the fact that the NZS does not provide information on the predicted GHG reductions and time-scales for the policies and proposals it describes?
>
> 2. Does that impact on the CCC's ability to comment on the NZS including on whether it will secure compliance with carbon budgets and Net Zero?
>
> 3. In relation to those matters, has the CCC a) raised concerns about this with the Government and/or b) asked the Government for any further information?
>
> 4. Has the CCC been provided with any further information on those matters, either in response to its request or in any event?"

154. The Chief Executive responded on 22 April 2022: -

> "As you will be aware, the Climate Change Committee published an interim assessment of the UK Government's Net Zero Strategy in October 2021. We will shortly publish a more detailed assessment of the strategy, in June, as part of our annual statutory report to Parliament.
>
> As we stated in October, the Government has not quantified the effect of each policy and proposal on emissions. This makes it hard to assess the risks attached to the plans and how best to manage these. That remains our view.
>
> We are now in the final stages of completing a new assessment for our annual Progress Report. It will contain new analysis of the Net Zero Strategy and a more complete commentary on its likely impacts.
>
> As part of this assessment, we are in regular dialogue with BEIS to understand the Government's strategy in more detail. So far, we have been provided with some limited clarifications and further breakdowns of the pathway that was published in the Net Zero Strategy. *We have not received any new quantification of emissions savings from specific policies.* These discussions continue and the information we have received is not complete. We expect to receive some further clarification on the emissions pathway in response to our ongoing queries.
>
> It is difficult to provide a fuller response at this point, until we have completed our analysis."

The claimants emphasised the words I have italicised. The CCC's report to Parliament in June 2022 had not been published by the time of hearing, so it was not referred to by

the parties and I have not had regard to it. No party has suggested that it affects the issues that the court has to decide.

Ground 1

155. Some of the submissions made by the parties were wide-ranging, but I will only address those issues which I consider need to be resolved for the determination of these claims for judicial review.

Preliminary issues

156. It is convenient to clear the decks before coming to the issues of real substance under ground 1.

157. One of the main issues which the court has been asked to determine (ground 1(i)) is whether the Secretary of State must be satisfied under s.13(1) that the numerical projections of his quantifiable policies will enable at least 100% of the reductions in emissions required by CB6 to be achieved. The defendant submits that the issue is academic, alternatively relief should be refused, because it was decided at COP26 to adopt the less conservative GWP values rather than the more conservative GWPs used in the NZS. The defendant's suggestion that use of the lower GWPs would result in the quantified policies meeting CB6 is untenable. First, the NZS and the advice given to the Minister on 15 October 2021 proceeded on the basis that international discussion at COP26 on this issue should not be pre-empted (see Ms. James WS paras. 54-55 and 148-149). Second, and in any event, the NZS expressly relied upon the conservatism in the use of the "with feedback" GWPs as providing "additional headroom" with which to manage the uncertainty in the Strategy's emissions projections in the event of the alternative set of GWP values being adopted. That conservatism was to be maintained until a future review during the implementation of the policies (see [89] above). That formed an intrinsic part of the policy approach adopted in the NZS. It is not permissible to ask the court in effect to ignore or rewrite this part of the Strategy. For their part, the claimants complain that this same subject was mentioned at the end of para. 10 of the ministerial briefing. But in my judgment the language indicates that it did not play a material part in the decision to approve the NZS and I do not think it would be appropriate to grant the claimants any relief in this regard.

158. The claimants submitted that the delivery pathways did not involve any assessment at all of the predicted effects of the defendant's proposals and policies: they simply set out requirements, alternatively aspirations, for meeting CB6. This turns out to be immaterial. The defendant's response to ground 1(i) rests upon the comparative approach taken in the defendant's decision as summarised at [118], [132] and [135] above. In this context I also refer again to Mr Honey's response set out at [134] and [136] above.

159. Complaint was also made about the looseness of some of the language used in the NZS, such as "keeping on track" for meeting the carbon budgets or "putting us on the path for Carbon Budget 6". I accept Mr. Wolfe's submission that there is a difference between s.13(1) and (2) in that the latter uses slightly softer language, "with a view to meeting" when dealing with the 2050 target (and any later target set under s.5(1)(c)). But this is because the central focus of s.13 is the preparation of measures which will enable the carbon budgets to be met. Measures which are considered by the Secretary

of State to pass that test are also required by s.13(2) to have the aim of meeting the 2050 target. However, reading the NZS fairly and as a whole, I do not accept Mr Wolfe's suggestion that when he addressed the carbon budgets the Secretary of State made the error of applying the wrong test in s.13(2). Instead, the phrases criticised by the claimants are consistent with the correct test in s.13(1).

160. In his first witness statement, Mr. Michael Childs, the Head of Science, Policy and Research of Friends of the Earth Limited, gave a number of examples of what he considers to be a lack of detail in certain proposals in the NZS or policy gaps. This court is not in a position to adjudicate on matters of that nature in proceedings for judicial review (see [22] above). No doubt the claimants are aware of this, because the points were not advanced in any detail during the hearing. I need say no more about that evidence.

Ground 1(i) - the duty in section 13(1) of the CCA 2008

161. The claimants submit that in order to be satisfied under s.13(1) that "proposals and policies" will enable the carbon budgets to be met, the Secretary of State, or in this instance the Minister, had to make an assessment of the time-scales within which the measures would take effect and their impact on reducing GHG emissions. Such an assessment necessarily required numerical predictions of the contribution which the proposals and policies would make to meeting the carbon budgets.

162. According to the claimants, the Secretary of State fails to comply with his duty in s.13(1) if his numerical projections show that his proposals and policies would reduce GHG emissions by only a proportion (e.g. 95%) of the reductions required to meet the carbon budgets. They say that to satisfy his duty, the Secretary of State's numerical projections must show that the policies with quantifiable effects will enable at least 100% of those required reductions to be achieved. Provided that that test is met, the claimants accept that s.13(1) does not preclude the Secretary of State from making *in addition* a qualitative judgment about the effects of one or more of his policies on meeting a carbon budget. But what the Secretary of State may not do is to rely upon a *qualitative* judgment of that kind to overcome a shortfall revealed by his *quantitative* analysis, the numerical projections, for enabling the carbon budgets to be met.

163. There are a number of points on the interpretation of s.13 which have become common ground between the parties.

164. Firstly, the obligation on the Secretary of State under s.13 is a continuing one.

165. Secondly, his duty is to *prepare* measures that will enable the carbon budgets to be met. The statutory scheme recognises that proposals will evolve over time and will be introduced and developed at different stages. Policies may need to be reconsidered as circumstances change. I would add that this is reinforced by s.10(2) of the CCA 2008, which requires the Secretary of State to take into account a wide range of considerations (see [36] above) which will be subject to considerable change over time.

166. Thirdly, it is agreed that the phrase "proposals and policies" is deliberately broad. The CCA 2008 received Royal Assent on the same day as the Planning Act 2008. Parliament's consideration of the two Bills overlapped. I agree with the parties that the Supreme Court's conclusion in *R (Friends of the Earth Limited) v Secretary of State for*

Transport [2021] PTSR 190 at [105] – [106] that the meaning of "Government policy" in s.8 of the Planning Act 2008 is restricted to "established policy", does not apply to s.13(1) of the CCA 2008. Mr. Wolfe and Mr. Coppel also accepted that the phrase "proposals and policies" includes an emerging policy or a proposal to be further developed. That must be correct. The context in which s.13 sits includes carbon budgets which may cover a period ending up to 16 years into the future, the 2050 target and the innovative nature of important aspects of climate change technology.

167. Fourthly, it is agreed that it is a matter of judgment for the Secretary of State to decide (a) on the proposals and policies which should be prepared and (b) whether they will enable the carbon budgets to be met. I return to this subject below.

168. Fifthly, Mr. Honey submitted, rightly, that s.13(1) does not require the Secretary of State to be certain that his proposals and policies will enable the carbon budgets to be met. Read in context, the word "will" cannot be taken to indicate that certainty is required. It was used simply because the duty imposed by s.13(1) is concerned with a predictive assessment about the future. Similarly, the claimants said that the Secretary of State must make an assessment of "the expected impact" of the proposals and policies (para. 39 of the claimants' skeleton).

169. But the claimants then used various expressions to describe the strength of this expectation, such as "some certainty" or "a degree of certainty". However, in a context where certainty is not required by the legislation or even achievable, I do not think it appropriate to use that word, even with qualifications of the kind suggested by the claimants. Such language is so ambiguous that the reference to "certainty" is misleading.

170. Instead, in my judgment the word "enable" should be given its ordinary meaning of "to make possible or effective" (Oxford English Dictionary). Here the emphasis is on policies which, taken overall, the Secretary of State judges will be "effective" or efficacious for achieving the reductions set by the carbon budgets.

171. Mr. Wolfe submits that there is a distinction between the language of s.13(1) and that of s.12(1) and (2). He suggests that the latter imposes a less onerous obligation on the Secretary of State to set out an "indicative range" for each of the years of the carbon budget just set, within which he *expects* the amount of the UK net carbon account to fall. I see no material difference for the purposes of the issues in this case. Section 13(1) uses "will enable" and "to be met" because they relate to the object of the proposals and policies being prepared and an assessment of the effect of those measures. That includes consideration of what the Secretary of State expects to be achieved during a budgetary period. In the same vein, s.14(2)(b) refers to the time-scales over which policies are "expected" to take effect.

172. Mr. Wolfe also submitted that because s.13(3) requires that the proposals and policies must contribute to sustainable development, it must be inferred that the Secretary of State is obliged to include in his assessment under s.13(1) the time-scales over which his proposals and policies are expected to take effect. He relied upon the definition of "sustainable development" adopted in Resolution 42/187 of the United Nations General Assembly: "meeting the needs of the present without compromising the ability of future generations to meet their own needs" (*Spurrier* at [635]). I do not

accept that the concept of sustainable development can support the highly specific interpretation of s.13(1) for which Mr. Wolfe contends.

173. Nevertheless, in my judgment there are two more straightforward routes by which s.13(1) requires the Secretary of State to assess the time-scales over which his proposals and policies are expected to take effect. First, this must be an obviously material consideration in predicting whether those measures will enable carbon budgets to be met (applying the tests set out in [200] below). Second, s.14(2)(b) implies that the point will already have been addressed when the policies covered by the s.14 report were being prepared under s.13.

174. Returning to the claimants' main submission, counsel accept that there is no express language in the legislation requiring the Secretary of State to take a quantitative approach nor, in particular, to be satisfied quantitatively that those policies which are quantifiable will enable at least 100% of the emissions reduction required by each carbon budget to be met. Instead, they agree that they have to show that this requirement is necessarily implicit in the legislation.

175. On this point they argue that s.13 (and indeed s.14) must be interpreted so as to support the duties imposed on the Secretary of State by ss.1 and 4. The targets are quantitative in nature and not qualitative. The carbon budgets are set by the Secretary of State having regard to the advice of an expert body, the CCC, and on the basis that he considers them to be realistic. Furthermore, they will have been prepared after taking into account the range of environmental, socio-economic, fiscal, political, scientific and technological considerations referred to in s.10(2). The scheme requires the Secretary of State to plan to achieve emissions reductions so as to comply fully with those budgets, reflecting the time-scales over which it is expected that his proposals and policies will take effect. Sections 16-20 require the UK's progress in meeting carbon budgets to be monitored on a numerical basis.

176. The claimants pointed to passages in the defendant's pleadings which suggested that whether *any* quantitative analysis is to be undertaken at all in discharging the obligation in s.13(1) is entirely a matter of judgment for the Secretary of State. However, in his submissions Mr. Honey rightly accepted that the obligations in s.13 and s.14 cannot properly and rationally be satisfied without quantitative projections and analysis of the effects of the proposals and policies in reducing GHG emissions.

177. I conclude that there is no basis in the statutory scheme to justify the court holding that the obligation in s.13(1) requires the Secretary of State to be satisfied by quantitative analysis that measures with quantifiable effects will enable at least 100% of the emissions reductions required by the carbon budgets to be achieved.

178. Plainly the targets are quantitative in nature and the provisions for monitoring the progress made each year and whether targets are being met involve measurement of the UK's actual performance in reducing emissions. But s.13(1) is different in that it involves making a predictive assessment many years into the future. Such predictions inevitably involve significant uncertainty, for example, in relation to future circumstances falling within s.10(2). There are uncertainties about economic growth, energy, prices, population growth, the impact of investment in technological innovation and the implementation of proposals. Even predictions expressed in quantitative terms involve subjective judgment (see below).

179. There is no reason to think that Parliament intended that s.13(1) could only be satisfied by the predicted numerical effects of those polices which are quantifiable. If Parliament had intended to impose such a significant constraint on the Secretary of State's ability to judge how to discharge his duty, it would have said so. It did not and the language it has used does not give rise to any implication to that effect.

180. To some extent the claimants' argument proceeds on the basis that there is a clear distinction between quantitative and qualitative analysis for the purposes of s.13(1) of the CCA 2008. At first glance that might appear to be so: one uses numbers and the other need not do so. But certainly in the present context, the distinction is illusory. The kind of quantitative analysis which is carried out is not focused simply on empirical measurements of past or present conditions. It is not a purely objective exercise. It involves predictions of future conditions over many years in a changing socio-economic, environmental and technological landscape and therefore a good deal of uncertainty. The consideration of matters such as these depends upon the use of judgment, whether the analysis is quantitative or qualitative.

181. In order to carry out predictive, quantitative analysis the defendant's officials have had to use a number of mathematical models. In *R (Mott) v Environment Agency* [2016] 1 WLR 4338 the Court of Appeal recognised that the use of models of this kind involves expert judgment (see e.g. [78]). That formed part of the Court's reasoning for its acceptance that decisions based on scientific, technical and predictive assessments should be afforded an enhanced margin of appreciation in judicial review (see also *Spurrier* [2020] PTSR 240 at [176]-[179] and *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 at [68] and [177]).

182. Here, models were used to link various matters relating to the policies under consideration and to assess their future effects. Judgment is needed in the construction and use of a model, for example, to create the formulae which express numerical relationships between different factors, or sets of factors, and to express the effects of changes over time. Judgment is required in the preparation of inputs for the modelling exercise and in the interpretation of the results. The simple fact that the outcomes of modelling are expressed in numerical terms cannot disguise the dependency of such analysis on the use of judgment.

183. Although the Secretary of State is assisted by the modelling work by his team of experts, the results of that exercise will be subject to uncertainties, some of which may be expressed in numerical terms and others which may not. Ultimately, the Secretary of State's decisions made under s.13(1) on the preparation of proposals and policies are matters of judgment for him. Those judgments will be informed, but not circumscribed, by the quantitative analysis carried out.

184. The claimants expressed concern that if the obligation in s.13(1) could be satisfied by taking into account a qualitative judgment on the unquantifiable effects of policies, then it would be possible for decisions of the Secretary of State to be based not on policies contributing 95% of the emissions reductions required by carbon budgets, but only say 50% or even less. I do not share this concern for a number of reasons.

185. As the claimants have said, s.1(1) and the carbon budgets set numerical targets. The Secretary of State accepts that there must be some quantitative assessment of the effects of the proposed policies (see [176] above). If those quantified effects falls

significantly below meeting the whole of the emissions reductions required, then the Secretary of State would need to be satisfied that the meeting of that shortfall by qualitative analysis is demonstrated to him with sufficient cogency. As that shortfall increases, so that task would be likely to become increasingly challenging for the Secretary of State and his officials.

186. Although the measures prepared by the Secretary of State under s.13 do not have to be approved by Parliament (contrast a national policy statement prepared under Part 2 of the Planning Act 2008), they will be scrutinised by the CCC as an expert body, by Parliament, the scientific community, bodies such as the claimants and the wider public.

187. As I explain below, the briefing given to the Secretary of State when approving a package of policies for the purposes of a s.14 report, and the report itself, must address (a) the assessment made by officials of the quantitative contributions that individual policies are expected to make to meeting carbon budgets (and the 2050 target) and (b) the justification for relying upon unquantified policies to make up any predicted shortfall in meeting a statutory target. These requirements enable the scrutiny, firstly by the Secretary of State of the policy package, and secondly by Parliament, the CCC and others of the s.14 report, to be effective and more rigorous.

188. The CCC's annual reports to Parliament under s.36 of the CCA 2008 on the progress made in dealing with climate change include the success (or otherwise) of measures prepared under s.13. The Secretary of State must report to Parliament responding to the points made by the CCC (s.37). In addition, under s.39 the CCC may give its independent assessment of a s.14 report by the Secretary of State, as they have done in relation to the NZS. It is apparent that the CCC as an expert body scrutinises the work of the Secretary of State and his Department with great care and in depth. The CCA 2008 proceeds on the basis that the reports of the CCC will provide much assistance to Parliament.

189. The Secretary of State is accountable to Parliament for his proposals and policies under s.13, for the work undertaken by his Department and for the performance of the UK in meeting the carbon budgets and the 2050 target (see e.g. ss.16, 18, 19, 20 and 37). This includes the obligation to answer Parliamentary questions and to appear before Parliamentary Committees. The Committees have the ability to call for evidence and information, to examine witnesses and to report to the relevant House. By such means, "the policies of the executive are subjected to consideration by the representatives of the electorate [and] the executive is required to report, explain and defend its actions….". Thus, Parliamentary accountability is no less fundamental to our constitution than Parliamentary sovereignty (*R (Miller) v The Prime Minister* [2020] AC 373 at [46]).

190. It is through these mechanisms that the merits, realism efficacy of the Secretary of State's climate change policies can be probed and evaluated, so that he may consider, for example, whether any additional work needs to be undertaken, amendments made, or new measures taken, pursuant to his continuing obligation under s.13(1).

191. Finally, the Secretary of State's consideration of whether his proposals and policies will enable the carbon budgets to be met may be the subject of judicial review. The courts have a duty to give effect to the law, irrespective of a Minister's accountability to Parliament. The fact that he is accountable to Parliament does not mean that he is

immune from legal accountability to the courts (*Miller* at [33]). For example, the interpretation of the CCA 2008 is plainly a matter for the court.

192. Sometimes the principle of Parliamentary accountability is used to justify restraint in judicial review, or even non-justiciability (*Miller* at [47]). In this case, the Secretary of State has not argued that his functions under s.13(1) are non-justiciable. He was right not to do so. Although the court may need to tread carefully in relation to some issues and apply an enhanced margin of appreciation, s.13(1) does not merely confer a power on the Secretary of State. It imposes a duty, compliance with which may be the subject of judicial review. If, for example, the court should grant permission for a legal challenge to be brought on the grounds that the "split" between quantitative analysis under s.13 was irrational (a point not advanced in any of the present cases) it may insist, if it considers it appropriate, upon a sufficiently clear and full explanation of the reasoning process of the defendant and his officials, as a *quid pro quo* for that enhanced margin of appreciation (*Mott* at [64]).

193. Accordingly, I conclude that s.13(1) of the CCA 2008 does not require the Secretary of State to be satisfied that the quantifiable effects of his proposals and policies will enable the whole of the emissions reductions required by the carbon budgets to be met. The obligation in s.13(1) does not have to be satisfied by quantitative analysis alone.

Ground 1(ii) - the legal sufficiency of the briefing provided to the Minister

194. Under the first component of s.13(1) it is a matter of judgment for the Secretary of State to decide which proposals and policies should be prepared and when (see [165]-[167] above). Judicial review does not provide an opportunity for a claimant to challenge the merits or demerits of the Secretary of State's policies. A challenge to the rationality of such policies must not be used as a cloak for a merits challenge. Having regard to the case law summarised in *Spurrier* at [141] *et seq.*, a rationality challenge to the selection and content of policy would involve a low intensity of review, or a "light touch", *a fortiori* in relation to policies of a high level, strategic nature.

195. The second component of s.13(1) is the Secretary of State's obligation to be satisfied that his proposals and policies will enable the carbon budgets to be met. As I have explained, this depends upon the making of a predictive assessment by the Minister. The nature and extent of the work to be carried out is a matter of judgment for the Secretary of State and his officials, subject, of course, to satisfying the requirements of the legislation. Otherwise, such judgments may only be challenged on *Wednesbury* principles (*R (Khatun) v Newham London Borough Council* [2005] QB 37). On that last point, the courts accord an enhanced margin of appreciation to decisions involving, or based upon, scientific, technical or predictive assessments by those with appropriate expertise (see *Mott*). In this case the assessments were carried out by officials whose expertise is not questioned. Not surprisingly, the claimants do not bring a legal challenge to any of the technical assessments.

196. Instead, the claimants contend that: -

(i) Omissions from the material provided to the Minister in October 2021 rendered his briefing legally insufficient for him to be satisfied under s.13(1) that the proposals and policies would enable CB6 to be met; and

(ii) The NZS did not comply with s.14 because the same matters were omitted from that report.

I will deal with issue (ii) under ground 2 below.

197. According to the claimants, those omissions were: -

(a) The lack of an assessment of the time-scales over which the proposals and policies were expected to take effect;

(b) The failure to identify under the quantitative analysis the contribution each quantifiable proposal or policy would make to meeting the carbon budgets;

(c) The failure to identify under the qualitative analysis which proposals and policies would meet the 5% shortfall for CB6 and how each would do so.

198. The relevant principles were laid down by the Court of Appeal in *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154 and by the High Court of Australia in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] 162 CLR 24. These decisions were analysed in *Transport Action Network Limited* at [60] – [73], and *R (Save Stonehenge World Heritage Site Limited) v Secretary of State for Transport* [2022] PTSR 74 at [62] – [65]. That analysis need not be repeated here.

199. A minister only takes into account matters of which he has personal knowledge or which are drawn to his attention in briefing material. He is not deemed to know everything of which his officials are aware. But a minister cannot be expected to read for himself all the material in his department relevant to the matter. It is reasonable for him to rely upon briefing material. Part of the function of officials is to prepare an analysis, evaluation and precis of material to which the minister is either legally obliged to have regard, or to which he may wish to have regard.

200. But it is only if the briefing omits something which a minister was *legally obliged* to take into account, and which was not insignificant, that he will have *failed* to take it into account a material consideration, so that his decision was unlawful. The test is whether the legislation mandated, expressly or by implication, that the consideration be taken into account, or whether the consideration was so "obviously material" that it was irrational not to have taken it into account (*National Association of Health Stores* at [62]-[63] and [73]-[75]; *R (Samuel Smith Old Brewery (Tadcaster) v North Yorkshire County Council* [2020] PTSR 221 at [30]-[32]; *Friends of the Earth* at [116]-[120]; *Oxton Farm v Harrogate Borough Council* [2020] EWCA Civ 805 at [8]. In this regard, it is necessary to consider the nature, scope and purpose of the legislation in question.

201. I deal first with omissions (b) and (c). There is no dispute that those matters were not addressed in the briefing to the Minister on 15 October 2021. The defendant has not suggested that they were addressed in any other briefing.

202. The statutory context is of paramount importance: -

(i) Section 1 of the CCA 2008 was amended to incorporate the net zero target because of the recognition internationally and in the UK of the need for action to be taken to reduce GHG emissions more urgently;

(ii) The UK's contribution to addressing the global temperature target in the Paris Agreement depends critically on meeting the net zero target for 2050 set by the CCA 2008 through the carbon budgets;

(iii) The Secretary of State is responsible for setting the carbon budgets:

(iv) The CCA 2008 imposes the obligation to ensure that the net UK carbon account meets those targets solely on the Secretary of State;

(v) Under the CCA 2008 the preparation of proposals and policies under s.13 (and if necessary under s.19(1)) is critical to achieving those targets;

(vi) The Act imposes solely on the Secretary of State the obligations to prepare such measures and to be satisfied that they will enable the carbon budgets to be met. There is no requirement for Parliament or the public to be consulted on those proposals and policies or for Parliament to approve them;

(vii) The Secretary of State cannot properly and rationally be satisfied that his proposals and policies will enable the carbon budgets to be met without quantitative analysis to predict the effects of those proposals and policies in reducing GHG emissions ([176] above);

(viii) The predictive quantitative assessment and any qualitative assessment put before the Secretary of State are essential to his decision on whether his proposals and policies will enable targets to be met which are expressed solely in numerical terms;

(ix) Although a quantitative assessment does not have to show that quantifiable policies can deliver the whole of the emissions reductions required by the targets, any qualitative judgment or assessment to address that shortfall will have to demonstrate to the Secretary of State how the quantitative targets can be met;

(x) The carbon budgets and the 2050 target relate to the whole of the UK economy and society and not to sectors. Achievement of those targets requires a multiplicity of policy measures addressing the UK as a whole, individual sectors, and factors falling within s.10(2). Those measures will be operative at different points in time. Some will apply in isolation and others in combination. Whether an overall strategy will enable the statutory targets to be met depends upon the contribution which each policy (or interrelated groups of policies) is predicted to make to the cumulative achievement of those targets;

(xi) The merits of individual measures, their contributions and their deliverability, together with the deliverability of the reductions in GHG

emissions required by s.1(1) and s.4(1), are all essential considerations for the Secretary of State, or the Minister in his place.

203. Given the confusion that has arisen in the defendant's case about the use of the modelling of the delivery pathways, I should make it clear that [198(vii)] above does not refer to the modelling of the delivery pathways as has been described to the court. Instead it refers to the type of quantitative analysis carried out by BEIS to quantify predicted reductions resulting from proposals and policies in the NZS (giving in this instance a cumulative estimate that those measures were expected to deliver 95% of the reduction required by CB6). It is plain that BEIS had information on the contributions of individual policies (or groups of policies) to that cumulative figure. There has been no suggestion that that cumulative figure could sensibly have been produced without an assessment of the effects of individual policies.

204. In my judgment, one obviously material consideration which the Secretary of State must take into account is risk to the delivery of individual proposals and policies and to the achievement of the carbon budgets and the 2050 net zero target. This is necessarily implicit in the statutory scheme. In turn, this must depend upon the relative contributions made by individual measures to achieving those targets.

205. Ms. Simor QC, on behalf of ClientEarth, pointed to those parts of the s.14 reports published in 2009 and 2011 (see [101] above) which did set out the contributions made by individual policies to achieving CB1 to CB4. It appears, however, that this information was not presented in the Clean Growth Strategy (2017), which also covered CB5. The reason for that change in practice is not clear.

206. Ms. James states that for the NZS the dataset produced by the Department included annual emission reductions in CO_2e against each quantified proposal or policy, split between traded and non-traded sectors (see [1015] above). However, that information was not presented to the Minister in October 2021 in any form, not even in summary form. Apart from the table included in the ministerial submission (see [128] above) the numerical information he received was essentially that set out in the NZS.

207. The NZS presented the delivery pathway to 2037 by sector (figure 13), indicative pathways for each sector, and the projections in the Technical Annex of emissions for the carbon budget periods, specifically CB6, both for the UK as a whole and by sector. The analysis looked at the effect of the NZS policies cumulatively on each of the seven sectors but did not go any further into the policy-specific analysis which BEIS had carried out in order to produce the overall figures placed before the Minister.

208. The Minister was provided with a list of policies and proposals in the NZS which told him which ones had been quantified and which had not (see [126] above). Plainly there was no need for detailed workings to be presented, but nothing more was said about that quantification, not even a summary of individual policy contributions, for example, in the list at Annex C to the ministerial submission.

209. Moreover, Mr. Coppel QC, on behalf of Good Law Project and Ms Wheatley, pointed out that the Minister was told that for some of the "quantified" measures options were still to be explored or that consultation was yet to take place.

210. I accept the submission made by Mr. Honey that individual policies may interact and some may have a combined, rather than a separate effect. But that does not alter the point that individual policy data was generated within the Department, even if it may have been necessary to group some of it together. The material presented to the Minister did not go below the national or sector levels referred to above, to look at the contributions to emissions reductions that would be made by individual policies where quantified, or even policies which had to be grouped together. The subject was not addressed at all.

211. Viewed in the context of the statutory scheme, I have no doubt that the quantification of the effect of individual policies was an obviously material consideration on which, as a matter of law, information had to be provided to the Minister, so that he could discharge his functions under s.13 lawfully by taking it into account. The defendant's role in approving a package of policies so as to enable the statutory targets to be met is critical to the operation of the CCA 2008. Risk to the delivery of individual policies and of the targets is "obviously material".

212. My general interpretation of the statutory scheme applies *a fortiori* to the circumstances of the NZS. The Minister was told in para. 8 of the submission that the assessment was based on an assumption that the quantifiable proposals and policies would be "delivered in full". As we have seen, the NZS described the scenarios and the delivery pathway as highly ambitious and referred to considerable delivery challenges. It was in this context that officials projected that the UK would "overachieve" CB4 by 11 Mt CO_2e and CB5 by 72 Mt CO_2e a year, but would achieve only 95% of the emissions reductions required for CB6. Ultimately, the Minister's decision depended upon unquantified measures and other quantified measures to be developed further (see [144]-[145] above) and upon comparison with a delivery pathway which was said to meet the CB6 target, but only just, and was in any event subject to a wide uncertainty range.

213. In my judgment, without information on the contributions by individual policies to the 95% assessment, the Minister could not rationally decide *for himself* how much weight to give to those matters and to the quantitative assessment in order to discharge his obligation under s.13(1).

214. The briefing to the Minister did not enable him to appreciate the extent to which individual policies, which might be subject to significant uncertainty in terms of content, timing or effect, were nonetheless assumed to contribute to the 95% cumulative figure. This concern is all the more serious because the Minister was told that that the assessment by BEIS was based upon the assumption that the quantified policies would be "delivered in full". The information which ought to have been provided to the defendant would have influenced his assessment of the merits of particular measures. It was crucial so that he could question whether, for example, the Strategy he was being advised to adopt was overly dependent on particular policies, or whether further work needed to be carried out to address uncertainty, or whether the overall figure of 95% was robust or too high. If it was too high, then that would affect the size of the shortfall and his *qualitative* judgment as to whether unquantified policies could be relied upon to make up that gap with what he would judge to be an appropriate level of confidence. Information on the numerical contribution made by individual policies was therefore legally essential to enable the defendant to discharge his obligation under s.13(1) by

considering the all-important issue of risk to delivery. These were matters for the Secretary of State and not simply his officials.

215. The role of the CCC is to give advice as an expert body rather than to opine on questions of law. But nonetheless the court should give considerable weight to their advice in December 2020 on the setting of CB6 that the Government's net zero plans should include a "quantified set of policy proposals" and their criticism in October 2021 of the NZS for failing to quantify the effect of each policy and proposal on emissions reductions ([65]-[67] and [152] above).

216. There remains the manner in which the 5% shortfall was handled in the ministerial submission. Although this was critical to the advice given that the proposals and policies would enable CB6 to be met, the Minister was not told:-

(i) Which unquantified policies were being relied upon as part of the judgment that was made;

(ii) Which already quantified policies were assumed to be capable of further development;

(iii) Alternatively, whether the advice and comparison with the delivery pathway did *not* involve relying upon or identifying any specific policies;

(iv) Whether any further calculations had been performed, or whether this exercise was solely a matter of judgment.

Although Ms. James's witness statement did supply more detail than was contained in the briefing to the Minister, it did not address those four issues.

217. Having regard to the statutory scheme summarised above, I have reached the firm conclusion that the four matters set out in [216] above were also "obviously material" considerations which the defendant was legally required to take into account so that he could discharge his obligation under s.13(1) rationally. Without that information being included in the briefing the Minister was unable to decide for himself whether to attach any, and if so how much, weight to the manner in which officials advised that the 5% shortfall could be overcome.

218. Lastly, I turn to omission (a). In so far as the effects of the proposed policies were judged to be quantifiable, the periods during which those effects were assessed or predicted to occur will have formed part of the modelling work. Otherwise, this was a matter for qualitative assessment. I accept the defendant's submission that it was a matter of judgment as to how much of this detail should have been included in the ministerial submission, including the draft NZS.

219. There can be no doubt that the NZS did refer to time-scales for a number of policies. Ms. James explains that the NZS contains many statements on the time-scales over which specific policies were expected to take effect (see e.g. paras. 25 and 161 of WS). This was achieved in the description of the delivery pathway, trajectories for each sector, and more generally the text of chapters 2 to 4. Her exhibit SJ17 contains 12 pages of material summarising references to time-scales in chapters 2 to 4 of the NZS. In addition, figure 16, referred to at [81] above, shows the expected milestones and

activities for each of the sectors. On the material before the court, the claimants have not demonstrated that the judgment made by officials on the extent to which this subject (viewed in isolation) should be addressed in the briefing to the Minister was legally flawed, applying the *Wednesbury* standard.

220. However, the requirement for the defendant to consider adequate briefing on the matters set out in [211]-[214] and [216]-[217] above is inevitably interrelated with assumptions about when individual proposals and policies will come into effect and produce reductions in emissions. Accordingly, it will be necessary for this subject to be addressed as part of the Strategy and the briefing.

221. For the above reasons, I uphold ground 1, but only to the extent set out above.

222. As I have said, the obligation under s.13 is a continuing one ([164] above). But it is necessary to record that the argument in this case has focused solely on whether the defendant complied with his duty under s.13 at a particular point in time, October 2021, which was directly connected to the discharge of his obligation at the same time to present a report under s.14, the NZS. His s.13 decision had to include measures to address CB6. The announcement to Parliament and the public of the defendant's proposals and policies was plainly one of the key stages in the operation of the CCA 2008. The parties' submissions did not address any implications of the issues I have had to resolve for compliance with s.13 on a continuing basis, nor was there any evidence on that aspect. Accordingly, my reasoning and conclusions on, for example, the legal adequacy of information before the Minister on quantification, should not be treated as necessarily applying to compliance with s.13 at *any* point in time. No doubt the development of policy measures is kept under review by officials and by the Secretary of State, but my judgment does not address how often and when quantitative analysis might be required to be carried out. Such issues are essentially matters of judgment for the defendant and his officials.

Ground 2

Submissions

223. The claimants submit that one of the purposes of s.14 of the CCA 2008 is to enable Parliament to scrutinise the Secretary of State's proposals and policies for meeting the current and future carbon budgets, including the budget which will have recently been set, and to hold him to account in respect of those matters. The statute expressly requires the report to: -

(i) set out the Secretary of State's "current" proposals and policies under s.13;

(ii) set out the time-scales over which those proposals and polices are expected to take effect;

(iii) explain how the proposals and policies effect different sectors of the economy; and

(iv) outline the implications of the proposals and policies for the crediting of carbon units to the net UK carbon account for each budgetary period.

224. The claimants submit that for a report to meet the requirements of s.14 it must include (a) a numeric explanation of the basis for the Secretary of State's conclusion that his policies and proposals will enable the carbon budgets to be met and (b) a numeric analysis of the extent to which those policies and proposals individually and in combination will enable those targets to be met. That information is necessary for the purposes of s.14, namely to facilitate Parliamentary scrutiny and accountability and to satisfy the public interest in transparency.

225. The claimants acknowledge that a s.14 report is a "snapshot", in the sense that such a document is produced once every 5 years and therefore will explain how the Secretary of State expects that carbon budgets will be able to be met, viewed as at the time of the report. But they say that the requirements for which they contend are nevertheless consistent with that position.

226. The claimants submit that the NZS failed to set out the numeric contributions of individual policies and proposals toward reducing GHG emissions or the time-scales over which they were each expected to take effect, as had previously been done in the UK Low Carbon Transition Plan (2009) and the Carbon Plan: Delivering Our Low Carbon Future (2011). They also complain that the document did not even reveal that the quantification carried out by BEIS, and described in the Strategy, of the cumulative effect of the proposals and policies addressed only 95%, rather than the whole, of the reductions claimed, or explain how the 5% shortfall was expected to be made up. The NZS did not contain the explanation in the ministerial submission dated 15 October 2021 or give any clue that that approach had been taken. Rather, tables 6 and 8 of the Technical Annex to the NZS gave the impression that the quantitative analysis carried out showed that the Secretary of State's proposals and policies would enable CB6 to be fully met.

227. The defendant submits that s.14(1) requires the Secretary of State to publish a report "setting out proposals and policies for meeting the carbon budgets…". The object is to ensure Parliament is informed of the Secretary of State's current proposals and policies. Section 14 does not require the report to provide an explanation or quantified information to show that his proposals and policies will enable the carbon budgets to be met. Technical scrutiny of the Secretary of State's proposals and policies is provided by the CCC, not by Parliament. Subsections s.14(2) to (4) do not lend any support to the claimants' case on what the report to Parliament is required to contain.

228. Mr. Honey referred to *R (Packham) v Secretary of State for Transport* [2021] Env. L.R. 10 at [87] where Lindblom LJ said: -

> "…… the statutory and policy arrangements we have described, while providing a clear strategy for meeting carbon budgets and achieving the target of net zero emissions, leave the Government a good deal of latitude in the action it takes to attain those objectives — in Mr Mould's words, "as part of an economy-wide transition". Likely increases in emissions resulting from the construction and operation of major new infrastructure are considered under that strategy. But — again as Mr Mould put it — "it is the role of Government to determine how best to make that transition"."

229. A report must address the matters referred to in s.14(2) to (4), but it is a matter of judgment for the Secretary of State as to the extent to which any matter is addressed in the report. Mr. Honey sought to draw an analogy with the approach taken by the courts to judicial review of compliance with the requirements for Strategic Environmental Assessment of plans and programmes (*Spurrier* [2020] PTSR 240 at 434 and see also the Supreme Court in the *Friends of the Earth* case [2021] PTSR 190 at [142] – [148]).

230. Mr. Honey emphasised the language in s.14(1), "a report setting out proposals and policies", and submitted that this provision essentially only requires Parliament to be told what those measures are. He submits that the thinking which lay behind the Secretary of State's policies, the rationale, does not have to be provided.

Discussion

231. I do not accept the defendant's interpretation of s.14. It treats the requirement to "set out" the defendant's proposals and policies as amounting to little more than a requirement to publish those measures.

232. The phrase "set out" can have a very wide range of meanings (see the Oxford English Dictionary). For example, it may mean simply to lay out or display, or it can mean to express in detail, describe or enumerate, or to put down on paper in express or detailed form. The specific sense used in s.14 must depend on the context and purpose of that provision.

233. The Explanatory Notes for the CCA 2008 state that s.14 "will ensure that Parliament is clear about *how* the Government intends to meet its obligations under the Act" (emphasis added). That plainly indicates that the report which must be provided is something more than a statement simply telling Parliament what the proposals and policies are. Given the nature of the problems posed by climate change, the need for substantial changes across the country and the challenges involved, telling Parliament how the Secretary of State proposes to meet the carbon budgets does indeed require him to explain the thinking behind his proposals and how they will enable the carbon budgets to be met.

234. This is also clear from s.19(1). If a final statement for a budgetary period is laid before Parliament under s.18 and the carbon budget has not been met, the Secretary of State must provide Parliament with a report "setting out" proposals and policies to *compensate* in future periods for the *excess* emissions. In essence, that is the same language as s.14(1). I do not accept that, as a matter of law, it would be sufficient for such a report simply to tell Parliament what those new measures are. In such circumstances, s.19(1) would require the Secretary of State to explain how his proposals are intended to remedy the problems encountered so as to meet the targets.

235. Accordingly, both s.14 and s.19 require an explanation to be provided to Parliament as to how the Secretary of State's policies are intended to meet the statutory targets. I do not accept that those obligations could properly be discharged without any quantitative explanation being provided to Parliament. The defendant submits that the legislation does not require the Department's detailed workings or the modelling to be provided to Parliament. No doubt that is correct, but the claimants have not taken that extreme position.

236. My reading of the obligation in s.14(1) is reinforced by the specific requirements of s.14(2)-(4). For example, s.14(3) requires an explanation of how the proposals and polices affect different sectors of the economy. It could not be said that the report need not address effects upon the economy as a whole. Effects on the national economy and on sectors are plainly relevant to the requirement under s.14(1) for the Secretary of State to explain how his measures will enable the carbon budgets to be met.

237. Section 14(2) requires the Secretary of State to "set out", or explain, the time-scales over which his measures "are expected to take effect". As Mr, Honey rightly points out, the carbon budgets can extend many years into the future. Current proposals and policies will be implemented over a range of different time-scales. Some measures will already be in the course of implementation or almost concluded, some will be imminent, and others for the longer term. The approximate periods over which different proposals and policies are expected to be implemented will have been taken into account in the modelling and quantitative analysis which enabled officials to advise the Secretary of State that certain measures would enable 95% of the reduction required by CB6 (and all of CB4 and CB5) to be achieved. There is a clear link between the Secretary of State's explanation of those time-scales and his estimates of the reductions in the amounts of GHG emissions. Quantification of the reductions he expects from the implementation of his s.13 policies is legally essential to the explanation which the Secretary of State is required to give under s.14(1) as to how he expects those measures to meet carbon budgets.

238. Similarly, the requirement in s.14(4) to outline the implications of the defendant's s.13 policies for carbon crediting and the net UK carbon account implies that quantitative analysis is necessary in relation to the effects of those policies on the net UK carbon account.

239. The defendant's narrower interpretation of the scope of s.14 is not supported by the expert role given by the CCA 2008 to the CCC. On the contrary. The legislation requires Parliament to be provided with statements each year by the Secretary of State on GHG emissions in the UK (s.16), his final statement after each budgetary period has ended (s.19), annual reports by the CCC on progress made and needing to be made on meeting carbon budgets and the 2050 targets, including whether they are likely to be met (s.36) and the Secretary of State's response to the CCC's points (s.37). Plainly, those requirements could not be met without quantitative analysis being provided to Parliament to show the extent to which the Secretary of State's proposals and policies are meeting, and are likely to meet, the statutory targets. Those proposals and policies are the central focus of the methods laid down in the statutory scheme for meeting the carbon budgets and the 2050 target.

240. Explanation and quantitative analysis are essential to the reports which are to be provided under ss.36 and 37 for Parliament to scrutinise. Those reports look both to the past and to the future. There is no good reason why the legal approach should be any different for the reports to be provided for Parliamentary scrutiny under ss.14 and 19.

241. Because the reports under ss.14, 19, 36 and 37 are required to be laid before Parliament, they will be published. The requirement is not simply to provide unpublished reports to, for example, a regulatory body. The statutory objective of transparency in how the targets are to be met extends beyond Parliament, to local authorities and other statutory authorities, NGOs, businesses and the general public.

That transparency requires reports under s.14 to contain explanation and quantification. The purpose of a such a report is not limited to telling Parliament what the Secretary of State's proposals and policies are.

242. How then is the court to assess whether the Secretary of State has complied with s.14? The court is dealing with a report by the Executive to Parliament on matters of national policy. Section 14 facilitates Parliamentary accountability and it is necessary to respect the constitutional separation of functions between the Executive, Parliament and the Courts. Parliament is well able to call for more information to be provided where it wishes to do so. The court needs to tread carefully in this area (see [189] – [192] above). But in addition, ss. 14 and 19 serve the public's interest in transparency regarding Government policy under the CCA 2008. Ultimately, it remains for the court to interpret the legislation and to resolve legitimate disputes on the scope of the obligations it imposes.

243. Mr. Honey makes the point that the CCA 2008 does not require a report under s.14 to be the subject of public consultation before the adoption of the policies by the Secretary of State. If consultation had been required, then the *Gunning* principles, approved by the Supreme Court in *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947, would have been applicable. A consulting party is required to give consultees sufficient explanation and information to enable intelligent consideration and responses by the latter. On this basis Mr. Honey seeks to distinguish a report under s.14 of the CCA 2008 from the "National low carbon transition and mitigation plan", adopted by the Irish Government under s.4 of the Climate Action and Low Carbon Development Act 2015, and considered by the Supreme Court of Ireland in *Friends of the Irish Environment CLG v The Government of Ireland* [2020] IESC 49. The Irish legislation did require public consultation on that draft plan.

244. However, in the final analysis I do not think that this distinction makes any substantial difference to the determination of the issues in this case. I say that for two reasons.

245. First, I see no justification for the legal adequacy of a s.14 report required in the context of Parliamentary accountability to be materially lower than that of a report issued for public consultation, certainly not when dealing with the core legal requirements for reports relating to climate change policy. In both instances, the legal object of the reports is to enable its readers to understand and assess the adequacy of the Government's policy proposals and their effects. Furthermore, a report under s.14 is also required in the interests of public transparency.

246. Second, the reasoning of the Supreme Court of Ireland did not rest solely on the obligation to consult the public. There was another statutory obligation of equal importance. Clarke CJ stated 6.21: -

> "Second, the very fact that there must be a plan and that it must be published involves an exercise in transparency. The public are entitled to know how it is that the government of the day intends to meet the NTO. The public are entitled to judge whether they think a plan is realistic or whether they think the policy measures adopted in a plan represent a fair balance as to where the benefits and burdens associated with meeting the NTO are likely to fall.

> If the public are unhappy with a plan then, assuming that it is considered a sufficiently important issue, the public are entitled to vote accordingly and elect a government which might produce a plan involving policies more in accord with what the public wish. But the key point is that the public are entitled, under the legislation, to know what the plan is with some reasonable degree of specificity."

And then at 6.22: -

> "Thus, it seems to me that key objectives of the statutory regime are designed to provide both for public participation and for transparency around the statutory objective which is the achievement of the NTO by 2050."

247. In my judgment, that approach also applies to a report under s.14 of the CCA 2008. Such a report, and similar documents under ss. 19, 36 and 37, are to be laid before Parliament and hence published, so that there is transparency for the public as to how the Government is seeking to achieve the targets in the legislation, potential effects on different sectors of the economy, the progress made to date, whether more needs to be done and, if so, what.

248. However, there may be one distinction to be drawn with the Irish legislation. That requires the plan to "specify" the manner in which it is proposed to achieve "the national transition objective" and other matters. Hence, the judgment of the Supreme Court of Ireland focused on whether, in the court's opinion, the national plan satisfied the statutory requirement for "specificity". No such language appears in the CCA 2008. So I will confine myself to considering the core requirements of "explanation" and "quantification" which derive from the obligation in the CCA 2008 to "set out" proposals and policies "for meeting the carbon budgets".

249. I rely upon the analysis at [202]-[204] above under ground 1(ii). I emphasise the point made at [202(x)] that the ability to meet the statutory targets depends upon the contributions made by a multiplicity of proposals and policies adopted by the Secretary of State. This is obviously material to the risk of delivery. It is critical to any assessment by Parliament, and by the public, of how the statutory targets are likely to be met, by what means and with what implications.

250. I also gratefully adopt the observations of Clarke CJ in the *Friends of the Irish Environment* case at paras. 6.46 to 6.47:-

> "6.46 ….. In that context it must, of course, be recognised that matters such as the extent to which new technologies for carbon extraction may be able to play a role is undoubtedly itself uncertain on the basis of current knowledge. However, that is no reason not to give some estimate as to how it is currently intended that such measures will be deployed and what the effect of their deployment is hoped to be. Undoubtedly any such estimates can be highly qualified by the fact that, as the technology and knowledge develops, it may prove to be more or less able to achieve the initial aims attributable to it.

> 6.47 However, that is no reason not to indicate how and when particular types of technology are currently hoped to be brought on board. If it proves possible to achieve more than might currently be envisaged then, doubtless, other elements of the Plan can evolve in a way which may place a lesser burden on certain sectors. If it proves that the technology is less useful than currently envisaged, then the burden on some sectors may have to increase. But the public are entitled to know what current thinking is and, indeed, form a judgment both on whether the Plan is realistic and whether the types of technology considered in the Plan are appropriate and likely to be effective."

251. Given the analysis set out above, I do not accept Mr Honey's suggestion that it is significant that s.14 does not include an obligation to give reasons, unlike, for example, ss. 3(6), 7(6) and 22(7) where the Secretary makes a decision differing from a statutory recommendation of the CCC. The functions are plainly different. The language imposing the obligation in s.14 to "set out" policy measures for meeting numerical targets, read properly in context, is sufficient to carry with it requirements to provide explanation and legally adequate estimates of the quantitative effects of those policies.

252. As I have explained, the NZS did not go below national and sector levels to look at the contributions to emissions reductions made by individual policies (or by interacting policies) where assessed as being quantifiable. In my judgment it ought to have done so in order to comply with the language and statutory purposes of s.14 of the CCA 2008.

253. In addition, the NZS failed to explain:-

(i) that the quantitative analysis carried out by BEIS (which related solely to quantifiable policies with a direct effect on emissions) predicted that those policies would achieve 95%, not 100%, of the reductions required for CB6, and had assumed "delivery in full" of those policies;

(ii) how it was judged that that 5% shortfall would be made up (see also [216] above), including the judgment based upon comparing the 95% result with the projections of the implied performance of the delivery pathway;

(iii) that tables 6-8 did not present the outcome of the Department's quantitative analysis of emissions reductions predicted to result from NZS polices;

(iv) how that quantitative analysis differed from the modelling of the delivery pathway.

254. All those subjects were obviously material to the critical issue of risk to the delivery of the statutory targets. They were matters upon which the defendant was obliged to inform Parliament under s.14, and thus the public. They were not dealt with at all in the NZS, although it is plain from the evidence before the court that the information existed at the time.

255. In para. 97 of her witness statement Ms. James states that "not all" of the data collected by the Department was "intended or suitable for publication" and goes on to give four reasons. However, two points should be noted. First, the statement does not explain which parts of the dataset were thought to be unsuitable for publication, as opposed to simply being "not intended for publication". Second, and more importantly, there is no evidence that this thinking was considered by the Secretary of State or the Minister.

256. It is the responsibility of the Secretary of State, not his officials, to lay a report before Parliament under s.14. The adequacy of such a report is a matter for him, acting on the advice of officials and with legally sufficient briefing. Here, the matters which I have concluded ought to have been addressed in the NZS were not put before the Minister (see ground 1(ii)). The Minister was therefore not in a position to form any view on whether those matters should be included in the NZS in order to satisfy s.14 or to consider the reasons for non-inclusion now put forward in the witness statement. Consequently, those four reasons are, with respect, legally irrelevant.

257. Nevertheless, I have considered those reasons. None of them alter the conclusion I have reached that, as a matter of law, the NZS did not comply with s.14 through failing to address the matters identified above. A clearly presented report would not lead a reader to misunderstand predictions of the effects of each policy as "targets", or to fail to appreciate the uncertainties involved. Similarly, there is no reason why it could not be made clear to a reader that policies are at various stages of development and that current predictions should not be taken to undermine the need for future flexibility to respond to changes in circumstance. Indeed, these points are clearly explained in the NZS. Problems in publishing details of quantitative analysis of the effects of policies yet to be "fully developed" *may* raise matters of judgment for the defendant as to how much detail should be included in a report. But that cannot affect the legal principle that contributions from individual policies which are properly quantifiable *must* be addressed in the report. Here, they were not at all. Lastly, the existence of other Government mechanisms for making public "granular data about our delivery against carbon budgets and net zero" has nothing to do with the legal requirements of s.14.

258. As I have explained under ground 1(ii), the NZS does address time-scales over which policies and proposals "are expected to take effect" and the court is unable to say that the material before the Minister on that subject was legally insufficient on that subject if viewed in isolation. The same applies to the issue of compliance with s.14(2)(b) of the CCA 2008.

259. However, the requirement to provide legally adequate briefing to the defendant on the matters set out in [211]-[214] and [216]-[217] above is inevitably interrelated with assumptions about when individual proposals and policies will produce reductions in emissions. So it will be necessary for that aspect to be addressed as part of that exercise.

260. For the above reasons, I uphold ground 2, but only to the extent set out above.

Ground 3

261. Mr. Coppel summarised the claimant's argument in six stages: -

(i) The UK has obligations under Articles 2, 8 and A1P1 to take effective action against climate change because this represents a real and "imminent threat" to "life, quality of life and to property". These obligations arise now, notwithstanding that the relevant impacts of climate change may not be experienced until some time in the future and that it is not possible to predict with certainty exactly who will be impacted and how. The obligation under Article 2 may require protection not only for individuals identifiable in advance as the subject of potential harm, but also general protection for society. The obligation under Articles 2 and 8 may also apply to risks that materialise over time;

(ii) The greater and more effective the action taken by the state to reduce emissions and to safeguard against climate change, the greater will be the effect in minimising the risk in the future to life, quality of life and property;

(iii) The CCA 2008 represents an important step in the discharge of the UK's obligations under the ECHR including the provision of general protection to society against imminent threats. In turn, the setting and meeting of carbon budgets is an important aspect of the measures put in place by Parliament to combat climate change and so protect against future threats to life, quality of life and property. Such measures against climate change should be interpreted so as to be more, rather than less, effective;

(iv) The requirements of sections 13 and 14 are more likely to be effective in ensuring that the carbon budgets are met if they are interpreted in the more stringent way for which the claimants contend. The Claimants' interpretation is liable to minimise future climate change impacts and breaches of Convention rights in that: -

- Compliance with the obligation in s.13(1) must only be based on quantifiable policies meeting 100% of the carbon budgets; and

- Greater transparency in a s.14 report enhances scrutiny of the policies and proposals so that carbon budgets are more likely to be met;

(v) The effect of s.3(1) of the HRA 1998 is to require ss.13 and 14 of the CCA 2008 to be interpreted as the claimants contend, and not as the defendant contends. Parliament should be assumed to have intended that those provisions be interpreted so as to be more, rather than less, conducive to the protection of Convention rights;

(vi) It is open to Good Law Project to advance these submissions, and to invoke s.3(1) of the HRA 1998 in the interpretation of ss.13 and 14 of the CCA 2008, without itself being a "victim" of an actual or potential breach of Convention rights. Alternatively, Ms. Wheatley is a "victim" for the purposes of s.7 of the HRA 1998 and is therefore entitled to invoke s.3(1).

262. It will be noted that ground 3 depends upon the application of s.3(1) of the HRA 1998. If the claimants are unsuccessful in that respect, they have not gone further by asking the court to grant a declaration of incompatibility under s.4.

263. Mr Coppel has presented a carefully constructed, interlocking argument, but it is too ambitious in a number of respects.

264. First, he accepted that his argument depends upon the proposition that s.3(1) of the HRA 1998 requires the Court to adopt an interpretation which would be more, rather than less, conducive to the protection of Convention rights and, in this context, to minimise future climate change impacts. He also accepted that he was not aware of any authority in which a court has stated that this is a permissible application of s.3(1).

265. The approach for which the claimants contend does not accord with established principle. It is only if the ordinary interpretation of a provision is incompatible with a Convention right that s.3(1) is applicable. Otherwise s.3(1) may safely be ignored. If the court does have to rely on s.3(1), it should limit the extent to which the ordinary interpretation of the provision is modified to that which is necessary to achieve compatibility (*R (Wardle) v Leeds Crown Court* [2002] 1 AC 754 at [79]; *Poplar Housing and Regeneration Community Association Limited v Donoghue* [2002] QB 48 at [75]). Section 3(1) does not allow a court to adopt an interpretation of a provision different from that which would otherwise apply in order to be "more conducive" to, or "more effective" for, the protection of a Convention right, or to minimise climate change impacts.

266. Second, the claimants' "more conducive" approach does not provide a proper test for interpreting legislation. It raises a question of degree and leaves open the possibility that there might be another interpretation which would be even "more conducive". On this approach how would it be possible for a court to identify the point at which the alteration of the ordinary meaning of the language used by Parliament should cease? The court would be crossing the demarcation between interpreting and amending legislation (*Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [121]). Instead, where s.3(1) is applicable, the court should limit the extent to which it modifies the ordinary interpretation of the provision in question to that necessary to achieve compatibility. For each of these two reasons alone ground 3 must fail.

267. Third, although Mr. Coppel's proposition (i), which is essential to all of the propositions which follow, can in general be derived from jurisprudence of the ECtHR, he accepts that that court has not gone so far as to apply those principles to climate change. In my judgment, the Strasbourg decisions upon which he relies did not involve circumstances or issues comparable to those posed by climate change, for example the national and global effects involved or the extensive nature of the national measures required. I refer also to the recent analysis by the Divisional Court (Bean LJ and Garnham J) in *Gardner v Secretary of State for Health and Social Care* [2022] EWHC 967 (Admin) of the limitations of the principles laid down in the Strasbourg jurisprudence.

268. Consequently, the main source upon which Mr. Coppel relies to support his line of argument is the decision of the Supreme Court of the Netherlands in *The State of the Netherlands v Urgenda* (20 December 2019), in particular, those passages which interpret and apply Convention rights and Strasbourg jurisprudence.

269. Mr. Honey submitted that this court should not rely upon the Dutch judgment because it takes a broader view of Convention rights than is justified. Furthermore, he says that the central propositions relating to climate change which the claimants seek to take from *Urgenda* are hotly contested in three cases to be heard by the Grand Chamber of the ECtHR.

270. It is necessary to bear in mind that *Urgenda* was concerned with a very specific challenge: the legality of the State's decision in 2011 to reduce its 2020 GHG reduction target from 30% (set in 2007) to 20%. The Supreme Court referred to the need identified in the IPCC's 2007 report for emissions in developed countries to be reduced in 2020 by 25-40%, the subsequent endorsement of that target in annual international conferences of the UNFCCC since 2007, and the stricter targets introduced by the Paris Agreement in 2015. The Court decided that the Government had failed to explain why the reduction of the Dutch target to 20% was justified, in view of the longstanding international consensus that the figure should be appreciably higher. *Urgenda* provides no assistance on the interpretation of a Minister's duty to formulate policy where the legislation gives him a wide scope to exercise judgment on the content of such policy. Furthermore, given the dualist system we have in this country (*Spurrier* at [606]), care is also needed in seeking to apply a decision from a legal system with monist characteristics.

271. In *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 Lord Bingham stated at [20] that, in the absence of special circumstances, a domestic court should follow the "clear and constant" jurisprudence of the Strasbourg court. That duty "is to keep pace with Strasbourg jurisprudence as it evolves over time: no more, but certainly no less".

272. In *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153 at [106] Lord Brown continued: -

> "I would respectfully suggest that last sentence could as well have ended: "no less, but certainly no more." There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual can have the decision corrected in Strasbourg".

273. In *R (AB) v Secretary of State for Justice* [2022] AC 487 Lord Reed PSC restated these principles at [54] – [59] and added that they did not preclude "incremental development" by a domestic court of Convention jurisprudence "based on the principles established by the European Court".

274. Whether the claimants' argument accords with the principles in [255]-[257] above is a matter for determination by the courts in this country. It has not been shown that the decision in *Urgenda* sets out a line of reasoning which conforms to those principles.

275. I agree with Mr. Honey that the claimants' argument under ground 3 goes beyond permissible incremental development of clear and constant Strasbourg case law.

Section 31(2A) of the Senior Courts Act 1981

276. Whether it is highly likely that the outcome for the claimants would not have been substantially different if the conduct complained of had not occurred depends upon the nature of the legal errors found by the court to have taken place.

277. Under ground 1(ii) the defendant was not briefed upon, and therefore did not take into account as he was legally obliged to do, *inter alia* the contribution to reductions in GHG emissions estimated by his officials from individual policies (or groups of interacting policies). As I have explained, this was essential to the defendant's decision on whether he was satisfied that the proposals and policies in the NZS would enable the carbon budgets to be met so as to comply with s.13(1) of the CCA 2008. It is impossible for the court to conclude that it is highly likely that the defendant would still have been satisfied that he had discharged his obligation in s.13(1) if he had been provided with, and taken into account, the missing information, to assess for himself *inter alia* risks to delivery of the policies and carbon targets and whether the content of the NZS needed to be reconsidered and amended.

278. Under ground 2 the court has identified matters which ought to have been, but were not, addressed in the NZS in order to comply with s.14(1) of the CCA 2008. Parliament and the public, including the claimants, were entitled to see a report which covered those matters, so that they would properly be able to understand and address the Government's proposals and policies and their effects upon emissions reductions and socio-economic matters. Given the nature of this legal error, it is impossible for the court to conclude that it is highly likely that the outcome would not have been substantially different for the claimants and those they represent if the defendant had complied with s.14(1).

Conclusions

279. For the reasons set out above:-

(i) ground 3 must be rejected;

(ii) the challenge succeeds under grounds 1 and 2 but only to the extent indicated above;

(iii) all other parts of grounds 1 and 2 are rejected.

TAB B



Neutral Citation Number: [2024] EWHC 995 (Admin)

Case No: AC-2023-LON-001856
AC-2023-LON-002005
AC-2023-LON-002008

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/05/2024

Before :

MR. JUSTICE SHELDON

- -

Between :

(1) FRIENDS OF THE EARTH **(2) CLIENTEARTH** **(3) GOOD LAW PROJECT**	**Claimants**
- and -	
SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO	**Defendant**

- -
- -

David Wolfe KC, Catherine Dobson, Nina Pindham (instructed by **Leigh Day**) for the **First Claimant**
Jessica Simor KC, Emma Foubister (instructed by **ClientEarth)** for the **Second Claimant**
Peter Lockley (instructed by **Good Law Practice**) for the **Third Claimant**
Jonathan Moffett KC, Christopher Badger, Robert Williams (instructed by **the Government Legal Department**) for the **Defendant**

Hearing dates: 20-22 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Mr. Justice Sheldon :

1. This case concerns the statutory process that Parliament has prescribed for the United Kingdom to achieve net zero greenhouse gas emissions by 2050. Under the Climate Change Act 2008 ("the CCA 2008"), the relevant Secretary of State (now the Secretary of State for Energy Security and Net Zero, and the Defendant to these proceedings) is required to set carbon budgets for the United Kingdom in relation to successive five-year periods.

2. In a judgment handed down on 18th July 2022 in the case of *R (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2023] 1 WLR 225 ("*FoE (No.1)*"), Holgate J decided that decisions taken by the Secretary of State for Business, Energy and Industrial Strategy ("BEIS") (the Minister who previously had responsibility under the CCA 2008) in 2021 failed to comply with the Secretary of State's duty under section 13(1) of the CCA 2008 to prepare such proposals and policies as he considered would enable relevant carbon budgets up to and including the sixth carbon budget (relating to the period 2033-2037) ("CB6") to be achieved, and failed to fulfil the Secretary of State's obligation pursuant to section 14(1) of the CCA 2008 to set out for Parliament his proposals and policies for meeting the relevant carbon budgets.

3. Holgate J ordered the Secretary of State for BEIS to lay before Parliament a report which was compliant with section 14 of the CCA 2008 by no later than 31st March 2023. The Secretary of State for Energy Security and Net Zero reconsidered matters and purported to comply with sections 13 and 14 of the CCA 2008. On 31st March 2023, he laid before Parliament the Carbon Budget Delivery Plan ("the CBDP"). In these proceedings, the Claimants contend that the Secretary of State failed to comply with sections 13 and 14 of the CCA 2008.

4. The hearing before me was for permission to be followed by a substantive hearing if permission was granted: a "rolled up" hearing.

Background

5. The general background to the requirement for the setting of carbon budgets can be found in Holgate J's judgment in *FoE (No.1)* at paragraphs 2-12:

> "2. In 1992 the United Nations adopted the United Nations Framework Convention on Climate Change ("UNFCCC"). Following the 21st Conference of the parties to the Convention, the text of the Paris Agreement on Climate Change was agreed and adopted on 12 December 2015. The United Kingdom ratified the Agreement on 17 November 2016.
>
> 3. Article 2 of the Agreement seeks to strengthen the global response to climate change by holding the increase in global average temperature to 2°C above pre-industrial levels, and by pursuing efforts to limit that increase to 1.5°C. Article 4(1) lays down the objective of achieving "a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases ["GHGs"] in the second half of this century."

That objective forms the basis for what is often referred to as the "net zero target", which will be satisfied if the global level of any residual GHG emissions (after measures to reduce such emissions) is at least balanced by sinks, such as forests, which remove carbon from the atmosphere.

4. Article 4(2) requires each party "to prepare, communicate and maintain successive nationally determined contributions ["NDCs"] that it intends to achieve". Each party's NDC is to represent a progression beyond its current contribution and reflect its "highest possible ambition" reflecting inter alia "respective capabilities" and "different national characteristics" (article 4(3)).

5. The UK responded to the Paris Agreement in two ways. First, section 1 of the Climate Change Act 2008 ("CCA 2008") was amended so that it became the obligation of the Secretary of State for Business, Energy and Industrial Strategy to ensure that "the net UK carbon account" for 2050 is at least 100% lower than the baseline in 1990 for CO2 and other GHGs, in substitution for the 80% reduction originally enacted (see the Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019 No.1056)). That change came into effect on 27 June 2019. Second, on 12 December 2020 the UK communicated its NDC to the UNFCCC to reduce national GHG emissions by 2030 by at least 68% compared to 1990 levels, replacing an earlier EU based figure of 53% for the same year.

6. According to the Net Zero Strategy ("NZS"), the UK currently accounts for less than 1% of global GHG emissions (p.54 para. 31).

7. Section 4 of the CCA 2008 imposes a duty on the Secretary of State to set an amount for the net UK carbon account, referred to as a carbon budget, for successive 5 year periods beginning with 2008 to 2012 ("CB1"). Each carbon budget must be set "with a view to meeting" the 2050 target in s.1. The ninth period, CB9, will cover the period 2048-2052 for which 2050 is the middle year. Section 4(1)(b) imposes a duty on the Secretary of State to ensure that the net UK carbon account for a budgetary period does not exceed the relevant carbon budget. Thus, the CCA 2008 has established a framework by which the UK may progress towards meeting its 2050 net zero target.

8. The net UK carbon account referred to in s.1 and s.4 relates to carbon dioxide and the other "targeted" GHGs listed in s.24 (methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride). GHG emissions are expressed for the purposes of the Act in tonnes of "carbon dioxide equivalent" (s.93(1)). That term refers to either a tonne of CO2 or an amount

of another GHG with "an equivalent global warming potential" ("GWP").

9. The Secretary of State has set the first 6 carbon budgets. Each has been the subject of affirmative resolution by Parliament. CB6 came into force on 24 June 2021 (The Carbon Budget Order 2021 – SI 2021 No. 750) and sets a carbon budget of 965 Mt CO_2e (million tonnes of carbon dioxide equivalent) for the period 2033 – 2037.

10. The six carbon budgets and their relationship to the 1990 baseline are summarised below:

Carbon budget	Period	Target emissions Mt CO_2 e	Percentage reduction from 1990 level
1	2008–2012	3,018	25%
2	2013–2017	2,782	31%
3	2018–2022	2,544	41%
4	2023–2027	1,950	55%
5	2028–2032	1,725	60%
6	2033–2037	965	78%

Sources: NZS: p. 306 para.5 and p. 310 Table 1; *R (Transport Action Network Ltd) v Secretary of State for Transport* [2022] PTSR 31 at [50].

11. The UK overachieved CB1 by 36 Mt CO_2e and CB2 by 384 Mt CO_2e. It is on track to meet CB3 (NZS p.306 para.5 and endnote 4).

12. CB6 is the first carbon budget to be based on the net zero target in the amended s.1 of the CCA 2008. The previous budgets were based on the former 80% target for 2050. CB6 is also the first carbon budget to include emissions from international aviation and shipping attributable to the UK. It is common ground that the target in CB6 is substantially more challenging than those previously set."

6. In accordance with the statutory framework under the CCA 2008, in October 2021 the Secretary of State for BEIS approved proposals and policies which he considered would enable CB6 to be achieved, and on 19th October 2021 he laid before Parliament a report setting out those proposals and policies: the Net Zero Strategy ("the NZS").

7. In *FoE (No.1)*, the Claimants (who are the same parties as are before the Court in the present proceedings) challenged the NZS, and the decision to approve proposals and policies. Holgate J upheld the challenge, deciding that the Secretary of State for BEIS

had acted unlawfully with respect to his duties under both sections 13 and 14 of the CCA 2008. Holgate J made the following declarations:

> "3. In determining that the proposals and policies set out in the Net Zero Strategy will enable carbon budgets set under the Climate Change Act 2008 ('the Act') to be met, the Defendant failed to comply with section 13(1) of the Act by failing to consider
>
> (i) the quantitative contributions that individual proposals and policies (or interrelated group of proposals and policies) were expected to make to meeting those carbon budgets;
>
> (ii) how the identified c.5% shortfall for meeting the sixth carbon budget would be made up, including the matters set out at [216] of the judgment and
>
> (iii) the implications of these matters for risk to delivery of policies in the NSZ and the sixth carbon budget.
>
> 4. The Net Zero Strategy of 19 October 2021 failed to comply with the obligation in section 14(1) of the Act to set out proposals and policies for meeting the carbon budgets for the current and future budgetary periods
>
> (i) by failing to include information on the quantitative contributions that individual proposals and policies (or interrelated group of proposals and policies) were expected to make to meeting those carbon budgets and
>
> (ii) by failing to address the matters identified in [253] of the judgment."

8. Following Holgate J's Order, the Secretary of State looked again at the policies and proposals and produced the CBDP. As part of this process, it was necessary to identify the emissions savings that needed to be made in each of the periods for the fourth, fifth and sixth carbon budget periods: 2023-2027, 2028-2032 and 2033-2037. Essentially, the emissions limit for each of the budgetary periods was compared to a projection of net emissions for the relevant period, referred to as a "baseline". The difference between the "baseline" and the emissions limit represented the volume of additional emissions savings that needed to be made in order to meet the relevant carbon budget.

9. The projection of net emissions was based on the Government's Energy and Emissions Projections 2021-2040 ("the EEP"). This was published in October 2022, and set out a projection of future greenhouse gas emissions based on a variety of assumptions as to factors such as future economic growth, the prices of fossil fuels, the cost of electricity generation, and population growth. It also took account of policies that are likely to have an impact on greenhouse gas emissions, where those policies have already been implemented or are at a near final stage of design and funding for them has been agreed; the Government has a high degree of confidence that these policies will be delivered. This produced what is referred to as "the EEP baseline". The EEP baseline was adjusted

before the CBDP was finalised, as a result of various changes that were identified after its initial publication.

10. The adjusted EEP baseline was of 1,958 Mt CO_2e of greenhouse gas emissions across the five-year period of CB6. The emissions limit for CB6 is 965 Mt CO_2e. Accordingly, proposals and policies that would produce emissions savings of 993 Mt CO_2e (in addition to those projected to result from the EEP policies) needed to be identified by the Secretary of State to meet the budget for CB6.

11. A large number of civil servants were involved in the work that led up to the advice to the Secretary of State as to the proposals and policies for meeting the budget for CB6. These included officials referred to as "Sector Leads": policy officials within the Department for Energy Security and Net Zero ("DESNZ") with responsibility for specific sectors within which emissions savings are to be made (power, fuel supply, heat and buildings, transport, natural resources and waste, F-gases, and agriculture, forestry and other land use); and officials within "Sector Teams", who are teams of officials in different government departments who have primary responsibility for overseeing the decarbonisation of the sectors for which they are responsible and for devising, designing, implementing and maintaining the proposals and policies that result in emissions savings. In a witness statement for the present proceedings, Chris Thompson, the Director of the Net Zero Strategy Directorate in the Department for Energy Security and Net Zero, explained that the relevant Sector Teams and Sector Leads working together were well-placed to assess risk to delivery of a particular proposal or policy, and significant weight was placed on their judgments in making recommendations to the Secretary of State for his section 13 decision.

12. The Secretary of State who took the decisions that are in issue in these proceedings, the Rt Hon Grant Shapps MP, was appointed as Secretary of State for BEIS on 25th October 2022. On 8th November 2022, he was provided with an introductory brief for his new role in delivering net zero. He subsequently assumed the role of Secretary of State for Energy Security and Net Zero when that office was created on 7th February 2023.

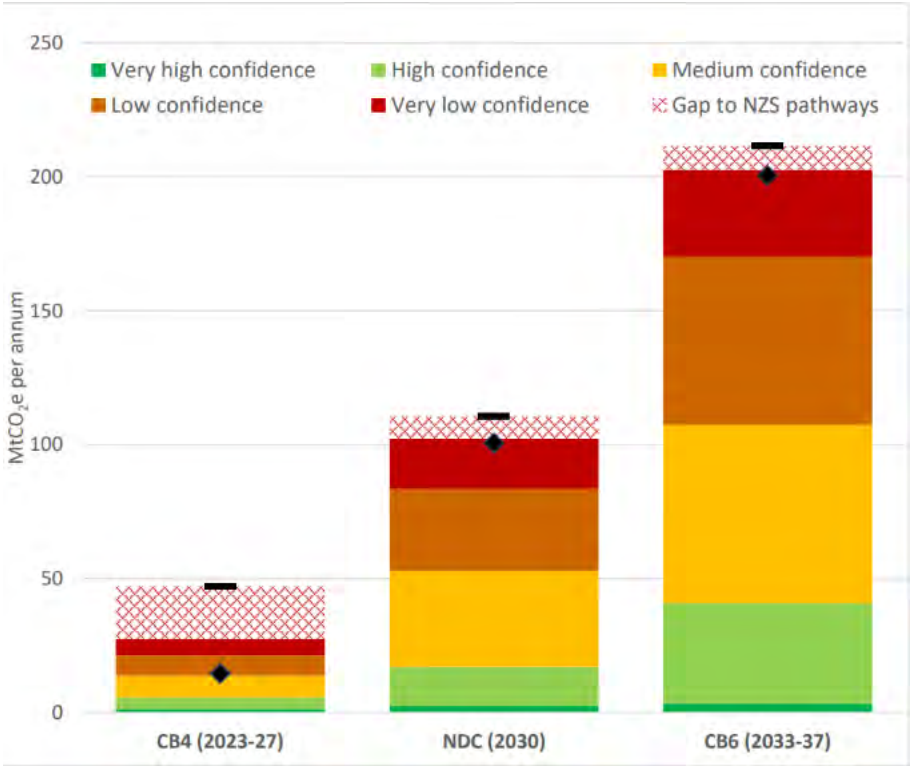
13. The introductory brief described the legally binding target to reduce greenhouse gas emissions to net zero by 2050. It explained that to ensure a phased and realistic transition towards that target, a system of carbon budgets in five-year blocks had been established. The Secretary of State was informed of his legal duties and was told about the outcome of the judicial review challenge: *FoE (No. 1)*. The Secretary of State was told that:

> "Last year the government published the Net Zero Strategy, which set out a detailed plan for achieving our emissions targets up to 2037, and a vision for a market-led, technology-driven transition with emphasis on growth, private investment, and going with the grain of consumer choice. Our most recent projections from August show **we have sufficient savings to meet carbon budgets and the NDC if all planned policies are delivered in full, but there are increasing delivery risks and little or no headroom to later targets** (Annex C). Further developments since August may have affected this position. We will provide further advice on the overall carbon picture."

(Emphasis in the original).

14. It was explained to the Secretary of State that the analysis on progress against carbon budgets had been subject to an assurance process. There were said to be "significant uncertainties" in the analysis. The Secretary of State was told that: "Policy design and delivery can affect savings, represented by 'delivery confidence' reflecting judgments of officials. Emission savings are also conditional on projections of GDP, population, fuel prices, and technology costs and availability."

15. At Annex C to the introductory brief, the Secretary of State was provided with a bar chart which showed the projected emissions savings from planned policies across all sectors of the economy, with carbon savings designated by level of delivery confidence, based on data as of August 2022. The bar chart related to quantified proposals and policies and did not take into account the effects of unquantified proposals and policies, or other factors that may improve or reduce the prospects of meeting the carbon budgets. The bar chart shows the following:



16. The bar chart - illustrated in colours: including red, amber and green - showed that just over 50% of the emissions savings that were required to meet CB6 were designated as "Very high confidence", "High confidence" or "Medium confidence". The remainder were rated as either "Low confidence" or "Very low confidence". The text accompanying the chart stated that "projected carbon savings would be sufficient to meet these carbon targets *if all planned policies were delivered in full*" (emphasis added).

17. A sectoral summary was also provided to the Secretary of State. This set out a description of the progress to date in each sector, as well as the key policies in development with the largest carbon impact. For the Industry sector, for example, it was stated that "Manufacturing and construction account for c.14% of UK emissions.

Government has increased ambition for over the 2030s, but we are starting to see slips in delivery which risk meeting those commitments in full."

18. A further submission was sent to the Secretary of State on 30th November 2022. This included the following advice:

> "There are also likely to be challenges in showing we are making sufficient emission savings towards our carbon budgets. Latest projections suggest you have sufficient savings to meet carbon budgets if all planned policies and proposals are delivered in full (Net Zero Strategy policies and subsequent policies changes such as BESS). But there are significant delivery risks and little or no headroom particularly for later carbon budgets. We also expect this position to worsen over the coming months with likely policy announcements that, while helpful in showing we are progressing on our plans, are not achieving the emission savings we originally expected, for example in CCUS, ZEV mandate and Environmental Land Management Schemes.
>
> At the time of the Net Zero Strategy, we had quantifiably secured 95% of the savings needed to reach carbon budget 6, which included many early-stage policies. We think this could slip closer to 85% due to anticipated changes in policy ambition, technical updates and delivery risk and delays. Whilst some of this is to be expected as we move from strategy to implementation, it highlights the dependencies on upcoming decisions. We will need to address the reduction in quantifiable savings in our response to the Court Order".

(Emphasis added).

19. The next briefing to the Secretary of State about the proposals and policies and the proposed CBDP was sent in early March 2023. In the meantime, officials had been reviewing the proposals and policies, assessing the risks to delivery and identifying the mitigating measures that could be put in place. The details of carbon savings by policy were collected through a mechanism known as a 'Policy Commission', which took place quarterly. For the March Policy Commission, officials were set a deadline to submit returns by 25th January 2023. They were asked to provide information on additional policies and proposals which could be 'quantified', as well as those which could be 'unquantified'. The former were to be preferred on the basis that "a greater reliance on unquantified policies carries increased legal risk".

20. With respect to delivery risks, it was explained that the judgment of Holgate J in *FoE (No. 1)* was clear that the Secretary of State "needs sufficient information on delivery risks to make an informed judgment about whether carbon budgets can be met. This must include qualitative explanation of risks and planned mitigations, in addition to Red Amber Green ratings, building on existing work on monitoring delivery risks."

21. Returns were to be provided on various templates. These needed to be cleared by members of the Senior Civil Service within the relevant government departments that were providing information. One of the tabs on the relevant template was to be used to

capture new information on policy-level milestones and RAG (that is, Red, Amber, Green) ratings to reflect progress against these. It was explained that "Collecting this information will allow the NZS Directorate to continue to track progress across the NZS policy portfolio and help identify where we can work across government to maintain ambition and mitigate risks". With respect to the RAG ratings, it was stated that:

> "This section captures a policy level assessment of the confidence of delivering the carbon savings to the same level of ambition and timelines assumed by the projected carbon savings. (n.b. if a policy does not have projected carbon savings then please provide the RAG rating on the basis of delivering the policy to the expected timelines assumed in your policy portfolio). Please refer to table 3 below for guidance on selecting RAG ratings.
>
> To meet the Court Judgment, we require **additional narrative detail** in this commission to support your carbon delivery confidence ratings at policy level. For all policies, this should:
>
> • Clearly set out any barriers to delivery i.e. technical, political, funding, resourcing, etc.
>
> • Provide an estimate of the impact these barriers have in the delivery of the projected savings, focusing on the impact on timing of delivery and effect on total carbon emissions delivered.
>
> **If your policy is rated Red, Amber/Red** or Amber this should also:
>
> • Explain why Ministers can still treat these projected savings as deliverable by setting out detail on a timebound 'return to Green plan' or mitigating actions and the expected impact on projected savings and delivery confidence. The lower the confidence rating and the higher the projected carbon savings the more detail is required.
>
> This is important because the Minister will need to have confidence that the package of policies and proposals will enable carbon budgets to be met, and how delivery risks will be mitigated."

(Emphasis added).

22. Examples were given as to how a Red, Amber-Red, or Amber Policy could be described:

> "Biomass (for illustrative purposes only, not accurate) Clearly set out the barriers to delivery: No funding was secured at SR21.

> Provide an estimate of the impact these barriers have in the delivery of the projected savings: This means that all savings have been pushed back, and the longer term for Biomass savings are more at risk. Delivering the projected savings is still possible and is dependent on future demand for domestically sourced biomass and the outcome of the Biomass Strategy.
>
> Explain why Ministers can still treat these projected savings as deliverable/set out a timebound 'return to green' plan: Continued engagement with BEIS through Biomass Strategy process required to obtain agreement on demand for biomass, and therefore the upscaling required. Further work is also required to test the feasibility of the biomass deployment metrics that underpin these figures. Provided these mitigations are delivered within X timeframe, delivery of these savings projections, although difficult remain possible to achieve".

23. The RAG ratings themselves were described as follows:

> "Green: Very high degree of confidence. Successful delivery of projected carbon emission savings . . . appears likely (**very high degree of confidence**) and there are no major outstanding issues that at this stage appear to threaten delivery of carbon targets.
>
> Amber/Green: High degree of confidence. Successful delivery of projected carbon emission savings . . . appears probable (**high degree of confidence**); however, there are potential risks. Continual monitoring required to ensure this does not materialise into wider issues threatening overall delivery of projected carbon savings.
>
> Amber: Medium degree of confidence. Successful delivery of projected carbon emission savings . . . appears feasible (**medium degree of confidence**) significant issues already exist, requiring attention. These appear resolvable at this stage and if addressed promptly, should not present … under-delivery of projected carbon savings.
>
> Amber: Low degree of confidence. Successful delivery of projected carbon emission savings is in doubt (**low degree of confidence**), with major risks or issues apparent, or the policy is at an early stage of development with a need for careful monitoring that we are achieving sufficient progress. Urgent action is needed to ensure these are addressed, but this may still result in under-delivery of carbon savings without mitigating actions.
>
> Red: Very low degree of confidence. Successful delivery of projected carbon emission savings appears potentially unachievable (**very low degree of confidence**). There are major issues, which do not currently appear manageable or resolvable,

> or the policy is at an early stage of development without clarity on how sufficient progress will be made. Significant action will be required to resolve these issues now or in the future, and without this there will be under-delivery of carbon savings, with a need for overall viability to be reassessed."

(Emphasis in original).

24. Responses were provided by various government departments. For the present proceedings the Secretary of State disclosed returns from one department: the Department for Environment, Food and Rural Affairs ("DEFRA"). This included a note dated January 2023, headed "Net Zero Pathway Commission Return". Reference was made in the note to the contribution from the Devolved Administrations (referred to as "DAs").

25. In the note, it was stated that the savings returned by DEFRA included a mix of UK-wide and England savings, and the distribution of savings had been calculated using "a range of bespoke scalers with no bespoke engagement with the DAs on whether and how they will be delivering their portions of the allotted savings." It was stated that the Devolved Administrations may choose to implement different policies across environment and farming sectors. It was stated that "Currently DEFRA is not resourced to track or monitor DAs' contributions to UK wide savings and thus the numbers provided should not be treated as either accurate or reliable. We welcome further guidance from BEIS on their strategy for assuring DA contributions across the whole economy."

26. The DEFRA return also stated that the department calculated a total gap of 13% between their Net Zero Strategy effort share (that is, the share of emissions which each relevant government department agreed that it would aim to contribute to the overall target) and the current quantified list for England in CB6, and a gap of 13% for the UK. 63% of the gap at UK level was accounted for by changes to their policy projections. DEFRA also stated that their emissions savings projections generally represented:

> "maximum feasible savings rather than a likely scenario. Delivery confidence is low for many of these emissions savings and scientific uncertainty limits precision. Key assumptions underpinning these numbers that are subject to high levels of uncertainty include land area that will be available for peatland restoration and afforestation; policy uptake rates by businesses, land managers and farmers; and sector-level economic growth projections."

27. In February 2023, Sector Leads were written to, asking them to provide a line-by-line delivery risk summary for the section 13 advice. It was explained that:

> "for the section 13 advice we need to explain the delivery risk of each individual policy in a way that most easily allows DESNZ SoS to understand the delivery risk of the package, at both a collective and individual policy level. This is necessary to ensure DESNZ SoS has the appropriate level of detail to make a rational

> decision on whether the package of policies and proposals is sufficient to enable carbon budgets to be met."

28. Sector Leads were commissioned, therefore, to draft this for their sector:

> "We need you to describe and explain the delivery risk for each individual policy and proposal, and then explain the mitigation we are taking to address this delivery risk and why that gives us the necessary confidence in delivery of our policies."

29. A guidance sheet was provided to assist with this process. The purpose of this guidance was explained as follows:

> "Describe and explain the delivery risk for each individual policy and proposal, and then explain the mitigation we are taking to address this delivery risk and why that gives us the necessary confidence in delivery of our policies. We are not seeking to 'categorise' policies in a uniform way. Instead we want to explain the delivery risk of each individual policy in a way that most easily allows DESNZ SoS to understand the delivery risk of the package at both a collective and individual policy level".

30. Sector Leads were given guidance as to how to set out the explanation for the delivery risks by a series of prompts. These would, it was hoped, enable the Secretary of State to understand the delivery risk when looking at the package of policies and proposals as a whole. The prompts were as follows:

> "For policies that are labelled green or green-amber in the commission returns, the new descriptions could start: 'We have high certainty in the delivery of this policy and confidence/certainty that the policy can be its associated carbon savings'. A single bespoke line should then be added to explain why.
>
> For policies that are labelled amber in the commission returns, please begin by describing the actual risks faced, with a couple of short lines. This could then be finished with a summary line such as 'These risks require attention, however appear resolvable based on the actions already underway.'
>
> For policies that are labelled amber-red or red in the commission returns, whose rating is not due to uncertainty, but real and present risks, please begin by describing the actual risks faced (with a couple of short lines) and then finishing with a summary sentence, such as: If not mitigated, these risks could materially affect the successful delivery of the savings in full associated with the policy.
>
> For policies that are labelled amber-red or red in the commission returns, whose rating is due to uncertainty, please begin by

> stating 'Uncertain delivery risk', and then list as many of the below reasons as applicable (and any others that may apply).
>
> a. Funding is subject to a future spending review round and therefore cannot be confirmed now, creating inevitable uncertainty.
>
> b. The policy has yet to be consulted on.
>
> c. The policy uses a technology that is nascent, creating inherent uncertainties and risk
>
> d. The policy relies on another part of the NZ system/another NZ policy that is also not completed
>
> e. The policy requires additional research to provide greater clarity on savings potential and to inform further policy development.
>
> f. The policy requires further appraisal of options"

31. With respect to "Delivery risks: mitigation", the guidance was as follows:

> "For green policies, leave blank
>
> For all amber and reds: please include short summaries of the Template 'route to green' data, with added line on why this gives us confidence/certainty that the policy can be delivered and deliver the associated carbon savings."

32. In his evidence, Mr Thompson stated that he was aware that one of the consequences of the requests for narrative text was that some specific risks that had been identified in the returns to the earlier December Commission might not be included in that text; this was a likely consequence of requesting that the information be presented in a more concise and digestible way. Mr Thompson explained that he did not consider that this was problematic, especially as not all of the risks identified in the returns to the December commission were material from a net zero perspective.

33. On 24th March 2023, a draft submission was sent by Mr Thompson to the Secretary of State on proposals and policies to enable the carbon budgets to be met. A further, slightly updated, version of the draft was sent on 27th March 2023.

34. The 27th March submission stated that it "sets out the current package of proposals and policies that, in our view, enable Carbon Budgets 4, 5 and 6 . . . to be met". The Secretary of State was told that he was required to make a judgment and be satisfied that this package will enable those Carbon Budgets to be met. He was also asked to approve the level of detail to be published in the CBDP, as well as a draft version of the CBDP.

35. The submission included the following:

> "Background

5. To meet the Court Order and fulfil your statutory duties under the Climate Change Act 2008, you have a duty to prepare a package of proposals and policies that you consider will enable Carbon Budgets to be met, with a view to meeting the 2050 net zero target.

6. When making this decision, you should consider the quantified and unquantified policies and proposals, particularly timescales and delivery risks (Table 2 of Annex B). As there is a gap between the total quantified emissions savings of our proposals and policies and what is required to meet Carbon Budget 6, you must also consider whether and how that shortfall will be made up (Annex B). Finally, you must take into account wider matters in connection with Carbon Budgets under section 10 of the CCA, the contribution of these proposals and policies to sustainable development . . .

Quantified savings to meet Carbon Budgets

7. Any emissions savings forecast contains inherent uncertainty due to the long-term nature of a 15 year transition and the complexity of the net zero system. Broader macroeconomic factors will determine the exact quantity of emissions savings required to meet Carbon Budgets meaning that we will continue to review and adapt the proposals and policies in this package, especially those at earlier stages of development.

8. Based on current projections, our view is that the package of proposals and policies that we can quantify will deliver sufficient quantified savings to meet CB4 and CB5, and 97% of CB6. This incorporates recent Budget announcements, comments from [redacted], and the response to Skidmore recommendations [this was a reference to the independent review of the Government's approach to delivering its net zero target, led by a former Minister for Energy and Clean Growth, which had reported its findings on 13th January 2023] . . .

9. The Technical Annex (Annex D) sets out the methodology for the quantification of policies and proposals. You should note that this quantification relies on the package of proposals and Policies being delivered in full. Our advice is that it is reasonable to expect this level of ambition – having regard to delivery risk (see Annex B) and the wider context.

Considerations in making up the shortfall (further detail in Annex B)

10.You must be satisfied that further, as yet, unquantified emissions savings can be made in CB6 to judge that the package will enable carbon budgets to be met. We are confident that further savings can be delivered through proposals and policies

> that will deliver emissions savings but cannot currently be quantified, e.g. by early-stage proposals and policies where the evidence is still being assessed. See Table 3 of Appendix B (Annex B).
>
> 11.The package is further strengthened through the inclusion of a range of cross-cutting proposals and policies which do not directly deliver emissions savings but enable and support our quantified proposals and policies – whether through leveraging the investment needed for technological growth or delivering the green jobs needed for the transition. This supports with de-risking delivery across the package. We can also expect that some of these areas could lead to additional carbon savings: for example our package of policies to drive innovation is likely to lead to new low-carbon technologies which may accelerate the transition.
>
> 12.Wider factors may also impact our ability to meet carbon budgets. Areas of uncertainty in our modelled projections could lead to delivery of emissions savings being faster or slower than expected. The package also does not fully reflect emissions savings from policies developed outside central government: such as in local councils and Devolved Administrations, nor does it reflect potential future shifts in consumer behaviour (see Annex B).
>
> Delivery risk and further considerations (further detail in Annex B)
>
> 13. To assess whether the proposals and policies are sufficient, you must consider the risks to delivery of the emissions savings that each of the proposals and policies carries, see Tables 2 and 3 of Appendix B (Annex B). We have included summaries of key delivery risks for each sector to aid your understanding in Appendix D (Annex B). A number of proposals and policies across sectors currently carry high delivery risk. This is expected given that many of these will be implemented over the next 15 years. We expect delivery confidence for many of these proposals and policies to improve as they are implemented (demonstrated by the high delivery confidence attached to significant savings already in delivery phase) and have suggested potential mitigations to improve delivery confidence outlined in Tables 2 and 3 of Appendix B (Annex B). …"

(Emphasis in original).

36. In his witness statement, Mr Thompson has sought to explain the underlined text at paragraph 9 of the submission. Mr Thompson stated that the underlined text was not intended to convey to the Secretary of State that he should conclude or assume, or otherwise proceed on the basis, that each and every proposal and policy would be delivered in full. Rather, the text was intended to make the point that the total volume

of quantified emissions savings (i.e. those projected to be achieved by the quantified proposals and policies) had been calculated on the basis that the package of proposals and policies would be delivered in full, i.e. the total figure represented the sum of all of the individual quantified emissions savings. Some of the proposals and policies might under-deliver, just as some might over-deliver and this was reflected in the overall sum.

37. In his witness statement, Mr Thompson also stated that quantifying and weighing risk for each and every policy, differentiating the relative risk of every policy proportionately, adjusting for the degree of systemic risk posed by each policy as well as each policy's upside potential that may deliver higher emission savings than planned, would be extraordinary in its complexity and in the additional resource that it would require.

38. A read-out of the Secretary of State's decision was sent on 28th March 2023. This stated the following:

> "He was content with the level of detail set out and, considering the legal advice, feels that it allows us to meet our obligations
>
> He feels he has sufficient confidence that the policies included in our energy and emissions projections are expected to deliver over 100% of the carbon savings needed for CB4 and >40% of the savings needed for CB6
>
> He has noted that quantified proposals would deliver 94% of the nationally determined contribution and 97% of CB6, and comments that this is very good to see
>
> He has considered the unquantified proposals and concludes that they should be capable of delivering significant further savings, with the usual understanding that potential and early stage proposals carry delivery risk
>
> He has further noted that the package does not fully reflect emissions savings from policies developed outside government, particularly local government
>
> He considered the other matters outlined in annexes A-F, including the equalities impact assessment and the risks explanations and mitigations
>
> Overall, he agreed with the advice that the package will enable carbon budgets 4-6 to be met".

39. A further submission was sent to the Secretary of State later on 28th March 2023. This contained some amendments, and asked the Secretary of State to confirm his earlier judgment that he was satisfied that the package of proposals and policies as a whole will enable carbon budgets through to CB6 to be met. The Secretary of State was also asked to approve the final version of the CBDP and associated Technical Annex to be laid before Parliament.

40. The further submission explained as part of the background that:

> "Since the submission of that advice, a number of changes have been incorporated into the package of proposals and policies following final analytical assurance and changes due to final cross government agreements. These are outlined at Annex C, alongside an assessment of their overall impact on the package of proposals and policies. These are largely naming changes and do not impact the quantified position against carbon budgets, nor, taking into account unquantified policies and wider factors, the ability to meet carbon budgets, as outlined in the advice of 27 March."

41. Under a heading "Confirming your decision", it was stated that:

> "We have continued to undertake analytical assurance across the full package of proposals and policies. We had prioritised your legal obligation under the CCA 2008 to prepare a package of proposals and policies that will enable carbon budgets through to CB6 to be met. This process has confirmed that the proposals and policies that we can quantify will deliver sufficient quantified savings to meet CB4 and CB5, and 97% of CB6, and therefore does not change our recommendation in the advice of 27 March."

42. With respect to the CBDP, the submission of 28th March 2023 stated as follows:

> "Level of detail included in the Carbon Budget Delivery Plan
>
> 9. We plan to lay the CBDP and Technical Annex before Parliament on 30 March. To meet the Court order and to fulfil your statutory duties under section 14 of the Climate Change Act 2008 (CCA), these documents set out:
>
> • The proposals and policies you have concluded enable carbon budgets to be met (see Tables 5 and 6 of the CBDP);
>
> • The timescales over which those proposals and policies are expected to take effect (see Tables 5 and 6 of the CBDP);
>
> • An explanation of how the proposals and policies set out in this report affect different sectors of the economy (see pp. 204-210 of the CBDP);
>
> • The implications of the proposals and policies as regards the crediting of carbon units to the net UK carbon account for each budgetary period covered by the report (see Section 1 of the Technical Annex).
>
> 10.The level of detail we recommend publishing in the CBDP reflects its function of promoting public transparency and

> enabling Parliamentary scrutiny of the Government's climate measures.
>
> 11.You agreed to publish sectoral summaries of delivery risk in the CBDP, rather than outlining delivery risks of each individual proposal or policy (see pp.190-200). This is because we do not consider it appropriate or necessary to set out information about specific delivery risks for each of the proposals and policies as we have for you in the advice of 27 March. That was to assist you to look at the contribution of each measure and associated delivery risk to make the judgement that the package of proposals and policies will enable carbon budgets 4, 5 and 6 (CB4, CB5 and CB6) to be met.
>
> . . .
>
> 13. The report relates to proposals and policies of Devolved Administrations and was prepared in consultation with those authorities as required by the CCA 2008. A copy of this report will be shared with those authorities following your approval of the CBDP."

43. Annex B to the Section 13 advice to the Secretary of State set out the various quantified and unquantified proposals and policies that would contribute towards the emissions savings required to meet the Carbon Budgets along with their delivery risks, as well as the consideration of factors under section 10 of the CCA 2008 and Sustainable Development factors.

44. Annex B stated that "Based on current projections, the package of proposals and policies that we can quantify will deliver sufficient quantified savings to meet CB4, significantly overperform for CB5 by 81Mt of savings, and we have quantified 97% of the emissions savings that will enable CB6 to be met". The conclusion set out in Annex B was that:

> "Our overall assessment, taking account of the uncertainty in wider trends and factors, is that the unquantified proposals and policies will enable Carbon Budget 6 to be met when considered alongside the quantified proposals and policies set out in Table 2, Appendix."

45. With respect to sustainable development, the submission contained a table which stated that "[t]here are both positive and negative capital impacts associated with emissions reductions policies but the overall contribution to sustainable development is likely positive". The table cross-referred the Secretary of State to the "natural capital" section of Appendix E to the section 13 advice and explained that other aspects of sustainable development were addressed in the sections of Appendix E addressing economic, fiscal and social factors. The introduction to that section stated that:

> "Sustainable development concerns the stability and prosperity of society, and its capacity to provide for future generations. Sustainable development also incorporates social, economic, and

> environmental dimensions of sustainability. The Climate Change Act requires that the proposals and policies we put in place to enable our carbon budgets to be met, taken as a whole, must be such as to contribute to sustainable development. The main outcomes of the proposals and policies in this report will have a positive impact on the UK's contribution to the global Sustainable Development Goals, in particular goal 7, targeting affordable and clean energy, and goal 13, targeting climate action. In this section, we set out how this package of policies and proposals will contribute to sustainable development. The social considerations section considers the impact on different social groups of climate policies and the net zero transition, and what mitigation the government is putting place, where necessary. The Natural Capital section considers the impact on the continuation and improvement of environmental functions, and stability and renewal of natural assets. This is most relevant to the Sustainable Development Goals 6, 14 and 15, which target protection of water and life on land and marine habitats."

46. Under the heading "social considerations", there was reference to energy prices, the transition from fossil fuels, energy consumption and fuel poverty. Under the heading "natural capital", the text explained that natural capital refers to "those elements of the natural environment which provide valuable goods and services to people". The text cautioned that further assessment of the implications for natural capital of proposals and policies would be required, but summarised the position as follows:

> "This package of proposals and policies is expected to have a significant net benefit to natural capital and thus sustainable development. Moving away from i) fossil fuels towards a greater share of renewable energy, ii) petrol and diesel cars towards lower-emissions alternatives such as electric vehicles iii) gas boilers to lower carbon heating sources and iv) high carbon land uses towards afforestation and other land-based carbon dioxide removals, are just a few examples that will provide significant benefits. However, some negative impacts to some natural capital stocks are likely to arise and impacts will likely be specific and localised. The impact from the significant land use change required to deliver proposals in this report and meet net zero will depend on how and where this change is enacted, with a systemic and spatial approach more likely to deliver on net zero while providing natural capital benefits. Further in-depth appraisal of the natural capital impacts of specific policies and policy mixes will need to be undertaken as proposals are developed following this report. This will be done through the normal channels of Impact Assessments and Business Cases, to ensure trade-offs are managed and impacts mitigated."

The text went on to address specific issues such as air quality, recreation, biodiversity, floods, the availability of water and water quality, raw materials, rare metals, and land use.

47. Annex B contained three tables: Table 1 (Policies captured in the Energy and Emissions Projections); Table 2 (Quantified proposals and policies); Table 3 (Unquantified proposals and policies). In Table 2, the Power sector proposals and policies were grouped together.

48. During the course of oral argument, I was referred to a number of specific proposals and policies by the parties. One example was number 159 in Table 2 of Annex B. The policy name was "Analyse manure prior to application to match crop requirements". The policy description was:

> "Analysing the nitrogen content of slurry, prior to application on crops and grassland, can improve nutrient management, ensuring nitrogen applications do not exceed crop requirements to minimise emissions of nitrous oxide (N2O). Increasing industry adoption is expected as part of a market-led take up of precision farming that is already occurring. Government will work with industry to identify the most appropriate mechanisms for change. We expect the Sustainable Farming Incentive (nutrient management standard) to contribute indirectly to this outcome."

The average annualised savings in CB6 was stated to be 0.00096 Mt CO_2e, and the timescale from which the policy takes effect was 2022. The delivery risks were explained as:

> "Delivery risk uncertain. Requires further analysis of actions under SFI [Sustainable Farming Incentive] to help deliver this".

49. The delivery risks mitigation was described as:

> "Identify whether the actions encouraged under the SFI (particular advisor visits) will partly mitigate delivery risks".

50. On 29th March 2023, a read-out from the Secretary of State's private office confirmed that the Secretary of State had fully considered the documents in considerable detail and was happy to confirm his decision.

51. In his witness statement, Mr Thompson discusses RAG ratings, and has sought to explain why they were not provided to the Secretary of State in the March submissions. Mr Wolfe KC, for Friends of the Earth, contended that Mr Thompson's explanation was not admissible as it amounts to *ex post facto* evidence, contrary to the principle in *R*(*United Trade Action Group Ltd) v Transport for London* [2021] EWCA Civ 1197, at §125. It was argued that Mr Thompson's evidence is not consistent with the contemporaneous evidence, and could be self-serving. I disagree.

52. It seems to me what Mr Thompson was seeking to do in his witness statement was to explain why he did not consider it appropriate to provide RAG ratings to the Secretary of State in advance of the March 2023 decision. This was not an *ex post facto* attempt to elaborate upon or elucidate reasons for a decision that was under challenge, which is generally impermissible as the Court of Appeal pointed out in *United Trade Action Group Ltd.* Rather, Mr Thompson was seeking to explain why he took a particular step in circumstances where that approach has been called into question in these

proceedings; he was not seeking to expand or elaborate upon his reasons for a public law decision that was under challenge. Furthermore, it does not seem to me that the explanation given by Mr Thompson is inconsistent with the contemporaneous evidence. Indeed, there is no contemporaneous evidence making it clear that the Secretary of State would be provided with RAG ratings. The contemporaneous evidence shows that RAG ratings were provided to the Secretary of State in November 2022, and at a later point Mr Thompson requested that a narrative explanation of risk should be provided. The contemporaneous evidence does not provide any clues for why the shift was made. To understand why that shift was made, it is entirely appropriate for Mr Thompson to seek to explain the factors involved.

53. In his witness statement, Mr Thompson explained that RAG ratings are a useful tool to convey information to a Secretary of State who is new to a brief or has little or no prior knowledge of the policy area and the complexities and challenges involved. In his view, they are not a useful way of conveying information to a Minister who is more experienced in the area and has a greater grasp of the complexities and challenges. As a result, Mr Thompson explained that it was his view (and that of other senior colleagues within the department) that RAG ratings were not an effective tool for the Secretary of State to have available to him when making an assessment as to whether a package of proposals and policies will enable the carbon budgets to be met, and could be misleading. Mr Thompson stated that:

> "RAG ratings necessarily group types of risks that are dissimilar in nature: a policy may be categorised as "red" for a range of reasons, such as because it is at an early stage of development, it relies on public funding in future Spending Reviews, it relies on further research and development, it requires consultation, or it relies on the adoption of a new technology. The Secretary of State might decide, however, that these different types of risk pose very different levels of risk.
>
> The RAG ratings do not take into account of the systemic relationships between different proposals and policies. The RAG ratings provided by Sector Teams do not differentiate between the risk attached to delivery of a specific policy and the wider risk posed to the delivery of emissions savings more generally.
>
> The proposals and policies vary significantly in their scope and complexity. Risk assessments of major infrastructure programmes will usually be a composite of tens of individual risks or more, and aggregating those risks into one summary category of risk is challenging. Other policies may be discrete and are either less complex or involve different types of risk.
>
> The fact that a particular proposal or policy might be given a "red" RAG rating by a Sector Team does not mean that it will not be delivered, or that it will not deliver the emissions savings attributed to it."

54. Mr Thompson also pointed out that by its very nature a RAG rating (or its equivalent) focuses on the potential negatives relating to a proposal or policy and does not account

for potential positives. In his view, it was important that Ministers consider a package of proposals as a whole, and that includes potential upsides as well as potential downsides. Instead of RAG ratings, Mr Thompson considered that the Secretary of State should be provided with narrative descriptions of delivery risk, together with sectoral summaries of risk.

55. With respect to the contents of the CBDP, Mr Thompson explained that the decision as to the contents of the plan was for the Secretary of State to take. The broad consensus amongst senior officials was to recommend to the Secretary of State that the narrative descriptions of risk to individual policies and proposals should not be included in the CBDP. The reasons for this recommendation were that (i) section 14 of the CCA of 2008 did not impose a legal requirement that descriptions of risk to individual policies and proposals should be included; (ii) to publish assessments of risk to delivery of such a varied range of proposals and policies, particularly those at an early stage of development, may compromise the space that is required to ensure that policy is developed (and risk is identified and addressed) to an appropriate level before it is subjected to public scrutiny. Mr Thompson expressed the view that there was a real risk that Sector Teams would be more guarded in their assessments of risk if they knew that they would be published; publication of an assessment of risk could itself create risk; and the Secretary of State is familiar with the context and will have background information that would not be available to, for example, a member of the public; and (iii) summaries of risk at a sectoral level were a more meaningful and helpful way of conveying risk, as they enable the identification of cross-cutting risks that potentially pose material risks to the emissions savings that the package of proposals and policies are intended to deliver.

56. In his witness statement, Mr Thompson also discussed the Devolved Administrations. In certain areas, in particular agriculture, land use, waste and building sectors, he explained that policy is devolved to the administrations in Wales, Scotland and Northern Ireland. Each of the Devolved Administrations has committed to achieving net zero, and their proposals and policies can contribute to the United Kingdom's emissions savings.

57. The Scottish Government has committed to achieving net zero by 2045 and has set interim binding targets of reductions in emissions of 75% by 2030 and 90% by 2040. The Scottish Government published its latest Climate Change Plan, which covers the period 2018 to 2032, in 2020. This plan covers all sectors of the economy, mirroring those set out in the CBDP, and outlines actions that the Scottish Government intends to take in order to make to meet its targets. They include actions to improve energy efficiency and introduce low carbon heating to buildings, and to restore peatlands, support afforestation and reduce emissions in agriculture.

58. The Welsh Government has committed to achieving net zero by 2050 and to achieving reductions in emissions of 63% by 2030 and of 89% by 2040. It has published *Net Zero Wales*, which is the emissions reduction plan for Wales for CB2, covering the period 2021 to 2025. The plan is cross-economy, and includes actions for the electricity and heat generation sectors, transport, residential buildings, industry, business and agriculture.

59. The Northern Irish Executive has committed to achieving net zero by 2050, with an interim target of at least a 48% net reduction in emissions by 2030. Sectoral targets

have also been set, including targets for 2030 of obtaining at least 80% of electricity consumption from renewable sources. The draft Green Growth Strategy sets out the Northern Ireland's vision for 2050, and a Climate Action Plan is being developed.

60. The specific information provided by the Devolved Administrations was limited. The Welsh Government shared what had already been published in *Net Zero Wales*. The Welsh Government was due to begin work to develop proposals and policies for the period 2025 to 2030. The Northern Irish Department of Agriculture provided information relating to 48 different proposals and policies, with a brief description of each of these and further information on the relevant sector and implementation status. The Scottish Government provided information relating to 228 "key emissions-reducing policies".

61. Mr Thompson acknowledged that the responses provided by the Devolved Administrations did not provide much detail. There was no quantification of projected emissions savings attributable to their proposals or policies. This was not unexpected as there was much less data of that kind available at the devolved level. Nevertheless, as the Devolved Administrations had committed to taking action to achieve net zero, it was considered that they would need to take further action to meet their commitments. It was decided that the best way of taking this into account was to "scale up" the emissions savings that would be delivered in the relevant areas. Mr Thompson considered that it was reasonable to use this approach, based on the assumption that the proposals and policies would have similar effects to those adopted by the United Kingdom government, that similar levels of uptake would be achieved and the emissions savings results would be similar. In total, 58 proposals and policies were scaled to provide an estimate for United Kingdom-wide emissions savings: about 5% of the total emissions savings. Mr Thompson considered that this was a conservative approach, as there were some sectors where no scaling was undertaken, and also the Devolved Administrations might also take action which achieves greater emissions savings than reflected in the scaling. In the final presentation of materials to the Secretary of State, the scaled contributions in the agriculture and land use, land use change and forestry sector and the waste sector were presented separately as quantified proposals and policies.

62. In a witness statement for the present proceedings, Paul Bailey, the Deputy Director for Strategic Energy and Climate Analysis in the Department for Energy Security and Net Zero has sought to explain the modelling process that was undertaken. He states that the modelled emissions savings represent their "best estimate" of the real-world outcomes and associated emissions savings that would be achieved by the proposals and policies. Where policies are in development, or still to be developed, modelling shows the emission savings that could be achieved with suitable policy action. Mr Bailey explained the reasons why proposals and policies – of which there were 143 – were unquantified: they may deliver indirect emission savings, via changes in social behaviour or technology uptake; analysis has not been completed in time and so could not be modelled; the evidence-base is not strong enough to estimate resulting emission savings robustly; and they include measures that do not lead to individual abatement but are integral to the delivery of quantified proposals and policies(referred to as "enablers").

63. Friends of the Earth, one of the Claimants, has produced for these proceedings an analysis of the risk tables that had been provided to the Secretary of State as an annex

to the submission (this is set out in the witness statement of Michael Childs, the Head of Science, Policy and Research). It is pointed out that 60 of the 191 quantified proposals and policies are expressed to be "uncertain"; and this represents at least 766 Mt CO_2e, or 47% of the total CB4-6 savings. For 65 of the 191 quantified proposals and policies, whilst information is included on delivery risks, contingencies, dependencies, barriers or similar, no information is included on either the degree of delivery risk (high/low) or on the confidence of the assessment (certain/uncertain). This represents at least 683 Mt CO_2e, or 42% of the total CB4-6 savings. For 25 of the 191 quantified proposals and policies, no information is included on either what the delivery risks there may be, or on the degree of delivery risk. This represents 27 Mt CO_2e, 2% of the total CB4-6 savings.

64. The delivery risks for 6 of the 191 policies are expressed as being significant, high or challenging. Total CB4-6 savings from these policies are calculated at to be least 18 Mt CO_2e (approximately 1% of the total). For the remaining 35 of the 191 policies, the delivery risks are expressed in terms of having high confidence or certainty. Total CB4-6 savings from these policies are calculated to be at least 135 Mt CO_2e (approximately 8% of the total).

65. Lord Deben, a former Secretary of State for the Environment, and the Chairman of the Climate Change Committee ("the CCC") from 2012 to 2023, has provided a witness statement on behalf of Friends of the Earth. Lord Deben explained that the CCC's Progress Report to Parliament was published on 28th June 2023. This report concluded that the CCC was even less convinced that the Government had a programme that would enable net zero to be achieved by 2050 than it had been previously. Whereas previously it had been possible for the CCC to give certain plans and proposals in the Net Zero Strategy the benefit of the doubt, this could not be done for the CBDP. The greater detail of the CBDP had removed possibilities that more general language had included.

66. Lord Deben explained that the government's programme for achieving net zero depends on assumptions, none of which can ever be 100% safe. However, the first assumption in the CBDP is that everything will go exactly as planned, and no contingency had been built in. The CBDP depends upon significant improvements in technology being realised, and yet it is not right to assume that such improvements will always be achieved within the necessary timeframe for achieving net zero targets or indeed achieved at all. Lord Deben also pointed out that there is also very little said about the timing for the delivery of policies, or how they will be achieved. This is important because there has been a history of significant delays in delivery.

67. Lord Deben commented on the absence of RAG ratings for each proposal and policy. He said that this was "surprising to me. Had the Secretary of State been provided with this information it is quite clear to me that he could not have formed a view that the policies and proposals will enable the statutory targets to be met when that depended on all policies and proposals being delivered in full - it being clear that the DEFRA itself had no confidence in that conclusion."

68. On 30th March 2023, the Secretary of State laid the CBDP before Parliament. The CBDP stated that it was being published to inform Parliament and the public of the Government's proposals and policies to enable carbon budgets to be met. The CBDP set out the policies captured in the EEP; it listed the various 'Quantified proposals and policies', and identified the emissions savings that they were each predicted to make,

and the timescale from which the policy would take effect; and it also set out the 'Unquantified proposals and policies' that were expected to deliver further emissions savings. The CBDP also provided "Sectoral summaries of delivery confidence": this set out the "Risks and mitigation" for each of the sectors. The CBDP was accompanied by a Technical Annex, which provided an overview of the methodological approach taken to the analysis in the CBDP.

The Climate Change Act 2008

69. The statutory framework is set out in considerable detail in *FoE (No. 1)* at §§28-55, and I agree with Holgate J's lucid exposition of the structure of the legislation. In the instant case, of especial relevance are sections 13 and 14 of the CCA 2008, which I set out in full.

70. Section 13 of the CCA provides that:

> "(1) The Secretary of State must prepare such proposals and policies as the Secretary of State considers will enable the carbon budgets that have been set under this Act to be met.
>
> (2) The proposals and policies must be prepared with a view to meeting—
>
> (a) the target in section 1 (the target for 2050), and
>
> (b) any target set under section 5(1)(c) (power to set targets for later years).
>
> (3) The proposals and policies, taken as a whole, must be such as to contribute to sustainable development.
>
> (4) In preparing the proposals and policies, the Secretary of State may take into account the proposals and policies the Secretary of State considers may be prepared by other national authorities."

Section 14 provides that:

> "(1) As soon as is reasonably practicable after making an order setting the carbon budget for a budgetary period, the Secretary of State must lay before Parliament a report setting out proposals and policies for meeting the carbon budgets for the current and future budgetary periods up to and including that period.
>
> (2) The report must, in particular, set out—
>
> (a) the Secretary of State's current proposals and policies under section 13, and
>
> (b) the time-scales over which those proposals and policies are expected to take effect.

> (3) The report must explain how the proposals and policies set out in the report affect different sectors of the economy.
>
> (4) The report must outline the implications of the proposals and policies as regards the crediting of carbon units to the net UK carbon account for each budgetary period covered by the report.
>
> (5) So far as the report relates to proposals and policies of the Scottish Ministers, the Welsh Ministers or a Northern Ireland department, it must be prepared in consultation with that authority.
>
> (6) The Secretary of State must send a copy of the report to those authorities."

71. It is also important for the present proceedings to note that the role of the CCC is set out at Part 2 of the CCA 2008. This includes laying before Parliament an annual report setting out its views on the progress made towards meeting carbon budgets, and whether these budgets and target are likely to be met: section 36(2). The Secretary of State is obliged to respond to the CCC's report annually: section 37.

The case law

72. Of considerable relevance to these proceedings is Holgate J's judgment in *FoE (No. 1)*. Both the Claimants and the Defendant relied on aspects of Holgate J's judgment to support their arguments. It is therefore necessary for me to set out Holgate J's analysis in some detail.

73. The case involved a challenge to the way in which the Secretary of State exercised his functions under sections 13 and 14 of the CCA 2008. It was contended that (i) the Secretary of State was not entitled to conclude under section 13 that the proposals and policies in the NZS would enable the carbon budget for CB6 (2033-37) to be met where the quantified effects of those policies were estimated to deliver only 95% of the emissions reductions required to meet that budget; (ii) the Secretary of State had failed to take into account relevant considerations which were obviously material to his decision under section 13, namely the risk to the delivery of individual proposals and policies and to the achievement of the carbon budgets; (iii) the Secretary of State had failed to include in the NZS the information legally required to discharge his reporting obligations under section 14, and it was not sufficient for him to merely tell Parliament what the proposals and policies were. Holgate J agreed with the Claimants on points (ii) and (iii), but rejected point (i).

74. With respect to point (i), Holgate J held at §§177 and 193 that section 13(1) of the CCA 2008 did not require the Secretary of State to be satisfied that the quantifiable effects of his proposals and policies will enable the whole of the emissions reductions required by the carbon budgets to be met; the shortfall could be made up by unquantified policies. The first Claimant in these proceedings takes issue with this holding, and reserves the right to argue the point on another occasion.

75. In arriving at his finding on point (i) Holgate J made some important observations about the obligation under section 13. Holgate J noted a number of matters that were agreed

between the parties, including (at §167) that it was a matter of judgment for the Secretary of State to decide on the proposals and policies which should be prepared, and whether they will enable the carbon budgets to be met. Holgate J noted at §178 that the targets are quantitative in nature, and that section 13(1) involved the Secretary of State "making a predictive assessment many years into the future. Such predictions inevitably involve significant uncertainty, for example, in relation to future circumstances falling within section 10(2). There are uncertainties about economic growth, energy, prices, population growth, the impact of investment in technological innovation and the implementation of proposals. Even predictions expressed in quantitative terms involve subjective judgment". At §180, Holgate J explained that the exercise to be carried out "involves predictions of future conditions over many years in a changing socio-economic, environmental and technological landscape and therefore a good deal of uncertainty. The consideration of matters such as these depends upon the use of judgment, whether the analysis is quantitative or qualitative".

76. Holgate J acknowledged at §181 that to carry out "predictive, quantitative analysis", the Secretary of State's officials had to use a number of mathematical models, and the Courts had accepted that the use of such models involves expert judgment, and "decisions based on scientific, technical and predictive assessments should be afforded an enhanced margin of appreciation in judicial review", referring to *R (Mott) v Environment Agency* [2016] 1 WLR 4338, *Spurrier* [2020] PTSR 240 at §§176-[179; and *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 at §68 and §177.

77. Holgate J stated at §183 that the Secretary of State's decisions under section 13(1) on the preparation of proposals and policies were matters of judgment, which will be informed, but not circumscribed, by the quantitative analysis carried out. At §185, Holgate J commented that the greater the shortfall between the quantified effects and the emissions target, the more cogent the qualitative analysis would need to be.

78. With respect to point (ii), the legal sufficiency of the briefing to the Secretary of State, Holgate J stated at §195 that the nature and extent of the work that needed to be carried out to make the predictive assessment was a matter of judgment for the Secretary of State and his officials, subject to *Wednesbury* review. The approach that should be taken by the Court in carrying out that review needed to bear in mind a number of propositions:

> "198 A minister only takes into account matters of which he has personal knowledge or which are drawn to his attention in briefing material. He is not deemed to know everything of which his officials are aware. But a minister cannot be expected to read for himself all the material in his department relevant to the matter. It is reasonable for him to rely upon briefing material. Part of the function of officials is to prepare an analysis, evaluation and precis of material to which the minister is either legally obliged to have regard, or to which he may wish to have regard.
>
> 199 But it is only if the briefing omits something which a minister was legally obliged to take into account, and which was not insignificant, that he will have failed to take it into account a

> material consideration, so that his decision was unlawful. The test is whether the legislation mandated, expressly or by implication, that the consideration be taken into account, or whether the consideration was so "obviously material" that it was irrational not to have taken it into account. . . . In this regard, it is necessary to consider the nature, scope and purpose of the legislation in question".

79. Holgate J analysed the legislation at §202:

> "(i) Section 1 of the CCA 2008 was amended to incorporate the net zero target because of the recognition internationally and in the UK of the need for action to be taken to reduce GHG emissions more urgently;
>
> (ii) The UK's contribution to addressing the global temperature target in the Paris Agreement depends critically on meeting the net zero target for 2050 set by the CCA 2008 through the carbon budgets;
>
> (iii) The Secretary of State is responsible for setting the carbon budgets:
>
> (iv) The CCA 2008 imposes the obligation to ensure that the net UK carbon account meets those targets solely on the Secretary of State;
>
> (v) Under the CCA 2008 the preparation of proposals and policies under s.13 (and if necessary under s.19(1)) is critical to achieving those targets;
>
> (vi) The Act imposes solely on the Secretary of State the obligations to prepare such measures and to be satisfied that they will enable the carbon budgets to be met. There is no requirement for Parliament or the public to be consulted on those proposals and policies or for Parliament to approve them;
>
> (vii) The Secretary of State cannot properly and rationally be satisfied that his proposals and policies will enable the carbon budgets to be met without quantitative analysis to predict the effects of those proposals and policies in reducing GHG emissions ([176] above);
>
> (viii) The predictive quantitative assessment and any qualitative assessment put before the Secretary of State are essential to his decision on whether his proposals and policies will enable targets to be met which are expressed solely in numerical terms;
>
> (ix) Although a quantitative assessment does not have to show that quantifiable policies can deliver the whole of the emissions reductions required by the targets, any qualitative judgment or

> assessment to address that shortfall will have to demonstrate to the Secretary of State how the quantitative targets can be met;
>
> (x) The carbon budgets and the 2050 target relate to the whole of the UK economy and society and not to sectors. Achievement of those targets requires a multiplicity of policy measures addressing the UK as a whole, individual sectors, and factors falling within s.10(2). Those measures will be operative at different points in time. Some will apply in isolation and others in combination. Whether an overall strategy will enable the statutory targets to be met depends upon the contribution which each policy (or interrelated groups of policies) is predicted to make to the cumulative achievement of those targets;
>
> (xi) The merits of individual measures, their contributions and their deliverability, together with the deliverability of the reductions in GHG emissions required by s.1(1) and s.4(1), are all essential considerations for the Secretary of State, or the Minister in his place".

80. At §204, Holgate J found that "one obviously material consideration which the Secretary of State must take into account is risk to the delivery of individual proposals and policies and to the achievement of the carbon budgets and the 2050 net zero target. This is necessarily implicit in the statutory scheme. In turn, this must depend upon the relative contributions made by individual measures to achieving those targets". That had not been provided to the Secretary of State, even though it was available within the Department.

81. The same point was also made at §211:

> "Viewed in the context of the statutory scheme, I have no doubt that the quantification of the effect of individual policies was an obviously material consideration on which, as a matter of law, information had to be provided to the minister, so that he could discharge his functions under section 13 lawfully by taking it into account. The defendant's role in approving a package of policies so as to enable the statutory targets to be met is critical to the operation of the CCA 2008. Risk to the delivery of individual policies and of the targets is "obviously material"".

82. Holgate J held at §213 that "without information on the contributions by individual policies to the 95% assessment, the minister could not rationally decide for himself how much weight to give to those matters and to the quantitative assessment in order to discharge his obligation under section 13(1)". This was explained in more detail at §214*:*

> "The briefing to the minister did not enable him to appreciate the extent to which individual policies, which might be subject to significant uncertainty in terms of content, timing or effect, were nonetheless assumed to contribute to the 95% cumulative figure. This concern is all the more serious because the minister was told

> that that the assessment by BEIS was based upon the assumption that the quantified policies would be "delivered in full". The information which ought to have been provided to the defendant would have influenced his assessment of the merits of particular measures. It was crucial so that he could question whether, for example, the strategy he was being advised to adopt was overly dependent on particular policies, or whether further work needed to be carried out to address uncertainty, or whether the overall figure of 95% was robust or too high. If it was too high, then that would affect the size of the shortfall and his qualitative judgment as to whether unquantified policies could be relied upon to make up that gap with what he would judge to be an appropriate level of confidence. Information on the numerical contribution made by individual policies was therefore legally essential to enable the defendant to discharge his obligation under section 13(1) by considering the all important issue of risk to delivery. These were matters for the Secretary of State and not simply his officials."

83. Holgate J went on to find that there was further information about the 5% shortfall which should have been provided to the Secretary of State by his officials, as this was "obviously material" (§§216-7). As for the claimants' contention about information relating to the time scales over which the proposals and policies were expected to take effect, Holgate J held at §218 that it was a matter of judgment as to how much of this material needed to be included in the ministerial submission.

84. With respect to point (iii), whether or not the section 14 duty was complied with, Holgate J rejected the Secretary of State's submission that the duty to "set out" his proposals and policies amounted to little more than a requirement to publish those measures. Holgate J held at §233 that the Secretary of State was required "to explain the thinking behind the proposals and how they will enable the carbon budgets to be met". This requires a "quantitative explanation" being provided to Parliament (§235), although the Court accepted the Secretary of State's contention that "the legislation does not require the department's detailed workings or the modelling to be provided to Parliament".

85. Holgate J's reasoning was based in part on the "statutory objective of transparency". At §241, Holgate J explained:

> "Because the reports under sections 14, 19, 36 and 37 are required to be laid before Parliament, they will be published. The requirement is not simply to provide unpublished reports to, for example, a regulatory body. The statutory objective of transparency in how the targets are to be met extends beyond Parliament, to local authorities and other statutory authorities, NGOs, businesses and the general public. That transparency requires reports under section 14 to contain explanation and quantification. The purpose of a such a report is not limited to telling Parliament what the Secretary of State's proposals and policies are".

86. In considering whether the Secretary of State had complied with section 14 of the CCA 2008, Holgate J held at §245 that the adequacy of the report should not be "materially lower than that of a report issued for public consultation . . . In both instances, the legal object of the reports is to enable its readers to understand and assess the adequacy of the Government's policy proposals and their effects. Furthermore, a report under section 14 is also required in the interests of public transparency". This position was supported by the reasoning of the Supreme Court of Ireland in *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49, where the Court considered the obligation of the Irish Government under section 4 of the Climate Action and Low Carbon Development Act 2015.

87. Holgate J held that the NZS was not compliant with section 14 of the CCA 2008 because it did not look at the contributions to emissions reductions made by individual policies, or interacting policies, where these were assessed as quantifiable (§252). Other matters which were "obviously material" to the critical issue of risk to the delivery of the statutory targets, and which the Secretary of State was obliged to inform Parliament under section 14 were explanations:

> "(i) that the quantitative analysis carried out by BEIS (which related solely to quantifiable policies with a direct effect on emissions) predicted that those policies would achieve 95%, not 100%, of the reductions required for CB6, and had assumed "delivery in full" of those policies; "
>
> (ii) how it was judged that that 5% shortfall would be made up (see also para 216 above), including the judgment based upon comparing the 95% result with the projections of the implied performance of the delivery pathway;
>
> (iii) that tables 6—8 did not present the outcome of the department's quantitative analysis of emissions reductions predicted to result from NZS polices;
>
> (iv) how that quantitative analysis differed from the modelling of the delivery pathway".

(§§253-4).

88. At §256, Holgate J stated that it was the responsibility of the Secretary of State, and not his officials, to lay the report before Parliament; and the adequacy of the report was a matter for him, acting on the advice of his officials and with legally sufficient briefing. At §257, Holgate J concluded that:

> "A clearly presented report would not lead a reader to misunderstand predictions of the effects of each policy as "targets", or to fail to appreciate the uncertainties involved. Similarly, there is no reason why it could not be made clear to a reader that policies are at various stages of development and that current predictions should not be taken to undermine the need for future flexibility to respond to changes in circumstance. Indeed, these points are clearly explained in the NZS. Problems

> in publishing details of quantitative analysis of the effects of policies yet to be "fully developed" may raise matters of judgment for the defendant as to how much detail should be included in a report. But that cannot affect the legal principle that contributions from individual policies which are properly quantifiable must be addressed in the report. Here, they were not at all."

89. Holgate J's exposition of the section 13 duty was approved by the Court of Appeal in *R (Global Feedback Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWCA Civ 1549 at §79. The Court of Appeal also held that section 13 involved a "strategic" and a "whole-economy", or "economy-wide", judgment to be applied by the Secretary of State. It was also a "continuing" duty.

90. The Court of Appeal explained at §83 that the Secretary of State for Energy Security and Net Zero was "uniquely well placed to discharge the duty in section 13. He has an overview of the whole economy, is conscious of the likely levels of greenhouse gas emissions in all sectors of it for the budgetary period or periods in question, and is able to judge the potential for appropriate action to ensure the meeting of carbon budgets".

91. In *Global Feedback*, the Court of Appeal considered the relationship between the Secretary of State and the CCC, and in particular the extent to which the Secretary of State had to have regard to the advice of the CCC in relation to diet and climate change, as part of his section 13 obligations. The Court of Appeal held at §112 that in exercising his functions under section 13 of the CCA 2008, the Secretary of State was not under a duty to take the CCC's advice into account, let alone give it significant weight or to follow it unless there are cogent reasons for departing from it. In reaching this conclusion, the Court of Appeal observed at §114 that it was "telling" that Parliament had chosen not to impose an express duty on the Secretary of State to obtain or take into account the CCC's advice.

Grounds of Challenge

92. A compendious summary of the Grounds of Claim was described by the Secretary of State in his skeleton argument for these proceedings as follows:

93. Ground 1: The Secretary of State failed to take into account mandatory material considerations when purporting to comply with section 13 of the CCA 2008;

Ground 2: The Secretary of State proceeded on the basis of an assumption that all of the quantified proposals and policies would be delivered in full, and this assumption was not supported by the information as to risk to delivery with which the Secretary of State was provided;

Ground 3: The Secretary of State's conclusion that the proposals and policies will enable the carbon budgets to be met was irrational;

Ground 4: The Secretary of State applied the wrong legal test to section 13(3) of the CCA 2008 ("sustainable development");

Ground 5: The Secretary of State failed to include in the CBDP information that he was required to include.

94. In oral argument, the Claimants argued grounds 2 and 3 together on the basis that there was considerable overlap between the two. As the arguments were presented to me, it seemed to me that there was considerable overlap with ground 1 as well. In this judgment, therefore, I shall set out the arguments with respect to ground 1, and then grounds 2 and 3, and then set out my judgment with respect to the three grounds. I will then set out the arguments on ground 4, followed by my judgment on that ground; and finally, will set out the arguments on ground 5, followed by my judgment on that ground.

Ground 1: *The failure to take into account mandatory material considerations when purporting to comply with section 13 of the CCA 2008*

The parties' arguments

95. Mr Wolfe KC and Ms Simor KC contend that the Secretary of State was not provided with, and so failed to take into account, key materials on the risk to the delivery of individual policies and proposals set out in the CBDP. They also argue that the officials within the Department for Energy, Security and Net Zero misrepresented the extent of these risks in the briefing materials they provided to the Secretary of State.

96. Mr Wolfe KC's essential contention was that the Secretary of State should have been provided with RAG ratings for each of the proposals and policies, or something which faithfully reflected the information that the RAG ratings would have contained. He makes three main arguments. First, he contends that the Risk Narratives that were provided to the Secretary of State did not provide him with mandatory material about the risk to delivery of each policy. As a result, the Secretary of State failed to consider this mandatory material about the delivery risk associated with each policy when approving the CBDP. Second, he submits that the information about the delivery risks in the Risk Narratives provided to the Secretary of State did not fairly and accurately summarise the information about delivery risks provided by other departments. Third, he argues that the briefing to the Secretary of State was deficient because it provided "no information" about the delivery risk to the Devolved Administration's policies and proposals as part of his briefing for CB6.

97. The focus of Ms Simor KC's arguments was that the Secretary of State was not provided with mandatory information *quantifying* the delivery risk for CB6, either on an individual policy level or taking CB6 as a whole. She makes five key arguments. First, that the quantification of emissions reductions forecast in CB6 should have been adjusted to reflect that some of these policies were unlikely to be delivered or achieved in full. This would have allowed the Secretary of State to appreciate the (significant) uncertainty associated with certain policies. Second, that the Secretary of State should have been provided with material summarising the cumulative risk to delivery across the policies and proposals. Without this information, he could not have reasonably understood the very significant extent of that risk. Third, that the Secretary of State was not given sufficient information in the Risk Narratives (or otherwise) about the risk to delivery in relation to individual policies and proposals that were described as having "uncertain delivery risk" but that had been rated as "low" or "very low" confidence in the RAG ratings. Fourth, that there were quantification errors in modelling the projected

emission reductions from 'non-EEP' policies and proposals. Fifth, that the Department erred by including some of the EEP policies and proposals in the high confidence CBDP baseline, when these policies and proposals had in fact been identified as having low delivery confidence. These errors meant the Secretary of State's understanding was that he could be confident in delivering the emissions reductions needed to meet CB6, which was wrong.

98. For the Secretary of State, Mr Moffett KC contended that the Claimants are operating under the false premise that the RAG ratings are the reliable, definitive description of delivery risks for each policy. He argued that the Risk Narratives, and not the RAG ratings, should be treated as the most reliable description of risks. He emphasises that the Risk Narratives were produced with input from the Sector Leads, who are those best equipped to assess the delivery risk associated with each policy: the RAG ratings were produced by the Sector Teams and not the Sector Leads. Mr Moffett KC submits that the RAG ratings do not always include an accurate description of the delivery risk for each policy. It is the Risk Narratives which summarise the delivery risks fairly and accurately, and it was justifiable (and not misleading) that the Secretary of State was presented with these narratives and not the RAG ratings in his March 2023 briefing materials.

99. Addressing Mr Wolfe KC's argument that the Secretary of State was not provided with mandatory material about risk to delivery from each of the departments, Mr Moffett KC submits that this argument must fail because Friends of the Earth have failed to show: (i) that officials took an irrational approach to the information provided to the Secretary of State; Mr Thompson's witness statement shows that the approach taken was rational; (ii) that the Secretary of State could not make a strategic and whole economy judgment in relation to the CBDP on the basis of the information that was available to him.

100. In response to Mr Wolfe KC's argument that Secretary of State was not provided with information on delivery risks for policies from the Devolved Administrations, Mr Moffett KC acknowledges that there was a lack of information about the policies and proposals pursued by the Devolved Administrations generally. Nevertheless, the Department proceeded on the basis that the Devolved Administrations would prepare policies and proposals that were materially similar to those pursued in England (an approach the Claimants do not challenge). Given this approach, it was realistic to assume that the substantive risks to delivery of the policies and proposals were similar for the Devolved Administrations as for England. There were no deficiencies in the information provided to the Secretary of State, who was informed that:

> "[The Department's] understanding of DA-specific risks is limited. However we understand that many of the risks to delivery of emissions savings will be common across all four Nations."

101. Responding to Ms Simor KC's first and second arguments that adjustments should have been made to the quantification of emissions savings for each policy to reflect delivery risk and that the Secretary of State should have been presented with cumulative delivery risk, Mr Moffett KC says that this is no more than a disagreement about how information was presented to the Secretary of State. He submits that ClientEarth have

failed to show that the Department acted irrationally by not presenting the information as Ms Simor KC proposes.

102. Mr Moffett KC also argues that there is no evidence to support ClientEarth's submission that red or red-amber RAG ratings for delivery were inaccurately described as policies for which delivery was "uncertain" in the Risk Narratives. Central to his arguments on this issue is his submission that RAG ratings should not be treated as the definitive assessment of risk. Mr Moffett KC also argues that the central question for the Court is rationality: in his submission, the Court cannot find that the approach of allowing the Sector Leads to draft the Risk Narratives is irrational.

103. As to ClientEarth's argument that the Department's modelling of emissions savings for each non-EEP policy or proposal was deficient as it was based on maximum technical potential, Mr Moffett KC submits that this is not a complaint about the information provided to the Secretary of State about the delivery risk but instead a complaint about the Department's modelling choices. He identifies that Holgate J's prior judgment found there was "*nothing objectionable*" in modelling based on theoretical potential (§77).

104. As to ClientEarth's argument that the Secretary of State was not notified that certain EEP policies had low delivery confidence, Mr Moffett KC submits that such uncertainties were taken into account when modelling the EEP baseline. Reference is specifically made to the explanation of the modelling approach in the Technical Annex to the CBDP, which explains: "*In our approach to modelling the assumptions we need to make, we have taken, on balance, a conservative approach to err on the side of caution, with the effect of either increasing the size of emissions savings required (as discussed above on the baseline) or of reducing the potential effectiveness of policies (for example by assuming slower take-up of technologies than recent evidence suggests)*".

Ground 2: *When taking the Decision under section 13(1), the Secretary of State proceeded on the basis of an assumption that all of the quantified proposals and policies would be delivered in full, and this assumption was not supported by the information as risk to delivery with which the Secretary of State was provided.*

Ground 3: *The Secretary of State's conclusion that the proposals and policies will enable the carbon budgets to be met was irrational.*

The parties' arguments

105. Mr Wolfe KC and Ms Simor KC argued that the Secretary of State expressly approved the CBDP on the assumption that all of the quantified policies and proposals relating to emissions savings would be delivered in full. They highlight the following paragraph which was included at paragraph 26 of the CBDP:

> "26. The calculated savings assume the package of proposals and policies are delivered in full. We consider it is reasonable to expect this level of ambition – having regard to delivery risks and the wider context, which give rise to both downside and upside risks (see further information on delivery risks below)."

106. Friends of the Earth and ClientEarth say that it was not open to the Secretary of State to make this assumption when approving the CBDP, based on the information available to the Secretary of State about the delivery risk.

107. Ms Simor KC seeks to rely on evidence from Mr Eames which shows that 90% of the emissions savings attributable to quantified policies were described in the Risk Narratives available to the Secretary of State as having "uncertain" or "high" delivery risk. Mr Wolfe KC highlights that the Department had available further information which highlighted the substantial risk to the delivery of individual policies, including:

i) advice from DEFRA that the emissions savings projections it had provided "*by and large represent maximum feasible savings rather than a likely scenario*";

ii) the fact that in November 2022 there was a concern that emissions savings achievable from quantifiable policies and proposals could slip to 85% of those required to reach CB6, but that the CBDP was signed off in March 2023 on the basis that the emissions savings it could achieve would be 97% of those required to reach CB6, despite there being no evidence for the increase in confidence in delivery; and

iii) broader criticism from Lord Deben over a plan as significant as the CBDP being made on the basis of everything going smoothly, which Lord Deben describes as an "unsatisfactory" assumption.

108. In Mr Wolfe KC's submission, in the light of the degree of delivery risk associated with the policies and proposals relied upon to enable the carbon budgets to be met, the information provided to the Secretary of State did not provide a proper basis to conclude that all proposals and policies would be delivered in full. It was irrational for the Secretary of State to approve the plan based on this assumption.

109. If, in the alternative, the Secretary of State was not advised to assume that all policies and proposals would be delivered in full, Mr Wolfe KC submits that there would have been an even greater shortfall in the quantified effects of the proposed policies and a sufficiently cogent analysis would be required to demonstrate how this shortfall would be met. Nothing in the advice provided to the Secretary of State explained the basis on which he could conclude that the proposals and policies will enable the carbon budgets to be met if the proposals and policies are not delivered in full.

110. Ms Simor KC submits that that the conclusion that the policies and proposals would be delivered in full was not reasonably open to the Secretary of State having regard to (i) the level of risk and uncertainty assessed by her own officials; (ii) the expert analysis of the CCC in relation to CB6 and the NZS 2022; (iii) the scale and nature of the challenge of meeting CB6; and (iv) the levels of emissions savings to be delivered by EEP ready policies and proposals, compared to previous plans, and the fact that these too involved risks.

111. Ms Simor KC additionally identifies that the Secretary of State (through his Department) was presented with material stating that he could be confident that at best only 10% of the emissions reductions projected to derive from the non-EEP policies would be delivered. This showed a real risk of the CBDP under delivering in terms of emission reduction requirements. In these circumstances there was, in Ms Simor KC's

submission, no rational basis for the Secretary of State's conclusion that the "package of proposals and policies" would be "delivered in full".

112. As to the intensity of review that would be appropriate, Friends of the Earth and ClientEarth submit that it would be appropriate for the Court to scrutinise the Secretary of State's decision closely on the basis that climate change affects us all and requires us all to take action. It was noted that there was no precedent for the application of a higher degree of scrutiny in climate change cases. However, it was submitted that this was due to the relatively limited climate change litigation to date, and not because an enhanced standard of review should not apply.

113. Mr Moffett KC does not dispute that the Secretary of State (and his Department) could not assume that each and every policy and proposal would be delivered in full. However, relying on evidence from Mr Thompson, he argues that this is not the meaning of the text at paragraph 26 of the CBDP. He explains that this wording was intended to "*make the point that the total volume of quantified emissions savings (i.e. those projected to be achieved by the quantified P&Ps) had been calculated on the basis that the package of proposals and policies would be delivered in full, i.e. the total figure represented the sum of all of the individual quantified emissions savings*". Mr Moffett KC argues that this explanation is consistent with advice given to the Secretary of State, which expressly and repeatedly reiterated that delivery of individual policies and proposals carried risk. For example, he highlights that paragraph 15 of the CBDP explains: "*it is very likely that some proposals or policies will outperform expectations…Meanwhile, some other policies or proposals will under deliver compared to expectations*". Mr Moffett KC argues that these materials show that the Secretary of State cannot have based his decision on an assumption that every policy and proposal is delivered in full, and that this element of the case of Friends of the Earth and ClientEarth should fall away.

114. Mr Moffett KC argues that the Secretary of State did not act irrationally by assuming that the package of policies and proposals was sufficient to meet CB6. Mr Moffett KC submits that the Court cannot rely on Mr Eames' witness statement to make findings of fact because: (i) Mr Eames is an in-house solicitor who works for ClientEarth, and the statement should be treated as an assertion of his subjective opinion; and (ii) Mr Eames has adopted a narrow approach to assessing risk by reference to only some of the briefing materials that were before the Secretary of State.

115. Mr Moffett KC further argues that, even if the Court were to proceed on the basis that Mr Eames' statement was fact, that is insufficient to make out irrationality. Friends of the Earth and ClientEarth would need to meet an extremely high hurdle to show that the decision was irrational: given the decision involves a predictive judgment, on a strategic, whole economy issue reaching many years into the future that involves an assessment based on expert advice of social, economic and environmental and technological factors. Mr Moffett KC did not consider it appropriate for the Court to apply a different standard of review because the case relates to climate change: this is, in his submission, a classic example of a case in which the Court should apply only a low intensity of review.

Discussion

Grounds 1-3: *The Secretary of State's decision pursuant to section 13(1) of the CCA 2008*

116. It was common ground between the parties that, as Holgate J had held at §204 of his judgment in *FoE (No. 1)*, "one obviously material consideration which the Secretary of State must take into account is risk to the delivery of individual proposals and policies and to the achievement of the carbon budgets and the 2050 net zero target." Much of the argument (in writing through the skeleton arguments, and orally in the hearing before me) involved consideration of the way in which risk material was presented and the extent to which it was, or was not, sufficient for the Secretary of State to take a lawful decision under section 13.

117. There is no statutorily prescribed way in which the information about risk needs to be provided to the Secretary of State. There is also no free-standing obligation in public law that information about risk has to be presented in a particular way. Officials were not obliged, therefore, to provide the Secretary of State with information about risk by using RAG ratings, or by some other illustrative form. How the risk information should have been presented to the Secretary of State was plainly a matter for the officials, and could only be impugned by this Court if the content of what was provided to the Secretary of State did not enable him to carry out the statutory evaluation exercise lawfully. That would have been the case if, for instance, the information was misleading in that it did not reflect the real risk that officials had identified with respect to a specific proposal or policy, or if the information was incomplete in a material way.

118. The information about risk was presented to the Secretary of State in the narrative of the March 2023 submissions, with the detail of the risk to individual proposals and policies as well as at a sectoral level contained in Annex B to the submissions. In the submissions, the Secretary of State was told with respect to the "Quantified savings to meet Carbon Budgets" that "Based on current projections, our view is that the package of proposals and policies that we can quantify will deliver sufficient quantified savings to meet . . . 97% of CB6. . . . The Technical Annex (Annex D) sets out the methodology for the quantification of policies and proposals. You should note that this quantification relies on the package of proposals and Policies being delivered in full. Our advice is that it is reasonable to expect this level of ambition – having regard to delivery risk (see Annex B) and the wider context."

    (Emphasis in the original).

119. There is a dispute between the parties as to what the underlined text meant and, therefore, what the Secretary of State was being told by his officials. Mr Moffett KC argued that the Secretary of State could not assume from this statement that each and every policy and proposal would be delivered in full. This argument was supported by the evidence of Mr Thompson, who has explained in his witness statement that that was not the intention of those drafting the submissions. On the other hand, the Claimants contend that this construction does not reflect the wording used in the submissions and the reasonable understanding that the Secretary of State would have had. I agree with the Claimants.

120. It seems to me that the reasonable interpretation of the underlined text, and therefore what the Secretary of State was being told by his officials, was that **each** of the

individual proposals and policies that form the package of measures would be delivered in full. There was no evidence before the Court to indicate that the Secretary of State interpreted the underlined text in the way suggested by Mr Thompson rather than on the basis of the reasonable interpretation of the meaning of the underlined text.

121. If it was intended for the underlined text to mean that not all of the proposals and policies would be delivered in full, then the sentence does not make sense: the package is made up of the sum of its parts, and so if the package was expected to be delivered in full, this would necessarily mean that each of the package's constituent parts would be delivered in full. There is no indication from the first sentence of the underlined text that some of the proposals and policies might not happen at all or would not deliver the full amount of the contribution to the budget assigned to them.

122. The second sentence of the underlined text deals with the ambition required to achieve this, and advises that this is "reasonable" having regard to delivery risk (Annex B) and the "wider context". Later in the submission (at paragraph 13), it is stated under the heading "Delivery risk and further considerations (further detail in Annex B)" that "To assess whether the proposals and policies are sufficient, you must consider the risks to delivery of the emissions savings that **each of the proposals and policies carries**". Annex B does not contain any reference to proposals and policies within the package not being delivered at all, or in full. The "wider context" cannot mean that either. The reference to Annex B and to the "wider context" reads as the explanation for why the Secretary of State can assume that each of the proposals and policies will be delivered in full: that is, there are delivery risks, but they can be overcome, especially when one considers the wider context.

123. This interpretation is also supported by the language used in the earlier submissions to the Secretary of State, where the underlying assumption was that all of the proposals and policies would be delivered in full. In the introductory brief submitted on November 8th 2022, the Secretary of State was told that "Our most recent projections from August show we have sufficient savings to meet carbon budgets and the NDC **if all planned policies are delivered in full**" (emphasis added). Similarly, in the submission made to the Secretary of State on 30th November 2022, it was stated that "Latest projections suggest you have sufficient savings to meet carbon budgets **if all planned policies and proposals are delivered in full**" (emphasis added).

124. It was suggested by Mr Moffett KC that the Secretary of State could not have understood the underlined text as meaning that each of the individual proposals and policies would be delivered in full as there was material in the Technical Annex that stated otherwise. Reference was made to the explanation in the Technical Annex that a conservative approach had been taken to modelling; and that "all else equal, there is likely to be more upside than downside risk, which could support meeting carbon budgets". That, however, is not an indication that individual proposals or policies might not be delivered in full.

125. It was also suggested by Mr Moffett KC that there was material in the CBDP, a draft of which was provided to the Secretary of State along with the March submissions, which would support the contrary interpretation. In the CBDP it was stated that "…it is very likely that some proposals or policies will out-perform expectations… some other proposals or policies will under deliver compared to expectations." However, the Secretary of State did not have his attention drawn to this provision in connection with

the underlined text in the submission, so it is difficult to see how the Secretary of State could have had this passage in mind when he was reading the underlined text.

126. If, as I have found, the Secretary of State did make his decision on the assumption that each of the proposals and policies would be delivered in full, then the Secretary of State's decision was taken on the basis of a mistaken understanding of the true factual position. Indeed, this is the Secretary of State's own case to this Court: Mr Moffett KC acknowledged that not all of the proposals and policies would be delivered in full.

127. As a matter of law, therefore, in making this assumption the Secretary of State made an irrational decision in the sense explained by Saini J in *R(Wells) v Parole Board* [2019] EWHC 2710 (Admin) at §33. In *Wells*, Saini J held that *Wednesbury* unreasonableness may be made out where there was an unexplained evidential gap or leap in reasoning which fails to justify the conclusion reached by the public law decision-maker. The Secretary of State's decision under section 13 was based on reasoning which was simply not justified by the evidence.

128. This otherwise irrational decision could only be saved if it could be established that the Secretary of State would have been highly likely to reach the same decision even if he had not made that assumption (section 31(2A) of the Senior Courts Act 1981). That proposition was not made on behalf of the Secretary of State at the oral hearing before me. Looking at the matter myself, I cannot see how the very high threshold set out at section 31(2A) could have been met.

129. In the first instance, the counterfactual that I am required to consider under section 31(2A) of the Senior Courts Act 1981 presupposes that the information available to the Secretary of State would have enabled him to reach the conclusion that the 97% emissions savings would be met by the quantified proposals and policies even if not all of the individual proposals and policies would be achieved in full. It is not possible for the Court to find that this was highly likely to have been the case, as the Secretary of State did not have sufficient information to enable him to make that decision. It is not possible to ascertain from the materials presented to the Secretary of State which of the proposals and policies would not be delivered at all, or in full. It was not possible, therefore, for the Secretary of State to have evaluated for himself the contribution to the overall quantification that each of the proposals and policies was likely to make, bearing in mind that this evaluation had to be made by the Secretary of State personally: he could not simply rely on the opinions of his officials. The section 13 decision was one for him to make.

130. None of the commentary – or the narrative risk – provided to the Secretary of State reads as if the policy will not happen at all, or in full. From the material provided, the Secretary of State could not work out, therefore, whether and which of the quantified policies were likely to miss the target by a small or a large amount, and he could not evaluate for himself whether, and if so the extent to which, any shortfall from the policies that under-delivered would be compensated for by those policies that over-delivered. To take the example of proposal number 159 from Table 2 to Annex B (slurry: see paragraph 47 above), it is simply not possible for the Secretary of State to have evaluated from himself whether this proposal would miss the target, and if so by how much.

131. The material in the draft CBDP that there would be over-delivery and under-delivery was vague and unquantified, and so did not provide the Secretary of State with sufficient information to make his own evaluation or assessment. Furthermore, although there was reference in the submissions (and in the "read out" of the Secretary of State's decision) to the fact that the package does not fully reflect emissions savings from policies developed outside government, particularly local government, there is no information available to the Secretary of State from which he could evaluate what level of savings those additional policies might be able to generate within the relevant time-frame. The Secretary of State would not have been able to determine therefore, whether those additional policies would offset the shortfall from the quantified policies that did not meet their targets in full.

132. If I am wrong about the assumption made by the Secretary of State, and he did not consider that each of the proposals and policies would be delivered in full, then his decision under section 13 of the CCA 2008 is flawed and would therefore have been unlawful because he was not provided with sufficient information as to the obviously material consideration of risk to the individual proposals and policies. As already explained, the Secretary of State had no way of knowing which proposals and policies might not be delivered, or delivered in full; he could not calculate therefore what "over-delivery" was required from the other quantified proposals and policies, and whether those other quantified proposals and policies would meet the shortfall.

133. In reaching the latter (alternative) decision, I do not consider that it was necessary for the commentary or narrative risk provided to use the same language as used in the descriptors from the RAG ratings – "low confidence" or "very low confidence". It was appropriate for the officials to use a proxy for this, such as "uncertain delivery risk" accompanied by a narrative description of the risk and the proposed mitigations.

134. I also do not consider that the information provided to the Secretary of State was, as Mr Wolfe KC put it, "Panglossian"[1], or that it was provided on the basis of letting the Secretary of State know what the officials thought he wanted to hear. I also do not consider that the information was misleading. A clear description was provided to the Secretary of State about the risks involved with a particular proposal and policy and the kinds of mitigation measures that would or could be applied. However, the information provided was incomplete. It was necessary to say more if the Secretary of State was to work out for himself whether the proposal or policy was likely to miss the target by a small or large amount and if so by how much.

135. I do not consider that, as a matter of principle, it was necessary for the Secretary of State to be provided with advice or information as to the cumulative risk affecting the various proposals and policies, so long as he had sufficient information to work this out for himself. Nevertheless, the failure to identify which, and by how much, individual proposals and policies were likely to miss their targets, meant that the Secretary of State could not work this out for himself.

136. In his witness statement, Mr Thompson set out the difficulties in quantifying and weighing risk for each and every policy, stating that to do so would be extraordinary in its complexity and would require additional resource. I do not underestimate the

[1] An allusion to the fictional character, Pangloss, the tutor of Candide in Voltaire's novel bearing the latter's name.

difficulties that may be involved in carrying out this exercise for each and every policy. However, that does not seem to be the task that the officials would have been required to carry out. It is clear from the officials' own assessments that many of the proposals and policies are most likely to be delivered. If so, then further estimation would not have been required for these. It is only those proposals and policies which were at most risk of not being achieved that would have needed further analysis. Mr Thompson's evidence did not address that.

137. Moreover, even if there were difficulties in providing the latter analysis, the material could have been presented in the way suggested by Ms Simor KC: that is, the quantification of emissions reductions forecast in CB6 could have been adjusted to reflect that some of the policies were unlikely to be delivered or achieved in full. This could have been accompanied by a further forecast reflecting the possibility that there would be "over-delivery" of some of the proposals and policies. The Secretary of State could then have compared the different forecasts, and made his own evaluation of what was likely to transpire.

138. I do not consider that the information presented to the Secretary of State about the Devolved Administrations was insufficient for him to make the section 13(1) decision. It is accepted that the information provided about the Devolved Administrations was limited. Further information was simply not available as to what would happen in each of the nations for the entire CB6 budget period. Rather than leave a gap in the analysis for what might happen in the nations outside of England, the officials adopted the approach of scaling up from the English experience where that was appropriate. This enabled the Secretary of State to make an assessment as to what contribution the Devolved Administrations would be likely to make to meeting the carbon budgets, including CB6. That assessment was not obviously irrational.

139. I also do not consider that the Secretary of State needed to be told specifically that certain EEP policies had low delivery confidence. As Mr Moffett KC has explained, such uncertainties were taken into account when modelling the EEP baseline. In this regard, I have in mind the explanation of the modelling approach in the Technical Annex to the CBDP, which states:

> "In our approach to modelling the assumptions we need to make, we have taken, on balance, a conservative approach to err on the side of caution, with the effect of either increasing the size of emissions savings required (as discussed above on the baseline) or of reducing the potential effectiveness of policies (for example by assuming slower take-up of technologies than recent evidence suggests)".

140. The Claimants made a number of other points challenging the rationality of the Secretary of State's decision under section 13(1) of the CCA 2008. These include that: (i) the Secretary of State's own officials, and those in DEFRA, had assessed some risk and uncertainty; (ii) the CCC had produced its own expert analysis in relation to CB6; (iii) the scale and nature of the challenge of meeting CB6 was considerable given that most of the "easy wins" or "low hanging fruit" had been picked; and (iv) the EEP-ready policies and proposals also involved risks. These points were powerfully made, but would not in my judgment come close to satisfying the threshold of irrationality had the error identified above not been made by the Secretary of State.

141. I agree with Mr Moffett KC that the Court should apply a low intensity of review to the section 13(1) assessment made by the Secretary of State. The Secretary of State's decision involved an evaluative, predictive judgment as to what may transpire up to 14 years into the future, based on a range of complex social, economic, environmental and technological assessments, themselves involving judgments (including predictive judgments), operating in a polycentric context. These are not matters in respect of which the Court has any real expertise or competence, whereas the Secretary of State will be able to rely on officials with considerable expertise across the various domains (social, economic, environmental and technological), and the Secretary of State will himself have an experience of what is practicable within the governmental and wider political context.

142. This is not to say that the subject matter of the Secretary of State's decision under section 13 of the CCA 2008 is not of considerable importance. It plainly is. Nevertheless, it is clear from the statutory framework that Parliament itself is the proper forum in which scrutiny and interrogation of the Secretary of State's proposals and policies is properly to take place, aided by the expert contributions made by the CCC: including through the CCC's annual reports under section 36 of the CCA 2008. Given the clear role for the CCC and Parliament set out in the legislation, there is no indication that Parliament intended the Court to do anything other than apply the ordinary - and not enhanced - supervisory jurisdiction of judicial review.

Ground 4: *The Secretary of State applied the wrong legal test to section 13(3) of the CCA 2008 ("sustainable development")*

Arguments

143. Section 13(3) of the Act states:

> "The proposals and policies, taken as a whole, must be such as to contribute to sustainable development."

144. Mr Wolfe KC argues that this provision imposed a mandatory statutory requirement on the Secretary of State to reach the conclusion that the proposals and policies for meeting CB6, taken as a whole, will contribute to sustainable development. He argues that the Secretary of State has failed to meet this requirement, because in the CBDP he states in relation to sustainable development only that:

> "*There are both positive and negative natural capital impacts associated with these proposals and polices but the overall contribution to sustainable development is likely to be positive.*"

(Emphasis added). Mr Wolfe KC submitted that a finding that the impact of the proposals is "*likely to be positive*" is clearly not the same as a finding that it *will* be positive.

145. On behalf of the Secretary of State, Mr Badger replies that section 13(3) of the Act does not impose a threshold of certainty. First, because such an approach would result in section 13(3) imposing a higher standard than the section 13(1) duty, despite the fact that it is plainly ancillary to the section 13(1) duty. Second, because it cannot be realistic that the statute imposes such a duty, in circumstances where there is inherent

uncertainty involving a predictive judgment. Third, Mr Badger argues that the use of "must" in section 13(3) is not intended to connote a threshold of certainty, but instead to identify that the Secretary of State is under a duty to conduct an evaluative assessment that the proposals are expected to contribute to sustainable development.

Discussion

146. The term "sustainable development" is not defined in the CCA 2008. The Divisional Court in *R (Spurrier) v Secretary of State for Transport* [2019] EW HC 1070 (Admin) at §635 held that it was an "uncontroversial concept" which had been defined in the planning context as "meeting the needs of the present without compromising the ability of future generations to meet their own needs."

147. During the course of argument, I raised with Mr Badger the proposition that on its face section 13(3) did not appear to require an assessment or evaluation at all by the Secretary of State. Rather, that the statutory language was suggestive of a factual assessment: that is, whether in fact the proposals and policies contribute to sustainable development or not. This would not be a matter for the Secretary of State to determine, but would be a matter for the Courts if there is a challenge to the adequacy of the proposals and policies in contributing to sustainable development.

148. On its face, there is no reference within section 13(3) to the Secretary of State making an assessment, or considering anything, at all. This is in clear contrast with subsections (1) and (4) which refer specifically to the Secretary of State and what he may or must consider. Section 13(3) can also be contrasted with subsection (2). The latter subsection does not expressly refer to the Secretary of State, but it does state that "The proposals and policies must be prepared with a view to meeting" certain targets, and so it is implicit in this subsection that the Secretary of State's thought process is involved.

149. Mr Badger pushed back against this reading of the legislation, and argued that the whole structure of section 13 involved an evaluation by the Secretary of State. I agree. Section 13(3) needs to be read as forming part of the same evaluation or assessment as the Secretary of State is carrying out at subsection (1): will the proposals and policies enable the carbon budgets to be met. To decide otherwise would involve the Court engaging in a process for which it is not equipped, and for which it would have to rely on expert evidence. It would be surprising if Parliament had intended for the Court to have such a role.

150. As for what the term specifically means in the context of an evaluative assessment by the Secretary of State under section 13(3), I consider it connotes a degree of certainty that a particular outcome will eventuate. The term "must" is used elsewhere in section 13 (subsections (1) and (2)), and in both of those instances it is understood to mean that the Secretary of State has to carry out a particular exercise. He is obliged to do so. There is no obvious reason why the draftsman would have used the same term at subsection (3) if it was to bear a very different meaning.

151. As for Mr Badger's suggestion that section 13(3) is merely ancillary to subsection (1) and so could not impose a greater obligation on the Secretary of State, this does not necessarily follow. The two subsections are dealing with different targets or outcomes, and the assessment as to whether they will be achieved may require different thresholds. In section 13(1) the focus is on actually meeting the carbon budgets; the outcome or

target is absolute. In those circumstances, given that one is dealing with a predictive assessment, with so many imponderables, an evaluative assessment based on the likelihood that the outcome or target will be enabled makes sense. The focus of subsection (3) is on "sustainable development" and whether the proposals and policies will "contribute" to that target or outcome, not that there will actually be "sustainable development". As the target or outcome – to contribute – is lower, there is no reason why Parliament could not have intended for a greater degree of certainty that it would be achieved.

152. As for whether the Secretary of State's assessment did reach the required threshold under subsection (3), it was stated in the CBDP that the proposals and policies are "likely" to make that contribution. I understand that to mean that the Secretary of State considers that there is a greater than evens chance of the contribution being made, but not higher. The Secretary of State does not qualify the term with "highly" or "very", which would connote a higher degree of certainty. In the circumstances, I do not consider that the Secretary of State's assessment comes near to the much higher threshold that is mandated by section 13(3). On no reasonable view, could it be said that "likely" means "must".

153. In my judgment, therefore, the Secretary of State erred in making his decision under section 13(3) of the CCA 2008.

Ground 5: *did the Secretary of State fail to comply with s 14 of the Act because he failed to include in the CBDP information that he was required to include?*

Arguments

154. Mr Wolfe KC for Friends of the Earth, and Mr Lockley for the Good Law Project, argue that information on delivery risks qualifies as information "*obviously material to the critical issue of risk to the delivery of statutory targets*" and that, following Holgate J at §254, this should have been published under section 14 of the Act. They argue that the information on delivery risk included in the CBDP was insufficient, because it was limited to:

    i) A high level summary of the delivery risk to the packages of proposals and policies: which notes that policies and proposals in the EEP baseline "have high delivery confidence" but non-EEP policies and proposals "*vary in their delivery confidence …as we move towards Carbon Budget 6, a greater number of proposals and policies that are currently at an earlier stage of development will move into implementation and form part of the EEP baseline, giving higher delivery confidence*."

    ii) Sectoral summaries of the delivery risk picture included in Appendix D of the CBDP entitled "*sectoral summaries of delivery confidence*".

155. Neither of the above addresses the delivery risk associated with each individual policy. Mr Wolfe KC and Mr Lockley argue that individual delivery risk was a mandatory material consideration in the Secretary of State's decision-making process. They both argue that the Risk Narratives, or equivalent information, should have been published in order to comply with section 14 of the Act. Mr Wolfe also argues that the RAG tables, or equivalent information, should have been published.

156. Mr Wolfe KC relies on §245 of Holgate J's judgment which explained that the "*legal adequacy*" of a section 14 report is to be assessed by reference to its legal object, which is "*to enable its readers to understand and assess the adequacy of the Government's policy proposals and their effects*" and "*in the interests of public transparency*". Holgate J emphasised that this was important to the democratic process and the constitution as a whole. Mr Wolfe KC argues that, as a result of the failure to publish information on the risks to individual policies, neither Parliament nor the public was given the information necessary to form a judgment on the CBDP. Relatedly, Mr Wolfe KC submits, that the failure to publish this information impacted on the CCC's statutory function of providing independent scrutiny of the Secretary of State's plan as set out in a section 14 report.

157. Mr Lockley submits that it is mandatory under section 14 to publish information on anything that is a mandatory material consideration for the purposes of section 13 of the Act. He highlights paragraphs 202(xi); 204, 211, 214 of Holgate J's judgment, which support the case that information on individual risk is a mandatory material consideration for section 13 purposes. As to the interrelationship between section 13 and section 14: Mr Lockley identifies commentary at §77 of the *Feedback* case, which supports that section 13 and section 14 are twin duties. He also highlights examples from the planning law context which support the need for the Secretary of State to address, in his decision, the mandatory material considerations that were taken into account when reaching that decision.

158. In the alternative, Mr Lockley submits that even if the Secretary of State is not required to publish every section 13 mandatory material consideration in the section 14 report, he is required to publish details of individual risk because this information will always be central to the Secretary of State's conclusion that her policies and proposals will allow the carbon budgets to be met. He relies on §233 and 241 of Holgate J's judgment, which establish that the section 14 report must go beyond merely setting out policies and proposals, it must explain them and on §246-247 and 250 which establish the need to provide Parliament, the CCC and the public with information necessary to scrutinise the adequacy and realism of the proposals.

159. In the further alternative, Mr Lockley submits that the section 14 duty requires the Department to publish the Risk Narratives (or equivalent information pertaining to individual risk), in the particular circumstances of the CBDP. This is because the Secretary of State clearly based her overall section 13 conclusion – that the CBDP policies and proposals would be met – on the assumptions that quantified policies would deliver 97% of the reductions required to meet CB6 and this, in turn, rested on the assumption that the "package of policies and proposals are delivered in full". Even accepting the Secretary of State's position that by this, he meant that the net emissions reduction would be the same as if all policies and proposals were delivered in full, Mr Lockley submits that this was a very significant and optimistic assumption which required detailed justification in the CBDP.

160. Mr Moffett KC, for the Secretary of State, submits that the legal test against which the Claimants arguments must be assessed is: does the Plan set out an explanation as to why the Secretary of State reached the overarching judgement that the overall package of policies and proposals would enable the carbon budgets to be met? Mr Moffett submits that the CBDP and its Technical Annex do include information sufficient for this purpose. The granular information that the Claimants suggest should have been

published was not relevant to his decision. He submits that Friends of the Earth's contention that the RAG ratings should have been published is baseless. It is common ground that the Secretary of State did not have regard to these RAG ratings when making his section 13 decision, and he cannot be required to publish material to which he did not have regard.

Discussion

161. In my judgment, the material contained in the CBDP complied with the Secretary of State's duty under section 14 of the CCA 2008. The CBDP told Parliament how the Secretary of State proposes to meet the carbon budgets by explaining his thinking behind the proposals and how they will enable the carbon budgets to be met: this included a description of each of the proposals and policies, as well as the contribution that the quantified policies were expected to make to the emission savings, and how it was judged that the shortfall to be made up from unquantified policies would be met. This is precisely the information that Holgate J held should have been provided in the NZS, which was subject to challenge in *FoE (No. 1)*. I do not consider that it is possible to read Holgate J's judgment as supporting an obligation on the Secretary of State to provide risk data, however expressed or portrayed, as part of the section 14 report to Parliament.

162. The section 14 report that is subject to challenge in these proceedings did include summaries of risk at the sectoral level. It does not seem to me that that was required by the statutory language. In any event, I do not consider that section 14 required the Secretary of State to provide further risk information as to the specific policies, whether via the RAG table format or through a narrative description, and how the risks would be overcome. Requiring the Secretary of State to provide information about risk would unduly strain the statutory language of section 14.

163. The express statutory language does not call for any explanation or discussion of the risk factors and how they will be overcome. Nor is it implied or implicit. Holgate J rightly in my judgment held that the statutory language implicitly or impliedly requires the Secretary of State to explain "how" the proposals and the policies will enable the carbon budgets to be met, and that this calls for a description of the proposals and policies and the contribution that they will make to achieving the objective. What the risk factors are and how they are expected to be overcome or mitigated does not explain or describe the proposal or policy, but addresses the operational (whether by way of funding, legislation or otherwise) means by which the proposal or policy might be achieved.

164. The principle of transparency that is inherent in the legislation does not, in my judgment, call for that to be explained. Indeed, as a factual matter, it is clear that in June 2023 the CCC was able to fulfil its statutory role in commenting on the CBDP without having sight of the Secretary of State's risk analysis, or the analysis that was provided to him by officials.

165. As for the contention that the risk information needed to be provided in the CBDP because that information was "obviously material" to the Secretary of State's decision and so had to be included in the CBDP, I disagree. Holgate J's analysis of the statutory obligation did not depend on this. Holgate J's analysis of section 14 from §§ 231 to 241 makes no mention of "obviously material" information. At §249, where Holgate J uses

the term "obviously material [to the risk of delivery]", this is descriptive of "the contributions made by a multiplicity of proposals and policies adopted by the Secretary of State". Similarly, at §254, where Holgate J uses the term "obviously material [to the critical issue of risk to the delivery of the statutory targets]", this is descriptive of the various factors set out at §253 (see paragraph 87 above). I do not consider, therefore, that Holgate J was intending to say that any and all information that was "obviously material" to the decision-making of the Secretary of State under section 13 had to be published by means of the section 14 document.

166. I also reject the argument, made by Mr Lockley, that the CBDP needed to include all obviously material information by analogy with the duty to give reasons. Mr Lockley relied on *South Bucks District Council v Porter (No. 2)* [2004] 1 WLR 1953, where Lord Brown summarised the authorities governing the proper approach to a reasons challenge in the planning context. At §36, Lord Brown stated that:

> "The reasons for a decision must be intelligible and they must be adequate. **They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved**. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. **The reasons need refer only to the main issues in the dispute, not to every material consideration.** They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

(Emphasis added).

167. It does not seem to me that the analogy to a decision in the planning context, or more generally to a decision in any form of litigation, is apt. The planning cases, or litigation, involve disputes between parties on issues of fact and/or law. It is necessary for the decision-maker to resolve those disputes and only fair for the parties, or litigants, to understand why they have won or lost, which involves some intelligible explanation for the conclusion reached. The CBDP is plainly not a matter of litigation; there is no dispute between parties. There are no sides which need to know why they have won or lost. Rather, the CBDP is a plan which explains to Parliament (and to wider

stakeholders) *how* the carbon budget is going to be met, and it is only right that Parliament (and wider stakeholders) understand those matters.

168. The risk information would not be required to be included by the Secretary of State if he had consulted on the CBDP before laying it before Parliament. The *Gunning* principles (see *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168), approved by the Supreme Court in *R (Stirling) v Haringey London Borough Council* [2014] 1 WLR 3947), require a consulting party to give consultees sufficient explanation and information to enable intelligent consideration and responses by the latter. As Holgate J. explained at §245 that would require sufficient information "to understand and assess the adequacy of the Government's policy proposals and their effects". That could be done without supplying the Government's risk analysis.

169. The risk information is not required to be included in the section 14 report on the basis that it is necessary to inform the annual report that the CCC has to make to Parliament under section 36 of the CCA 2008. The annual report must include the CCC's views on whether the carbon budgets are "likely to be met". It was contended that if detailed risk information is not provided in the section 14 report, the CCC cannot scrutinise the Secretary of State's proposals and policies, and so cannot meet their section 36 duties. This argument is misconceived. There is no explicit textual connection between sections 14 and 36 of the CCA 2008. Rather, the connection within the statute is the other way round: pursuant to section 37 of the CCA, the Secretary of State is required to respond to the CCC's annual report. If Parliament had intended the CCC's report under section 36 to respond specifically to the section 14 report, the direct linkage could have been made in the statutory text. Furthermore, the argument presupposes that the CCC does not have its own expertise to consider risk independently of the Secretary of State's evaluation. The CCC is an expert body, with their own ability to consider the question of risk. Indeed, that is what happened on the facts here.

170. It was suggested in oral argument that this reading of section 14 of CCA 2008 may mean that there is no right of the public to see the risk information. I am not asked to consider the impact here of the Freedom of Information Act 2000. However, I do note that Parliament may be able to call for the risk information, given that the report was provided to Parliament. Indeed, this was commented upon by Holgate J. at §242 "Parliament is well able to call for more information to be provided where it wishes to do so".

171. In the circumstances, therefore, this ground of challenge fails.

Conclusion

172. I consider that each of the grounds of challenge were arguable, and so permission is granted on each of the grounds. As a matter of substance, the application for judicial review is allowed on Grounds 1, 2, 3 and 4. Ground 5 is dismissed. I shall invite the parties to make submissions on the terms of the order that I should make.

TAB C

THE SUPREME COURT

[Appeal No: 205/19]

Clarke C.J.
Irvine P.
O'Donnell J.
MacMenamin J.
Dunne J.
O'Malley J.
Baker J.

BETWEEN/

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANTS/APPELLANTS

AND

THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice Clarke, Chief Justice, delivered the 31st of July, 2020.

1. Introduction

1.1 Climate change is undoubtedly one of the greatest challenges facing all states. Ireland is no different. There are many issues at the level of both policy and practice as to how the problems associated with climate change can, or should, be tackled. However, it is important to emphasise that these proceedings are concerned with whether the Government of Ireland ("the Government") has acted unlawfully and in breach of rights in the manner in which it has adopted a statutory plan for tackling climate change. It is important at the outset to emphasise that the role of the courts generally, and of this Court in particular, is confined to identifying the true legal position and providing appropriate remedies in circumstances which the Constitution and the laws require.

1.2 The applicants/appellants ("FIE") contend that the Government, in the plan in question, has failed adequately to vindicate rights which are said to be guaranteed by either or both of the Constitution and the European Convention on Human Rights ("ECHR" or "the Convention"). It is also said that the Plan is *ultra vires* the relevant legislation. On that basis proceedings were brought in the High Court seeking a range of reliefs, to which it will be necessary to refer in more detail in due course. For the reasons set out in a judgment of MacGrath J. (*Friends of the Irish Environment CLG v. The Government of Ireland* [2019] IEHC 747), the High Court dismissed FIE's proceedings. From that dismissal, FIE sought leave to appeal directly to this Court.

2. The Grant of Leave to Appeal

2.1 By determination dated 13th February 2020 (*Friends of the Environment CLG v. The Government of Ireland & The Attorney General* [2020] IESCDET 13) this Court granted FIE leave to appeal the decision of the High Court for the following reasons:-

> *"8. The applicant and the respondents accept that there exists a degree of urgency in respect of the adoption of remedial environmental measures.*

There is no dispute between the parties as to the science underpinning the Plan and the likely increase in greenhouse emissions over the lifetime of the Plan. Further, the parties accept the gravity of the likely effects of climate change.

9. *It is unlikely, therefore, that the questions of law or the factual issues will be further refined as a result of a hearing before the Court of Appeal.*

10. *The availability of judicial challenge to the legality of the Plan by the Government, the standard of such review if adoption of the Plan is justiciable as matter of law, and the broader environmental rights asserted by the applicant to arise under the Constitution, from the European Convention of Human Rights and/or from Ireland's international obligations are issues of general public and legal importance."*

2.2 As noted, it is usually appropriate, even in cases which might meet the constitutional threshold for leave to appeal to this Court, that an initial appeal is considered by the Court of Appeal, where narrowing and clarification of the issues of importance can take place. However, in the present proceedings the parties did not dispute the relevant science, meaning that these issues were unlikely to require further refinement. Furthermore, the urgency which attends the resolution of this matter was determined by this Court to meet the additional criteria necessary for a leapfrog appeal.

2.3 At a very general level it may be said that the issues arising on this appeal relate solely to standing, to justiciability, to the legality of the adoption of the National Mitigation Plan ("the Plan"), the correct standard of judicial review if the adoption of the Plan is justiciable and the broader environmental and other rights asserted by FIE to arise under the Constitution and the ECHR.

2.4 The background to these proceedings is, of course, the science surrounding climate change. While the dispute between the parties (insofar as it did not relate to legal issues) focused on the measures which FIE suggest the Government is legally required to take in order to alleviate climate change under the Constitution, the ECHR, and under statute, the broad underlying scientific evidence as to the causes of, and problems created by, climate change was not in dispute. It may be necessary, in the context of some of the issues raised, to deal with that scientific evidence in more detail, but for present purposes it is appropriate to set out a brief broad overview of the agreed position as tendered in evidence before the High Court and as accepted by the trial judge.

3. A Brief Overview of the Science

3.1 Clearly one of the principal aspects of the factual background to these proceedings concerns the current scientific understanding of climate change itself, the consequences of a continuation of current trends and of the type of measures which may need to be put in place to minimise the extent of the rise in temperatures. There would not appear to have been any dispute before the High Court about that scientific analysis and, as it

provides the backdrop to the legal issues which need to be explored, it is appropriate to set it out first.

3.2 Since the beginning of the Industrial Revolution, mankind has generated and consumed energy on a large scale, predominantly through the combustion of fossil fuels. This process produces carbon dioxide and releases it into the atmosphere, where it remains for hundreds of years. Carbon dioxide, along with other contributory greenhouse gases, traps the heat emitted by the earth in the atmosphere, in a process known as the greenhouse effect. The greenhouse effect produces a warming effect on global temperatures. The greater the quantity of carbon dioxide emissions, the more global warming becomes exacerbated. The climate system shows a delayed response to the emissions of greenhouse gases, meaning that the full warming effect of gases which are emitted today will only become apparent some 30 to 40 years in the future.

3.3 Studies have indicated that there is a consistent and almost linear relationship between carbon dioxide emissions and projected global temperature increases over the next 80 years. Climate change is already having a profound environmental and societal impact in Ireland and is predicted to pose further risks to the environment, both in Ireland and globally, in the future. While the challenges of climate change will affect all sectors of society, it is acknowledged that the impact will be felt most severely in developing countries. Future impacts of climate change are predicted to include further increases in global temperatures, rising sea levels and an increase in extreme weather events, such as episodes of flooding and drought. There are also reported increased risks of mortality and morbidity, as climate related extremes may place food systems at risk, lead to water shortages and the emergence of new pests and diseases, while also contributing to significant changes in the ecosystems of many plants and animals. The more global warming proceeds to a level which is 2°C higher than typical temperatures at the beginning of the Industrial Revolution, the greater are such risks.

3.4 There is, therefore, a general consensus in climate science that, if the effects of global warming are to be mitigated or reduced, the rise in global temperatures should not exceed 2°C above pre-industrial levels. However, MacGrath J. in the High Court in this case noted that, since the Paris Agreement 2015, which forms part of the United Nations Framework Convention on Climate Change (1992), scientific thinking has moved in the direction of a lower figure which is in the region of 1.5°C above pre-industrial levels. In October 2018, The Hague Court of Appeal in the Netherlands in *The State of the Netherlands v. Urgenda Foundation* (C/09/456689/ZA) found that global warming levels were approximately 1.1°C higher than they were at the beginning of the Industrial Revolution. It will be necessary to refer to the decision of the Hoge Raad (the Supreme Court of the Netherlands) on a cassation appeal in that case in due course. Scientific evidence suggests that, in order to meet either the 2°C temperature rise target, or the more ambitious 1.5°C target, net negative carbon dioxide emissions are required at some point during this century. Achieving net negative emissions will require the use of costly carbon dioxide removal technologies, such as bioenergy and extensive reforestation. Many of the measures necessary to reduce emissions are still in the development stages

and much of the technology remains untested. While it is widely acknowledged that urgent action is required in order to address climate change, urgency is assessed differently within the global community.

3.5 The threats posed by climate change have been set out in greater detail in both the High Court judgment and in the affidavits sworn by Mr. Lowes, director of FIE, on its behalf and Mr. Frank Maughan, principal officer in the Department of Communications, Climate Action and Environment, on behalf of the Government. As noted earlier, it may be necessary to refer further to that evidence in respect of some of the issues arising.

3.6 It can, however, safely be said that the consequences of failing to address climate change are accepted by both sides as being very severe with potential significant risk both to life and health throughout the world but also including Ireland. While the severity of that situation is not disputed, a number of commentaries on the likely impact of global warming were established in evidence before the High Court. To take one example, it is possible to look at a summary of the impact on Ireland which was prepared by the Environmental Protection Agency. That summary referred to an increased risk from extreme weather likely to cause death, injury, ill health and disrupted livelihoods. It also referred to the risk that hundreds of square kilometres of coastal land could be inundated due to sea level rises. In similar vein, there was a reference to more extreme storm activity which would have the potential to bring the devastation of storm surges to the coast of Ireland. There was further reference to a likely increase in heat related mortalities and morbidity, together with a further risk in food-borne disease and infectious diseases. Reference was also made to a probable increase in cases of skin cancer and potential mental health effects.

3.7 At the oral hearing, counsel for FIE also drew attention to so-called tipping points. The scientific consensus suggests that, in general terms, rising greenhouse gas concentrations are likely to give rise to a slow evolution of temperature and precipitation with a certain delay. However, it is also accepted that, in addition, climate change may lead to more abrupt changes. There is as yet no consensus as to the precise level of climate change which is likely to trigger many of the tipping points in question. However, there are strong suggestions that even a level of global warming limited to below 2ºC may give rise to some important tipping elements. It has, for example, been suggested that the tipping point for marine ice sheet instability in the Amundsen Basin of West Antarctica may already have been crossed. While, therefore, it is not possible to predict the precise temperatures at which irreversible adverse events will occur, there does appear to be a consensus that the risk of such tipping points occurring is materially increased as temperatures themselves rise. It would certainly seem to me on the evidence that the practical irreversibility and significant consequences of reaching some of the tipping points in question adds a further imperative to the early tackling of global warming. That being said, it is, of course, necessary to again emphasise that this Court is not concerned with policy issues but rather with the lawfulness or otherwise of the Plan.

3.8 The central factual issue between the parties concerns aspects of the Plan. It is, therefore, appropriate to briefly outline the Plan with particular reference to the central contention made on behalf of FIE as to the manner in which it is said that the Plan breaches guaranteed rights.

4. The Plan

4.1 The Plan was adopted under the provisions of the Climate Action and Low Carbon Development Act, 2015 ("the 2015 Act"). The Plan is stated to be required, under s.3(1) of the 2015 Act, to be for the purpose of enabling the State to pursue and achieve the objective of transitioning to a low carbon climate resilient and environmental sustainable economy by the end of 2050. That objective is described as the National Transitional Objective ("NTO").

4.2 The Plan was published in draft form and a period of consultation followed. That consultation was required by s.4(8) of the 2015 Act. The procedure for the adoption of the Plan by the Government is specified in s.4 of the Act. The Minister for the Environment, Community and Local Government ("the Minister") is required to submit a plan for consideration by the Government which can then approve the plan either in the form submitted or subject to such modifications as the Government thinks appropriate (see s.4(1) and s.4(4)). However, the Minister is required, before submitting the Plan, to publish a draft and to have regard to any submissions made in respect of that draft. A significant number of observations from interested parties was received and considered by the Minister before the Plan was finalised.

4.3 While it may be necessary to go into some of the details of the Plan in due course, for present purposes it is sufficient to indicate that a central contention on the part of FIE draws attention to the fact that the Plan envisages an increase, rather than a decrease, in emissions over the initial period of the Plan while, at the same time, committing to achieving the objective of zero net carbon emissions by 2050. FIE describes this as the trajectory of the Plan. A key argument advanced by FIE suggests that the level of global warming which will have come about by 2050 will be dependent not only on whether zero net emissions have been achieved by that time, but also the way in which the pattern of emission reduction has developed in the intervening years. It is said that it is the total amount of emissions which drive climate change and that an initial increase in emissions, even if the ultimate target of zero net emissions by 2050 is achieved, will inevitably lead to a greater total volume of emissions in the period to 2050 thus it is said, not contributing sufficiently to the aim of reducing warming. There is a dispute between the parties as to whether any, or any sufficient, basis is given in the Plan for adopting this initial target which allows for an increase in emissions.

4.4 For its part, the Government suggested that FIE had mischaracterised the Plan as representing a stand-alone measure. Rather it was suggested that the Plan should be viewed, as the trial judge held, as being a living document whose measures are not set in stone and do not represent a once and for all response to the need for urgent action to tackle climate change. The Government argued that FIE had failed, in its submissions, to engage with this issue and with that finding of the trial judge.

4.5 As already noted, while there is significant scientific consensus both on the causes of climate change and on the likely consequences, there is much greater room for debate about the precise measures which will require to be taken to prevent the worst consequences of climate change materialising. FIE accepted that, in determining the measures required, the Government enjoys a very wide degree of discretion. However, it was said that, in adopting in the Plan, measures which will allow for an increase in emissions over the lifetime of the Plan, the Government had acted unlawfully.

4.6 In the context of the Plan, it is also worth mentioning at this stage that a range of measures have been adopted at European Union level designed to meet the EU's international obligations. Those measures do allow for a degree of what is called effort sharing. For example, the 2009 Effort Sharing Decision (Decision no. 406/2009/EU) set individual member states targets for certain types of emissions primarily associated with heating in buildings, transport and agriculture. It is not, however, said that Ireland is at this stage in breach of any of its international climate change obligations whether arising under EU law or under international treaties. Whether that will necessarily remain the case in the future will, of course, depend both on the trajectory of Irish emissions but also on any evolution in EU or other international treaty obligations.

4.7 Against that very brief account of both the science and the central thrust of FIE's challenge to the Plan, it is necessary to turn to the issues which arise on this appeal and the manner in which those issues were addressed by the trial judge.

5. The Issues and the High Court Judgment

5.1 Having regard to the judgment of the High Court and the written submissions filed by the parties on this appeal, it is useful to set out the issues which require to be resolved on this appeal. In addition, both parties helpfully filed respective documents setting out the headings under which it was said the issues arise. While not identical to either document, what follows appears to be one convenient way of categorising the issues. It is proposed, at this stage, simply to set out a brief account of the central contentions of the parties on those issues so as to identify the mattes which may require to be explored further in order to resolve this appeal.

(a) The Rights Involved

5.2 FIE contended that it is entitled to rely on rights, said to be guaranteed both under the Constitution and under the ECHR, to put forward its claim that the Plan fails to vindicate the rights concerned such that the adoption of the Plan is unlawful.

5.3 So far as the Constitution is concerned, FIE placed reliance on the right to life and, in particular, on what is said to be the obligation of the State to seek to protect persons against a future threat to life arising from climate change. Likewise, FIE placed reliance on the constitutional right to bodily integrity, as also guaranteed by the Constitution. It was again said that the consequences of climate change will significantly impact on the health and bodily integrity of persons thus infringing that right.

5.4 There are, however, issues between the parties as to the extent of a third right said to be engaged. The Government raised a question over whether it can be said that there is a so-called unenumerated right to an environment consistent with human dignity. The High Court has recognised such a right in the judgment of Barrett J. in *Friends of the Irish Environment v. Fingal County Council* [2017] IEHC 695. The question of whether such a right is recognised by the Constitution has not been the subject of any decision of this Court as yet. In addition, it may be necessary to consider whether a more appropriate characterisation of those rights which have been identified in the jurisprudence of the Irish courts, even though not expressly referred to in the text of the Constitution, may be to describe such rights as "derived rights". Such a re-characterisation would not mean that any of the rights described as unenumerated rights in the jurisprudence would no longer be recognised. The term "unenumerated rights" is not inaccurate for it describes rights which are not expressly referred to in the text of the Constitution itself.

5.5 However, it may be necessary to consider, for the purposes of determining whether the asserted right to the environment exists and, if so, the parameters of any such right, the basis on which a court should analyse whether such a right is recognised by the Constitution. It may be that the term "derived rights" more accurately reflects the true nature of those rights which do not find expression in the text of the Constitution itself but may, nonetheless, be accepted as being recognised by the Constitution by virtue of representing aspects of rights positively identified in that text as interpreted in accordance with the terms of the Constitution as a whole or deriving from the values either expressly referred to or inherent in the structure of the Constitution.

5.6 For the purposes of the case, the trial judge was willing to accept that there was an unenumerated constitutional right to the environment consistent with human dignity. However, the trial judge concluded that, even if FIE was found to have standing to engage the asserted constitutional rights, he was not satisfied that the making or approval of the Plan could be said to put these rights at risk.

5.7 It may be necessary, therefore, to address the question, insofar as it may be relevant to the resolution of this appeal, of the existence or extent of the right to the environment sought to be invoked.

5.8 In relation to the ECHR, FIE placed reliance on the rights guaranteed by both Art. 2 and Art. 8. In particular, attention is drawn to the requirements in the European Convention on Human Rights Act, 2003 ("the 2003 Act"), which places a positive obligation on all organs of the State (with the exception of the courts) to perform their functions in a manner compatible with the State's obligations under the Convention. On that basis it was said that decisions of the Government in relation to the Plan can be assessed to determine whether, in reaching any such decisions, the Government had met its obligations under the 2003 Act to properly act in a way which protects Convention rights.

5.9 That the rights sought to be relied on are recognised in the ECHR is, of course, clear. However, the precise way in which those rights may impact on legitimate decision-making in the field of climate change is disputed. There would not appear to have been any

judgments, as yet, of the ECtHR directly in this area. On that basis the Government argued that national courts should not anticipate but rather should follow the ECtHR.

5.10 However, FIE drew attention both to the fact that ECtHR, in *Fadeyeva v. Russia* (App. No. 55723/00) (2005) 45 E.C.R.R. 10, considered rights in the context of pollution and did so while acknowledging that it was not for that Court to determine exactly what needed to be done, but rather to assess whether Russia had dealt with the issues under consideration with what was described as due diligence and proper consideration for all interests involved. The extent to which it may be appropriate for this Court to consider the precise application of the ECHR in an area which has not as yet been the subject of a determination by the ECtHR is another matter which may need to be considered.

5.11 On the other hand, the Government argued that the jurisprudence of the ECtHR in environmental pollution cases is confined to situations where the pollution concerned "directly and seriously" creates an imminent and immediate risk to guaranteed rights. In addition, the Government suggested that the relevant jurisprudence of the ECtHR makes clear that a state is entitled to maintain a "fair balance" in respect of all relevant interests. On that basis the Government argued that the existing jurisprudence of the ECtHR does not give guidance on the proper application of the Convention in relation to what was said to be an admittedly very difficult environmental challenge but one with global reach rather than relating to an immediate pollutant with direct effects. It follows that it may be necessary for this Court to consider what may be said to be the established application of the Convention in the context of claims that environmental issues may infringe convention rights.

5.12 In the context of the rights under the ECHR said to be engaged, there were significant references in the submissions of both parties to the decision of the Hoge Raad (Supreme Court of the Netherlands) in *Urgenda* (*the State of the Netherlands v. Stichting Urgenda* (ECLI: NL: HR: 2019: 2007). In that case the Dutch Supreme Court considered the scope of protection provided by Arts. 2 and 8 of the ECHR and considered it appropriate, as a matter of Dutch law, and having regard to the obligations arising under the ECHR as recognised in Dutch law, to make an order requiring the Dutch state to take measures against climate change.

5.13 FIE placed significant reliance in its submissions on *Urgenda* and suggested that this Court should consider the reasoning of the Supreme Court of the Netherlands as being persuasive as to the proper application of the ECHR to climate change. It was argued by FIE that, if the relevant interpretation of the Convention as determined by the Dutch Supreme Court is correct, then it would follow, on the facts, that Ireland is also in breach of its obligations under the Convention.

5.14 The Government argued that this Court should not consider the judgment of the Hoge Raad as being persuasive. This was done on a number of bases. First, it was said that, echoing a point already mentioned, national courts should exercise care in considering the decisions of other national courts under the Convention in circumstances where the ECtHR itself has not addressed the issue concerned. It was pointed out that a subscribing state

to the Convention does not enjoy the right to bring proceedings before the ECtHR to suggest that an interpretation placed on the Convention by its own national legal system, which was unfavourable to the State, was incorrect.

5.15 It addition, the Government suggested that FIE has not established what were said to be necessary requirements in order that any significant weight might be paid to the judgment of a national court on convention issues. It was said that the precise status of the ECHR in Dutch law has not been established and it was further suggested that the Netherlands operates a monist system whereby, unlike the position in Ireland, international treaties can affect domestic law without the necessity of legislation. Furthermore, it was argued that FIE had not explained the manner in which any relevant provisions of Dutch law might have affected the Court's decision. There is, therefore, a significant issue between the parties as to the weight, if any, which this Court should attribute to the decision in *Urgenda*. In addition, and to the extent that this Court concludes that it should attach some weight to that decision, it might obviously be necessary for the Court to consider the reasoning of the Dutch Supreme Court for the purposes of determining whether that reasoning assists in assessing the issues which arise under Irish law in these proceedings.

5.16 As an overarching argument in respect of the various rights based claims made by FIE, the Government suggests that, contrary to FIE's submission, the fact that it accepts "the science" does not mean that it must also be taken to accept that the legal consequences of that science involve the sort of actionable breach of rights for which FIE contends. While not presented in this way, it might be said that the Government's argument suggests that three questions require to be addressed, being:-

(a) Is there a legal rights based obligation to take action;

(b) If so, what is the extent of that obligation; and

(c) In light of any such obligations identified, does the Plan comply with same?

5.17 The trial judge concluded that FIE had failed to establish that the Plan had breached rights under either Article 2 or Article 8 of the ECHR. Having considered the decision in *Urgenda*, in which the Dutch Government's failure to meet more ambitious levels of reduction of GHG emissions was held to violate the rights guaranteed by those articles, the trial judge noted that no evidence had been presented before the High Court relevant to the constitutional order of the Netherlands, particularly in relation to the separation of powers in that jurisdiction. The trial judge distinguished *Urgenda* from this case on the basis that no particular statutory framework had been impugned.

5.18 The trial judge then went on to consider the importance of the decision of this Court in *McD (J) v. L (P) & M (B)* [2009] IESC 81, in which it was held that it is not the role of a domestic court to declare rights under the Convention, but that this is rather a matter for the ECtHR. In the absence of any authority opened before the High Court to suggest that the ECtHR had previously dealt with this issue, the trial judge adopted the dicta of

Fennelly J in *McD* to the effect that an Irish court cannot anticipate further developments in the interpretation of the Convention by the ECtHR in a direction not yet taken by that Court. As such, the High Court concluded that the adoption of the Plan could not be said to be incompatible with the rights guaranteed by Articles 2 and 8 of the ECHR.

5.19 While there are, as noted, some issues in relation to the precise scope of certain of the rights asserted, many of the contentious issues which may require resolution on this appeal stem from the extent to which the existence of those rights and any potential breach of them can provide a proper legal basis for the type of challenge which FIE has mounted in these proceedings.

(b) Can the Claim Be Maintained?

5.20 Under this general topic a number of sub-issues arise, having regard to the arguments put forward by the Government which suggest that FIE's claim cannot properly be maintained in these proceedings. The following issues were relied on by the State.

(b) (i) Justiciability

5.21 The Government argued that, having regard to the separation of powers, the issues raised are matters of policy which are within the exclusive remit of the Oireachtas and the Executive and not within the scope of questions which can properly be the subject of litigation.

5.22 The Government argued that FIE's case represents a "merits based disagreement with government policies". It was accepted by the Government that questions concerning compliance with the provisions of the 2015 Act, concerning the procedures adopted in formulating the Plan, are justiciable. However, it was argued that the substantive provisions of the Plan itself involve policy choices made by the Government. It may be that the need to make such choices is mandated by the 2015 Act itself. However, it was argued that, on a proper construction of the Act, the requirements in that regard do not alter the fact that the Government is still required to make policy choices.

5.23 The trial judge held that the doctrine of the separation of powers was central to the arguments on the issue of justiciability in the present case. In the course of a lengthy discussion on the distinct functions of the organs of state, the trial judge observed that the jurisdiction of the courts can only be exercised in deciding on justiciable matters and that the courts have no general supervisory or investigatory functions. While the courts have a right and duty to interfere in the activities of the Government in circumstances where the constitutional rights of individual litigants are threatened, the trial judge considered that it is not for the courts to assume a policy-making role. Therefore, the courts should exercise caution when interfering in the exercise of Executive power, particularly where the aim is the pursuit of policy.

5.24 The trial judge held that, while the courts should be slow to find a matter or issue non-justiciable, they should also recognise that, due to the nature, extent or wording of a

statutory obligation, it may be necessary to afford a wide margin of discretion to the Executive in discharging its obligations. In the present case, the trial judge considered that both the 2015 Act and the Plan were heavily oriented towards policy considerations and, therefore, even if it the Plan were justiciable, a considerable margin of discretion must be afforded to the Government in the Plan's preparation and approval, as well as in deciding how it should achieve its wider obligations under the 2015 Act. It was held by the trial judge that it is not the function of the courts to second-guess the Government in these matters.

5.25 In the light of justiciability issues raised by the Government, and at least significantly accepted by the trial judge, it is necessary for this Court to consider the extent to which, having regard to the separation of powers, it is open to the Court to judicially review those policy choices in the context of the argument put forward on behalf of FIE that some of the choices made, and in particular the emission reduction trajectory, are said to impermissibly interfere with rights guaranteed under the Constitution and the ECHR. In that context it is worth recalling the point made earlier to the effect that FIE accepted that the Government has a wide discretion as to the methods to be adopted to reduce emissions. However, the principal focus of the factual contention made by FIE centres on the fact that the Plan envisages an increase in emissions in the short term although seeking by 2050 to meet the NTO and also the National Climate Policy Position of April 2014. This policy envisages that there should be an aggregate reduction in carbon dioxide (CO2) emissions of at least 80% (compared to 1990 levels) by 2050 across the electricity generation, built environment and transport sectors. It is also envisaged that there should be, in parallel, an approach to carbon neutrality in the agriculture and land-use sector, including forestry, which does not compromise capacity for sustainable food production.

(b) (ii) Standing

5.26 Insofar as the claims made by FIE involve an assertion of whatever rights may be established under either or both of the Constitution and the ECHR, the Government questioned the standing of FIE to bring such claims reliant on those rights.

5.27 In substance the Government argued that what FIE seeks to maintain in these proceedings is a so-called *actio popularis* which form of action, it was said, does not exist in Irish constitutional law. In that regard, reliance is placed on the decision of this Court in *Mohan v. Ireland and the Attorney General* [2019] IESC 18. On that basis it was said that only a person who is affected in reality or as a matter of fact may bring such a challenge.

5.28 In addition, it was argued by the Government that FIE, being an incorporated association, cannot assert either constitutional or convention rights which it does not and, it was said, could not, ever enjoy, such as the right to life or the right to bodily integrity. The Government submitted that, to allow FIE to maintain these proceedings would be to recognise a *jus tertii* contrary, it was argued, to the decision of this Court in *Cahill v.*

Sutton [1980] I.R. 269. In addition, it was argued that none of the possible exceptions recognised in *Cahill v. Sutton* apply.

5.29 So far as rights under the ECHR are concerned, similar points were made. It was said that the Convention does not permit an *actio popularis* or complaints *in abstracto* and that likewise the ECtHR would not grant standing to corporate bodies for violation of rights which they do not have.

5.30 FIE noted in its written submissions that the High Court did not hold against it on the question of standing and suggested that the Government was precluded from raising the standing question by virtue of the fact that the Government did not seek to cross appeal. The Government did include the standing issue in the section of the respondent's notice at the application for leave stage which is headed "additional ground on which this decision should be affirmed".

5.31 However, without conceding that the point was invalid, FIE indicated in providing further clarification on foot of a request for such clarification, made under Practice Direction S.C. 21, that it was not pursuing the point. Thus the issue of standing is before the Court. I should, however, say that, in my view, the position adopted by the Government on this question was correct. The current procedure requires an application for leave to cross appeal only where the respondent to the appeal wishes to suggest that this Court should give a different result to the case, rather than that this Court might come to the same result by a different route. These proceedings were dismissed by the High Court. There was, therefore, nothing for the Government to appeal against. The procedures allow for the specification by a respondent of any alternative route by which the same result could be achieved. This is precisely what the Government did by indicating that it would urge on this Court that the proceedings could be dismissed on standing grounds as well.

5.32 Be that as it may, it is also important to note that the standing argument raised by the Government did not apply to the *ultra vires* part of the case for it was accepted that FIE had standing to raise those issues. There were, however, other procedural questions concerning that aspect of the case to which it will shortly be necessary to turn.

5.33 On the other issues, FIE argued that the Court should recognise the standing of FIE notwithstanding its corporate nature and the fact that it seeks to enforce rights whose infringement, if such be established, do not affect it in any particular way. It was said that this may be done by analogy with the position adopted by this Court in cases such as *SPUC Ltd v. Coogan (No 1)* [1989] I.R. 734 and *Irish Penal Reform Trust v. Minister for Justice* [2005] IEHC 305.

5.34 The trial judge concluded that FIE did enjoy standing in the particular circumstances of this case. MacGrath J. first considered the approach to standing set out by this Court in its decision in *Mohan* where it was held that, in Irish constitutional law, in order for a plaintiff to enjoy standing to challenge the validity of legislation on the grounds that it infringes their constitutional rights, a claimant must demonstrate that his or her interests have been adversely affected, or are in imminent danger of being adversely affected, by

the operation of the legislation in question. The trial judge followed the observations of O'Donnell J. at para. 11 of *Mohan*.

5.35 In line with the approach taken by this Court in *Mohan*, MacGrath J. held that, in order for a potential plaintiff to establish that his or her interests had been adversely affected by legislation, it was sufficient that the court be satisfied that the plaintiff was affected in a real way in his or her life. Where a plaintiff successfully demonstrates to the court that the legislation they seek to challenge has had a real effect their life, they have standing to claim that the same legislation infringes on their constitutional rights. While the trial judge acknowledged that the term "interests" was deliberately intended by the court in *Mohan* to be broader than the term "rights", he was nevertheless willing to consider the nature of the constitutional rights which are alleged to have been infringed when determining whether FIE enjoyed standing, as, in his view, it was in this context only that one can consider whether interests relevant to the case being made have been affected.

5.36 The trial judge then moved on to consider *Digital Rights Ireland Ltd v. Minister for Communications* [2010] 3 I.R. 251, in which McKechnie J. (in the High Court) had suggested that a more relaxed approach to standing might be taken where it was clear that a particular public act could adversely affect a plaintiff's constitutional or ECHR rights, or society as a whole. In these circumstances, McKechnie J. held that a potential plaintiff should not be precluded from bringing proceedings to protect the rights of others.

5.37 Adopting the dicta of McKechnie J. in *Digital Rights Ireland*, the trial judge concluded that, as FIE sought to raise important issues of a constitutional nature which affected both its own members and the public at large, as well as significant issues in relation to environmental concerns, in the interests of justice, FIE did have standing in the present proceedings.

(b) (iii) The Nature of the Challenge

5.38 The Government questioned the entitlement of FIE to maintain proceedings of this type. The first basis on which this challenge was made was the Government's submission that the absence of any challenge to the 2015 Act itself precluded FIE from obtaining the reliefs sought.

5.39 The Government argued that the challenge to the validity of the Plan amounts to a collateral attack on the 2015 Act itself. FIE argued that its complaint was directed towards the Plan rather than the 2015 Act. It is, of course, the case that FIE also challenged the legality of the Plan on the basis of a contention that it is *ultra vires* the 2015 Act. The issues under that heading will be briefly identified in succeeding paragraphs. Clearly if the Plan were found to be *ultra vires* the 2015 Act, then it would be unnecessary to consider the collateral challenge issues. However, the Government's argument was that, in the event that it successfully persuades this Court that the Plan is not *ultra vires* the 2015 Act, then it would follow that a challenge to the Plan, without also challenging the constitutionality of the legislation, would necessarily amount to a collateral challenge.

5.40 In this context it may be necessary for the Court to consider the extent to which it may be permissible to view the range of options open to a person or body under a statute as being circumscribed by the need to vindicate rights. On one view, it might be said that legislation would have to be interpreted in a constitutional manner, following *East Donegal* principles, so that, on its proper construction, the range of options available to a decision maker might be constrained in any event by the necessity to interpret the legislation in a manner which did not infringe rights. If that view were to prevail then, of course, an exercise of any discretion conferred on the decision maker in a manner which impermissibly infringed rights would itself be *ultra vires*. On the other hand, if it could be said that the relevant legislation could not be interpreted in a manner which would constrain the range of options open, then it might be argued that, by allowing a discretion which could be exercised in a manner which breached rights, the legislation itself was unconstitutional thus grounding an argument based on collateral attack.

5.41 The trial judge held that if, as FIE contends, the Plan is an inadequate response to, and does not propose to do enough, quickly enough, to combat the effects of climate change, then that is not a legal deficiency or inadequacy of the Plan, but of the provisions and objectives outlined in the 2015 Act and also possibly of national policy. The trial judge noted that the provisions of that act were not challenged by FIE and he therefore made no observation on them.

5.42 Second, it was argued by the Government that what were described as "fundamental rights-based relief" of the type sought by FIE is not available under the provisions of the European Convention on Human Rights Act, 2003 ("the 2003 Act").

5.43 Under this heading the Government argued that FIE had failed to identify the precise way in which the 2003 Act permits reliance to be placed on the Convention rights asserted. It was submitted that FIE sought to rely directly on the ECHR which, it was argued, is impermissible. FIE contended that the Government is under an obligation to perform its functions in a manner compatible with the State's obligations under the Convention and that it was, therefore, open to FIE to assert that the Government is in breach of the 2003 Act by virtue of what is contended to be a failure to comply with convention obligations in making the Plan.

(c) *Ultra vires*

5.44 FIE contended that the Plan is *ultra vires* the 2015 Act. The Government contested that assertion.

5.45 A series of detailed arguments were put forward in the written submissions under this heading. FIE drew attention to a number of what were said to be mandatory requirements under the 2015 Act, such as those specified in s.3(1) and s.4(2)(a), (b) and (d). In addition, FIE drew attention to a range of obligations placed on the Government whereby the statute requires that regard be had to certain matters under, for example, s.3(2)(a) – (d). It is said that the Government, in adopting the Plan, failed to comply with each of the relevant obligations.

5.46 In substance, the Government argued in its written submissions that each of the mandatory requirements were met and that there is no basis, on the facts, for suggesting that the Government did not have regard to the matters specified in the sections in question. The resolution of those issues would require a consideration of the precise way in which it is, respectively, argued that the relevant statutory provisions either were or were not complied with.

5.47 However, at the oral hearing a further dispute emerged between the parties concerning the scope of the appeal which was permitted, having regard to the grounds of appeal specified in the application for leave to this Court filed by FIE. With one narrow exception, it was suggested by the Government that FIE had not pursued an appeal to this Court in respect of many of the individual assertions by virtue of which it was argued that the Plan was *ultra vires*. On that basis, the Government contended that FIE was confined to a very narrow ground in respect of the vires argument. FIE disputed that contention on a number of bases to which it will be necessary to refer in due course. It follows, therefore, that it will be necessary to consider the scope of the appeal on *ultra vires* grounds which is properly before this Court.

5.48 It should also be noted that the justiciability argument, to which reference has already been made, was put forward by the Government in respect of the *ultra vires* aspect of the case as well as the rights based elements. It follows, therefore, that while standing was not an issue in respect of these questions, justiciability was.

5.49 The trial judge concluded that the Plan did not breach any of the relevant sections of the 2015 Act and was, therefore, intra vires. In reaching this conclusion, MacGrath J. bore in mind both the standard of review which he considered should be applied to the Plan and the wide latitude to be afforded to the Government in making and adopting the Plan under the 2015 Act.

5.50 MacGrath J. found nothing in the Plan which, in his view, could be said to be inconsistent with the statutory aim to transition to a low carbon, climate resilient and environmentally sustainable economy by 2050 as required by the NTO. He also held that the Plan made clear proposals in respect of the state's pursuit of the NTO by 2050 and, therefore, it could not be said to be inconsistent with s. 4 (2) of the 2015 Act. Furthermore, the trial judge found that the Plan did specify policy measures which, in the opinion of the Government, would be required in order to manage greenhouse gas emissions, consistent with s. 4(2)(b) of the Act. It was also held that the Plan had fulfilled the obligations under s. 3(2) of the 2015 Act, as a result of which the Government was required to have regard to existing EU law and international agreements. Finally, the trial judge held that the plan contained clear sectoral analysis and that responsibilities had evidently been allocated to relevant government ministers under s. 4(2)(d) of the Act. None of the relevant sections of the 2015 Act having been breached, it was the conclusion of the trial judge that the Plan was intra vires.

5.51 In determining whether the Plan was *ultra vires*, the trial judge also placed a great deal of weight on the fact that the Plan represented, in his view, an initial step on a long and

challenging journey towards achieving the NTO. MacGrath J. observed that the principal difference of approach between the parties was one of immediacy, as they disagreed on the extent of the measures required to be taken immediately in order to achieve the NTO by 2050. In this regard, he emphasised that that it was the 2015 Act, as opposed to the Plan, which provided for reaching the NTO by the end of the year 2050. On the basis of this interpretation of the 2015 Act, MacGrath J. found that the legislation did not prescribe or impose on the Government a statutory obligation to achieve particular intermediate targets.

5.52 Finally, in support of its submission that the Plan was *ultra vires*, FIE had relied heavily on the criticisms of the Plan made by the Advisory Council established under s. 8 of the 2015 Act. The trial judge found that, while the Advisory Council was obliged to review the Plan and was expected to deliver a robust and critical appraisal, its recommendations did not amount to the imposition of a statutory obligation. As such, it was the view of the High Court that the criticisms made by the Advisory Council were themselves insufficient to establish that the Plan was *ultra vires*.

(d) Standard of Review

5.53 Insofar as the Court might be persuaded that there are rights which can be asserted by FIE in these proceedings for the purposes of seeking to obtain relief of the type claimed, then an issue potentially arises as to the appropriate standard of review which should be applied by the Court in considering whether the Plan can be said to breach such rights to the extent that relief should be granted. In the same context, issues of proportionality may possibly arise.

5.54 In the respective submissions of the parties there is a debate as to the role which proportionality might play in a judicial review of this type. It is, of course, the case that one of the issues which may arise in the context of a challenge to the substantive legality of a measure adopted under statute can involve the application of the test set out by this Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. To an extent that test may have been modified, at least in certain circumstances, by the introduction of a consideration of proportionality as identified by this Court in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, 2 I.R. 701. However, the Government argued that the place which proportionality holds in a challenge of this type is limited and asserted that the trial judge was correct to identify that proportionality must be seen "through the prism" of *O'Keeffe*. FIE urged that proportionality should be given a wider role.

5.55 Similar considerations arise in the context of the potential application of proportionality in relation to the asserted ECHR rights.

5.56 The Government also suggested that FIE has not truly identified what the practical consequences of the introduction of a test of proportionality would be in the context of this case. Furthermore, it was argued that proportionality can have little or no effect in a case where it can be established that a decision maker, such as the Government here, has a very wide margin of discretion. In the context of that margin of discretion, it was

also said on behalf of the Government that the level of expertise required in the formulation of the Plan should lead the Court to afford a particularly wide margin of appreciation.

5.57 In respect of the correct standard of review to be applied to the Plan, the trial judge observed that it is not the role of the courts to engage in a merit-based review of the actions of the Government in the creation and approval of the Plan. MacGrath J. considered that the jurisprudence indicates that the test of irrationality and unreasonableness as set out in *O'Keeffe* remains largely unaltered.

5.58 Adopting the approach taken by this Court in *Donegan v. Dublin City Council* [2012] IESC 18 and *AAA v. Minister for Justice* [2017] IESC 80, the trial judge found that, where an issue of fundamental rights is agitated, it is appropriate to apply the *O'Keeffe* irrationality test viewed through the prism of a *Meadows* type proportionality analysis. However, the trial judge also emphasised that the court's review must be accommodated within the existing judicial review regime. On that basis, it was considered by MacGrath J. that the level of scrutiny required is perhaps greater than the "no evidence" standard required by *O'Keeffe*, but, at the same time, he was of the view that the review must be within the tenets of those principles and cannot be a merit-based review. MacGrath J. approached the assessment of FIE's claims on this basis.

5.59 In light of this approach to the standard of review, MacGrath J. concluded that, in the absence of any express authority relied on by the FIE to suggest that there is a free standing cause of action to have executive action assessed on the basis of proportionality and having regard to the wide discretion which is available to the Executive, FIE had failed to establish that that Government has acted in a disproportionate manner in the creation and adoption of the Plan.

5.60 I have set out the issues as they appeared from the written submissions filed by the parties subject only to noting where there were developments during either the clarification stage or the oral hearing. It is worth commenting, however, that the case as originally pleaded focused much more substantially on an allegation that the Plan was *ultra vires* the 2015 Act. As the case evolved, the rights based elements of the argument took greater prominence. However, it seems to me that there is a logic in considering the *vires* issue first. If FIE are correct in saying that the Plan did not comply with the 2015 Act then it would follow that the Plan would have to be quashed and that the Government would have to adopt a new Plan. Such a finding would at least have some implications as to how it might be appropriate to deal with the remaining issues. I, therefore, propose to turn first to the question of whether the Plan complied with the 2015 Act.

6. The Statutory Argument

(i) The Issues

6.1 For the reasons already identified there would appear to be five general questions which need to be answered under this heading.

6.2 The first is as to the permitted scope of this appeal so far as the question of *ultra vires* is concerned. As noted earlier, the Government suggests that many of the grounds relied on by FIE in its written and oral submissions in this regard go beyond the grounds specified in the application for leave to appeal. On that basis it is said that those wider grounds should not be entertained by the Court.

6.3 Second, there are certain issues concerning the proper interpretation of the 2015 Act which relate to the question of what that Act requires of a compliant plan.

6.4 Third, and at least in some respects inter-related with the second issue, there is the question of justiciability. In that context the Government argues that the Plan simply represents policy and that it is not, therefore, amenable to judicial review.

6.5 Fourth, there is the question of what is said to be an impermissible collateral attack on the 2015 Act. As noted earlier, the Government argues that the attempt by FIE to suggest that the Plan is *ultra vires* amounts, in substance, to a suggestion that the 2015 Act is itself unconstitutional in some respect and that such a course of action is not permitted.

6.6 Fifth, and depending on the proper answers to the earlier questions, it may be necessary to assess whether the Plan actually complies with the statute as properly interpreted. I propose to deal with each of these issues in turn.

(ii) The Scope of the Appeal

6.7 A starting point has to be to note that it is accepted that a wide range of issues concerning the compliance of the Plan with the provisions of the 2015 Act were canvassed before the High Court and were dealt with by the trial judge in his judgment. This is not a case, therefore, where it is said that FIE are seeking to run a significantly different case on appeal than that which was canvassed at trial. Rather, it is suggested that the grounds of appeal set out by FIE in the application for leave to appeal narrowed the range of issues which can properly be canvassed.

6.8 The relevant part of the grounds of appeal dealing with the contention that the Plan does not comply with the 2015 Act are as follows:-

> "It was wrong to conclude that the Respondent had discharged its obligation to have regard to EU and international law obligations in considering the Plan for approval by virtue of simply referring to those obligations. [Judgment (113)]. The Judgment under appeal did not address the Applicant's specific, separate point re *Tristor* [para 7.14]: cogent reasons must be provided where a decision flies in the face of a matter to which regard must be had."

6.9 Those grounds are, as the Government argued, quite limited. However, that is not the only factor to be taken into account. There is no doubt that FIE did include in its written submissions a number of different contentions concerning what was said to be the failure of the Plan to comply with relevant statutory requirements. Those contentions were

addressed in the replying submissions filed on behalf of the Government. No suggestion was made in those replying submissions to the effect that the case made by FIE was said to go outside the proper scope of the appeal.

6.10 In that context it is important to note the procedures which have been in place in respect of appeals to this Court since the new constitutional architecture brought about by the 33rd Amendment of the Constitution came into force. Each appeal is subject to detailed case management before a single judge. One of the questions which can arise, from time to time, in the context of that case management process, can involve an assertion by one or other party that the written submissions filed by its opponent seeks to rely on matters which are outside the scope of the appeal. Indeed, there have been a number of appeals where the Court has conducted a preliminary hearing to consider the scope of the appeal so that clarity can be brought in advance to the question of the issues which can be properly be canvassed at the hearing of the appeal itself. It is worth recording that neither in its own replying submissions, nor at any stage during case management, was any issue raised by the Government concerning what is now said to be an impermissible reliance by FIE on certain grounds for suggesting that the Plan does not comply with the 2015 Act. The first time that this issue arose was at the oral hearing.

6.11 In reply on this point, counsel for FIE made the point that, had the issue been raised earlier, it would have been open to FIE, if it was considered necessary, to invite the Court to allow FIE to expand its grounds of appeal. Given that, by so doing, FIE would not have been seeking to rely on issues which had themselves not been canvassed the High Court, it must be said that there would at least have been a reasonable possibility that the Court would have acceded to an application to extend the grounds of appeal had one been made.

6.12 However, the matter does not end there. In accordance with Practice Direction S.C. 21, this Court issued a Statement of Case. This new procedure had been in contemplation by the Court for some little time but was brought forward in the context of the need to further refine issues prior to the hearing of the appeal in circumstances where it was anticipated that a significant number of appeals to this Court would, during the continuance of restrictions connected with COVID-19, be conducted as remote hearings.

6.13 The Statement of Case involves the Court setting out its understanding, drawn from the papers filed and from the written submissions of the parties, as to the facts, the issues before the Court, the relevant aspects of the judgment/judgments of the court/courts which have dealt with the case previously and the position of the parties on the issues.

6.14 Precisely because no question had been raised as to the scope of the appeal, the Statement of Case issued in respect of this appeal included, as some of the issues to be considered by the Court, the wider questions concerning the consistency of the Plan with the requirements of the 2015 Act that were dealt with in the written submissions filed by both parties.

6.15 It is again part of the process which has been put in place that parties are invited to identify any aspects of the Statement of Case which they consider to be inaccurate or incomplete. Indeed, in this case, a number of minor observations were made about the text of the Statement of Case which observations were taken on board by the Court leading to the issuing of a slightly revised version. However, no issue was taken about the fact that the Statement of Case suggested that a wider range of issues might require to be dealt with under this heading.

6.16 I would agree with counsel for the Government that it would require a somewhat strained interpretation of the grounds of appeal to suggest that the wider range of challenge set out in the written submissions and addressed in the Statement of Case come within those grounds. Nevertheless, it seems to me that no injustice would be done by allowing FIE to pursue those grounds. As noted, those grounds were canvassed before the High Court, were set out in the written submissions of FIE and fully replied to on behalf of the Government and form part of the Statement of Case which sought to frame the parameters of the issues which would need to be debated at the oral hearing. On that basis I would propose that the Court should consider the issues.

(iii) The Interpretation of the Act

6.17 For present purposes, the main relevant provisions of the Act are to be found in section 4 and in particular the following:-

> *"4. — (1) The Minister shall—*
>
> *(a) not later than 18 months after the passing of this Act, and*
>
> *(b) not less than once in every period of 5 years, make, and submit to the Government for approval, a plan, which shall be known as a national low carbon transition and mitigation plan (in this Act referred to as a "national mitigation plan").*
>
> *(2) A national mitigation plan shall—*
>
> *(a) specify the manner in which it is proposed to achieve the national transition objective,*
>
> *(b) specify the policy measures that, in the opinion of the Government, would be required in order to manage greenhouse gas emissions and the removal of greenhouse gas at a level that is appropriate for furthering the achievement of the national transition objective,*
>
> *(c) take into account any existing obligation of the State under the law of the European Union or any international agreement referred to in section 2, and*
>
> *(d) specify the mitigation policy measures (in this Act referred to as the "sectoral mitigation measures") to be adopted by the Ministers of the Government,*

referred to in subsection (3)(a), in relation to the matters for which each such Minister of the Government has responsibility for the purposes of—

(i) reducing greenhouse gas emissions, and
(ii) enabling the achievement of the national transition objective.

(3) For the purpose of including, in the national mitigation plan, the sectoral mitigation measures to be specified for the different sectors in accordance with subsection (2)(d)—

(a) the Government shall request such Ministers of the Government they consider appropriate to submit to the Minister, within a specified period, the sectoral mitigation measures that each such Minister of the Government proposes to adopt in relation to the matters for which each such Minister of the Government has responsibility,…".

6.18 A number of points are worth noting. First, the overriding requirement of a national mitigation plan is that it must, in accordance with s.4(2)(a), "specify the manner in which it is proposed to achieve the national transition objective". The national transition objective is defined by s.3(1) as requiring the transition by 2050 to a "low carbon, climate resilient and environmentally sustainable economy". Thus the overriding requirement of a compliant plan is that it specifies how that objective is to be achieved by 2050.

6.19 Section 4(2) goes on to require that a compliant plan specify the policy measures which, in the opinion of the Government, are needed to achieve the NTO. Furthermore, such measures are required by s.4(2)(d) to be specified by reference to various sectors.

6.20 It is true that s.4(1)(b) requires there to be a new plan at least every fifth year. But it would be wrong, in my view, to suggest that the legislation contemplates a series of five year plans. Rather, the legislation contemplates a series of rolling plans each of which must be designed to specify, both in general terms and on a sectoral basis, how it is proposed that the NTO is to be achieved. Given that the Plan was adopted in 2017, it was required to be a 33-year plan albeit one which the legislation understood was likely to be adjusted within five years to take into account further developments. However, it seems to me to be absolutely clear that it would be wrong to suggest that the legislation envisages that details be provided for only the first five years. The sole relevance of the five-year provision in s.4(1)(b) is that it recognises that circumstances generally, scientific knowledge and technology and, doubtless, other matters may alter so that it would be appropriate to adjust the Plan from time to time to reflect prevailing circumstances. It also seems to me that the legislation does contemplate, therefore, that the level of detail about what is to happen between, say, 2040 and 2050, may be less than the level of detail about what is to happen in the immediate future. By recognising the possibility of the need to adjust at least every five years, the legislation implicitly accepts that it may become possible, as time goes on, to give greater detail about precisely what is to be done in the latter part of the period up to 2050. However, that analysis does not seem to me to take away from the fundamental obligation of a

compliant plan to, in the words of the statute itself, "specify" how it is intended that the NTO will be met by 2050.

6.21 While dealing with the proper interpretation of the statute, it also seems to me that it provides for two important obligations which inform the statutory purpose. Firstly, s.4(8) provides for a significant national consultation whenever a plan is being formulated. Thus there is a clear statutory policy involving public participation in the process. Second, the very fact that there must be a plan and that it must be published involves an exercise in transparency. The public are entitled to know how it is that the government of the day intends to meet the NTO. The public are entitled to judge whether they think a plan is realistic or whether they think the policy measures adopted in a plan represent a fair balance as to where the benefits and burdens associated with meeting the NTO are likely to fall. If the public are unhappy with a plan then, assuming that it is considered a sufficiently important issue, the public are entitled to vote accordingly and elect a government which might produce a plan involving policies more in accord with what the public wish. But the key point is that the public are entitled, under the legislation, to know what the plan is with some reasonable degree of specificity.

6.22 Thus, it seems to me that key objectives of the statutory regime are designed to provide both for public participation and for transparency around the statutory objective which is the achievement of the NTO by 2050. In light of that view as to the proper approach to the interpretation of the statute, it is next necessary to turn to the question of justiciability.

(iv) Justiciability

6.23 The central argument put forward on behalf of the Government under this heading is that the Plan simply involves the adoption of policy and that, it is said, courts have frequently indicated that matters of policy are not justiciable. The Government draws attention to comments such as those made by Charleton J. (in the High Court) in *Garda Representative Association v. Minister for Finance* [2010] IEHC 78 at para. 15 where the following is said:-

> *"The Government has the power to set policy on areas of national interest and to disperse funds in accordance with that policy. These decisions are, in my view, in a category beyond the scope of judicial review".*

6.24 There may be an issue as to whether there are any areas which are truly completely outside the scope of judicial review on the grounds of a barrier, based on respect for the separation of powers, on the remit of the courts to review policy. But it does not seem to me that such questions properly arise in the circumstances of this case. If the government of the day were to announce that, as a matter of policy, it was going to publish, after public consultation, a plan designed to achieve precisely that which is defined in the 2015 Act as the NTO and then publish a plan which arguably failed to do what it was said it should do, then such questions might well arise. However, the position here is that there is legislation.

6.25 Most legislation has some policy behind it. It is likely to have been the policy of the government which was in power at the time when the legislation was enacted that legislation of the type in question should be promoted. Indeed, in the context of issues concerning whether there has been an impermissible delegation by the Oireachtas of the power to legislate, courts regularly have to consider whether legislation indicates the "principles and policies" by reference to which secondary law-making power can be exercised (see *Cityview Press v. An Chomhairle Oiliúna* (1980) IR 381). It may have been the policy of a particular government to introduce the legislation in question but once that legislation is passed it then become law and not policy.

6.26 In fairness, counsel for the Government accepted that insofar as the process set out in the 2015 Act was concerned, judicial review was available. It was accepted, for example, that, if the Minister did not engage in the statutorily mandated public consultation, then the courts could take appropriate action. However, the position of the Government was that judicial review could extend only to process or procedural matters and not to the substantive content of the report itself.

6.27 In that context, it does have to be acknowledged that some elements of the legislation simply require the Government to adopt a policy designed to the statutory end. For example, the legislation does not require any particular view to be taken as to which sectors are to contribute in which amounts to the reduction of carbon emissions. The legislation leaves it to the government of the day to make those policy choices. It is possible, therefore, that there may be elements of a compliant plan under the 2015 Act which may not truly be justiciable. However, it does seem to me to be absolutely clear that, where the legislation requires that a plan formulated under its provisions does certain things, then the law requires that a plan complies with those obligations and the question of whether a plan actually does comply with the statute in such regard is a matter of law rather than a matter of policy. It becomes a matter of law because the Oireachtas has chosen to legislate for at least some aspects of a compliant plan while leaving other elements up to policy decisions by the government of the day. It seems to me that the requirements of s.4, as to what a plan must specify, come within a category of statutory obligation which is clearly law rather than policy. Whether a plan complies, for example, with the obligation that it be specific as to how the NTO is to be achieved is, in my view, clearly a matter of law. The choices as to how the NTO might be achieved may well be policy choices and real questions might arise at to the extent to which those choices might be justiciable. However, whether the Plan does what it says on the statutory tin is a matter of law and clearly justiciable. For present purposes, it is sufficient to suggest that the Court should hold that a question of whether the Plan meets the specificity requirements in s.4 is clearly justiciable. In the light of that suggestion it is next necessary to consider the question of collateral attack.

(v) Collateral Attack

6.28 It is possible that there might be questions, in certain circumstances, as to whether a challenge to a measure adopted under legislation amounts to an impermissible collateral

attack on the legislation itself. However, it seems to me that issues of that type can be reasonably described as amounting to a corollary of the jurisprudence which has followed from *East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General* (1970) IR 317. Under that jurisprudence, of course, a court must assume that any power or discretion available under a statute will be exercised in a constitutional manner. If the clear wording of the statute would not permit a power to be exercised in a way which was consistent with the Constitution, then the statute must be declared to be inconsistent with the Constitution and thus of no effect.

6.29 If there is only one, or a small number of ways in which a particular statutory power or obligation can be exercised, and if that way or all of those ways would give rise to a breach of the Constitution, then there might well be a case for saying that an attack on an individual exercise of the statutory power concerned would necessarily amount to an attack on the statute itself. If the statute requires something to be done, or done in a particular way, then an attack on a measure adopted under the statute may well amount to a collateral attack on the statute itself unless it could be demonstrated that there were other ways in which measures could have been adopted which would have been consistent with the Constitution.

6.30 It follows, in my view, that the real question that must be addressed is, therefore, as to whether a claim that the Plan is *ultra vires* necessarily amounts to an assertion that any plan adopted in accordance with the statute would have also been unlawful. If it is possible to have a lawful plan under the statute but if, equally, it might be possible to have a plan which, while in technical compliance with the statute, breached rights in some way so that it too was invalid, a challenge mounted on such grounds would clearly not, in my view, amount to a collateral attack. It would simply amount to an assertion that the plan chosen was invalid but that other plans could have been chosen which were valid. Such a challenge would not suggest that there was anything inappropriate about the Act itself.

6.31 Applying that general approach to, in particular, the claim that the Plan lacks the specificity required by s.4 does not, in any way, amount to a suggestion that the 2015 Act is inconsistent with the Constitution. On the contrary, it is simply an assertion that the legislation requires a particular level of specificity which has not been met in the formulation of the Plan. Such an assertion does not carry with it any suggestion that there is any problem concerning the consistency of the 2015 Act with the Constitution.

6.32 As already noted, there was no dispute about the standing of FIE to mount this aspect of the claim. For the reasons set out earlier, I would suggest that, notwithstanding that the matter is not properly addressed in the grounds of appeal, nonetheless this Court should go on to deal with the wider range of *ultra vires* issues canvassed in the written submissions. I have also indicated the reasons why I would hold that that at least some of those issues are clearly justiciable and also do not amount to a collateral attack on the 2015 Act itself. In particular, I would hold that the question of whether the Plan is sufficiently specific to meet the mandatory requirements of s.4 of the 2015 Act is both

justiciable and does not amount to a collateral attack. It follows in turn that it is necessary to consider whether, on the merits, the Plan does meet those requirements of specificity.

(vi) Specificity

6.33 An important part of the case made by the Government draws attention to the fact that the Plan is a living document. So far as it goes, it seems to me that that is a reasonable proposition. As already noted, the 2015 Act contemplates a revision of the Plan at least every five years and that must carry with it an assumption that the intention is that it will be possible to provide greater detail of certain aspects of any plan made under the 2015 Act as matters progress.

6.34 In the course of submissions, counsel for the Government drew attention to a new document, the Climate Action Plan, which was produced in 2019 ("the 2019 Plan"). It was submitted that this 2019 Plan is an example of how policy is evolving. The introduction to the 2019 Plan states that it aims to build on the policy, framework, measures and actions of the Plan. The 2019 Plan, it was suggested, contains updated detail. In particular, Counsel for the Government drew attention to the fact that the 2019 Plan identifies measures which, it is said, were first envisaged in the Plan under review and which are aimed at closing the carbon gap, but which will not be successful in closing it completely. Counsel then submitted that the 2019 Plan identifies the outstanding carbon gap which will remain after the measures referred to above have been implemented and goes on to identify further measures which will be necessary to completely close that gap.

6.35 While there may be some merit in the suggestion that the document in question does provide greater detail in some areas, it must also be emphasised that it is not a plan in the sense in which that term is used in the 2015 Act. It has not been, for example, through the public consultation process which the 2015 Act mandates. While it may provide some level of transparency about the Government's thinking as of 2019, it does not do so in the very formal way which the 2015 Act mandates. Whatever level of clarity is required by that Act about government policy to achieve the NTO by 2050, it must be provided in a formal plan adopted in accordance with the public participation measures set out in the 2015 Act.

6.36 More importantly, the real question at issue is as to whether the Plan itself gives any real or sufficient detail as to how it is intended to achieve the NTO. In that regard a number of factors must be taken in to account.

6.37 First it is necessary to reach some overall conclusion as to the level of specificity which the Act requires. It seems to me that the starting point for a consideration of that question must be to consider the purpose of the 2015 Act as a whole. The public participation element of that purpose is, of course, met by the public consultation process set out in section 4(8). But it is to the transparency element of the purpose of the legislation as a whole that the specificity mandated by s.4 is directed. The purpose of

requiring the Plan to be specific is to allow any interested member of the public to know enough about how the Government currently intends to meet the NTO by 2050 so as to inform the views of the reasonable and interested member of the public as to whether that policy is considered to be effective and appropriate.

6.38 What the public thinks of any plan and what the public might do about it if they do not like a plan is a matter for the public to consider. But the 2015 Act requires that the public have sufficient information from the Plan to enable them to reach such conclusions as they wish. On that basis, it seems to me that the level of specificity required of a compliant plan is that it is sufficient to allow a reasonable and interested member of the public to know how the government of the day intends to meet the NTO so as, in turn, to allow such members of the public as may be interested to act in whatever way, political or otherwise, that they consider appropriate in the light of that policy.

6.39 Next there is what the Plan itself says. In the Plan's introduction it is stated that,

> *"Under the 2015 Act, each National Mitigation Plan must specify the policy measures that Government consider are required to manage greenhouse gas emissions and the removal of emissions at a level that is appropriate for furthering the national transition objective set out in that Act. Given that this long-term objective must be achieved by 2050, it is not prudent or even possible to specify, in detail, policy measures to cover this entire period as we cannot be certain what scientific or technical developments and advancements might arise over the next 30 years or so."*

6.40 Furthermore, it is of some relevance to consider what the Climate Change Advisory Council ("the Advisory Council") says. The Advisory Council was established under s.8 of the 2015 Act. Section 11 of the Act provides that the functions of the Advisory Council include advising and making recommendations to the Minister and the Government in relation to the preparation and adoption of the Plan and in relation to the reduction of GHG emissions and adaptions to the effects of climate change. Sections 12 and 13 of the Act provide that the Advisory Council is to submit annual records and periodic review reports to the Minister. Under s.12(2) of the 2015 Act, the annual report of the Advisory Council is required to include recommendations in relation to the most cost-effective manner of achieving reductions in GHG emissions in order to enable the achievement of the NTO and such other recommendations or advice as the Advisory Council considers necessary or appropriate in order to enable the achievement of the NTO. Section 13(7) provides that a periodic review report should contain a consideration of the NTO and any matter relating to that objective as the Advisory Council considers appropriate, a consideration of (and recommendations in relation to) compliance with obligations arising under EU law or international agreements and any matters relating to such obligations as the Advisory Council considers appropriate together with such advice or recommendations as the Advisory Council considers appropriate in relation to the Plan. The Advisory Council is not, therefore, an informal body but rather one which is established by statute and has, therefore, a role in law.

6.41 I appreciate that the Government is not bound by the views of the Advisory Council. However, in considering, as this Court must, whether the Plan gives sufficient detail to allow a reasonable and interested observer to understand how it is suggested that the NTO is to be met by 2050, it seems to me that it is appropriate to place significant weight on the views of the Advisory Council which is, after all, set up under the same statute as requires the Plan to specify how the NTO is to be achieved.

6.42 In that context it is appropriate to consider what the Advisory Council says. In its 2018 annual report, the Advisory Council stated that,

> *"Ireland's greenhouse gas emissions for 2016, and projections of emissions to 2035, are disturbing. Ireland's greenhouse gas emissions increased again in 2016. Instead of achieving the required reduction of 1 million tonnes per year in carbon dioxide emissions, consistent with the National Policy Position, Ireland is currently increasing emissions at a rate of 2 million tonnes per year… Ireland is completely off course in terms of its commitments to addressing the challenge of climate change."*

Similarly, in the Advisory Council's 2017 periodic review, it was stated that,

> *"Ireland is not projected to meet 2020 emissions reduction targets and is not on the right trajectory to meet longer term EU and national emission reduction commitments."*

6.43 Finally, it is necessary to look at the kind of policies which the Plan suggests need to be followed in order to meet the NTO. Having considered what the Plan says it does seem to me to be reasonable to characterise significant parts of the policies as being excessively vague or aspirational. For example, in the field of agriculture the following is said:-

> *"Ireland is one of a small number of EU countries to have elected to report on grassland and cropland management activities for the 2nd commitment period of the Kyoto Protocol (KP) (2013-2020) so we are endeavouring to improve our understanding of the drivers of emissions from these activities with a view to developing policies and measures to reducing the source of these emissions… Further investigation will also be necessary to analyse synergies between these policies and mobilising carbon credits under the LULUCF (land use, land-use change and forestry) flexibility, referred to below, in particular related to emissions and removals from grassland and cropland activities… While we cannot be sure what future technologies will deliver, this is true of every sector. That said, new technologies are constantly emerging and we will be ready to encourage adoption of those that support climate ambition…*
>
> *In addition, continued research and development is needed to support the development and roll-out of new technologies to reduce greenhouse gas emissions, which highlights the importance of national research and coherence with the EC Horizon 2020 programme and LIFE funding." (Emphasis added.)*

6.44 Furthermore, several of the proposals made in the agriculture chapter of the Plan involve carrying out "further research" into areas such as beef genomics and the behavioural barriers which influence farmers' participation in environmental schemes. This chapter of the Plan also contains somewhat vague proposals to "continue to improve knowledge transfer and exchange to farmers by developing a network across State agencies and relevant advisory bodies" and to "further develop the range and depth of sustainability information collected for beef, dairy and other agriculture sectors."

6.45 I accept that the legislation clearly contemplates that knowledge will evolve and that the detail of the Plan will become more fixed as time moves on. However, that does not seem to me to prevent there being a clear present statutory obligation on the Government, in formulating a plan, to at least give some realistic level of detail about how it is intended to meet the NTO. Some general indication of the sort of specific measures which will or may be required needs to be given. The legislation does, after all, require that a plan "specify" how the NTO is to be met. For the reasons already set out, it seems clear that s.4 requires that the measures necessary to achieve the NTO must be specified not only for the first five years but for the full length of the period then unexpired up to 2050. The level of specificity for the latter years may legitimately be less but there must be, nonetheless, a policy identified which does specify in some reasonable detail the kind of measures that will be required up to 2050. The fact that some of those measures may come to be adjusted over time because of developments in knowledge, data or technology does not alter the fact that a best current estimate as to how the NTO is going to be achieved needs to be made and not left to sometime in the future. As noted earlier, this is not a five-year plan but rather ought to have been a 33-year plan.

6.46 In my judgment the Plan falls a long way short of the sort of specificity which the statute requires. I do not consider that the reasonable and interested observer would know, in any sufficient detail, how it really is intended, under current government policy, to achieve the NTO by 2050 on the basis of the information contained in the Plan. Too much is left to further study or investigation. In that context it must, of course, be recognised that matters such as the extent to which new technologies for carbon extraction may be able to play a role is undoubtedly itself uncertain on the basis of current knowledge. However, that is no reason not to give some estimate as to how it is currently intended that such measures will be deployed and what the effect of their deployment is hoped to be. Undoubtedly any such estimates can be highly qualified by the fact that, as the technology and knowledge develops, it may prove to be more or less able to achieve the initial aims attributable to it.

6.47 However, that is no reason not to indicate how and when particular types of technology are currently hoped to be brought on board. If it proves possible to achieve more than might currently be envisaged then, doubtless, other elements of the Plan can evolve in a way which may place a lesser burden on certain sectors. If it proves that the technology is less useful than currently envisaged, then the burden on some sectors may have to increase. But the public are entitled to know what current thinking is and, indeed, form a judgment both on whether the Plan is realistic and whether the types of technology

considered in the Plan are appropriate and likely to be effective. In my view, a reasonable and interested observer would not really have a sufficient view of just how it is currently hoped that such measures might contribute towards achieving the NTO to form a considered judgement.

6.48 On that basis, I would hold that the Plan does not comply with the requirements of the 2015 Act and, in particular, section 4. On that basis I would hold that the Plan should be quashed on the grounds of having failed to comply with its statutory mandate in that regard.

6.49 Given that the Plan should, in my view, be quashed, it is necessary to consider whether, and, if so, to what extent, it is appropriate to deal with the wider rights based issues which arose on this appeal. In that context it is worth noting that I propose that the Plan be quashed on grounds which are substantive rather than purely procedural. On that basis this plan will never fall to be assessed again, for any new plan adopted under the 2015 Act will need to be different so as to meet the deficiencies which have been identified. There is, therefore, an argument to the effect that any consideration of the further rights based issues which arise on this appeal would be purely theoretical as such a consideration would have, as its focus, a plan which will not be reproduced. However, it seems to me that at least the question of standing is of some continuing importance because that issue would arise in any challenge sought to be brought by FIE, or indeed any other corporate NGO in the environmental field, in respect of any future plan. On that basis, it does seem to me to be appropriate to go on to consider at least the question of standing in respect of the rights based claims made under both the Constitution and the ECHR. It may also, to a limited extent, be appropriate to consider some of the other issues which arose on this appeal. I will address that question when I have outlined my views on the position in respect of standing to which I now turn.

7. Standing

7.1 I propose to consider together the question of the standing of FIE to mount rights-based claims both in respect of certain rights guaranteed by the Constitution and also under the 2003 Act. It is appreciated that it does not necessarily follow that the requirements of standing must be the same under both headings but I nonetheless consider it to be convenient to address all standing issues at this stage.

7.2 The fundamental objection which the Government takes to the proposition that FIE has standing under either heading stems from the fact that all of the rights sought to be relied on, whether under the Constitution or under the ECHR, are personal rights which FIE itself does not enjoy. The rights relied on under the Constitution are the right to life and the right to bodily integrity. Those rights are personal to individuals. Likewise, the rights relied on under the ECHR are those guaranteed by both Article 2 and Article 8. These are again personal rights.

7.3 Counsel accepted that FIE, as a corporate entity, did not itself enjoy the rights sought to be relied on, whether under the Constitution or the ECHR. However, counsel argued that the jurisprudence recognises that there have been cases where entities have been

accorded standing, even though the entities concerned did not enjoy the rights sought to be advanced in the relevant proceedings.

7.4 On the question of standing to put forward the claim based on constitutional rights, the argument put forward by the Government relies on well-established jurisprudence to the effect that Irish constitutional law does not recognise a so-called *actio popularis*, being an action brought, as it were, on behalf of the public as a whole. Furthermore, it is said that, relying on *Cahill v. Sutton* and subsequent case law, Irish standing rules in constitutional cases do not recognise a so-called *jus tertii*, or an action in which a person seeks to rely on rights enjoyed by others. The Government argues that these proceedings fall into both excluded categories.

7.5 As already noted, it was accepted at the oral hearing that FIE does not enjoy the personal constitutional rights on which reliance is sought to be placed. To that extent, it would appear that it must follow that FIE does not, *prima facie*, have standing for constitutional purposes so far as these proceedings are concerned. The real issue under this heading is as to whether this case comes within one of those exceptions where a third party, including a corporate body such as FIE, may have standing to maintain a claim based on the rights of others.

7.6 So far as standing to maintain the claims under the ECHR are concerned, it was accepted at the oral hearing that FIE would not have standing to bring a complaint before the ECtHR. However, it was argued that it did not follow that a party that would not have Strasbourg standing would necessarily be precluded from maintaining a claim under the 2003 Act. The real question, so far as standing to maintain the ECHR aspect of the claim is concerned, was as to whether it is possible for a party, who would not have standing before the ECtHR, to bring proceedings relying on the 2003 Act and, if so, what circumstances permit such a claim to be brought.

7.7 Before considering those issues in detail, it is also necessary to mention the potential reliance placed by FIE on an asserted right to a healthy environment, relying on the judgment of Barrett J. in *Fingal Co. Council*. However, at the oral hearing, counsel for FIE accepted that, in the context of these proceedings, there was no material difference, insofar as this case was concerned, between the established constitutional rights relied on, being the right to life and the right to bodily integrity, and any right to a healthy environment, should one exist. Counsel did, of course, indicate that, should such a right be found to exist under the Constitution, it might well have significant implications in other proceedings where the asserted rights sought to be relied on went beyond representing an aspect of the right to life or the right to bodily integrity. However, it was clear that no such issues arose in this case so that any right to a healthy environment which might be held to exist for the purposes of these proceedings would not extend beyond the boundaries of the right to life and the right to bodily integrity. In those circumstances, it does not seem to me that it is either necessary or appropriate to give any additional consideration to the question of identifying those persons or bodies as might have standing to maintain a claim based on the asserted right to a healthy

environment said to derive from those quintessentially personal rights. In the particular circumstances of this case it is difficult to see how a body, such as FIE, could have standing to maintain a right to a healthy environment (which is co-extensive with the right to life and the right to bodily integrity) unless such a body also would have standing to maintain a claim based directly on those rights. Ultimately, therefore, the question of whether FIE has standing to maintain the constitutional rights based aspect of their case comes down to a question of whether they come within exceptions to the general rule.

7.8 In that context, reliance is placed on decisions such as *Coogan* and *Irish Penal Reform Trust*. However, it is important to return to *Cahill v. Sutton*, which remains the most important case in this area and represents the foundation of the modern law of standing in constitutional cases. It is important to recognise first that *Cahill v. Sutton* suggested a general rule which is to the effect that, in order to have standing, a claimant must be able to show that rights which that claimant enjoyed have potentially been interfered with (or be in danger of being interfered with) by the measure whose constitutionality is in question. In that context Henchy J. stated the following at pp. 281-282:-

> *"The general approach to the question of standing that has been adopted in other jurisdictions was referred to as follows in the judgment of this Court in the East Donegal Co-Operative case (at p.338):*
>
> > *"With regard to the locus standi of the plaintiffs the question raised has been determined in different ways in countries which have constitutional provisions similar to our own. It is unnecessary here to go into this matter in detail beyond stating that at one end of the spectrum of opinions on this topic one finds the contention that there exists a right of action akin to an actio popularis which will entitle any person, whether he is directly affected by the Act or not, to maintain proceedings and challenge the validity of any Act passed by the parliament of the country of which he is a citizen or to whose laws he is subject by residing in that country. At the other end of the spectrum is the contention that no one can maintain such an action unless he can show that not merely do the provisions of the Act in question apply to activities in which he is currently engaged but that their application has actually affected his activities adversely. The Court rejects the latter contention and does not find it necessary in the circumstances of this case to express any view upon the former".*
>
> *In point of fact, in no comparable jurisdiction to which the Court's attention has been directed does either of those two polarised opinions or contentions seem to have received authoritative judicial acceptance. On the contrary, in other jurisdictions the widely accepted practice of courts which are invested with comparable powers of reviewing legislation in the light of constitutional provisions is to require the person who challenges a particular legislative provision to show either that he has been personally affected injuriously by it or that he is in imminent danger of becoming the victim of it. This general rule means that the*

challenger must adduce circumstances showing that the impugned provision is operating, or is poised to operate, in such a way as to deprive him personally of the benefit of a particular constitutional right. In that way each challenge is assessed judicially in the light of the application of the impugned provision to the challenger's own circumstances."

7.9 However, in *Cahill v. Sutton*, this Court also recognised that the general rule can be relaxed in appropriate cases. At p. 285 of his judgement in that case, Henchy J stated:-

"This rule, however, being but a rule of practice must, like all such rules, be subject to expansion, exception or qualification when the justice of the case so requires. Since the paramount consideration in the exercise of the jurisdiction of the Courts to review legislation in the light of the Constitution is to ensure that persons entitled to the benefit of a constitutional right will not be prejudiced through being wrongfully deprived of it, there will be cases where the want of the normal locus standi on the part of the person questioning the constitutionality of the statute may be overlooked if, in the circumstances of the case, there is a transcendent need to assert against the statute the constitutional provision that has been invoked. For example, while the challenger may lack the personal standing normally required, those prejudicially affected by the impugned statute may not be in a position to assert adequately, or in time, their constitutional rights. In such a case the court might decide to ignore the want of normal personal standing on the part of the litigant before it. Likewise, the absence of a prejudice or injury peculiar to the challenger might be overlooked, in the discretion of the court, if the impugned provision is directed at or operable against a grouping which includes the challenger, or with whom the challenger may be said to have a common interest—particularly in cases where, because of the nature of the subject matter, it is difficult to segregate those affected from those not affected by the challenged provision.

However, those examples of possible exceptions to the rule should not be taken as indicating where the limits of the rule are to be drawn. It is undesirable to go further than to say that the stated rule of personal standing may be waived or relaxed if, in the particular circumstances of a case, the court finds that there are weighty countervailing considerations justifying a departure from the rule."

7.10 In my view, Henchy J. also made a number of important observations at pp. 282-284 in the following terms:-

"This general, but not absolute, rule of judicial self-restraint has much to commend it. It ensures that normally the controversy will rest on facts which are referable primarily and specifically to the challenger, thus giving concreteness and first-hand reality to what might otherwise be an abstract or hypothetical legal argument. The resulting decision of the court will be either the allowance or the rejection of the challenge in so far as it is based on the facts adduced. If the challenge succeeds, the impugned provision will be struck down. If it fails, it does not follow that a

similar challenge raised later on a different set of facts will fail: see Ryan v. The Attorney General [1965] I.R. 294. at p. 353 of the report. In that way the flexibility and reach of the particular constitutional provision invoked are fully preserved and given necessary application.

...

There is also the hazard that if the courts were to accord citizens unrestricted access, regardless of qualification, for the purpose of getting legislative provisions invalidated on constitutional grounds, this important jurisdiction would be subject to abuse."

7.11 Henchy J. went on to comment as follows:-

"In particular, the working interrelation that must be presumed to exist between Parliament and the Judiciary in the democratic scheme of things postulated by the Constitution would not be served if no threshold qualification were ever required for an attack in the courts on the manner in which the Legislature has exercised its law-making powers. Without such a qualification the courts might be thought to encourage those who have opposed a particular Bill on its way through Parliament to ignore or devalue its elevation into an Act of Parliament by continuing their opposition to it by means of an action to have it invalidated on constitutional grounds. It would be contrary to the spirit of the Constitution if the courts were to allow the opposition that was raised to a proposed legislative measure, inside or outside Parliament, to have an unrestricted and unqualified right to move from the political arena to the High Court once a Bill has become an Act. And it would not accord with the smooth working of the organs of State established by the Constitution if the enactments of the National Parliament were liable to be thwarted or delayed in their operation by litigation which could be brought at the whim of every or any citizen, whether or not he has a personal interest in the outcome."

7.12 It might well be said that the distinction identified by Henchy J. is of some relevance in the context of these proceedings. There clearly is a risk of the distinction between rights based litigation, on the one hand, and political or policy issues, on the other becoming blurred in cases such as this. I would view the observations of Henchy J., which I have cited, as conveying a warning against an over-liberal use of the undoubted entitlement of the courts to relax the general rule. However, it also seems clear that cases such as *Coogan* and *Irish Penal Reform Trust* do represent appropriate relaxations of the general rule in accordance with the overall approach identified in *Cahill v. Sutton*. It is important to analyse the reasons why standing was accepted as existing in those cases.

7.13 The rights asserted in *Coogan* were the rights of the unborn. It is clear that any rights which the unborn might have enjoyed, whether under the 8th Amendment to the Constitution (since repealed) or otherwise, would inevitably involve some other person or body seeking to vindicate those rights. In *Coogan*, Finlay C.J. commented, at p. 742 as follows:-

> *"In such a case I am satisfied that the test is that of a bona fide concern and interest, interest being used in the sense of proximity or an objective interest. To ascertain whether such bona fide concern and interest exists in a particular case it is of special importance to consider the nature of the constitutional right sought to be protected. In this case that right is the right to life of an unborn child in its mother's womb. The threat to that constitutional right which it is sought to avoid is the death of the child. In respect of such a threat there can never be a victim or potential victim who can sue… The part, however, that the plaintiff has taken in the proceedings to which I have referred, which were successfully brought to conclusion by the Attorney General at its relation, and the particular right which it seeks to protect with its importance to the whole nature of our society, constitute sufficient grounds for holding that it is a person with a bona fide concern and interest and accordingly has the necessary legal standing to bring the action."*

7.14 While McCarthy J. dissented on the question of whether the plaintiffs in that case had standing, he did so on the basis of his view that the appropriate plaintiff was the Attorney General in all the circumstances of the case. McCarthy J., therefore, considered that the rights involved could be vindicated but with a different plaintiff. He did, however, in that context, observe, in a typically pithy fashion, at p. 750 the following:-

> *"The direct threat to that right to life is an abortion, a procedure which in the nature of things is likely to be procured by the expectant mother. The two whose rights are protected cannot or will not invoke the constitutional guarantee. Who will?"*

7.15 On one view it might be said that *Irish Penal Reform Trust* extends the scope of standing a little further. In that case the Irish Penal Reform Trust was one of three plaintiffs seeking to challenge prison conditions and their compatibility with the Constitution. The other two plaintiffs were former prisoners. The case sought to address what, it was contended, amounted to systemic deficiencies in the treatment of prisoners with psychiatric problems. If the case were limited to the personal experience of the two individual plaintiffs, it would not have been possible to advance the case that the deficiencies were systemic.

7.16 Furthermore, a representative of the Irish Penal Reform Trust swore an affidavit setting out her belief, and that of the Trust, that, in their experience, prisoners affected by these deficiencies (by definition prisoners suffering from psychiatric illnesses) are not in a position to assert adequately or in time their constitutional rights, especially in regard to systemic deficiencies. The Trust had carried out a great deal of work and expended considerable effort in bringing the proceedings, including the retention of international experts. It was specifically stated that the Trust believed that, notwithstanding the fact that prison conditions were a matter of interest to the wider community, and that it strongly contended the conditions in Mountjoy Prison did not comply at the time with basic standards of human rights, nevertheless, such matters would never be adequately addressed unless the proceedings could be determined as constituted.

7.17 Gilligan J. in his judgment observed that Henchy J. in *Cahill v Sutton* had been careful to note that the rule on standing was a rule on practice and could be waived or relaxed if, in the particular circumstances of the case, there were weighty countervailing considerations. An example given by Henchy J. was where those prejudicially affected by the impugned statute might not be in a position to assert adequately or in time their constitutional rights. Gilligan J. considered that a case illustrating this exception was *Coogan*. Gilligan J. also considered that prisoners with psychiatric problems were among the most vulnerable and disadvantaged members of society. Many prisoners might be ignorant of their rights and fear retribution if they challenged the prison authorities. Such prisoners might well be unaware of the constitutional right to receive a better standard of treatment. This put the particular category of prisoner in an extremely disadvantaged position. He considered that this was an appropriate case in which to relax the rules on standing in such circumstances.

7.18 In the present case, no real attempt has been made to explain why FIE has launched these proceedings and why individual plaintiffs have not commenced the proceedings, or sought to be joined. It is not suggested that the potential class of individual plaintiffs (which is very extensive indeed) suffers from any vulnerability or would face any difficulty in asserting the claim or that the claim would in any way be limited if brought by individuals. For these reasons and more, it does not seem to me that *Irish Penal Reform Trust* supports the plaintiff's case on standing.

7.19 It should be emphasised that Irish standing rules are, therefore, flexible but not infinitely so. This point was again emphasised in *Mohan* which represents the latest clarification of the constitutional law of standing by this Court. In that context it is worth recalling that the standing recognised in *Digital Rights* involved claims which a company was entitled to bring as a company.

7.20 Thus there was no question in *Digital Rights* of a corporate entity being permitted to assert rights which were only those of others. The rights were those of the company itself. I would, in any event, reserve my position on whether I would fully follow all of the reasoning in *Digital Rights* concerning standing. For present purposes it is sufficient to indicate that *Digital Rights* does not provide any basis for suggesting that a corporate entity has standing to bring proceedings which solely seek to advance the rights of individuals rather than rights of the corporate entity itself.

7.21 I would accept, therefore, that there are circumstances in which an overly strict approach to standing could lead to important rights not being vindicated. However, that does not take away from the importance of standing rules in our constitutional order. The underlying position was reiterated in the recent decision of this Court in *Mohan*, which re-emphasised the need, ordinarily, for a plaintiff to be able to demonstrate that they have been affected in reality or as a matter of fact by virtue of the measure which they seek to challenge on the basis that it breaches rights. That remains the fundamental proposition. The circumstances in which it is permissible to accord standing outside the bounds of that basic principle must necessarily be limited and involve situations where there would be a

real risk that important rights would not be vindicated unless a more relaxed attitude to standing were adopted.

7.22 That leads to a consideration of the reasons why a corporate entity has chosen to bring these proceedings relying, as FIE does, on personal rights which it does not enjoy. Other than a suggestion that it was desire to protect individuals from a possible exposure to the costs of unsuccessful proceedings, no real explanation was given as to why an individual or individuals could not have brought these proceedings instead of FIE. There does not seem to be any practical reason why FIE could not have provided support for such individuals in whatever manner it considered appropriate. It seems to me that these proceedings are a far cry from the kind of circumstances which this Court accepted justified departure from ordinary standing rules in cases such as *Coogan* and *Irish Penal Reform Trust*. To hold that FIE had standing in the circumstances of this case would, in my view, involve a move to a situation where standing was greatly expanded and the absence of standing would largely be confined to cases involving persons who simply maintain proceedings on a meddlesome basis. I do not consider that there is a justification for such a wide expansion of our standing rules. Nor do I consider that FIE have put forward any adequate basis to explain why these proceedings could not have been brought in the ordinary way by persons who would undoubtedly enjoy the right to life and the right to bodily integrity on which reliance is placed. In those circumstances I would conclude that FIE does not have standing to maintain the constitutional rights based aspect of their case.

7.23 Turning to the issues which arise in respect of standing to maintain the ECHR claim, I am prepared to accept that there may be circumstances where a person or entity might not have standing to bring a complaint before the ECtHR but where, in accordance with Irish standing rules, the same party might be able to maintain a claim based on the 2003 Act. However, I find it difficult to see how a party who would not have standing to maintain a particular form of claim based on an asserted breach of Irish constitutional rights could have standing to maintain a claim based on the 2003 Act, where the rights under the ECHR said to be infringed are the same or analogous rights to those which might have been asserted under the Constitution.

7.24 Having concluded that FIE would not have standing to maintain a claim based on the right to life or the right to bodily integrity of others under the Irish Constitution, it seems to me to follow that FIE likewise does not have standing to maintain a claim based on the provisions of the 2003 Act where reliance is being placed on the analogous Art. 2 and Art. 8 rights. I would, therefore, conclude that FIE does not have standing to maintain any of the rights based claims put forward in these proceedings.

7.25 In those circumstances I would not, ordinarily, go on to deal with any other aspects of the case and would leave further consideration of any of the issues raised to a case brought by a person or persons who did have standing. However, there is one aspect of the case on which I feel it appropriate to comment. The question of whether there exists an unenumerated or derived right to a healthy environment under the Irish Constitution was

debated in these proceedings both in the High Court and in this Court. MacGrath J., in the High Court, indicated that he was prepared to accept, for the purposes of these proceedings, that such a right does exist following on from the decision of Barrett J. in *Fingal Co. Council*. Lest by not commenting on those matters it might in the future be argued that this Court had implicitly accepted the position identified by Barrett J., and accepted by MacGrath J. for the purposes of the argument, in their respective High Court judgments, I feel it is necessary to go on to make at least some observations on that issue.

8. A Constitutional Right to a Healthy Environment?

8.1 In *Fingal County Council*, at para. 264 of his judgment, Barrett J. said the following:-

> *"A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Art. 40.3.1° of the Constitution. It is not so utopian a right that it can never be enforced. Once concretised into specific duties and obligations, its enforcement is entirely practicable. Even so, every dimension of the right to an environment that is consistent with the human dignity and well-being of citizens at large does not, for the reasons identified previously above, require to be apprehended and to be described in detail before that right can be recognised to exist. Concrete duties and responsibilities will fall in time to be defined and demarcated. But to start down that path of definition and demarcation, one first has to recognise that there is a personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large and upon which those duties and responsibilities will be constructed. This the court does."*

8.2 In the High Court in this case, MacGrath J. said the following at para. 133 of his judgment:-

> *"Accepting for the purposes of this case, that there is an unenumerated right to an environment consistent with human dignity, in my view, it cannot be concluded that it is the plan which places these rights at risk."*

8.3 An appropriate starting point might well be to consider what precisely was meant by Barrett J. when he suggested that there was an unenumerated constitutional right to the environment consistent with human dignity. It is perhaps overly pedantic to say that everyone has an environment whether it be good or bad. A world in which some of the more pessimistic predictions connected with climate change had actually come to pass would still be a world in which there was an environment, albeit one which might be extremely hostile and very dangerous. I understand that it was for such reasons that, quite sensibly, counsel for FIE suggested that the appropriate characterisation of the right (at least for the purposes of this case) was to describe it as a right to a healthy environment. In fairness to Barrett J., it should again be noted that he did describe the right as being one of an entitlement to an environment consistent with human dignity.

8.4 I should start by commenting that, in my view, it would be more appropriate to characterise constitutional rights which cannot be found in express terms in the wording of the Constitution itself as being derived rights rather than unenumerated rights. The jurisprudence has, of course, identified rights recognised by the Constitution where the wording of the text does not use a term directly providing for the right concerned. There is no direct reference to privacy. There is no direct reference to a right not to be inappropriately deprived of the ability to work. Yet both of these rights have been recognised as existing under the Constitution, the former in *McGee v. The Attorney General* [1974] IR 284 and the latter in *N.V.H v. Minister for Justice and Equality* [2018] 1 IR 246.

8.5 There is a sense in which the term "unenumerated" is not incorrect, precisely because the wording of the Constitution does not refer directly to rights such as those which I have mentioned. However, there is a danger that the use of the term "unenumerated" conveys an impression that judges simply identify rights of which they approve and deem them to be part of the Constitution.

8.6 That does not seem to me to have been the process by which the so-called unenumerated rights have come to be identified, but nonetheless it carries a risk of misimpression. It is for that reason that I would consider the term "derived rights" as being more appropriate, for it conveys that there must be some root of title in the text or structure of the Constitution from which the right in question can be derived. It may stem, for example, from a constitutional value such as dignity when taken in conjunction with other express rights or obligations. It may stem from the democratic nature of the State whose fundamental structures are set out in the Constitution. It may derive from a combination of rights, values and structure. However, it cannot derive simply from judges looking into their hearts and identifying rights which they think should be in the Constitution. It must derive from judges considering the Constitution as a whole and identifying rights which can be derived from the Constitution as a whole.

8.7 In saying that, I would emphasise that I do not thereby advocate a narrow textualist approach. In that context I fully agreed with the observations of Henchy J. in *McGee*, where, at p.325 he says:-

> *"It is the totality and absoluteness of the prohibition effected by s. 17 of the Act of 1935 that counsel for the plaintiff impugn as infringing what they say are her constitutionally guaranteed rights as a citizen. As has been held in a number of cases, the unspecified personal rights guaranteed by sub-s. 1 of s. 3 of Article 40 are not confined to those specified in sub-s. 2 of that section. It is for the Courts to decide in a particular case whether the right relied on comes within the constitutional guarantee. To do so, it must be shown that it is a right that inheres in the citizen in question by virtue of his human personality. The lack of precision in this test is reduced when sub-s. 1 of s. 3 of Article 40 is read (as it must be) in the light of the Constitution as a whole and, in particular, in the light of what the Constitution, expressly or by necessary implication, deems to be fundamental to*

the personal standing of the individual in question in the context of the social order envisaged by the Constitution. The infinite variety in the relationships between the citizen and his fellows and between the citizen and the State makes an exhaustive enumeration of the guaranteed rights difficult, if not impossible."

8.8 This approach was extended on by Henchy J. in his dissenting judgment in *Norris v. The Attorney General* [1984] IR 36. The above passage was also cited by McCarthy J. in his judgment in the same case at p. 97, and the general approach identified has been affirmed by this Court more recently in *Fleming v. Ireland & Ors*. [2013] 2 IR 417 and in *N.V.H.*

8.9 What needs to be guarded against is allowing for a blurring of the separation of powers by permitting issues which are more properly political and policy matters (for the legislature and the executive) to impermissibly drift into the judicial sphere. Where it is possible properly to derive rights from the Constitution then no such risk arises. Where, however, judges are simply asked to identify rights which they consider might be "a good thing" then the separation of powers is truly blurred. Indeed, in this context, there are common considerations between these issues and questions of standing already addressed. Allowing even well motivated parties to rely on constitutional rights which they do not enjoy, likewise, runs the risk of blurring the lines between the judicial and the other powers of the State.

8.10 Returning to the issue in this case, it might be said that, in one sense, the beginning and end of this argument stems from the acceptance by counsel for FIE that a right to a healthy environment, should it exist, would not add to the analysis in these proceedings, for it would not extend the rights relied on beyond the right to life and the right to bodily integrity whose existence is not doubted. However, that very fact seems to me to demonstrate one of the difficulties with the asserted right. What exactly does it mean? How does it fit into the constitutional order? Does it really advance rights beyond the right to life and the right to bodily integrity? If not, then what is the point of recognising such a right? If so, then in what way and within what parameters?

8.11 The very vague nature of the right identified by Barrett J. in *Fingal Co. Council* can, in my view, be demonstrated from the fact that it seemed to have little or no bearing on the outcome of those proceedings. While it is of course the case, as Barrett J. noted, that the parameters of identified rights can be refined as the case law develops, it does seem to me that there needs to be at least some concrete shape to a right before it is appropriate to identify it as representing a standalone and separate right derived from the Constitution. If it does not extend existing recognised rights, then there is no need for it. If it does extend existing recognised rights, then there needs to be at least some general clarity about the nature of the right so that there can be a proper analysis of whether the recognition of the asserted right can truly be derived from the Constitution itself. In my view, the right to an environment consistent with human dignity, or alternatively the right to a healthy environment, as identified in *Fingal Co. Council* and as accepted by the trial judge for the purposes of argument in this case, is impermissibly vague. It either does

not bring matters beyond the right to life or the right to bodily integrity, in which case there is no need for it. If it does go beyond those rights, then there is not a sufficient general definition (even one which might, in principle, be filled in by later cases) about the sort of parameters within which it is to operate.

8.12 In the course of argument, the Court was referred to a textbook by David Boyd, a leading expert in Canadian environmental law and policy, entitled *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2011), which is a detailed and scholarly account of the recognition of environmental rights in many jurisdictions. It is, however, striking that, in most of the states where a constitutional right in the environmental field has been recognised, same has been achieved by the inclusion of express wording in the constitutional instruments of the state concerned. In other words, in accordance with the appropriate process to adopt or amend the Constitution of the state concerned, a particular type of environmental right has been inserted into the Constitution. The advantage of express incorporation is that the precise type of constitutional right to the environment which is to be recognised can be the subject of debate and democratic approval. As is also clear from *Boyd*, there have been a number of different models adopted to incorporate environmental rights into constitutional instruments.

8.13 It is striking that, with one exception, no such right has been recognised in countries within the broad common law family. The exception concerned is India. However, it is necessary to have regard to the fact that there are significant differences between the constitutional structure and context in India compared with this jurisdiction which would make it inappropriate, without significant further analysis, to consider that the relevant Indian jurisprudence in this case might prove persuasive in the Irish constitutional regime. Given that neither party sought to place reliance on Indian case law, I do not think it appropriate, in the context of this case, to consider the Indian case law further.

8.14 It does not seem to me that a cogent case has been made out for the identification of a derived right to a healthy environment. However, it is important, in saying that, to fully acknowledge that there may well be cases, which are environmental in nature, where constitutional rights and obligations may be engaged. Indeed, this case provides a good example. Had standing been established or had similar proceedings been brought by persons who undoubtedly had standing, then it would have been necessary for this 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. Other examples could, doubtless be given. In indicating that I consider the asserted right to a healthy environment to be an either unnecessary addition (if it does not go beyond the right to life and the right to bodily integrity) or to be impermissibly vague (if it does), I should not be taken as suggesting that constitutional rights and state obligations have no role to play in environment issues.

8.15 There is, perhaps, a connecting thread between some of the important elements which are touched on in this judgment. As noted in the section on *ultra vires*, what might well

have been a non-justiciable question of policy clearly became justiciable because both a policy (the NTO) and the need to specify how that policy was to be achieved became matters of law by virtue of the 2015 Act. The fact that policy became law obliges this Court to consider whether the Plan complied with the legal obligations imposed on a plan by the 2015 Act and, if not satisfied that the Plan does so, to say so in clear terms.

8.16 Similar considerations apply in respect of constitutional claims. It is again important to reiterate that questions of general policy do not fall within the remit of the courts under the separation of powers. However, if an individual with standing to assert personal rights can establish that those rights have been breached in a particular way (or, indeed, that the Constitution is not being complied with in some matter that affects every citizen equally as occurred in *Crotty v An Taoiseach* [1987] I.R. 713), then the Court can and must act to vindicate such rights and uphold the Constitution. That will be so even if an assessment of whether rights have been breached or constitutional obligations not met may involve complex matters which can also involve policy. Constitutional rights and obligations and matters of policy do not fall into hermetically sealed boxes. There are undoubtedly matters which can clearly be assigned to one or other. However, there are also matters which may involve policy, but where that policy has been incorporated into law or may arguably impinge rights guaranteed under the Constitution, where the courts do have a role.

8.17 In that context, I do acknowledge that, in an appropriate case, it may well be that constitutional rights might play a role in environmental proceedings. I would not rule out the possibility that the interplay of existing constitutional rights with the constitutional values to be found in the constitutional text and other provisions, such as those to be found in Art. 10 and also the right to property and the special position of the home, might give rise to specific obligations on the part of the State in particular circumstances. Exactly how any such rights or obligations should be characterised and how the boundaries of such rights and obligations might be defined is a matter to be addressed in cases where they truly arise and have the potential to affect the result. Those questions do not arise in this case and it would, therefore, be, in my view, wholly inappropriate to address them. For present purposes, I think it is sufficient to indicate that the ill-defined right to a healthy environment sought to be relied on is either superfluous or lacking in precision and I would not suggest that a right as so described can be derived from the Constitution.

9. Conclusions

9.1 In this judgment I first consider the argument put forward by FIE to the effect that the Plan does not comply with its legislative remit under the 2015 Act and is, therefore, *ultra vires*. It is noted that there was no question raised at the hearing as to the standing of FIE to make arguments along those lines. For the reasons set out in this judgment I conclude that, contrary to the submissions made on behalf of the Government, FIE should be entitled to pursue the wider range of argument on this issue addressed in their written submissions. I also conclude that the issues are justiciable and do not amount to an

impermissible impingement by the courts into areas of policy. What might once have been policy has become law by virtue of the enactment of the 2015 Act.

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

9.3 For the reasons also set out in this judgment, I have concluded that the Plan falls well short of the level of specificity required to provide that transparency and to comply with the provisions of the 2015 Act. On that basis, I propose that the Plan be quashed.

9.4 I have also considered in this judgment whether it is appropriate to go on to deal with any of the further issues raised, given that I propose that the Plan be quashed and that it follows that an identical plan cannot be made in the future. However, as the issues of standing debated in this appeal could well arise in any future challenge to a new plan, I do address those questions. For the reasons set out in this judgment I conclude that FIE, as a corporate entity which does not enjoy in itself the right to life or the right to bodily integrity, does not have standing to maintain the rights based arguments sought to be put forward whether under the Constitution or under the ECHR. I also conclude that it has not been shown that it is necessary to allow FIE to have standing under the exception to the general rule, which arises in circumstances where refusing standing would make the enforcement of important rights either impossible or excessively difficult.

9.5 On that basis I did not consider it appropriate to address the rights-based arguments put forward, but do offer views on the question of whether there is an unenumerated or, as I would prefer to put it, derived right under the Constitution to a healthy environment. While not ruling out the possibility that constitutional rights and obligations may well be engaged in the environmental field in an appropriate case, I express the view that the asserted right to a healthy environment is either superfluous (if it does not extend beyond the right to life and the right to bodily integrity) or is excessively vague and ill-defined (if it does go beyond those rights). As thus formulated, I express the view that such a right cannot be derived from the Constitution. I would reserve the position of whether, and if in what form, constitutional rights and state obligations may be relevant in environmental litigation to a case in which those issues would prove crucial.

TAB D

ECLI:NL:HR:2019:2007

Instantie

Hoge Raad

Datum uitspraak

20-12-2019

Datum publicatie

13-01-2020

Zaaknummer

19/00135 (Engels)

Rechtsgebieden

Civiel recht

Bijzondere kenmerken

Cassatie

Inhoudsindicatie

Klimaatzaak Urgenda. Mensenrechten. EVRM. VN-Klimaatverdrag. Bevel aan Staat om maatregelen te nemen tegen klimaatverandering. Gevaar klimaatverandering. Beschermingsomvang art. 2 en 8 EVRM; positieve verplichtingen. Effectieve rechtsbescherming art. 13 EVRM. Deelverantwoordelijkheid staten. Art. 3:305a BW en art. 34 EVRM. Doelstelling van 25-40% reductie van de uitstoot van broeikasgassen en de noodzaak daarvan. Internationaal draagvlak daarvoor. Binding Nederland aan deze doelsteling. Verantwoord beleid en de onderbouwing daarvan. Is sprake van ontoelaatbaar bevel tot wetgeving? Politiek domein. (English version)

Vindplaatsen

Rechtspraak.nl

Uitspraak

SUPREME COURT OF THE NETHERLANDS

CIVIL DIVISION

Number 19/00135

Date 20 December 2019

JUDGMENT

In the matter between:

THE STATE OF THE NETHERLANDS (MINISTRY OF ECONOMIC AFFAIRS AND CLIMATE POLICY),
seated in The Hague,
CLAIMANT in cassation,
referred to hereinafter as: ‘the State’,
counsel: attorneys K. Teuben, M.W. Scheltema and J.W.H. van Wijk,

and

STICHTING URGENDA,
having its office in Amsterdam,
RESPONDENT in cassation,
referred to hereinafter as: 'Urgenda',
counsel: attorney F.E. Vermeulen.

Summary of the Decision

The issue in this case is whether the Dutch State is obliged to reduce, by the end of 2020, the emission of greenhouse gases originating from Dutch soil by at least 25% compared to 1990, and whether the courts can order the State to do so.

Urgenda's claim and the opinions of the District Court and the Court of Appeal

Urgenda sought a court order directing the State to reduce the emission of greenhouse gases so that, by the end of 2020, those emissions will have been reduced by 40%, or in any case at by at least 25%, compared to 1990.

In 2015, the District Court allowed Urgenda's claim, in the sense that the State was ordered to reduce emissions by the end of 2020 by at least 25% compared to 1990.

In 2018, the Court of Appeal confirmed the District Court's judgment.

Appeal in cassation

The State instituted an appeal in cassation in respect of the Court of Appeal's decision, asserting a large number of objections to that decision.

The deputy Procurator General and the Advocate General advised the Supreme Court to reject the State's appeal and thus to allow the Court of Appeal's decision to stand.

Opinion of the Supreme Court

The Supreme Court concludes that the State's appeal in cassation must be rejected. That means that the order which the District Court issued to the State and which was confirmed by the Court of Appeal, directing the State to reduce greenhouse gases by the end of 2020 by at least 25% compared to 1990, will stand as a final order.

The Supreme Court's opinion rests on the facts and assumptions which were established by the Court of Appeal and which were not disputed by the State or Urgenda in cassation. In cassation, the Supreme Court determines whether the Court of Appeal properly applied the law and whether, based on the facts that may be taken into consideration, the Court of Appeal's opinion is comprehensible and adequately substantiated.

The grounds for the Supreme Court's judgment are laid down below in sections 4-8 of the judgment. These grounds will be summarised below. This summary does not supersede the grounds for this judgment and does not fully reflect the Supreme Court's opinion.

Dangerous climate change

(see paras. 4.1-4.8, below)

Urgenda and the State both endorse the view of climate science that a genuine threat exists that the climate will undergo a dangerous change in the coming decades. There is a great deal of agreement on the presence of that threat in climate science and the international community. In that respect and briefly put, this comes down to the following.

The emission of greenhouse gases, including CO2, is leading to a higher concentration of those gases in the atmosphere. These greenhouse gases retain the heat radiated by the earth. Because over the last century and a half since the start of the industrial revolution, an ever-increasing volume of greenhouse gases is being emitted, the earth is becoming warmer and warmer. In that period, the earth has warmed by approximately 1.1oC, the largest part of which (0.7oC) has occurred in the last forty years. Climate science and the international community largely agree on the premise that the warming of the earth must be limited to no more than 2oC, and according to more recent insights to no more than 1.5oC. The warming of the earth beyond that temperature limit may have

extremely dire consequences, such as extreme heat, extreme drought, extreme precipitation, a disruption of ecosystems that could jeopardise the food supply, among other things, and a rise in the sea level resulting from the melting of glaciers and the polar ice caps. That warming may also result in tipping points, as a result of which the climate on earth or in particular regions of earth changes abruptly and comprehensively. All of this will jeopardise the lives, welfare and living environment of many people all over the world, including in the Netherlands. Some of these consequences are already happening right now.

Protection of human rights based on the ECHR

(see paras. 5.2.1-5.5.3, below)

The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) requires the states which are parties to the convention to protect the rights and freedoms established in the convention for their inhabitants. Article 2 ECHR protects the right to life, and Article 8 ECHR protects the right to respect for private and family life. According to the case law of the European Court of Human Rights (ECtHR), a contracting state is obliged by these provisions to take suitable measures if a real and immediate risk to people's lives or welfare exists and the state is aware of that risk.

The obligation to take suitable measures also applies when it comes to environmental hazards that threaten large groups or the population as a whole, even if the hazards will only materialise over the long term. While Articles 2 and 8 ECHR are not permitted to result in an impossible or disproportionate burden being imposed on a state, those provisions do oblige the state to take measures that are actually suitable to avert the imminent hazard as much as reasonably possible. Pursuant to Article 13 ECHR, national law must offer an effective legal remedy against a violation or imminent violation of the rights that are safeguarded by the ECHR. This means that the national courts must be able to provide effective legal protection.

Global problem and national responsibility

(see paras. 5.6.1-5.8, below)

The risk of dangerous climate change is global in nature: greenhouse gases are emitted not just from Dutch territory, but around the world. The consequences of those emissions are also experienced around the world.

The Netherlands is a party to the United Nations Framework Convention on Climate Change (UNFCCC). The objective of that convention is to keep the concentration of greenhouse gases in the atmosphere to a level at which a disruption of the climate system through human action can be prevented. The UNFCCC is based on the premise that all member countries must take measures to prevent climate change, in accordance with their specific responsibilities and options.

Each country is thus responsible for its own share. That means that a country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope and that a reduction of its own emissions would have very little impact on a global scale. The State is therefore obliged to reduce greenhouse gas emissions from its territory in proportion to its share of the

responsibility. 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.

What, specifically, does the State's obligation to do 'its part' entail?

(see paras. 6.1-7.3.6, below)

When giving substance to the positive obligations imposed on the State pursuant to Articles 2 and 8 ECHR, one must take into account broadly supported scientific insights and internationally accepted standards. Important in this respect are, among other things, the reports from the IPCC. The IPCC is a scientific body and intergovernmental organisation that was set up in the context of the United Nations to handle climatological studies and developments. The IPCC's 2007 report contained a scenario in which the warming of the earth could reasonably be expected to be limited to a maximum of 2oC. In order to achieve this target, the Annex I countries (these being the developed countries, including the Netherlands) would have to reduce their emissions in 2020 by 25-40%, and in 2050 by 80-95%, compared to 1990.

At the annual climate conferences held in the context of the UNFCCC since 2007, virtually every country has regularly pointed out the necessity of acting in accordance with the scenario of the IPCC and achieving a 25-40% reduction of greenhouse gas emissions in 2020. The scientifically supported necessity of reducing emissions by 30% in 2020 compared to 1990 has been expressed on multiple occasions by and in the EU.

Furthermore, since 2007, a broadly supported insight has arisen that, to be safe, the warming of the earth must remain limited to 1.5oC, rather than 2oC. The Paris Agreement of 2015 therefore expressly states that the states must strive to limit warming to 1.5oC. That will require an even greater emissions reduction than was previously assumed.

All in all, there is a great degree of consensus on the urgent necessity for the Annex I countries to reduce greenhouse gas emissions by at least 25-40% in 2020. The consensus on this target must be taken into consideration when interpreting and applying Articles 2 and 8 ECHR. The urgent necessity for a reduction of 25-40% in 2020 also applies to the Netherlands on an individual basis.

The policy of the State

(see paras. 7.4.1-7.5.3, below)

The State and Urgenda are both of the opinion that it is necessary to limit the concentration of greenhouse gases in the atmosphere in order to in order to achieve either the 2oC target or the 1.5oC target. Their views differ, however, with regard to the speed at which greenhouse gas emissions must be reduced.

Until 2011, the State's policy was aimed at achieving an emissions reduction in 2020 of 30% compared to 1990. According to the State, that was necessary to stay on a credible pathway to keep the 2oC target within reach.

After 2011, however, the State's reduction target for 2020 was lowered from a 30% reduction by the Netherlands to a 20% reduction in an EU context. After the reduction in 2020, the State intends to accelerate the reduction to 49% in 2030 and 95% in 2050. Those targets for 2030 and 2050 have since been laid down in the Dutch Climate Act.

The State has not explained, however, that – and why – a reduction of just 20% in 2020 is considered responsible in an EU context, in contrast to the 25-40% reduction in 2020, which is internationally broadly supported and is considered necessary.

There is a broad consensus within climate science and the international community that the longer reduction measures to achieve the envisaged final target are postponed, the more comprehensive and more expensive they will become. Postponement also creates a greater risk of an abrupt climate change occurring as the result of a tipping point being reached. In light of that generally endorsed insight, it was up to the State to explain that the proposed acceleration of the reduction after 2020 would be feasible and sufficiently effective to meet the targets for 2030 and 2050, and thus to keep the 2oC target and the 1.5oC target within reach. The State did not do this, however.

The Court of Appeal was thus entitled to rule that the State must comply with the target, considered necessary by the international community, of a reduction by at least 25% in 2020.

The courts and the political domain

(see paras. 8.1-8.3.5, below)

The State has asserted that it is not for the courts to undertake the political considerations necessary for a decision on the reduction of greenhouse gas emissions.

In the Dutch system of government, the decision-making on greenhouse gas emissions belongs to the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is up to the courts to decide whether, in taking their decisions, the government and parliament have remained within the limits of the law by which they are bound. Those limits ensue from the ECHR, among other things. The Dutch Constitution requires the Dutch courts to apply the provisions of this convention, and they must do so in accordance with the ECtHR's interpretation of these provisions. This mandate to the courts to offer legal protection, even against the government, is an essential component of a democratic state under the rule of law.

The Court of Appeal's judgment is consistent with the foregoing, as the Court of Appeal held that the State's policy regarding greenhouse gas reduction is obviously not meeting the requirements pursuant to Articles 2 and 8 ECHR to take suitable measures to protect the residents of the Netherlands from dangerous climate change. Furthermore, the order which the Court of Appeal issued to the State was limited to the lower limit (25%) of the internationally endorsed, minimum necessary reduction of 25-40% in 2020.

The order that was issued leaves it up to the State to determine which specific measures it will take to comply with that order. If legislative measures are required to achieve such compliance, it is up to the State to determine which specific legislation is desirable and necessary.

Conclusion

In short, the essence of the Supreme Court's judgment is that the order which the District Court issued to the State and which was confirmed by the Court of Appeal, directing the State to reduce greenhouse gases by the end of 2020 by at least 25% compared to 1990, will be allowed to stand. Pursuant to Articles 2 and 8 ECHR, the Court of

Appeal can and may conclude that the State is obliged to achieve that reduction, due to the risk of dangerous climate change that could have a severe impact on the lives and welfare of the residents of the Netherlands.

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9. Decision

Appendix: list of abbreviations used

1 Course of the proceedings

For the course of the proceedings in the fact-finding instances, the Supreme Court refers to:

a. the judgment in case C/09/456689/HA ZA 13-1396 rendered by The Hague District Court on 24 June 2015, ECLI:NL:RBDHA:2015:7145;
b. the judgment in case 200.178.245/01 rendered by The Hague Court of Appeal on 9 October 2018, ECLI:NL:GHDHA:2018:2591.

The State has instituted an appeal in cassation against the judgment of the Court of Appeal. Urgenda has submitted a statement of defence seeking dismissal of the appeal in cassation.

The case for the State was argued orally and in writing by its counsel, with the oral arguments being handled in part by attorney E.H.P. Brans, who practises law in The Hague. The case for Urgenda was argued orally by its counsel, with the oral arguments being handled in part by attorney J.M. van den Berg, who practises law in Amsterdam. The State's counsel submitted a reply, and Urgenda's counsel submitted a rejoinder.

The State objected to the size of Urgenda's rejoinder. The Supreme Court sees no reason in this case to set the rejoinder aside. The rejoinder does not contain any elements that are new to the debate between the parties, and largely comprises the partial repetition and elaboration of the arguments Urgenda made previously in its statement of defence in cassation. In that statement of defence, and prior to the oral and written arguments, Urgenda extensively discussed the complaints in cassation, which the cassation procedural rules do not require it to do in a case that originates with a claim. The written arguments and the State's memorandum of oral arguments provide a partial response to that statement of defence. Given all of this, adequate justice has been done to the parties' right to be heard and the scope of the rejoinder does not cause an imbalance in the debate.

The Opinion of deputy Procurator General F.F. Langemeijer and Advocate General M.H. Wissink is that the appeal in cassation must be rejected.

The State's counsel submitted a written response to that Opinion.

2 Assumptions and facts

(a) Facts

2.1 In this case, according to para. 2 of the Court of Appeal's judgment, the facts established by the District Court's in paras. 2.1-2.78 of its judgment,[1] as well as the facts established by the Court of Appeal in paras. 3.1-3.26 and 44 of its judgment can be taken as a starting point.[2] The parties do not dispute these facts in cassation. The Supreme Court will therefore base its judgment on those facts (Article 419(3) DCCP). The most relevant of these are the following.

Climate change and its consequences

- Since the beginning of the industrial revolution, mankind has consumed energy on a large scale. This energy has predominantly been generated by the combustion of fossil fuels (coal, oil and natural gas). This releases carbon dioxide. This compound of carbon and oxygen is referred to by its chemical formula: CO2. Part of the CO2 that is released is emitted into the atmosphere, where it remains for hundreds of years or more and is partly absorbed by the ecosystems in forests and oceans. This absorption capacity is dropping continuously due to deforestation and the warming of the sea water.
- CO2 is the most significant greenhouse gas and, in tandem with other greenhouse gases, it retains the heat radiated by our planet in the atmosphere. This is called the 'greenhouse effect'. The greenhouse effect increases as more CO2 is emitted into the atmosphere, which in turn exacerbates global warming. The climate is slow to respond to the emission of greenhouse gases: the full warming effect of the greenhouse gases being emitted today will not be felt for another thirty to forty years. Other greenhouse gases include methane, nitrous oxide and fluorinated gases.
- Concentrations of greenhouse gases in the atmosphere are expressed in parts per million (hereinafter: ppm). The term ‘ppm CO2 equivalent’ is used to express the total concentration of all greenhouse gases, in which respect the concentration of all of the other, non-CO2 greenhouse gases is converted into CO2 equivalents based on the warming effect.
- There is a direct, linear connection between the greenhouse gas emissions caused by humans, which are partly caused by the burning of fossil fuels, and the warming of the planet. The planet is already approximately 1.1°C warmer than it was at the start of the industrial revolution. The Court of Appeal assumed that the concentration of greenhouse gases in the atmosphere stood at 401 ppm at the time it rendered its judgment. In recent decades, worldwide emissions of CO2 have increased by 2% annually.
- The rise in the planet's temperature can be prevented or reduced by ensuring that fewer greenhouse gases are emitted into the atmosphere. This is referred to as ‘mitigation’. Measures can also be taken to anticipate the effects of climate change, such as raising dikes in low-lying areas. The taking of such measures is referred to as ‘adaptation’.
- There has long been a consensus in climate science – the science that studies climate and climate change – and in the international community that the average temperature on earth may not rise by more than 2°C compared to the average temperature in the pre-industrial era. According to climate scientists, if the concentration of greenhouse gases in the atmosphere has not risen above 450 ppm by the year 2100, there is a reasonable chance that this objective (hereinafter: “the two-degree target”) will be achieved. In recent years, new insights have shown that the temperature can only safely rise by no more than 1.5°C, which translates into a greenhouse gas concentration level of no more than 430 ppm in the year 2100.

- When viewed in light of the maximum concentration level of 430 or 450 ppm in the year 2100 and the current concentration level of greenhouse gases (401 ppm), it is clear that the world has very little leeway left when it comes to the emission of greenhouse gases. The total worldwide leeway that now remains for emitting greenhouse gases is referred to as the 'carbon budget'. In the meantime, the chance that the warming of the earth can be limited to a maximum temperature increase of 1.5oC has become extremely slim.
- If the earth warms by substantially more than 2°C compared to the pre-industrial era, this would cause, *inter alia*: flooding as a result of sea level rise; heat stress as a result of more intense and longer-lasting heat waves, increases in respiratory ailments associated with deteriorating air quality resulting from periods of drought (with severe forest fires), increased spread of infectious diseases, severe flooding as a result of torrential rainfall, and disruptions of the production of food and the supply of drinking water. Ecosystems, flora and fauna will be eroded and there will be a loss of biodiversity. An inadequate climate policy will, in the second half of this century, result in hundreds of thousands of victims in Western Europe alone.
- It is not just the consequences that become more severe as global warming progresses. The accumulation of CO2 in the atmosphere may cause the climate change process to reach a tipping point, which may result in abrupt climate change, for which neither mankind nor nature can properly prepare. The risk of reaching such a tipping point increases at a steepening rate upon a rise in temperature of between 1°C and 2°C.

The IPCC reports

- The Intergovernmental Panel on Climate Change (IPCC) was created in 1988 under the auspices of the United Nations by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP). The IPCC's objective is to obtain insight into all aspects of climate change through scientific research. The IPCC does not conduct research itself, but studies and assesses, *inter alia*, the most recent scientific and technological information that becomes available around the world. The IPCC is not just a scientific organisation, but an intergovernmental organisation as well. It has 195 members, including the Netherlands. Since its inception, the IPCC has published five Assessment Reports and accompanying sub-reports about the state of climate science and climatological developments. Particularly relevant to these proceedings are the fourth report from 2007 and the fifth report from 2013-2014.
- The Fourth IPCC Assessment Report (hereinafter: AR4) from 2004 indicates that a temperature increase of 2°C above the level of the pre-industrial era entails the risk of a dangerous, irreversible change in the climate. After an analysis of various reduction scenarios, this report states that to be able to achieve a maximum volume of 450 ppm in the year 2100, the emissions of greenhouse gases by the countries listed in Annex I to the UNFCCC (including the Netherlands) must be 25% to 40% lower in the year 2020 than they were in the year 1990.
- The IPCC published its Fifth Assessment Report in 2013-2014 (hereinafter: AR5). This report established, *inter alia*, that the planet is warming as a result of the increase in the concentration of CO2 in the atmosphere since the beginning of the industrial revolution, and that this is being caused by human activities, in particular by the burning of oil, gas and coal and by deforestation. In AR5, the IPCC concluded that if the concentration of greenhouse gases in the atmosphere stabilises at around 450 ppm in the year 2100, the chance that the global temperature increase would remain under 2°C was “likely”, that is, higher than 66%. In 87% of the scenarios for achieving this target detailed in AR5, assumptions are made regarding 'negative emissions': in other words, the extraction of CO2 from the atmosphere.

The UNFCCC and the climate conferences

(13) The United Nations Framework Convention on Climate Change (UNFCCC) was ratified in 1992.[3] The purpose of this convention is to promote the stabilisation of the concentration of greenhouse gases in the atmosphere at a level at which would prevent dangerous anthropogenic interference (i.e.: interference caused by humans) with the climate system. The parties to the UNFCCC are referred to as Annex I countries and non-Annex I countries. The Annex I countries are the developed countries, including the Netherlands. According to Article 4(2) of the convention, the Annex I countries must take the lead, in an international context, in counteracting climate change and its negative consequences. They have committed themselves to reducing greenhouse gas emissions. They must periodically report on the measures they have taken. The objective is to return the level of emissions to the level in 1990.

- Article 7 UNFCCC provides for the Conference of the Parties (hereinafter: “COP”). The COP is the highest decision-making body within the UNFCCC. Resolutions passed by the COP are generally not legally binding. The COP meets annually at climate conferences.
- At the climate conference in Kyoto in 1997 (COP-3), the Kyoto Protocol was agreed upon between a number of Annex I countries, including the Netherlands. This protocol records the reduction targets for the period 2008-2012. According this protocol, the then-Member States of the EU were obliged to achieve a reduction target of 8% compared to 1990.
- The Bali Action Plan was adopted at the climate conference in Bali in 2007 (COP-13). The Bali Action Plan, citing the AR4 referred to in (11), above, acknowledged the need for drastic emissions reductions. This reference regards, *inter alia*, the part of AR4 which states that if the Annex I countries wish to achieve the 450 ppm scenario by the year 2100, they would have to reduce their emissions of greenhouse gases by 2020 by 25-40% compared to 1990.
- No agreement could be reached at the climate conference in Copenhagen in 2009 (COP-15) regarding a successor to, or an extension of, the Kyoto Protocol.
- At the next climate conference in Cancún in 2010 (COP-16), the parties involved acknowledged in the Cancún Agreements the long-term target of maximising the rise in temperature at 2°C compared to the average temperature in the pre-industrial era – along with the possibility of a more stringent target of a maximum of 1.5°C. In the preamble they refer to the urgency of a major reduction in admissions.
- In Cancún, the parties to the Kyoto Protocol stated that the Annex I countries had to continue to take the lead in counteracting climate change and that, given AR4, this “would require Annex I Parties as a group to reduce emissions in a range of 25-40 per cent below 1990 levels by 2020”. The parties to the Kyoto Protocol have urged the Annex I countries to raise their level of ambition in relation to the commitments they already made, with a view to the 25-40% range referred to in AR4. In the 'Cancun Pledges', the EU countries as a group declared themselves prepared to achieve a 20% reduction by 2020 compared to 1990, and offered to achieve a 30% reduction on the condition that other countries were to undertake the achievement of similar reduction targets.
- At the climate conference in Doha in 2012 (COP-18), all Annex I countries were called on to raise their reduction targets to at least 25-40% in 2020. An amendment to the Kyoto Protocol was adopted, in which the EU committed to a reduction of 20% in 2020 compared to 1990, and offered to reduce emissions by 30% if other countries were to undertake the achievement of similar reduction targets. This condition was not met. The Doha Amendment did not enter into force.

The Paris Agreement

(21) The Paris Agreement was concluded at the climate conference in Paris in 2015 (COP-21).[4] This convention calls on each contracting state to account for its own responsibilities. The convention stipulates that global warming must be kept “well below 2°C” as compared to the average pre-industrial levels, striving to limit the temperature increase to 1.5°C. The parties must prepare ambitious national climate plans and of which the level of ambition must increase with each new plan.

The UNEP reports of 2013 and 2017

- Since 2010, UNEP (referred to in (10), above) has been reporting annually on the difference between the desired emissions level and the reduction targets to which the parties have committed: this is referred to as the 'emissions gap'. In the 2013 annual report, UNEP noted, for the third time running, that the contracting states' commitments were falling short and greenhouse gases emissions were increasing rather than decreasing. UNEP also notes that the Annex I countries fail to meet their joint emissions targets to achieve a 25-40% reduction in 2020, as laid down in the AR4 referred to above in (11). UNEP concludes that it is becoming increasingly improbable that emissions will be low enough in 2020 to achieve the 2°C target at the lowest possible cost. Although later reduction actions could ultimately lead to the same temperature targets, according to UNEP these would be more difficult, costlier and riskier.
- UNEP's 2017 annual report states that, in light of the Paris Agreement, an enhanced pre-2020 mitigation action is more urgent than ever. UNEP notes that if the emissions gap that has been observed is not bridged by 2030, then it will be extremely improbable that the 2°C target can still be achieved. This was why, according to UNEP, the targets for 2020 need to be more ambitious.

European climate policy

- Article 191 TFEU sets out the EU's environmental targets. The EU formulated directives to implement its environmental policy. The ETS Directive is one of these. 'ETS' stands for 'Emissions Trading System'. This system entails that companies in the ETS sector may only emit greenhouse gases in exchange for the surrender of emissions rights. These emissions rights may be bought, sold or retained. The total volume of greenhouse gases which ETS companies may emit in the period 2013-2020 decreases by 1.74% annually until, in 2020, a 21% reduction is achieved compared to the year 2005.
- The Council determined that the EU must reduce greenhouse gas emissions by at least 20% in 2020, 40% in 2030, and 80%-95% in 2050, measured in each case compared to emissions in 1990. Based on the Effort Sharing Decision[5], it has been determined within the EU that the reduction target of 20% in 2020 for the non-ETS sector means that the Netherlands will have to achieve an emissions reduction of 16% compared to emissions in 2005.

(26) According to the expectations that existed when the Court of Appeal's judgment was rendered, the EU as a whole would achieve an actual emissions reduction in 2020 of 26-27% compared to 1990.

Dutch climate policy and the results of that policy

(27) Based on a 2007 programme entitled *‘Schoon en zuinig’* [English approximation: ‘Clean and economical’], the Netherlands was working from the premise of a 30% reduction target in 2020 compared to 1990. In a letter of 12 October 2009, the then-Minister of Housing, Spatial Planning and the Environment (*Volkshuisvesting,*

Ruimtelijke Ordening en Milieubeheer - "VROM") informed the Dutch House of Representatives about the Netherlands' negotiation objective in the context of the climate conference in Copenhagen in 2009 (COP-15). This letter stated, *inter alia*:

"The total of emission reductions proposed by the developed countries so far is insufficient to achieve the 25%-40% reduction in 2020, which is necessary to stay on a credible track to keep the 2-degree target within reach."

- After 2011, the Dutch reduction target was adjusted to the EU-level reduction of 20% in 2020; in other words, for the Netherlands (a) a reduction of 16% in the non-ETS sector and 21% in the ETS sector, each time in comparison to emissions in 2005, and (b) a reduction of at least 40% in 2030, and 80-95% in 2050, in each case compared to 1990.
- In the Government Agreement from 2017, the government announced that it would strive to achieve an emissions reduction of at least 49% in 2030 compared to 1990. According to the Government Agreement, the EU reduction target of 40% in 2030 was not sufficient to achieve the two-degree target, let alone the 1.5°C ambition laid down in the Paris Agreement.
- Dutch CO2 emissions per capita of the population are relatively high compared to other industrialised countries. In terms of emissions, the Netherlands was ranked 34th out of 208 countries when the Court of Appeal rendered its judgment. Of the 33 countries with even higher emissions, only 9 had higher per capita emissions, none of which were EU Member States. Of the total volume of Dutch greenhouse gas emissions, 85% consists of CO2. Dutch CO2 emissions have barely decreased since 1990 and have even risen in recent years (up until the Court of Appeal's judgment). In the 2008-2012 period, the Netherlands achieved a 6.4% reduction in CO2-equivalent emissions. The reduction is attributable to greenhouse gases other than CO2. In that same period, the fifteen largest EU Member States achieved an emissions reduction of 11.8%, and the EU as a whole achieved a reduction of 19.2%. Moreover, 30-50% of the reduction in the 2008-2012 period was due to the economic crisis. Had this crisis not occurred, emissions for this period would have been substantially higher (and the reduction substantially lower).
- When the Court of Appeal rendered its judgment, it was expected that the Netherlands would achieve a reduction of 23% in 2020, and taking into account a margin for uncertainty, of 19-27%. The District Court refers to a substantially lower expectation in its judgment. The difference is largely attributable to a new calculation method (which is more consistent with that used by the IPCC, but) as a result of which the theoretical reduction percentage is achieved earlier even though the situation is actually more serious. The difference can largely be explained by the fact that the emissions calculation in the base year of 1990 was retrospectively adjusted upwards.

(b) Urgenda's claim and the State's defence

2.2.1 Urgenda ('Urgent Agenda') is engaged in developing plans and measures to prevent climate change. Urgenda's legal form is that of a foundation under Dutch law (*stichting*). Its object according to its Articles is to stimulate and accelerate transition processes towards a more sustainable society, starting in the Netherlands.

Urgenda's view is that the State is doing too little to prevent dangerous climate change. In these proceedings, to the extent relevant in cassation, it is requesting an order instructing the State to limit the volume of greenhouse gas emissions in the Netherlands such that this volume would be reduced by 40% at the end of the year 2020, or at least by a minimum of 25%, compared to the volume in the year 1990.

It institutes its claim pursuant to Article 3:305a DCC, which enables interest organisations to bring class action suits. It is pursuing its claim, to the extent relevant in cassation, on behalf of the interests of the current residents of the Netherlands (the inhabitants of the Netherlands) who are being threatened with dangerous climate change.

2.2.2 Urgenda has, briefly put, asserted the following grounds for its claims. The greenhouse gas emissions from the Netherlands are contributing to a dangerous change in the climate. The Netherlands' share of worldwide emissions is excessive, speaking both absolutely and relatively (per capita of the population). This means that Dutch emissions, for which the State as a sovereign power has systemic responsibility, are unlawful, since they violate the due care which is part of the State's duty of care to those whose interests Urgenda represents (Article 6:162(2) DCC), as well as Articles 2 and 8 ECHR. Under both national and international law, the State is obliged, in order to prevent dangerous climate change, to ensure the reduction of the Dutch emissions level. This duty of care entails that, in 2020, the Netherlands must achieve a reduction in greenhouse gas emissions of 25-40% compared to emissions in 1990, in accordance with the target referred to in AR4 (see para. 2.1(11), above). A reduction of this magnitude is necessary in order to maintain the prospect of achieving the 2°C target. This is also the most cost-effective option.

2.2.3 The defences asserted by the State include the following. The requirements of neither Article 3:296 DCC (court order) nor Article 6:162 DCC (unlawful act) have been met. There is no basis in either national or international law for a duty that legally requires the State to take measures in order to achieve the reduction target as sought. The target laid down in AR4 is not a legally binding standard. Articles 2 and 8 ECHR do not imply an obligation for State to take mitigating or other measures to counter climate change. Granting the reduction order being sought would also essentially come down to an impermissible order to create legislation and would contravene the political freedom accruing to the government and parliament and, thus, the system of separation of powers.

(c) Judgment of the District Court

2.3.1 The District Court ordered the State to limit the combined volume of Dutch annual greenhouse gas emissions, or cause them to be limited, so that this will have been reduced by at least 25% at the end of 2020 compared to the level of the year 1990. The District Court's findings on this point included the following.

The legal obligation of the State towards Urgenda cannot be derived from Article 21 of the Dutch Constitution, the 'no harm' principle, the UNFCCC with associated protocols, Article 191 TFEU, or the ETS Directive and Effort Sharing Decision based on Article 191 TFEU. (paras. 4.36-4.44 and 4.52)

Urgenda cannot be considered a direct or indirect victim as meant in Article 34 ECHR. Therefore, Urgenda cannot directly rely on Articles 2 and 8 ECHR. (para. 4.45)

The State may act unlawfully by violating its duty of care to prevent dangerous climate change. (paras. 4.52-4.53) The criteria laid down in the *Kelderluik* judgment[6] are relevant to interpreting that duty of care, as are the provisions, principles and rules previously referred to by the District Court. (paras. 4.54 -4.63)

Given the severity of the impact from climate change and the significant chance that – unless mitigating measures are taken – dangerous climate change will occur, the State has a duty of care to take mitigating measures. This duty is not diminished by the fact that the Dutch contribution to the present global greenhouse gas emissions is currently quite minor. Given that at least the 450 ppm scenario is required to prevent hazardous climate change, the Netherlands should take measures to ensure that this scenario can be achieved. (paras. 4.64-4.83)

Postponing the mitigation as advocated by the State – a less stringent reduction between now and 2030 and a sharp reduction starting in 2030 – will in fact significantly contribute to the risk of dangerous climate change and therefore cannot be deemed a sufficient and acceptable alternative to the scientifically proven and acknowledged higher reduction path of 25-40% in 2020. (para. 4.85)

The State did not argue that a reduction order of 25-40% would result in an undue burden for the Netherlands. On the contrary: the State also argues that a higher reduction target is one of the possibilities. If the reduction is less than 25-40%, the State is failing to fulfil its duty of care and is therefore acting unlawfully. Imposing an obligation of higher than 25% is not allowable due to the State's discretionary power. (para. 4.86)

The reduction order sought by Urgenda does not constitute an order to the State to take certain legislative or policy-making measures. If the claim is allowed, the State will retain full discretion, which is pre-eminently vested in it, to determine how to comply with that order. (para. 4.101)

In a general sense, the aspects that relate to the *trias politica* do not preclude allowing the order being sought. The restraint which the court should exercise does not result in a further limitation than that ensuing from the State's aforementioned discretionary power. (para. 4.102)

(d) Judgment of the Court of Appeal

2.3.2 The Court of Appeal confirmed the District Court's judgment. In so doing, the Court of Appeal held as follows.

Urgenda's standing

Dutch law determines who is permitted access to the Dutch courts, including, in the case of Urgenda in these proceedings, Article 3:305a DCC, which provides for class actions brought by interest groups. Since individuals who fall under the State's jurisdiction may rely on Articles 2 and 8 ECHR, which have direct effect in the Netherlands, Urgenda may also do so on behalf of these individuals, pursuant to Article 3:305a DCC. (para. 36)

The parties do not dispute that Urgenda has standing to pursue its claim to the extent it is acting on behalf of the current generation of Dutch nationals against the emission of greenhouse gases in Dutch territory. It is entirely plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced. (para. 37) Their interests lend themselves to consolidation as is required for instituting a claim pursuant to Article 3:305a DCC. (para. 38)

Articles 2 and 8 ECHR

The State has a positive obligation pursuant to Article 2 ECHR to protect the lives of citizens within its jurisdiction, while Article 8 ECHR obliges the State to protect their right to their home life and private life. This obligation applies to all activities, public and non-public, which could jeopardise the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous. If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible. (paras. 39-43)

Genuine threat of dangerous climate change

The established facts and circumstances imply that there is a real threat of dangerous climate change, resulting in the serious risk that the current generation of Dutch inhabitants will be confronted with losing their lives or having their family lives disrupted. Articles 2 and 8 ECHR imply that the State has a duty to protect against this genuine threat. (paras. 44-45)

Is the State acting unlawfully by not reducing by at least 25% by the end of 2020?

The end goal is clear and is not disputed between the parties. By the year 2100, global greenhouse gas emissions must have ceased entirely. Nor do the parties hold differing opinions as to the required interim target of 80-95% reduction relative to 1990 by 2050, and Urgenda endorses the reduction target of 49% relative to 1990 by 2030, as established by the government. The dispute between the parties specifically concerns the question of whether the State can be required to achieve a reduction of at least 25% relative to 1990 by the end of 2020. (para. 46)

A significant effort will have to be made between now and 2030 to reach the 49% target in 2030; more efforts than the limited efforts the Netherlands has undertaken so far. It has also been established that it would be advisable to start the reduction efforts at as early a stage as possible to limit the total emissions in this period. Delaying the reduction will lead to greater risks for the climate. A delay would, after all, allow greenhouse gas emissions to continue in the meantime; greenhouse gases which would linger in the atmosphere for a very long time and further contribute to global warming. An even distribution of reduction efforts over the period up to 2030 would mean that the State should achieve a substantially higher reduction in 2020 than 20%. An even distribution is also the starting point of the State for its reduction target of 49% by 2030, which has been derived in a linear fashion from the 95% target for 2050. If extrapolated to the present, this would result in a 28% reduction by 2020, as confirmed by the State in answering the Court of Appeal's questions." (para. 47)

In AR4, the IPCC concluded that a concentration level not exceeding 450 ppm in 2100 is permissible to keep the two-degree target within reach. Following an analysis of the various reduction scenarios, the IPCC concluded that in order to reach this concentration level, the total greenhouse gas emissions in 2020 of Annex I countries, of which the Netherlands is one, must be 25-40% lower than 1990 levels. In AR5, the IPCC also assumed that a concentration level of 450 ppm may not be exceeded in order to achieve the two-degree target. (para. 48)

It is highly uncertain whether it will be possible – as AR5 assumes – to use certain technologies to extract CO_2 from the atmosphere. Given the current state of affairs, climate scenarios based on such technologies bear little resemblance to reality. AR5 might thus have painted too rosy a picture, and it cannot be assumed outright, as the State does, that the 'multiple mitigation pathways' listed by the IPCC in AR5 could, as a practical matter, lead to the achievement of the two-degree target. Furthermore, it is plausible

that no reduction percentages as of 2020 were included in AR5, because, in 2014, the IPCC's focus was on targets for 2030. Therefore, the AR5 report does not give cause to assume that the reduction scenario laid down in AR4 has been superseded and that a reduction of less than 25-40% by 2020 would now be sufficient to achieve the two-degree target. In order to assess whether the State has met its duty of care, the Court of Appeal will take as a starting point that an emission reduction of 25-40% in 2020 is required to achieve the two-degree target. (para. 49)

The 450 ppm scenario and the related necessity to reduce CO2 emissions by 25-40% by 2020 are absolutely not overly pessimistic starting points to use as a basis for determining the State's duty of care. It is not certain whether the two-degree target can be achieved with this scenario. Furthermore, climate science has now acknowledged that a temperature rise of 1.5oC is much more likely to be safe than a rise of 2oC. (para. 50)

The IPCC report which states that a reduction of 25-45% by the end of 2020 is needed to achieve the two-degree target (AR4) dates all the way back to 2007. Since that time, virtually all COPs (in Bali, Cancún, Durban, Doha and Warsaw) have referred to this 25-40% standard and Annex I countries have been urged to align their reduction targets accordingly. This may not have established a legal standard with a direct effect, but it does confirm the fact that a reduction of at least 25-40% in CO2 emissions is needed to prevent dangerous climate change. (para. 51)

Until 2011, the Netherlands assumed its own reduction target to be 30% in 2020. A letter dated 12 October 2009 from the Minister of VROM shows that the State itself was convinced that a scenario with a reduction of less than 25%-40% in 2020 would lack credibility to keep the two-degree target within reach. The Dutch reduction target for 2020 was subsequently adjusted downwards. But a substantiation based on climate science was never given, while it is an established fact that postponing reductions in the meantime will cause continued emissions of CO2, which in turn will contribute to further global warming. More specifically, the State failed to give reasons why a reduction of only 20% by 2020 (at the EU level) should currently be regarded as credible, for instance by presenting a scenario which proves how – in concert with the efforts of other countries – the currently proposed postponed reduction could still lead to achieving the two-degree target. The EU itself also deemed a reduction of 30% for 2030 necessary to prevent dangerous climate change. (para. 52)

The State's Defences

The State asserts that a 'waterbed effect' would result if the Netherlands takes measures to reduce greenhouse gas emissions that fall within the scope of the ETS. Specifically, those measures would create leeway for other EU countries to emit more greenhouse gases. Therefore, according to the State, national measures to reduce greenhouse gas emissions within the framework of the ETS are pointless. This argument does not hold. Just like the Netherlands, other EU countries bear their own responsibility for reducing CO_2 emissions as much as possible. It cannot automatically be assumed that the other Member States will take less far-reaching measures than the Netherlands. On the contrary, compared to Member States such as Germany, the United Kingdom, Denmark, Sweden and France, Dutch reduction efforts are lagging far behind. (paras. 55 and 56)

The State also pointed out the risk of 'carbon leakage', which the State understands to be the risk that companies will move their production to other countries with less strict greenhouse gas reduction obligations. The State has failed to substantiate that this risk will actually occur if the Netherlands were to

increase its efforts to reduce greenhouse gas emissions before the end of 2020. (para. 57)

The State has also argued that adaptation and mitigation are complementary strategies to limit the risks of climate change and that Urgenda has failed to appreciate the adaptation measures that the State has taken or will take. This argument also fails. Although it is true that the consequences of climate change can be cushioned by adaptation, it has not been made clear or plausible that the potentially disastrous consequences of excessive global warming can be adequately prevented with adaptation. So while it is certainly logical for the State also to take adaptation measures, this does not diminish its obligation to reduce CO2 emissions quicker than it has planned. (para. 59)

The State has furthermore argued that the emission reduction percentage of 25-40% in 2020 is intended for the Annex I countries as a whole, and that this percentage can therefore not be taken as a starting point for the emission reduction an individual Annex I country, such as the Netherlands, should achieve. The State has failed to provide substantiation for why a lower emission reduction percentage should apply to the Netherlands than to the Annex I countries as a whole. That is not obvious, considering a distribution in proportion to the per capita GDP, which *inter alia* has been taken as a starting point in the EU's Effort Sharing Decision for distributing the EU emission reductions among the Member States. It can be assumed that the Netherlands has one of the highest per capita GDPs of the Annex I countries and the per capita GDP in any case is far above the average of those countries. That is also evident from Appendix II of the Effort Sharing Decision, in which the Netherlands is allocated a reduction percentage (16% relative to 2005) that is among the highest of the EU Member States. It is therefore reasonable to assume that what applies to the Annex I countries as a whole should at least also apply to the Netherlands. (para. 60)

The State has also asserted that Dutch greenhouse gas emissions, in absolute terms and compared with global emissions, are minimal, that the State cannot solve the problem on its own, that the worldwide community must cooperate. These arguments are not such that they warrant the absence of more ambitious, genuine action. The Court of Appeal, too, acknowledges that this is a global problem and that the State cannot solve this problem on its own. However, this does not release the State from its obligation to take measures in/on its territory, within its capabilities, which in concert with the efforts of other states provide protection from the hazards of dangerous climate change. (paras. 61 and 62)

The fact that full scientific certainty regarding the efficacy of the ordered reduction scenario is lacking does not mean, given the due observance of the precautionary principle, that the State is entitled to refrain from taking measures. The high degree of plausibility of that efficacy is sufficient. (para. 63)

The existence of a real risk of the danger for which measures have to be taken is sufficient to issue an order. It has been established that this is the case. Moreover, if the opinion of the State were to be followed, an effective legal remedy for a global problem as complex as this one would be lacking. After all, each state held accountable would then be able to argue that it does not have to take measures if other states do not do so either. That is a consequence that cannot be accepted, also because Urgenda does not have the option to summon all eligible states to appear in a Dutch court. (para. 64)

Regarding the plea of a lack of the required relativity as meant in Article 6:163 DCC, the Court of Appeal notes at the outset that these proceedings constitute an action for an order and not an action for damages. The standards that have been violated (Articles 2 and 8 ECHR) do seek to protect Urgenda (or those it represents). (para. 65)

The State argues that the system of the separation of powers should not be interfered with because it is not the courts, but the democratically legitimised government, that is the appropriate body to make the attendant policy choices. This argument is rejected in this case, also because the State violates human rights, which calls for the provision of measures, while at the same time the order to reduce emissions gives the State sufficient room to decide how it can comply with the order. (para. 67)

The District Court correctly held that Urgenda's claim is not intended to create legislation, either by parliament or by lower government bodies, and that the State retains complete freedom to determine how it will comply with the order. The order also will in no way prescribe the substance which this legislation must have. For this reason alone, the order is not an 'order to enact legislation'. Moreover, the State has failed to substantiate why compliance with the order can only be achieved through creating legislation by parliament or by lower government bodies. (para. 68)

Conclusion of the Court of Appeal

The foregoing implies that, up to now, the State has done too little to prevent dangerous climate change and is doing too little to catch up, at least in the short term (up to the end of 2020). Targets for 2030 and beyond do not diminish the fact that a dangerous situation is imminent which requires intervention right now. In addition to the risks in that context, the social costs also come into play. The later reduction actions are taken, the sooner the available carbon budget will be depleted, which in turn would require considerably more ambitious measures to be taken at a later stage, as is acknowledged by the State, to ultimately achieve the desired level of 95% reduction by 2050. (para. 71)

The State cannot hide behind the reduction target of 20% by 2020 at EU level. First of all, also the EU deems a greater reduction in 2020 necessary from a climate science perspective. In addition, the EU as a whole is expected to achieve a reduction of 26-27% in 2020; much higher than the agreed 20%. Also taken into consideration is the fact that, in the past, the Netherlands, as an Annex I country, acknowledged the severity of the climate situation time and again and, mainly based on climate scientific arguments, for years premised its policy on a reduction of 25-40% by 2020, with a concrete policy target of 30% by then. After 2011, this policy objective was adjusted downwards to 20% by 2020 at EU level, without any scientific substantiation and despite the fact that more and more was becoming known about the serious consequences of greenhouse gas emissions for global warming. (para. 72)

Based on this, the Court of Appeal held that the State was failing to fulfil its duty of care pursuant to Articles 2 and 8 ECHR by not wanting to reduce emissions by at least 25% by the end of 2020. A reduction of 25% should be considered a minimum, in connection with which recent insights about an even more ambitious reduction in connection with the 1.5°C target have not even been taken into consideration. There is a genuine chance that the reduction by 2020 will prove to be (substantially) lower than 25%. Such a margin of uncertainty is unacceptable. Since there also are clear indications that the current measures will be insufficient to prevent dangerous climate change, even leaving aside the question of whether the current policy will actually be implemented, measures have to be chosen, also in view of the precautionary principle, that are safe, or at least as safe as possible. The very serious dangers, not contested by the State, associated with a temperature rise of 2°C or 1.5°C – let alone higher – also preclude such a margin of uncertainty. (para. 73)

3. The State's complaints in cassation; the manner of addressing those complaints

3.1 The State has put forward nine grounds for cassation, each of which contains multiple complaints in cassation. Briefly put, the complaints assert the following.

3.2 Grounds for cassation 1 and 2 are aimed at the Court of Appeal's interpretation of Articles 2 and 8 ECHR. According to the State, there are various reasons why no protection can be derived from these provisions in this case, or at any rate the Court of Appeal failed to provide adequate grounds for its holding that such protection can indeed be derived. According to ground for cassation 1, the Court of Appeal also failed to recognise that the ECtHR leaves the national states a margin of appreciation in the application of these provisions.

3.3 Ground for cassation 3 asserts that the rights under Articles 2 and 8 ECHR do not lend themselves to being combined as is required in order to be able to institute a claim pursuant to Article 3:305a DCC. The Court of Appeal should therefore have dismissed Urgenda's claim for lack of standing to the extent it was based on Articles 2 and 8 ECHR. According to this ground for cassation, those provisions only guarantee individual rights and do not protect society as a whole.

3.4 Grounds for cassation 4-8 assert the following. The State is not legally bound to a reduction target of 25% in 2020. The State did not agree to this reduction target, nor is it an internationally accepted standard. The State is, however, bound in both an international and European context to a target of 20% in 2020 by the EU as a whole. The EU will easily surpass this percentage (specifically, by a reduction of between 26% and 27%).

The reduction target of 25% in 2020 is, moreover, not actually necessary to meeting the two-degree target. That necessity is not implied by the IPCC reports. The recommended extra reduction for the Netherlands in 2020 will have no measurable effect on the global rise in temperature.

Furthermore, the reduction target of 25% in 2020 was once proposed as an overall target for a group of wealthy countries as a whole (the Annex I countries, of which the Netherlands is one) and not as a target for an individual country like the Netherlands. The Netherlands cannot solve the global climate problem on its own. In addition, the 25% reduction target in 2020 has been superseded by AR5, as well as the distinction between Annex I countries and other countries.

The Court of Appeal either failed to recognise this or neglected to take it into proper account. Moreover, the Court of Appeal failed to appreciate that it is up to the State to determine which reduction pathway it follows. The Court of Appeal wrongfully impinged on the discretionary leeway to which the State is entitled.

3.5 In conclusion, ground for cassation 9 raises two issues. First, the State complains that the District Court order that was confirmed by the Court of Appeal was tantamount to an order to create legislation, which is impermissible under Supreme Court case law. This ground for cassation also asserts that the Court of Appeal failed to recognise that it is not for the courts to make the political considerations necessary for a decision on the reduction of greenhouse gas emissions.

3.6 The substance of the aforementioned ground raises various issues. Those issues will be dealt with below, as follows. First, by way of an introduction, the danger and consequences of climate change established by the Court of Appeal will be discussed in more detail (see 4.1-4.8). Subsequently, an answer is provided to the question of whether, as the Court of Appeal held, Articles 2 and 8 ECHR oblige the State to take measures to counter that threat (see 5.1-5.8). Next is discussed which specific obligations on the part of the State that this

may imply (see 6.1-6.6). Afterwards, it is discussed whether the State is bound by the 25-40% target stated in AR4, as the Court of Appeal found (see 7.1-7.5.3). Finally, the permissibility of the District Court order confirmed by the Court of Appeal will be discussed (see 8.1-8.35).

4 Assumptions regarding the danger and consequences of climate change

4.1 Given the widely accepted, on climate science derived insights established by the Court of Appeal which the parties do not dispute, the findings of fact regarding the danger and consequences of climate change are, briefly and in essence, the following.

4.2 The emission of greenhouse gases, which are the partial result of burning of fossil fuels and the resultant release of the greenhouse gas CO2, is leading to an ever-higher concentration of those gases in the atmosphere. This is warming the planet, which is resulting in a variety of hazardous consequences. This may result in local areas of extreme heat, extreme drought, extreme precipitation, or other extreme weather. It is also causing both glacial ice and the ice in and near the polar regions to melt, which is raising the sea level. Some of these consequences are already happening right now. That warming may also result in tipping points, as a result of which the climate on earth or in particular regions of earth changes abruptly and comprehensively. This will result in, among other things, the significant erosion of ecosystems which will, example, jeopardise the food supply, result in the loss of territory and habitable areas, endanger health, and cost human lives.

4.3 Climate science long ago reached a high degree of consensus that the warming of the earth must be limited to no more than 2°C and that this means that the concentration of greenhouse gases in the atmosphere must remain limited to a maximum of 450 ppm. Climate science has since arrived at the insight that a safe warming of the earth must not exceed 1.5°C and that this means that the concentration of greenhouse gases in the atmosphere must remain limited to a maximum of 430 ppm. Exceeding these concentrations would involve a serious degree of danger that the consequences referred to in 4.2 will materialise on a large scale. Below, for brevity's sake, the materialisation of this danger will be referred to below as 'dangerous climate change', as it was in the Court of Appeal's judgment.

4.4 If the emission of greenhouse gases is not sufficiently reduced, the possibility that dangerous climate change will materialise in the foreseeable future cannot be excluded. According to the AR5 “Synthesis Report” AR5, which the IPCC published in 2014 as part of the AR5 report referred to above in para. 2.1(12), there is a danger that the tipping points referred to above in para. 4.2 will occur at a steepening rate once there is a warming between 1°C and 2°C.

4.5 As is clear from the facts stated above in para. 2.1 in (13) *et seq.*, this has been recognised at international level. The UNFCCC, which was concluded in 1992, states that its objective is to reduce the emission of greenhouse gases. Since then, annual climate conferences have been held by the COP, the highest body under that convention, which comprises representatives of the contracting states. At each of those conferences, the point is emphasised that reducing greenhouse gas emissions is urgent and the contracting states are called on

to make that reduction a reality. At several conferences, specific agreements have also been made about that reduction. The insight referred to above in para. 4.3 – that the warming of the earth must remain limited to a maximum of 2°C and that the concentration of greenhouse gases in the atmosphere must be limited to a maximum of 450 ppm in order to prevent dangerous climate change – has been endorsed by the IPCC and the COP. The insight that a safe warming is limited to a maximum of 1.5°C, and that this means that the concentration of greenhouse gases in the atmosphere must be limited to a maximum of 430 ppm, was included in the Paris Agreement of 2015, which was based on the UNFCCC and which was signed by more than 190 countries, including the Netherlands.

4.6 The need to reduce greenhouse gas emissions is becoming ever more urgent. Every emission of greenhouse gases leads to an increase in the concentration of greenhouse gases in the atmosphere, and thus contributes to reaching the critical limits of 450 ppm and 430 ppm. In any case, the limited remaining carbon budget (see above in para. 2.1(7)) means that each postponement of a reduction in greenhouse gas emissions will require a future reduction to be more stringent in order to stay within the confines of the remaining carbon budget.

In its annual reports, the UNEP reports on the emissions gap, which is the difference between emissions based on the emissions-reduction target which countries reported to the UN – in which respect the assumption is that these targets have been achieved – and the desired emissions (see above in para. 2.1(22)). The 2017 UNEP report states that, in light of the Paris Agreement, the reduction of greenhouse gas emissions is more urgent than ever. The UNEP also remarks that if the emissions gap is not bridged by 2030, achieving the target of a maximum warming of 2°C is extremely unlikely.

4.7 Based on the aforementioned facts, the Court of Appeal concluded, quite understandably, in para. 45 that there was “a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life”. The Court of Appeal also held, in para. 37, that it was "clearly plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced."

4.8 The Netherlands is a party to the UNFCCC and to the Paris Agreement, and the State acknowledges the facts stated above. The State does not challenge the Court of Appeal's conclusion, as referred to above in para. 4.7, and acknowledges the urgent need to take measures to reduce greenhouse gas emissions. The State also does not dispute that it is required to contribute to that emissions reduction. What the State does challenge is that Articles 2 and 8 ECHR oblige it to take these measures, as the Court of Appeal held, and that it is obliged based on those provisions to ensure that the volume of greenhouse gases being emitted at the end of 2020 is 25% less than it was in 1990.

5 Do Articles 2 and 8 ECHR oblige the State to take measures?

5.1 According to the State, Articles 2 and 8 ECHR do not oblige it to offer protection from the genuine threat of dangerous climate change. The State asserts that this danger is not specific enough to fall within the scope of protection afforded by Articles 1, 2 and 8 ECHR. To that end, the State asserts that the threat is global in

nature; in other words, that it is global in both cause and scope, and that it relates to the environment, which the State argues is not protected as such by the ECHR.

(a) The meaning of Articles 1, 2 and 8 ECHR; positive treaty obligations

5.2.1 Article 1 ECHR provides that the contracting parties must secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the ECHR. In other words, ECHR protection is afforded to the persons who fall within the states' jurisdiction. In the Netherlands this regards, primarily and to the extent relevant in this case, the residents of the Netherlands.

5.2.2 Article 2 ECHR protects the right to life. According to established ECtHR case law, this provision also encompasses a contracting state's positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction.[7] According to that case law, this obligation applies, *inter alia*, if the situation in question entails hazardous industrial activities, regardless of whether these are conducted by the government itself or by others, and also in situations involving natural disasters. The ECtHR has on multiple occasions found that Article 2 ECHR was violated with regard to a state's acts or omissions in relation to a natural or environmental disaster.[8] It is obliged to take appropriate steps if there is a real and immediate risk to persons and the state in question is aware of that risk. In this context, the term 'real and immediate risk' must be understood to refer to a risk that is both genuine and imminent. The term 'immediate' does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved. The protection of Article 2 ECHR also regards risks that may only materialise in the longer term.[9]

5.2.3 Article 8 ECHR protects the right to respect for private and family life. This provision also relates to environmental issues. The ECHR may not entail a right to protection of the living environment, but according to established ECtHR case law, protection may be derived from Article 8 ECHR in cases in which the materialisation of environmental hazards may have direct consequences for a person's private lives and are sufficiently serious, even if that person's health is not in jeopardy. According to that case law, when it comes to environmental issues, Article 8 ECHR encompasses the positive obligation to take reasonable and appropriate measures to protect individuals against possible serious damage to their environment. The ECtHR has found that Article 8 ECHR was violated in various cases involving environmental harm.[10] The obligation to take measures exists if there is a risk that serious environmental contamination may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. That risk need not exist in the short term.[11]

5.2.4 According to the ECtHR, when it comes to activities that are hazardous to the environment, the positive obligation implied by Article 8 ECHR largely overlaps with the obligation implied by Article 2 ECHR. The case law regarding the former obligation therefore applies to the latter obligation.[12] In the case of environmentally hazardous activities, the state is expected to take the same measures pursuant to Article 8 ECHR that it would have to take pursuant to Article 2 ECHR.[13] Therefore, the obligations pursuant to Articles 2 and 8 ECHR will be referred to collectively below.

5.3.1 The protection afforded by Articles 2 and 8 ECHR is not limited to specific persons, but to society or the population as a whole.[14] The latter is for instance the case with environmental hazards.[15] In the case of environmental hazards that endanger an entire region, Articles 2 and 8 ECHR offer protection to the residents of that region.

5.3.2 The obligation to take appropriate steps pursuant to Articles 2 and 8 ECHR also encompasses the duty of the state to take preventive measures to counter the danger, even if the materialisation of that danger is uncertain.[16] This is consistent with the precautionary principle.[17] If it is clear that the real and immediate risk referred to above in paras. 5.2.2 and 5.2.3 exists, states are obliged to take appropriates steps without having a margin of appreciation. The states do have discretion in choosing the steps to be taken, although these must actually be reasonable and suitable.[18]

The obligation pursuant to Articles 2 and 8 ECHR to take appropriate steps to counter an imminent threat may encompass both mitigation measures (measures to prevent the threat from materialising) or adaptation measures (measures to lessen or soften the impact of that materialisation). According to ECtHR case law, which measures are suitable in a given case depends on the circumstances of that case.[19]

5.3.3 The court may determine whether the measures taken by a state are reasonable and suitable. The policy a state implements when taking measures must be consistent and the state must take measures in good time. A state must take due diligence into account in its policy.[20] The court can determine whether the policy implemented satisfies these requirements. In many instances found in ECtHR case law, a state's policy has been found to be inadequate, or a state has failed to provide sufficient substantiation that its policy is not inadequate.[21] In its judgment in *Jugheli et al./Georgia*[22], for example, the ECtHR held as follows:

“76. The Court reiterates that it is not its task to determine what exactly should have been done in the present situation to reduce the impact of the plant’s activities upon the applicants in a more efficient way. However, it is within the Court’s jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests. In this respect the Court reiterates that the onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community (see Fadeyeva, cited above, § 128). Looking at the present case from this perspective, the Court notes that the Government did not present to the Court any relevant environmental studies or documents informative of their policy towards the plant and the air pollution emanating therefrom that had been affecting the applicants during the period concerned.”

5.3.4 Articles 2 and 8 ECHR must not result in an impossible or under the given circumstances disproportionate burden being imposed on a state.[23] If a state has taken reasonable and suitable measures, the mere fact that those measures were unable to deter the hazard does not mean that the state failed to meet the obligation that had been imposed on it. The obligations ensuing from Articles 2 and 8 ECHR regard measures to be taken by a state, not the achievement, or guarantee of the achievement, of the envisaged result.[24]

(b) Interpretation standards for the ECHR; 'common ground'

5.4.1 According to established ECtHR case law, the provisions of the ECHR must be interpreted and applied so as to make its safeguards practical and effective. According to the ECtHR, this 'effectiveness principle' ensues from "the object and purpose of the Convention as an instrument for the protection of individual human beings".[25] This also regards the application of Article 31(1) of the Vienna Convention on the Law of Treaties,[26] which stipulates that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the light of its object and purpose.

5.4.2 According to ECtHR case law, an interpretation of the ECHR must also take into account the relevant rules of international law referred to in Article 31(3)(c) of the Vienna Convention on the Law of Treaties. For example, in its judgment in *Nada/Switzerland*, the ECtHR held as follows:[27]

"169. Moreover, the Court reiterates that the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (...)."

Furthermore, in accordance with Article 31(3), opening words and paragraph (b), of the Vienna Convention on the Law of Treaties, an interpretation of treaty provisions must take the Member States' application practice into account.

The ECtHR's holding in the *Demir and Baykara/Turkey*[28] judgment was consistent with the foregoing:

"85. The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.

86. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies (...)."

In this context, is spoken of the common-ground method of interpreting the ECHR, in accordance with the last section of the findings cited above.

5.4.3 According to ECtHR case law, an interpretation and application of the ECHR must also take scientific insights and generally accepted standards into account.[29]

(c) Article 13 ECHR

5.5.1 Article 13 ECHR is also relevant to the interpretation of Articles 2 and 8 ECHR; Article 13 provides that if the rights and freedoms under the ECHR are violated, there exists the right to an effective remedy before a national authority. According to ECtHR case law, this provision guarantees the existence of a remedy at national level to compel the observance of these rights and freedoms. In cases involving an arguable complaint regarding the violation of those rights and freedoms, national law must therefore offer a remedy that leads to obtaining appropriate relief. The scope of this obligation depends on the nature of the violation. The remedy must be both practically and legally effective.[30]

5.5.2 A remedy is considered effective as meant in Article 13 ECHR if it will prevent or end the violation or if the remedy offers adequate redress for a violation that has already occurred. In the case of more serious violations, the available remedies must provide for both: the prevention or end of the violation as well as redress.[31] National states are thus required to provide remedies that can effectively prevent more serious violations.

5.5.3 The remedy must ensure that a national court determines whether the rights and freedoms ensuing from the ECHR have been violated and that this court does so in accordance with the rules of the ECHR and the interpretation of those rules by the ECtHR.[32] In short: the remedy must offer effective legal protection from possible violations of the rights and freedoms ensuing from the ECHR.

(d) Do Articles 2 and 8 ECHR apply to the global problem of the danger of climate change?

5.6.1 Pursuant to Articles 93 and 94 of the Dutch Constitution, Dutch courts must apply every provision of the ECHR that is binding on all persons. Because the ECHR also subjects the Netherlands to the jurisdiction of the ECtHR (Article 32 ECHR), Dutch courts must interpret those provisions as the ECtHR has, or interpret them premised on the same interpretation standards used by the ECtHR.[33] This means that the findings above in paras. 5.2.1-5.5.3 must also be used as a premise by the Dutch courts.

5.6.2 Pursuant to the findings above in paras. 5.2.1-5.3.4, no other conclusion can be drawn but that the State is required pursuant to Articles 2 and 8 ECHR to take measures to counter the genuine threat of dangerous climate change if this were merely a national problem. Given the findings above in paras. 4.2-4.7, after all, this constitutes a 'real and immediate risk' as referred to above in para. 5.2.2 and it entails the risk that the lives and welfare of Dutch residents could be seriously jeopardised. The same applies to, *inter alia*, the possible sharp rise in the sea level, which could render part of the Netherlands uninhabitable. The fact that this risk will only be able to materialise a few decades from now and that it will not impact specific persons or a specific group of persons but large parts of the population does not mean – contrary to the State's assertions – that Articles 2 and 8 ECHR offer no protection from this threat (see above in para. 5.3.1 and the conclusion of paras. 5.2.2 and 5.2.3). This is consistent with the precautionary principle (see para. 5.3.2, above). The mere existence of a sufficiently genuine possibility that this risk will materialise means that suitable measures must be taken.

5.6.3 As the State has asserted, the ECtHR has not yet issued any judgments regarding climate change or decided any cases that bear the hallmarks that are particular to issues of climate change. Those hallmarks are, briefly put, the dangers presented by a globally occurring activity – the emission of greenhouse gases all over the world, and not just from Dutch territory – whose consequences will have a worldwide impact, including in the Netherlands. The question is whether the global nature of the emissions and the consequences thereof entail that no protection can be derived from Articles 2 and 8 ECHR, such that those provisions impose no obligation on the State in this case.

5.6.4 The Supreme Court considers the answer to this question to be sufficiently clear. It will therefore give the answer to this question itself and will not submit it to the ECtHR for an advisory opinion, as is possible but not compulsory under Protocol no. 16 to the ECHR, which entered into effect on 1 June 2019. In addition, both parties have asked the Supreme Court to hand down its judgment before the end of 2019, in view of the time to which the District Court's order, upheld by the Court of Appeal, relates, which is the end of 2020.

(e) Joint responsibility of the states and partial responsibility of individual states

5.7.1 The answer to the question referred to in 5.6.3 above is in the opinion of the Supreme Court, that, under Articles 2 and 8 ECHR, the Netherlands is obliged to do 'its part' in order to prevent dangerous climate change, even if it is a global problem. This is based on the following grounds.

5.7.2 The UNFCCC is based on the idea that climate change is a global problem that needs to be solved globally. Where emissions of greenhouse gases take place from the territories of all countries and all countries are affected, measures will have to be taken by all countries. Therefore, all countries will have to do the necessary. The preamble to this convention states, among other things, the following in this context:

"Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions, (…).

Recalling also that States have (…) the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

5.7.3 The objective of the UNFCCC is to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous human induced interference with the climate system (Article 2). Article 3 contains various principles to achieve this objective. For instance, Article 3(1) provides that the parties "should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities". Article 3(3) provides that the parties "should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects". And Article 4

provides, put succinctly, that all parties will take measures and develop policy in this area. It follows from these provisions that each state has an obligation to take the necessary measures in accordance with its specific responsibilities and possibilities.

5.7.4 At the annual climate change conferences held on the basis of the UNFCCC since 1992, the provisions mentioned above in 5.7.3 have been further developed in various COP decisions. In each case these are based first and foremost on an acknowledgement of the above understanding: all countries will have to do the necessary. Articles 3 et seq. of the 2015 Paris Agreement reiterates this in so many words.

5.7.5 This understanding corresponds to what is commonly referred to as the 'no harm principle', a generally accepted principle of international law which entails that countries must not cause each other harm. This is also referred to in the preamble to the UNFCCC (in the section cited in 5.7.2 above). Countries can be called to account for the duty arising from this principle. Applied to greenhouse gas emissions, this means that they can be called upon to make their contribution to reducing greenhouse gas emissions. This approach justifies partial responsibility: each country is responsible for its part and can therefore be called to account in that respect.

5.7.6 This partial responsibility is in line with what is adopted in national and international practice in the event of unlawful acts that give rise to only part of the cause of the damage. Partial responsibility is in line with, inter alia, the Draft Articles on Responsibility of States for Internationally Wrongful Acts, as proposed by the UN International Law Commission and adopted by the UN General Assembly. This is apparent, for example, in the explanatory notes to Article 47(1) thereof, in which the following is remarked:[34]

"6. According to paragraph 1 of article 47, where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. (…)

8. Article 47 only addresses the situation of a plurality of responsible States in relation to the same internationally wrongful act. The identification of such an act will depend on the particular primary obligation, and cannot be prescribed in the abstract. Of course, situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. (…) In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations."

Many countries have corresponding rules in their liability law system.[35]

It is true that Article 3(1) UNFCCC referred to in 5.6.3 above entails that the distribution of the measures to be taken against climate change must not be based solely on the basis of responsibility for past emissions by a country, and that consideration must also be given to the possibilities for countries to reduce their emissions. But that does not detract from the fact that the underlying principle of these widely accepted rules is always that, in short, 'partial fault' also justifies partial responsibility.

5.7.7 Partly in view of the serious consequences of dangerous climate change as referred to in 4.2 above, the defence that a state does not have to take responsibility because other countries do not comply with their partial responsibility, cannot be accepted. Nor can the assertion that a country's own share in global greenhouse gas emissions is very small and that reducing emissions from one's own territory makes little difference on a global scale, be accepted as a defence. Indeed, acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing out other countries or its own small share. If, on the other hand, this defence is ruled out, each country can be effectively called to account for its share of emissions and the chance of all countries actually making their contribution will be greatest, in accordance with the principles laid down in the preamble to the UNFCCC cited above in 5.7.2.

5.7.8 Also important in this context is that, as has been considered in 4.6 above about the carbon budget, each reduction of greenhouse gas emissions has a positive effect on combating dangerous climate change, as every reduction means that more room remains in the carbon budget. The defence that a duty to reduce greenhouse gas emissions on the part of the individual states does not help because other countries will continue their emissions cannot be accepted for this reason either: no reduction is negligible.[36]

5.7.9 Climate change threatens human rights, as follows from what has been considered in 5.6.2 above. This is also recognised internationally outside the context of the Council of Europe.[37] In order to ensure adequate protection from the threat to those rights resulting from climate change, it should be possible to invoke those rights against individual states, also with regard to the aforementioned partial responsibility. This is in line with the principle of effective interpretation, referred to in 5.4.1 above, that the ECtHR applies when interpreting the ECHR and also with the right to effective legal protection guaranteed by Article 13 ECHR, referred to 5.5.1-5.5.3 above.

5.8 In view of the considerations in 5.7.2-5.7.9 above, the Supreme Court finds that Articles 2 and 8 ECHR relating to the risk of climate change should be interpreted in such a way that these provisions oblige the contracting states to do 'their part' to counter that danger. In light both of the facts set out in 4.2-4.7 and of the individual responsibility of the contracting states, this constitutes an interpretation of the positive obligations laid down in those provisions that corresponds to its substance and purport as mentioned in 5.2.1-5.3.3 above. This interpretation is in accordance with the standards set out in 5.4.1-5.4.3 that the ECtHR applies when interpreting the ECHR and that the Supreme Court must also apply when interpreting the ECHR.

(f) Can this obligation pursuant to Articles 2 and 8 ECHR also be relied upon in a case involving a claim pursuant to Article 3:305a DCC?

5.9.1 It follows from the above that, as the Court of Appeal has ruled, the State is obliged on the basis of Articles 2 and 8 ECHR to take appropriate measures against the threat of dangerous climate change, in accordance with its share as referred to in 5.8 above.

5.9.2 Urgenda, which in this case, on the basis of Article 3:305a DCC, represents the interests of the residents of the Netherlands with respect to whom the obligation referred to in 5.9.1 above applies, can invoke this obligation. After all, the interests of those residents are sufficiently similar and therefore lend themselves to being pooled, so as to promote efficient and effective legal protection for their benefit.[38] Especially in

cases involving environmental interests, such as the present case, legal protection through the pooling of interests is highly efficient and effective.[39] This is also in line with Article 9(3) in conjunction with Article 2(5) of the Aarhus Convention,[40] which guarantees interest groups access to justice in order to challenge violations of environmental law, and in line with Article 13 ECHR (see 5.5.1-5.5.3 above).

5.9.3 As the Court of Appeal rightly held in para. 35, the fact that Urgenda does not have a right to complain to the ECtHR on the basis of Article 34 ECHR, because it is not itself a potential victim of the threatened violation of Articles 2 and 8 ECHR, does not detract from Urgenda's right to institute proceedings. After all, this does not deprive Urgenda of the power to institute a claim under Dutch law in accordance with Article 3:305a DCC on behalf of residents who are in fact such victims.

(g) Assessment of the complaints in cassation

5.10 The complaints of grounds for cassation 1-3 fail on the basis of the above. The same applies to the complaints of grounds for cassation 4-8 insofar as these relate to the Court of Appeal's opinion that Articles 2 and 8 ECHR subject the State to the duty to take measures to counter dangerous climate change.

6. Assumptions in answering the question of what specific obligation on the part of the State results from the foregoing

6.1 As considered above, pursuant to Articles 2 and 8 ECHR the State is obliged towards the residents of the Netherlands, in accordance with its share as referred to above in 5.8, to take adequate measures to reduce greenhouse gas emissions from Dutch territory. However, this does not yet answer the question of what this obligation on the part of the State means in concrete terms.

6.2 The answer to this question belongs, in principle, to the political domain, both internationally and nationally. States will have to agree among themselves on their respective individual share in reducing greenhouse gas emissions and make the necessary choices and considerations in this regard. Such agreements have been made, in the UNFCCC, but only in the form of the general obligations mentioned in 5.7.3 above and principles set out in Articles 3 and 4 of the UNFCCC. These general obligations and principles mean that a fair distribution must take place, taking into account the responsibility and state of development of the individual countries. For obvious political reasons, international or otherwise, some which relating to negotiation strategy, the emission reduction agreements made at the various climate conferences are not legally binding in themselves.

6.3 In the Dutch constitutional system, making the agreement referred to in 6.2 above falls within the competence of the government, which is subject to parliamentary oversight. The Netherlands can also decide to reduce greenhouse gas emissions from its territory without binding or non-binding international agreements. The Netherlands is also obliged to do so, as has been considered in 5.9.1 above. Although determining the share to be contributed by the Netherlands in the reduction of greenhouse gas emissions is, in that context too, in principle, a matter for the government and parliament, the courts can assess whether the measures taken by the State are too little in view of what is clearly the lower limit of its share in the measures to be taken

worldwide against dangerous climate change. It is clear, for example, in view of what has been considered above in 5.7.2-5.8, that the State cannot at any rate do nothing at all and that the courts can rule that the State is in breach of its obligation referred to in 5.9.1 above if it does nothing.

Under certain circumstances, there may also be such clear views, agreements and/or consensus in an international context about the distribution of measures among countries that the courts can establish what – in accordance with the widely supported view of states and international organisations, which view is also based on the insights of climate science – can in any case be regarded as the State's minimum fair share. On the basis of the standards referred to above in 5.4.2 and 5.4.3 (including the common ground method), which the Dutch courts are obliged to apply when interpreting the ECHR (see above in 5.6.1), the courts are then obliged to proceed to establishing such and to attach consequences to it in their judgment on the extent of the State's positive obligations. It follows from the ECtHR case law referred to above in 5.4.2 that, under certain circumstances, agreements and rules that are not binding in and of themselves may also be meaningful in relation to such establishment. This may be the case if those rules and agreements are the expression of a very widely supported view or insight and are therefore important for the interpretation and application of the State's positive obligations under Articles 2 and 8 ECHR.

6.4 The right to effective legal protection under Article 13 ECHR mentioned above in 5.5.1-5.5.3 entails, in a case such as this, that the courts must examine whether it is possible to grant effective legal protection by examining whether there are sufficient objective grounds from which a concrete standard can be derived in the case in question.

6.5 In addition, the courts can assess whether the State, with regard to the threat of a dangerous climate change, is complying with its duty mentioned above in 5.5.3 under Articles 2 and 8 ECHR to observe due diligence and pursue good governance. Under certain circumstances, the obligation to take measures of a certain scope or quality may arise from this duty. Furthermore, this duty implies that, under certain circumstances, the State must properly substantiate that the policy it pursues meets the requirements to be imposed, i.e. that it pursues a policy through which it remains above the lower limit of its fair share.

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

7 The 25-40% target for Annex I countries

7.1 The first question to be addressed in these proceedings is whether the 25% to 40% reduction in greenhouse gas emissions in 2020 compared to 1990, which is based on AR4 (hereinafter: 'the 25-40% target'), formulated as a target for the Annex I countries, represents a corresponding obligation for the state. The State rightly argues that this target is not a binding rule or agreement in and of itself. The question is therefore whether this target nevertheless binds the State on one or more of the grounds mentioned above in 6.3-6.5.

The first question that needs to be answered in this context is (a) to what extent there is support within the international community for the 25-40% target. This question will be dealt with in 7.2.1-7.2.11 below. The next question is (b) whether this target also applies to the Netherlands as an individual country. This question will be dealt with in 7.3.1-7.3.6 below. After that (c) the State's policy to combat dangerous climate change is discussed in 7.4.1-7.4.6. Lastly (d) in 7.5.1-7.5.3 the question is answered whether it follows from all this that the Netherlands is obliged to meet the 25-40% target, as ruled by the District Court and Court of Appeal.

This is based on the facts established by the Court of Appeal.

(a) The degree of international consensus regarding the 25-40% target

7.2.1 The 25-40% target is part of an IPCC scenario in AR4 from 2007 for a global reduction in greenhouse gas emissions.[41] This scenario provides for Annex I countries to reduce greenhouse gas emissions by 25% to 40% in 2020 and by 80% to 95% in 2050, both compared to 1990 emissions. The distribution of measures between Annex I countries and other countries in this scenario is based on the principles of Articles 3 and 4 UNFCCC. The scenario was written for the target of a maximum concentration of greenhouse gases in the atmosphere of 450 ppm by 2100. This is the concentration at which global warming is reasonably expected to be limited to a maximum of 2°C. AR4 was established on the assumption that this is probably the critical limit above which there is risk of dangerous climate change. The scenario offers a good chance of not exceeding the limit of warming of more than 2°C.

7.2.2 The Bali Action Plan, established at the Bali Climate Change Conference in 2007 (COP-13) endorses the need for far-reaching reductions in greenhouse gas emissions to prevent dangerous climate change. In this respect, reference was made to, among other things, the scenario referred to in 7.2.1. It bears noting here that at climate change conferences decisions are often made on the basis of consensus.

7.2.3 At the Cancún Climate Change Conference in 2010 (COP-16), the countries that are parties to the Kyoto Protocol passed a resolution, the preamble to which expresses, among other things, that, taking into account the findings in AR4, the Annex I countries as a group should reduce their greenhouse gas emissions by 25% to 40% by 2020 compared to 1990:

> “Also recognizing that the contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Climate Change 2007: Mitigation of Climate Change, indicates that achieving the lowest levels assessed by the Intergovernmental Panel on Climate Change to date and its corresponding potential damage limitation would require Annex I Parties as a group to reduce emissions in a range of 25–40 per cent below 1990 levels by 2020, through means that may be available to these Parties to reach their emission reduction targets, (…)”

In the same resolution, the parties to the Kyoto Protocol urged Annex I countries to raise their level of ambition to meet the AR4 target individually or as a group:

> “4. Urges Annex I Parties to raise the level of ambition of the emission reductions to be achieved by them individually or jointly, with a view to reducing their aggregate level of emissions of greenhouse gases in accordance with the range indicated by Working Group III to the Fourth Assessment Report of the

Intergovernmental Panel on Climate Change, Climate Change 2007: Mitigation of Climate Change, and taking into account the quantitative implications of the use of land use, land-use change and forestry activities, emissions trading and project-based mechanism and the carry-over of units from the first to the second commitment period; (…).”

At the Durban Climate Change Conference in 2011 (COP-17), these countries passed another resolution, the preamble to which explicitly states that the target for Annex I countries is to reduce their total emissions by at least 25% to 40% compared to 1990 levels:

“Aiming to ensure that aggregate emissions of greenhouse gases by Parties included in Annex I are reduced by at least 25–40 per cent below 1990 levels by 2020, noting in this regard the relevance of the review referred to in chapter V of decision 1/CP.16 to be concluded by 2015, (…)”

The need for a reduction of this magnitude was also expressed at the Doha Climate Change Conference in 2012 (COP-18) in a resolution passed by the COP of countries party to the Kyoto Protocol. For the first time, the countries themselves stated in a resolution that, “in order to increase the ambition of its commitment”, the Annex I countries should strive to achieve at least a 25-40% reduction in greenhouse gas emissions by 2020 compared to 1990 levels.

The need for a reduction of this magnitude was also expressed at the climate change conferences in Warsaw, Lima and Paris in 2013, 2014 and 2015, respectively (COP-19, COP-20 and COP-21). At these conferences, this need has been endorsed again and again in resolutions, by reference either to the Doha Amendment or to resolutions passed at previous conferences. The preamble to the COP decision to adopt the Paris Agreement stresses the urgency of achieving this reduction.

Climate change conferences after 2015 no longer explicitly addressed or referred to the reduction target of 25-40% by 2020. At those conferences, however, the need for sufficient reductions in greenhouse gas emissions before and by 2020 has always been stressed.

7.2.4 As the Court of Appeal established in para. 49, the 25-40% target has not been superseded by the 2013-2014 AR5, contrary to what the State suggests. This report, too, is based on the target of a maximum concentration of greenhouse gases in the atmosphere of 450 ppm by 2100 as part of the objective that global warming not exceed 2oC. AR5 no longer discusses 2020. Indeed, this report focuses on later years, i.e. 2030 and in particular 2050 and 2100, and no longer contains targets for 2020. The 2014 and 2015 COP resolutions mentioned above in 7.2.3, which date from after AR5, still refer to the need for Annex I countries to reduce their greenhouse gas emissions by 25% to 40% by 2020 in accordance with AR4.

The distinction made in UNFCCC between Annex I countries and other countries was dropped in AR5, because by that time countries other than Annex I countries had to be deemed developed countries as well. It emerges from the above, however, that, contrary to what the State argues, this does not mean that AR4’s reduction scenario for 2020 has become outdated.

7.2.5 AR5 does contain new scenarios to achieve by 2050 and 2100 the reductions in greenhouse gas concentrations deemed necessary. These are largely based on the premise that there will not be a sufficient reduction in greenhouse gas emissions and that the concentration of greenhouse gases will

therefore have to be reduced by taking measures to remove these gases from the atmosphere (see 2.1(12) above). It is certain, however, that at the moment there is no technology that allows this to take place on a sufficiently large scale. Therefore, as the Court of Appeal held in para. 49, these new scenarios cannot be taken as a starting point for policy at this time without taking irresponsible risks by doing so. Taking such risks would run counter to the precautionary principle that must be observed when applying Articles 2 and 8 ECHR and Article 3(3) UNFCCC (see 5.3.2 and 5.7.3 above). It does not appear, therefore, that these new scenarios have been taken as a starting point for subsequent decisions at climate change conferences.

The Court of Appeal's finding that the 25-40% target has not been superseded by AR5 is therefore understandable and serves as a starting point in cassation.

7.2.6 The EU also took as a starting point the need for the AR4 scenario mentioned above in 7.2.1. Several EU bodies – the Council, the Commission and the Parliament – expressed the scientifically supported necessity of reducing emissions by 30% in 2020 in comparison to 1990. At the Cancún Climate Change Conference in 2010, the EU offered to commit itself to reducing its emissions by this percentage by 2020 if, among other things, the other developed countries would commit themselves to comparable reductions. The following has been noted on behalf of the EU:[42]

"10. The EU and its 27 member States wished to reconfirm their commitment to a negotiating process aimed at achieving the strategic objective of limiting the increase in global average temperature to below 2°C above pre-industrial levels. Meeting that objective requires the level of global GHG emissions to peak by 2020 at the latest, to be reduced by at least 50 per cent compared with 1990 levels by 2050 and to continue to decline thereafter. To this end, and in accordance with the findings of the Intergovernmental Panel on Climate Change, developed countries as a group should reduce their GHG emissions to below 1990 levels through domestic and complementary international efforts by 25 to 40 per cent by 2020 and by 80 to 95 per cent by 2050, while developing countries as a group should achieve a substantial deviation below the currently predicted rate of growth in emissions, in the order of 15 to 30 per cent by 2020. The EU and its 27 member States are fully committed to continuing to negotiate with the other Parties, with a view to concluding as soon as possible within the United Nations framework a legally binding international agreement for the period commencing 1 January 2013."

In case this condition would not be met – which has proved to be the case – the EU has committed itself to a 20% reduction by 2020. However, by 2020 the EU is expected to achieve a reduction of 26-27% compared to 1990.

7.2.7 It follows from the above that there is a high degree of consensus in the international community on the need for in any case the Annex I countries to reduce greenhouse gas emissions by 25% to 40% by 2020, in order to reduce global warming to the maximum of 2°C deemed responsible at the time of AR4.

7.2.8 After 2007, when AR4 came into being, a high degree of consensus on the need for even greater reductions was reached in the climate science community and the international community. As mentioned in 4.3 above, it has been recognised for some years that global warming should not be limited to a maximum of 2°C to prevent dangerous climate change, but to a maximum of 1.5°C. Therefore, the 2015

Paris Agreement explicitly stipulates that the states will endeavour to limit warming to 1.5°C, “recognising that this would significantly reduce the risks and impacts of climate change” (Article 2(1), opening words and (a), of the Agreement). This necessitates a greater reduction in greenhouse gas emissions than is necessary for a target of no more than 2°C.

7.2.9 The UNEP's 2017 annual report, referring to the carbon budget and the emissions gap described in 4.6 above, therefore states that, in light of the Paris Agreement, the reduction of greenhouse gas emissions is more urgent than ever. The UNEP also remarks that if the emissions gap is not bridged by 2030, achieving the two-degree target is extremely unlikely. Even if the reduction targets underlying the Paris Agreement are fully achieved, 80% of the carbon budget corresponding with the two-degree target will be used up by 2030. Starting from a 1.5°C target, the carbon budget will even have been completely exhausted by then. That is why even more ambitious reduction targets are needed for the year 2020, according to the UNEP. The UNEP concludes that “later-action scenarios may not be feasible in practice and, as a result, temperature targets could be missed” and that “later-action scenarios pose greater risks of climate impacts”.[43]

7.2.10 With regard to the above, it must be taken into account that, as the Court of Appeal established in para. 63 without being disputed in cassation, that the maximum targets of 1.5°C or 2°C and the related concentrations of a maximum of 430 or 450 ppm are based on estimates. It is therefore possible that dangerous climate change will occur even with less global warming and a lower concentration of greenhouse gases, for example because a tipping point is reached or because ice melts at a higher rate (see 4.4 above). The precautionary principle therefore means that more far-reaching measures should be taken to reduce greenhouse gas emissions, rather than less far-reaching measures.

7.2.11 From what has been considered above in 7.2.8-7.2.10, it follows once again that there is a high degree of international consensus on the urgent need for the Annex I countries to reduce greenhouse emissions by at least 25-40% by 2020 compared to 1990 levels, in order to achieve at least the two-degree target, which is the maximum target to be deemed responsible. This high degree of consensus can be regarded as common ground within the meaning of the ECtHR case law referred to above in 5.4.2, which according to that case law must be taken into account when interpreting and applying the ECHR.

(b) The 25-40% target for the Netherlands individually

7.3.1 The State has argued that the 25-40% target only applies to the Annex I countries as a group and not to each of them individually. Therefore, according to the State, this objective allegedly does not apply to it individually. In addition, the State has argued that the EU as a whole is committed to a 20% reduction in greenhouse gas emissions by 2020 (see 7.2.6 above) and that it was agreed at EU level that the Netherlands would contribute to this by reducing its greenhouse gas emissions in 2020 by 21% for the ETS sector and by 16% for the non-ETS sector, both compared to 2005 levels. According to the State, it complies with all its obligations by making these contributions.

7.3.2 In and of itself, it is correct that the 25-40% target in AR4 was included for the Annex I countries as a group. However, as shown by the considerations in 5.7.3 and 5.7.4 above, the UNFCCC and the Paris Agreement are both based on the individual responsibility of states. Therefore, in principle, the target from AR4 also applies to the individual states within the group of Annex I countries. As will become clear in 7.4.1, the State itself interpreted this target in the same way. Both the UNFCCC and the Paris Agreement provide for states to cooperate and conclude an agreement whereby they jointly reduce their emissions and whereby one may do more than the other (Article 4(2)(a), last sentence, UNFCCC and Article 4(16) and 4(17) Paris agreement). The State has not argued, however, that such an agreement was concluded by it in relation to the 25-40% target of AR4.

7.3.3 The purport of the State's reference to the agreements at EU level as mentioned in 7.3.1 above is not that such an agreement was reached at EU level. The State refers to those agreements only because, in its view, they are only standards that oblige it to achieve a certain concrete reduction in greenhouse gas emissions. However, this argument fails to recognise that, as considered in 5.8 and 6.3-6.5 above, the State may also be obliged to make such a reduction on the basis of Articles 2 and 8 ECHR, in which regard the consensus mentioned above in 7.2.11 is important.

Incidentally, as far as the present case has shown, the said agreements at EU level are not intended to replace the obligations of the individual EU Member States under the UNFCCC. At the Cancún Climate Change Conference in 2020, the EU formulated its own reduction target as it is a party to the UNFCCC on its own. By virtue of the agreements made within the EU on the distribution of measures necessary to enable the EU to achieve this reduction target, the Netherlands is subject to the reduction obligations set out in 7.3.1 above. However, these agreements are without prejudice to the individual responsibility of the EU Member States by any other virtue. The Effort Sharing Decision therefore states in consideration 17 of the preamble that this decision does not preclude more stringent national objectives. This also follows from Article 193 TFEU.

In addition, the EU itself expressed the need for 30% reduction by 2020 and the EU as a whole is expected to achieve a 26-27% reduction by 2020 compared to 1990, which is above the minimum target of 25% of the AR4 scenario and significantly more than the 20% reduction undertaken by the EU at the Cancún Climate Change Conference in 2010.

7.3.4 Moreover, the Court of Appeal rightly held in para. 60 that it would not be obvious for a lower reduction rate to apply to the Netherlands as an Annex I country than to the Annex I countries as a whole. As the Court of Appeal considered in para. 66, the Netherlands is one of the countries with very high per capita emissions of greenhouse gases. In the above agreements at EU level, the reduction percentage agreed upon for the Netherlands is, accordingly, one of the highest reduction percentages applicable to the EU Member States (Annex II to the Effort Sharing Decision). It can be assumed that this high percentage corresponds to the possibilities and responsibilities of the Netherlands. As the Court of Appeal established in para. 60, the State has not substantiated why a lower percentage should apply.

7.3.5 In ground for cassation 8.2.3, the State complains that the Court of Appeal ignored the State's argument that it was contributing to reducing global greenhouse gas emissions by providing knowledge and financial resources to developing countries, with which those countries could take mitigation and adaptation

measures. However, it did not elaborate on this assertion. The State did, amongst other things, not put forward that this contribution realises a reduction of greenhouse gas emissions and that this should be taken into account when answering the question as to which target applies to the State and whether the State achieves the target applicable to it.[44] This complaint therefore fails.

7.3.6 In view of the foregoing, the Court of Appeal rightly ruled that the urgent need for a 25-40% reduction by 2020 also applies to the Netherlands individually.

(c) The State's policy regarding measures to counter climate change

7.4.1 As considered in 4.8 above, the State acknowledges the need of the target of a maximum concentration of greenhouse gases in the atmosphere of 430 or 450 ppm by 2100, with global warming reasonably expected to be limited to no more than 1.5°C or 2°C. In this context, the State also endorsed the targets set out in the AR4 scenario. As regards that scenario's targets of 80% to 95% reduction by 2050 and of 450 ppm by 2100 (now 430 ppm by 2100), it still endorses them. For the year 2020, the State assumed a reduction target of 30% until 2011. According to the letter from the Minister of Housing, Spatial Planning and the Environment dated 12 October 2009 cited above in 2.1(27), the State, like the EU (see 7.2.6 and 7.3.3 above), was at the time of the opinion that a reduction of 25% to 40% by 2020 was necessary to stay on a credible track to keep the 2°C target within reach.

7.4.2 After 2011, the State adjusted its target for 2020 downwards to the 20% reduction at EU level as referred to in 7.3.1 above. In these proceedings, the State argues that, on closer inspection, achieving a 25% to 40% reduction by 2020 is not necessary, because the same result can be achieved by accelerating the reduction of greenhouse gas emissions in the Netherlands after 2020. The State argues that it intends to have this accelerated reduction take place after 2020 and that it prefers this reduction path over the AR4 scenario. The question, however, is whether an accelerated reduction of greenhouse gas emissions in the Netherlands after 2020 can indeed achieve the same result. In this context, the following facts taken into account by the Court of Appeal are relevant.

7.4.3 All greenhouse gas emissions lead to a reduction in the carbon budget still available (see also 4.6 above). Any postponement of the reduction of emissions therefore means that emissions in the future will have to be reduced on an increasingly large scale in order to make up for the postponement in terms of both of time and size. This means that, in principle, for each postponement of emissions reductions, the reduction measures to be taken at a later date will have to be increasingly far-reaching and costly in order to achieve the intended result, and it will also be riskier. The UNEP already warned about this in its 2013 annual report (see 2.1(22) above).

7.4.4 Following AR4, it became clear that in order to prevent dangerous climate change even greater reductions of greenhouse gas emissions are actually needed in the short term and that this need is becoming increasingly urgent, both before 2020 and in the subsequent period up to 2030 (see also 7.2.8-7.2.9 above). Also according to the Netherlands Environmental Assessment Agency (*Planbureau voor de Leefomgeving*) (the PBL) – which is an independent research institute that is part of the Ministry of

Infrastructure and the Environment – a policy is needed, in view of the Paris Agreement, that goes far beyond the current policies of the countries in question. According to the PBL in a 2016 report, the Dutch policy should be tightened in the short time in order to align it with the Paris Agreement.

7.4.5 The State acknowledges the fact referred to in 7.4.3 above (para. 71 of the Court of Appeal's judgments) and does not contest the facts mentioned in 7.4.4 above. Moreover, it has meanwhile formulated a reduction target for 2030 of 49% and for 2050 of 95% (these targets have been laid down in the Dutch Climate Act after the date of the Court of Appeal's judgment[45]). The target of 49% for 2030 was derived linearly from the target of 95% for 2050. On request, the State informed the Court of Appeal that if this line were extended to 2020 this would result in a target of 28% for that year (para. 47).

7.4.6 In view of the considerations in 7.4.3-7.4.5 above, there may be serious doubts as to whether, with the 20% reduction envisaged by the State at EU level by 2020, the overall reduction over the next few decades, which the State itself believes to be necessary in any case, is still feasible. After all, the need for this reduction requires the State to aim for a reduction in greenhouse gas emissions by more than 25% by 2020, rather than a reduction that is lower. The State has not explained that and why, despite the above and taking into account the precautionary principle applicable in this context, a policy aimed at 20% reduction by 2020 can still be considered responsible. The State has not provided any insight into which measures it intends to take in the coming years, let alone why these measures, in spite of the above, would be both practically feasible and sufficient to contribute to the prevention of dangerous climate change to a sufficient extent in line with the Netherlands' share. The State has confined itself to asserting that there "are certainly possibilities" in this context.

(d) Must the State adhere to the 25-40% target?

7.5.1 In view of the above, the Court of Appeal was allowed to rule in para. 52 that the State has insufficiently substantiated that it would be possible for a responsible policy to prevent dangerous climate change to include a greenhouse gas emissions reduction target of less than at least 25% by 2020. Therefore, in accordance with the foregoing considerations in 6.3-6.5, there is reason to come to the conclusion that the State should in any event adhere to the target of at least 25% reduction by 2020. As stated above, there is a large degree of consensus in the international community and climate science that at least this reduction by the Annex I countries, including the Netherlands, is urgently needed (see 7.2.11 and 7.3.6 above). Proper legal protection means that this consensus can be invoked when implementing the positive obligations incumbent on the State pursuant to Articles 2 and 8 ECHR. The target of achieving a reduction of at least 25% by 2020 is also in line with what the State itself considers necessary for other years (2030, 2050 and 2100 (see 7.4.1-7.4.5 above). In the context of the positive obligation on the State under Articles 2 and 8 ECHR to take appropriate measures to prevent dangerous climate change, this target can therefore be regarded as an absolute minimum. As the State has not been able to provide a proper substantiation of its claim that deviating from that target is nevertheless responsible (see 7.4.6 above), it must adhere to the target of 25%. It should therefore strive to achieve at least this reduction by 2020, as the Court of Appeal rightly held in para. 53.

7.5.2 The State has also argued, in ground for cassation 8.2, that it meets its obligations under Articles 2 and 8 ECHR by taking adaptation measures, whether or not in combination with mitigation measures already taken and proposed, and that it therefore does not have to meet the 25-40% target. In para. 59, however, the Court of Appeal established fully comprehensibly that although it is correct that the consequences of climate change can be mitigated by taking adaptation measures, it has not been demonstrated or made plausible that the potentially disastrous consequences of excessive global warming can be adequately prevented by such measures. This finding also implies that even if account is taken of the fact that the State is taking adaptation measures, mitigation measures that reduce emissions by at least 25% by 2020 are urgently needed, also for the Netherlands. The State's aforementioned argument therefore does not hold.

7.5.3 It should also be noted that the Court of Appeal's judgment implies in paras. 57 and 66 that the State has not sufficiently substantiated that the reduction of at least 25% by 2020 is an impossible or disproportionate burden, as referred to in 5.3.4 above. In this context, the State only referred to the short time remaining until the end of 2020 and to the impairment of the level playing field of the Dutch business community in an international context. In connection with the first argument, the Court of Appeal took into account that the District Court's order to the State dates back to 2015, i.e. has been in force since then, and that the State has moreover been aware of the seriousness of the climate problem for some time and initially pursued a policy aimed at a 30% reduction by 2020 (para. 66). With respect to the second argument, the Court of Appeal took into account that other EU countries pursue much stricter climate policies and that the State has not explained this argument in more detail (para. 57). By doing so, the Court of Appeal has comprehensibly rejected the State's assertion that there would be an impossible or disproportionate burden. Ground for cassation 8.4, which accuses the Court of Appeal of not having investigated this assertion, is therefore unfounded.

(e) Assessment of complaints in cassation

7.6.1 The complaints referred to in 4.237-4.248 of the Opinion proffered by the deputy Procurator General and the Advocate General cannot lead to cassation for the reasons stated there.

7.6.2 Insofar as complaints from grounds for cassation 4-8 have not been dealt with in the foregoing, these cannot lead to cassation either. With regard to Article 81(1) DJOA, this does not require any further substantiation since the complaints do not require answers to legal questions in the interest of unity of law or legal development.

8 Permissibility of the order issued; political domain

8.1 The State argues in ground for cassation 9 that the District Court's order to reduce Dutch greenhouse gas emissions by at least 25% in 2020 compared to 1990 levels, which was upheld by the Court of Appeal, is impermissible for two reasons. The first reason is that the order amounts to an order to create legislation,

which according to Supreme Court case law is not permissible. The second reason is, briefly put, that it is not for the courts to make the political considerations necessary for a decision on the reduction of greenhouse gas emissions. The following is considered in response to these arguments.

(a) Order to create legislation

8.2.1 If the government is obliged to do something, it may be ordered to do so by the courts, as anyone may be, at the request of the entitled party (Article 3:296 DCC). This is a fundamental rule of constitutional democracy, which has been enshrined in our legal order. As far as the rights and freedoms set out in the ECHR are concerned, this rule is consistent with the right to effective legal protection laid down in Article 13 ECHR referred to above in 5.5.1-5.5.3. Partly in connection with this fundamental rule, the Dutch Constitution stipulates that civil courts have jurisdiction over all claims, so that they can always grant legal protection if no legal protection is offered by another court.[46]

8.2.2 It follows from the considerations in 5.1.7-6.2 above that, in this case, the State has a legal duty by virtue of the protection it must provide to residents of the Netherlands on the basis of Articles 2 and 8 ECHR in order to protect their right to life and their right to private and family life. It may therefore be ordered to comply with this duty by the courts, unless there are grounds for an exception in accordance with Article 3:296 DCC. Under that provision, an exception arises if the law so provides or if it follows from the nature of the obligation or the legal act. The Supreme Court case law relating to orders to create legislation constitutes an application of this exception.[47]

8.2.3 This case law is based on two considerations. First of all, there is the consideration that the courts should not intervene in the political decision-making process involved in the creation of legislation. Secondly, there is the consideration that such an order should create an arrangement that also applies to parties other than the parties to the proceedings.[48]

8.2.4 The first consideration does not mean that courts cannot enter the field of political decision-making at all. In the case law referred to above, therefore, the earlier case law of the Supreme Court has been reiterated, which dictates that, on the basis of Article 94 of the Dutch Constitution, the courts must disapply legislation if any binding provisions of treaties entail such.[49] It has also been decided in that case law that the courts may issue a declaratory decision to the effect that the public body in question is acting unlawfully by failing to enact legislation with a particular content.[50]

The first consideration on which the case law referred to in 8.2.2 is based must therefore be understood to mean that the courts should not interfere in the political decision-making process regarding the expediency of creating legislation with a specific, concretely defined content by issuing an order to create legislation. In view of the constitutional relationships, it is solely for the legislator concerned to determine for itself whether legislation with a particular content will be enacted. Therefore, the courts cannot order the legislator to create legislation with a particular content.

8.2.5 The second consideration on which the case law referred to in 8.2.2 above is based relates to the circumstance that the civil courts only pronounce binding decisions between the parties to the dispute (cf. Article 236 DCCP). The courts do not have the power to decide in a manner binding on everyone how a

statutory provision should read. An order to create legislation is therefore subject to the objection that third parties, which are not involved in the proceedings and are therefore not bound by the judgment, would still be bound (indirectly) by that order by virtue of the fact that that legislation would also apply to them. This objection does not arise in the case of an order not to apply statutory provisions, which applies only to a particular claimant, or in the case of a declaratory decision. The same applies to a general order to take measures, while respecting the legislator's freedom, as referred to in the second paragraph of 8.2.4 above, to create or not to create legislation with a particular content. After all, the courts in that case do not determine the content of the statutory provision by issuing their order; this determination is still reserved to the legislator in question.

8.2.6 It follows from the above that the courts are only not permitted to issue an order to create legislation with a particular, specific content. After all, only then do the objections arise which are raised in the consideration on which the case law referred to in 8.2.2 above is based. Therefore, the courts are not prevented to issue a declaratory decision to the effect that the omission of legislation is unlawful (see 8.2.4 above). They may also order the public body in question to take measures in order to achieve a certain goal, as long as that order does not amount to an order to create legislation with a particular content. In the Supreme Court judgment of 9 April 2010 (SGP), the impermissibility of courts issuing an order to create legislation is for that reason limited to this case.[51]

8.2.7 In light of the foregoing, the District Court's order, upheld by the Court of Appeal, constitutes an application of the main rule of Article 3:296 DCC. Indeed, this order does not amount to an order to take specific legislative measures, but leaves the State free to choose the measures to be taken in order to achieve a 25% reduction in greenhouse gas emissions by 2020. This is not altered by the fact that many of the possible measures to be taken will require legislation, as argued by the State. After all, it remains for the State to determine what measures will be taken and what legislation will be enacted to achieve that reduction. The exception to Article 3:296 DCC made in the case law referred to in 8.2.2 above therefore does not apply in this case.

(b) Political domain

8.3.1 This brings the Supreme Court to the assessment of the State's more general argument that it is not for the courts to make the political considerations necessary for a decision on the reduction of greenhouse gas emissions.

8.3.2 As considered in 6.3 above, in the Dutch constitutional system of decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound.

8.3.3 The limits referred to in 8.3.2 above include those for the State arising from the ECHR. As considered in 5.6.1 above, the Netherlands is bound by the ECHR and the Dutch courts are obliged under Articles 93 and 94 of the Dutch Constitution to apply its provisions in accordance with the interpretation of the

ECtHR. The protection of human rights it provides is an essential component of a democratic state under the rule of law.

8.3.4 This case involves an exceptional situation. After all, there is the threat of dangerous climate change and it is clear that measures are urgently needed, as the District Court and Court of Appeal have established and the State acknowledges as well (see 4.2-4.8 above). The State is obliged to do 'its part' in this context (see 5.7.1-5.7.9 above). Towards the residents of the Netherlands, whose interests Urgenda is defending in this case, that duty follows from Articles 2 and 8 ECHR, on the basis of which the State is obliged to protect the right to life and the right to private and family life of its residents (see 5.1-5.6.4 and 5.8-5.9.2 above). The fact that Annex I countries, including the Netherlands, will need to reduce their emissions by at least 25% by 2020 follows from the view generally held in climate science and in the international community, which view has been established by the District Court and the Court of Appeal (see 7.2.1-7.3.6 above). The policy that the State pursues since 2011 and intends to pursue in the future (see 7.4.2 above), whereby measures are postponed for a prolonged period of time, is clearly not in accordance with this, as the Court of Appeal has established. At least the State has failed to make it clear that its policy is in fact in accordance with the above (see 7.4.6 and 7.5.1 above).

8.3.5 In this case, therefore, the Court of Appeal was allowed to rule that the State is in any case obliged to achieve the aforementioned reduction of at least 25% by 2020.

(c) Assessment of the complaints in cassation

8.4 Ground for cassation 9 therefore cannot lead to cassation either.

9 Decision

The Supreme Court:

- rejects the appeal;

- orders the State to pay the costs of the proceedings in cassation, up to this decision estimated on the part of Urgenda at EUR 882.34 in disbursements and EUR 2,200 in fees.

This judgment rendered by Vice President C.A. Streefkerk as chairman and justices G. Snijders, M.V. Polak, T.H. Tanja-van den Broek and H.M. Wattendorff, and pronounced in open court by Vice President C.A. Streefkerk on 20 December 2019.

Appendix

List of abbreviations used

AR4 The Fourth IPCC Assessment Report (2007)

AR5 The Fifth IPCC Assessment Report (2013– 2014)

oC degrees Celsius

Cf. compare

CO2 carbon dioxide

COP Conference of the Parties to the UNFCCC

DCC Dutch Civil Code (*Burgerlijk Wetboek*)

DCCP Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*)

DJOA Dutch Judiciary Organisation Act (*Wet op de Rechterlijke Organisatie*)

ECHR European Convention on the Protection of Human Rights and Fundamental Freedoms

ECtHR European Court of Human Rights

et al. and other(s)

ETS Emissions Trading System

EU The European Union

GDP gross domestic product

GHG greenhouse gases

IPCC Intergovernmental Panel on Climate Change

no. or nos. number or numbers

p. or pp. page or pages

para. paragraph

PBL The Netherlands Environmental Assessment Agency (*Planbureau voor de Leefomgeving*)

ppm parts per million

Stb. The Dutch Bulletin of Acts and Decrees (*Staatsblad)*

Supreme Court The Supreme Court of the Netherlands

TFEU Treaty on the Functioning of the European Union

Trb. The Dutch Bulletin of Treaties (*Tractatenblad)*

UN United Nations

UNEP United Nations Environment Program

UNFCCC The United Nations Framework Convention on Climate Change

Vol. Volume

VROM Ministry of Public Health, Spatial Planning and the Environment

WMO World Meteorological Organization

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1 The Hague District Court 24 June 2015, ECLI:NL:RBDHA:2015:7145. English translation ECLI:NL:RBDHA:2015:7196.

2 The Hague Court of Appeal 9 October 2018, ECLI:NL:GHDHA:2018:2591. English translation ECLI:NL:GHDHA:2018:2610.

3 United Nations Framework Convention on Climate Change, New York, 9 May 1992, Trb. 1992, 189, entered into force in the Netherlands on 21 March 1994 (Trb. 1994, 63).

4 Paris Agreement, 12 December 2015, Trb. 2016, 94 (rectification in Trb. 2016, 127), entered into force in the Netherlands on 27 August 2017 (Trb. 2017, 141).

5 Decision 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020.

6 Supreme Court 5 November 1965, ECLI:NL:HR:1965:AB7079.

7 See, inter alia, ECtHR 28 March 2000, no. 22492/93 (Kiliç/Turkey), para. 62, and ECtHR 17 July 2014, no. 47848/08 (Centre for Legal Resources on behalf of Valentin Câmpeanu/Romania), para. 130.

8 Cf. ECHR, Guide on Article 2 of the European Convention on Human Rights (version 31 August 2019), nos. 9, 10 and 31-37 and the ECtHR judgments mentioned there.

9 Cf., inter alia, the following judgments in which the ECtHR held that the requirements set out here were met: ECtHR 30 November 2004, no. 48939/99 (Öneryildiz/Turkey), paras 98-101 (gas explosion at landfill; the risk of this occurring at any time had existed for years and had been known to the authorities for years), ECtHR 20 March 2008, no. 15339/02 (Budayeva et al./Russia), paras. 147-158 (life-threatening mudslide; the authorities were aware of the danger of mudslides there and of the possibility that they might occur at some point on the scale it actually did) and ECtHR 28 February 2012, no. 17423/05 (Kolyadenko et al./Russia), paras. 165 and 174-180 (necessary outflow from the reservoir because of exceptionally heavy rains; the authorities knew that in the event of exceptionally heavy rains evacuation might be necessary). See in this sense also Administrative Jurisdiction Division of the Council of State 18 November 2015,ECLI:NL:RVS:2015:3578 (Gas extraction in Groningen), para. 39.3.

10 Cf. ECtHR, Guide on Article 8 of the European Convention on Human Rights (version dated 31 August 2019), nos. 119-127, 420-435 and 438-439 and the ECtHR judgments mentioned there.

11 Cf. ECtHR 10 November 2004, no. 46117/99 (Taşkin et al./Turkey), paras. 107 and 111-114 (Article 8 ECHR also applies to the threat of environmental pollution that might materialise only in twenty to fifty years), and ECtHR 27 January 2009, no. 67021/01 (Tătar/Romania), paras. 89-97 (possible longer-term health risks from heavy metal emissions from gold mining).

12 ECtHR 20 March 2008, no. 15339/02 (Budayeva et al./Russia), para. 133.

13 ECtHR 24 July 2014, no. 60908/11 (Brincat et al./Malta), para. 102.

14 With regard to Article 2 ECHR, see, inter alia, ECtHR 12 January 2012, no. 36146/05 (Gorovenky and Bugara/Ukraine), para. 32, and ECtHR 13 April 2017, no. 26562/07 (Tagayeva et al./Russia), para. 482. With regard to Article 8 ECHR, see, inter alia, ECtHR 26 July 2011, no. 9718/03 (Stoicescu/Romania), para. 59.

15 See ECtHR 10 January 2012, no. 30765/08 (Di Sarno et al./Italy), para. 110 and ECtHR 24 January 2019, no. 54414/13 (Cordella et al./Italy), para. 172.

16 See, inter alia, the judgments cited in 5.2.2 and 5.2.3 above.

17 With regard to Article 8 ECHR, see: ECtHR 27 January 2009, no. 67021/01 (Tătar/ Romania), para. 120.

18 With regard to Article 2 ECHR, see, inter alia, ECtHR 20 March 2008, no. 15339/02 (Budayeva et al./Russia), para. 134, and ECtHR 24 July 2014, no. 60908/11 (Brincat et al./Malta), para. 101. With regard to Article 8 ECHR, see, inter alia, ECtHR 9 June 2005, no. 55723/00 (Fadeyeva/Russia), para. 96.

19 See again the judgments cited in 5.2.2 and 5.2.3, above.

20 See, inter alia, ECtHR 30 November 2004, nr. 48939/99 (Öneryildiz/Turkey), para. 128, ECtHR 9 June 2005, no. 55723/00 (Fadeyeva/Russia), para. 128, and ECtHR 26 July 2011, no. 9718/03 (Stoicescu/Romania), para. 59

21 See ECtHR 9 June 2005, no. 55723/00 (Fadeyeva/Russia), paras. 124-134, ECtHR 20 March 2008, no. 15339/02 (Budayeva et al./Russia), paras. 156-158, ECtHR 24 January 2019, no. 54414/13 (Cordella et al./Italy), paras. 161-174, ECtHR 10 February 2011, no. 30499/03 (Dubetska et al./Ukraine), paras. 150-156, and ECtHR 13 July 2017, no. 38342/05 (Jugheli et al./Georgia), paras. 76-78.

22 ECtHR 13 July 2017, no. 38342/05 ECtHR 13 July 2017, no. 2017/190 (Jugheli et al./Georgia).

23 See ECtHR 20 March 2008, no. 15339/02 (Budayeva et al./Russia), para. 135, and ECtHR 24 July 2014, no. 60908/11 (Brincat et al./Malta), para. 101.

24 See ECtHR 26 July 2011, no. 9718/03 (Stoicescu/Romania), para. 59.

25 See, inter alia, ECtHR 7 July 1989, no. 14038/88 (Soering/United Kingdom), para. 87.

26 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, Trb. 1972, 51 and 1985, 79.

27 ECtHR 12 September 2012, no. 10593/08 (Nada/Switzerland).

28 ECtHR 12 November 2008, no. 34503/97 (Demir and Baykara/Turkey). For an example, see ECtHR 27 January 2009, no. 67021/01 (Tătar/Romania), para. 120 (reference to the Rio Declaration).

29 See, inter alia, ECtHR 17 October 1986, no. 9532/81 (Rees), para. 47, ECtHR 30 November 2004, no. 48939/99 (Öneryildiz/Turkey), paras. 59, 71, 90 and 93 (meaning ‘dangerous activities’), and ECtHR 20 May 2010, no. 61260/08 (Oluić/Croatia), paras. 29-31, 49, 60 and 62 (WHO noise standards).

30 See ECtHR 26 October 2000, no. 30210/96 (Kudla/Poland), para. 157, ECtHR 27 January 2015, no. 36925/10 (Neshkov et al./Bulgaria), paras. 180 and 181, and ECtHR 31 October 2019, no. 21613/16 (Ulemek/Croatia), para. 71.

31 See, inter alia, ECtHR 15 January 2015, no. 62198/11 (Kuppinger/Germany), paras. 136 and 137, with regard to a violation of Article 8 ECHR, and ECtHR 27 January 2015, no. 36925/10 (Neshkov et al./Bulgaria), para. 181, and ECtHR 31 October 2019, no. 21613/16 (Ulemek/Croatia), para. 71, with regard to a violation of Article 3 ECHR.

32 See ECtHR 27 January 2015, no. 36925/10 (Neshkov et al./Bulgaria), paras.186 and 187, and ECtHR 31 October 2019, no. 21613/16 (Ulemek/Croatia), para. 71.

33 Cf. Supreme Court 16 December 2016, ECLI:NL:HR:2016:2888, para. 3.3.3, first paragraph.

34 Yearbook of the International Law Commission 2001, Vol. II, Part Two, p. 125, right-hand column.

35 Cf. the overview at A.M. Honoré, Causation and Remoteness of Damage, International Encyclopedia of Comparative Law, Vol. XI, Torts Chapter 7, no. 112, and A.J. Akkermans, WPNR 6043. Cf. also Article 3:105 of Principles of European Tort Law. For the Netherlands, see: Supreme Court 23 September 1988, ECLI:NL:HR:1988:AD5713 (Kalimijnen), para. 3.5.1, third paragraph.

36 See in this sense also the judgment of the Supreme Court of United States in the case Massachusetts et al. v. Environmental Protection Agency et al., 2 April 2007, 549 U.S. 497 (2007), pp. 22-23.

37 Cf., inter alia, the data mentioned in 2.79-2.80 of the Opinion proffered by the deputy Procurator General and the Advocate General.

38 Cf., inter alia, Parliamentary Papers II, 1991/92, 22 486, no. 3, pp. 7 and 21-22, Supreme Court 27 June 1986, ECLI:NL:HR:1986:AD3741 (de Nieuwe Meer), para. 3.2, and Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549 (SGP), para. 4.3.2.

39 Supreme Court 27 June 1986, ECLI:NL:HR:1986:AD3741 (de Nieuwe Meer), para. 3.2, and Parliamentary Papers II, 1991/92, 22 486, no. 3, pp. 22-23.

40 Convention on access to information, public participation in decision-making and access to justice in environmental matters, 25 June 1998, Trb. 1998, 289, entered into force in the Netherlands on 29 March 2005, Trb. 2005, 22.

41 See box 13.7 from the Working Group III report that forms part of AR4.

42 United Nations Framework Convention on Climate Change, Compilation of economy-wide emission reduction targets to be implemented by Parties included in Annex I to the Convention, 7 June 2011, FCCC/SB/2011/INF.1/Rev.1, p. 4-5.

43 UNEP Emission Gap Report 2013, executive summary, under 6. According to the glossary of the report, ‘later-action scenarios’ refer to scenarios where emissions in the period 2020 to 2030 are higher than in the corresponding least-cost scenarios.

44 Cf. the provisions in 4.222 of the Opinion proffered by the deputy Procurator General and the Advocate General.

45 Act of 2 July 2019, Stb. 2019, 253.

46 Cf., inter alia, Supreme Court 28 September 2018, ECLI:NL:HR:2018:1806, para. 3.5.2, Parliamentary Papers II, 1979/80, 16 162, no. 3, pp. 6 and 10, and Parliamentary Papers II, 1991/92, 22 495, no. 3, pp. 83-84.

47 Supreme Court 21 March 2003, ECLI:NL:HR:2003:AE8462 (Waterpakt), para. 3.5, second paragraph.

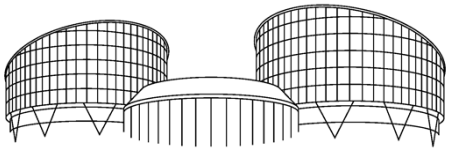
48 See Supreme Court 21 March 2003, ECLI:NL:HR:2003:AE8462 (Waterpakt), para. 3.5, Supreme Court 1 October 2004, ECLI:NL:HR:2004:AO8913 (Faunabescherming/Fryslân), paras. 3.3.4 and 3.3.5, Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549 (SGP), para. 4.6.2, and Supreme Court 7 March 2014, ECLI:NL:HR:2014:523 (State/Norma et al.), para. 4.6.2.

49 See Supreme Court 21 March 2003, ECLI:NL:HR:2003:AE8462 (Waterpakt), para. 3.5, third paragraph, and Supreme Court 1 October 2004, ECLI:NL:HR:2004:AO8913 (Faunabescherming/Fryslân), para. 3.3.4, third paragraph.

50 See the judgments Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549 (SGP), paras. 4.6.1-4.6.2, which involved a similar declaratory decision and Supreme Court 7 March 2014, ECLI:NL:HR:2014:523 (State/Norma et al.), para. 4.6.2.

51 See Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549 (SGP), para. 4.6.2.

TAB E



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF VEREIN KLIMASENIORINNEN SCHWEIZ AND OTHERS v. SWITZERLAND

(Application no. 53600/20)

JUDGMENT

Art 34 • Victim • *Locus standi* • Separate key criteria set out for establishing victim status of individual applicants and *locus standi* (representation) of associations in climate-change context • Need for effective protection of Convention rights taking into account special features of this phenomenon without undermining the exclusion of *actio popularis* from the Convention system • In case-circumstances victim-status criteria not fulfilled by individual applicants • Especially high threshold for fulfilling criteria not met (incompatible *ratione personae*) • Applicant association fulfilled relevant criteria (*locus standi*) and thus had standing to act on behalf of its members • Importance of collective action and intergenerational burden-sharing in climate-change context

Art 8 • Positive obligations • Private and family life • Respondent State's failure to comply with positive obligation to implement sufficient measures to combat climate change • Art 8 applicable • Art 8 encompassing a right for individuals to effective protection by the State authorities from the serious adverse effects of climate change on their lives, health, well-being and quality of life • Need to develop a more appropriate and tailored approach as regards the various Convention issues arising in the climate-change context not addressed by Court's existing environmental case-law • Importance of intergenerational burden-sharing • Reduced margin of appreciation as regards State's commitment combating climate change, its adverse effects and the setting of aims and objectives in this respect • Wide margin of appreciation as to the choice of means designed to achieve those objectives • Contracting State's primary duty to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change • Enumeration of requirements to which competent authorities need to have due regard • Need for domestic procedural safeguards • Mitigation measures to be supplemented by adaptation measures aimed at alleviating the most serious or imminent consequences of climate-change • Existence of critical lacunae in Swiss authorities' process of putting in place the relevant domestic regulatory framework • Failure to quantify, through a carbon budget or otherwise, national GHG emission limitations • Failure to act in good time

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework • Wide margin of appreciation exceeded
Art 6 § 1 (civil) • Access to court • Applicability of civil limb concerning the effective implementation of mitigation measures under domestic law • Domestic courts' failure to engage seriously or at all with applicant association's action • Lack of convincing reasons for non-examination of merits of complaints • Failure to consider compelling scientific evidence concerning climate change and to examine applicant association's legal standing • Lack of further legal avenues or safeguards • Very essence of right of access to court impaired • Emphasis on domestic courts' key role in climate-change litigation and of access to justice in this field
Art 46 • Execution of judgment • General measures • Respondent State to assess specific measures to be taken with the assistance of the Committee of Ministers

Prepared by the Registry. Does not bind the Court.

STRASBOURG

9 April 2024

This judgment is final but it may be subject to editorial revision.

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In the case of Verein KlimaSeniorinnen Schweiz and Others v. Switzerland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Síofra O'Leary,
Georges Ravarani,
Marko Bošnjak,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Arnfinn Bårdsen,
Pauliine Koskelo,
Tim Eicke,
Jovan Ilievski,
Darian Pavli,
Raffaele Sabato,
Lorraine Schembri Orland,
Anja Seibert-Fohr,
Peeter Roosma,
Ana Maria Guerra Martins,
Mattias Guyomar,
Andreas Zünd*, judges*,

and Søren Prebensen, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 30 March 2023, 6 and 7 December 2023 and 14 February 2024,

Delivers the following judgment, which was adopted on the latter date:

PROCEDURE

1. The case originated in an application (no. 53600/20) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an association registered under Swiss law, Verein KlimaSeniorinnen Schweiz, and by four Swiss nationals, Ms Ruth Schaub, Ms Marie-Eve Volkoff Peschon, Ms Bruna Giovanna Olimpia Molinari and Ms Marie Gabrielle Thérèse Budry ("the applicants"), all members of that association, on 26 November 2020.

2. The applicants were represented by Ms C.C. Bähr and Mr M. Looser, lawyers practising in Zürich, Ms J. Simor KC and Mr M. Willers KC, lawyers practising in London, and Mr R. Mahaim, a lawyer practising in Lausanne. The Swiss Government ("the Government") were represented by their Agent, Mr A. Chablais, of the Federal Office of Justice.

3. The applicants alleged, in particular, various omissions of the Swiss authorities in the area of climate-change mitigation. They relied on Articles 2, 6, 8 and 13 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 26 April 2022 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. The President of the Court decided that in the interests of the proper administration of justice the case should be assigned to the same composition of the Grand Chamber as the cases of *Carême v. France* (application no. 7189/21) and *Duarte Agostinho and Others v. Portugal and 32 Others* (application no. 39371/20) (Rule 24, Rule 42 § 2 and Rule 71), which were also relinquished by Chambers of the Fifth and Fourth Sections respectively.

6. The applicants and the Government each filed memorials on the admissibility and merits of the case. In addition, having been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3), third-party comments were received from the Governments of Austria, Ireland, Italy, Latvia, Norway, Portugal, Romania and Slovakia.

7. Upon the leave granted by the President, third-party comments were also received from the following entities: the United Nations High Commissioner for Human Rights; the United Nations Special Rapporteurs on toxics and human rights, and on human rights and the environment, and the Independent Expert on the enjoyment of all human rights by older persons; the International Commission of Jurists (ICJ) and the ICJ Swiss Section (ICJ-CH); the European Network of National Human Rights Institutions (ENNHRI); the coordinated submission of the International Network for Economic, Social and Cultural Rights (ESCR-Net); the Human Rights Centre of Ghent University; Professors Evelyne Schmid and Véronique Boillet (University of Lausanne); Professors Sonia I. Seneviratne and Andreas Fischlin (Swiss Federal Institute of Technology Zurich); Global Justice Clinic, Climate Litigation Accelerator and Professor C. Voigt (University of Oslo); ClientEarth; Our Children's Trust, Oxfam France and Oxfam International and its affiliates (Oxfam); a group of academics from the University of Bern (Professors Claus Beisbart, Thomas Frölicher, Martin Grosjean, Karin Ingold, Fortunat Joos, Jörg Künzli, C. Christoph Raible, Thomas Stocker, Ralph Winkler and Judith Wyttenbach, and Doctors Ana M. Vicedo-Cabrera and Charlotte Blattner); the Center for International Environmental Law and Dr Margaretha Wewerinke-Singh; the Sabin Center for Climate Change Law at Columbia Law School; and Germanwatch, Greenpeace Germany and Scientists for Future.

8. On 11 January 2023 the Grand Chamber decided that in the interest of the proper administration of justice, after the completion of the written stage of the proceedings in the above-mentioned cases, the oral stage would be

staggered so that a hearing in the present case and in the Carême v. France case would be held on 29 March 2023, and a hearing in the Duarte Agostinho and Others v. Portugal and 32 Others case would be held before the same composition of the Grand Chamber at a later stage (the hearing was held on 27 September 2023). At a later stage, Armen Harutyunyan, who was prevented from sitting in the present case, was replaced by Jovan Ilievski, substitute judge (Rule 24 § 3).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 29 March 2023 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
MR A. CHABLAIS, *Agent*,
MR F. PERREZ,
MS M. BEELER-SIGRON,
MS L.L. PAROZ,
MS R. BURKARD,
MS S. NGUYEN-BLOCH,
MS I. RYSE *Advisers*;

(b) *for the applicants*
MS J. SIMOR KC,
MR M. WILLERS KC,
MS C.C. BÄHR,
MR M. LOOSER,
MR R. MAHAIM, *Counsel*,
MR R. HARVEY,
MS L. FOURNIER, *Advisers*,
MS B. MOLINARI,
MS M. BUDRY, *Applicants*,
MS A. MAHRER,
MS R. WYDLER-WÄLTI, *Co-Presidents of the applicant association*;

(c) *for the Government of Ireland*
MR B. LYSAGHT, *Agent*,
MS C. DONNELLY SC,
MR D. FENNELLY, *Counsel*,
MR M. CORRY,
MS E. GRIFFIN, *Advisers*;

(d) *for ENNHRI*
MS J. SANDVIG,
MS K. SULYOK,
MS H.C. BRAENDEN,

MR P.W. DAWSON, *Advisers*.

The Court heard addresses by Mr Chablais, Mr Perrez, Ms Simor KC, Mr Willers KC, Ms Donnelly SC and Ms Sandvig, and the answers by Mr Chablais, Mr Perrez and Ms Simor KC to questions put by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicants' particular situation

1. The first applicant

10. The first applicant – Verein KlimaSeniorinnen Schweiz – is a non-profit association established under Swiss law ("the applicant association"). According to its Statute, the applicant association was established to promote and implement effective climate protection on behalf of its members. The members of the association are women living in Switzerland, the majority of whom are over the age of 70. The applicant association is committed to reducing greenhouse gas ("GHG") emissions in Switzerland and their effects on global warming. The activity of the applicant association is stated to be in the interests of not only its members, but also of the general public and future generations, through effective climate protection. The applicant association pursues its purpose in particular through the provision of information, including educational activities, and by taking legal action in the interests of its members with regard to the effects of climate change. The applicant association has more than 2,000 members whose average age is 73. Close to 650 members are 75 or older.

11. For the purposes of the proceedings before the Grand Chamber, the applicant association solicited submissions by its members about the effects of climate change on them. The members described how their health and daily routines were affected by heatwaves.

2. The second to fifth applicants

12. The second to fifth applicants ("applicants nos. 2-5") are women who are members of the applicant association. The second applicant, Ms Schaub, was born in 1931. She died in the course of the proceedings before the Court (see paragraph 273 below). The third applicant, Ms Volkoff Peschon, was born in 1937 and lives in Geneva. The fourth applicant, Ms Molinari, was born in 1941 and lives in Vico Morcote. The fifth applicant, Ms Budry, was born in 1942 and lives in Geneva.

(a) The second applicant

13. In a written declaration, the second applicant submitted that she had experienced difficulties enduring the heatwaves and had more than once collapsed while exposed to the sun on a balcony in her flat. She had had to adapt her lifestyle to the heatwaves, for instance when going to the shops, and had to stay indoors almost the entire day. She had also received assistance from a nurse, who had given her special clothing to keep cool. She had needed to get medical attention and had suffered extremely painful episodes of gout, which intensified during hot days. She had even been hospitalised once after she had collapsed during a heatwave, but then she had adapted her habits to the heat by going to the shops earlier and getting fresh air at night. All these limitations had led to problems in her social environment.

14. The second applicant also provided a medical certificate of 15 November 2016 describing how in August 2015, during a warm summer's day, she had collapsed in the doctor's waiting room owing to the high temperature. The medical certificate also indicated that the applicant wore a pacemaker.

(b) The third applicant

15. In a written declaration, the third applicant submitted that she had difficulties enduring the heatwaves, such that she needed to organise her life according to the weather forecast. When it was very hot, she had to stay at home the entire day, with the blinds down and the air conditioning turned on. She was also required to refrain from recreational activities and was obliged to regularly measure her blood pressure and then take her medication accordingly. She had also had to see a cardiologist. She would like to move and live somewhere at altitude, but her cardiovascular problems limited her in that respect. She had never been hospitalised, but on several occasions she had felt severely unwell. In addition, owing to the pollution, she had experienced breathing difficulties and extreme sweating. In conclusion, the third applicant stressed that between May and September, the thermometer determined the way she led her life, including her relations with family and friends.

16. The third applicant provided a medical certificate of 19 October 2016 indicating that for the previous two summers she had suffered significantly as a result of the heatwaves. They affected her physical capacities as she had cardiovascular health issues. Another medical certificate of 11 February 2019 indicated that the applicant's health condition and the medication she took were not compatible with heatwaves. During heatwaves she had to stay at home and take the appropriate medication (which needed to be adjusted).

17. A medical certificate of 23 September 2021 confirmed that the applicant suffered from cardiovascular health issues. During heatwaves she generally felt weak and had been unable to continue with her usual therapy.

Moreover, she was required to adjust her daily routines. Another medical certificate of 26 November 2022, which was based on a telephone interview with the applicant and the inspection of her medical file, confirmed that the applicant suffered physically and psychologically during the heatwaves.

(c) The fourth applicant

18. According to a written declaration of the fourth applicant, her mobility was restricted during heatwaves as excessive heat exacerbated her asthma and chronic obstructive pulmonary disease.

19. She provided medical certificates of 7 October 2016 and 15 July 2020 attesting to her medical condition and to the adverse effects of periods of hot weather on it. This was confirmed in a medical certificate of 26 November 2022 according to which it was highly probable that the aggravation of the applicant's health condition was in correlation with the occurrence of climate change-induced heatwaves. Moreover, during heatwaves, the applicant suffered because she had to reduce her activities and she felt isolated.

(d) The fifth applicant

20. In a written declaration, the fifth applicant complained that the heatwaves had the effect of taking away all her energy. During summer she could not face leaving her home and going for a swim. At the same time, she could not afford to take longer holidays in a hotel with a swimming pool. She had never been hospitalised and had not seen a doctor in relation to the heatwaves. Previously she had also worried about her 90-year-old mother, until the latter had moved away to a place with a better climate.

21. The fifth applicant provided a medical certificate of 4 October 2016 attesting that she suffered from asthma.

B. Proceedings instituted by the applicants

1. The applicants' requests to the authorities

22. On 25 November 2016, relying on section 25a of the Federal Administrative Procedure Act of 20 December 1968 ("the APA"), and Articles 6 and 13 of the Convention, the applicants requested the Federal Council, the Federal Department of the Environment, Transport, Energy and Communications ("the DETEC"), the Federal Office for the Environment ("the FOEN") and the Federal Office for Energy ("the SFOE") to take a formal decision on "real acts" (acts based on federal public law that affect rights and obligations, but do not arise from formal rulings) with a view to addressing alleged omissions in climate protection. Their requests for a legal remedy read as follows:

"1. By 2020, the Respondents [the above-noted authorities] shall take all necessary actions within their competence to reduce [GHG] emissions to such an extent that Switzerland's contribution aligns with the target of holding the increase in global average temperature to well below 2°C above pre-industrial levels, or at the very least, does not exceed the 2°C target, thereby putting an end to the unlawful omissions undermining these targets.

Specifically:

a. Respondent 1 shall examine the duties of the Confederation under Article 74 § 1 of the Federal Constitution and their implementation in the climate sector [under] the current climate goal and regarding compliance with:

– Article 74 § 2 and Article 73 of the Constitution and the constitutional duty of the government to protect the individual in accordance with Article 10 § 1 of the Constitution; and

– Articles 2 and 8 of the European Convention on Human Rights (ECHR);

and shall develop, without delay, a new plan to be implemented immediately and through 2020 that will permit Switzerland to achieve the 'well below 2°C' target or, at the very least, not [to] exceed the 2°C target, which requires a reduction of domestic [GHG] emissions by at least 25% below 1990 levels by 2020;

b. Respondent 1 shall communicate to the Federal Assembly (Parliament) and the general public that – in order to comply with Switzerland's obligation to protect and [with] the principles of precaution and sustainability – a reduction of [GHG] emissions is necessary by 2020 in order to meet the 'well below 2°C' target or, at the very least, not exceed [the] 2°C target, which requires a domestic [GHG] reduction of at least 25% below 1990 levels by 2020;

c. Through a decision at the level of the Federal Council, department or federal office, Respondents 1, 2, or 3 shall initiate, without delay, a preliminary legislative procedure for an emission reduction target as laid out in the request [at] 1 (a); and

d. Respondent 1 shall inform Parliament as stated in the request [at] 1 (c) [whether] the proposed emissions reduction target is in compliance with the Constitution and the ECHR.

2. The respondents shall take all necessary mitigation measures within their competence to meet the [GHG] reduction target defined in the request [at] 1, namely reducing [GHG] emissions by at least 25% below 1990 levels by 2020, thereby putting an end to their unlawful omissions. In particular:

a. Respondent 1 shall consider measures to achieve the target as defined in the request [at] 1 (a);

b. Respondent 1 shall communicate the appropriate measures to reach the target as stated in the request [at] 1 (b);

c. Respondents 1, 2, or 3 shall, with regard to the request [at] 1 (c) above, include measures to achieve the target in the preliminary legislative procedure.

3. Respondents shall carry out all acts, within their competence, required to lower emissions by 2030 to such an extent that Switzerland's contribution aligns with the 'well below 2°C' target or, at the very least, does not exceed [the] 2°C target, thus ending the unlawful omissions inconsistent with these targets. In particular:

a. Respondents 1, 2, or 3 shall, in the course of the preliminary legislative procedure, carry out all actions that allow Switzerland to do its share to meet the 'well below 2°C'

target or, at the very least, to not exceed [the] 2°C target, which means a domestic reduction of [GHG] emissions of at least 50% below 1990 levels by 2030;

b. Respondents 1, 2, or 3 shall include in the preliminary legislative procedure all necessary mitigation measures required to meet the [GHG] reduction target as defined in the request [at] 3 (a).

4. The respondents shall implement all mitigation measures, within their competence, required to achieve the current [GHG] reduction target of 20%, thus ending the unlawful omissions. In particular:

a. Respondent 3 shall obtain without delay the reports of cantons detailing the technical measures adopted to reduce the CO_2 emissions from buildings;

b. Respondent 3 shall verify that the cantonal reports include data about CO_2 reduction measures that have already been taken or are planned and their effectiveness; demonstrate the progress made to reduce CO_2 emissions from buildings in their territory; and require improvements if necessary;

c. Respondent 3 shall verify that cantons are issuing state of the art building standards for new and existing buildings;

d. Respondents 1, 2 and 3 shall take the necessary actions if cantons fail to comply with the verification requirement as stated in the request at 4 (c); if necessary they shall become active in [the] preparation of new state of the art federal building standards for new and existing buildings;

e. Respondent 2, having determined that the interim building sector target for 2015 was not achieved, shall examine the need for improvements by cantons and propose additional effective mitigation measures to Respondent 1;

f. Respondents 1, 2, and 3 shall take steps aimed at rapidly increasing the CO_2 tax on thermal fuels;

g. Respondent 4 shall require the importers of passenger cars to submit data showing actual CO_2 emissions of passenger cars;

h. Respondent 2, given that the interim transport sector target 2015 will likely not be achieved, shall immediately draft additional and effective mitigation measures and propose them to Respondent 1; in particular, Respondent 1 shall take actions to promote electromobility or otherwise demonstrate that the sector interim target in section 3(2) of the CO_2 Ordinance can be achieved without such promotion; and Respondents l, 2, and 3 shall take steps to raise the compensation rate for the CO_2 emissions from motor fuels;

i. Respondent 1 shall make a comprehensive assessment of the effectiveness of measures enacted under the CO_2 Act and consider whether additional measures are necessary, report the findings of the assessment to Parliament, and immediately initiate steps to implement the necessary measures for the period ending in 2020.

5. Alternatively, with regard to the requests 1, 2, 3 and 4, a declaratory ruling shall be issued finding the respective omissions unlawful.

as well as the following procedural motion:

The requests for legal remedies 1-5 shall be enacted in a timely manner."

23. In their memorial submitted to the DETEC, the applicants pointed out, in particular, that the aim of their request was to compel the authorities, in the interest of safeguarding their lives and health, to take all necessary measures

required by the Constitution and the Convention to prevent the increase of the global temperature.

24. As regards their individual circumstances, the applicants pointed to the nature and mission of the applicant association and, as regards the rest of them, contended that they were members of a most vulnerable group affected by climate change. Evidence showed that the life and health of older women were more severely impacted by periods of heatwaves than the rest of the population. They submitted that this could be seen in their cases as they all had various health impairments affected by heatwaves, and such adverse effects would exacerbate with time owing to the predicted rise in the frequency and duration of heatwaves.

25. The applicants further explained that they considered the current domestic emissions reduction targets insufficient, unconstitutional and incompatible with the Convention and international law. They also considered the mitigation measures taken by the authorities to be insufficient. In their view, the authorities had no justification for their inaction in the field of climate change.

26. The applicants contended that the above-noted omissions violated the sustainability principle (Article 73 of the Constitution), the precautionary principle (Article 74 § 2 of the Constitution) and the right to life (Article 10 of the Constitution), and also their rights under the Convention, in particular "the right to life, to health, and to physical integrity protected in Article 2 and Article 8 [of the Convention]" in relation to the positive duty to protect. Specifically, they argued that the State had a duty to put in place the necessary regulatory framework and administration, taking into account the particular situation in question and the level of risk.

27. Furthermore, the applicants relied on Articles 6 and 13 of the Convention. They argued, in particular, that their request concerned a serious and genuine dispute over their civil rights and obligations within the meaning of Article 6 § 1 of the Convention, since the omissions at issue posed a serious risk to their lives, health and physical integrity. They were therefore entitled to have their request assessed by the authorities and ultimately a court. This was, in their view, the intention and purpose of the remedy under section 25a of the APA, which, by the nature of things, was being used in the present case to contest omissions and claim protection under the Convention. However, and independently of section 25a of the APA, the applicants considered that their request should be examined, having regard to the requirements of Articles 6 and 13 of the Convention.

28. On 25 April 2017 the DETEC rejected the applicants' request for lack of standing. The DETEC explained that an action under section 25a of the APA was subject to the following conditions: (a) there had to be a "real act"; (b) the request had to concern federal public law; (c) the authority concerned had to be a federal administrative authority; (d) the real act had to affect rights

or obligations; (e) there had to be an "interest worthy of protection"; and (f) the principle of subsidiarity had to be observed.

29. While, in principle, the DETEC accepted that the conditions under (a) to (c) had been fulfilled, it considered that the condition under (d) – namely, that the real act had to affect rights or obligations – had not been met, which made it irrelevant to discuss the conditions under (e) to (f).

30. The DETEC held that the main aim of the applicants' request to the federal administrative authorities had been to initiate the enactment of legislative provisions to reduce CO_2 emissions. That action was not comparable with an order (individual-specific order) or at least with a general order (general-specific order), as required by section 25a of the APA. In the DETEC's view, the general purpose of the applicants' request was to achieve a reduction in CO_2 emissions worldwide and not only in their immediate surroundings. The DETEC considered that no individual legal positions were affected in the case in issue as the applicants' request did not serve to specifically realise such individual positions, but rather aimed to have general, abstract regulations and measures put in place. The DETEC therefore considered that section 25a of the APA did not apply, as legislative procedures were not regulated by that Act and the applicants had other means at their disposal to engage in the exercise of their political rights.

31. For similar reasons, the DETEC rejected the applicants' Convention arguments. Focusing on Article 13 of the Convention, the DETEC found that the applicants were pursuing general-public interests, which could not provide the basis for them having victim status under the Convention. The DETEC also held that Article 13 of the Convention allowed only the review of a concrete State act in relation to an individual person, which was not the situation in the case at hand.

2. Proceedings in the Federal Administrative Court

(a) The applicants' appeal

32. On 26 May 2017 the applicants lodged an appeal with the Federal Administrative Court ("the FAC") against the DETEC's decision. They requested that the impugned decision be quashed and remitted to the DETEC for re-examination.

33. In their appeal the applicants reiterated their arguments regarding the effects of climate change made before the DETEC (see paragraphs 22-27 above) and argued that their request was not aimed at obtaining the adoption of general, abstract regulations, but rather specific actions in the context of preliminary legislative proceedings as well as the correct implementation of the existing law. Such a request, in the applicants' view, fell within the scope of section 25a of the APA. The applicants also argued that the DETEC had violated their right to be heard by not entering into the details of their request and particularly their arguments based on the Convention.

(b) The FAC's decision

34. On 27 November 2018 the FAC dismissed the applicants' appeal.

35. With regard, first, to the applicants' standing to lodge the appeal, the FAC held that applicants nos. 2-5 had an "interest worthy of protection" in the revocation or amendment of the impugned DETEC decision, which made the appeal admissible from that perspective. The FAC therefore considered that it was unnecessary to determine whether the applicant association had such an interest as well.

36. The FAC then examined the applicants' complaint as regards the breach of their right to be heard. It found that, while the DETEC decision lacked reasoning, in the circumstances of the case at hand it was clear that the applicants' request had been rejected because the DETEC considered it to be of an *actio popularis* nature.

37. As regards the remainder of the applicants' arguments, the FAC explained that section 25a of the APA reflected the guarantee of access to a court provided in Article 29a of the Constitution and Article 6 of the Convention, in so far as "real acts" were concerned. It also pointed out that neither the law nor the case-law defined the concept of "real acts". However, the FAC considered that, as regards the substantive area of application of section 25a of the APA, the decisive factor was the question whether a need for individual legal protection existed. Moreover, in order to restrict the area of application as was necessary to exclude *actio popularis* claims, the other criteria mentioned in section 25a(l) of the APA – namely, an "interest worthy of protection", and rights and obligations being affected – were to be applied. The concept of an "interest worthy of protection", which derived primarily from fundamental rights, required that there should be an existing interest and a practical benefit in pursuing it. Moreover, the appellant had to be affected in a way that differed from the general population, which was a criterion intended to exclude *actio popularis* proceedings. As regards potential infringements of fundamental rights, it was necessary to examine the material scope of the right in question in order to determine whether the right was affected or not. This assessment was to be carried out in the circumstances of a particular case.

38. Examining the applicants' case from the perspective of these considerations, and relying on the Federal Supreme Court's case-law on *actio popularis* complaints, the FAC held that the applicants' claim relating to the consequences of climate change, and demanding the issuance of a material ruling under section 25a of the APA, required the existence of a close proximity between the applicants and the matter in dispute, which – as opposed to *actio popularis* claims – went beyond the existence of a possible proximity which the general public might claim. In this connection, while accepting that over the course of the twenty-first century climate change would affect Switzerland in all its regions and seasons, the FAC considered that the impacts of climate change on people, animals and plants would be of

a general nature, even if not all would be impacted equally. The FAC reasoned, in particular, as follows:

> "The adverse effects vary among different population groups in terms of economic and health impacts. For the population in cities and agglomerations, for example, heatwaves are a health burden because of the formation of heat islands. Heatwaves in the summer can put infants and small children at risk as well because of their susceptibility to dehydration, and high ozone levels owing to the heat can bring about respiratory disorders and impairment of pulmonary function. In addition, the changed geographic areas of carriers of disease such as ticks and mosquitoes will newly affect parts of the population which had previously not been exposed to such risks. Climate change, and in particular the associated change of average temperature and average amounts of precipitation also impact forestry, agriculture, winter tourism and water management, for example. In addition, because of the thawing permafrost, the danger of rockslides is increasing, and, particularly in the winter, also the risk of flooding, debris flows and landslides."

39. However, the FAC considered that the group of women older than 75 would not be particularly affected by the impacts of climate change such as to allow them to lodge an action under section 25a APA. It noted the following:

> "Although different groups are affected in different ways, ranging from economic interests to adverse health effects affecting the general public, it cannot be said from the perspective of the administration of justice, having regard to the case-law as described above, that the proximity of the appellants to the matter in dispute – climate protection on the part of the Confederation – was close, compared with the general public ... Thus, the appellants have no sufficient interest worthy of protection, for which reason the authority of first instance rightly refused to issue a material ruling in terms of section 25a APA."

40. As regards the applicants' reliance on Article 6 § 1, and subsidiarily on Article 13, of the Convention, concerning the protection of their rights under Articles 2 and 8 of the Convention, the FAC held that the applicability of Article 6 § 1 of the Convention required, *inter alia*, the existence of a genuine dispute of a serious nature, the outcome of which was directly decisive for the civil claim in question. According to the FAC, this meant that a claim should be asserted in formal terms in a reasonable way and that Article 6 § 1 should be interpreted in conjunction with Article 34 of the Convention, which regulated the conditions for lodging individual applications before the Court and excluded the possibility of *actio popularis* complaints.

41. In this respect, as regards the applicants' specific complaints, the FAC reasoned as follows:

> "Neither preliminary legislative proceedings nor the requested provision of information to the public [as requested by the appellants] can make a direct contribution toward reducing [GHG] emissions in Switzerland in line with the case-law summarised above. Rather, this depends on the decisions of the legislature and regulators as well as of each individual concerned. The requested actions are therefore not appropriate for reducing the risk of heatwaves during the summer. The same applies inasmuch as the

appellants demand the introduction of emission reduction measures not currently provided for by law ...

In this factual situation, it cannot be said that a genuine dispute of a serious nature was brought before the first-instance authority the outcome of which would have proven to be directly decisive for any possible civil claims by the appellants; a reduction of the general risk of danger cannot be achieved directly through the requested actions. The first-instance authority was therefore not obliged on the basis of Article 6 § 1 [of the Convention] to enter into the matter of the appellants and to issue a material ruling which would open up the path to appeal and thus provide for protection through the courts. With this outcome, it is not necessary to examine Article 13 [of the Convention], either ... the guarantee in terms of Article 13 [of the Convention] is absorbed in full by Article 6 [of the Convention] in civil disputes."

42. Finally, the FAC summarised its findings in the following manner:

"In summary, the appellants are not affected by the Confederation's climate protection measures in a way that goes beyond that of the general public. Their legal requests, inasmuch as they are based on section 25a of the APA and demand (further) actions to reduce [GHG] emissions, are therefore to be qualified as inadmissible *actio popularis*; the first-instance authority rightly did not enter into the matter. Further claims to the issuance of a material ruling do not result from the [Convention] either. Therefore, the appeal is to be dismissed."

3. Proceedings in the Federal Supreme Court

(a) The applicants' appeal

43. On 21 January 2019 the applicants lodged an appeal in the Federal Supreme Court ("the FSC") against the FAC's judgment. They requested that it be quashed, and the case remitted to the DETEC for examination on the merits or, alternatively, to the FAC for its reassessment. In their appeal, the applicants relied on Articles 9, 10, 29 and 29a of the Constitution and Articles 2, 6, 8, 13 and 34 of the Convention.

44. The applicants argued that they had an "interest worthy of protection", which was current and practical, since, in the absence of a remedial action, Switzerland continued to emit excessive GHG emissions which increasingly impacted their lives and health. As regards the applicant association, they stressed that it was appealing on its own behalf but also in the interests of its members, which represented a vulnerable group whose health, and potentially lives, were particularly impacted by the consequences of global warming.

45. The applicants further contended that the FSC needed to make the necessary determination of the facts of the case since the FAC had failed to do that or had done it only in a rudimentary way, particularly in relation to the possible impacts of climate change. In their view, the FAC had failed to consider the issues relating to more frequent deaths and the adverse health impacts in the population group of women aged 75 to 84 linked to climate change. They referred to the various health ailments suffered by applicants nos. 2-5, which made them even more vulnerable to climate change.

46. Moreover, as regards the object of the appeal before the FSC, the applicants explained that they were challenging, in particular, the lower bodies' determination of the procedural prerequisites for examination of the substance of their case in terms of section 25a of the APA and Articles 6 § 1 and 13 of the Convention, in conjunction with Articles 10 and 29 § 2 of the Constitution and Articles 2 and 8 of the Convention. They complained of a breach of their right to be heard, namely the right to have a proper examination of their case by the DETEC and the FAC. The applicants also referred to Article 9 § 3 of the Aarhus Convention[1] (see paragraph 141 below) as regards their standing to bring the present proceedings before the courts.

47. The applicants further argued that the FAC had incorrectly considered that their complaint was of an *actio popularis* nature. In their view, as a group which was particularly vulnerable to climate change, they had a right to seek protection under Article 10 of the Constitution and under Article 2 of the Convention. Moreover, pointing to the risks to their health, physical integrity and well-being as a result of global warming, the applicants argued that excessive GHG emissions were similar to harmful air pollution and were to be considered as dangerous activities within the meaning of Article 8 of the Convention. On the basis of these considerations, the applicants also considered that they had victim status under Article 34 of the Convention.

48. As regards, in particular, their reliance on Article 6 of the Convention, the applicants argued that the FAC had examined the wrong question by reviewing the connection between their legal requests and GHG emissions (which it had, moreover, assessed incorrectly), whereas it had been supposed to examine the connection between GHG emissions and the State's obligation to protect their right to life under Article 10 of the Constitution.

49. In this connection, the applicants alleged that they had not had effective legal protection as required by the Convention. In their view, the FAC had misconstrued the concept of a dispute of a genuine and serious nature relevant for the applicability of Article 6. The applicants argued that their request had been aimed at addressing the omissions in climate protection on the part of the State, thereby leading to a reduction in excessive GHG emissions and the heatwaves linked to them. In other words, the outcome of the proceedings they sought to achieve was the reduction of GHG emissions and heatwaves. However, the FAC had incorrectly considered that there needed to be a direct connection between their requests and the reduction of GHG emissions. In any event, in the applicants' view, the FAC had not properly examined the existence of a link between some of the demands they had made (such as the institution of preliminary legislative proceedings or the

[1] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, United Nations, Treaty Series, vol. 2161, p. 447. This Convention was adopted on 25 June 1998 in Aarhus, Denmark and entered into force on 30 October 2001.

provision of information to the public and Parliament) and the reduction of GHG emissions and heatwaves, and, by extension, the protection of their right to life guaranteed under the relevant domestic law, namely Article 10 of the Constitution.

50. According to the applicants, there was a sufficient connection between this protected civil right under domestic law and the outcome of the proceedings which they sought to achieve. Moreover, citing the Court's case-law in *Bursa Barosu Başkanlığı and Others v. Turkey* (no. 25680/05, § 128, 19 June 2018), the applicants argued that Article 6 was applicable even if their claim did not benefit only them exclusively, but also benefited the general public. The applicants also considered that the FAC's interpretation of Article 6 in conjunction with Article 34 of the Convention had had no legal basis and been arbitrary. In summary, the applicants noted as follows:

> "The appellants' dispute is genuine and serious because the outcome of the proceedings – the reduction of [GHG] – is directly decisive for their right to protection of their lives as well as for the implementation of CO_2 legislation. The appellants thus have the right to access to a court in terms of Article 6 [of the Convention]."

51. As regards Article 13 of the Convention, the applicants argued that even if the FAC had considered Article 6 to be inapplicable, it had been required to examine the complaint under Article 13 in conjunction with the existence of adverse effects of climate change on their right to life under Article 2, and their right to respect for private and family life under Article 8 of the Convention.

(b) The FSC's decision

52. On 5 May 2020 the FSC dismissed the applicants' appeal.

53. The FSC considered that applicants nos. 2-5 had standing to lodge an appeal against the FAC's judgment. The FSC, however, left it open whether the applicant association also had standing to lodge the appeal and considered it more appropriate to limit its considerations to applicants nos. 2-5.

54. As regards the merits of the applicants' appeal, the FSC first found that the decisions of the DETEC and the FAC had been duly reasoned, as required by Article 29 § 2 of the Constitution and Article 6 § 1 of the Convention (assuming that it applied).

55. With respect to the applicants' reliance on section 25a of the APA, the FSC stressed that this provision was intended to provide legal protection against "real acts" and not for an *actio popularis* avenue. This necessitated a careful examination in the particular circumstances of each case of whether the person was affected in a different way from the general public. In other words, it was essential that an applicant's own rights were affected. Moreover, the FSC explained that the term "real acts" under section 25a of the APA referred to a broad concept of State acts (or failures to act). However, the legal protection guaranteed under that provision was restricted by the application of other admissibility criteria, notably the requirement that the

"real act" affect rights or obligations and that the person have an "interest worthy of protection". The requirement of being affected presupposed an interference (actual or potential) of a certain gravity with the rights of an individual. Linked to that, the "interest worthy of protection" was primarily concerned with fundamental rights, although other legal titles might also be taken into account.

56. Applying these considerations to the case in issue, the FSC first noted that the applicants had requested a large number of measures of different nature and scope which essentially amounted to a request to institute preparatory work for the enactment of laws and secondary legislation. However, finding that in the light of other considerations it was not necessary to engage further with this issue, the FSC stressed that, according to Swiss constitutional law, proposals for shaping current policy areas should in principle be pursued by way of democratic participation.

57. The FSC further considered that the fact that the DETEC and the other authorities had not taken the actions requested by the applicants did not in itself mean that the rights invoked by the applicants would be violated. Moreover, it did not follow from that alleged omission alone that the applicants' fundamental rights would be affected with the necessary intensity, as required under section 25a of the APA.

58. In this connection, the FSC held that the limit of "well below 2°C" in terms of the Paris Agreement[2] was not expected to be exceeded in the near future. Relying on the 2018 Special report "1.5°C global warming" of the Intergovernmental Panel on Climate Change (IPCC), the FSC concluded that global warming would reach 1.5°C around the year 2040 (likely range 2030 to 2052), provided that it continued at the current rate (0.2°C per decade, likely range 0.1 to 0.3°C per decade). The limit of "well below 2°C" would accordingly be reached at a later time. The FSC considered that the Paris Agreement and the international climate protection regime based on it, including the relevant Swiss law, were based on the assumption that the limit of "well below 2°C" would not be exceeded in the near future and that there was still some time to prevent global warming from exceeding this limit.

59. On the basis of the above considerations, the FSC found as follows:

> "In the circumstances mentioned above, the appellants' right to life under Article 10 § 1 of the Constitution and Article 2 [of the Convention] does not appear to be threatened by the alleged omissions to such an extent at the present time that one could speak of their own rights being affected in terms of section 25a of the APA with sufficient intensity ... The same applies to their private and family life and their home in terms of Article 8 [of the Convention] and Article 13 § 1 of the Constitution. The alleged domestic omissions do not achieve the fundamental rights relevance required under section 25a to guarantee the protection of individual rights. Therefore, section 25a of the APA, which ensures the protection of individual rights, does not apply ... Nor do the appellants appear to be victims of a violation of the above-mentioned Convention rights in terms of Article 34 [of the Convention] ... Their

[2] Paris Agreement, 12 December 2015, United Nations, Treaty Series, vol. 3156.

above-mentioned rights are not affected and they are not victims within the meaning of Article 34 [of the Convention] because their rights are not affected with sufficient intensity. This is not altered by the fact that – as they argue – in certain cases potential victims can be victims in terms of Article 34 [of the Convention]. This also requires being affected with a certain intensity ..., which requirement is not met here.

In view of what has been said above, it follows that the rights of the appellants – like the rest of the population – are not affected by the alleged omissions with sufficient intensity in terms of section 25a of the APA. Accordingly, their request to the above-mentioned authorities for issuance of a ruling on real acts does not have the aim of ensuring their individual legal protection. Rather, it aims to have the climate protection measures at the federal level existing today and planned up to the year 2030 examined in the abstract for their compatibility with State obligations to protect. Indirectly – through the requested action of State authorities – it aims to initiate the tightening of these measures. Such a procedure or *actio popularis* is inadmissible in terms of section 25a of the APA, which guarantees the protection of individual rights only. Article 9 § 3 of the Aarhus Convention ... to which the appellants referred, cannot alter this finding ..."

60. Moreover, the FSC considered that, in terms of section 25a of the APA, the applicants' legal action was of an *actio popularis* nature and aimed at achieving something which should more appropriately be achieved not by legal action but by political means. The DETEC had therefore not acted in breach of section 25a of the APA when rejecting the applicants' requests.

61. As regards the applicants' reliance on Article 6 § 1 of the Convention, the FSC reasoned as follows:

"[The] condition [that the disputed claim existing in domestic law must at least be "arguable"] is not met in the present case. In terms of domestic law, the appellants base their alleged subjective right to have the impugned omissions ceased and to have the requested actions performed, on the right to life under Article 10 § 1 of the Constitution. However, as noted above, the alleged omissions do not affect this fundamental right in a legally relevant way. Therefore, they cannot derive the requests mentioned from this right. Accordingly, they have no subjective right to the declaratory ruling requested in the alternative, namely that the alleged omissions breach (fundamental) rights. The [FAC] therefore rightly confirmed the DETEC's decision not to examine the case in this respect. It is therefore not necessary to address the further requirements of Article 6 § 1 [of the Convention] ..."

62. Lastly, as regards the applicants' complaint under Article 13 of the Convention, the FSC found that, in the light of the findings above, the applicants did not have an arguable claim under another provision of the Convention triggering the application of Article 13.

63. In conclusion, the FSC stressed as follows:

"It is clear from the considerations above that the appellants cannot use the means of individual legal protection invoked to protect themselves against the alleged omissions of the abovementioned authorities in the field of climate protection. Therefore, even though their concern is readily comprehensible given the possible consequences of insufficient implementation of the Paris Climate Agreement for older women which they highlighted, their appeal must be dismissed."

II. FACTS CONCERNING CLIMATE CHANGE

A. Submissions by the applicants

1. General observations on climate change

64. The work of the IPCC demonstrated that increases in GHG concentrations since around 1750 had unequivocally been caused by human activities and that the human-caused global surface temperature increase from the period 1850-1900 to the period 2010-19 was 1.07°C. The IPCC had also found with high confidence that there was a near-linear relationship between cumulative anthropogenic GHG emissions and global warming: human-induced global warming resulted in more frequent and more intense heatwaves[3]. The IPCC had emphasised that reductions this decade largely determined whether warming could be limited to 1.5°C or 2°C[4].

65. Increasing temperatures and heatwaves increased mortality which could be attributed to human-induced climate change[5]. Indeed, climate change and related extreme events would significantly increase ill health and premature deaths in the near to long term[6]. Globally, heat-related mortality in people over 65 had increased by approximately 68% between 2000-04 and 2017-21[7]. Of all the climate hazards, heat was by far the most significant cause of death in Europe[8].

66. Increasing temperatures and heatwaves not only entailed increased mortality but also posed a serious health risk. Heatwaves placed strain on the human body and caused dehydration and the impairment of heart and lung function, leading to an increase in emergency hospital admissions: older people and infants were particularly at risk. They also contributed to dehydration, hyperthermia, fatigue, loss of consciousness, heat cramps and heat strokes, including the aggravation of existing medical conditions such as

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[3] Citing IPCC, "Climate Change 2021: The Physical Science Basis", Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change ("AR6 WGI").

[4] Citing AR6 Synthesis Report: Climate Change 2023 ("AR6SR").

[5] Citing, *inter alia*, IPCC, "Climate Change 2022: Impacts, Adaptation and Vulnerability", Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change ("AR6 WGII"); and study Vicedo-Cabrera/Scovronick/Sera et al., "The burden of heat-related mortality attributable to recent human-induced climate change", *Nature Climate Change* 11, 492-500 (2021).

[6] Citing, *inter alia*, AR6 WGII (cited above); study Evan De Schrijver/Sidharth Sivaraj/Christoph Raible et al., "Nationwide Projections of Heat and Cold-Related Mortality under Different Climate Change and Population Development Scenarios in Switzerland" (2003).

[7] Citing "The 2022 report of the Lancet Countdown on health and climate change: health at the mercy of fossil fuels".

[8] Citing AR6 WGII (cited above).

cardiovascular, respiratory and kidney conditions or mental illnesses and stress[9].

67. Older adults, women and persons with chronic diseases were at the highest risk of temperature-related morbidity and mortality[10]. Overall, women aged above 75 (such as applicants nos. 2-5) were at greater risk of premature loss of life, severe impairment of life and of family and private life, owing to climate change-induced excessive heat than the general population[11].

68. While any increase in global warming was projected to affect heat-related morbidity and mortality, the global scientific consensus was that many premature deaths and health impairments could be prevented by adhering to the 1.5°C limit[12].

2. The situation in Switzerland

69. Per capita GHG emissions in Switzerland in 2020 had been 5.04 tonnes of CO_2eq. Total domestic GHG emissions in Switzerland in 2020 had amounted to 43.40 Mt CO_2e[13]. In the same year, Switzerland's share of global cumulative CO_2 emissions had been 0.18%[14].

70. These figures, however, excluded emissions attributable to Switzerland but occurring outside of its territory ("external emissions") such as GHG emissions from international aviation and shipping fuels tanked in Switzerland (these emissions had nearly doubled since 2004 and in 2019 had been equivalent to about 13.2% of total domestic GHG emissions in Switzerland[15]) and consumption-based GHG emissions, created by the import of goods (Switzerland being the world's largest importer of such emissions relative to its domestic emissions[16]). The per capita footprint in that respect

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[9] Citing, *inter alia*, FOEN "Climate Change in Switzerland" (2020); FOEN report "La canicule et la sécheresse de l'été 2018" (2019); Report of Ragettli and Röösli, the Swiss Tropical and Public Health Institute (2020); AR6 WGII (cited above).

[10] Citing, *inter alia*, the IPCC 2018 Special report (cited above); AR6 WGII (cited above); study Ana M. Vicedo-Cabrera/Evan De Schrijver/Dominik Schumacher et al., "The Footprint of Anthropogenic Climate Change on Heat-Related Deaths in Summer 2022 in Switzerland" (2003).

[11] Citing, *inter alia*, Swiss Tropical and Public Health Institute (TPH) report "Hitze und Gesundheit" (2022); study Saucy et al., "The role of extreme temperature in cause-specific acute cardiovascular mortality in Switzerland: A case-crossover study", *Science of The Total Environment*, vol. 790, 10 October 2021; report of Ragettli and Röösli, the Swiss Tropical and Public Health Institute (2021).

[12] Citing, *inter alia*, IPCC 2018 Special report (cited above).

[13] Citing FOEN "Kenngrössen zur Entwicklung der Treibhausgasemissionen in der Schweiz 1990-2020".

[14] Citing Our World in Data portal (1 October 2019); available at www.ourworldindata.org (last accessed 14.02.2024).

[15] Citing FOEN report "Greenhouse gas emissions from aviation" (2022).

[16] Citing Our World in Data chart.

had been 13 tonnes of CO_2eq[17]. Such a GHG footprint had been found to be excessively high by the FOEN[18].

71. Moreover, to this had to be added the emissions caused by finance flows (such as investing, underwriting, lending, insurance). A 2015 study commissioned by the FOEN had shown that the investments made by the largest equity funds authorised in Switzerland tended to a contribution to global warming of 4-6ºC[19]. The FOEN had therefore considered that more could be done at this level[20].

72. In Switzerland, the annual temperature had increased around 2.1ºC since the measurements had begun in 1864[21]. The summers of 2003, 2015, 2018, 2019 and 2022 had been the five warmest summers on record in Switzerland, with those of 2003 and 2022 being the first and second hottest since records had begun[22].

73. In Switzerland more deaths than average occurred during hot summers[23]. Almost 1,000 additional heat-related deaths had occurred in June and August 2003, approximately 800 in June, July and August 2015, 185 in August 2018 and 521 in June, July and August 2019. Between June and August 2022, 1,700 more people over 65 had died than statistically expected (the reasons having still not been completely analysed)[24].

74. During the 2003 heatwave, 80% of the additional deaths had occurred in persons over 75. The most significant rise in mortality risk during the hot summer of 2015 had been for 75 to 84-year-olds. In August 2018, nearly 90% of heat-related deaths had occurred in older women, almost all of whom were older than 75. During the 2019 heatwave, older persons had been at the highest risk of mortality, and people aged 85 and over had been most affected (448 of 521). Similarly, the 2022 heatwaves appeared predominantly to have affected people over 65[25].

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[17] Citing FOEN report 1990-2020 (cited above).

[18] Citing FOEN report "Indicator Economy and Consumption, GHG footprint" (2021).

[19] Citing report "Kohlenstoffrisiken für den Finanzplatz Schweiz" (2015).

[20] Citing FOEN communication "Le test climatique 2022 révèle le potentiel du marché financier" (2022).

[21] Citing Federal Office of Meteorology and Climatology MeteoSwiss portal on Climate Change (last modified 14 January 2022).

[22] Citing FOEN report "La canicule et la sécheresse de l'été 2018" (2019); MeteoSwiss Climate Report 2019 (2020); Michel, *Die Republik*, "Ein tödlicher Sommer" assessment (2022).

[23] Citing FOEN "La canicule et la sécheresse" (cited above).

[24] Citing FOEN "Climate Change in Switzerland" (2020); Ragettli and Röösli 2020 (cited above); Michel (cited above).

[25] Citing IPCC, "Climate Change 2014: Impacts, Adaptation, and Vulnerability", Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change ("AR5 WGII"); FOEN report "Hitze und Trockenheit im Sommer 2015" (2016); FOEN "La canicule et la sécheresse" (cited above); Ragettli and Röösli 2020 (cited above); Michel (cited above).

3. Measures taken by the Swiss authorities

75. Switzerland had not transposed its Nationally Determined Contributions (NDC) under international law into domestic law:

– The current CO_2 Act 2011 merely contained a binding emissions reduction target for 2020 and 2024;

– A new CO_2 Act 2020[26], containing a binding target for 2030, had been rejected in a referendum on 13 June 2021;

– On 16 September 2022 the government had submitted to Parliament a draft amendment of the CO_2 Act 2011[27] which was intended to apply for the period from 2025 to 2030[28]. Parliament had, however, agreed on another proposed amendment[29] to the Act;

– Moreover, Switzerland had never carried out an analysis of its carbon budget.

76. According to the applicants, Switzerland's climate reduction targets and actions could be summarised as follows:

– 2007-13: in accordance with the CO_2 Act 2011 (in force since 2013), domestic GHG needed to be reduced by 20% below 1990 levels by 2020. However, in 2007, the IPCC had stated that developed countries like Switzerland had to reduce their domestic emissions by 25%-40% below 1990 levels by 2020 to meet the (now outdated) 2°C limit with a 66% probability[30]. The inadequacy of the solution had been recognised by the government[31].

– 2014-17: in 2017 the government had presented a new CO_2 Act (which had later become the rejected 2020 CO_2 Act) proposing an overall reduction of 50% and a domestic emissions reduction of 30% below 1990 levels by 2030[32]. However, in 2014, the IPCC had found that countries such as Switzerland had to achieve domestic reductions of at least 40% and possibly as much as 100% by 2030 for there to be a 66% probability of remaining

[26] FF 2020 7607 – Loi fédérale sur la réduction des émissions de gaz à effet de serre (Loi sur le CO_2).

[27] FF 2022 2652 – Loi fédérale sur la réduction des émissions de CO_2 (Loi sur le CO_2) (Projet).

[28] Citing "Politique climatique : le Conseil fédéral adopte le message relatif à la révision de la loi sur le CO_2".

[29] Put forward by the Glacier initiative.

[30] Citing IPCC, "Climate Change 2007: Mitigation of Climate Change", Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Mitigation of Climate Change.

[31] Citing FF 2009 6723 "Message relatif à la politique climatique suisse après 2012 (Révision de la loi sur le CO2 et initiative populaire fédérale « pour un climat sain »)"; FF 2012 1857 "Message concernant l'évolution future de la politique agricole dans les années 2014-2017 (Politique agricole 2014–2017)".

[32] Citing FF 2018 229 "Message relatif à la révision totale de la loi sur le CO2 pour la période postérieure à 2020"; FF 2018 373 Loi fédérale sur la réduction des émissions de gaz à effet de serre (Loi sur le CO_2).

within the (now outdated) 2°C limit. This implied the need for an on average domestic reduction of 50% by 2030[33].

– In 2020 Switzerland had submitted an updated NDC, stating that it was committed to following scientific recommendations in order to limit warming to 1.5°C and that in view of its climate neutrality target by 2050, Switzerland's NDC was to reduce its GHG emissions by at least 50% by 2030 compared with 1990 levels[34].

– 2018-2030: There had been no real progression in the formally updated NDC by Switzerland[35] and the text of the current and planned national climate legislation did not reflect a commitment to the 1.5°C limit. Moreover, the emission reduction pathways were not in line with the 1.5°C limit: in comparison to the period up to 2020 (which the applicants considered as entailing an annual decrease of 2%), in 2021 they had even decreased (see paragraph 123 below; section 3(1^{bis}) and (1^{ter}) of the CO_2 Act 2011). The Swiss authorities had accepted that the reduction pathway would not be sufficient to achieve Switzerland's NDC and that compensating for the delay in emissions reduction would be a major challenge and the share of measures taken abroad would have to be significantly higher than planned[36]. For the period from 2025 to 2030, it was planned that it would be within the competence of the government to determine the spread of domestic measures within the reduction target of at least 50% by 2030. The intention was a domestic reduction of around 34% by 2030 compared to 1990 (1.52% per year). At the same time, the State had not explained how the delay could be compensated for with this domestic reduction pathway[37].

– 2031-50: for the period from 2031 onwards, the Swiss authorities' goal was to reduce GHG emissions by 75% below 1990 levels by 2040 and to net zero by 2050. However, the applicants pointed out that according to that legislation these targets were to be achieved only "as far as possible" through domestic measures[38]. They also considered that these targets were not in line with the 1.5°C objective.

77. In this connection, taken globally, the IPCC had considered that immediate action to limit the warming to 1.5°C required a reduction in net global GHG emissions from 2019 levels of 43% by 2030 and by 84%

[33] Citing AR5 WGII (cited above).
[34] Citing Switzerland's submissions within the framework of international climate negotiations (UNFCCC): 2020.
[35] Citing Emissions Gap Report 2022 (available at www.unep.org; last accessed 14.02.2024), figure 3.1; and Climate Analytics, "A 1.5°C compatible Switzerland" (2021).
[36] Citing FF 2021 2252 – Initiative parlementaire. Prolongation de l'objectif de réduction de la loi sur le CO_2. Projet et rapport explicatif de la Commission de l'environnement, de l'aménagement du territoire et de l'énergie du Conseil national.
[37] Citing "Message relatif à la révision de la loi sur le CO_2 pour la période postérieure à 2024".
[38] Citing FF 2022 1537 Loi fédérale relative aux objectifs en matière de protection du climat (LCl) (Projet), sections 3(3) and (4).

by 2050[39]. To limit the global temperature increase required limiting the overall cumulative CO_2 emissions within a carbon budget. To have a 67% chance of meeting the 1.5°C limit, the remaining global carbon budget was 400 $GtCO_2$ and to have an 83% chance, 300 $GtCO_2$[40]. Thus, according to the applicants' calculation, even applying the method of same "per capita burden-sharing" for emissions from 2020 onwards (the applicants challenged the validity of the method of "equal per capita emissions" as compared to "highest possible ambition"), Switzerland would have a remaining carbon budget of 0.44 $GtCO_2$ for a 67% chance of meeting the 1.5°C limit, or 0.33 $GtCO_2$ for an 83% chance. In a scenario with a 34% reduction in CO_2 emissions by 2030 and 75% by 2040, Switzerland would have used the remaining budget around 2034 (or 2030 for an 83% chance).

78. The Climate Action Tracker ("the CAT")[41] had found that if all States followed Switzerland's approach, warming would reach up to 3°C. In addition, the CAT had rated Switzerland's fair share target as "insufficient" and its climate finance as "insufficient", indicating that "substantial improvements" were needed to be consistent with limiting warming to 1.5°C[42]. The CAT had concluded that to do its fair share to limit global warming to 1.5°C, Switzerland had to reduce its GHG emissions to significantly below zero by 2030 (a reduction of between 160% and more than 200% below 1990 emissions)[43]. Similar findings had been reached in other studies[44].

79. However, Switzerland was pursuing a strategy of purchasing emission reductions abroad and taking them into account in the national emission reduction target for 2030, which had the effect of postponing the reduction efforts Switzerland itself had to undertake to be net zero in 2050. Such a strategy would require Switzerland, after 2030, to reduce domestic emissions to zero within a very short period of time with high annual emission reduction rates that would become increasingly difficult to achieve[45].

80. Furthermore, most of the GHG emissions attributable to Switzerland occurred abroad. The Swiss authorities had at first recognised that they should be taken into account when setting climate targets[46]. However, this did not

[39] Citing IPCC, "Climate Change 2022: Mitigation of Climate Change", Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change ("AR6 WGIII").
[40] Citing AR6 WGI (cited above).
[41] Available at www.climateactiontracker.org (last accessed 14.02.2024).
[42] Ibid.
[43] Ibid; citing also Rajamani et al., "National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law", *Climate Policy* 21:8, pp. 983-1004, 2021.
[44] Citing Climate Analytics "A 1.5°C compatible Switzerland".
[45] Citing Emissions Gap Report (cited above); IPCC 2018 Special report (cited above).
[46] Citing FF 2018 229 (cited above).

form part of their current legislative proposals or of the updated 2021 NDC[47]. In this context, the financial sector had a considerable influence on GHG emissions[48]. However, according to the amended CO_2 Act 2011, the finance sector would be included in national climate law only in 2025 and with a limited effect, since it would merely be obliged to review the financial risks of climate change and not to make financial flows compatible with a climate-compatible emissions pathway.

81. The Swiss authorities also recognised that they had missed their own 2020 climate target. Even after the COVID-19 restrictions, GHG emissions were rising again significantly[49]. Some sectors (and most notably the building and transport sectors in the cantons) were not properly supervised and some sectors (such as the agricultural and financial sectors) were not regulated.

82. The (planned) emission reduction measures for 2030 were similar to those in the CO_2 Act 2011 and these measures would not be able to achieve a domestic reduction of around 34% by 2030[50]. At the same time, a 1.5°C compatible domestic pathway was technically and economically feasible[51]. However, Switzerland would need to achieve full decarbonisation in line with the 1.5°C limit and should step up the taking of the measures abroad in order to meet its "fair share" target.

B. Submissions by the Government

83. The Government considered that the situation concerning climate change in Switzerland, and the measures taken in that respect, should be viewed in two separate phases: the first concerned the measures taken before the adoption of the FSC's judgment of 5 May 2020 in the applicants' case (see paragraphs 52-63 above); and the second related to the measures taken after the adoption of that judgment.

1. The first phase

84. The CO_2 Act 2011, applying the Kyoto Protocol[52], envisaged that GHG emissions in Switzerland should be reduced by 20% compared to 1990 levels by 2020. This corresponded to an average reduction of 15.8% in the period between 2013 and 2020, which was the international objective fixed

[47] Citing "Switzerland's information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 of its updated and enhanced nationally determined contribution (NDC) under the Paris Agreement (2021-2030)".
[48] Citing FOEN "Climate and financial markets" (2020); FOEN "Testing for climate goal alignment" (2022).
[49] Citing FOEN "Inventaire des gaz à effet de serre 2020 : la Suisse manque de peu son objectif climatique".
[50] Citing Climate Analytics (cited above); CAT (cited above).
[51] Citing CAT Targets (cited above).
[52] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, United Nations, Treaty Series, vol. 2303, p. 162.

by Switzerland under the Kyoto Protocol. The Federal Council had relied on the available scientific data when fixing the objective for the period up until 2020.

85. The fourth IPCC report of 2007[53] had noted that the concentration of GHG in the atmosphere should be stabilised at a level of 445 to 490 ppm of the equivalent CO_2 in order to avoid dangerous climate change. In this way, it would have been possible to limit the rise in temperature to 2 or even 2.4°C compared to the pre-industrial period. To achieve this objective, it was necessary to reduce GHG emissions at the global level from 5.8 t to 1 to 1.5 t of CO_2 equivalent per inhabitant at most. Such an objective would have required a reduction in GHG emissions of at least 50 to 85% globally and an 80 to 95% reduction at the national level of industrialised countries until 2050 compared to 1990. Industrialised countries therefore had to reduce their emissions by 25 to 40% until 2020 compared to 1990. In this connection, the objective fixed by Switzerland (20% compared to 1990 levels) corresponded to the objective set by its principal commercial partners, notably the European Union. Moreover, although the Federal Council had envisaged the possibility of increasing the relevant level of reduction of GHG emissions to 30%, it had not ultimately pursued this possibility.

86. By the end of 2020, the relevant legislation on climate had envisaged the following measures: (a) imposing a CO_2 tax on fossil fuels and creating benefits for the construction sector, technology, households and enterprises; (b) requiring all installations emitting significant levels of GHG emissions to participate in the EU Emissions Trading System[54]; (c) ensuring the undertaking of emissions reduction by small and mid-size installations emitting GHG emissions; (d) aligning domestic legislation with EU requirements relating to the GHG emissions emanating from passenger cars; (e) obliging the importers of fossil fuels to compensate for a certain proportion of CO_2 emissions; (f) taking measures in the field of waste management in order to reduce GHG emissions; (g) coordination of the relevant adaptation measures; and (h) provision of information and education on climate change.

87. These measures, as well as measures taken in other areas, in particular agriculture and energy, should have enabled Switzerland to reduce its emissions by 20% to 2020 compared to 1990. According to the relevant assessment[55], Switzerland had just barely missed this target: in 2020 GHG emissions had been some 19% below 1990 levels. Owing to the mild winter, in 2020 emissions had been particularly low in buildings and the measures to contain the coronavirus pandemic had further contributed to a reduction of transport-related emissions. However, only the industrial sector had achieved

[53] Citing IPCC, Fourth Assessment Report, AR4 Climate Change 2007, ("AR4").
[54] See EU Emissions Trading System (EU ETS) (available at www.europa.eu; last accessed 14.02.2024).
[55] Citing FOEN report "Examen de l'objectif 2020 (pour la période de 2013 à 2020)".

the fixed objective. Emissions from the building and transport sectors and other emissions had been above the target level. On average over the period from 2013 to 2020, Switzerland had reduced its GHG emissions by around 11% compared to 1990 levels.

88. Since 2012 the Federal Council had put in place the national strategy of climate change adaptation measures which identified the measures that needed to be taken in different sectors to address the issues of climate change.[56] While this strategy was at the federal level, at the local and cantonal levels many measures could be taken by the relevant authorities under the CO_2 Act.

89. The Federal Council had envisaged sixty-three adaptation measures for the period between 2014 and 2019, which included, among others, measures of protection against heatwaves. Some further scientific reports on the matter had also been published[57], including a FOEN report which had found that the increase in heat stress and the damage to human health it caused were among the main risks of climate change in Switzerland[58]. Other adaptation measures had also been adopted[59].

90. In 2015 Switzerland had also established a National Centre for Climate Services which was in charge of coordinating various climate services at the federal level. Moreover, and in reaction to the heatwaves in the summer of 2003, since 2005 the Federal Office of Meteorology and Climatology (MeteoSwiss) had been publishing heatwaves alerts, and the Federal Office for Public Health had been publishing recommendations on how to deal with the effects of heatwaves[60]. Various adaptation measures had accordingly been taken at the cantonal level to protect the population during heatwaves.

91. Furthermore, as regards the planning for the period between 2030 and 2050, on 27 February 2015 Switzerland had been the first country to provide its NDC[61]. It was committed to reducing its GHG emissions by 50% by 2030 compared to 1990, which represented an average reduction of 35% over the period from 2021 to 2030. It had also set an indicative reduction target of 70 to 85% by 2050. When setting these targets, Switzerland had relied on the available scientific evidence contained notably in the fifth IPCC report (2014)[62]. Switzerland considered that its commitment to reduce emissions by

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[56] Citing FOEN "Federal Council strategy for adaptation to climate change in Switzerland".
[57] Citing the report "Boite outils contre chaleur" (2021) prepared by the Swiss Tropical and Public Health Institute under the authority of the Federal Office for Public Health, and the FOEN report "Quand la ville surchauffe" (2018).
[58] Citing FOEN study "Climate-related risks and opportunities" (2018).
[59] Citing FOEN Pilot programme "Adaptation to climate change".
[60] Citing FOEN publication "Chaleur", available at www.bag.admin.ch (last accessed 14.02.2024)
[61] Citing Federal Council's communication "Switzerland targets 50% reduction in greenhouse gas emissions by 2030".
[62] IPCC, Fifth Assessment Report, AR5 Climate Change 2014 ("AR5").

50% by 2030 compared to 1990 would correspond to the recommendations in the IPCC report, namely of reducing global emissions by 40 to 70% by 2050 compared to 2010. Switzerland also noted that its responsibility for GHG emissions had been limited since it only produced around 0.1% of global emissions and its per capita emissions had been within the international average. Moreover, it was taking measures to reduce GHG emissions.

92. By ratifying the Paris Agreement, Switzerland had made a definite commitment to halve its GHG emissions by 2030 and reduce them by on average 35% per year over the period from 2021 to 2030 compared to 1990. In 2017 the Federal Council had proposed legislation to implement this commitment but, despite its acceptance by Parliament, it had been rejected in a referendum on 13 June 2021.

93. The parliamentary deliberations on the complete revision of the CO_2 Act had been delayed. In 2019 Parliament had therefore decided to proceed with a partial revision of the CO_2 Act in force at the time by extending the time-limit for the measures provided for and setting a reduction target for 2021, according to which GHG emissions were to be limited by 1.5% compared to 1990. The 2021 objective represented, in particular, a legal basis for determining the applicable compensation rate for importers of fossil fuels and the level of the CO_2 tax increase. In August 2019 the Federal Council had decided that as of 2050, Switzerland should no longer emit more GHG than could be absorbed by natural sinks and stored by technical installations (net zero emissions target)[63]. This corresponded to the scientific evidence established in the IPCC 2018 Special report "1.5°C global warming" (cited above). The same scientific basis underpinned the objectives set out in the 2021 strategy adopted by Switzerland (see paragraph 100 below).

2. The second phase

94. On 25 September 2020 Parliament had enacted a new CO_2 Act which had been intended to implement Swiss commitments under the Paris Agreement and fix the objectives for the period until 2030 (reduce emissions by 50% by 2030 and by 35% for the period from 2021 to 2030, each time relative to 1990). The new CO_2 Act, envisaging a comprehensive set of measures to achieve those objectives, had been supposed to come into force on 1 January 2022. However, on 13 June 2021 it had been rejected in a referendum.

95. In order to avoid a legislative lacuna, on 17 December 2021 Parliament had decided to enact a partial revision of the existing CO_2 Act 2011[64]. In accordance with this solution, the reduction target for the years

[63] Citing Federal Council's communication "Federal Council aims for a climate-neutral Switzerland by 2050".

[64] Citing communication "Prolongation de l'objectif de réduction de la loi sur le CO_2" (2021).

2021 to 2024 was 1.5% per year compared to 1990, on the understanding that from 2022, a maximum of 25% of this reduction could be achieved by measures implemented abroad. These objectives were independent of the reduction objective of 20% set for the period until 2020, and they were susceptible to further amendments.

96. In the meantime, on 17 September 2021 the Federal Council had defined the next steps of Swiss climate policy[65]. It had sought to address, in particular, the concerns expressed in the popular vote relating to fears of an increase in the cost of living and in particular a possible rise in the price of petrol, which had led to the rejection of the new CO_2 Act. The Federal Council had therefore established the following guiding principles for the new legislation: (a) keeping the instruments of the existing CO_2 Act; (b) no new taxes; (c) additional financial aid to the sectors and population affected; and (d) the development of sustainable aviation fuel.

97. Furthermore, on 17 December 2021 the Federal Council had started the consultation process on the revision of the CO_2 Act for the period after 2024[66]. The consultation process had ended in April 2022 and in September of that year the Federal Council had issued a communication regarding a revision of the CO_2 Act for the period after 2024[67]. The following measures had been envisaged: (a) reintroduction of the CO_2 tax and, for a determined period, an increase in climate-protection benefits; (b) financial support for biogas installations and the encouragement of energetic planning in the municipalities; (c) lowering of the CO_2 emission target values applicable to new vehicles in cooperation with the European Union; (d) introduction of the relevant climate-protection measures in the transport sector; (e) the development of sustainable aviation fuel in coordination with the European Union; (f) an increase in the maximum share of emissions that had to be offset by petrol importers to 90% (compensation measures in Switzerland and abroad); (g) introduction of a possible CO_2 tax exemption for companies which were willing to put in place the relevant offsetting measures; and (h) introduction of an obligation for the financial sector supervision authorities to review the risks linked to climate change. All these measures, combined with the use of new developing technologies, should allow Switzerland to maintain its reduction target of 50% by 2030. The Federal Council had considered that the measures implemented in Switzerland should lead to a reduction of emissions by some 34%. The legislative process with a view to enacting this legislation was currently ongoing.

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[65] Citing Federal Council's communication "Politique climatique : le Conseil fédéral pose les jalons pour un nouveau projet de loi".

[66] Citing Federal Council's communication "Politique climatique : le Conseil fédéral met la loi révisée sur le CO2 en consultation".

[67] Citing Federal Council's communication FF 2022 2651 "Message relatif à la révision de la loi sur le CO2 pour la période postérieure à 2024".

98. There had also been developments in the domestic legislation in relation to popular initiatives to combat climate change, in particular the "Initiative pour les glaciers" that sought to establish in the Constitution a prohibition of GHG emission by 2050. The Federal Council had opposed certain aspects of this initiative, considering that it had gone too far. On 11 August 2021 the Federal Council had made a counter legislative proposal considering that it would be more appropriate to introduce an obligation to reduce consumption of fossil fuels, save in some exceptional circumstances (such as when needed for the military, police or other security services).

99. Parliament had finally, on 30 September 2022, passed the Law on climate protection, innovation and strengthening energy security ("the Climate Act")[68], which had put in place the principle of a net zero emissions target by 2050. This Act – approved by a popular vote on 18 June 2023 – provided for an intermediate target for 2040 (75% reduction compared to 1990) and for the years 2031 to 2040 (average reduction of 64%) and 2041 to 2050 (average reduction of 89%). It had also set indicative values for the reduction of emissions in the building, transport and industry sectors for the years 2040 and 2050. A significant budget had already been put in place in order to meet the objectives of this Act.

100. The Climate Act corresponded to the climate strategy for 2050 drafted by the Federal Council in January 2021[69], several months before the publication of the sixth IPCC report[70]. In adopting this strategy, Switzerland had, albeit with a month's delay, complied with its commitments under the Paris Agreement by showing that it could reduce its GHG emissions to close to 90% by 2050. The building and transport sectors would be able to cut their emissions by 2050 and emissions from energy consumption in the industry sector could also be eliminated by 2050. A reduction in emissions of at least 40% compared to 1990 was also possible in the agricultural sector.

101. As regards the adaptation measures, on the basis of preliminary assessments of the situation, in August 2020 the Federal Council had adopted the second climate-change adaptation plan.[71] The major novelty of this plan was the putting in place of the "prevention of heat stress" measure, which aimed to protect the population from the heat, specifically the workforce. Moreover, various other measures had been put in place to address the adverse effects of heatwaves. Switzerland was currently in the process of drafting its next climate-change adaptation plan for the period after 2025.

102. At the international level, on 9 December 2020 Switzerland had submitted its new NDC, setting out the target of reducing GHG emissions by at least 50% by 2030 compared to 1990. Compared to the objective

[68] Citing FF 2022 2403 Loi fédérale sur les objectifs en matière de protection du climat, sur l'innovation et sur le renforcement de la sécurité énergétique.
[69] Citing "Long-term climate strategy to 2050".
[70] Citing Sixth Assessment Report – IPCC.
[71] Citing "Adaptation aux changements climatiques en Suisse: Plan d'action 2020-2025".

announced in 2015, that of 2020 had been characterised by the following elements: the reduction target had gone from 50% to at least 50%, and the indicative reduction target from below 70% to below 85% until 2050, complemented by the target of GHG neutrality by 2050.[72] Switzerland had also kept the parties to the Paris Agreement duly informed of developments at the domestic level.

C. Facts in relation to climate change emerging from the material available to the Court

103. With a view to its examination of the present case, and having regard to the two other cases being examined by the Grand Chamber (see paragraph 5 above), in which rulings are being delivered on the same day, as well as other pending cases stayed at the Chamber level, the Court deems it necessary to highlight the following factual elements which emerge from the material available to it.

104. As early as 1992, when there was less scientific evidence and knowledge than there is at present, the United Nations Framework Convention on Climate Change (UNFCCC)[73] noted in its Preamble that "human activities have been substantially increasing the atmospheric concentrations of GHG, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind". This was further developed in the operationalisation of the commitments under the UNFCCC by the adoption of the Kyoto Protocol 1997 (including its Doha Amendment) and of the Paris Agreement 2015, as a legally binding international treaty on climate change. The Preamble to the latter instrument acknowledged, in particular, that "climate change is a common concern of humankind, [and that] Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity".

105. More recently, in 2021, the acknowledgment expressed in the Paris Agreement was reiterated in the Glasgow Climate Pact[74], which also expressed "alarm and utmost concern" as regards human activity-induced global warming, and the Paris Agreement was also endorsed in the 2022

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[72] Citing "Protection du climat : cinq ans après l'Accord de Paris".

[73] United Nations Framework Convention on Climate Change, 9 May 1992, United Nations, Treaty Series, vol. 1771, p. 107. All Council of Europe member States are members of the UNFCCC system.

[74] Available at unfccc.int/process-and-meetings/the-paris-agreement/the-glasgow-climate-pact-key-outcomes-from-cop26; last accessed 14.02.2024.

COP 27 Sharm el-Sheikh Implementation Plan and similar findings have been reached in the 2023 COP28 decision (see paragraph 140 below). For its part the EU recognised in the European Climate Law "[t]he existential threat posed by climate change" which required "enhanced ambition and increased climate action by the Union and the Member States". A similar position has been adopted in the recent developments on climate change in the various initiatives and instruments adopted at the UN level, notably as regards the recognition of a human right to a clean, healthy and sustainable environment (UN General Assembly Resolution 76/300[75]).

106. The Court further notes that by defining the Paris Agreement targets the States formulated, and agreed to, the overarching goal of limiting warming to "well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels", recognising that this would significantly reduce the risks and impacts of climate change (Article 2 § 1 (a)). Since then, scientific knowledge has developed further and States have recognised that "the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2°C" and thus resolved "to pursue further efforts to limit the temperature increase to 1.5°C" (see Glasgow Climate Pact, paragraph 21, and Sharm el-Sheikh Implementation Plan, paragraph 4).

107. Indeed, in this connection, the Conference of Parties to the UNFCCC, in its decision adopting the Paris Agreement, invited the IPCC to provide a special report on the impacts of global warming of 1.5°C above pre-industrial levels and related global GHG emission pathways (1/CP.21, paragraph 21). The IPCC report in question – IPCC 2018 Special report "1.5°C global warming" (cited above) – found that human-induced warming had reached approximately 1°C above pre-industrial (the period 1850-1900) levels in 2017, increasing at 0.2°C per decade (*high confidence*). Ambitious mitigation actions were therefore considered indispensable to limit warming to 1.5°C[76]. The report further found that any increase in global temperature (such as +0.5°C) was projected to affect human health, with primarily negative consequences (*high confidence*). Lower risks were projected at 1.5°C than at 2°C for heat-related morbidity and mortality (*very high confidence*), and for ozone-related mortality if emissions needed for ozone formation remained high (*high confidence*)[77].

108. The report also noted with alarm that in line with the then existing emission commitments under the Paris Agreement (NDCs), global warming was expected to surpass 1.5°C above pre-industrial levels, even if those pledges were supplemented with very challenging increases in the scale and ambition of mitigation, after 2030 (*high confidence*). Thus, net zero CO_2

[75] UN General Assembly Resolution The human right to a clean, healthy and sustainable environment, A/RES/76/300, 28 July 2022.
[76] Chapter 1, Executive summary, pp. 51-52.
[77] Chapter 3, Executive summary, p. 177.

emissions would be required in less than fifteen years, and lower GHG emissions in 2030 would lead to a higher chance of keeping peak warming to 1.5°C (*high confidence*). In particular, limiting warming to 1.5°C implied reaching net zero CO_2 emissions globally around 2050 and concurrent deep reductions in emissions of non-CO_2 forcers (*high confidence*)[78].

109. The IPCC report sought to quantify mitigation requirements in terms of 1.5°C pathways that refer to "carbon budgets". The report explained that cumulative CO_2 emissions would be kept within a budget by reducing global annual CO_2 emissions to net zero. This assessment suggested a remaining budget of about 420 $GtCO_2$ for a two-thirds chance of limiting warming to 1.5°C, and of about 580 $GtCO_2$ for an even chance (*medium confidence*). At the same time, staying within a remaining carbon budget of 580 $GtCO_2$ implied that CO_2 emissions would have to reach carbon neutrality in about thirty years, reduced to twenty years for a 420 $GtCO_2$ remaining carbon budget (*high confidence*). Moreover, non-CO_2 emissions contributed to peak warming and affected the remaining carbon budget[79].

110. In its subsequent Assessment Reports ("AR"), the IPCC came to similar conclusions confirming and updating its findings in the 2018 Special Report. Thus, in AR6 "Climate Change 2021: The Physical Science Basis" (cited above), the IPCC unequivocally confirmed that anthropogenic climate change has produced various adverse effects for humans and nature and created risks for further such effects in the future, in particular in relation to global warming. According to the report, global surface temperature would continue to increase until at least the middle of the century under all emissions scenarios considered, and global warming of 1.5°C and 2°C would be exceeded during the twenty-first century unless deep reductions in CO_2 and other GHG emissions occurred in the coming decades. On the other hand, with further global warming, changes in several climatic impact-drivers would be more widespread at 2°C compared to 1.5°C global warming and even more widespread and/or pronounced for higher warming levels[80]. The report also confirmed the IPCC's earlier findings (*high confidence*) that there was a near-linear relationship between cumulative anthropogenic CO_2 emissions and the global warming they caused. Thus, limiting human-induced global warming to a specific level required limiting cumulative CO_2 emissions, reaching at least net zero CO_2 emissions, together with strong reductions in other GHG emissions. Furthermore, the report nuanced the relevant estimated remaining carbon budgets from the beginning of 2020. It explained that to have a 67% chance of meeting the 1.5°C limit, the remaining global carbon budget was 400 $GtCO_2$ and to have an 83% chance, 300 $GtCO_2$.[81]

[78] Chapter 2, Executive summary, p. 95.
[79] Ibid., p. 96.
[80] Summary for Policymakers, pp. 14 and 24.
[81] Ibid., pp. 27-29.

111. In AR6 "Climate Change 2022: Mitigation of Climate Change" (cited above), the IPCC found that total net anthropogenic GHG emissions had continued to rise during the period 2010-2019. During that period, average annual GHG emissions had been higher than in any previous decade (*high confidence*). Net anthropogenic GHG emissions had increased across all major sectors globally[82]. The report further pointed out that a consistent expansion of policies and laws addressing mitigation had led to the avoidance of emissions that would otherwise have occurred. However, global GHG emissions in 2030 associated with the implementation of NDCs announced prior to the Glasgow Climate Conference (COP26) would make it likely that warming would exceed 1.5°C during the twenty-first century. It was likely that limiting warming to below 2°C would then rely on a rapid acceleration of mitigation efforts after 2030. Policies implemented by the end of 2020 were projected to result in higher global GHG emissions than those implied by NDCs (*high confidence*). In other words, according to the findings of the IPCC, the world was currently on a trajectory that would lead to very significant adverse impacts for human lives and well-being.

112. According to the above-mentioned IPCC report, global GHG emissions would be projected to peak between 2020 and at the latest before 2025 in global modelled pathways that limited warming to 1.5°C with no or limited overshoot and in those that limited warming to 2°C and assumed immediate action (in both types of modelled pathways, rapid and deep GHG emissions reductions follow throughout 2030, 2040 and 2050). However, without a strengthening of policies beyond those already implemented by the end of 2020, the report predicted GHG emissions to rise beyond 2025, leading to a median global warming of 3.2°C (2.2 to 3.5°C) by 2100 (*medium confidence*)[83].

113. Furthermore, the report stressed that global net zero CO_2 emissions would be reached in the early 2050s in modelled pathways that limited warming to 1.5°C with no or limited overshoot, and around the early 2070s in modelled pathways that limited warming to 2°C. These pathways also included deep reductions in other GHG emissions. Reaching and sustaining global net zero GHG emissions would result in a gradual decline in warming (*high confidence*).[84]

114. In the latest AR6 "Synthesis Report: Climate Change 2023", the IPCC noted that human activities, principally through GHG emissions (increasing with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals), had unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850-1900

[82] Summary for Policymakers, pp. 6, 8 and 14.
[83] Ibid., p. 17.
[84] Ibid., p. 23.

levels between 2011 and 2020. According to the report, human-caused climate change was already affecting many weather and climate extremes in every region across the globe, which had led to widespread adverse impacts and related losses and damages to nature and people (*high confidence*)[85].

115. The IPCC further stressed that policies and laws addressing mitigation had consistently expanded and had already been deployed successfully in some countries, leading to avoided and in some cases reduced or removed emissions (*high confidence*). Global GHG emissions in 2030 implied by NDCs announced by October 2021 made it likely that warming would exceed 1.5°C during the twenty-first century and made it harder to limit warming below 2°C. There were gaps between projected emissions from implemented policies and those from NDCs. Moreover, finance flows fell short of the levels needed to meet climate goals across all sectors and regions (*high confidence*). The IPCC warned that continued GHG emissions would lead to increasing global warming, with the best estimate of reaching 1.5°C in the near term (2021-2040). At the same time, every increment of global warming would intensify multiple and concurrent hazards. However, deep, rapid and sustained reductions in GHG emissions would lead to a discernible slowdown in global warming within around two decades, and also to discernible changes in atmospheric composition within a few years (*high confidence*). While some future changes were unavoidable and/or irreversible, they could be limited by deep, rapid and sustained global GHG emissions reductions. The likelihood of abrupt and/or irreversible changes increased with higher global warming levels. Similarly, the probability of low-likelihood outcomes associated with potentially very large adverse impacts increased with higher global warming levels (*high confidence*). Adaptation options that were feasible and effective today would become constrained and less effective with increasing global warming; losses and damages would also increase and additional human and natural systems would reach adaptation limits (*high confidence*).[86]

116. In the same report, the IPCC stressed the importance of carbon budgets and policies for net zero emissions. It noted that limiting human-caused global warming required net zero CO_2 emissions. Cumulative carbon emissions until the time of reaching net-zero CO_2 emissions and the level of GHG emission reductions this decade would largely determine whether warming could be limited to 1.5°C or 2°C. Projected CO_2 emissions from existing fossil fuel infrastructure without additional abatement would exceed the remaining carbon budget for 1.5°C (50%) (*high confidence*). As regards mitigation pathways, the IPCC noted that all global modelled pathways that limited warming to 1.5°C (>50%) with no or limited overshoot, and those that limited warming to 2°C (>67%), involved rapid and deep and,

[85] Summary for Policymakers, pp. 4-5.
[86] Ibid., pp. 10-19.

in most cases, immediate GHG emissions reductions in all sectors this decade. Global net zero CO_2 emissions would be reached for these pathway categories in the early 2050s and around the early 2070s, respectively (*high confidence*).[87]

117. However, the IPCC stressed that if warming exceeded a specified level such as 1.5°C, it could gradually be reduced again by achieving and sustaining net negative global CO_2 emissions, which would require additional deployment of carbon dioxide removal, compared to pathways without overshoot. This would, however, lead to greater feasibility and sustainability concerns as overshoot entailed adverse impacts, some irreversible, and additional risks for human and natural systems, all growing with the magnitude and duration of overshoot (*high confidence*)[88].

118. The IPCC stressed the urgency of near-term integrated climate action. It noted that climate change was a threat to human well-being and planetary health. There was a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*). Climate-resilient development integrated adaptation and mitigation to advance sustainable development for all, and was enabled by increased international cooperation, including improved access to adequate financial resources and inclusive governance and coordinated policies (*high confidence*). The choices and actions implemented in this decade would have impacts now and for thousands of years (*high confidence*).[89]

119. According to the IPCC, deep, rapid and sustained mitigation and accelerated implementation of adaptation actions in this decade would reduce projected losses and damages for humans and ecosystems (finding with *very high confidence*). On the other hand, delayed mitigation and adaptation action would lock in high-emissions infrastructure, raise risks of stranded assets and cost-escalation, reduce feasibility, and increase losses and damages (*high confidence*)[90].

120. The IPCC noted that effective climate action was enabled by political commitment, well-aligned multilevel governance, institutional frameworks, laws, policies and strategies and enhanced access to finance and technology. Clear goals, coordination across multiple policy domains and inclusive governance processes facilitated effective climate action. Regulatory and economic instruments could support deep emissions reductions and climate resilience if scaled up and applied widely (*high confidence*).[91]

[87] Ibid., pp. 20-23.
[88] Ibid., p. 24.
[89] Ibid., p. 25.
[90] Ibid., pp. 27-29.
[91] Ibid., p. 34.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LEGAL FRAMEWORK

A. Constitution

121. The relevant provisions of the Federal Constitution of the Swiss Confederation, adopted on 18 April 1999 (Cst., RS 101), read as follows:

Article 10 Right to life and to personal freedom

"1. Every person has the right to life. The death penalty is prohibited.

2. Every person has the right to personal liberty and in particular to physical and mental integrity and to freedom of movement.

..."

Article 13 Right to privacy

"1. Every person has the right to respect for their private and family life and their home, and the relations established via mail and telecommunications.

..."

Article 29 General procedural guarantees

"1. Every person has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time.

2. Each party to a case has the right to be heard.

..."

Article 29a Guarantee of access to the courts

"In a legal dispute, every person has the right to have their case determined by a judicial authority. The Confederation and the cantons may by law preclude the determination by the courts of certain exceptional categories of case."

Article 73 Sustainable development

"The Confederation and the cantons shall endeavour to achieve a balanced and sustainable relationship between nature and its capacity to renew itself and the demands placed on it by the population."

Article 74 Protection of the environment

"1. The Confederation shall legislate on the protection of the population and its natural environment against damage or nuisance.

2. It shall ensure that such damage or nuisance is avoided. The costs of avoiding or eliminating such damage or nuisance are borne by those responsible for causing it.

3. The cantons are responsible for the implementation of the relevant federal regulations, except where the law reserves this duty for the Confederation."

Article 189 Jurisdiction of the Federal Supreme Court

"...

4. Acts of the Federal Assembly or the Federal Council may not be challenged in the Federal Supreme Court. Exceptions may be provided for by law."

B. Federal Act on the Protection of the Environment

122. The relevant provisions of the Federal Act on the Protection of the Environment of 7 October 1983 (EPA, RS 814.01) read as follows:

Section 1 Aim

"(1) [The Environmental Protection] Act is intended to protect people, animals and plants, their biological communities and habitats against harmful effects or nuisances and to preserve the natural foundations of life in the long term, in particular biological diversity and the fertility of the soil.

(2) Early preventive measures must be taken in order to limit effects which could become harmful or a nuisance."

Section 3 Reservation of other legislation

"(1) Stricter regulations in other federal legislation are reserved.

..."

Section 4 Implementing provisions based on other federal legislation

"(1) Regulations on the environmental effects of air pollution, noise, vibrations and radiation that are based on other federal legislation must comply with the principles of limitation of emissions (Art. 11), ambient limit values (Art. 13-15), alarm values (Art. 19) and planning values (Art. 23-25).

..."

Section 11 Principles

"(1) Air pollution, noise, vibrations and radiation are limited by measures taken at their source (limitation of emissions).

(2) Irrespective of the existing environmental pollution, as a precautionary measure emissions are limited as much as technology and operating conditions allow, provided that this is economically acceptable.

(3) Emissions are limited more strictly if the effects are found or expected to be harmful or a nuisance, taking account of the existing level of environmental pollution."

Section 12 Limitation of emissions

"(1) Emissions are limited by issuing:

(a) maximum emission values;

(b) regulations on construction and equipment;

(c) traffic or operating regulations;

(d) regulations on the heat insulation of buildings;

(e) regulations on thermal and motor fuels.

(2) Limits are prescribed by ordinance or, in cases where an ordinance makes no such provision, by rulings based directly on this Act."

Section 13 Ambient limit values

"(1) The Federal Council stipulates by ordinance the ambient limit values for assessing harmful effects or nuisances.

(2) In doing so, it also takes account of the effects of pollution levels on particularly sensitive groups such as children, the sick, the elderly and pregnant women."

Section 14 Ambient limit values for air pollution

"The ambient limit values for air pollution must be set so that, in the light of current scientific knowledge and experience, ambient air pollution below these levels:

(a) does not endanger people, animals or plants, their biological communities and habitats;

(b) does not seriously affect the well-being of the population;

(c) does not damage buildings;

(d) does not harm soil fertility, vegetation or waters."

C. CO_2 Act

123. The relevant provision of the Federal Act on the Reduction of CO2 Emissions of 23 December 2011 (CO2 Act, RS 641.71), read as follows:

Section 1 Aim

"(1) This Act is intended to reduce [GHG] emissions and in particular CO_2 emissions that are attributable to the use of fossil fuels (thermal and motor fuels) as energy sources with the aim of contributing to limiting the global rise in temperature to less than 2 degrees Celsius.

..."

Section 3 Reduction target

"(1) Domestic [GHG] emissions must be reduced overall by 20 per cent as compared with 1990 levels, by 2020. The Federal Council may set sector-specific interim targets.

(1^{bis}) [GHG] emissions must be reduced by a further 1.5 per cent annually by 2024 compared with 1990 levels. The Federal Council may specify sectoral interim targets.

(1^{ter}) At least 75 per cent of the reduction in [GHG] emissions in accordance with paragraph 1^{bis} must be achieved through domestic measures.

(3) The total volume of [GHG] emissions is calculated on the basis of the [GHG] emitted in Switzerland. Emissions from the use of aviation fuel on international flights are not taken into account.

...

(4) The Federal Council may set reduction targets for individual economic sectors by agreement with the parties concerned.

(5) It shall at the due time submit proposals to the Federal Assembly on the reduction targets for the period after 2020. It shall consult the parties concerned beforehand."

124. The Federal Council set interim targets for various sectors (section 3(1) of the Ordinance on the Reduction of CO_2 Emissions [CO_2 Ordinance, SR 641.711] in conjunction with section 3(1)(2) of the CO_2 Act). If a sectoral interim target is not achieved, the DETEC, after hearing the cantons and the parties concerned, applies to the Federal Council for further measures (section 3(2) of the CO_2 Ordinance) or – for the fuels sector – the CO_2 tax is automatically increased (section 94(1) of the CO_2 Ordinance in conjunction with section 29 of the CO_2 Act). The CO_2 Act provides for various measures to achieve the reduction target. These are, first of all, technical measures for the reduction of CO_2 emissions in the building sector (enactment of building standards for new and old buildings by the cantons, combined with a reporting obligation for the attention of the FOEN – section 9 of the CO_2 Act in conjunction with section 16 of the CO_2 Ordinance) and in the transport sector (overall target values for the CO_2 emissions of all new passenger cars placed on the market in Switzerland and, since 1 January 2018, also for vans and light articulated vehicles placed on the market for the first time, combined with individual targets and penalty payments – sections 10 et seq. of the CO_2 Act).

125. In the transport sector, part of the CO_2 emissions resulting from the use of motor fuels as an energy source must be compensated, for example, through emissions-reduction projects. The Federal Council determines the compensation rate according to, among other things, the achievement of the reduction target pursuant to section 3 of the CO_2 Act (section 26(1) and (2) of the CO_2 Act in conjunction with section 89(1) of the CO_2 Ordinance).

126. The Federal government levies the above-mentioned CO_2 tax on the production, extraction and import of fuels (section 29 of the CO_2 Act). The enforcement of the CO_2 Act and the issuance of implementing regulations is the responsibility of the Federal Council (section 39(1) of the CO_2 Act). It then periodically reviews the effectiveness of the legal measures and the need for further measures (section 40(1) of the CO_2 Act). The implementation of the CO_2 Ordinance is generally the responsibility of the Federal Office for the Environment (section 130(1) of the CO_2 Ordinance).

D. Climate Act

127. The relevant provisions of the Federal Act on climate protection, innovation and strengthening energy security of 30 September 2022 (the Climate Act, FF 2022 2403), read as follows:

Section 1 Aim

"The purpose of the present Act is to set the following objectives, in accordance with the Agreement of 12 December 2015 on climate change:

(a) reduction of [GHG] emissions and use of negative-emissions technologies;

(b) adaptation to and protection from the effects of climate change;

(c) directing of financial flows so as to render them compatible with climate-resilient low-emission development."

Section 3 Targets for emissions reduction and negative-emissions technologies

"(1) The Confederation shall ensure a reduction to net zero by 2050 of human-induced [GHG] emitted in Switzerland (net-zero objective) through the following measures:

(a) reducing [GHG] emissions as far as possible, and

(b) offsetting the impact of residual [GHG] emissions through the use of negative-emissions technologies in Switzerland and abroad.

(2) After 2050, the quantity of CO_2 removed and stored using negative-emissions technologies must be greater than the residual [GHG] emissions.

(3) The Confederation shall ensure a reduction in [GHG] emissions compared with 1990 levels. The intermediate reduction targets shall be the following:

(a) between 2031 and 2040: at least 64% on average;

(b) by 2040: at least 75%;

(c) between 2041 and 2050: at least 89% on average.

(4) The reduction targets must be technically feasible and economically sustainable. As far as possible, they should be achieved through emissions reductions in Switzerland.

(5) Within the scope of their powers, the Confederation and the cantons shall ensure that, by 2050 at the latest, carbon sinks are available in Switzerland and abroad in sufficient quantity to achieve the net-zero objective. The Federal Council may set indicative values for the use of negative-emissions technologies.

(6) Emissions from international air and sea transport refuelling in Switzerland shall be taken into account for the achievement of the targets referred to in subsections 1 and 2."

Section 4 – Indicative values for different sectors

"(1) The reduction targets referred to in section 3, subsections 1 and 3, are to be achieved by reducing [GHG] emissions in Switzerland compared with 1990 levels by at least the following amounts:

(a) in the construction sector:

1. by 2040: 82%,

2. by 2050: 100%;

(b) in the transport sector:

1. by 2040: 57%,

2. by 2050: 100%;

(c) in the industrial sector:

1. by 2040: 50%,

2. by 2050: 90%.

(2) After consultation with the relevant actors the Federal Council may, in accordance with subsection 1, set indicative values for other sectors and for [GHG] and emissions from fossil-based energy sources. It shall take into account the latest scientific knowledge, the availability of new technologies, and developments within the European Union."

Section 11 – Achievement of the objectives

"(1) After hearing the views of the relevant actors and taking into account the most recent scientific knowledge, the Federal Council shall submit to the Federal Assembly, in good time, proposals for the realisation of the objectives set in the present Act:

(a) for the period from 2025 to 2030;

(b) for the period from 2031 to 2040;

(c) for the period from 2041 to 2050.

(2) The proposals referred to in subsection 1 are to be implemented primarily in the CO_2 Act of 23 December 2011.

(3) The proposals of the Federal Council shall aim to strengthen the economy and ensure social acceptance.

(4) Within the scope of their powers, the Confederation and the cantons shall undertake efforts, in Switzerland and internationally, to limit the risks and effects of climate change, in accordance with the objectives of the present Act."

E. The Federal Administrative Procedure Act

128. The relevant provision of the Federal Administrative Procedure Act of 20 December 1968 (APA, RS 172.021), determining standing for a ruling on real acts, namely acts based on federal public law that affect rights and obligations, but do not arise from formal rulings, provides as follows:

Section 25a Ruling on real acts

"(1) Any person who has an interest that is worthy of protection may request from the authority that is responsible for acts that are based on federal public law and which affect rights or obligations that it:

(a) refrains from, discontinues or revokes unlawful acts;

(b) rectifies the consequences of unlawful acts;

(c) confirms the illegality of such acts.

(2) The authority shall decide by way of a ruling."

129. For further relevant provisions of the Act, see *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 28, ECHR 2000-IV.

F. Relevant domestic case-law

130. According to the Federal Supreme Court's case-law, Article 73 of the Constitution does not provide for individual claims (ATF [judgments of the Federal Supreme Court] 132 II 305, at 4.3). Conversely, it is not a mere declaration or interpretation aid, "but a binding instruction for action addressed to the competent authorities" (FOJ, VPB 65.2, A.III). The Constitution therefore recognises the pursuit of sustainability as a (never completed) permanent task. The addressees are the Confederation and the cantons, each within the scope of their competence. The political authorities (legislature, parliaments and governments) are to be addressed first and foremost, and only subsidiarily – within the scope of their competence – also the authorities applying the law.

131. Similarly to Article 73, Article 74 of the Constitution is also not a justiciable norm. It simply provides a guideline for legislation. The addressee is primarily the legislature. The authorities applying the law must, however, take into account the requirements of Article 74 § 2 of the Constitution within the framework and limits of constitutional interpretation (see ATF 132 II 305, at 4.3, concerning the concept of precaution). The "precautionary principle" as a constitutional guideline is intended to prevent a lack of scientific certainty from becoming a pretext for government inaction (ATF 132 II 305, at 4.3). Paragraph 2 leaves the (federal) legislature a certain scope for assessment and design of the necessary legislative measures to be taken. In line with Article 74 § 2 of the Constitution, Article 1 § 2 of the Environmental Protection Act interprets this constitutional mandate to mean that impacts that could become harmful or a nuisance are to be "limited at an early stage".

132. Furthermore, Article 189 § 4 of the Constitution excludes the abstract review of norms by way of appeal. It does not, however, prejudice action against an ordinance by way of concrete legal action. The preliminary review of an ordinance in the particular circumstances of a case in which it has been applied is not excluded (concrete norm control; see ATF 141 V 473, at 8.3, and ATF 141 II 169, at 3.4) and neither is the preliminary review of another Federal Council or parliamentary act (see ATF 139 II 499, at 4.1). Article 189 § 4 of the Constitution can also not allow the constitutional guarantee of legal recourse under Article 29a of the Constitution to be circumvented. The content of the latter must be taken into account in the interpretation and implementation of Article 189 of the Constitution, as must the requirements of international law arising from Article 6 § 1 or Article 13 of the Convention (see message of the Federal Council accompanying the Constitution, p. 531).

II. RELEVANT INTERNATIONAL MATERIALS

A. United Nations

1. The system of the United Nations Framework Convention on Climate Change

(a) United Nations Framework Convention on Climate Change

133. The relevant parts of the UNFCCC provide as follows:

"Acknowledging that change in the Earth's climate and its adverse effects are a common concern of humankind,

Concerned that human activities have been substantially increasing the atmospheric concentrations of [GHG], that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind,

Noting that the largest share of historical and current global emissions of [GHG] has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs,

...

Noting that there are many uncertainties in predictions of climate change, particularly with regard to the timing, magnitude and regional patterns thereof,

Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions,

...

Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction,

...

Recognizing that States should enact effective environmental legislation, that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply, and that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries,

...

Recognizing that steps required to understand and address climate change will be environmentally, socially and economically most effective if they are based on relevant scientific, technical and economic considerations and continually re-evaluated in the light of new findings in these areas,

Recognizing that various actions to address climate change can be justified economically in their own right and can also help in solving other environmental problems,

Recognizing also the need for developed countries to take immediate action in a flexible manner on the basis of clear priorities, as a first step towards comprehensive response strategies at the global, national and, where agreed, regional levels that take into account all [GHG], with due consideration of their relative contributions to the enhancement of the greenhouse effect,

...

Affirming that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty,

...

Determined to protect the climate system for present and future generations ...”

Article 1
Definitions

“For the purposes of this Convention:

1. ’Adverse effects of climate change’ means changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.

2. ’Climate change’ means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.

...

4. ’Emissions’ means the release of [GHG] and/or their precursors into the atmosphere over a specified area and period of time.

5. ’[GHG]’ means those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation.

...

9. ’Source’ means any process or activity which releases a [GHG], an aerosol or a precursor of a [GHG] into the atmosphere.”

Article 2
Objective

“The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of [GHG] concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow

ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."

Article 3
Principles

"In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.

3. The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost ...

4. The Parties have a right to, and should, promote sustainable development ...

5. The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties ..."

Article 4
Commitments

"1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:

(a) Develop, periodically update, publish and make available to the Conference of the Parties ... national inventories of anthropogenic emissions ...

(b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all [GHG] not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change;

(c) Promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices ...

(d) Promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs ...

(e) Cooperate in preparing for adaptation to the impacts of climate change ...

(f) Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change;

(g) Promote and cooperate in scientific, technological, technical, socio-economic and other research ...

2. The developed country Parties ... commit themselves specifically as provided for in the following:

(a) Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of [GHG] and protecting and enhancing its [GHG] sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, recognizing that the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other [GHG] not controlled by the Montreal Protocol would contribute to such modification, and taking into account the differences in these Parties' starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of these Parties to the global effort regarding that objective. These Parties may implement such policies and measures jointly with other Parties and may assist other Parties in contributing to the achievement of the objective of the Convention and, in particular, that of this subparagraph;

(b) In order to promote progress to this end, each of these Parties shall communicate ... detailed information on its policies and measures referred to in subparagraph (a) above, ... with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other [GHG] not controlled by the Montreal Protocol ..."

(b) The Kyoto Protocol

134. The UNFCCC was first operationalised through the Kyoto Protocol (1997). This Protocol committed industrialised countries and economies in transition to limit and reduce GHG emissions in accordance with agreed individual targets and the principle of "common but differentiated responsibility and respective capabilities". The relevant part of the Kyoto Protocol provides as follows:

Article 3 § 1

"The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the [GHG] listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.

135. Annex B of the Kyoto Protocol set quantified emission limitation or reduction commitment (percentage of base year or period) for Switzerland at 92%.

(c) The Paris Agreement

136. The Paris Agreement – adopted at the UN Climate Change Conference (COP21) in Paris on 12 December 2015 – is an international treaty setting out the overarching goal of GHG emissions reduction. The relevant parts of it provide as follows:

> "In pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances,
>
> Recognizing the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge,
>
> ...
>
> Recognizing that Parties may be affected not only by climate change, but also by the impacts of the measures taken in response to it,
>
> ...
>
> Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,
>
> ..."

Article 2

> "1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:
>
> (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;
>
> (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low [GHG] emissions development, in a manner that does not threaten food production; and
>
> (c) Making finance flows consistent with a pathway towards low [GHG] emissions and climate-resilient development.
>
> 2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

Article 3

"As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts ..."

Article 4

"1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of [GHG] emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of [GHG] in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.

2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."

(d) COP26 and COP27

137. At the UNFCCC Conference of the Parties (COP26) in Glasgow, which took place between 31 October and 13 November 2021, the Glasgow Climate Pact was adopted, which provides, *inter alia*, as follows:

"The Conference of the Parties

...

Also acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,

...

I. Science and urgency

1. Recognizes the importance of the best available science for effective climate action and policymaking;

...

3. Expresses alarm and utmost concern that human activities have caused around 1.1 ºC of warming to date, that impacts are already being felt in every region and that carbon budgets consistent with achieving the Paris Agreement temperature goal are now small and being rapidly depleted;

4. Recalls Article 2, paragraph 2, of the Paris Agreement, which provides that the Paris Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities in the light of different national circumstances;

5. Stresses the urgency of enhancing ambition and action in relation to mitigation, adaptation and finance in this critical decade to address the gaps in the implementation of the goals of the Paris Agreement;

...

IV. Mitigation

20. Reaffirms the Paris Agreement temperature goal of holding the increase in the global average temperature to well below 2 ºC above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 ºC above pre-industrial levels;

21. Recognizes that the impacts of climate change will be much lower at the temperature increase of 1.5 ºC compared with 2 ºC and resolves to pursue efforts to limit the temperature increase to 1.5 ºC;

22. Recognizes that limiting global warming to 1.5 ºC requires rapid, deep and sustained reductions in global [GHG] emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around mid-century as well as deep reductions in other [GHG];

23. Also recognizes that this requires accelerated action in this critical decade, on the basis of the best available scientific knowledge and equity, reflecting common but differentiated responsibilities and respective capabilities in the light of different national circumstances and in the context of sustainable development and efforts to eradicate poverty;

...

26. Emphasizes the urgent need for Parties to increase their efforts to collectively reduce emissions through accelerated action and implementation of domestic mitigation measures in accordance with Article 4, paragraph 2, of the Paris Agreement;

..."

138. The UNFCCC Conference of the Parties (COP27) took place in Sharm el-Sheikh from 6 to 20 November 2022. The relevant parts of the adopted Sharm el-Sheikh Implementation Plan provide as follows:

"The Conference of the Parties

...

Acknowledging that climate change is a common concern of humankind, and that Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to a clean, healthy and sustainable environment, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,

...

57. Encourages Parties to increase the full, meaningful and equal participation of women in climate action and to ensure gender-responsive implementation and means of implementation, including by fully implementing the Lima work programme on gender and its gender action plan, to raise climate ambition and achieve climate goals;

...

59. Recognizes the role of children and youth as agents of change in addressing and responding to climate change and encourages Parties to include children and youth in their processes for designing and implementing climate policy and action, and, as appropriate, to consider including young representatives and negotiators into their

national delegations, recognizing the importance of intergenerational equity and maintaining the stability of the climate system for future generations;"

(e) COP28

139. In preparation for the UNFCCC Conference of the Parties (COP28) in Dubai, held between 30 November and 12 December 2023, the synthesis report on the technical dialogue of the first global stocktake under the Paris Agreement[92], made the following key findings:

"Key finding 1: since its adoption, the Paris Agreement has driven near-universal climate action by setting goals and sending signals to the world regarding the urgency of responding to the climate crisis. While action is proceeding, much more is needed now on all fronts.

Key finding 2: to strengthen the global response to the threat of climate change in the context of sustainable development and efforts to eradicate poverty, governments need to support systems transformations that mainstream climate resilience and low GHG emissions development. Credible, accountable and transparent actions by non-Party stakeholders are needed to strengthen efforts for systems transformations.

Key finding 3: systems transformations open up many opportunities, but rapid change can be disruptive. A focus on inclusion and equity can increase ambition in climate action and support.

Key finding 4: global emissions are not in line with modelled global mitigation pathways consistent with the temperature goal of the Paris Agreement, and there is a rapidly narrowing window to raise ambition and implement existing commitments in order to limit warming to 1.5 °C above pre-industrial levels.

Key finding 5: much more ambition in action and support is needed in implementing domestic mitigation measures and setting more ambitious targets in NDCs to realize existing and emerging opportunities across contexts, in order to reduce global GHG emissions by 43 per cent by 2030 and further by 60 per cent by 2035 compared with 2019 levels and reach net zero CO2 emissions by 2050 globally.

Key finding 6: achieving net zero CO2 and GHG emissions requires systems transformations across all sectors and contexts, including scaling up renewable energy while phasing out all unabated fossil fuels, ending deforestation, reducing non-CO2 emissions and implementing both supply- and demand-side measures.

Key finding 7: just transitions can support more robust and equitable mitigation outcomes, with tailored approaches addressing different contexts.

Key finding 8: economic diversification is a key strategy to address the impacts of response measures, with various options that can be applied in different contexts.

Key finding 9: as climate change threatens all countries, communities and people around the world, increased adaptation action as well as enhanced efforts to avert, minimize and address loss and damage are urgently needed to reduce and respond to increasing impacts, particularly for those who are least prepared for change and least able to recover from disasters.

[92] FCCC/SB/2023/9, 8 September 2023.

Key finding 10: collectively, there is increasing ambition in plans and commitments for adaptation action and support, but most observed adaptation efforts are fragmented, incremental, sector-specific and unequally distributed across regions.

Key finding 11: when adaptation is informed and driven by local contexts, populations and priorities, both the adequacy and the effectiveness of adaptation action and support are enhanced, and this can also promote transformational adaptation.

Key finding 12: averting, minimizing and addressing loss and damage requires urgent action across climate and development policies to manage risks comprehensively and provide support to impacted communities.

Key finding 13: support for adaptation and funding arrangements for averting, minimizing and addressing loss and damage need to be rapidly scaled up from expanded and innovative sources, and financial flows need to be made consistent with climate-resilient development to meet urgent and increasing needs.

Key finding 14: scaled-up mobilization of support for climate action in developing countries entails strategically deploying international public finance, which remains a prime enabler for action, and continuing to enhance effectiveness, including access, ownership and impacts.

Key finding 15: making financial flows – international and domestic, public and private – consistent with a pathway towards low GHG emissions and climate-resilient development entails creating opportunities to unlock trillions of dollars and shift investments to climate action across scales.

Key finding 16: existing cleaner technologies need to be rapidly deployed, together with accelerated innovation, development and transfer of new technologies, to support the needs of developing countries.

Key finding 17: capacity-building is foundational to achieving broad-ranging and sustained climate action and requires effective country-led and needs-based cooperation to ensure capacities are enhanced and retained over time at all levels."

140. The relevant parts of the COP28 First Global Stocktake[93] provide as follows:

The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement,

Recalling Article 2, paragraph 1, of the Paris Agreement, which provides that the Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty,

Also recalling Article 2, paragraph 2, of the Paris Agreement, which provides that the Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances,

...

Acknowledging that climate change is a common concern of humankind and that Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to a clean, healthy and sustainable environment, the right to health, the rights of Indigenous Peoples, local

[93] FCCC/PA/CMA/2023/L.17, 13 December 2023.

communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,

...

I. Context and cross-cutting considerations

1. Welcomes that the Paris Agreement has driven near-universal climate action by setting goals and sending signals to the world regarding the urgency of responding to the climate crisis;

2. Underlines that, despite overall progress on mitigation, adaptation and means of implementation and support, Parties are not yet collectively on track towards achieving the purpose of the Paris Agreement and its long-term goals;

3. Reaffirms the Paris Agreement temperature goal of holding the increase in the global average temperature to well below 2 ºC above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 ºC above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

4. Underscores that the impacts of climate change will be much lower at the temperature increase of 1.5 ºC compared with 2 ºC and resolves to pursue efforts to limit the temperature increase to 1.5 ºC;

5. Expresses serious concern that 2023 is set to be the warmest year on record and that impacts from climate change are rapidly accelerating, and emphasizes the need for urgent action and support to keep the 1.5 ºC goal within reach and to address the climate crisis in this critical decade;

6. Commits to accelerate action in this critical decade on the basis of the best available science, reflecting equity and the principle of common but differentiated responsibilities and respective capabilities in the light of different national circumstances and in the context of sustainable development and efforts to eradicate poverty;

7. Underscores Article 2, paragraph 2, of the Paris Agreement, which stipulates that the Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances;

...

15. Notes with alarm and serious concern the following findings of the Sixth Assessment Report of the Intergovernmental Panel on Climate Change:

(a) That human activities, principally through emissions of [GHG], have unequivocally caused global warming of about 1.1 ºC;

(b) That human-caused climate change impacts are already being felt in every region across the globe, with those who have contributed the least to climate change being most vulnerable to the impacts, and, together with losses and damages, will increase with every increment of warming;

(c) That most observed adaptation responses are fragmented, incremental, sector-specific and unequally distributed across regions, and that, despite the progress made, significant adaptation gaps still exist across sectors and regions and will continue to grow under current levels of implementation;

16. Notes the following findings of the Sixth Assessment Report of the Intergovernmental Panel on Climate Change:

(a) That mitigation efforts embedded within the wider development context can increase the pace, depth and breadth of emissions reductions, as well as that policies that shift development pathways towards sustainability can broaden the portfolio of available mitigation responses and enable the pursuit of synergies with development objectives;

(b) That both adaptation and mitigation financing would need to increase manyfold, and that there is sufficient global capital to close the global investment gap but there are barriers to redirecting capital to climate action, and that Governments through public funding and clear signals to investors are key in reducing these barriers and investors, central banks and financial regulators can also play their part;

(c) That feasible, effective and low-cost mitigation options are already available in all sectors to keep 1.5 ºC within reach in this critical decade with the necessary cooperation on technologies and support;

17. Notes with concern the pre-2020 gaps in both mitigation ambition and implementation by developed country Parties and that the Intergovernmental Panel on Climate Change had earlier indicated that developed countries must reduce emissions by 25–40 per cent below 1990 levels by 2020, which was not achieved;

II. Collective progress towards achieving the purpose and long-term goals of the Paris Agreement ...

A. Mitigation

...

25. Expresses concern that the carbon budget consistent with achieving the Paris Agreement temperature goal is now small and being rapidly depleted and acknowledges that historical cumulative net carbon dioxide emissions already account for about four fifths of the total carbon budget for a 50 per cent probability of limiting global warming to 1.5 ºC;

...

28. Further recognizes the need for deep, rapid and sustained reductions in [GHG] emissions in line with 1.5 ºC pathways and calls on Parties to contribute to the following global efforts, in a nationally determined manner, taking into account the Paris Agreement and their different national circumstances, pathways and approaches:

...

(d) Transitioning away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science;

..."

2. The Aarhus Convention

141. The relevant parts of the 1998 Aarhus Convention read as follows:

"The Parties to this Convention,

...

Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,

Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

...

Have agreed as follows:"

Article 2
Definitions

"4. 'The public' means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

5. 'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

Article 9
Access to justice

"2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

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

142. The relevant parts of the Aarhus Convention Implementation Guide[94] provide as follows (footnotes omitted):

[94] United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, Second Edition, 2014.

"While narrower than the 'public,' the 'public concerned' is nevertheless still very broad. With respect to the criterion of 'being affected', this is very much related to the nature of the activity in question. Some of the activities subject to article 6 of the Convention may potentially affect a large number of people. For example, in the case of pipelines, the public concerned is usually in practice counted in the thousands, while in the case of nuclear power stations the competent authorities may consider the public concerned to count as many as several hundred thousand people across several countries.

With respect to the criterion of 'having an interest', the definition appears to go well beyond the kind of language that is usually found in legal tests of 'sufficient interest' (see next paragraph). In particular it should be read to include not only members of the public whose legal interests or rights guaranteed under law might be impaired by the proposed activity. Potentially affected interests may also include social rights such as the right to be free from injury or the right to a healthy environment. It also applies, however, to a category of the public that has an unspecified interest in the decision-making procedure.

It is significant that article 2, paragraph 5, does not require that a person must show a legal interest to be a member of the public concerned. Thus, the term may encompass both 'legal interest' and 'factual interest' as defined under continental legal systems, such as those of Austria, Germany and Poland. Under national law, persons with a mere factual interest do not normally enjoy the full panoply of rights in proceedings accorded to those with a legal interest. In contrast, the Convention accords the same status (at least in relation to article 6) regardless of whether the interest is a legal or factual one.

Article 2, paragraph 5, explicitly includes within the category of the interested public NGOs whose statutory goals include promoting environmental protection, so long as they meet 'any requirements under national law'. Whether or not an NGO promotes environmental protection can be ascertained in a variety of ways, such as through its charter, by-laws or activities. 'Environmental protection' can include any purpose consistent with the implied definition of environment found in article 2, paragraph 3. The requirement for 'promoting environmental protection' would thus be satisfied in the case of NGOs focusing on any aspect of the implied definition of environment in article 2, paragraph 3. For example, if an NGO works to promote the interests of those with health concerns due to water-borne diseases, this NGO would be considered to fulfil the definition of article 2, paragraph 5.

The reference to 'meeting any requirements under national law' should not be read as leaving absolute discretion to Parties in defining these requirements. Their discretion should be seen in the context of the important role the Convention assigns to NGOs with respect to its implementation and the clear requirement of article 3, paragraph 4, to provide 'appropriate recognition' for NGOs. In its findings on communication ACCC/C/2004/05 (Turkmenistan), the Compliance Committee found that 'Non-governmental organizations, by bringing together expertise and resources, generally have greater ability to effectively exercise their rights under the Convention than individual members of the public'.

Parties may set requirements for NGOs under national law, but in the light of the integral role that NGOs play in the implementation of the Convention, Parties should ensure that these requirements are not overly burdensome or politically motivated, and that each Party's legal framework encourages the formation of NGOs and their constructive participation in public affairs. Moreover, any requirements should be consistent with the Convention's principles, such as non-discrimination and the

avoidance of technical and financial barriers. Within these limits, Parties may impose requirements based on objective criteria that are not unnecessarily exclusionary.

For example, a possible requirement for environmental NGOs to have been active in that country for a certain number of years might not be consistent with the Aarhus Convention, because it may violate the non-discrimination clause of article 3, paragraph 9. Furthermore, the requirement 'to have been active' in itself might be overly exclusive in countries that have permitted the formation of NGOs for only a relatively short period of time, and where they are therefore relatively undeveloped.

There are also sometimes requirements for NGOs to have a certain number of active members. This was one of the issues considered by the ECJ in Case C-263/08 (Sweden), discussed in the box above. Such a membership requirement would also be considered overly strict under the Convention, if the threshold is set at such a high level that only a handful of NGOs can meet it in a given country. In 2009, Slovenia amended its Environmental Protection Act to remove the requirement that NGOs promoting environmental protection undergo a financial audit of operations in order to qualify as the 'public concerned' under article 2, paragraph 5.

If an NGO meets the requirements set out in article 2, paragraph 5, it is deemed to be a member of the 'public concerned' under article 6 and article 9, paragraph 2. But for NGOs that do not meet such requirements ab initio, and for individuals, the Convention is not entirely clear whether the mere participation in a public participation procedure under article 6, paragraph 7, would qualify a person as a member of the 'public concerned'. Because article 9, paragraph 2, is the mechanism for enforcing rights under article 6, however, it is arguable that any person who participates as a member of the public in a hearing or other public participation procedure under article 6, paragraph 7, should have an opportunity to make use of the access to justice provisions in article 9, paragraph 2. In this case, he or she would fall under the definition of 'public concerned'.

...

Nothing in the Convention prevents the Parties from granting standing to any person without distinction. However, the Convention requires – as a minimum – that members of the 'public concerned' either having a sufficient interest or maintaining impairment of a right have standing to review the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 ...

With respect to NGOs, the Convention states clearly that NGOs meeting the requirements of article 2 paragraph 5, are deemed to have a 'sufficient interest' or a right capable of being impaired...

Proper implementation of, and compliance with, the Convention requires that the objective of wide access to justice is upheld when determining the scope of persons – both natural and legal with standing. Several Parties to the Convention apply some kind of test to establish standing, often in terms of a direct, sufficient, personal or legal interest, or of a legally protected individual right. While some such criteria, for instance limiting standing only to members of the public with private property rights, would not be in line with the Convention, the permissibility of other criteria will depend on how they are construed by the reviewing body in practice. In other words, even criteria such as having a sufficient interest or a right that can be impaired may be incompatible with the Convention if understood too narrowly in the case law of the reviewing bodies.

As illustrated by the Compliance Committee's findings on communication ACCC/C/2005/11 (Belgium), meeting the Convention's objective of giving the public concerned wide access to justice may require a significant shift of thinking in countries where NGOs have previously lacked standing in cases because they were held not to

have a sufficient interest, or an impaired right. In ACCC/C/2005/11, the Belgian judiciary had applied the general criteria for standing under Belgian law to NGOs, meaning that NGO applicants had to show a direct, personal and legitimate interest as well as a 'required quality'. The Compliance Committee concluded that even though the wording of the relevant Belgian laws did not as such imply a lack of compliance, the jurisprudence of the Belgian courts, as developed before the entry into force of the Convention for Belgium, implied a too restrictive access to justice to environmental organizations, and thus did not meet the requirements of the Convention. ...

An example of national criteria for standing that would clearly not be in compliance with the Convention was the former Swedish criteria for NGOs. According to former Swedish law, to be able to appeal environmental permits, environmental associations were required to be active in Sweden for more than three years and to have at least 2,000 members. This was found by the CJEU to be in violation of the EU legislation intended to implement the Aarhus Convention ..."

143. The relevant part of the 2015 Maastricht Recommendations[95] on the implementation of the Aarhus Convention provides as follows:

"c. 'The public concerned' includes, inter alia, non-governmental organizations (NGOs) promoting environmental protection and meeting any requirements under national law. To ensure the framework for public participation is as transparent, clear and consistent as possible, the following may be clearly specified through national law:

i. What constitutes 'having an interest in' environmental decision-making;

ii. The requirements, if any, which NGOs promoting environmental protection must meet in order to be deemed to have an interest. What constitutes a sufficient interest should be determined in accordance with the objective of giving the public concerned wide access to justice."

3. The United Nations General Assembly

(a) Resolution on the human right to a clean, healthy and sustainable environment

144. Upon the invitation of the Human Rights Council formulated in its Resolution 48/13 of 8 October 2021, the General Assembly of the United Nations adopted its Resolution 76/300 on the human right to a clean, healthy and sustainable environment on 28 July 2022.

145. It was adopted with 161 votes in favour (of the 169 member States present), 8 abstentions[96] and no votes against[97]. 45 of the 46 member States of the Council of Europe voted in favour.[98]

146. In the Preamble to the Resolution, the General Assembly noted the following:

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[95] United Nations Economic Commission for Europe, *Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters*, 2015.

[96] China, Russian Federation, Belarus, Cambodia, Iran, Syria, Kyrgyzstan and Ethiopia.

[97] Official Records: A/76/PV.97.

[98] Türkiye does not appear in the Official records as a voting country.

"[A] vast majority of States have recognized some form of the right to a clean, healthy and sustainable environment through international agreements, their national constitutions, legislation, laws or policies."

147. Its four operative paragraphs provide as follows:

"1. *Recognizes* the right to a clean, healthy and sustainable environment as a human right;

2. *Notes* that the right to a clean, healthy and sustainable environment is related to other rights and existing international law;

3. *Affirms* that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law;

4. *Calls upon* States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all."

(b) Other General Assembly material

148. Nearly every year since its first Resolution on the subject, namely Resolution no. 43/53 on the protection of global climate for present and future generations of mankind adopted on 6 December 1988, the issue of global climate protection for future generations has been put on the agenda of the General Assembly, resulting in the adoption of numerous resolutions[99].

149. In its Resolution 69/220 adopted on 19 December 2014, the General Assembly made explicit reference to the necessity to protect the climate system for the benefit of present and future generations of humankind, referring to the UNFCCC.

150. In the Preamble to its Resolution 72/219 adopted on 20 December 2017, the General Assembly made a statement which it has retained ever since in the Preamble of each of the resolutions adopted on this subject[100]:

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[99] Resolutions nos. 43/53, 6 December 1988; 44/207, 22 December 1989; 45/212, 21 December 1990 ; 46/169, 19 December 1991; 47/195, 22 December 1992; 48/189, "United Nations Framework Convention on Climate Change", 21 December 1993; 49/120, 19 December 1994; 50/115, 20 December 1995; 51/184, 16 December 1996; 52/199, 18 December 1997; 54/222, 22 December 1999; Decision no. 55/443, 20 December 2000; Resolutions nos. 56/199, 21 December 2001; 57/257, 20 December 2002; 58/243, 23 December 2003; 59/234, 22 December 2004; 60/197, 22 December 2005; 61/201, 20 December 2006; 62/86, 10 December 2007; 63/32, 26 November 2008; 64/73, 7 December 2009; 65/159, 20 December 2010; 66/200, 22 December 2011; 67/210, 21 December 2012; 68/212, 20 December 2013; 69/220; 70/205, 22 December 2015; 71/228, 21 December 2016; 72/219, 20 December 2017; 73/232, 20 December 2018; 74/219, 19 December 2019; 75/217, 21 December 2020; 76/205, 17 December 2021.

[100] Including in its last Resolution under this item, namely Resolution 76/205 on the protection of global climate for present and future generations of mankind, 17 December 2021.

> "Recognizing that, in undertaking its work, the United Nations should promote the protection of the global climate for the well-being of present and future generations of humankind ..."

4. The Secretary-General of the United Nations

151. In 2009, the Secretary-General of the United Nations noted that:

> "The United Nations human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water and to housing (see A/HRC/10/61)".[101]

152. In May 2022, pursuant to the request of the Human Rights Council[102], the Secretary-General issued a report on "The impacts of climate change on the human rights of people in vulnerable situations"[103], in which he presented the legal and policy framework applying to persons in vulnerable situations in the context of climate change (footnotes omitted):

> "The nine core international human rights instruments set forth binding legal obligations on the States that are party to them, including some that are relevant to climate change. In the context of climate change, fulfilling these obligations may require States to, among other things, take action to protect people against climate change-related harms that impact on the enjoyment of human rights and to implement inclusive climate policies. Climate action should empower people in vulnerable situations, ensuring their full and effective participation as rights holders."

153. In the report, the Secretary-General made a series of recommendations to States and other stakeholders to address the impacts of climate change on the human rights of people in vulnerable situations (paragraphs 48-58).

5. The Human Rights Council

(a) Resolutions

154. In 2018, in its Resolution 37/8, the Human Rights Council acknowledged that "more than 100 States [had] recognized some form of a right to a healthy environment in, inter alia, international agreements, their constitutions, legislations or policies".[104]

155. In Resolution 46/7 on human rights and the environment[105] the Human Rights Council noted as follows:

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[101] "Climate change and its possible security implications", Report of the Secretary-General to the General Assembly A/64/350, distr. 11 September 2009.
[102] Human Rights Council, Resolution 47/24, adopted on 14 July 2021.
[103] "The impacts of climate change on the human rights of people in vulnerable situations", Report of the Secretary General, A/HRC/50/57, distr. 6 May 2022.
[104] Human Rights Council Resolution 37/8, adopted on 22 March 2018, A/HRC/RES/37/8, last preambular paragraph.
[105] Human Rights Council Resolution 46/7, Human rights and the environment, 20 March 2021, A/HRC/RES/46/7.

"Recalling also the Paris Agreement, adopted on 12 December 2015 by the parties to the United Nations Framework Convention on Climate Change, in which they acknowledged in the preamble that they should, when taking action to address climate change, respect, promote and consider their respective obligations with regard to human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, the empowerment of women and intergenerational equity,

...

Taking note of the outcomes of the twenty-fifth session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, and encouraging States to consider, among other aspects, respect for and the promotion of human rights at the twenty-sixth session, to be held in Glasgow, United Kingdom of Great Britain and Northern Ireland, from 1 to 12 November 2021,

..."

156. In Resolution 48/13 of 8 October 2021, the Human Rights Council formally recognised the right to a clean, healthy and sustainable environment as a human right and invited the General Assembly to consider the matter (see the General Assembly Resolution 76/300, cited above). The relevant parts of the Resolution read as follows:

"Recalling also States' obligations and commitments under multilateral environmental instruments and agreements, including on climate change, and the outcome of the United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil, in June 2012, and its outcome document entitled "The future we want", which reaffirmed the principles of the Rio Declaration on Environment and Development,

Recalling further all its resolutions on human rights and the environment, the most recent of which are resolutions 45/17 of 6 October 2020, 45/30 of 7 October 2020 and 46/7 of 23 March 2021, and relevant resolutions of the General Assembly,

Recognizing that sustainable development, in its three dimensions (social, economic and environmental), and the protection of the environment, including ecosystems, contribute to and promote human well-being and the enjoyment of human rights, including the rights to life, to the enjoyment of the highest attainable standard of physical and mental health, to an adequate standard of living, to adequate food, to housing, to safe drinking water and sanitation and to participation in cultural life, for present and future generations,

Reaffirming the importance of international cooperation, on the basis of mutual respect, in full compliance with the principles and purposes of the Charter, with full respect for the sovereignty of States while taking into account national priorities,

Recognizing that, conversely, the impact of climate change, the unsustainable management and use of natural resources, the pollution of air, land and water, the unsound management of chemicals and waste, the resulting loss of biodiversity and the decline in services provided by ecosystems interfere with the enjoyment of a clean, healthy and sustainable environment, and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights,

...

1. Recognizes the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights;

2. Notes that the right to a clean, healthy and sustainable environment is related to other rights and existing international law;

3. Affirms that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law;"

157. The Human Rights Council also adopted Resolution 50/9 on human rights and climate change of 7 July 2022, in which it focused more closely on the implications of climate change for the full enjoyment of the right to food, but also called upon all States to adopt

"a comprehensive, integrated, gender-responsive, age-inclusive and disability-inclusive approach to climate change adaptation and mitigation policies, consistent with the United Nations Framework Convention on Climate Change and the objective and principles thereof".

158. On 6 October 2022 the Human Rights Council adopted Resolution 51/4 on the human rights of older persons, in which it recognised the essential contribution that older persons made to the functioning of societies and to the achievement of the 2030 Agenda for Sustainable Development (see also Resolution 44/7 of 16 July 2020).

(b) Special procedures

(i) Special Rapporteur on the promotion and protection of human rights in the context of climate change

159. The mandate of the Special rapporteur on the promotion and protection of human rights in the context of climate change was established in October 2021 by the Human Rights Council.

160. In the thematic report of July 2022 to the United Nations General Assembly – entitled "Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation" (A/77/226) – the Special rapporteur provided a series of recommendations:

"Recommendations with respect to bridging the mitigation gap

89. The Special Rapporteur maintains that all of the recommendations made by the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment in his report to the General Assembly in 2019 with respect to mitigation action are still relevant and should be considered as recommended in the present report. In addition, the below recommendations should be considered.

90. With respect to mitigation, the Special Rapporteur on the promotion and protection of human rights in the context of climate change recommends that the General Assembly:

...

(d) Establish an international human rights tribunal to hold accountable Governments, business and financial institutions for their ongoing investments in fossil fuels and carbon intensive industries and the related human rights effects that such investments invoke;

...

97. The Special Rapporteur also recommends that the General Assembly encourage all Member States to include youth representatives in national parliaments to highlight climate change concerns.

98. The Special Rapporteur further recommends that the General Assembly encourage all States to give standing to children and young people, including indigenous children and young people international, national and subnational court systems."

(ii) Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

161. In 2018 the then Special Rapporteur issued a report which summarised the main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment under the title of "Framework principles on human rights and the environment"[106].

162. The subsequent Rapporteur issued two thematic reports in 2019 (one to the Human Rights Council, the other to the General Assembly).

163. In his 2019 report to the Human Rights Council of 8 January 2019 (A/HRC/40/55), the Special Rapporteur focused on the right to breathe clean air as one of the human rights to a safe, clean, healthy and sustainable environment. He detailed the scope and content of human rights obligations relating to clean air in the following terms:

"IV. Human rights obligations relating to clean air

57. As the previous mandate holder made clear, States have obligations to protect the enjoyment of human rights from environmental harm (A/HRC/25/53). The foreseeable adverse effects of poor air quality on the enjoyment of human rights give rise to extensive duties of States to take immediate actions to protect against those effects. In a joint statement issued in 2017, a group of United Nations experts said 'a threat like this can no longer be ignored. States have a duty to prevent and control exposure to toxic air pollution and to protect against its adverse effects on human rights.'[107]

58. The framework principles on human rights and the environment clarify the three categories of State obligations: procedural, substantive, and special obligations towards those in vulnerable situations. Therefore, the framework principles can be operationalized in the context of air pollution in order to respect, protect and fulfil human rights.

59. The procedural obligations of States in relation to the right to breathe clean air include duties related to promoting education and public awareness; providing access

[106] The Framework principles on human rights and the environment are annexed to the Special Rapporteur's Report, A/HRC/37/59, distr. 24 January 2018.

[107] "Toxic air pollution: UN rights experts urge tighter rules to combat 'invisible threat'", press release, 24 February 2017.

to information; ensuring freedom of expression, association and assembly; facilitating public participation in the assessment of proposed projects, policies and environmental decisions; and ensuring affordable, timely access to remedies.

60. With respect to substantive obligations, States must not violate the right to breathe clean air through their own actions; must protect the right from being violated by third parties, especially businesses; and must establish, implement and enforce laws, policies and programmes to fulfil the right. States also must avoid discrimination and retrogressive measures.

61. There are seven key steps that States must take in fulfilling the right to breathe clean air: monitor air quality and impacts on human health; assess sources of air pollution; make information publicly available, including public health advisories; establish air quality legislation, regulations, standards and policies; develop air quality action plans at the local, national and, if necessary, regional levels; implement an air quality action plan and enforce the standards; and evaluate progress and, if necessary, strengthen the plan to ensure that the standards are met.

62. At each of these stages, States must ensure that the public is fully informed and has an opportunity to participate in decision-making processes. Extra effort should always be made to reach out to women, children and others in vulnerable situations whose voices are too often not heard in environmental policy processes. States must pay special attention to environmental defenders working to protect the right to clean

164. In the 2019 report to the General Assembly (A/74/161), the Special Rapporteur built on the above-mentioned 2018 framework principles on human rights and the environment (see paragraph 161 above) and detailed the content of State obligations (footnotes omitted):

"63. The framework principles on human rights and the environment clarify three categories of State obligations: procedural, substantive, and special obligations towards those in vulnerable situations. The framework principles can be operationalized in the context of climate change in order to respect, protect and fulfil human rights.

64. Pursuant to international human rights law, States have procedural obligations to:

(a) Provide the public with accessible, affordable and understandable information regarding the causes and consequences of the global climate crisis, including incorporating climate change into the educational curriculum at all levels;

(b) Ensure an inclusive, equitable and gender-based approach to public participation in all climate-related actions, with a particular emphasis on empowering the most affected populations, namely women, children, young people, indigenous peoples and local communities, persons living in poverty, persons with disabilities, older persons, migrants, displaced people, and other potentially at-risk communities;

(c) Enable affordable and timely access to justice and effective remedies for all, to hold States and businesses accountable for fulfilling their climate change obligations;

(d) Assess the potential climate change and human rights impacts of all plans, policies and proposals, including both upstream and downstream effects (i.e. both production- and consumption-related emissions);

(e) Integrate gender equality into all climate actions, enabling women to play leadership roles;

(f) Respect the rights of indigenous peoples in all climate actions, particularly their right to free, prior and informed consent;

(g) Provide strong protection for environmental and human rights defenders working on all climate-related issues, from land use to fossil fuels. States must vigilantly protect defenders from harassment, intimidation and violence.

65. With respect to substantive obligations, States must not violate the right to a safe climate through their own actions; must protect that right from being violated by third parties, especially businesses; and must establish, implement and enforce laws, policies and programmes to fulfil that right. States also must avoid discrimination and retrogressive measures. These principles govern all climate actions, including obligations related to mitigation, adaptation, finance, and loss and damage.

66. Human rights obligations are reinforced by international environmental law, as States are obliged to ensure that polluting activities within their jurisdiction or control do not cause serious harm to the environment or peoples of other States or to areas beyond the limits of national jurisdiction. Given the foreseeability of increasing climate impacts, this well-established 'no harm' rule of customary international law is being violated as a result of [GHG] emissions, which, regardless of where they are emitted, are contributing, cumulatively, to adverse effects in other States, including small island developing States. The Urgenda case in the Netherlands is an important precedent, as the Court relied on international human rights law to hold the Government of the Netherlands accountable for fulfilling commitments the Government itself says are necessary to prevent dangerous climate change.

...

68. States have an obligation to cooperate to achieve a low-carbon, climate resilient and sustainable future, which means sharing information; the transfer of zero-carbon, low-carbon and high-efficiency technologies from wealthy to less wealthy States; building capacity; increasing spending on research and development related to the clean energy transition; honouring international commitments; and ensuring fair, legal and durable solutions for migrants and displaced persons. Wealthy States must contribute their fair share towards the costs of mitigation and adaptation in low-income countries, in accordance with the principle of common but differentiated responsibilities. Climate finance to low-income countries should be composed of grants, not loans. It violates basic principles of justice to force poor countries to pay for the costs of responding to climate change when wealthy countries caused the problem.

69. Climate actions, including under new mechanisms being negotiated pursuant to article 6 of the Paris Agreement, must be designed and implemented to avoid threatening or violating human rights. In the past, policies supporting biofuel production contributed to spikes in food prices, riots, and a major increase in the total number of people suffering from hunger. Forest preservation policies raise similar concerns about the impact on rights, as such policies may limit access to lands used for hunting, fishing, gathering, cultivation and other important cultural activities. Integrating actions to achieve climate targets and the Sustainable Development Goals, in cooperation with affected communities, will ensure that these types of adverse outcomes are avoided.

70. In 2018, the Committee on Economic, Social and Cultural Rights warned States that a failure to prevent foreseeable human rights harm caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach of their obligation to respect, protect and fulfil all human rights for all. States must, therefore, dedicate the maximum available financial and material resources to shift to renewable energy, clean transport and agroecological farming; halt and reverse deforestation and soil deterioration; and increase adaptive capacity, especially in vulnerable and marginalized communities ...

74. A failure to fulfil international climate change commitments is a prima facie violation of the State's obligations to protect the human rights of its citizens. ...

75. A dramatic change of direction is needed. To comply with their human rights obligations, developed States and other large emitters must reduce their emissions at a rate consistent with their international commitments. To meet the Paris target of limiting warming to 1.5ºC, States must submit ambitious nationally determined contributions by 2020 that will put the world on track to reducing [GHG] emissions by at least 45 per cent by 2030 (as calculated by the Intergovernmental Panel on Climate Change). All States should prepare rights-based deep decarbonization plans intended to achieve net zero carbon emissions by 2050, in accordance with article 4, paragraph 19, of the Paris Agreement. Four main categories of actions must be taken: addressing society's addiction to fossil fuels; accelerating other mitigation actions; protecting vulnerable people from climate impacts; and providing unprecedented levels of financial support to least developed countries and small island developing States."

165. In the 2020 Report to the Human Rights Council, entitled "Right to a healthy environment: good practices" (A/HRC/43/53), the Special Rapporteur summarised good practices in implementing the human right to a safe, clean, healthy and sustainable environment, drawn from more than 175 States. He argued that the legal recognition of this right could itself be considered a good practice. The relevant parts of the report read as follows:

"III. Good practices in the implementation of the right to a safe, clean, healthy and sustainable environment

A. Legal recognition

9. In the present report, the Special Rapporteur focuses on the implementation of the right to a safe, clean, healthy and sustainable environment. The legal recognition of this right can itself be considered a good practice, whether by means of constitutional protection, inclusion in environmental legislation or through ratification of a regional treaty that includes the right.

10. In cooperation with the Vance Center for International Justice, the Special Rapporteur prepared an updated list of States that legally recognize the right to a safe, clean, healthy and sustainable environment (see annex II). There are 110 States where this right enjoys constitutional protection. Constitutional protection for human rights is essential, because the constitution represents the highest and strongest law in a domestic legal system. Furthermore, the constitution plays an important cultural role, reflecting a society's values and aspirations.

11. The right to a healthy environment is explicitly included in regional treaties ratified by 126 States. This includes 52 States that are parties to the African Charter on Human and Peoples' Rights, 45 States that are parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 16 States that are parties to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) and 16 States that are parties to the Arab Charter on Human Rights. As at 1 December 2019, five States had ratified the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement); this recent treaty requires, however, 11 ratifications to enter into force. Ten States adopted the non-binding Declaration on Human Rights of the Association of South-East Asian Nations.

12. It is also important that legislation be enacted and implemented to respect, protect and fulfil the right to a safe, clean, healthy and sustainable environment. There are 101 States where this right has been incorporated into national legislation. Especially good practices can be seen in Argentina, Brazil, Colombia, Costa Rica, France, the Philippines, Portugal and South Africa, where the right to a healthy environment serves as a unifying principle that permeates legislation, regulations and policies.

13. In total, more than 80 per cent of States Members of the United Nations (156 out of 193) legally recognize the right to a safe, clean, healthy and sustainable environment. The Special Rapporteur has collected the texts of the constitutional and legislative provisions that recognize this right."

166. The Special Rapporteur also issued thematic reports on "Human rights and the global water crisis: water pollution, water scarcity and water-related disasters" (A/HRC/46/28, 2021); Healthy and sustainable food: reducing the environmental impacts of food systems on human rights (A/76/179, 2021); and "The right to a clean, healthy and sustainable environment: non-toxic environment" (A/HRC/49/53, 2022).

167. In the recent thematic report – entitled "The human right to a clean, healthy and sustainable environment: a catalyst for accelerated action to achieve the Sustainable Development Goals" (A/77/284, 2022) – the Special Rapporteur wanted to "challeng[e] the conventional wisdom that the Sustainable Development Goals are mere aspirations, by highlighting the extensive human rights obligations that underlie the Goals". The relevant recommendations in this respect include the following:

"(a) Incorporate the right to a clean, healthy and sustainable environment at all levels (global, regional and national), including in a legally binding global instrument, the Universal Declaration of Human Rights, post-2020 global biodiversity framework, the European Convention on Human Rights and national constitutions, legislation and policies;

(b) Acknowledge that the Goals are built on a robust foundation of human rights law, establishing legally binding obligations;"

(iii) Independent expert on human rights and international solidarity

168. In a 2020 Report submitted to the Human Rights Council – entitled "International solidarity and climate change" (A/HRC/44/44) – the Independent expert on human rights and international solidarity made a series of recommendations for human rights based reform, in relation to threats posed by climate change, in particular:

"(a) All States, corporations and international organizations should take all necessary separate and joint steps towards achieving net-zero emissions by 2050, consistent with their highest possible ambitions to reduce emissions and the common objective of keeping the global temperature rise below 1.5°C under the Paris Agreement;

(b) To that end, States, corporations and financial institutions, particularly the highest emitting States, in historical and contemporary terms, should consider ceasing to pursue the exploration of and new investments in fossil fuels as a matter of human rights-based

international solidarity, since the shared carbon budget will be exceeded if already existing and proposed fossil fuel developments proceed;

(c) States, corporations and financial institutions should cooperate to ensure that any transformation of the fossil fuel economy (which is imperative) does not perpetuate asymmetries between richer and poorer States and peoples. As countries phase down or even phase out their fossil fuel operations, wealthier countries should provide poorer countries that are less adaptable to the transition with support based on the right to development of the poorer States, and the social and economic rights of their people that are tied to energy systems;

...

(g) States should cooperate through the international climate regime and international human rights community, including through ILO, to guarantee access to justice in the context of climate change with respect to the following:

(i) Rectifying loss and damage associated with the inequalities perpetuated by climate change, including by giving this agenda the same priority as mitigation and adaptation and providing meaningful financial support to affected countries and peoples;

(ii) Safeguarding the enjoyment of international human rights among indigenous peoples and local communities affected by climate change-related projects, including protecting environmental defenders from criminalization;

(iii) Formulating and implementing concrete plans from the global to the local levels for a just transition towards sustainable economies that ensures the right to decent work for all;

(iv) Cooperating to realize international human rights obligations as they apply to marginalized groups uniquely affected by climate change, including indigenous peoples, the elderly, children, persons with disabilities, persons living in poverty and women."

(iv) Independent Expert on the enjoyment of all human rights by older persons

169. The 2019 Report (A/HRC/42/43) of the Independent Expert noted the following negative impacts of climate change on older people:

"101. The Independent Expert reiterates her view that the lack of a comprehensive and integrated international legal instrument to promote and protect the rights and dignity of older persons has significant practical implications, including for older persons in emergency situations. She stresses in particular that current instruments do not make the issues of ageing specific or sufficiently visible, and therefore preclude older persons from the full enjoyment of their human rights, particularly in emergency situations."

170. In the 2021 Report entitled "Human rights of older women: the intersection between ageing and gender" (A/76/157), the Independent Expert added that "in emergencies brought on by climate change impacts, older women might be viewed as a burden and therefore be vulnerable to abuse and neglect ... The specific risks and impacts for older women are, however, generally invisible."

6. The Human Rights Committee

171. The International Covenant on Civil and Political Rights ("ICCPR")[108] does not contain any provisions explicitly aimed at environmental protection. Nevertheless, the Human Rights Committee ("the HRC") derives specific obligations related to environmental protection from the right to life (Article 6) and the right to private and family life (Article 17).

172. In its General Comment No. 36 on the right to life, adopted in 2019[109], the HRC reiterated the link between environmental protection and the duty to protect life (a connection already made by the HRC in a communication from 2001):

> "26. The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include ... degradation of the environment ..."

173. Referring to international instruments, such as the Paris Agreement, the HRC further detailed the connection between States' obligations regarding the right to life and environmental preservation (footnotes omitted):

> "62. Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach."

174. In the case of *Portillo Cáceres v. Paraguay*[110] the HRC held as follows:

> "6.3 The Committee takes note of the State party's argument that the communication is inadmissible ratione materiae because environmental rights are not provided for in the Covenant. The Committee also notes, however, that the authors have stated that they are not claiming a violation of the right to a healthy environment but rather violations of their right to life, physical integrity, privacy, family life and an effective remedy and

[108] International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407.

[109] HRC, General comment No. 36, Article 6: right to life, CCPR/C/GC/36, 3 September 2019.

[110] *Portillo Cáceres v. Paraguay*, Communication No. 2751/2016, CCPR/C/126/D/2751/2016, 20 September 2019.

that they are doing so on the grounds that the State party has not honoured its positive obligation to protect those rights, which, in the case at hand, would entail enforcing environmental standards. The Committee considers, therefore, that article 3 of the Optional Protocol does not constitute an obstacle to a finding of admissibility in respect of the present communication.

...

7.4 The Committee also takes note of developments in other international tribunals that have recognized the existence of an undeniable link between the protection of the environment and the realization of human rights and that have established that environmental degradation can adversely affect the effective enjoyment of the right to life. Thus, severe environmental degradation has given rise to findings of a violation of the right to life.

7.5 In the present case, the Committee is of the view that heavily spraying the area in question with toxic agrochemicals – an action which has been amply documented – poses a reasonably foreseeable threat to the authors' lives given that such large-scale fumigation has contaminated the rivers in which the authors fish, the well water they drink and the fruit trees, crops and farm animals that are their source of food. (...) Consequently, in view of the acute poisoning suffered by the authors, as acknowledged in the amparo decision of 2011 (paras. 2.20 and 2.21), and of the death of Mr. Portillo Cáceres, which has never been explained by the State party, the Committee concludes that the information before it discloses a violation of article 6 of the Covenant in the cases of Mr. Portillo Cáceres and the authors of the present communication.

...

7.8 ... When pollution has direct repercussions on the right to one's private and family life and home, and the adverse consequences of that pollution are serious because of its intensity or duration and the physical or mental harm that it does, then the degradation of the environment may adversely affect the well-being of individuals and constitute violations of private and family life and the home. Consequently, in the light of the information that it has before it, the Committee concludes that the events at issue in the present case disclose a violation of article 17 of the Covenant."

175. In *Teitiota v. New Zealand*[111] the HRC noted as follows:

"9.4 The Committee recalls that the right to life cannot be properly understood if it is interpreted in a restrictive manner, and that the protection of that right requires States parties to adopt positive measures. The Committee also recalls its general comment No. 36 (2018) on the right to life, in which it established that the right to life also includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death (para. 3). The Committee further recalls that the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of article 6 of the Covenant even if such threats and situations do not result in the loss of life. Furthermore, the Committee recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.

[111] *Teitiota v. New Zealand*, Communication No. 2728/2016, CCPR/C/127/D/2728/2016, 23 September 2019.

9.5 Moreover, the Committee observes that both it and regional human rights tribunals have established that environmental degradation can compromise effective enjoyment of the right to life, and that severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life.

...

9.7 [In relation to the author's claims regarding the risk of violence during land-disputes] the Committee considers that a general situation of violence is only of sufficient intensity to create a real risk of irreparable harm under articles 6 or 7 of the Covenant in the most extreme cases, where there is a real risk of harm simply by virtue of an individual being exposed to such violence on return, or where the individual in question is in a particularly vulnerable situation. ... [T]he author has not demonstrated clear arbitrariness or error in the domestic authorities' assessment as to whether he faced a real, personal and reasonably foreseeable risk of a threat to his right to life as a result of violent acts resulting from overcrowding or private land disputes in Kiribati.

9.8 ... While recognizing the hardship that may be caused by water rationing, the Committee notes that the author has not provided sufficient information indicating that the supply of fresh water is inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death.

9.9 ... The Committee recognizes that in certain places, the lack of alternatives to subsistence livelihoods may place individuals at a heightened risk of vulnerability to the adverse effects of climate change. ... The information made available to the Committee does not indicate that when the author's removal occurred, there was a real and reasonably foreseeable risk that he would be exposed to a situation of indigence, deprivation of food and extreme precarity that could threaten his right to life, including his right to a life with dignity. ...

9.11 ... The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending States. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.

9.12 In the present case, the Committee accepts the author's claim that sea level rise is likely to render Kiribati uninhabitable. However, it notes that the time frame of 10 to 15 years, as suggested by the author, could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population. The Committee notes that the State party's authorities thoroughly examined that issue and found that Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms. Based on the information made available to it, the Committee is not in a position to conclude that the domestic authorities' assessment that the measures taken by Kiribati would suffice to protect the author's right to life under article 6 of the Covenant was clearly arbitrary or erroneous in that regard, or amounted to a denial of justice."

176. In its views adopted on 21 July 2022 in Communication No. 3624/2019 (*Daniel Billy et al. v. Australia*; "Torres Strait Islanders case"), although not finding a violation of Article 6 in that particular case, the

HRC considered that adverse climate-change impacts could qualify as a reasonably foreseeable threat to life:

> "Article 6
>
> 8.3 The Committee notes the authors' claim that the events in this case constitute a violation by act and omission of their right to a life with dignity under article 6 of the [International Covenant on Civil and Political Rights], owing to the State party's failure to perform its duty to provide adaptation and mitigation measures to address climate change impacts that adversely affect their lives, including their way of life. With respect to the State party's position that article 6 (1) of the Covenant does not obligate it to prevent foreseeable loss of life from climate change, the Committee recalls that the right to life cannot be properly understood if it is interpreted in a restrictive manner, and that the protection of that right requires States parties to adopt positive measures to protect the right to life.[112] The Committee also recalls its general comment No. 36 (2018) on the right to life, in which it established that the right to life also includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death (para. 3).[113] The Committee further recalls that the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life.[114] States parties may be in violation of article 6 of the Covenant even if such threats and situations do not result in the loss of life. The Committee considers that such threats may include adverse climate change impacts, and recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The Committee recalls that States parties should take all appropriate measures to address the general conditions in society that may give rise to direct threats to the right to life or prevent individuals from enjoying their right to life with dignity.
>
> 8.4 The Committee takes note of the State party's position that the extension of article 6 (1) of the Covenant to a right to life with dignity through general comment No. 36 is unsupported by the rules of treaty interpretation, with reference to article 31 of the 1969 Vienna Convention on the Law of Treaties. However, the Committee is of the view that the language at issue is compatible with the latter provision, which requires that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In this regard, the Committee notes that under article 31 of the Convention, the context for interpretation of a treaty includes in the first place the text of the treaty, including its preamble and annexes. The preamble of the Covenant initially recognizes that the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, and further recognizes that those rights derive from the inherent dignity of the human person. While the State party notes that socioeconomic entitlements are protected under a separate Covenant, the Committee observes that the preamble of the present Covenant recognizes that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy their civil and political rights, as well as their economic, social and cultural rights.

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[112] For example, *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016), paragraph 9.4, and *Toussaint v. Canada*, paragraph 11.3.
[113] See also *Portillo Cáceres et al. v. Paraguay* (CCPR/C/126/D/2751/2016), paragraph 7.3.
[114] *Toussaint v. Canada* (CCPR/C/123/D/2348/2014), paragraph 11.3, and *Portillo Cáceres et al. v. Paraguay*, paragraph 7.5.

> 8.5 The Committee observes that both it and regional human rights tribunals have established that environmental degradation can compromise effective enjoyment of the right to life, and that severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life."

7. Committee on the Elimination of Discrimination against Women

177. The Convention on the Elimination of All Forms of Discrimination against Women does not make explicit reference to environmental rights. However, in its General Recommendation No. 37 on the gender-related dimensions of disaster risk reduction in the context of climate change, issued in 2018[115], the Committee identified general (§§ 25-38) as well as specific (§§ 39-54) principles of that Convention applicable to disaster risk reduction and climate change.

8. Committee on the Rights of the Child

178. The Committee on the Rights of the Child ("the CRC") dealt with the issue of the effects of climate change on children in General comment No. 26 on children's rights and the environment, with a special focus on climate change.[116]

179. In *Sacchi and Others v. Argentina* (CRC/C/88/D/104/2019, 22 September 2021), the CRC dealt[117] with a complaint lodged by sixteen children of various nationalities against Argentina (the same complaint was also lodged against Brazil, France, Germany and Türkiye). The authors claimed to be victims of climate change, and that the respondent States were responsible for (a) failing to prevent foreseeable human rights violations caused by climate change by reducing their emissions at the "highest possible ambition", and (b) delaying the steep cuts in carbon emissions needed to protect the lives and welfare of children at home and abroad. While the Committee established jurisdiction of the respondent States, it declared the case inadmissible for non-exhaustion of domestic remedies. For further details, see *Duarte Agostinho and Others v. Portugal and 32 Others* (dec.) [GC], no. 39371/20, §§ 58-60, 9 April 2024.

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[115] CEDAW, General recommendation No. 37 on gender-related dimensions of disaster risk reduction in a changing climate, CEDAW/C/GC/37, distr. 13 March 2018.

[116] General comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change, RC/C/GC/26, 23 August 2023.

[117] Under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, A/RES/66/138, 19 December 2011.

9. Committee on Economic, Social and Cultural Rights

180. In its Statement on climate change and the Covenant of 8 October 2018[118], the Committee on Economic, Social and Cultural Rights noted as follows:

> "3. The Committee welcomes the pledges already made. Quite apart from such voluntary commitments made under the climate change regime however, all States have human rights obligations, that should guide them in the design and implementation of measures to address climate change.
>
> ...
>
> 5. Under the International Covenant on Economic, Social and Cultural Rights, States parties are required to respect, protect and fulfil all human rights for all. They owe such duties not only to their own populations, but also to populations outside their territories, consistent with articles 55 and 56 of the United Nations Charter. In doing so they should, consistent with the Covenant, act on the basis of the best scientific evidence available.
>
> 6. This Committee has already noted that a failure to prevent foreseeable human rights harm caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach of this obligation.
>
> The nationally determined contributions (NDCs) that have been announced until now are insufficient to meet what scientists tell us is required to avoid the most severe impacts of climate change. In order to act consistently with their human rights obligations, the NDCs should be revised to better reflect the 'highest possible ambition' referred to in the Paris Agreement (article 4.3). The future implementation guidelines of the Agreement should require from States that they take into account their human rights duties in the design of the NDCs. This implies acting in accordance with the principles of gender sensitivity, participation, transparency and accountability; and building on local and traditional knowledge.
>
> Moreover, States parties should adopt measures to adapt to the negative consequences of climate change, and integrate such measures within existing social, environmental and budgetary policies at domestic level. Finally, as part of their duties of international assistance and cooperation for the realization of human rights, high-income States should also support adaptation efforts, particularly in developing countries, by facilitating transfers of green technologies, and by contributing to the Green Climate Fund. This would be consistent with the requirement under the Covenant that States ensure 'the right of everyone to enjoy the benefits of scientific progress', and with the Covenant's acknowledgement of 'the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific ... field'.
>
> ...
>
> 8. ... Human rights mechanisms have an essential role to play in protecting human rights by ensuring that States avoid taking measures that could accelerate climate change, and that they dedicate the maximum available resources to the adoption of measures that could mitigate climate change. Such measures include accelerating the shift to renewable sources of energy such as wind or solar; slowing down deforestation

[118] OHCHR, Climate change and the International Covenant on Economic, Social and Cultural Rights, Statement of the Committee on Economic, Social and Cultural Rights of 8 October 2018.

and moving to agroecological farming allowing soils to function as carbon sinks; improving the insulation of buildings; and investing in public transport. A fundamental shift in the global energy order is urgently required from hydrocarbon to renewable energy sources, in order to avoid dangerous anthropogenic interference with the climate system and the significant human rights violations that such interference would cause.

9. Complying with human rights in the context of climate change is a duty of both State and non-State actors. This requires respecting human rights, by refraining from the adoption of measures that could worsen climate change; protecting human rights, by effectively regulating private actors to ensure that their actions do not worsen climate change; and fulfilling human rights, by the adoption of policies that can channel modes of production and consumption towards a more environmentally sustainable pathway.
...

The role of the Committee on Economic, Social and Cultural Rights

10. In its future work, the Committee shall continue to keep under review the impacts of climate change on economic, social and cultural rights, and provide States guidance as to how they can discharge their duties under the International Covenant on Economic, Social and Cultural Rights in the mitigation of climate change and adaptation to its unavoidable effects."

181. In the relevant parts of General Comment No. 25 (2020) on science and economic, social and cultural rights[119], the Committee on Economic, Social and Cultural Rights held as follows:

"B. Participation and the precautionary principle

56. Participation also includes the right to information and participation in controlling the risks involved in particular scientific processes and its applications. In this context, the precautionary principle plays an important role. This principle demands that, in the absence of full scientific certainty, when an action or policy may lead to unacceptable harm to the public or the environment, actions will be taken to avoid or diminish that harm. Unacceptable harm includes harm to humans or to the environment that is: (a) threatening to human life or health; (b) serious and effectively irreversible; (c) inequitable to present or future generations; or (d) imposed without adequate consideration of the human rights of those affected. Technological and human rights impact assessments are tools that help to identify potential risks early in the process and the use of scientific applications.

...

International cooperation

...

81. Fourth, international cooperation is essential because the most acute risks to the world related to science and technology, such as climate change, the rapid loss of biodiversity, the development of dangerous technologies, such as autonomous weapons based on artificial intelligence, or the threat of weapons of mass destruction, especially nuclear weapons, are transnational and cannot be adequately addressed without robust international cooperation. States should promote multilateral agreements to prevent these risks from materializing or to mitigate their effects."

[119] Committee on Economic, Social and Cultural Rights, General Comment No. 25 (2020) on science and economic, social and cultural rights, E/C.12/GC/25, 30 April 2020.

182. The relevant parts of General Comment No. 14 on the right to health (2000)[120] read as follows (footnotes omitted):

> "11. The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health -related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.
>
> ...
>
> 15. 'The improvement of all aspects of environmental and industrial hygiene' (art. 12.2 (b)) comprises, inter alia, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health. ...
>
> 36. The obligation to fulfil requires States parties, inter alia, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation ... States are also required to adopt measures against environmental and occupational health hazards and against any other threat as demonstrated by epidemiological data. For this purpose they should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline. ..."

183. The relevant parts of General Comment No. 26 (2022) on land and economic, social and cultural rights[121] read as follows:

> "Climate change
>
> 56. The impact of climate change on access to land, affecting user rights, is severe in many countries. In coastal zones, sea level rise has an impact on housing, agriculture and access to fisheries. Climate change also contributes to land degradation and desertification. Rising temperatures, changing patterns of precipitation and the increasing frequency of extreme weather events such as droughts and floods are increasingly affecting access to land. States shall cooperate at the international level and comply with their duty to mitigate emissions and their respective commitments made in the context of the implementation of the Paris Agreement. States have these duties also under human rights law, as the Committee has highlighted previously. Moreover, States shall avoid adopting policies to mitigate climate change, such as carbon sequestration through massive reforestation or protection of existing forests, that lead to different forms of land grabbing, especially when they affect the land and territories of populations in vulnerable situations, such as peasants or Indigenous Peoples. Mitigation policies should lead to absolute emissions reductions through the phasing out of fossil fuel production and use.

[120] Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000) on the right to the highest attainable standard of health, E/C.12/2000/4, 11 August 2000.
[121] Committee on Economic, Social and Cultural Rights, General Comment No. 26 (2022) on land and economic, social and cultural rights, E/C.12/GC/26, 24 January 2023.

57. States have an obligation to design climate change adaptation policies at the national level that take into consideration all forms of land use change induced by climate change, to register all affected persons and to use the maximum available resources to address the impact of climate change, particularly on disadvantaged groups.

58. Climate change affects all countries, including those that may have contributed to it the least. Thus, those countries that have historically contributed most to climate change and those that are currently the main contributors to it shall assist the countries that are most affected by climate change but are least able to cope with its impact, including by supporting and financing land-related adaptation measures. Cooperation mechanisms for climate change mitigation and adaptation measures shall provide and implement a robust set of environmental and social safeguards to ensure that no project negatively affects human rights and the environment and to guarantee access to information and meaningful consultation with those affected by such projects. They shall also respect the free, prior and informed consent of Indigenous Peoples."

10. Office of the High Commissioner for Human Rights

184. Since presenting a general report on the relationship between climate change and human rights to the Human Rights Council in 2009, the Office of the High Commissioner for Human Rights has submitted several reports to the Human Rights Council focused on the effects of climate change on the enjoyment of human rights of several categories of persons, including on persons with disabilities[122], women[123], migrants and displaced persons[124], children[125] and on persons suffering from mental health issues[126].

185. In its Analytical study on the promotion and protection of the rights of older persons in the context of climate change (A/HRC/47/46) published in 2021, the Office of the High Commissioner for Human Rights addressed multiple and intersecting forms of discrimination in relation to climate change, the relevant parts of which read as follows (footnotes omitted):

"34. Both ageing and climate change have differential effects when it comes to gender. Because women tend to live longer, there are more older women than older men, and women in heterosexual partnerships tend to outlive their partners, so more older women live alone. Physiological and physical differences, social norms and roles,

[122]Analytical study on the promotion and protection of the rights of persons with disabilities in the context of climate change, A/HRC/44/30, distr. 2 April 2020.
[123] Analytical study on gender-responsive climate action for the full and effective enjoyment of the rights of women, A/HRC/41/26, distr. 1 May 2019.
[124] Addressing human rights protection gaps in the context of migration and displacement of persons across international borders resulting from the adverse effects of climate change and supporting the adaptation and mitigation plans of developing countries to bridge the protection gaps, A/HRC/38/21, distr. 23 April 2018.
[125] Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child, A/HRC/35/13, distr. 4 May 2017.
[126] Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/32/23, distr. 6 May 2016.

and gender discrimination and inequities in access to resources and power all play a role in making older women face particular risk of vulnerability to climate impacts.

35. Older women experience higher rates of poverty than older men and face other economic hardships that are aggravated by climate change. They also face disproportionate health risks, including a greater likelihood of experiencing chronic diseases and air pollution harms, and have higher rates of mortality and other health complications from extreme heat events than any other demographic group. Conversely, during typhoons, older men have been found to be more at risk of death.

36. Gendered social roles and expectations have complex effects on climate risks for older people. In some societies, older men are more socially isolated and thus have more difficulty in accessing assistance to cope with the negative effects of climate change. However, in situations of emergency or strained family resources brought on by climate impacts, older women are sometimes more likely to be viewed as a burden and to suffer abuse or neglect. In some countries, older women are blamed for extreme weather through accusations of witchcraft or sorcery, and face violence or exclusion as a result. Transformation of traditional livelihoods and of cultural and social practices also has varying effects on men and women because of their different social roles. Social norms around gender orientation and sexual identity may also compound the negative human rights effects of climate change for lesbian, gay, bisexual, transgender and intersex older persons."

11. Other developments

186. In 2019 the UN Treaty Bodies (Committee on the Elimination of Discrimination against Women; Committee on Economic, Social and Cultural Rights; Committee on the Protection of the Rights of All Migrant Workers and Members of their Families; Committee on the Rights of the Child; and Committee on the Rights of Persons with Disabilities) issued a Joint Statement on human rights and climate change[127], the relevant parts of which provide as follows (footnotes omitted):

"3. [The report released in 2018 by the Intergovernmental Panel on Climate Change on global warming of 1.5°C above pre-industrial levels] confirms that climate change poses significant risks to the enjoyment of the human rights protected by the International Convention on the Elimination of all Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of the Child, and the International Convention on the Rights of Persons with Disabilities. The adverse impacts identified in the report threaten, among others, the right to life, the right to adequate food, the right to adequate housing, to health and to water, and cultural rights. These negative impacts are also illustrated in the damage suffered by the ecosystems which in turn affect the enjoyment of human rights. The risk of harm is particularly high for those segments of the population already marginalized or in vulnerable situations or that, owing to discrimination and pre-existing inequalities, have limited access to decision-making or resources, such as women, children, persons with disabilities, indigenous peoples and persons living in rural areas. Children are at a

[127] OHCHR Joint Statement on human rights and climate change, HRI/2019/1, 16 September 2019.

particularly heightened risk of harm to their health, owing to the immaturity of their body systems.

...

States' Human Rights Obligations

10. Under the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Convention on the Rights of the Child, and the International Convention on the Rights of Persons with Disabilities, States parties have obligations, including extraterritorial obligations, to respect, protect and fulfil all human rights of all peoples. Failure to take measures to prevent foreseeable harm to human rights caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations.

11. In order for States to comply with their human rights obligations, and to realize the objectives of the Paris Agreement, they must adopt and implement policies aimed at reducing emissions. These policies must reflect the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development.

12. In their efforts to reduce emissions, States parties should contribute effectively to phasing out fossils fuels, promoting renewable energy and addressing emissions from the land sector, including by combating deforestation. Additionally, States must regulate private actors, including by holding them accountable for harm they generate both domestically and extraterritorially. States should also discontinue financial incentives or investments in activities and infrastructure which are not consistent with low [GHG] emissions pathways, whether undertaken by public or private actors as a mitigation measure to prevent further damage and risk.

13. When reducing emissions and adapting to climate impacts, States must seek to address all forms of discrimination and inequality, including advancing substantive gender equality, protecting the rights of indigenous peoples and of persons with disabilities, and taking into consideration the best interests of the child.

...

Role of the Committees

18. In their future work, the Committees shall continue to keep under review the impacts of climate change and climate-induced disasters on the rights holders protected under their respective treaties. They will also continue to provide States parties with guidance on how they can meet their obligations under these instruments in relation to mitigation and adaptation to climate change."

187. On 12 December 2022 the International Tribunal for the Law of the Sea received a request from the Commission of Small Island States on Climate Change and International Law to deliver an advisory opinion on the scope and content of the "specific obligations of States Parties to the United Nations Convention on the Law of the Sea ('UNCLOS') including under Part XII thereof".[128] The questions put in the request were the following:

[128] The detailed questions and the obligations at stake can be found in the press release ITLOS/Press 327, 12 December 2022.

"What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea ('UNCLOS'), including under Part XII:

(a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic [GHG] emissions into the atmosphere?

(b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?"

188. On 29 March 2023, under Article 96 of the Charter of the United Nations, the UN General Assembly adopted a Resolution[129] requesting the International Court of Justice to provide an advisory opinion on States' obligations in respect of climate change. The questions put to that court were the following:

"Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,

(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of [GHG] for States and for present and future generations;

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?"

B. Council of Europe

1. Parliamentary Assembly of the Council of Europe

189. In a Recommendation adopted on 29 September 2021, entitled "Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe"[130], the Parliamentary Assembly of the Council of Europe (PACE) recommended that the Committee of Ministers draw up an additional protocol to the European Convention on Human Rights and an additional protocol to the European Social Charter on the right to a safe, clean,

[129] Resolution A/RES/77/276, 29 March 2023.
[130] PACE, Recommendation 2211 (2021), adopted on 29 September 2021.

healthy and sustainable environment, based on the terminology used by the United Nations.

190. More generally, in a Resolution similarly entitled, PACE recommended that the member States build and consolidate a legal framework – domestically and at European level – to anchor the right to a safe, clean, healthy and sustainable environment, based on the United Nations guidance on this matter.[131] The relevant part of the Resolution reads as follows:

> "3. The Parliamentary Assembly notes that already in 1972, the Stockholm Declaration of the United Nations Conference on the Human Environment explicitly linked environmental protection and first generation human rights, indirectly referring to the right to a healthy environment. Since then, about half the countries of the world have recognised the right to a healthy environment in their constitutions, including 32 Council of Europe member States. The right to a healthy environment is also recognised through a series of regional agreements and arrangements worldwide – with the exception of the European region.
>
> 4. The Assembly believes that the European vision of contemporary human rights protection could nevertheless become a benchmark for ecological human rights in the 21st century, if action is taken now. So far this vision has been limited to civil and political rights enshrined in the European Convention on Human Rights and its Protocols (ETS No. 5, hereafter 'the Convention') and socio-economic rights recognised in the European Social Charter (ETS Nos. 35 and 163, hereafter 'the Charter').
>
> 5. The Assembly notes that the Convention does not make any specific reference to the protection of the environment, and the European Court of Human Rights (hereafter the 'Court') can thus not deal effectively enough with this new generation human right. The Assembly's call for action, in particular in Recommendation 1885 (2009) 'Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment', was unfortunately not followed by the Committee of Ministers.
>
> 6. The Court's case law provides for indirect protection of a right to the environment by sanctioning only environmental violations that simultaneously result in an infringement of other human rights already recognised in the Convention. The Court thus favours an anthropocentric and utilitarian approach to the environment which prevents natural elements from being afforded any protection per se. The Assembly encourages the Council of Europe to recognise, in time, the intrinsic value of Nature and ecosystems in the light of the interrelationship between human societies and Nature.
>
> 7. The Assembly is convinced that the Council of Europe as the European continent's leading human rights and rule of law organisation should stay proactive in the evolution of human rights and adapt its legal framework accordingly. A legally binding and enforceable instrument, such as an additional protocol to the Convention, would finally give the Court a non-disputable base for rulings concerning human rights violations arising from environment-related adverse impacts on human health, dignity and life.
>
> 8. The Assembly considers that an explicit recognition of a right to a healthy and viable environment would be an incentive for stronger domestic environmental laws and a more protection-focused approach by the Court. It would make it easier for

[131] Resolution 2396 (2021), adopted on 29 September 2021.

victims to lodge applications for remedies and would also act as a preventive mechanism to supplement the currently rather reactive case law of the Court.

9. Recognising an autonomous right to a healthy environment would have the benefit of allowing a violation to be found irrespective of whether another right had been breached and would therefore raise the profile of this right. In this context, the Assembly notes that the United Nations (UN), in its studies and resolutions on human rights and the environment, mainly refers to the human rights obligations linked to the enjoyment of 'a safe, clean, healthy and sustainable environment'. The Council of Europe should be encouraged to use this terminology for its own legal instruments – though it may want to go even further and guarantee the right to a 'decent' or 'ecologically viable' environment."

191. In Recommendation 2211 (2021)[132], PACE recommended that the Committee of Ministers draw up an additional protocol to the European Convention on Human Rights on the right to a safe, clean, healthy and sustainable environment. The relevant part of the Recommendation reads as follows:

"1. The Parliamentary Assembly refers to its Resolution 2396 (2021) 'Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe' and reiterates the need for the Council of Europe to modernise its standard setting activity so as to embrace the new generation of human rights. The Assembly is highly concerned by the speed and extent of environmental degradation, loss of biodiversity, and the climate crisis that directly impact on human health, dignity and life. It considers that it is high time for the Council of Europe to show ambition and strategic vision for the future by facing up to this major transformative challenge for human rights and securing their enhanced protection in the era of systemic environmental threats to the present and future generations.

2. The Assembly notes that harmful environmental impacts are increasingly affecting the enjoyment of first and second generation human rights by individuals and society at large, hurting the shared values that the Council of Europe is called upon to defend. Those impacts are being recognised through environmental litigation at national level across Europe and beyond; they constitute a compelling case for consolidating and updating the Council of Europe legal arsenal, and linking up national action with commitments under the relevant international treaties, such as the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.

3. To this end, the Assembly recommends that the Committee of Ministers:

3.1 draw up an additional protocol to the European Convention on Human Rights (ETS No. 5, hereafter 'the Convention') on the right to a safe, clean, healthy and sustainable environment, based on the terminology used by the United Nations and drawing on the text reproduced below, which is an integral part of this recommendation. The inclusion of this right in the Convention would establish the clear responsibility of member States to maintain a good state of the environment that is compatible with life in dignity and good health and the full enjoyment of other fundamental rights; this would also support a much more effective protection of a safe, clean, healthy and sustainable environment at national level, including for generations to come;

3.2 draw up an additional protocol to the European Social Charter (ETS Nos. 35 and 163, hereafter 'the Charter') on the right to a safe, clean, healthy and sustainable

[132] Recommendation 2211 (2021), adopted on 29 September 2021.

environment; the inclusion of this right in the ESC would make it possible to recognise the interrelationship between protection of social rights and environmental protection; it would also enable non-governmental organisations to lodge collective complaints on environmental issues;

3.3 launch the preparation of a feasibility study for a '5P' convention on environmental threats and technological hazards threatening human health, dignity and life; the drawing-up of such a convention would afford an opportunity to incorporate therein the principles of prevention, precaution and non-regression, which are necessary if humanity's right to a healthy environment is to be properly protected; the convention could also include a supranational monitoring mechanism modelled on independent expert committees such as the Group of Experts on Action against Trafficking in Human Beings (GRETA) and The Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO);

3.4 revise Recommendation CM/Rec(2016)3 on human rights and business with a view to strengthening corporate environmental responsibility for the adequate protection of the human right to a safe, clean, healthy and sustainable environment."

192. PACE also adopted a Recommendation[133] and a Resolution[134] entitled "The climate crisis and the rule of law". In the latter, it referred to the Court's case-law in relation to environmental damage. In particular, it urged the member States to do the following:

"5.1 promote the rule of law and employ a transparent, accountable and democratic legislative process for implementing the aim of 'net zero emissions', based on clear and credible plans to meet commitments to keep the global temperature increase in line with the preferred objective of the Paris Agreement, amounting to an increase in average temperatures of 1.5°C;"

2. Committee of Ministers

193. The Committee of Ministers issued replies to the above-mentioned recommendations of the Parliamentary Assembly. In a reply issued on 4 October 2022, it addressed the recommendation to adopt a new protocol to the European Convention on Human Rights, indicating that it had instructed the Steering Committee for Human Rights (CDDH) to undertake other possible work, including the preparation of a study on the need for and feasibility of a further instrument or instruments on human rights and the environment[135].

194. The Committee of Ministers adopted its Recommendation CM/Rec(2022)20 to member States on human rights and the protection of the environment on 27 September 2022. In the Preamble, the Committee of Ministers noted:

[133] Recommendation 2214 (2021), adopted on 29 September 2021.
[134] Resolution 2399 (2021), adopted on 29 September 2021.
[135] Committee of Ministers, Reply to Recommendation 2211(2021), Doc. 15623, adopted at the 1444th meeting of the Ministers' Deputies (27 September 2022), 4 October 2022, paragraphs 3-4.

"the increased recognition of some form of the right to a clean, healthy and sustainable environment in, *inter alia*, international instruments, including regional human rights instruments, and national constitutions, legislation and policies;"

195. The Committee of Ministers then recommended that the member States undertake the following:

"1. reflect on the nature, content and implications of the right to a clean, healthy and sustainable environment and, on that basis, actively consider recognising at the national level this right as a human right that is important for the enjoyment of human rights and is related to other rights and existing international law;

2. review their national legislation and practice in order to ensure that they are consistent with the recommendations, principles and guidance set out in the appendix to this recommendation;

..."

196. The appendix to this Recommendation, containing six paragraphs, reads as follows:

"1. In the implementation of this recommendation, member States should ensure the respect of general principles of international environmental law, such as the no harm principle, the principle of prevention, the principle of precaution and the polluter pays principle, and take into account the need for intergenerational equity.

2. Member States should ensure, without discrimination, the effective enjoyment of the rights and freedoms set forth in the Convention for the Protection of Human Rights and Fundamental Freedoms and, when applicable, the European Social Charter and the European Social Charter (revised), including in relation to the environment.

3. Member States should take adequate measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.

4. Member States should ensure access without discrimination, *inter alia*, to information and justice in environmental matters, participation in environmental decision making and environmental education. Member States should ensure that human rights are taken into account at all stages of the environmental decision-making process.

5. Taking into consideration their vital role in the protection of the environment, member States should consult and co-operate in the implementation of this recommendation with sub-national entities, civil society, national human rights institutions, regional institutions for the protection and promotion of human rights, environmental human rights defenders, economic stakeholders, indigenous peoples and local communities, cities and regions.

6. Member States should encourage or, where appropriate, require business enterprises to act in compliance with their human rights responsibilities related to the environment, including by applying a smart mix of measures– national and international, mandatory and voluntary."

197. In the Explanatory memorandum to the Recommendation[136] the CDDH stated that the Recommendation in question did not have any effect

[136] CM(2022)141-add3final, 27 September 2022.

on the legal nature of the instruments on which it was based, or on the extent of States' existing legal obligations; nor did it seek to establish new standards or obligations.

3. Council of Europe Commissioner for Human Rights

198. In the human rights comment "Living in a clean environment: a neglected human rights concern for all of us"[137], the Commissioner stressed as follows:

> "The Council of Europe bodies overseeing the implementation of the European Convention of Human Rights and the European Social Charter have produced an extensive body of case law that delineates states parties' obligations in the field of the environment. Despite the absence in the Convention of a specific reference to the environment, the European Court of Human Rights has clearly established that various types of environmental degradation can result in violations of substantive human rights, such as the right to life, to private and family life, the prohibition of inhuman and degrading treatment, and the peaceful enjoyment of the home. Moreover, the European Committee of Social Rights has interpreted the right to health included in the Charter to encompass the right to a healthy environment.
>
> ...
>
> States must adopt – and adhere to – ambitious, holistic policies and measures to preserve the environment and biodiversity, combat air, water and soil pollution, mitigate climate change and ensure proper waste disposal. In doing so, they should pay extra attention to protect the rights of those most vulnerable, including children, the poor and marginalised communities who tend to be disproportionally affected by environmental degradation. Rather than a piecemeal approach that merely reacts to individual complaints, what is needed is a preventive approach at national and local level grounded in the human rights standards of the Council of Europe. This also means ensuring that environmental policies are accompanied by measures to protect the rights of those they may impact, including the right to work and to an adequate standard of living of those working in mining or heavy industries, for example. It is extremely important for states to educate people from an early age of the need to preserve the environment and teach them how to do so. Further, states must ensure people's rights to information, participation and redress, and demonstrate their commitment to doing so by ratifying the Aarhus convention."

4. Other materials

199. In 2020 the European Commission for Democracy through Law ("the Venice Commission") addressed the question of judicial control in the field of environmental protection:

> "114. The Venice Commission is aware of the problems of judicial control in the area of protection of the environment. Critics or sceptics will claim that this area is not suitable for judicial control, as it will take the courts into sophisticated discussions on natural sciences. They might also claim that as the environmental protection is an area for discretion and political compromises, in case a parliament or government made a

[137] Commissioner for Human Rights Human rights comment "Living in a clean environment: a neglected human rights concern for all of us", 4 June 2019.

political compromise on the protection of the environment, the judicial branch should not intervene. However, an important argument to counter such a conclusion is that the protection of the environment is not like the traditional human rights conflict, where the minority needs protection against the majority. In the area of protection of the environment, there is a totally new dimension: the protection of the rights of future generations. As the future generations do not take part in present day democracy and do not vote in present day elections, the judicial branch appears to be best placed to protect the future generations against the decisions of present-day politicians."[138]

200. In Appendix V of the Reykjavík Declaration[139] the following was declared:

"We, the Heads of State and Government, underline the urgency of taking co-ordinated action to protect the environment by countering the triple planetary crisis of pollution, climate change and loss of biodiversity. We affirm that human rights and the environment are intertwined and that a clean, healthy and sustainable environment is integral to the full enjoyment of human rights by present and future generations.

...

We note that the right to a healthy environment is enshrined in various ways in several constitutions of the Council of Europe member States and the increased recognition of the right to a clean, healthy and sustainable environment in, inter alia, international instruments, regional human rights instruments, national constitutions, legislation and policies.

We recall the extensive case law and practice on environment and human rights developed by the European Court of Human Rights and the European Committee of Social Rights. We appreciate the ongoing work of the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of the Council of Europe, the Commissioner for Human Rights, the youth sector and other parts of the Council of Europe to strengthen the protection of human rights linked to the protection of the environment.

Together we commit to:

i. strengthening our work at the Council of Europe on the human rights aspects of the environment based on the political recognition of the right to a clean, healthy and sustainable environment as a human right, in line with United Nations General Assembly Resolution 76/300 'The human right to a clean, healthy and sustainable environment', and by pursuing the implementation of Committee of Ministers Recommendation CM/Rec(2022)20 on human rights and the protection of the environment; ...

v. initiating the 'Reykjavík process' of strengthening the work of the Council of Europe in this field, with the aim of making the environment a visible priority for the Organisation. The process will focus and streamline the Organisation's activities, with a view to promoting co-operation among member States. We will identify the challenges raised by the triple planetary crisis of pollution, climate change and loss of

[138] European Commission for Democracy through Law, Opinion No. 997/2020, 9 October 2020, CDL-AD(2020)020-e. The opinion was issued on four draft constitutional bills on the protection of the environment, on natural resources, on referendums and on the President of Iceland, the government, the functions of the executive and other institutional matters.

[139] Declaration of the Fourth Summit of Heads of State and Government of the Council of Europe (Reykjavík, Iceland, 16-17 May 2023).

biodiversity for human rights and contribute to the development of common responses thereto, while facilitating the participation of youth in these discussions. We will do this by enhancing and co-ordinating the existing Council of Europe activities related to the environment and we encourage the establishment of a new intergovernmental committee on environment and human rights ('Reykjavík Committee')."

C. European Union

1. Primary legislation

201. The relevant part of the Treaty on European Union (OJ 2012/C 326, pp. 13-390) provides as follows:

Article 3 § 3

"The Union ... shall work for the sustainable development of Europe ... aiming at ... a high level of protection and improvement of the quality of the environment ..."

202. The relevant parts of the Treaty on the Functioning of the European Union (OJ 2012/C 326, pp. 47-390) provide as follows:

Article 11

"Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."

Article 191

"1. Union policy on the environment shall contribute to pursuit of the following objectives:

– preserving, protecting and improving the quality of the environment,

– protecting human health,

– prudent and rational utilisation of natural resources,

– promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.

3. In preparing its policy on the environment, the Union shall take account of:

– available scientific and technical data,

– environmental conditions in the various regions of the Union,

– the potential benefits and costs of action or lack of action,

– the economic and social development of the Union as a whole and the balanced development of its regions.

..."

Article 263

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

...

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

..."

203. Article 37 of the Charter of Fundamental Rights of the European Union (OJ 2012/C 326, pp. 391-407) provides as follows:

Article 37
Environmental protection

"A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

2. Legislative acts

(a) Concerning GHG emissions

204. By Decision No. 94/69/EC of the Council of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change (OJ 2009/L 140, pp. 136-48), the Council approved the UNFCCC on behalf of the European Community (now the European Union).

205. Decision No. 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their GHG emissions to meet the Community's GHG emission reduction commitments up to 2020 (OJ 2009/L 140, pp. 136-48) provides that each Member State is to limit its GHG emission according to a percentage set for that Member State (Article 3). Detailed percentages by Member States can be found in Annex II.

206. Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009/L 140, pp. 16-62), establishes a common framework for the promotion of energy from renewable sources (Article 1) and sets mandatory national overall targets for the use of energy from renewable sources (Article 3 and Annex 1).

207. Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ 2012/L 315, pp. 1-56) establishes a common framework of measures for the promotion of energy efficiency within the Union in order to ensure the achievement of the Union's 2020 20% headline target on energy efficiency (Article 1).

208. Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual GHG emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 (OJ 2018/L 156, pp. 26-42) defines obligations on Member States with respect to their minimum contributions for the period from 2021 to 2030 to fulfilling the Union's target of reducing its GHG emissions by 30% below 2005 levels in 2030 in specific sectors. It provides that each Member State will, by 2030, limit its GHG emissions at least by the percentage set for that Member State in relation to its GHG emissions in 2005 (Article 4 § 1; Annex 1).

209. By Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action ("the Governance Regulation", OJ 2018/L 328, pp. 1-77), the European Union established a governance mechanism, based on long-term strategies, to implement strategies and measures designed to meet the objectives and targets of the Energy Union and the long-term Union GHG emissions commitments consistent with the Paris Agreement (Article 1).

210. Through the adoption on 6 April 2022 of Decision (EU) 2022/591 on a General Union Environment Action Programme to 2030 (OJ 2022/L 114, pp. 22-36), the European Parliament and the Council set out a general action programme in the field of the environment for the period up to 31 December 2030 (the "8th Environment Action programme" or "8th EAP").

211. Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law") (OJ 2021/L 243, pp. 1-17), established a framework for the irreversible and gradual reduction of anthropogenic GHG

emissions by sources and enhancement of removals by sinks regulated in Union law. It sets out a binding objective of climate neutrality in the Union by 2050 in pursuit of the long-term temperature goal set out in point (a) of Article 2 § 1 of the Paris Agreement, as well as a binding Union target of a net domestic reduction in GHG emissions for 2030. The Regulation also requires that the projected indicative Union GHG budget be established and based on the best available science.

(b) Concerning access to information, public participation and access to justice in environmental matters

212. Through Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006/L 264, pp. 13-19), the then European Community guaranteed the right of public access to environmental information received or produced by Community institutions and bodies (Article 1).

213. This Regulation was recently amended, following the 2017 findings and recommendations of the Aarhus Convention Compliance Committee with regard to a communication brought by an NGO concerning compliance of the European union with the Aarhus Convention (in particular with its Article 3 § 1 and Article 9 §§ 2, 3, 4 and 5).[140]

214. Consequently, Regulation (EU) 2021/1767 of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies broadened the scope of the type of acts that can be subject to internal review and the range of persons entitled to request an internal review. The relevant provisions of the consolidated Regulation (EC) No 1367/2006 read as follows:

Article 2
Definitions

"...

(g) 'administrative act' means any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1);

[140] Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union, adopted by the Compliance Committee on 17 March 2017, ECE/MP.PP/C.1/2017/7.

(h) 'administrative omission' means any failure of a Union institution or body to adopt a non-legislative act which has legal and external effects, where such failure may contravene environmental law within the meaning of point (f) of Article 2(1)."

Article 10
Request for internal review of administrative acts

"1. Any non-governmental organisation or other members of the public that meet the criteria set out in Article 11 shall be entitled to make a request for internal review to the Union institution or body that adopted the administrative act or, in the case of an alleged administrative omission, should have adopted such an act, on the grounds that such an act or omission contravenes environmental law within the meaning of point (f) of Article 2(1).

..."

Article 11
Criteria for entitlement at Union level

"1. A non-governmental organisation shall be entitled to make a request for internal review in accordance with Article 10, provided that:

(a) it is an independent non-profit-making legal person in accordance with a Member State's national law or practice;

(b) it has the primary stated objective of promoting environmental protection in the context of environmental law;

(c) it has existed for more than two years and is actively pursuing the objective referred to under (b);

(d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.

1a. A request for internal review may also be made by other members of the public, subject to the following conditions:

(a) they shall demonstrate impairment of their rights caused by the alleged contravention of Union environmental law and that they are directly affected by such impairment in comparison with the public at large; or

(b) they shall demonstrate a sufficient public interest and that the request is supported by at least 4 000 members of the public residing or established in at least five Member States, with at least 250 members of the public coming from each of those Member States.

In the cases referred to in the first subparagraph, the members of the public shall be represented by a non-governmental organisation which meets the criteria set out in paragraph 1 or by a lawyer authorised to practise before a court of a Member State. That non-governmental organisation or lawyer shall cooperate with the Union institution or body concerned in order to establish that the quantitative conditions in point (b) of the first subparagraph are met, where applicable, and shall provide further evidence thereof upon request."

3. Case-law of the Court of Justice and the General Court of the European Union

215. In 1991 the European Commission adopted a decision granting Spain financial assistance from the European Regional Development Fund for the construction of two power stations in the Canary Islands. In 1993 Greenpeace brought an action before the Court of First Instance ("the CFI", now the General Court) seeking annulment of the Commission's decision to disburse these funds to Spain, and of another decision which the Commission had allegedly subsequently taken to reimburse further expenses incurred in the construction of the power stations. In 1995 the CFI dismissed the annulment action of the applicant association for lack of standing. On appeal, the applicant association argued, on the one hand, that by applying case-law on standing developed by the Court of Justice of the European Union (CJEU) in relation to economic issues, the CFI had failed to take account of the nature and specific character of the environmental interests underpinning their action and, on the other, that "the approach adopted by the [CFI] [had created] a legal vacuum in ensuring compliance with Community environmental legislation, since in this area the interests [were], by their very nature, common and shared, and the rights relating to those interests [were] liable to be held by a potentially large number of individuals so that there could never be a closed class of applicants satisfying the criteria adopted by the [CFI]" (judgment of the CJEU of 2 April 1998 in *Stichting Greenpeace Council (Greenpeace International) and Others v. Commission*, C-321/95 P, EU:C:1998:153, paragraphs 17-18). In reply, the CJEU held as follows (ibid., paragraphs 27-30 and 33):

> "The interpretation of the fourth paragraph of Article 173 of the Treaty [now Article 263 TFEU] that the [CFI] applied in concluding that the appellants did not have locus standi is consonant with the settled case-law of the Court of Justice.
>
> As far as natural persons are concerned, it follows from the case-law ... that where, as in the present case, the specific situation of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the act.
>
> The same applies to associations which claim to have locus standi on the basis of the fact that the persons whom they represent are individually concerned by the contested decision. For the reasons given in the preceding paragraph, that is not the case.
>
> In appraising the appellants' arguments purporting to demonstrate that the case-law of the Court of Justice, as applied by the [CFI], takes no account of the nature and specific characteristics of the environmental interests underpinning their action, it should be emphasised that it is the decision to build the two power stations in question which is liable to affect the environmental rights arising under Directive 85/337 that the appellants seek to invoke.
>
> ... in the circumstances of the present case those rights are fully protected by the national courts which may, if need be, refer a question to this Court for a preliminary ruling under Article 177 of the Treaty [now Article 267 TFEU]."

216. This line of reasoning, on the strict requirements for natural and legal persons to have standing to institute annulment actions, was confirmed by the CJEU in its judgment of 25 July 2002 in *Unión de Pequeños Agricultores v. Council of the European Union*, C-50/00 P, EU:C:2002:462, paragraphs 40-41:

> "By Article 173 and Article 184 [now Article 263 and Article 277 TFEU], on the one hand, and by Article 177 [now Article 267 TFEU], on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts (see, to that effect, *Les Verts v. Parliament*, paragraph 23). Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty [now Article 263 TFEU], directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty [now Article 277 TFEU] or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid (see Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 20), to make a reference to the Court of Justice for a preliminary ruling on validity.
>
> Thus, it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection."

217. In 2021 two annulment actions concerning climate change were rejected by the CJEU. In one case the applicants sought the annulment of the legislative package relating to GHG emissions (*Armando Carvalho and Others*[141]), while in the other the applicants sought the annulment of part of Directive (EU) 2018/2001 of 11 December 2018 on the promotion of the use of energy from renewable sources (*Peter Sabo and Others*[142]). The CJEU, referring to its well-established case-law in relation to Article 263 § 4 of the Treaty on the Functioning of the European Union (TFEU) (OJ 2016/C 202/01, p. 47) on the standing of natural and legal persons to bring actions for annulment, confirmed that the latter had to be able to demonstrate that they were individually concerned by the impugned acts – a condition not fulfilled by the applicants in either of those cases.

218. The relevant parts of the judgment of the CJEU in *Armando Carvalho and Others*, which was decided by a Chamber of three judges, read as follows:

> "40 The General Court held, in essence ... that the fact that the effects of climate change may be different for one person than they are for another and that they depend on the personal circumstances specific to each person does not mean that the acts at issue distinguish each of the appellants individually. In other words, the fact that the appellants, owing to the alleged circumstances, are affected differently by climate

[141] *Armando Carvalho and Others v. European Parliament and Council of the European Union*, C-565/19 P, EU:C:2021:252.
[142] *Peter Sabo and Others v. European Parliament and Council of the European Union*, C-297/20 P, EU:C:2021:24.

change is not in itself sufficient to establish the standing of those appellants to bring an action for annulment of a measure of general application such as the acts at issue.

41 Accordingly, the General Court held, in paragraph 50 of the order under appeal, that the appellants' interpretation of the circumstances alleged by them as establishing that they were individually concerned would render the requirements of the fourth paragraph of Article 263 TFEU meaningless and would create locus standi for all without the criterion of individual concern referred to in the judgment in *Plaumann* being fulfilled.

42 Consequently, the appellants cannot claim that the General Court did not take into account, in the order under appeal, the characteristics specific to them in order to determine whether they were individually concerned.

43 Moreover, the appellants' argument that the General Court made no reference, in the order under appeal, to the evidence showing that the appellants were affected in different ways by climate change is, in the light of the foregoing, ineffective.

...

46 According to settled case-law, which has not been altered by the Treaty of Lisbon, natural or legal persons satisfy the condition of individual concern only if the contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed (judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 71 and 72 and the case-law cited).

47 In that regard, as is noted by the Parliament, the appellants' reasoning, in addition to its generic wording, leads to the conclusion that there is locus standi for any applicant, since a fundamental right is always likely to be concerned in one way or another by measures of general application such as those contested in the present case.

48 As was recalled by the General Court in paragraph 48 of the order under appeal, the claim that the acts at issue infringe fundamental rights is not sufficient in itself to establish that the action brought by an individual is admissible, without running the risk of rendering the requirements of the fourth paragraph of Article 263 TFEU meaningless (see, to that effect, orders of 10 May 2001, *FNAB and Others v Council*, C-345/00 P, EU:C:2001:270, paragraph 40, and of 14 January 2021, *Sabo and Others v Parliament and Council*, C-297/20 P, not published, EU:C:2021:24, paragraph 29 and the case-law cited).

49 Since, as is apparent from paragraph 46 of the order under appeal, the appellants merely invoked, before the General Court, an infringement of their fundamental rights, inferring individual concern from that infringement, on the ground that the effects of climate change and, accordingly, the infringement of fundamental rights are unique to and different for each individual, it cannot be held that the acts at issue affect the appellants by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguish them individually just as in the case of the person addressed.

50 Therefore, the General Court was fully entitled to hold, in paragraph 49 of the order under appeal, that the appellants had not established that the contested provisions of the acts at issue distinguished them individually from all other natural or legal persons concerned by those provisions just as in the case of the addressee."

219. Referring to the fact that, under EU law, actions for annulment by associations had been held to be admissible where, *inter alia*, the association represented the interests of its members, who would themselves be entitled to bring proceedings, the CJEU held as follows (ibid.):

> "89 Indeed, in so far as the appellants, as natural persons, were considered not to be individually concerned for the purposes of the fourth paragraph of Article 263 TFEU, the same consideration applies to the members of that association. Those members cannot therefore claim that they possess attributes which distinguish them individually from the other potential addressees of the acts at issue.
>
> 90 Concerning the first condition, it should be borne in mind that associations have a right to bring proceedings against an act of the Union where the provisions of EU law specifically recognise those associations as having procedural rights (see, to that effect, judgment of 4 October 1983, *Fediol v Commission*, 191/82, EU:C:1983:259, paragraph 28). However, the association Sáminuorra has not claimed that such provisions exist in its favour.
>
> 91 As regards the argument that the General Court should have recognised the existence of another situation in which associations would be entitled to bring proceedings, namely 'the action of a collective defending a collective good', that argument was not put forward at first instance and must therefore, pursuant to Article 170(1) of the Rules of Procedure of the Court of Justice, be rejected as inadmissible in the context of the present appeal.
>
> 92 To allow the appellants to raise for the first time before the Court of Justice arguments which they have not raised before the General Court would be to authorise them to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal, the jurisdiction of the Court of Justice is thus confined to review of the findings of law on the pleas argued before the lower court (see, to that effect, judgment of 17 June 2010, *Lafarge v Commission*, C-413/08 P, EU:C:2010:346, paragraph 52)."

220. In the case of *Peter Sabo and Others*, the CJEU also held as follows:

> "29 ... [T]he claim that an act infringes fundamental rights is not sufficient in itself for it to be established that the action brought by an individual is admissible, without running the risk of rendering the requirements of the fourth paragraph of Article 263 TFEU meaningless. Indeed, it is apparent from the settled case-law of the Court that the extent of the alleged adverse impact on the observance of the appellants' fundamental rights cannot give rise to non-application of the rules for admissibility expressly laid down by the fourth paragraph of Article 263 TFEU ..."

221. The CJEU also has extensive case-law on the Aarhus Convention, which the EU ratified in 2005, following which various pieces of EU legislation were enacted, including the 2006 Aarhus Regulation (Regulation 1367/2006). More recently, in the context of a request for a preliminary ruling under Article 267 TFEU, the scope and content of obligations under Article 9 § 3 of the Aarhus Convention (access to justice) were examined in relation to EU rules regarding emissions from motor

vehicles in the judgment of 8 November 2022 of the CJEU (Grand Chamber) in *Deutsche Umwelthilfe eV v. Bundesrepublik Deutschland*.[143]

222. The relevant parts of the reasoning provide as follows:

> "1. Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a situation where an environmental association, authorised to bring legal proceedings in accordance with national law, is unable to challenge before a national court an administrative decision granting or amending EC type-approval which may be contrary to Article 5(2) of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information.
>
> ...
>
> 65. Secondly, where a Member State lays down rules of procedural law applicable to the matters referred to in Article 9(3) of the Aarhus Convention concerning the exercise of the rights that an environmental organisation derives from Article 5(2) of Regulation No 715/2007, in order for decisions of the competent national authorities to be reviewed in the light of their obligations under that article, the Member State is implementing EU law for the purposes of Article 51(1) of the Charter and must, therefore, ensure compliance, inter alia, with the right to an effective remedy, enshrined in Article 47 thereof (see, to that effect, judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraphs 44 and 87 and the case-law cited).
>
> 66. Consequently, while it is true that Article 9(3) of the Aarhus Convention does not have direct effect in EU law and cannot, therefore, be relied on, as such, in a dispute falling within the scope of EU law, in order to disapply a provision of national law which is contrary to it, the fact remains that, first, the primacy of international agreements concluded by the European Union requires that national law be interpreted, to the fullest extent possible, in accordance with the requirements of those agreements and, secondly, that Article 9(3) of the Aarhus Convention, read in conjunction with Article 47 of the Charter, imposes on Member States an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law (judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraph 45).
>
> 67. However, the right to bring proceedings provided for in Article 9(3) of the Aarhus Convention, which is intended to ensure effective environmental protection (judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 46), would be deprived of all useful effect, and even of its very substance, if it had to be conceded that, by imposing criteria laid down by national law, certain categories of 'members of the public' – a fortiori 'the public concerned', such as environmental associations that satisfy the requirements laid down in Article 2(5) of the Aarhus Convention – were to be denied of any right to bring proceedings against acts and omissions by private persons and public authorities which contravene certain categories of provisions of national law relating to the environment (see, to that effect,

[143] C-873/19, EU:C:2022:857.

judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraph 46).

68. Imposing those criteria must not deprive environmental associations in particular of the possibility of verifying that the rules of EU environmental law are being complied with, given also that such rules are usually in the public interest, rather than simply in the interests of certain individuals, and that the objective of those associations is to defend the public interest (judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraph 47 and the case-law cited)."

D. Material from other regional human rights mechanisms

1. Inter-American system

(a) Relevant instruments

223. The American Convention on Human Rights[144] does not contain any specific provision relating to the protection of a human right to a healthy environment. However, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights[145] provides as follows:

Article 11
Right to a Healthy Environment

"1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.

2. The States Parties shall promote the protection, preservation, and improvement of the environment."

224. The Inter-American Convention on Protecting the Human Rights of Older Persons[146] provides the following:

Article 25
Right to a healthy environment

"Older persons have the right to live in a healthy environment with access to basic public services. To that end, States Parties shall adopt appropriate measures to safeguard and promote the exercise of this right, *inter alia*:

a. To foster the development of older persons to their full potential in harmony with nature;

[144] American Convention on Human Rights, adopted on 22 November 1969 and entered into force 18 July 1978, OAS Treaty Series No. 36.
[145] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", adopted on 17 November 1988 and entered into force on 16 November 1999, OAS Treaty Series No. 69.
[146] Inter-American Convention on Protecting the Human Rights of Older Persons, adopted in Washington on 15 June 2015 and entered into force on 11 January 2017.

b. To ensure access for older persons, on an equal basis with others, to basic public drinking water and sanitation services, among others."

(b) The Inter-American Court of Human Rights

225. On 15 November 2017 the Inter-American Court of Human Rights delivered an Advisory Opinion entitled "The Environment and Human Rights"[147] in which it derived the right to a healthy environment from Article 26 of the American Convention (Economic, social, and cultural rights). The relevant concluding part of the Advisory Opinion reads as follows:

"Conclusion ...

242. Based on the above, in response to the second and third questions of the requesting State, it is the Court's opinion that, in order to respect and to ensure the rights to life and to personal integrity:

a. States have the obligation to prevent significant environmental damage within or outside their territory, in accordance with paragraphs 127 to 174 of this Opinion.

b. To comply with the obligation of prevention, States must regulate, supervise and monitor the activities within their jurisdiction that could produce significant environmental damage; conduct environmental impact assessments when there is a risk of significant environmental damage; prepare a contingency plan to establish safety measures and procedures to minimize the possibility of major environmental accidents, and mitigate any significant environmental damage that may have occurred, even when it has happened despite the State's preventive actions, in accordance with paragraph 141 to 174 of this Opinion.

c. States must act in keeping with the precautionary principle in order to protect the rights to life and to personal integrity in the case of potential serious or irreversible damage to the environment, even in the absence of scientific certainty, in accordance with paragraph 180 of this Opinion.

d. States have the obligation to cooperate, in good faith, to protect against environmental damage, in accordance with paragraphs 181 to 210 of this Opinion.

e. To comply with the obligation of cooperation, States must notify other potentially affected States when they become aware that an activity planned under their jurisdiction could result in a risk of significant transboundary harm and also in cases of environmental emergencies, and consult and negotiate in good faith with States potentially affected by significant transboundary harm, in accordance with paragraphs 187 to 210 of this Opinion.

f. States have the obligation to ensure the right of access to information, established in Article 13 of the American Convention, concerning potential environmental impacts, in accordance with paragraphs 213 to 225 of this Opinion;

g. States have the obligation to ensure the right to public participation of the persons subject to their jurisdiction established in Article 23(1)(a) of the American Convention,

[147] Inter-American Court of Human Rights, *State Obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: Interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2*, Advisory Opinion OC-23/17 on the environment and human rights, 15 November 2017.

in policies and decision-making that could affect the environment, in accordance with paragraphs 226 to 232 of this Opinion, and

h. States have the obligation to ensure access to justice in relation to the State obligations with regard to protection of the environment set out in this Opinion, in accordance with paragraphs 233 to 240 of this Opinion.

243. The obligations described above have been developed in relation to the general obligations to respect and to ensure the rights to life and to personal integrity, because these were the rights that the State referred to in its request (supra paras. 37, 38, 46 and 69). However, this does not mean that the said obligations do not exist with regard to the other rights mentioned in this Opinion as being particularly vulnerable in the case of environmental degradation (supra paras. 56 to 69)."

226. In the 2020 case of the *Indigenous communities of the Lhaka Honhat Association (Our Land) v. Argentina*[148], the Inter-American Court of Human Rights held Argentina responsible for violating indigenous communities' human rights through its failure to recognise and protect their lands. In that case, the Court examined the rights to a healthy environment, adequate food, water, and cultural identity autonomously.

227. In January 2023 a new request[149] for an Advisory Opinion was submitted to the Inter-American Court of Human Rights by Colombia and Chile asking it to clarify the scope of State obligations, in their individual and collective dimension, in order to respond to the climate emergency within the framework of international human rights law, paying special attention to the differentiated impacts of this emergency on individuals from diverse regions and population groups, as well as on nature and on human survival on the planet.

(c) The Inter-American Commission on Human Rights

228. In March 2022, the Inter-American Commission on Human Rights and the Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights[150] published a resolution recognising that climate change was a human rights emergency.

2. African system

229. The relevant part of the African Charter on Human and Peoples' Rights[151] reads as follows:

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[148] *Case of the indigenous communities of the Lhaka Honhat Association (Our Land) v. Argentina*, 6 February 2020.

[149] Request for an advisory opinion on the climate emergency and human rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, 9 January 2023.

[150] Resolution No. 3/21 Climate Emergency: Scope of Inter-American human rights obligations.

[151] African Charter on Human and Peoples' Rights, adopted in Nairobi on 1 June 1981 and entered into force on 21 October 1981.

Article 24

"All people shall have the right to a general satisfactory environment favourable to their development."

230. On 14 May 2019, the African Commission on Human and Peoples' Rights adopted a Resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change[152] in which it addressed the implications of climate change on human rights.

231. In the case of *Social and Economic Action Rights Centre v. Nigeria*[153], the African Commission held as follows (footnotes omitted):

"50. The Complainants allege that the Nigerian government violated the right to health and the right to clean environment as recognized under Articles 16 and 24 of the African Charter ...

51. These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, 'an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.'

52. The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16(3)) already noted obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.

53. Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for

[152] ACHPR/Res. 417 (LXIV) 2019, adopted at its 64th Ordinary Session, held in Sharm el-Sheikh, Arab Republic of Egypt, from 24 April to 14 May 2019.

[153] African Commission on Human and People's Rights, *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, 27 May 2002.

individuals to be heard and to participate in the development decisions affecting their communities.

...

68. The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective. As indicated in the preceding paragraphs, however, the Nigerian Government did not live up to the minimum expectations of the African Charter."

III. COMPARATIVE LAW

A. Relevant comparative materials concerning the Aarhus Convention

232. Of the forty-six Council of Europe member States only five have not ratified the Aarhus Convention.[154] In a great majority of the thirty-eight member States surveyed by the Court[155], environmental non-governmental associations are allowed to bring cases in the interests of the protection of the environment and/or in the interests of private individuals who may be affected by specific environmental hazards or industrial projects (in at least thirty-four States).

233. However, the non-governmental association in question has to fulfil certain criteria. In almost all the member States surveyed, the corporate goals of the association have to be linked to the interests it seeks to protect. In eleven member States such associations have to have existed, or to have been actively involved in the protection of the environment, for some time before bringing a case, and in eight member States the association bringing a case has to operate in a particular geographical zone. Some member States provide for additional criteria for recognising the standing of associations, but these are less common: the size of the association; prior participation in the decision-making process; internal organisation; prohibition for the association or its leadership to participate in for-profit activities; and a general requirement of the lawfulness of the activities of the association. Moreover, in some systems the question of the standing of the association may depend on the question of the standing of natural persons who may be directly affected by the environmental hazards. The standing of the association may

[154] Andorra, Lichtenstein, Monaco, San Marino, and Türkiye.

[155] Armenia, Austria, Belgium, Bosnia and Herzegovina, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Republic of Moldova, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, San Marino, Serbia, the Slovak Republic, Slovenia, Spain, Türkiye, Ukraine, and the United Kingdom.

be established directly by the court or, in six member States, through a mechanism of preliminary accreditation by an administrative authority.

234. As to climate-change cases, in most member States, it appears that while a theoretical possibility of an environmental association bringing a climate-change case may exist, or cannot be ruled out, there is no conclusive case-law on the matter, or no case-law at all. In seven member States such claims by an environmental association would probably not be acceptable in the national legal order, while in five others a possibility for an environmental association to bring legal cases concerning climate change, under certain conditions (linked to the actionability of the claim), has been examined by domestic courts (Belgium, France, Germany, Ireland and the Netherlands).

B. Overview of domestic case-law concerning climate change

235. The following overview of domestic case-law provides extracts from some cases on climate change brought before national courts in Council of Europe member States.

1. France

(a) The *Grande-Synthe* case

236. The detailed circumstances of the *Grande-Synthe* case of the *Conseil d'État* are set out in the case of *Carême v. France* (dec.) [GC], no. 7189/21, 9 April 2024. In that case, upon an action brought by Mr Carême acting on his own behalf and in his capacity as mayor of Grande-Synthe, and in the name and on behalf of the latter municipality, the *Conseil d'État* declared admissible the action brought by the municipality and inadmissible the action brought by Mr Carême. The *Conseil d'État* found that the measures taken by the authorities to tackle climate change had not been sufficient and ordered the authorities to take additional measures by 31 March 2022 to meet the GHG emissions reduction targets set out in the domestic legislation and Annex I of Regulation (EU) 2018/842.

(b) Applications for judicial review seeking to secure compliance with the limit values for concentrations of particulate matter and nitrogen dioxide

237. By a decision of 12 July 2017, the *Conseil d'État*, on an application for judicial review, set aside the tacit refusals of the President of the Republic, the Prime Minister and the Ministers responsible for the environment and health and ordered the Prime Minister and the Minister responsible for the environment to take all appropriate measures before 31 March 2018 and to draw up plans in accordance with Article 23 of Directive 2008/50/EC of 21 May 2008 in order to reduce the concentrations of particulate matter and nitrogen dioxide throughout the national territory (*Conseil d'État* (plenary), 10 July 2020, *Association Les Amis de la Terre France et autres*, no. 428409).

238. Referring in particular to the limit values for concentrations of particulate matter and nitrogen dioxide laid down by the Directive of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe[156] and to the fact that, in certain areas of French territory, those values had been exceeded each year between 2012 and 2014, the *Conseil d'État* found that the regulatory authority had failed to fulfil its obligations by omitting to draw up air-quality plans for the areas concerned in accordance with the provisions of the Directive and those transposing the Directive into domestic law.

239. The *Conseil d'État* stated in that judgment that the setting-aside of the decisions tacitly refusing to take action necessarily entailed taking all the measures necessary to ensure that the appropriate air-quality plans were drawn up and implemented.

(c) Full administrative-law actions seeking to secure compliance with GHG emissions reduction targets

240. In another more recent case, known as the "Case of the century", which concerned GHG emissions reduction targets, the Paris Administrative Court, drawing on the *Grande-Synthe* case, acknowledged, this time in the context of a full administrative-law action and in a judgment of 3 February 2021, that environmental associations were "justified in arguing that, to the extent [that the State] had made commitments which it had not complied with in the context of the first carbon budget, [it should] be regarded as liable for part of the ecological damage within the meaning ... of Article 1246 of the Civil Code". That Article, as amended by Law no. 2016-1087 of 8 August 2016 on the recovery of biodiversity, nature and landscapes, provides that "[a]ny person who causes ecological damage has the duty to afford redress" (Paris Administrative Court, 3 February 2021, *Oxfam France et autres*, no. 1904967).

241. As regards the commitments of the French State and the general obligation to combat climate change, the Paris Administrative Court found support in the same texts referred to in the *Grande-Synthe* case, namely: France's commitments under the UNFCCC, the Paris Agreement, Decision No 406/2009/EC of 23 April 2009 on the effort of Member States to reduce their GHG emissions, and Regulation (EU) 2018/842 of 30 May 2018 on binding annual GHG emission reductions; and Article L. 100-4 of the Energy Code and Article L. 222-1 B of the Environment Code. The Administrative Court also referred to Article 3 of the Environment Charter, which recalls the existence of the preventive principle already enshrined in law, and provides that "[e]veryone shall, in accordance with the conditions laid down by law, avoid causing any damage to the

[156] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ 2008/L 152, pp. 1-44.

environment or, failing that, limit its consequences". The Administrative Court inferred that it was clear from all the above provisions that the French State "[had] recognised the urgency of combating current climate change and acknowledged its capacity to take effective action in relation to that phenomenon in order to limit the causes and mitigate the adverse consequences" and "[had] chosen ... to exercise its regulatory powers, in particular by pursuing a public policy of reducing GHG emissions from French territory, through which it [had] undertaken to achieve, within specific and successive deadlines, a certain number of targets in this sphere ...".

242. As to the implementation of those State commitments in the light of the GHG emissions reduction targets, the Administrative Court concluded that "the State [had to] be regarded as having failed to adhere to the first carbon budget and [as not having] ... carried out the actions which it itself [had] recognised as apt to reduce GHG emissions". In reaching that conclusion the Administrative Court found support, *inter alia*, in the same reports of the High Council on Climate cited by the *Conseil d'État* in its decision in the *Grande-Synthe* case.

243. Observing that "the State [could not] be held liable for the alleged ecological damage ... except in so far as the failure to adhere to the first carbon budget [had] contributed to the increase in GHG emissions", the Administrative Court, in an interlocutory judgment, ordered further investigations. It found that, as the evidence stood, it could not determine the specific measures to be ordered to enable the State to achieve the targets that France had set itself in terms of reducing GHG emissions.

244. Following that investigative measure, in a subsequent judgment of 14 October 2021, the Administrative Court ordered the Prime Minister and the competent ministers to take, by 31 December 2022, all appropriate measures to remedy the environmental damage and prevent aggravation of the damage, in an amount equal to the uncompensated share of GHG emissions under the first carbon budget, namely 15 Mt CO_2e, and subject to an adjustment in line with the CITEPA's (Interprofessional Technical Centre for Studies on Air Pollution – *Centre interprofessionnel technique d'études de la pollution atmosphérique*) estimated data as at 31 January 2022. In the Administrative Court's view, those concrete measures were apt to afford redress for the alleged damage (Paris Administrative Court, 14 October 2021, *Oxfam France et autres*, no. 1904967). The court did not impose a coercive fine at that stage.

245. In his opinion on the second decision of the *Conseil d'État* of 1 July 2021 in the *Grande-Synthe* case, the public rapporteur set out the following considerations regarding the specific nature of the climate cases examined in France compared with other European States:

> "The case before you belongs ... [to the category of actions directed against the States' climate policy], applications for judicial review, within which climate-related cases again take various forms. One of the main distinctions between these cases is the rule

relied upon in seeking the setting-aside of the decision. The application may be based on an alleged breach of human rights, as recognised in particular by the Supreme Court of the Netherlands in the *Urgenda* case, or on specific GHG emission standards that are binding on States or governments. These standards may be derived from international law, where it can be relied upon before the national courts, from constitutional law, as in the case before the [German Constitutional Court] ..., or from legislation, as in the present case and in the *Friends of the Irish Environment* case.

The last aspect to be addressed in order to determine the case before you is undoubtedly the most delicate: all these cases seek to criticise shortcomings in climate policy."

246. In an address to the Court of Cassation on 21 May 2021 entitled "*L'environnement: les citoyens, le droit, les juges*"[157] ("The environment: citizens, the law and judges"), the Vice-President of the *Conseil d'État*, Bruno Lasserre, made the following remarks on the first decisions given by the administrative courts (the decision of the *Conseil d'État* of 19 November 2020 in the *Grande-Synthe* case, the decision of the *Conseil d'État*, sitting in plenary, of 10 July 2020 in the case of *Association Les Amis de la Terre France*, and the ruling of the Paris Administrative Court of 3 February 2021 in the "Case of the century"):

"... [one of the innovations of this line of case-law] concerns the legal scope conferred, first, on the Paris Agreement, which the *Conseil d'État*, followed by the Paris Administrative Court, recognised for the first time as having interpretative force; and, secondly, on the [GHG] emissions reduction targets laid down in EU law and national law, since the Administrative Court took a decisive step in finding that those targets are not merely aspirational, but binding. Thus, the *Conseil d'État* has opened a new avenue in relation to climate cases, which the [national] courts had hitherto viewed mainly through the lens of fundamental rights, at least in their most emblematic decisions. These include, for example, the *Urgenda* decisions, based on Articles 2 and 8 of the European Convention on Human Rights, and the recent decision of the Karlsruhe Constitutional Court based on a provision of the Basic Law protecting 'the natural foundations of life'. However, the approach of the courts varies significantly depending on whether they are verifying the State's compliance with specific and detailed undertakings or examining whether its actions are compatible with such general principles as the right to life or the right to respect for private life. Two standards which therefore influence the method and, more fundamentally, the stance adopted by the courts. ...

Finally, the *Conseil d'État* has adapted to current efforts to tackle climate change by inaugurating a new type of review, which could be termed a 'pathway review'. The time-limits laid down in law for achievement of the targets may be distant – 2030, 2040, and even 2050 – but for the courts to wait ten, twenty or thirty years to verify whether they have been achieved would mean denying the urgency of taking action now and depriving their review of all meaningful effect from the outset, given the very high inertia of the climate system. A pathway review is thus akin to monitoring compliance in advance. This means that the court must be satisfied, at the point at which it takes its decision, not that the targets have been achieved, but that they may be achieved, that

[157] Available at www.conseil-etat.fr; last accessed 14.02.2024.

they are in the process of being achieved, that they form part of a credible and verifiable pathway."

(d) Examples of orders and coercive fines imposed in climate cases

247. In the case of *Association Les Amis de la Terre France et autres*, on an application for judicial review, the *Conseil d'État*, having ordered the Prime Minister and the Minister responsible for the environment to take all necessary measures by 31 March 2018, gave a decision on 10 July 2020 in which it ordered the State to pay a coercive fine unless it could demonstrate, within six months of service of the decision, that it had implemented the decision of 12 July 2017 in each of the areas concerned. The *Conseil d'État* fixed the amount of the fine at EUR 10 million for each six-month period until the date of enforcement (*Conseil d'État*, 10 July 2020, *Association Les Amis de la Terre France et autres*, no. 428409).

248. The *Conseil d'État* subsequently assessed the interim amount of the fine.

249. By a decision of 4 August 2021, it ordered the State to pay the sum of EUR 10 million in respect of the six-month period from 11 January to 11 July 2021.

250. In his opinion on this case, the public rapporteur made the following remarks concerning the issue of the proper recipient of the sums payable by the State by way of fines in climate cases:

"4. ... This is where the innovative reasoning of your plenary judgment comes in, since the applicable provision is the second sub-paragraph of Article L. 911-8, according to which the portion not paid to the applicant is allocated to the State budget: 'However, since the purpose of the coercive fine is to compel a public-law entity ... to perform the obligations imposed on it by a court decision, those provisions are not applicable where the coercive fine in question is payable by the State. In such cases, where it appears necessary for effective enforcement of the judicial decision, the court may, even of its own motion, and having obtained the observations of the parties and of the legal entity or entities concerned on this point, decide to allocate that portion to a public-law entity which has sufficient autonomy *vis-à-vis* the State and whose activities relate to the subject matter of the dispute, or to a private-law, non-profit entity which, in accordance with its articles of association, carries out actions in the general interest that are likewise connected to that subject matter.' That is the wording of your plenary judgment.

4.1 In order to determine which persons other than the State may receive the proceeds of all or part of the coercive fine, ... it is important to bear in mind the purpose of coercive fines, which is to compel the State to enforce a judicial decision as is incumbent upon it in accordance with the rule of law."

251. In line with that opinion, the *Conseil d'État* therefore ordered that the sum of EUR 10 million be paid out as follows: EUR 8,800,000 mainly to four public institutions active in the environmental field, namely the Environment and Energy Management Agency (ADEME), the Centre for Studies and Expertise on Risk, Environment, Mobility and Planning (CEREMA), the National Health, Food, Environment and Work Safety

Agency (ANSES) and the National Institute for the Industrial Environment and Risk (INERIS), with the remainder to be paid to the air-quality monitoring associations in the most affected regions.

252. In a decision of 17 October 2022, the *Conseil d'État* again assessed the interim amount of the coercive fine, for the two six-month periods from 12 July 2021 to 12 July 2022, and ordered the State to pay the sum of EUR 20 million, of which EUR 16,950,000 was to be paid out mainly to the same public institutions. In a further decision of 24 November 2023, the *Conseil d'État* found that the decision of 12 July 2017 had been partially executed and ordered the State to pay the sum of EUR 10 million to the above-mentioned public institutions and associations, as well as to the association *Les Amis de la Terre France*.

253. Lastly, that case also resulted in a judgment of the CJEU finding an infringement in view of France's failure to comply with the limit values for concentrations of nitrogen dioxide and particulate matter laid down in Directive 2008/50/EC (judgment of 24 October 2019 in *Commission v. France*, C-636/18, EU:C:2019:900, paragraphs 44-45).

2. Germany

254. In the case of *Neubauer and Others v. Federal Republic of Germany*[158], the German Federal Constitutional Court ("the GFCC") examined four constitutional complaints directed against certain provisions of the Federal Climate Change Act of 12 December 2019 (*Bundes-Klimaschutzgesetz*) and against the State's failure to take further measures to reduce GHG emissions.

255. The applicants grounded their claims on the right to life and integrity (Article 2 § 2, first sentence, of the Basic Law), the right to property and the right of inheritance (Article 14 § 1 of the Basic Law), as well as on a fundamental right to a future consistent with human dignity and a fundamental right to an ecological minimum standard of living, which they derived from Article 2 § 1 in conjunction with Article 20a and from Article 2 § 1 in conjunction with Article 1 § 1, first sentence, of the Basic Law.

256. The GFCC held that the provisions of the Federal Climate Change Act were incompatible with fundamental rights in so far as they lacked sufficient specifications for further emission reductions from 2031 onwards. In all other respects, the constitutional complaints were rejected. The GFCC held that it could not be ascertained that the legislature, in introducing these provisions, had violated its constitutional duty to protect the complainants from the risks of climate change or failed to satisfy the obligation arising from Article 20a of the Basic Law to take climate action. However, the challenged provisions did violate the freedoms of the complainants, some of whom were

[158] Order of the First Senate of 24 March 2021, 1 BvR 2656/18 DE:BVerfG:2021:rs20210324.1bvr265618.

still very young, because the provisions irreversibly shifted major emission reduction burdens into periods after 2030. The fact that GHG emissions had to be reduced followed from the Basic Law, among other things the constitutional climate goal arising from its Article 20a. These future obligations to reduce emissions had an impact on practically every type of freedom because virtually all aspects of human life still involved the emission of GHG and were thus potentially threatened by drastic restrictions after 2030. Therefore, the legislature should have taken precautionary steps to mitigate these major burdens in order to safeguard the freedoms guaranteed by fundamental rights.

257. The official Headnotes of the Order summarised the findings as follows:

> "1. The protection of life and physical integrity under Art. 2(2) first sentence of the Basic Law encompasses protection against impairments of constitutionally guaranteed interests caused by environmental pollution, regardless of who or what circumstances are the cause. The state's duty of protection arising from Art. 2(2) first sentence of the Basic Law also encompasses the duty to protect life and health against the risks posed by climate change. It can furthermore give rise to an objective duty to protect future generations.
>
> 2. Art. 20a of the Basic Law obliges the state to take climate action. This includes the aim of achieving climate neutrality.
>
> a. Art. 20a of the Basic Law does not take absolute precedence over other interests. In cases of conflict, it must be balanced against other constitutional interests and principles. Within the balancing process, the obligation to take climate action is accorded increasing weight as climate change intensifies.
>
> b. If there is scientific uncertainty regarding causal relationships of environmental relevance, a special duty of care imposed upon the legislator by Art. 20a of the Basic Law – also for the benefit of future generations – entails an obligation to take account of sufficiently reliable indications pointing to the possibility of serious or irreversible impairments.
>
> c. As an obligation to take climate action, Art. 20a of the Basic Law has an international dimension. The fact that no state can resolve the problems of climate change on its own due to the global nature of the climate and global warming does not invalidate the national obligation to take climate action. Under this obligation, the state is compelled to engage in internationally oriented activities to tackle climate change at the global level and is required to promote climate action within the international framework. The state cannot evade its responsibility by pointing to [GHG] emissions in other states.
>
> d. In exercising its mandate and prerogative to specify the law, the legislator has formulated the climate goal of Art. 20a of the Basic Law in a constitutionally permissible manner, currently setting out that the increase in the global average temperature should be limited to well below 2°C and preferably to 1.5°C above pre-industrial levels.
>
> e. Art. 20a of the Basic Law is a justiciable legal provision designed to commit the political process to a favouring of ecological interests, partly with a view to future generations.

3. Compatibility with Art. 20a of the Basic Law is required in order to justify under constitutional law any state interference with fundamental rights.

4. Under certain conditions, the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations. In their subjective dimension, fundamental rights – as intertemporal guarantees of freedom – afford protection against the [GHG] reduction burdens imposed by Art. 20a of the Basic Law being unilaterally offloaded onto the future. Furthermore, in its objective dimension, the protection mandate laid down in Art. 20a of the Basic Law encompasses the necessity to treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence.

Respecting future freedom also requires initiating the transition to climate neutrality in good time. In practical terms, this means that transparent specifications for the further course of [GHG] reduction must be formulated at an early stage, providing orientation for the required development and implementation processes and conveying a sufficient degree of developmental urgency and planning certainty.

5. The legislator itself must set out the necessary provisions specifying the overall emission amounts that are allowed for certain periods. As regards the method by which the legal framework for the allowed emission amounts is adopted, the legislative process cannot be replaced by a reduced form of parliamentary involvement in which the Bundestag merely approves the Federal Government's ordinances. This is because it is precisely the special public function of the legislative process that makes the adoption of parliamentary legislation necessary here. It is true that having parliamentary legislation in areas of law that are constantly subject to new developments and knowledge can in some cases be detrimental to the protection of fundamental rights. This notion draws on the concept of dynamic fundamental rights protection (foundationally, see BVerfGE 49, 89 <137>). However, this concept cannot be used here as an objection against the requirement for parliamentary legislation. The challenge is not to protect fundamental rights by ensuring that the legal framework keeps pace with new developments and knowledge. The challenge is to create a framework that makes further developments aimed at protecting fundamental rights possible in the first place."

3. Ireland

258. In the case of *Friends of the Irish Environment CLG v. the Government of Ireland, Ireland and the Attorney General*[159], the Supreme Court of Ireland was asked to examine the adequacy of domestic measures taken in relation to climate change in the light of statutory provisions enacted in 2015, as well as rights-based arguments under the Constitution and the Convention in relation to the right to life and the right to bodily integrity.

259. The relevant concluding part of the judgment, delivered by the then Chief Justice, reads as follows:

"9.1 In this judgment I first consider the argument put forward by FIE to the effect that the Plan does not comply with its legislative remit under the 2015 Act and is, therefore, ultra vires. It is noted that there was no question raised at the hearing as to

[159] Supreme Court of Ireland, *Friends of the Irish Environment CLG v. The Government of Ireland, Ireland and the Attorney General*, Appeal No: 205/19, 31 July 2020.

the standing of FIE to make arguments along those lines. For the reasons set out in this judgment I conclude that, contrary to the submissions made on behalf of the Government, FIE should be entitled to pursue the wider range of argument on this issue addressed in their written submissions. I also conclude that the issues are justiciable and do not amount to an impermissible impingement by the courts into areas of policy. What might once have been policy has become law by virtue of the enactment of the 2015 Act.

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

9.3 For the reasons also set out in this judgment, I have concluded that the Plan falls well short of the level of specificity required to provide that transparency and to comply with the provisions of the 2015 Act. On that basis, I propose that the Plan be quashed.

9.4 I have also considered in this judgment whether it is appropriate to go on to deal with any of the further issues raised, given that I propose that the Plan be quashed and that it follows that an identical plan cannot be made in the future. However, as the issues of standing debated in this appeal could well arise in any future challenge to a new plan, I do address those questions. For the reasons set out in this judgment I conclude that FIE, as a corporate entity which does not enjoy in itself the right to life or the right to bodily integrity, does not have standing to maintain the rights based arguments sought to be put forward whether under the Constitution or under the ECHR. I also conclude that it has not been shown that it is necessary to allow FIE to have standing under the exception to the general rule, which arises in circumstances where refusing standing would make the enforcement of important rights either impossible or excessively difficult.

9.5 On that basis I did not consider it appropriate to address the rights-based arguments put forward, but do offer views on the question of whether there is an unenumerated or, as I would prefer to put it, derived right under the Constitution to a healthy environment. While not ruling out the possibility that constitutional rights and obligations may well be engaged in the environmental field in an appropriate case, I express the view that the asserted right to a healthy environment is either superfluous (if it does not extend beyond the right to life and the right to bodily integrity) or is excessively vague and ill-defined (if it does go beyond those rights). As thus formulated, I express the view that such a right cannot be derived from the Constitution. I would reserve the position of whether, and if in what form, constitutional rights and state obligations may be relevant in environmental litigation to a case in which those issues would prove crucial."

4. The Netherlands

260. In *State of the Netherlands v. Stichting Urgenda* (20 December 2019, NL:HR:2019:2007), the Supreme Court of the Netherlands upheld the lower

courts' order directing the State to reduce GHG by the end of 2020 by at least 25% compared to 1990.

261. The official summary of the judgment reads as follows:

"The issue in this case is whether the Dutch State is obliged to reduce, by the end of 2020, the emission of [GHG] originating from Dutch soil by at least 25% compared to 1990, and whether the courts can order the State to do so.

Urgenda's claim and the opinions of the District Court and the Court of Appeal

Urgenda sought a court order directing the State to reduce the emission of [GHG] so that, by the end of 2020, those emissions will have been reduced by 40%, or in any case at by at least 25%, compared to 1990.

In 2015, the District Court allowed Urgenda's claim, in the sense that the State was ordered to reduce emissions by the end of 2020 by at least 25% compared to 1990.

In 2018, the Court of Appeal confirmed the District Court's judgment.

Appeal in cassation

The State instituted an appeal in cassation in respect of the Court of Appeal's decision, asserting a large number of objections to that decision.

The deputy Procurator General and the Advocate General advised the Supreme Court to reject the State's appeal and thus to allow the Court of Appeal's decision to stand.

Opinion of the Supreme Court

The Supreme Court concludes that the State's appeal in cassation must be rejected. That means that the order which the District Court issued to the State and which was confirmed by the Court of Appeal, directing the State to reduce [GHG] by the end of 2020 by at least 25% compared to 1990, will stand as a final order.

The Supreme Court's opinion rests on the facts and assumptions which were established by the Court of Appeal and which were not disputed by the State or Urgenda in cassation. In cassation, the Supreme Court determines whether the Court of Appeal properly applied the law and whether, based on the facts that may be taken into consideration, the Court of Appeal's opinion is comprehensible and adequately substantiated. The grounds for the Supreme Court's judgment are laid down below in sections 4-8 of the judgment. These grounds will be summarised below. This summary does not supersede the grounds for this judgment and does not fully reflect the Supreme Court's opinion.

Dangerous climate change (see paras. 4.1-4.8, below)

Urgenda and the State both endorse the view of climate science that a genuine threat exists that the climate will undergo a dangerous change in the coming decades. There is a great deal of agreement on the presence of that threat in climate science and the international community. In that respect and briefly put, this comes down to the following.

The emission of [GHG], including CO_2, is leading to a higher concentration of those gases in the atmosphere. These [GHG] retain the heat radiated by the Earth. Because over the last century and a half since the start of the industrial revolution, an ever-increasing volume of [GHG] is being emitted, the Earth is becoming warmer and warmer. In that period, the Earth has warmed by approximately 1.1°C, the largest part of which (0.7°C) has occurred in the last forty years. Climate science and the international community largely agree on the premise that the warming of the Earth

must be limited to no more than 2°C, and according to more recent insights to no more than 1.5°C. The warming of the Earth beyond that temperature limit may have extremely dire consequences, such as extreme heat, extreme drought, extreme precipitation, a disruption of ecosystems that could jeopardise the food supply, among other things, and a rise in the sea level resulting from the melting of glaciers and the polar ice caps. That warming may also result in tipping points, as a result of which the climate on Earth or in particular regions of the Earth changes abruptly and comprehensively. All of this will jeopardise the lives, welfare and living environment of many people all over the world, including in the Netherlands. Some of these consequences are already happening right now.

Protection of human rights based on the ECHR (see paras. 5.2.1-5.5.3, below)

The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) requires the states which are parties to the convention to protect the rights and freedoms established in the convention for their inhabitants. Article 2 ECHR protects the right to life, and Article 8 ECHR protects the right to respect for private and family life. According to the case law of the European Court of Human Rights (ECtHR), a contracting state is obliged by these provisions to take suitable measures if a real and immediate risk to people's lives or welfare exists and the state is aware of that risk.

The obligation to take suitable measures also applies when it comes to environmental hazards that threaten large groups or the population as a whole, even if the hazards will only materialise over the long term. While Articles 2 and 8 ECHR are not permitted to result in an impossible or disproportionate burden being imposed on a state, those provisions do oblige the state to take measures that are actually suitable to avert the imminent hazard as much as reasonably possible. Pursuant to Article 13 ECHR, national law must offer an effective legal remedy against a violation or imminent violation of the rights that are safeguarded by the ECHR. This means that the national courts must be able to provide effective legal protection.

Global problem and national responsibility (see paras. 5.6.1-5.8, below)

The risk of dangerous climate change is global in nature: [GHG] are emitted not just from Dutch territory, but around the world. The consequences of those emissions are also experienced around the world.

The Netherlands is a party to the United Nations Framework Convention on Climate Change (UNFCCC). The objective of that convention is to keep the concentration of [GHG] in the atmosphere to a level at which a disruption of the climate system through human action can be prevented. The UNFCCC is based on the premise that all member countries must take measures to prevent climate change, in accordance with their specific responsibilities and options.

Each country is thus responsible for its own share. That means that a country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope and that a reduction of its own emissions would have very little impact on a global scale. The State is therefore obliged to reduce [GHG] emissions from its territory in proportion to its share of the responsibility. 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.

What, specifically, does the State's obligation to do 'its part' entail? (see paras. 6.1-7.3.6, below)

When giving substance to the positive obligations imposed on the State pursuant to Articles 2 and 8 ECHR, one must take into account broadly supported scientific insights and internationally accepted standards. Important in this respect are, among other things, the reports from the IPCC. The IPCC is a scientific body and intergovernmental organisation that was set up in the context of the United Nations to handle climatological studies and developments. The IPCC's 2007 report contained a scenario in which the warming of the Earth could reasonably be expected to be limited to a maximum of 2°C. In order to achieve this target, the Annex I countries (these being the developed countries, including the Netherlands) would have to reduce their emissions in 2020 by 25-40%, and in 2050 by 80 95%, compared to 1990.

At the annual climate conferences held in the context of the UNFCCC since 2007, virtually every country has regularly pointed out the necessity of acting in accordance with the scenario of the IPCC and achieving a 25-40% reduction of [GHG] emissions in 2020. The scientifically supported necessity of reducing emissions by 30% in 2020 compared to 1990 has been expressed on multiple occasions by and in the EU.

Furthermore, since 2007, a broadly supported insight has arisen that, to be safe, the warming of the Earth must remain limited to 1.5°C, rather than 2°C. The Paris Agreement of 2015 therefore expressly states that the states must strive to limit warming to 1.5°C. That will require an even greater emissions reduction than was previously assumed.

All in all, there is a great degree of consensus on the urgent necessity for the Annex I countries to reduce [GHG] emissions by at least 25-40% in 2020. The consensus on this target must be taken into consideration when interpreting and applying Articles 2 and 8 ECHR. The urgent necessity for a reduction of 25-40% in 2020 also applies to the Netherlands on an individual basis.

The policy of the State (see paras. 7.4.1-7.5.3, below)

The State and Urgenda are both of the opinion that it is necessary to limit the concentration of [GHG] in the atmosphere in order to achieve either the 2C target or the 1.5C target. Their views differ, however, with regard to the speed at which [GHG] emissions must be reduced.

Until 2011, the State's policy was aimed at achieving an emissions reduction in 2020 of 30% compared to 1990. According to the State, that was necessary to stay on a credible pathway to keep the 2C target within reach.

After 2011, however, the State's reduction target for 2020 was lowered from a 30% reduction by the Netherlands to a 20% reduction in an EU context. After the reduction in 2020, the State intends to accelerate the reduction to 49% in 2030 and 95% in 2050. Those targets for 2030 and 2050 have since been laid down in the Dutch Climate Act. The State has not explained, however, that – and why – a reduction of just 20% in 2020 is considered responsible in an EU context, in contrast to the 25-40% reduction in 2020, which is internationally broadly supported and is considered necessary.

There is a broad consensus within climate science and the international community that the longer reduction measures to achieve the envisaged final target are postponed, the more comprehensive and more expensive they will become. Postponement also creates a greater risk of an abrupt climate change occurring as the result of a tipping point being reached. In light of that generally endorsed insight, it was up to the State to explain that the proposed acceleration of the reduction after 2020 would be feasible and sufficiently effective to meet the targets for 2030 and 2050, and thus to keep the 2C target and the 1.5C target within reach. The State did not do this, however. The Court

of Appeal was thus entitled to rule that the State must comply with the target, considered necessary by the international community, of a reduction by at least 25% in 2020.

The courts and the political domain (see paras. 8.1-8.3.5, below)

The State has asserted that it is not for the courts to undertake the political considerations necessary for a decision on the reduction of [GHG] emissions.

In the Dutch system of government, the decision-making on [GHG] emissions belongs to the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is up to the courts to decide whether, in taking their decisions, the government and parliament have remained within the limits of the law by which they are bound. Those limits ensue from the ECHR, among other things. The Dutch Constitution requires the Dutch courts to apply the provisions of this convention, and they must do so in accordance with the ECtHR's interpretation of these provisions. This mandate to the courts to offer legal protection, even against the government, is an essential component of a democratic state under the rule of law.

The Court of Appeal's judgment is consistent with the foregoing, as the Court of Appeal held that the State's policy regarding [GHG] reduction is obviously not meeting the requirements pursuant to Articles 2 and 8 ECHR to take suitable measures to protect the residents of the Netherlands from dangerous climate change. Furthermore, the order which the Court of Appeal issued to the State was limited to the lower limit (25%) of the internationally endorsed, minimum necessary reduction of 25-40% in 2020.

The order that was issued leaves it up to the State to determine which specific measures it will take to comply with that order. If legislative measures are required to achieve such compliance, it is up to the State to determine which specific legislation is desirable and necessary.

Conclusion

In short, the essence of the Supreme Court's judgment is that the order which the District Court issued to the State and which was confirmed by the Court of Appeal, directing the State to reduce [GHG] by the end of 2020 by at least 25% compared to 1990, will be allowed to stand. Pursuant to Articles 2 and 8 ECHR, the Court of Appeal can and may conclude that the State is obliged to achieve that reduction, due to the risk of dangerous climate change that could have a severe impact on the lives and welfare of the residents of the Netherlands."

5. Norway

262. In a judgment of 22 December 2020[160], the Supreme Court of Norway ruled on the compliance with the right to a healthy environment (Article 112 of the Constitution) of a Royal Decree of 10 June 2016 concerning petroleum production licences awarded for blocks on the Norwegian continental shelf in the marine areas (referred to as the south Barents Sea South and the southeast Barents Sea). The case also raised the issue of whether the decisions complied with Article 93 on the right to life or Article 102 on the right to respect for private and family life, and with the

[160] Supreme Court of Norway, *Nature and Youth Norway and Greenpeace Nordic v. the Ministry of Petroleum and Energy*, HR-2020-2472-P (case no. 20-051052SIV-HRET).

corresponding Articles 2 and 8 of the Convention. The Supreme Court concluded that the decision in question to award the licences violated neither Article 2 nor Article 8 of the Convention. Nor did it find a violation of Article 112 of the Constitution. The case is currently pending before the Court (*Greenpeace Nordic and Others v. Norway*, application no. 34068/21).

263. The relevant parts of the judgment read as follows:

"Subject matter

(2) This case concerns the validity of a royal decree of 10 June 2016. The decree – the decision – concerns ten petroleum production licences awarded for a total of 40 blocks or parts of blocks on the Norwegian continental shelf in the marine areas referred to as the south Barents Sea South and the southeast Barents Sea – the 23rd licensing round.

(3) The decision has its legal basis in section 3-3 of the Petroleum Act. The key issue raised is the decision's compliance with Article 112 of the Constitution on the right to a healthy environment. The case also raises the issue of whether the decisions complies with Article 93 on the right to life or Article 102 on the right to respect for private and family life, and with the corresponding Articles 2 and 8 of the European Convention on Human Rights – ECHR – or whether the decision is otherwise invalid due to procedural errors. The crux of the matter is the interpretation of Article 112 of the Constitution and to which extent it confers substantive rights on individuals that may be asserted in court.

(4) The parties agree that we are facing major challenges related to climate change, that at least a considerable share of the last century's temperature increase on Earth is due to [GHG] emissions, and that these emissions must be reduced to halt, and hopefully reverse, the trend.

(5) The overall constitutional issue is which role the courts are to play in the environmental work. The case touches upon the principle of separation of powers and the tripartite system of the legislature, the executive and the judiciary.

...

Is the decision incompatible with Article 2 or 8 of the ECHR, or Article 93 or 102 of the Constitution?

(167) There is no doubt that the consequences of climate change in Norway may lead to loss of human lives, for instance through floods or landslides. The question is yet whether there is an adequate link between production licences in the 23rd licensing round and possible loss of human lives, which would meet the requirement of 'real and immediate' risk.

(168) In my view, the answer is no. First, it is uncertain whether or to which extent the decision will actually lead to [GHG] emissions. Second, the possible impact on the climate will be discernible in the more distant future. Although the climate threat is real, the decision does not involve, within the meaning of the ECHR, a 'real and immediate' risk of loss of life for citizens in Norway. Thus, no violation of Article 2 of the ECHR is found.

...

(171) To this point, the Court of Human Rights has not assessed applications related to climate. However, the Court has recently communicated an application from six youths against Norway and 32 other countries. The case concerned the failure to cut emissions with particular reference to forest fires and heatwaves in Portugal in 2017

and 2018. Nonetheless, there is nothing in present case law to suggest that the subject matter in climate cases will differ from that in cases concerning environmental harm in general. With the significance the Court until now has ascribed to 'direct and immediate', I find it clear that the effects of possible future emissions due to the licences awarded in the 23rd licensing round do not fall within Article 8 of the ECHR.

(172) During the appeal hearing, particular attention has been given to the Urgenda case from the Netherlands. In this case, a declaratory judgment was sought by the Dutch environmental organisation Urgenda against the Dutch State. Urgenda requested a judgment affirming that the Dutch state had a duty within 2020 to reduce [GHG] emissions by 40 percent, or at least 25 percent, compared with 1990. The Dutch Supreme Court – Hoge Raad – upheld in a judgment 20 December 2019 (ECLI:NL:HR:2019:2007, unofficial English translation) the rulings of the lower instances, ordering the Dutch state to reduce [GHG] emissions by 25 percent within 2020, compared with 1990. Among other things, Hoge Raad cited Articles 2 and 8 of the ECHR.

(173) The judgment from the Netherlands has little transfer value to the case at hand. First, the Urgenda case questioned whether the Dutch government could reduce the general emission targets it had already set. It was thus not a question of prohibiting a particular measure or possible future emissions. Secondly, it was not a question of challenging the validity of an administrative decision.

(174) The environmental groups have finally mentioned that the Court of Human Rights may identify the content of the rights on the basis of international agreements constituting 'common ground' between the Member States, see the Grand Chamber judgment 12 November 2008 Demir and Baykara v. Turkey paragraphs 85–86. Such a principle may hardly be applied to environmental issues, as the ECHR does not have a separate environment provision. In any case, it has not been demonstrated that the production licences constitute a breach of our international obligations.

(175) I add that most of the supporting documents that have been submitted and added to the case in accordance with section 15-8 of the Dispute Act, generally relate to international obligations, both under the ECHR and international law in general. These contain nothing that changes my assessments.

(176) Against this background, the decision is not a violation of Article 2 or 8 of the ECHR."

6. Spain

264. In the case of *Greenpeace Spain and Others v. Spain*, several associations and five individuals challenged the relevant national Energy and Climate Plan on the grounds that its GHG emissions reduction target (reduction of GHG emissions of 23% by 2030, compared to 1990 levels) did not comply with the Paris Agreement. They asked the courts to modify the Plan by imposing a 55% GHG reduction target, compared to 1990 levels, by 2030.

265. On 24 July 2023 the Supreme Court (STS 3556/2023) dismissed the claimants' action holding that under the relevant domestic law, courts could not impose on the government a measure such as that requested in the present case unless there was a clear conflict of regulations with a higher norm that left no discretion to the executive, which had not been the case in the case at

hand. The Supreme Court noted that GHG reduction targets had very significant implications for the national economy and the government's socio-economic policies. Tightening them would impose significant sacrifices on present generations and granting the claim would amount to an excessive invasion into the prerogatives of the government. Moreover, the Plan was compliant with EU law, which reflected ambitious efforts in the fight against climate change. The European Union was in the process of updating its GHG reduction targets and Spain would have to coordinate its actions with EU law.

7. The United Kingdom

266. In *Plan B Earth and four other citizens v. Prime Minister*[161], the appellants unsuccessfully challenged before the High Court of Justice the lawfulness of the policies of the United Kingdom government relating to climate change. They alleged a breach of section 6 of the Human Rights Act 1998 by way of Article 2 and/or Article 8 of the Convention.

267. Discussing these claims, Mr Justice Bourne held, in particular:

> "The insuperable problem with the Article 2 claim (and with any Article 8 claim based on the physical or psychological effects of climate change on the Claimants) is that there is an administrative framework to combat the threats posed by climate change, in the form of the 2008 Act and all the policies and measures adopted under it.
>
> 49. That framework includes and contemplates the role of the CCC in advising on, and assessing, policies and measures. That framework is constantly evolving.
>
> ...
>
> 51. ... [T]he Court is not well equipped to form its own views on the matters in question. I am being invited to adopt the views expressed in selective quotations from the work of the CCC and others. When I refer to selective quotation I am not questioning the good faith of any of the parties. Rather I am pointing out that the Court does not have and cannot acquire expertise in this complex area, and will always be dependent on competing extracts from a global debate. Even if I could overcome the problem of selective quotation, I would not be equipped to assess the correctness of what is being quoted."

268. In the same case, ruling on an application to the Court of Appeal for permission to appeal against the High Court's refusal to grant permission to apply for judicial review, Lord Justice Singh refused the application and noted as follows[162]:

> "5. ... The fundamental difficulty which the Claimants face is that there is no authority from the European Court of Human Rights on which they can rely, citing the Paris Agreement as being relevant to the interpretation of the ECHR, Articles 2 and 8. They do rely on decisions of the highest courts of other parties to the ECHR, in particular the Supreme Court of the Netherlands, but, as the Judge observed in the present case, we do not know what the constitutional context was for such decisions.

[161] High Court of Justice, 21 December 2021, [2021] EWHC 3469 (Admin).
[162] Court of Appeal, 18 March 2022, CA-2021-003448.

> Section 2 of the HRA requires courts in this country to take into account relevant decisions of the European Court of Human Rights. In general, we follow those decisions."

8. Belgium

269. In the case of *VZW Klimaatzaak v. the Kingdom of Belgium and Others*, an association and 58,000 individuals brought an action against the Federal government, the Walloon Region, the Flemish Region and the Brussels-Capital Region, alleging that they had failed to meet the relevant GHG emissions reduction targets and asking the court to order the necessary measures to be undertaken in that respect.

270. On 17 June 2021 the Brussels Court of First Instance, accepting the standing of the association and the individuals, held that the defendants had breached their duty of care under the relevant domestic law, and the preventive duty under Articles 2 and 8 of the Convention, by failing to take necessary measures as regards the harmful effects of climate change. The court declined to set specific reduction targets on the grounds of the separation of powers.

271. On 30 November 2023 the Brussels Court of Appeal confirmed the finding of breaches of the domestic law and Articles 2 and 8 of the Convention by the defendants, save the Walloon Region. Considering, in particular, that the courts would not be infringing the principle of the separation of powers provided that the judge did not take the place of the authorities in choosing the means to remedy the breaches found, that court ordered the defendants to reduce GHG emissions by at least 55% compared to 1990 levels by 2030.

272. Unlike the domestic case-law noted in paragraphs 236 to 266 above, the Brussels Court of Appeal's judgment is, as at today, susceptible to a further challenge before the Court of Cassation.

THE LAW

I. PRELIMINARY ISSUES

A. The second applicant

273. In the course of the proceedings before the Court, the second applicant passed away. By letters of 12 August and 8 September 2021, Ms Schaub's representative informed the Court that her son and heir, Mr André Seidenberg, wished to continue the proceedings before the Court on his mother's behalf. The respondent Government did not object to this. In these circumstances, having regard to the Court's well-established case-law, the Court is the view that Ms Schaub's son has a legitimate interest and is entitled to pursue the proceedings (see *Taşkın and Others v. Turkey*,

no. 46117/99, § 102, ECHR 2004-X; *Jivan v. Romania*, no. 62250/19, §§ 25-26, 8 February 2022; and *Pavlov and Others v. Russia*, no. 31612/09, § 51, 11 October 2022). Indeed, having regard to the fact that the second applicant was a woman of advanced age, and that her complaint was linked to the effects of climate change on the category of population to which she belonged, it could be considered contrary to the Court's mission to refrain from ruling on the complaints raised by the recently deceased applicant just because she did not have the strength, owing to her advanced age, to live long enough to see the outcome of the proceedings before it (see, *mutatis mutandis*, *Hristozov and Others v. Bulgaria*, nos. 47039/11 and 358/12, § 73, ECHR 2012 (extracts)).

274. For practical reasons, Ms Schaub will continue to be considered the second applicant in the present judgment.

B. Scope of the complaint

275. In their additional observations of 13 October 2021 in the proceedings before the Chamber, the applicants explicitly elaborated on the issue of GHG emissions generated abroad and attributed to Switzerland through the import of goods for household consumption and as such forming part of Switzerland's "embedded emissions". The question arose, however, whether this complaint formed part of the applicants' complaints or "claims" referred to the Court in their original application. In the course of the Grand Chamber proceedings, this question was explicitly put to the parties and their answers to it differ.

1. The parties' submissions

276. The Government argued that the issue of GHG emissions generated abroad and attributed to Switzerland had not formed part of the applicants' complaints or "claims" made in the original application before the Court. The applicants had only raised this issue in their additional observations of 13 October 2021 before the Chamber. In any event, they had not raised this issue before the domestic courts but had rather explicitly asked the latter to oblige Switzerland to reduce GHG emissions on its own territory. In addition, a major part of the applicants' arguments before the Court was based on the State's commitments under the Paris Agreement, which concerned the level of national contributions and the domestic measures that needed to be taken. The Government were therefore of the view that the issue of GHG emissions generated abroad was either outside the scope of the present case or inadmissible for non-exhaustion of domestic remedies or for non-compliance with the six-month time-limit.

277. The applicants argued that the arguments they had raised in their observations during the Chamber proceedings concerning GHG emissions generated abroad and attributed to the respondent State formed part of their

complaints or "claims" made in the original application before the Court. In particular, in their observations they had explained that the effort that the State was obliged to make should be determined by reference not merely to the emissions that occurred on its territory but also by reference to external emissions. That had been an elaboration on their original complaint made in the application form, namely that the State had failed to take preventive measures to reduce emissions in line with the 1.5°C limit. Moreover, the Court could also *ex officio* seek to clarify their original complaint by taking the aspect of external emissions into account.

2. The Court's assessment

278. The relevant principles of the Court's case-law concerning the scope of the case before it may be summarised as follows (see, for instance, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018, and, most recently, *Grosam v. the Czech Republic* [GC], no. 19750/13, § 88, 1 June 2023):

> "126. [T]he scope of a case 'referred to' the Court in the exercise of the right of individual application is determined by the applicant's complaint. A complaint consists of two elements: factual allegations and legal arguments. By virtue of the *jura novit curia* principle the Court is not bound by the legal grounds adduced by the applicant under the Convention and the Protocols thereto and has the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under Articles or provisions of the Convention that are different from those relied upon by the applicant. It cannot, however, base its decision on facts that are not covered by the complaint. To do so would be tantamount to deciding beyond the scope of a case; in other words, to deciding on matters that have not been 'referred to' it, within the meaning of Article 32 of the Convention."

279. In the case at hand, it is important to note that it has been accepted in the reports by the relevant Swiss authorities[163], and elsewhere[164], that the GHG emissions attributable to Switzerland through the import of goods and their consumption form a significant part (an estimate of 70% for 2015)[165] of the overall Swiss GHG footprint. Indeed, the FOEN has stressed the following: "In a globalised economy, both the GHG emitted in Switzerland and those emitted abroad as a result of Swiss final demand must be recorded (total final consumption expenditure of households and the public sector). A large part of Switzerland's footprint is created abroad because imports make up a high proportion of the country's total consumption."[166]

280. It would therefore be difficult, if not impossible, to discuss Switzerland's responsibility for the effects of its GHG emissions on the

[163] See FOEN "Climate Change in Switzerland" (2020).
[164] See Our World in Data "CO_2 emissions embedded in trade" (available at www.ourworldindata.org; last accessed 14.02.2024).
[165] FOEN "Climate Change in Switzerland" (2020), p. 6.
[166] FOEN, Indicator Economy and Consumption (available at www.admin.ch ; last accessed 14.02.2024).

applicants' rights without taking into account the emissions generated through the import of goods and their consumption or, as the applicants labelled them, "embedded emissions". As the FOEN noted, these emissions "must be" taken into account in the overall assessment of Switzerland's GHG emissions. This means, in terms of the above-noted principles of the Court's case-law, that the Court needs to clarify, if necessary even of its own motion, these facts when assessing the applicants' original – and rather general – complaint that Switzerland had failed to reduce its GHG emissions in line with the 1.5°C target.

281. Moreover, it is important to note that in an annex submitted together with the application form, when elaborating on their complaints, the applicants underlined that the "Respondent [should] do everything in its power to do its share to prevent a *global temperature increase* of more than 1.5°C above pre-industrial levels" (emphasis added). As far as the present discussion is concerned, this suggests that the applicants did indeed intend to cover in their complaints the overall Swiss contribution to the global effects of climate change. It is therefore acceptable, in terms of the Court's case-law, that they sought to complete and clarify their complaints later in the written proceedings by elaborating on, *inter alia*, the issue of "embedded emissions".

282. As regards the Government's argument that the applicants failed to raise this issue at the domestic level, it should be noted that in their request for a legal remedy they raised the same issue as the one raised before the Court relating to Switzerland's overall contribution to global temperature increase (see paragraph 22 above). While it is not possible to draw any conclusion as regards the domestic courts' position on this matter (including the issue of "embedded emissions"), as they did not examine the merits of the applicants' legal action, it is indicative to note that the DETEC rejected the applicants' action on the grounds that the general purpose of their request was to achieve a reduction in CO_2 emissions worldwide and not only in their immediate surroundings (see paragraph 30 above).

283. In these circumstances, it follows that the applicants' complaint regarding the "embedded emissions" falls within the scope of the case and that the respondent Government's objection in that respect must be dismissed. This is, of course, without prejudice to the examination of the actual effects of "embedded emissions" (namely Switzerland's import of goods for household consumption) on the State's responsibility under the Convention.

C. Jurisdiction

1. The parties' submissions

284. The Government did not contest that Switzerland had jurisdiction in regard to the applicants as regards the complaint about the domestic GHG emissions and their effects on climate change. However, as regards GHG emissions generated abroad, the Government, relying on the Court's

well-established case-law (citing, *inter alia*, *M.N. and Others v. Belgium* (dec.) [GC], no. 3599/18, 5 May 2020), argued that the issue did not fall under any of the exceptional criteria for establishing the State's extraterritorial jurisdiction.

285. In the Government's view, the only issue that could arise was whether the Court had jurisdiction to examine whether Switzerland had complied with any obligations it might have to take measures within the limits of its own jurisdiction and its own powers to reduce GHG emissions generated abroad. However, the Government pointed out, in particular, that the Court's case-law did not accept the cause-effect notion of jurisdiction and that the sole capacity of a State to act could not establish its jurisdiction (citing, *inter alia*, *H.F. and Others v. France* [GC], nos. 24384/19 and 44234/20, § 199, 14 September 2022). The Government therefore argued that GHG emissions generated abroad could not be considered to attract the responsibility of Switzerland as those emissions could not be directly linked to any alleged omissions on the part of Switzerland, whose authorities did not have direct control over the sources of emissions. Moreover, the whole system established by the UNFCCC, the Kyoto Protocol and the Paris Agreement was based on the principle of territoriality and the responsibility of States for emissions on their territory. In this context, the Government also submitted that the principle of interpreting the Convention as a living instrument was not applicable as regards the issue of jurisdiction under Article 1 of the Convention (citing *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, §§ 63-66, ECHR 2001-XII). Thus, in their view, establishing jurisdiction for GHG emissions generated abroad would go too far and would run counter to the very nature of the concept of jurisdiction under the Convention.

286. The applicants argued that no issue arose as to jurisdiction under Article 1 of the Convention. Their complaint concerned the failure of the respondent State to take the necessary measures to reduce GHG emissions within its territorial jurisdiction. The applicants did not argue that the State should take or had taken measures outside of its territory, nor that it was violating the rights of persons outside of its territory nor that it should exercise jurisdiction over persons outside its territory.

2. The Court's assessment

287. The Court is of the view that no genuine issue of jurisdiction, within the meaning of Article 1 of the Convention, arises in the context of the complaint about "embedded emissions". The Court notes in particular that all the applicants are residents of Switzerland, and thus under its territorial jurisdiction, which means that under Article 1 of the Convention Switzerland must answer for any infringement attributable to it of the rights and freedoms protected by the Convention in respect of the applicants (see *Duarte Agostinho and Others*, cited above, § 178). Thus, the applicants' complaint

concerning "embedded emissions", although containing an extraterritorial aspect, does not raise an issue of Switzerland's jurisdiction in respect of the applicants, but rather one of Switzerland's responsibility for the alleged effects of the "embedded emissions" on the applicants' Convention rights. The issue of responsibility, however, is a separate matter to be examined, if necessary, in relation to the merits of the complaint (ibid.).

288. Against the above background, the Court dismisses the Government's objection concerning the lack of jurisdiction.

D. Compliance with the six-month time-limit

289. The Government pointed out that the application had been lodged with the Court on 26 November 2020, and the final domestic court decision had been adopted on 5 May 2020, namely more than six months earlier. Although in the relevant period the Court had published a press release indicating that the time-limit for the lodging of individual applications had been extended owing to the exceptional circumstances of the COVID-19 pandemic, the Government were of the view that the six-month time-limit set out in Article 35 § 1 of the Convention could not be extended in this manner. In any event, the applicants had not been affected by any *force majeure* in the relevant period and could have lodged their application within the relevant six-month time-limit.

290. The Court notes that the issue raised by the Government in the present case as regards the extension of the time-limit for the lodging of individual applications in the context of the exceptional circumstances of the COVID-19 pandemic has already been clarified in the case-law (see *Saakashvili v. Georgia* (dec.), nos. 6232/20 and 22394/20, §§ 57-58, 1 March 2022; *Makarashvili and Others v. Georgia*, nos. 23158/20 and 2 others, §§ 47-48, 1 September 2022; *Kitanovska and Barbulovski v. North Macedonia*, no. 53030/19, § 40, 9 May 2023; and *X and Others v. Ireland*, nos. 23851/20 and 24360/20, § 58, 22 June 2023). The Court sees no reason to revisit this case-law. The Government's objection is therefore dismissed.

II. INTRODUCTORY REMARKS REGARDING THE COMPLAINTS RAISED IN THE PRESENT CASE

291. Complaining about the failures by the Swiss authorities to mitigate climate change, and in particular the effects of global warming, including a lack of access to a court in that connection, the applicants relied on Articles 2, 6, 8 and 13 of the Convention.

292. The Court notes that there is a close link between the substantive obligations under the various Convention provisions which come into play in the present context. This is owing to the fact that the Convention should be interpreted so as to achieve internal consistency and harmony between the

various provisions (see paragraph 455 below) and the fact that the State's positive obligations in the environmental context under Articles 2 and 8 largely overlap (see *Brincat and Others v. Malta*, nos. 60908/11 and 4 others, §§ 85 and 102, 24 July 2014).

293. Similarly, while Article 6 affords a procedural safeguard, namely the "right to a court" for the determination of one's "civil rights and obligations", Article 8 serves the wider purpose of ensuring proper respect for, *inter alia*, private life. The decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8 (see, for instance, *Zammit Maempel v. Malta*, no. 24202/10, § 32, 22 November 2011, with further references). It may, therefore, in some instances be sufficient to examine the case, including the issues of the requisite procedural safeguards, from the perspective of Article 8 (ibid., § 33), while in others, the Court may decide to examine both provisions separately (see, for instance, *Taşkın and Others*, cited above, §§ 118-25 and 135-38). This is a matter that can only be decided on the basis of the circumstances of a particular case.

294. The same approach applies as regards the procedural safeguards under Article 13 of the Convention, which the Court may or may not find it necessary to examine in addition to its assessment under the relevant substantive provision (see, for instance, *Kolyadenko and Others v. Russia*, nos. 17423/05 and 5 others, §§ 227-28, 28 February 2012, and *Cordella and Others v. Italy*, nos. 54414/13 and 54264/15, §§ 175-76, 24 January 2019). In any event, and as regards the relationship between Articles 6 and 13, it is the established case-law of the Court that the requirements of the latter are less strict than those of the former. Thus, the Court often considers that the requirements of Article 13 are absorbed by those of Article 6 (see, for instance, *FU QUAN, s.r.o. v. the Czech Republic* [GC], no. 24827/14, § 85, 1 June 2023; see also *Association Burestop 55 and Others v. France*, nos. 56176/18 and 5 others, § 64, 1 July 2021).

295. With these considerations in mind, the Court will first proceed by identifying the content of the State's obligations under the substantive Convention provisions – Articles 2 and 8 of the Convention. It will examine separately the complaints raised under Articles 6 and 13.

III. ALLEGED VIOLATION OF ARTICLES 2 AND 8 OF THE CONVENTION

296. The applicants complained of various failures by the Swiss authorities to mitigate climate change – and in particular the effect of global warming – which had adversely affected the lives, living conditions and health of the individual applicants and members of the applicant association. They relied on Articles 2 and 8 of the Convention.

297. The relevant part of Article 2 provides as follows:

"1. Everyone's right to life shall be protected by law ..."

298. The relevant part of Article 8 reads as follows:

"1. Everyone has the right to respect for his private and family life, his home ..."

A. The parties' submissions

1. The applicants

(a) Preliminary remarks

299. According to the applicants, there was no doubt that climate change-induced heatwaves had caused, were causing and would cause further deaths and illnesses to older people and particularly women. This message had been part of the respondent State's communication with its citizens regarding the public-health impacts of climate change.

300. The individual applicants argued that they were part of a vulnerable group owing to their age and gender. In particular, many members of the applicant association explained how they were affected by climate change. The second applicant had suffered, and the third applicant still suffered, from cardiovascular diseases, while the fourth and fifth applicants suffered from respiratory diseases. The relevant risk to the second to fourth applicants had already materialised, as evidenced by their medical certificates. In addition, the second to fifth applicants had described in personal statements how their health and well-being were affected by heatwaves.

301. The Swiss authorities were well aware of the risks associated with climate change and the necessity to address them. They had acknowledged these risks in their public communications, by endorsing the findings of the IPCC and by taking part in the UNFCCC and in the Paris Agreement. However, the authorities had failed to set binding climate targets for 2030 and 2050 and their climate strategy was not in line with the 1.5°C limit. Moreover, the authorities had failed to meet their own inadequate climate targets. At the same time, Switzerland was able to do its share, namely, to reduce the risk of heat-related excess mortality and morbidity.

302. In this connection, the applicants argued that Switzerland's 2020 climate target had been intended to meet the (outdated) 2°C limit. After committing to the 1.5°C limit, the Swiss 2030 target underwent only a superficial update. The intended reductions were not only wholly inadequate, but their inadequacy had been aggravated by a reduction in domestic ambition. Neither the 1.5°C long-term temperature goal itself nor 1.5°C compatible emission reduction targets had been enshrined in national law, nor was there an intention to do so. The applicants' complaint therefore related to the current climate situation in Switzerland and to the inadequacy of the targets set for 2030 and 2050.

303. Under its current climate strategy, Switzerland planned to emit more emissions than an "equal per capita emissions" quantification approach

would entitle it to do. In any event, an "equal per capita emissions" burden-sharing approach was not a valid approach to determine national "fair shares" in reducing GHG emissions. The general understanding, embodied in the Paris Agreement and the Rio Declaration[167], was that a fair level of contribution reflected the "highest possible ambition" and "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances".

304. The applicants argued that Switzerland's current climate strategy fell far short of meeting a "fair share" contribution towards the global mitigation target of 1.5°C. A fair contribution would require Switzerland to strengthen domestic reductions and – through financing emission reduction in other countries – attain a net-negative GHG emission level in 2030 with reductions of 160% and up to 200% below the 1990 emission levels for a 50% chance of meeting the 1.5°C limit. As regards the strengthening of the domestic emission reduction commitments within the "fair share" standard, Switzerland would need to ensure domestic GHG emission reductions of more than 60% below 1990 levels by 2030. However, this could not be realistically achieved with the measures currently envisaged in the domestic legislation.

(b) Victim status

305. The applicants contended that they were all (the applicant association and applicants nos. 2-5) victims, within the autonomous meaning of Article 34 of the Convention, of a violation of Articles 2 and 8 of the Convention on account of the ongoing failure of the respondent State to afford them effective protection against the effects of global warming. In particular, the applicants considered that they were victims as they were directly affected by the impugned measures. The term "victim" was an autonomous concept which should be interpreted in an evolutive manner and not applied in a rigid, mechanical, or inflexible way. It was sufficient that a violation was conceivable, whether it had materialised should be decided on the merits.

(i) The applicant association

306. As regards, specifically, the victim status of the applicant association, the applicants submitted that, albeit it had legal personality, it should simply be seen as a group of individuals, every single member of which was an individual directly affected by the failures of the respondent State in a similar way to applicants nos. 2-5 (who are also members of the applicant association). Accordingly, this complaint was not an *actio popularis*. The applicant association was not bringing an action in the general or public interest (even if the interests of its members aligned with those of the general public) since climate change mitigation measures could never

[167] Rio Declaration on Environment and Development, 1992.

benefit certain population groups exclusively. Rather, the applicant association should be seen as a means enabling the physical persons to bring their complaint before the Court. To preclude the applicant association's application under Articles 2 and 8 by virtue of the fact that it was a legal person, would be to ignore reality and would be out of line with the principle that the Convention rights should be practical and effective. Moreover, the Court should ensure that its approach to the notion of victim status was in line with the Aarhus Convention which essentially provided for a possibility that associations could substitute individuals in pursuit of environmental actions.

307. Referring to *Gorraiz Lizarraga and Others v. Spain* (no. 62543/00, ECHR 2004-III), the applicants pointed out that, similar to in that case, the applicant association had been set up for the specific purpose of bringing its members' interests before the courts. Its members, as part of a particularly vulnerable group, were directly concerned by the respondent State's omissions regarding climate protection and the applicant association was there to ensure that they had the ability to bring their claim before the Court. Thus, allowing the applicant association to claim victim status in respect of its individual members meant ensuring that members of this particular group were able to exercise their rights in the long term. This was particularly true given the fact that bringing a standalone case of this dimension through the domestic courts in Switzerland before approaching the Court would have been prohibitively expensive for most individuals. Indeed, given the complexity and cost of climate litigation it was not surprising that associations had played an increasingly significant role in such cases in recent years and had been more successful than individual plaintiffs in doing so.

(ii) Applicants nos. 2-5

308. Applicants nos. 2-5 had suffered and continued to suffer directly and personally from heat-related afflictions, and with every heatwave they had been and continued to be at a real and serious risk of mortality and morbidity greater than the general population solely because they were women over the age of 75. The risk to the present applicants was even higher compared with other older women owing to their respiratory and cardiovascular diseases. Applicants nos. 2-5 were also direct victims owing to the cumulative effect of all the consequences they had already experienced and would experience in the future. Thus, their complaint was specific and did not concern a general degradation of the environment.

309. In the applicants' view, it was beyond reasonable doubt that the risks posed by climate change-induced heatwaves to the particularly vulnerable group of older women would inevitably materialise in individual cases. The burden of proof was therefore on the State to show that their health afflictions had not been caused by excessive heat, contrary to the medical evidence provided by them.

310. In addition, applicants nos. 2-5 were potential victims because the respondent State's ongoing failure to take the necessary steps to reduce emissions in line with the 1.5°C limit would significantly increase their risk of heat-related mortality and morbidity. In their view, it was beyond doubt that climate change-induced heatwaves would increasingly cause further deaths and illnesses in older women with chronic diseases, which was a group of people to which they belonged. The applicants submitted that they had established this by reference to sound and detailed evidence (epidemiological data and other scientific evidence) so as to demonstrate the real probability of the occurrence of further violations of their rights. The IPCC had found that, on current trajectories, 1.5°C would be reached by the first half of the 2030s, or even the late 2020s.[168] The applicants hoped and expected to be alive at that time.

311. The applicants were members of a particularly vulnerable group. Heat-related deaths were not distributed randomly across the population but occurred especially in older women. Both the members of the applicant association and applicants nos. 2-5 belonged to this specific segment of the population which was particularly affected by climate change owing to their age and gender. Applicants nos. 2-5 were even more vulnerable owing to their chronic diseases. They were both personally, and as members of the particularly vulnerable group of women aged over 75, especially affected by the effects of rising temperatures in comparison with the general population.

(c) Applicability of the relevant Convention provisions

(i) Article 2 of the Convention

312. The applicants argued that Article 2 was engaged by the failure of the respondent State to take the necessary steps to reduce emissions in line with the 1.5°C limit so as to mitigate the effect of increasing temperatures. As a result of increasing temperatures, the lives of applicants nos. 2-5 and of the members of the applicant association were at real and serious risk. The recurring heatwaves had already led to heat-related excess mortality and morbidity in the older-women group; there was evidence of the seriousness of the risk presented to the applicants by ongoing climate change and proof that the applicants had, owing to their chronic diseases, already suffered harm and continued to be at particularly high risk.

313. In these circumstances, under Article 2, the State had the obligation to take appropriate steps to safeguard the lives of applicants nos. 2-5 and of the members of the applicant association. This related, in particular, to the positive obligation of the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life. In the applicants' view, this obligation arose where there was a known and serious risk to life. However, for this obligation to arise it was not

[168] Citing AR6 (cited above), Summary for policymakers, B.1 and footnote 29.

necessary to demonstrate the existence of an imminent or immediate risk to life, which was relevant only in relation to an operational duty, and that duty was not at issue in the present case.

314. In any event, there was an immediate risk posed by climate change related to the adverse events to which it led, as had been demonstrated with sufficient scientific evidence. Even assuming that there was any lack of certainty as to the effects of climate change, consistent with the principle that the Convention could not be interpreted in a vacuum, the precautionary principle would have to be applied, so as to encompass the concepts of directness, inevitability and irreversibility.

315. The applicants argued that they had provided sufficient evidence to demonstrate the facts as regards the causal link between the respondent State's failure to tackle climate change and the physical and psychological effects on them. As regards the causation test, they stressed that the fact that multiple States were responsible for GHG emissions did not absolve the respondent State of its responsibility. The causal test that should be applied in the context of climate change was whether there was individual, partial or joint responsibility to contribute to the fight against dangerous climate change (which they considered to be in line with Article 47 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts[169]). In this context, partial responsibility arose from partial causation, even if a single State could not prevent an outcome on its own. This accorded with the Court's approach to causation in the context of the rejection of the "but for" test (citing, *inter alia*, *O'Keeffe v. Ireland* [GC], no. 35810/09, § 149, ECHR 2014 (extracts)) and with the approach taken at the level of national jurisdictions in the context of climate-change litigation. Moreover, in this latter context, the argument of States that their emissions were only a small contributing cause to climate change (the so-called "drop-in-the-ocean argument") had been rejected. That could not absolve the State of its responsibility. Indeed, a single State's actions in combating climate change contributed substantively to creating the mutual trust necessary for other States to act.

(ii) Article 8 of the Convention

316. The applicants argued that the serious threat to their health, well-being and quality of life posed by dangerous climate change sufficed to trigger positive obligations under Article 8, which would also have been the case even if their state of health had not deteriorated or had not been seriously endangered. In the applicants' view, Article 8 included their right to personal autonomy and their right to age with dignity.

317. When examining the applicability of Article 8, the Court should have regard to the fact that the relevant circumstances and data established the real

[169] International Law Commission, Responsibility of States for Internationally Wrongful Acts, 2001 ("ILC Articles").

and serious risk posed by climate change-induced heatwaves to their health and well-being. The respondent State was aware of the real and serious risk of harm to the applicants. The applicants considered that they had established a direct causal link between the respondent State's omissions contributing to climate change and its harmful effects on them. In any event, proof of a direct causal link was not a necessary precondition for Article 8 to be engaged (citing *Tătar v. Romania*, no. 67021/01, § 107, 27 January 2009).

318. The applicants rejected the possibility that the respondent State could take the position that increased temperatures caused by climate change should be treated as a normal part of everyday life. The extreme consequences of climate change and the fact that Switzerland had engaged itself under international law to take steps to mitigate its effects showed that it was anything other than part of "normal life". Referring to their submissions under Article 2, the applicants argued that the cumulative effects of all the consequences they had already experienced and would experience showed that the necessary threshold for applicability of Article 8 had been reached.

(d) Merits

319. The applicants submitted that under Article 2 of the Convention the Court needed to determine whether, given the circumstances of the case, the State had done all that could have been required of it to prevent their life from being avoidably put at risk (citing *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III). The risks climate change posed to the lives of applicants nos. 2-5 and the other members of the applicant association were comparable to, and potentially greater than, those with which the Court had been faced to date. In particular, in view of the magnitude of the risks posed by climate change, the clear science, the urgency of the situation and the clear ultimate objective of the UNFCCC, the State had a positive obligation to take all measures that were not impossible or disproportionately economically burdensome with the objective of reducing GHG emissions to a safe level. The situation required the State to do everything in its power to protect the applicants.

320. The scope of the respondent State's obligation to protect derived in particular from relevant rules and principles of international law, evolving norms of national and international law, and the consensus emerging from specialised international instruments and from the practice of Contracting States. Having regard to the harmonious interpretation of the Convention taken together with these considerations, the applicants argued that to comply with its positive obligation to protect them effectively, the State was required to do everything in its power to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels. This necessarily included establishing a legislative and administrative framework to achieve that objective. The principle of harmonious interpretation also helped to clarify the ambiguity around the respondent State's exact "fair share" of the

required global mitigation effort, and the question whether the scope of the obligation to protect extended to emissions occurring abroad. In this respect, the commitments undertaken by the State under the UNFCCC and the Paris Agreement were of particular importance as they, together with the IPCC findings, demonstrated the State's knowledge of the real and serious risk of harm posed to the applicants by climate change, including extreme heatwaves. Moreover, the relevant scientific studies and the established standards[170] needed to inform the scope of the State's obligations.

321. In view of these considerations, the applicants contended that the respondent State had failed to take the necessary steps to mitigate the harm and risk to them caused by climate change. Specifically, it had done significantly less than its share to prevent a global temperature increase of more than 1.5°C. Contrary to what was required, the Swiss climate strategy was not in line with the 1.5°C limit. Instead, there was a long history of failed climate action. Also, the State had failed to set any domestically binding climate targets for 2030 and 2050 and had failed to meet its (inadequate) 2020 climate target. The mitigation potential in Switzerland remained largely unused, partly without any justification, partly on the justification of high costs, which was not evidenced and was – in so far as Switzerland was concerned – not a relevant consideration. The applicants stressed that the burden of proof was on the Government to demonstrate, using detailed and rigorous data, that the State had taken the necessary action. However, in Switzerland, the decisions had not been based on scientific studies and the State had in fact decided to dispense with its consultative body on climate change which had pointed to the inadequacy of the climate targets as long ago as 2012.

322. With respect to the Government's explanation as to Switzerland's failure to determine a national carbon budget – and thus to establish its climate policy on the basis of a quantitative assessment (see paragraph 360 below) – the applicants were of the view that there were fundamental misconceptions underlying the State's approach.

323. In this connection, the applicants had commissioned an expert report[171] to assess the methodology used in the 2012 Policy Brief on which the State relied[172]. The expert report applied the methodology of the Policy Brief to the remaining global 1.5°C budget from the IPCC's AR6 and determined a remaining budget for Switzerland of 381 Mt CO_2e from 1 January 2022 onwards. The expert report calculated that, based on Switzerland's current and planned emission reduction targets, this budget would be depleted by between 2030 and 2033. On the basis of its current and planned targets, Switzerland would apportion itself 0.2073% of the remaining

[170] Citing, *inter alia*, the 2015 Oslo Principles on Global Climate Change Obligation.
[171] Robiou du Pont and Nicholls, "Calculation of an emissions budget for Switzerland based on Bretschger's (2012) methodology" (2023).
[172] See footnote 180 below.

global CO_2 budget as of 2022, compared to a population share of 0.1099%. For Switzerland to stay within the budget as defined by the methodology of the Policy Brief, it would need to achieve net-zero emissions by 2040, and thus well before its current target of net zero by 2050. The expert report also noted several shortcomings of the methodology in the Policy Brief which made it unsuitable to inform "fair share" targets for countries.

324. The IPCC had also engaged with assessments of effort-sharing methodologies. In its most recent AR6, the IPCC had explicitly recognised the importance for countries to explain how fairness principles were "operationalised" and to express their targets in terms of the portion of the remaining global budget.[173] The same approach of the necessity to quantify a State's fair share had been followed in the national climate litigation in Germany and the Netherlands. On the other hand, and as regards the respondent State's reliance on the IPCC's global emission reduction pathways, the applicants stressed that it had been recognised by the IPCC itself that these could not be taken as explicit assumptions about global equity, environmental justice or intra-regional income distribution[174].

325. The studies provided by the applicants – notably by the CAT and Climate Analytics[175] and Rajamani et al. – provided an appropriate common ground for the applicants' submissions. They built upon the assessment of effort-sharing studies as reported by the IPCC in its AR5, updated with more recent studies and historical data. They therefore covered an even broader spectrum of effort-sharing methodologies as compared to the AR4 assessment. In contrast, the respondent State had not provided *any* quantified justification for the fairness of its emission target. Its reliance on an approach that came close to a budgetary approach was flawed and clearly insufficient. Upon the applicants' explicit request for it to do so, in a letter of 10 March 2021, the FOEN had, however, failed to demonstrate that in its assessment of Switzerland's climate policy it had relied on the Policy Brief or the internal assessment now provided by the Government before the Court, which were in any event documents based on flawed methodology (see paragraph 323 above).

326. The effort-sharing studies provided by the applicants only determined the "fair share" level of emission reductions for a country, and whether these reductions needed to be achieved domestically. Alleged technical difficulties and the high costs of reducing emissions within the respondent State's territory were irrelevant for the determination of the level of responsibility for overall emission reductions, which could also be achieved through supporting countries with lower levels of responsibility and

[173] Citing AR6 WGIII (full report), p. 1468.
[174] AR6 SYR (cited above), p. 29.
[175] The applicants provided letters by Climate Analytics and CAT of 26 April 2023 providing further explanations as regards the applied methodologies.

capability. Switzerland would therefore clearly be capable of achieving the requisite mitigation measures.

327. In short, the applicants submitted that Switzerland's action to tackle climate change was inadequate for the following reasons: (a) Switzerland had failed to legislate for the minimum possible requisite emissions reduction targets for 2020, and had then failed to meet that inadequate emissions reduction target; (b) the 2030 proposed target was manifestly inadequate and had not even been given legislative effect; and (c) Switzerland's 2050 proposed target was inadequate in so far as it did not commit Switzerland to net-zero domestic emissions and this too had not yet even been given legislative effect.

328. Against the above background, the applicants contended that the State had failed and continued to fail to protect them effectively, in violation of their right to life under Article 2 of the Convention.

329. The applicants also pointed out that in environmental matters, the scope of the positive obligations under Article 2 largely overlapped with those under Article 8 (citing, *inter alia*, *Kolyadenko and Others*, cited above, § 216). They therefore considered that the same considerations outlined above concerning Article 2 also applied to their complaint under Article 8. In addition, as regards a fair balance between the competing interests of the individual and the community as a whole (which was of relevance under Article 8), the applicants stressed that in the present context there was no conflict of interest. On the contrary, it was in the interests of the community as a whole that the State adopt preventive measures to reduce the likelihood of global temperatures exceeding the 1.5°C limit, as provided in the Paris Agreement. However, it would be a misrepresentation of their complaint to consider that they sought from the Court for the Paris Agreement to be applied. They only asked the Court to rule on whether Switzerland had violated their rights under the Convention.

330. The scope of the State's margin of appreciation was limited because the complaint concerned an issue of compliance with international standards recognised by the State itself. It also concerned the risk of a man-made disaster and a violation of fundamental rights protected by Article 2 of the Convention. The urgency of the situation and the risk of irreversible harm also pointed to a narrow margin of appreciation. While the applicants accepted that it was for Switzerland to decide what measures to take to give effect to targets and to that extent it had a margin of appreciation, no such margin existed in relation to the fixing of the targets themselves, nor the need for legislation to give them practical effect. This was because there was only one way to prevent the 1.5°C limit from being breached and that was for global emissions to not exceed the remaining carbon budget, which should be shared fairly between States.

331. The scope of the respondent State's obligation to protect under Articles 2 and 8 needed to be interpreted in the light of the relevant

international instruments, which manifested an international trend (and international obligations) on the measures that needed to be taken to address the serious and profound risks of climate change. This related, in particular, to the commitments undertaken by the State under the UNFCCC and the Paris Agreement, as well as the 2021 Glasgow Climate Pact which had confirmed 1.5°C as the primary global temperature rise ceiling.

332. The prevention principle and the precautionary principle were important sources in determining the scope of the obligation to protect through harmonious interpretation of the Convention (citing Article 3 § 3 of the UNFCCC and the Draft Articles on Prevention of Transboundary Harm[176]). The requirements of "prevention" and "precaution" covered the full range of preventive measures, whether taken in the context of scientific uncertainty or not. In its case-law, the Court had also referred to the precautionary principle (citing *Tătar*, cited above, §§ 109-20).

333. Further important sources for determining the scope of the obligation to protect through harmonious interpretation of the Convention were evolving norms of national and international law and the consensus emerging from specialised international instruments and from the practice of States. Over the past decade, a wide range of judicial, quasi-judicial and other institutions at the national, regional and international level had recognised the significant impact that climate change was already having, and would have in future, on the enjoyment of a wide range of human rights, including the rights to life and health. In this respect, the UN General Assembly Resolution 76/300 was to be seen as a major and recent development at the international level which explicitly recognised "the right to a clean, healthy and sustainable environment as a human right". All the Contracting States had voted in favour of this Resolution. The common ground could also be seen in the European Climate Law[177], which contained the agreement as to the minimum emissions reductions that had to be made and which was far more ambitious than the reductions envisaged by Switzerland.

334. As scientific developments had shown, there was now no doubt as to the catastrophic implications of climate change and the real urgency of taking the necessary measures to address it. This had been recognised in the UNFCCC. However, since its adoption, the urgency had increased significantly, as recognised in the need for and adoption of the Paris Agreement. The scientific consensus now was that there remained very little time, if any, to prevent catastrophic temperature increases. Accordingly, in the applicants' view, in construing and applying Convention rights, the Court had to have regard to this scientific consensus: that climate change had existential implications for life on Earth, that there was a real risk of exceeding critical further thresholds known as "tipping points", and that

[176] International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, 2001.
[177] Regulation (EU) 2021/1119, cited above.

significant climate change mitigation measures had to be taken as a matter of extreme urgency to avoid the most catastrophic impacts, even if all impacts could no longer be avoided.

335. Although the applicants could agree that adaptation was also crucial, it was not an answer to what Switzerland should have done to mitigate climate change. Even with adaptation measures, there would be increases in heat-related mortality overall, and with increasing temperatures, the potential for adaptation was increasingly limited.[178]

336. It was widely recognised internationally that averting climate change was an inherent part of the obligation on States to protect human rights.[179] This had also been recognised at the national level by the domestic courts. Were the Court to decide that those domestic courts had been wrong in their analysis that the failure of States and corporate entities to take sufficient measures to mitigate climate change engaged (and indeed on the facts of those cases, violated) Articles 2 and 8 of the Convention, that would amount to a significant setback in tackling climate change. The risks associated with such a setback could not be adequately averted by a possible reliance by the Court on the fact that under Article 53 of the Convention, domestic courts were entitled to go beyond what was required by the Convention.

2. The Government

(a) Preliminary remarks

337. The Government pointed out that global warming was one of the most important challenges for humanity. It had already created effects in different regions of the world and would certainly be felt even more in the future. There was therefore urgency to put in place, and effectively apply, a series of measures to tackle climate change and to limit its effects to the maximum possible extent. Only collective action by the States, combined with the individual effort of citizens, could provide a durable solution to the effects of global warming. Switzerland, as an Alpine State particularly affected by climate change, had already recognised the problem of global warming and had taken various measures to address it. However, it was important to note that globally Switzerland's contribution to GHG emissions was only some 0.1%.

338. While the Government accepted that in democratic societies the public legitimately sought to put pressure on the authorities to address climate change, they were of the view that the system of individual application under the Convention was not the appropriate means to do that given, in particular, the principle of subsidiarity. The democratic institutions in the political

[178] Citing AR6 WGII (cited above); study Rupert Stuart-Smith, Ana Vicedo-Cabrera, Sihan Li et al., "Quantifying heat-related mortality attributable to human-induced climate change" (2023).
[179] Citing HRC, *Daniel Billy et al. v. Australia*, cited above.

system of Switzerland provided sufficient and appropriate means to address concerns relating to climate change, and a "judicialisation" of the matter at the international level would only create tension from the perspective of the principle of subsidiarity and the separation of powers. In any event, the Court could not act as a supreme court for the environment, given, in particular, the evidentiary and scientific complexity of the matter. In the present case the Court could examine the facts relating to climate change only up to 5 May 2020, which was the date of the final domestic court decision in the applicants' case, since the period after that date had not been examined by the domestic courts.

339. Moreover, the present case could only be relevant in so far as Articles 6 and 13 were concerned in relation to a complaint that the domestic courts had not examined the merits of the applicants' complaint (owing to their failure to meet the admissibility requirements). However, as regards Articles 2 and 8 of the Convention the Court could not act as a first-instance court concerning climate-change issues.

(b) Victim status

(i) The applicant association

340. The Government noted that in the present case the domestic courts had left open the question whether the applicant association had victim status. However, it was clear that nothing prevented the applicant association from exercising its activities in the realisation of the objectives for which it had been established.

341. They further stressed that since the Convention did not recognise the possibility of an *actio popularis* complaint, associations could not have victim status unless they were directly affected by the impugned measure. Moreover, some Convention rights could not, by definition, be exercised by associations. In the Government's view, the applicant association could not claim to be the victim of a violation of Articles 2 and 8 as it could not rely on the right to life or the right to respect for private and family life.

(ii) Applicants nos. 2-5

342. The Government accepted that heatwaves (temperatures above 30°C for several days and not falling below 20°C at night) could pose a health risk and could even be fatal for older persons or those suffering from (chronic) illnesses, pregnant women or young children. However, studies had found that not all deaths caused by heat were linked to global warming. While applicants nos. 2-5 belonged to one of the categories at risk from heatwaves, the exact age of the person concerned was only one factor, which made it impossible to take all older persons as a single category at particular risk. It would not appear that women were at a higher risk compared to men of the same age. In any event, it was not possible to establish the victim status of an

applicant solely on the grounds that he or she belonged to a vulnerable group. In the present case, the applicants had failed to demonstrate the existence of a sufficient link between the harm they had allegedly suffered (or would suffer in the future) and the alleged omissions on the part of the State. Their complaint was essentially of an *actio popularis* nature.

343. As regards the individual circumstances of applicants nos. 2-5, the Government considered that the impugned effects they had suffered had not been sufficiently specific to them, nor of a sufficient intensity for them to be accorded direct victim status under the Convention. Thus, for instance, the adaptation to heatwaves they needed to make were a common feature during heatwaves which affected the rest of the population as well, and it had not been sufficiently demonstrated that the health issues from which the applicants suffered were linked to the alleged omissions and actions of the State. Moreover, the applicants' different health issues had either not been solely related to heatwaves or their complaints in that respect had been vague.

344. As regards the applicants' status as potential victims of a violation of Articles 2 and 8, the IPCC work had demonstrated that a real risk of them seeing their rights under Articles 2 and 8 of the Convention violated in the near future could not be established. Acknowledging potential risks for the future was uncertain and raised the question whether the applicants, who were women already over the age of 80, would themselves be individually affected by the effects invoked when global warming reached 1.5°C in 2040 in line with the relevant predictions. The further away the date damage would occur was, the more uncertain it was that it would occur and what the impact on the persons concerned would be.

345. In view of these considerations, the Government considered that the applicants were neither direct nor potential victims under Articles 2 and 8 of the Convention.

(c) Applicability of the relevant Convention provisions

346. The Government maintained that the applicants had not established a causal link between the alleged omissions of Switzerland and the interferences with their Articles 2 and 8 rights. Global warming was a global phenomenon and only resolute action by all States, combined with changes in behaviour on the part of private actors and all citizens, could make it possible to find lasting solutions to this immense challenge. GHG emissions were caused by the community of States and different States emitted different GHG emissions. Given Switzerland's current low GHG intensity, the omissions imputed to Switzerland were not of such a nature as to cause, on their own, the suffering claimed by the applicants and to have serious consequences for their lives and private and family life. There was therefore not a sufficient link between polluting emissions and the respondent State to raise the question of its positive obligations under Articles 2 and 8 of the Convention.

(i) Article 2 of the Convention

347. As regards more specifically Article 2, the Government argued that although the reality of the dangers linked to global warming was obvious, the applicants had failed to demonstrate the existence of an "imminent" risk to their lives, necessary to trigger the applicability of that provision. In addition, the gravity of the adverse effects of global warming was not such as to reach the necessary intensity for Article 2 to come into play.

(ii) Article 8 of the Convention

348. With respect to Article 8, having regard to the fact that the Court had recognised that serious damage to the environment could affect the well-being of a person and deprive him or her of the peaceful enjoyment of his or her home in such a way as to harm his or her private and family life, the Government could not completely exclude that this provision might apply in the context of climate change. Indeed, it was well known that the acceleration of global warming was an extremely worrying phenomenon for humanity and that it resulted from CO_2 emissions of human origin. Global warming was undoubtedly likely to impact the quality of life of individuals, even if their health was not seriously endangered.

349. However, global warming had not reached the necessary level to create a tangible effect on the private and family life of applicants nos. 2-5, including on their mental well-being. The applicants had not argued that GHG emissions were directly harmful to their health. They had rather argued that these emissions caused global warming and heatwaves which would be harmful to their health. However, the applicants were not constantly exposed to such effects and thus affected in their daily lives. Moreover, there were simple measures of prevention that could be taken in order to reduce the mortality risk during heatwaves.

350. In these circumstances, the Government expressed doubts as to the applicability of Article 8 but considered that this question could be left open given their arguments on the merits of this complaint.

(d) Merits

351. The Government argued that in a technical and complex area such as climate change, the State needed to have a wide margin of appreciation and the Court's scrutiny should be limited to verifying that there had not been a manifest error in the assessment by the State. As for the factors to be taken into account in this context, the Government stressed that global warming posed unprecedented questions and challenges of a high degree of complexity. The problem also included difficult social and technical issues. Its treatment required the study of scientific data and a risk assessment. The choice of the best means to combat global warming was delicate and should take into account many different, even competing, interests. Measures to

protect the climate could also restrict fundamental rights and individual freedoms. It was therefore necessary to find the most appropriate solutions after balancing all the interests at stake. Operational choices required setting priorities, including in the allocation of resources. In accordance with the principle of subsidiarity, the definition and choice of the measures to be taken, the range of which was wide, fell within the competence of national governments and parliaments as well as, in the case of Switzerland, within a system of direct democracy and choice of the people. This all spoke in favour of according a wide margin of appreciation to the State in the present case.

352. As regards the principle of harmonious interpretation of the Convention, the Government were of the view that it could not be used to fill an alleged gap in the international legal framework in relation to climate change and – as the applicants in reality wanted – to circumvent the mechanism established under the Paris Agreement by seeking to establish an international judicial control mechanism to review the measures to limit GHG emissions. Indeed, when negotiating the Paris Agreement, the parties had decided not to create a binding mechanism of control of States' commitments. Thus, the applicants could not seek for such a mechanism to be established under the Convention, particularly since not all the parties to the Paris Agreement were parties to the Convention, which risked creating inequality between them should issues regulated by the Paris Agreement be subject to judicial control under the Convention. It followed that the issues of climate change would be better addressed under international instruments other than the Convention.

353. However, if the Court considered that it should take some international instruments on climate change into account, all these instruments were the result of negotiations between sovereign States and provided for a collective objective and individual obligations, leaving various aspects of the matter to the discretion of the States. This was, in particular, the case for the UNFCCC and the Paris Agreement.

354. The Draft Articles on Prevention of Transboundary Harm were not of direct relevance for the present case given that it did not concern transboundary harm. Similarly, the European Climate Law was not relevant as Switzerland was not a European Union member State and, in any event, that document post-dated the domestic courts' decisions. As regards the developments under UN General Assembly Resolution 76/300, the Government stressed that this was not a legally binding document. The same was the case for Recommendation CM/Rec(2022)20 (cited above) and the current work being carried out by the Council of Europe in the field of climate change.

355. In this context, noting that the Convention did not guarantee the right to a healthy environment, the living-instrument doctrine did not allow the Convention to be interpreted in a way that undermined the basic principles of the system, such as the principle of subsidiarity. The living-instrument

doctrine could not be invoked to justify a radical change in the Court's case-law which would disregard the situation prevailing in the High Contracting Parties. It was in this light that the evolutive interpretation of the fundamental rights at the national level in the field of climate change (notably in the Netherlands, Ireland, France and Germany) should be viewed.

356. As regards the substance of the State's obligations, Switzerland had put in place an adequate legislative and administrative framework aimed at ensuring a reduction of GHG emissions and was committed to adapting this framework depending on the evolution of the situation, scientific discoveries and political and legal developments. The series of measures put in place at the domestic level were compatible with the objective of the Paris Agreement.

357. The Government further explained that the various actions taken at the domestic level demonstrated the desire to be within the range indicated by the IPCC to contribute to stabilisation of global warming at 1.5°C. The adoption of the net-zero emissions target by 2050 would be used as the starting-point for the development of a long-term climate strategy. The fact that the new CO_2 Act had been rejected in a referendum did not mean that Switzerland was not committed to tackling climate change or that its NDC had changed. In fact, citizens had not rejected the idea of the necessity of combating global warming but rather the proposed means to do so. Moreover, the Federal Council had envisaged a series of measures aimed at finding other solutions. In any event, it was within the State's margin of appreciation to find the best means to address climate change and Switzerland and its population were best placed to find the appropriate solutions. Since Switzerland had fulfilled, and had undertaken to fulfil, fully its commitments under the Paris Agreement, it had not exceeded and would not exceed its margin of appreciation.

358. The Government also argued that Switzerland had met its international objective under the Kyoto Protocol (to reduce GHG emissions between 2013 and 2020 by an average of 15.8% compared to 1990) by, in particular, reducing its emissions by an average of 11%. Moreover, at the national level, the objective set out in the existing CO_2 Act (20% by 2020 compared to 1990) had only been negligibly missed (19% GHG reduction). In this connection, however, it was important to bear in mind that the costs of reducing GHG emissions in Switzerland were high as the only sectors where reductions could be made were the housing and transport sectors, which required longer periods of conversion.

359. The Government were of the view that the assessments relating to the Swiss mitigation measures on which the applicants had relied – notably by the CAT, Climate Analytics and Rajamani et al. (2021) (see paragraph 325 above) – had been based on subjective hypotheses and could not be taken as suggesting that the pathway set by the State could not be achieved. In particular, the CAT's classification of countries into categories was debatable, and the methodology unclear. The CAT itself had acknowledged

that there was no single, agreed framework for what constituted a fair contribution to global efforts. And some studies used other methodologies. As regards Climate Analytics, its analysis did not propose a statistical range in their projections and the modelling was practically linear, with a starting-point in 2020 and an end point in 2030. It was not clear how Climate Analytics had accurately calculated a modelled pathway for 1.5°C warming. Climate Analytics had analysed the rejected amendments to the CO_2 Act, however, there was a new law that would be subject to a popular vote in 2023. Climate Analytics had not taken into account bilateral agreements into which Switzerland had entered with other countries concerning mitigation measures and had suggested reductions in GHG emissions which would have put a disproportionate strain on the domestic system. For its part, the study of Rajamani et al. (2021) had been based on considerations of various principles of international environmental law and was therefore partially subjective and also suggested measures which would have placed a disproportionate strain on the domestic system.

360. In any event, there was no established methodology to determine a country's carbon budget or a country's "fair share".[180] Switzerland had not determined a specific carbon budget, although its national climate policy could be considered as being close to an approach of establishing a carbon budget. Swiss climate policy was based on the relevant internal assessments[181], and through its NDCs Switzerland had determined its carbon reduction targets and was on a clear trajectory to achieving net-zero emissions by 2050. The Swiss NDC reflected its fair share through the principles of: responsibility (having regard to the low global contribution to GHG emissions), capacity to contribute to the resolution of the problem of climate change, and the potential to bear the financial burden of measures to reduce GHG emissions.

361. The adaptation measures were also important in this context, particularly since Switzerland could not prevent global warming through its own efforts alone. Switzerland had put in place various effective adaptation measures. Thus, the mortality rates linked to heat had been much lower in 2018 and 2019 when compared to the period between 2003 and 2015. There had been various initiatives at the cantonal and federal level to raise awareness about the risks posed by global warming and heatwaves.

362. The legislative and decision-making process concerning the development of measures to reduce Switzerland's GHG emissions had been characterised by openness and total transparency. There had also been the systematic inclusion of surveys and scientific studies as well as very broad

[180] Citing, in this context, study L. Bretschger, "Climate Policy and Equity Principles: Fair Burden Sharing in a Dynamic World", Center of Economic Research at ETH Zurich, Policy Brief 12/16, March 2012.

[181] Citing an internal document (available to the Court) "Klimawandel und das Pariser Abkommen: Welcher NDC der Schweiz ist 'fair und ambitiös'?" (2020).

participation of all interested stakeholders. A referendum on the matter had also been organised. The system of direct democracy in Switzerland was not a threat to minorities but rather a means of their integration and protection.

363. The above-noted efforts at the domestic level had been in line with the principles set out in the Aarhus Convention, although it had only later come into force as regards Switzerland (1 June 2014) and did not provide for such details as the necessity to have scientific studies when engaging public participation. Public participation and information had also been ensured by other means, notably through the Consultative Body on Climate Change (*Organe consultatif sur le changement climatique*) and the National Centre for Climate Services, as well as on the basis of the principle of transparency in the work of the administration.

364. In so far as the applicants relied on the principle of precaution, this principle had not been established as an uncontroversial rule of international law and had in fact been relied upon by the Court only in a rather specific context in the *Tătar* case (cited above). While the Government accepted that the precautionary principle could shed some light on the positive obligation of States under Articles 2 and 8 of the Convention, it considered that this principle was too vague to properly guide the decision-making process. In any event, Switzerland had never relied on scientific uncertainty in order to delay the adoption of measures in the field of climate change. Similarly to the principle of precaution, the principle of intergenerational solidarity had not been established as a rule of international law and was, in any event, irrelevant in the present case.

365. In sum, the Government argued that Switzerland had complied with its obligations under Articles 2 and 8 of the Convention and that the applicants' complaints should be declared inadmissible as manifestly ill-founded.

B. The third-party interveners

1. Intervening Governments

(a) The Government of Austria

366. The Government of Austria considered it important to clarify the nature of the Paris Agreement. They stressed that only some provisions of the Agreement were legally binding (Articles 2-4) while others were recommendations. The Paris Agreement provided that each State could autonomously define its intent to reduce emissions as regards quantity and means, on the basis of the respective national circumstances (the concept of "self-differentiation"). Moreover, the obligations under Articles 2 to 4 of the Agreement were obligations of conduct, and not of result. The Agreement did not provide for legal sanctions for non-achievement of the reduction goals or for non-compliance with the NDCs. In the intervening Government's view,

the present application represented an attempt to make the Paris Agreement justiciable and, *de facto*, to introduce the possibility for an application under the Convention in relation to the Agreement, which would not be in line with the very nature and purpose either of the Convention mechanism or the Paris Agreement. There was no room to establish the right to a healthy environment under the Convention and, in any event, it was not possible to do so under the Paris Agreement. Moreover, as to any relevance of the precautionary principle, it was not a universal principle under customary international law.

(b) The Government of Ireland

367. The Government of Ireland recognised the severity of the threat facing the global community as a result of climate change and the imperative for urgent action to address that threat. However, they considered that the response should be an effective global response and that the Court could not engage in a form of law-making and regulation which would bypass the role of the democratic process and institutions in the response to climate change. The intervening Government further argued that any notion of jurisdiction in this context should be territorial. They also considered that an association could not claim victim status under Articles 2 and 8 by reason of a risk to life and health, and that the age factor could not be sufficient to regard a group of applicants as victims in relation to climate change. Furthermore, the intervening Government pointed to the high threshold necessary for Articles 2 and 8 to apply in this context. They also submitted that, in accordance with the principle of subsidiarity and the wide margin of appreciation, the Court's main role in environmental claims was the procedural assessment of the decision-making process and only in "exceptional circumstances" should the Court proceed to a substantive assessment of environmental policy.

368. While the intervening Government accepted that the Convention should be interpreted in harmony with other norms of international law, they suggested that the current state of international law under the UNFCCC and the Paris Agreement should serve to inform the limits of the scope of obligation arising under the Convention. The Convention should be interpreted in line with, and in the light of, these specialised international instruments which were the more pertinent reference points in the field. The interpretation adopted by one or more domestic courts – particularly where it went beyond the settled case-law of this Court – could not be regarded as setting the standard under the Convention.

369. In sum, the intervening Government were of the view that the present application sought to create a far-reaching expansion of the Court's case-law on the admissibility and merits of Articles 2 and 8, that it sought to bypass the democratic process through which climate action should take place if it was to be legitimate and effective and that the application was inconsistent

with the dedicated international framework governing climate change to which the Contracting Parties were committed.

(c) The Government of Italy

370. The Government of Italy considered it important to stress that the Court's jurisdiction was primarily territorial. In their view, the "special" circumstances of a given case did not, as such, imply extraterritorial jurisdiction, nor was the "living instrument" principle of interpretation applicable to Article 1 of the Convention. Furthermore, in order to claim victim status as regards environmental damage and risk, the applicants would have to show that they were directly affected, and mere conjecture of a violation would not suffice. In order for Article 2 to apply, life should be put at risk, and from the perspective of Article 8 the adverse effects of environmental pollution should attain a certain minimum level of seriousness. In any event, in difficult and technical spheres, the State enjoyed a wide margin of appreciation.

(d) The Government of Latvia

371. The Government of Latvia were of the view that the international consensus on the need to tackle climate change created a very wide margin of appreciation for the States in the determination of what the appropriate balance of the competing interests should be. The choice of means and terms within which they ought to be implemented belonged to the State concerned. The principle of subsidiarity underpinning the Convention system was of particular importance, especially in the context of a possible application of Article 46 of the Convention. In the present context the Court's jurisdiction should be territorial and any developments at the international level should not be interpreted as extending that jurisdiction. While the intervening Government agreed that the relevant international instruments on climate change should be taken into account by the Court in determining the scope of States' obligations under the Convention, the Court could not establish an autonomous right for individuals to request that States adopt specific actions and measures or policies to tackle climate change, as such a right did not exist in the international instruments in question.

(e) The Government of Norway

372. The Government of Norway stressed that Norway was deeply committed to reducing national emissions and contributing to the global long-term target set out in Article 2 of the Paris Agreement. However, establishing climate and energy policy should be predominantly a political and democratic exercise. The Convention was not an instrument for the protection of collective interests, and the Court was not a supervisor of society-wide policy decisions. There was no legal basis for the expansion of

the territorial, personal, and material scope of the obligations under the Convention in the present context as that would run counter to the principle of subsidiarity and the State's margin of appreciation. In particular, there was no basis to extend the notion of territorial jurisdiction in the present climate context, or to call into question the Court's rejection of the "cause and effect" notion of jurisdiction. The various international instruments on climate change had no bearing on the interpretation of the Convention. They rather reflected the fact that the sovereign States retained their competence in the field of climate change. This was also evidenced by the fact that the Council of Europe member States were actually negotiating to decide whether they wished to introduce enforceable rights pertaining directly to the environment and climate. In any event, at present, the right to a healthy environment was not recognised as a rule of customary international law. When adopting UN General Assembly Resolution 76/300, Norway had made it clear that that Resolution had provided for a political recognition and that it had not had any legal effect.

(f) The Government of Portugal

373. The Government of Portugal recognised the urgency of climate change but stressed that it was for the States to take the initiative and put in place the relevant strategies to tackle climate change. With respect to the Convention requirements for establishing victim status, the intervening Government stressed the necessity for the applicants to provide evidence to show that they were directly affected by the measure complained of in the context of climate change. Thus, as regards the applicants belonging to a particular age group, they would need to demonstrate that: (a) there was an actual inaction on the part of the authorities, (b) such an inaction or omission actually affected differently distinct groups or segments of the population, and (c) this inaction amounted to a failure to afford effective protection against the effects of climate change. Moreover, as regards the applicability of Articles 2 and 8 of the Convention in the context of the environment, the measure complained of should reach a minimum threshold of severity. There should therefore be a real and imminent risk to life or health, or a direct and serious effect on an applicant's right to respect for his or her private and family life or home. The intervening Government also stressed that the Paris Agreement essentially established procedural obligations and the substantive obligation was only for the States to take appropriate measures to achieve the aims pursued. However, the Paris Agreement established no sanctioning or enforcement mechanism, and it was therefore questionable whether the Court had jurisdiction or competence to intervene in this context.

(g) The Government of Romania

374. The Government of Romania submitted that climate change represented a global challenge that required international reaction. It was by definition a transboundary challenge, and coordinated action – particularly at the EU level – was needed to effectively supplement and reinforce national policies. As regards the applicability of the Convention in relation to complaints concerning climate change, applicants needed to demonstrate the existence of a direct and immediate link between the effect on their rights and the impugned situation. Moreover, the violation complained of needed to reach a certain level of severity. In any event, the Convention system did not recognise the possibility of lodging *actio popularis* complaints and the Convention could not be expanded to cover the UNFCCC and the Paris Agreement. The intervening Government also considered it important that the Court should take into account the fact that national jurisdictions had often dealt with cases pertaining to climate change, in accordance with national and international standards related to the domain of environmental law. However, the Court should be mindful of its subsidiary role and the States' margin of appreciation. In the intervening Government's view, it was highly debatable whether a State or any other entity could be held directly responsible today – individually and separately from other entities – for the cumulative consequences of a process which had started more than a hundred years ago.

(h) The Government of Slovakia

375. The Government of Slovakia agreed that there was a real urgency to the need to implement a series of effective measures to combat global warming and to minimise its effects. In their view, nowadays it was commonly accepted that human rights and the environment were interdependent even to the point that it was suggested that environmental rights belonged to a "third generation of human rights". However, the Convention rights were not specifically designed to provide for a general protection of the environment as such. Given the global nature of the threat posed by climate change and its effects, it was not possible to interpret the concept of victim status under Article 34 of the Convention so as to cover every potentially vulnerable group. It would therefore be inappropriate, and could lead to an inaccurate outcome, if the Court were to try to deduce from statistical data the existence of a particular risk to a group or if it were to otherwise generalise the effects of climate change, such as global warming. The States should have a wide margin of appreciation when addressing the issues relating to climate change.

2. United Nations High Commissioner for Human Rights

376. The intervener submitted that according to the available data, Switzerland had not undertaken the efforts needed to meet the GHG

emissions reduction target for 2020. Moreover, its emission reduction target for 2030 was not compatible with climate change mitigation objectives set by the international community. With regard to victim status in climate-change cases, the intervener pointed out that international and national case-law developments suggested that the alleged victim's risk of being affected needed to be more than a theoretical possibility. However, the fact that a large segment of the population was affected by climate change did not preclude the applicants from being individually affected. The criterion of imminent harm should also be addressed holistically, taking into account the particular characteristic of slower onset impacts such as those often posed by climate change in which evolving risks could become irreparable given the extended timelines needed for effective remediation. The legal assessment of victim status had to take into account best available science. Moreover, the obligations associated with the adverse impacts of climate change required the existence of a remedial role of courts giving effect to such legal obligations.

377. The intervener also noted that the UN Human Rights Committee had "made clear that the duty to protect life also [implied] that states parties should take appropriate measures to address the general conditions in society that [could] give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity" including environmental degradation.[182] The intervener further referred to the studies finding that older persons', and in particular older women's, right to life and enjoyment of health were disproportionately affected by the adverse impacts of climate change. The enjoyment of health fell under the right to respect for private and family life and home which was in turn violated by the degradation of the environment. The States' obligations under Articles 2 and 8 should be read in the light of the precautionary principle, the principle of intergenerational equity and the duty of international cooperation.

3. United Nations Special Rapporteurs on toxics and human rights; on human rights and the environment; and the Independent Expert on the enjoyment of all human rights by older persons

378. The interveners submitted that the world faced a climate crisis. The climate emergency was causing widespread adverse impacts already and posed an existential threat to the effective enjoyment of human rights in the future. In climate cases, the interests of the individual and the community were not competing. Both the individual and the community shared a common interest in a safe climate system. This interest was common to all Convention Parties, as well as to the international community as a whole. There was therefore no room for the Court to balance between the competing

[182] CCPR, General comment No. 36 on article 6: right to life, CCPR/C/GC/36, 2019, paragraph 26.

interests of the individual and the community. When assessing whether a State was adequately carrying out its positive protective obligations to avert climate risks, the Court should be guided by scientific progress which could aid it to scrutinise the sufficiency of governmental action in the face of the catastrophic risks posed by climate change. The interveners noted that the best available science had reaffirmed the reality of anthropogenic climate change, including in respect of extreme weather events, and the necessity for an urgent and dramatic reduction of GHG emissions. The interveners further submitted that climate change had an effect on the full enjoyment of human rights of older persons. Ageing and climate change also had differential impacts when it came to gender, and older women faced a particular risk of vulnerability to climate impacts, including in relation to a greater likelihood of facing chronic diseases and air pollution harms, and had higher rates of mortality from extreme heat events.

379. Noting the legal developments at the international and national levels, the interveners stressed that the question was no longer whether, but how, human rights courts should address the impacts of environmental harms on the enjoyment of human rights. There was a need for a dialogue between human rights and environmental norms. To the extent that international environmental law contained customary and conventional norms and general principles which imposed substantive obligations – such as in relation to the principles of precaution and prevention of harm; the duty to conduct an environmental impact assessment; rights of access to information, participation and justice; and intergenerational equity – that enabled their use by human rights bodies. In this context, the Court's examination of the climate cases should, in particular, focus on the following: the precautionary principle (providing for a normative basis for ambitious climate action by governments, requiring them to act with determination to reduce their GHG emissions); the principle of prevention of environmental harm (duty to prevent significant transboundary environmental harm); extraterritorial human rights obligations; and the principle of highest possible ambition (premised on due-diligence requirements) set out in the Paris Agreement.

4. International Commission of Jurists (ICJ) and the ICJ Swiss Section (ICJ-CH)

380. The interveners pointed out that the fact that an applicant's climate-change action would contribute to the general public interest did not qualify that complaint as an *actio popularis*. The Court's case-law allowed for the possibility of recognising the victim status of applicants who were exposed to the broader effects of pollution, and it did not therefore require an element of immediate proximity. Moreover, it was critical to recognise the possibility for associations to bring climate-change complaints before the Court. That was mandated by the fact that in a demanding area such as climate change (in terms of costs and scientific evidence), associations were uniquely

positioned to bring such complaints to the Court. In any event, the interveners argued that in climate-related cases, which addressed the issues considered under the Paris Agreement as "a common concern of humankind", the assessment of victim status required documented scientific evidence and was thus closely linked to the substance of the applicants' complaints.

381. The interveners further submitted that it was critical to ensure that applicants had access to courts in matters concerning climate change. As regards Articles 2 and 8, scientific evidence confirmed the existence of a particular risk posed by climate change on, *inter alia*, older persons and women. The scale, intensity and imminence of the environmental damage posed by anthropogenic climate change were such as to engage Articles 2 and 8. Under those provisions, States had a positive obligation to take the necessary mitigation and adaptation measures. The State's positive obligations should be interpreted in the light of the goals established under the Paris Agreement and the precautionary principle under the UNFCCC and the Rio Declaration. In this regard, the State's margin of appreciation should be constrained by their international environmental-law undertakings, which required the implementation of NDCs and long-term strategies for reducing GHG emissions.

5. European Network of National Human Rights Institutions (ENNHRI)

382. The intervener submitted that since it was often difficult to quantify the negative effects of environmental pollution in each individual case, applicants should not need to prove a direct causal link between an environmental issue and its effect on them. Causality could be proved on the basis of statistical evidence. Moreover, the Court could take other materials into account, such as studies in scientific journals, and the reports of the IPCC should carry particular weight. The IPCC and other scientific studies had found that climate change induced by GHG emissions had already caused a significant increase in heatwave frequency, intensity and duration in Europe, and this was projected to worsen if warming exceeded 1.5°C, particularly in central European cities. Several heatwaves in Europe over the past twenty years would have been extremely unlikely to occur without human-induced climate change and extreme temperatures were likely to become commonplace by the 2040s. The negative impacts of heatwaves on mortality and morbidity were well documented and were projected to worsen with every incremental increase in warming. In Switzerland, between 1991 and 2018, 31.3% of heat-related deaths were attributable to human-induced climate change, with older women and infants being particularly affected. Older persons, especially those living in urban areas, were particularly vulnerable to heatwaves owing to both social and physiological factors. Women over 75 had the highest risk of heat-related health impacts in Switzerland.

383. The fact that climate change was caused by cumulative, global emissions did not absolve individual States from responsibility for the conduct attributable to them. Since GHG emissions caused territorial harm no matter where in the world they were combusted, a State's jurisdiction for the purposes of Article 1 of the Convention should encompass all emissions under the State's effective control. Moreover, as regards victim status, the above-noted scientific data demonstrated the existence of an immediate and direct impact of climate change on individuals and it also showed the existence of a real, rather than hypothetical, risk of future adverse impacts of climate change. Older women were a class of people particularly at risk from climate-attributed heat. In this context, as recognised in the Aarhus Convention, the environmental associations played an essential role. When examining their victim status, it was important to bear in mind that individuals might be prevented from lodging an application with the Court and effective protection of individuals' long-term interest in living in a safe environment might depend on environmental associations being able to bring complaints to protect against irreversible climate harm while there was still time to prevent it.

384. As regards the applicability of Article 2 of the Convention, GHG-induced climate change was inherently dangerous and thus the right to life might be at stake. In this context, when interpreting the immediacy of the risk to life, flexibility was required. It should also be taken into account that dangerous climate change had already posed a serious, real, and immediate risk to life, particularly for vulnerable individuals, and that every incremental increase in emissions led to further warming, with a certain and exponential increase in heat mortality. Similar considerations should be taken into account as regards the assessment of the applicability of Article 8, which applied not only where there was direct and immediate or serious and substantial risks of pollution or nuisance, but also to exposure of future environmental risks with a sufficiently close link to the enjoyment of home, private or family life.

385. The Convention was relevant to climate harm because it had to be interpreted in the light of present-day conditions. In this context, the Court had not been asked to break new ground but simply to confirm the jurisprudential developments in Europe (notably in the Netherlands and Germany) and elsewhere concerning climate change. Furthermore, scrutiny of emission cuts would strengthen democracy and that would be consistent with the requirements of international law. In the intervener's view, there would be a violation of the Convention in three instances: first, if the State adopted adaptation measures without mitigation; secondly, if the State pursued policies that undermined efforts to limit the warming to 1.5°C; and, thirdly, if the State failed to substantiate that its emission reduction measures were compatible with its fair share of the remaining carbon budget to limit the warming to 1.5°C.

6. The coordinated submission of the International Network for Economic, Social and Cultural Rights (ESCR-Net)

386. The interveners submitted that various international bodies had found that environmental degradation and climate change interfered with the enjoyment of the right to health and the right to life. In this context, the human rights mechanisms played a role in protecting human rights by ensuring that States avoid taking measures that could accelerate climate change, and that they dedicate the maximum available resources to the adoption of measures that could mitigate climate change. There had been national and regional judicial findings of violations of the right to a healthy environment and the right to life by the States for failing to sufficiently address climate change and reduce emissions. Older persons were particularly vulnerable in relation to climate change. There was therefore a need for States to take positive measures to ensure that this vulnerability was addressed. The States had a duty to take measures within their territories to prevent the effects of a foreseeable harm of climate change abroad.

7. The Human Rights Centre of Ghent University

387. The intervener submitted that the negative impact of climate change on human lives was increasingly recognised in international law as a human rights issue. Several international judicial and quasi-judicial bodies had outlined States' human rights obligations in this regard. Moreover, the domestic courts were increasingly recognising the links between climate change and human rights. Indeed, the past few years had seen a surge in complaints concerning climate change introduced before national courts and several pending cases had made explicit reference to the rights enshrined in the Convention. In this context, as regards the issue of causality, the domestic courts (in the Netherlands, Germany and Belgium) had held that State responsibility should be established not on the basis of causality, but on the basis of the principle of attribution, which meant that individual States were responsible, *pro rata*, for their own contribution to climate change. In the domestic litigation, the precautionary principle had also been very important when discussing the States' positive obligations, as well as the relevant climate science and the States' corresponding duties assumed under international climate-change treaties, in particular the Paris Agreement. This approach should also inform the Court's examination of the climate cases.

388. The recognition in the Court's case-law of the potentially adverse impact on human rights of environmental disasters and degradation (of both anthropogenic and natural causes) should, *a priori*, be expanded to climate change because climate change represented a longer-lasting, more forceful and potentially graver harm than more isolated, local and situational environmental damages. Similarly, the Court's existing vulnerability jurisprudence, including the rights of older people, should be acknowledged

and applied in the climate-change context. The interveners also suggested that recognising applicants as belonging to a particularly vulnerable group should lead to a narrow margin of appreciation for the States.

389. The issue of evidence was the key aspect of the climate cases. Attribution science had demonstrated more precisely the causal relationship between GHG emissions and climaterelated events. The interveners also invited the Court to recognise the specific evidentiary difficulties that applicants faced in climate-change cases and that Governments were better placed to control much of the domestic production of evidence. Thus, the burden of proof should not rest solely on the applicants. Where Governments argued that their environmental policies were sufficient to protect individuals against the adverse effects of climate change, they should be required to substantiate these assertions. Moreover, the precautionary principle could further guide the Court in setting the appropriate standard of proof.

8. Professors Evelyne Schmid and Véronique Boillet (University of Lausanne)

390. The interveners pointed out that it was important to differentiate between, on the one hand, the protective positive obligation (which addressed punctual specific threats) and, on the other hand, the positive obligation to provide a legislative and administrative framework ensuring the protection of the Convention rights (which addressed danger that was not necessarily punctual, specific and emanating from a specific source). In the present climate-change context, there was no doubt as regards the issue of attribution in terms of the responsibility of the State organs for the impugned omissions. However, when interpreting the issue of victim status under Article 34 it would be important to examine, first, the positive obligations under Articles 2 and 8, and then the link between the alleged omissions in this context and the actual applicants. Moreover, the issue of victim status should be examined in the light of the principles of prevention and precaution. In any event, by undertaking the obligations under various international climate-change initiatives, the States admitted to limiting their margin of appreciation regarding climate risks and the implementation of positive obligations under the Convention.

391. As regards the holding of a referendum concerning the issues of climate change, the interveners pointed to the principle under Article 27 of the Vienna Convention on the Law of Treaties[183] according to which a State could not invoke its internal law to justify non-compliance with its international obligations. In any event, a popular initiative could not be considered as a means to put in place the relevant obligations to protect the fundamental rights of applicants.

[183] Vienna Convention on the Law of Treaties, 1969.

9. Professors Sonia I. Seneviratne and Andreas Fischlin (Swiss Federal Institute of Technology Zurich)

392. The interveners submitted that there was a clear scientific consensus that humans had interfered with the climate system and caused global warming. There was also a clear scientific consensus on the role of global warming in the impacts and risks that were caused by climate change, notably for the most vulnerable. Impacts on health associated with increasing human-induced global warming were also well established. Limiting global warming to 1.5°C, as mentioned in the Paris Agreement, offered at present a large reduction of risk compared to higher levels of global warming (2°C or more). However, failing to halt global warming led to additional health risks and impacts for humans, especially for the most vulnerable.

393. On the basis of an analysis of the relevant GHG emissions measurements, the interveners submitted that despite some progress in climate policies made in recent years, Switzerland's contribution to human-induced climate change, including its historical responsibility, were roughly as high as, if not higher than, those of many other European countries. At the same time, Switzerland was long overdue in implementing legislation to reduce CO_2 emissions and other GHG emissions. The scientific evidence made it obvious that Switzerland was currently not contributing sufficiently to limit global warming to 1.5°C. While it was clear that no solely science-based set of criteria could be used to determine precisely and quantitatively what a country's ultimate fair share to limit global warming consisted of, in the case of Switzerland, all criteria pointed in the same direction, namely that Switzerland was obliged to make a bigger contribution than the average of all countries of which many had, for instance, a much lower consumption or historical responsibility. However, Switzerland was actually lagging behind the average of countries in a comparable situation.

10. Global Justice Clinic, Climate Litigation Accelerator and Professor C. Voigt (University of Oslo)

394. The interveners submitted that since 2015 there had been more than eighty human rights-based climate-change cases filed in courts around the world. The recurring issues in these cases were victim status and the substantive human rights obligations of States in the light of their commitments under international climate law. In the interveners' view, older persons could appropriately be considered both direct and potential victims under Article 34 of the Convention in climate cases given the climate impacts on them, notably heat, flooding and other extreme weather events, and disease, which placed them at increased risk of suffering grievous harms, including serious bodily injury and death. Moreover, NGOs could appropriately be considered victims of Convention violations owing to climate change if they could demonstrate that their personal interests had

been directly impacted by the harms alleged to violate the Convention. In any event, the Court should interpret the concept of victim status with some flexibility. The interveners also considered that the mere fact that the challenged act or omission impacted a large swath of the population – or even virtually all of the population – should not stop the Court from recognising the victim status of the particular applicants and assessing the merits of the case.

395. The interveners further submitted that the States' duties under Articles 2 and 8 of the Convention should be interpreted in the light of the provisions and commitments under the Paris Agreement. While this did not mean that the Court should be prescriptive in what the State had to do or what exact type of measures it had to adopt, it would need to determine whether the measures were adopted with due diligence, namely whether they were reasonable and adequate to prevent risk to the enjoyment of human rights from climate change. More specifically, the Court should assess whether the climate measures were at the level of the highest possible ambition and aimed at and effective for achieving rapid and deep reductions of GHG emissions so as to achieve a global net phaseout of GHG emissions around 2050, in line with the Paris Agreement.

11. ClientEarth

396. The intervener submitted that the science of climate change had shown that there were both present and future effects of global temperature increases on human health. Failing to act with sufficient urgency and scale posed grave threats to the health and well-being of current and future generations, with over nine million climate-related deaths per year projected by the end of the century. In this context, adaptation (measures to adapt to climate change and reduce its impacts) formed a vital part of States' climate-change duties. However, adaptation measures could not replace taking adequate mitigation measures (measures to reduce GHG emissions). Only with the required emissions reductions was the scale of required adaptation likely to be manageable.

397. When assessing the adequacy of action by States, the following key conclusions of the international scientific consensus on climate change were to be borne in mind: there was an urgency to reduce emissions to limit warming to 1.5ºC (the IPCC reports showed that the overall trend of global GHG emissions had not yet gone in the right direction, let alone reduced at the necessary rate); there was a likely irreversibility of temperature increases (global warming involved the risk of long-lasting and irreversible impacts); there was a real risk of "tipping points" (natural events that could result in major shifts in the scale and pace of climate change and related impacts) being exceeded and of dramatically worse impacts than under high-confidence projections; and there was a significant "lag" in the geophysical effects of

GHG emissions and in actions to transform human systems and reduce emissions.

398. The intervener also suggested that States were under a duty under international climate-change law to take the mitigation and adaptation measures arising in particular from the UNFCCC and the Paris Agreement. In this context, it would be important to develop the due-diligence standard under the Convention addressing the "highest possible ambition'" principle and the urgency of reducing global emissions. The requirement for State action in this context should include: early action on reducing emissions; credible and effective action based on binding near-term and long-term targets that aligned with a State's highest possible ambition; a "whole-systems" approach that recognised the need for action at all levels of government and in all sectors of the economy; independent expert advisory bodies to allow for effective scrutiny of the adequacy of targets and progress; and transparency regarding government plans and progress to allow for civil society scrutiny with a clear allocation of responsibilities within government to allow for accountability (including legal accountability through recourse to the courts).

12. Our Children's Trust, Oxfam France and Oxfam International and its affiliates (Oxfam)

399. The interveners submitted that the Court should base its decisions on the most up-to-date and best available scientific evidence, which meant evidence that: maximised the quality, objectivity and integrity of information, including statistical information; used multiple peer-reviewed and publicly available data; and clearly documented and communicated risks and uncertainties in the scientific basis for its conclusions. In this connection, the interveners were of the view that the 1.5°C and 2°C temperature targets specified in the Paris Agreement were the result of a political consensus and not scientific reality and were therefore insufficient to protect human rights. The Court should rather focus on the method of Earth's energy imbalance as the scientific metric for determining whether actions to combat climate change were working. In this connection, scientific consensus indicated that to restore the stability of the Earth's climate so as to protect human life and health, States should take the necessary measures to reduce atmospheric concentrations of CO_2 to an equitable and environmentally sustainable level of 350 parts per million (ppm; in 2021 this had been approximately 416 ppm and in 2022 it was expected to be even higher after the measurements were completed). While States had already overshot safe and stable levels of atmospheric CO_2, there remained a narrow window of opportunity to bring the dangerous levels of warming back down to levels that protected human life, health and well-being by the end of the century. However, immediate and ambitious action was required in order to achieve that.

400. In this connection, the interveners submitted that the Court should also act decisively and without delay. In their view, there was a solid evidentiary basis allowing the Court to reach, *inter alia*, the following critical conclusions:

(a) The rights to life and respect for private life, family life and the home under Articles 2 and 8 encompassed the right to a stable climate system that protected human life, health, and well-being;

(b) States' actions to address human-caused climate change should be based on the best available scientific evidence and therefore aligned to restore the Earth's energy balance which called on States to pursue a pathway to reduce atmospheric concentrations from current levels to 350 ppm as rapidly as possible;

(c) States whose laws, policies and commitments were not aligned with achieving the 350 ppm standard should take specific, immediate and adequate measures to phase out emissions of CO_2 and other GHG pollution and remove as much CO_2 from the atmosphere to stabilise the climate system and protect resources upon which human life, health and well-being depended. While the State had a margin of appreciation in designing the means to reach the 350 ppm standard, it had no discretion in revisiting that standard which was based on scientific evidence;

(d) Exceptional circumstances existed which would justify the Court indicating specific measures under Article 46 to guide States as to the relevant actions and pathway timetables in sufficiently specific terms.

401. The interveners also submitted that in its assessment the Court should take into account the fact that there was universal scientific consensus and research which demonstrated that climate change presented a clearly identifiable and present danger to individual life and human health. Moreover, the State authorities had been well aware of the effects of climate change. The interveners considered that it would be particularly important if the Court were to recognise under Article 2 of the Convention the right to a stable climate system which protected human life, health and well-being.

13. Group of academics from the University of Bern (Professors Claus Beisbart, Thomas Frölicher, Martin Grosjean, Karin Ingold, Fortunat Joos, Jörg Künzli, C. Christoph Raible, Thomas Stocker, Ralph Winkler and Judith Wyttenbach, and Doctors Ana M. Vicedo-Cabrera and Charlotte Blattner)

402. The interveners submitted that the Court should reaffirm the existence of the State's positive obligations to secure human rights in the environmental context. The issue of immediate and real risk from adverse climate effects should be viewed against the scientific evidence about the existing risks to older women in Switzerland from human-induced and, specifically, heat-related climate change. The scope of the State's positive obligations depended on the extent to which the risk was susceptible to

mitigation. When determining this extent, due regard should be paid to the legal landscape tasked with regulating such risks, namely the international climate-law regime. The relevant question to assess was whether the State's measures were aimed at and effectively contributed to its fair share of preventing dangerous levels of climate change.

403. As regards Switzerland's compliance with its climate commitments, the interveners argued that the relevant promises had not been met and, in particular, the commitments under the Paris Agreement had still not been incorporated into law. Switzerland's policies stood in stark contrast to scientific assessments of downscaled pathways compatible with the 1.5°C limit, even with a narrow view of ambition and progression. Switzerland had previously had no plan that would effectively contribute to mitigating global warming, and it still had no such plan. The chances that it would meet its ambitions were diminishing because the window of opportunity was closing, at the expense of the protection of especially vulnerable groups. Since the Paris Agreement had been adopted, Switzerland had made no progress on its climate targets and set no binding climate targets. In other words, Switzerland's climate policy had continuously been off track to achieve its already low mitigation targets. These were the considerations that the Court needed to take into account when assessing Switzerland's margin of appreciation and its compliance with the positive obligations under the Convention. In this context, the Court should also be mindful of the importance of access to justice and effective legislative initiative by the authorities.

14. Center for International Environmental Law and Dr Margaretha Wewerinke-Singh

404. The interveners submitted that, in the light of the principle of harmonious interpretation of the Convention, the Court should have regard to the relevant international developments, notably the recognition of the right to a clean, healthy and sustainable environment under UN General Assembly Resolution 76/300, as well as the consensus on the States' duties to avert the threat of climate change under the UNFCCC, the Paris Agreement, and best available science, in particular the IPCC reports. This best available science recognised that current levels of warming were already causing harm and infringing on human rights. Warming of 1.5°C or higher was not safe for most countries and communities. Exceeding 1.5°C even temporarily could unleash further irreversible harm such as excess deaths. The science therefore demonstrated that protecting human rights from further foreseeable climate harm required keeping warming below 1.5°C. The IPCC had shown that the most effective mitigation measures for reducing GHG emissions by 2030 – the period most important for avoiding overshoot of 1.5°C – were replacing fossil fuels with renewable energy and energy efficiency.

405. Citing scientific reports on the subject, including the IPCC Special Report, the interveners submitted that carbon dioxide removal and offset credits derived from extraterritorial activities did not deliver those reductions. The interveners considered that the precautionary principle and the principle of prevention precluded the States from forgoing available and proven measures to immediately and steeply reduce GHG emissions in reliance on speculative technologies such as engineered carbon dioxide removal that increased the likelihood of overshooting 1.5ºC. To the extent that the State's climate mitigation plans relied on the purchase of carbon offset credits from conduct outside its territory or CDR technologies, they failed to satisfy the State's duties to respect and ensure the rights to life and private and family life.

15. The Sabin Center for Climate Change Law at Columbia Law School

406. The intervener submitted that the existing case-law from international and national fora demonstrated that the Court's assessment of the existence of victim status might properly be understood as a question of merit. The intervener suggested that where such a question existed courts tended to give applicants the opportunity to prove that an alleged omission by a State in mitigating climate change caused them particularised individual harms. In the intervener's view, the science was clear that climate change had widespread and dramatic negative impacts on the lives and livelihoods of individuals and communities worldwide, and it was absolutely necessary that the international community, and individual nations, drastically and in short order reduced GHG emissions. However, in Europe as elsewhere, there was a gap between what a global carbon budget demanded, the time frames and extent of countries' climate commitments, and countries' implementation of the commitments they had.

407. As regards the States' margin of appreciation, the intervener pointed out that in the comparative context courts had addressed in three different ways the issue of separation of powers relating to climate-change obligations. First, courts had found that governments were given limited deference and that courts should provide judicial review where government action or inaction threatened human rights. Secondly, courts had found that they were authorised to provide judicial review of the legality of government action or inaction, but that governments held a great deal of discretion in establishing ultimate climate targets. Thirdly, courts had found that they could not dictate particular standards or remedies on the issues of the appropriateness of a State's mitigation action (or lack thereof), even where the court might grant certain forms of declaratory relief.

16. Germanwatch, Greenpeace Germany and Scientists for Future

408. The interveners submitted that there might be four different ways to construe an interference by the State with individual rights in the context of climate change: (a) interference by GHG emissions from public services; (b) interference by omission in relation to GHG emissions from private sources; (c) the anticipatory prevention of future interference, which was a concept developed by the German Constitutional Court in its climate change case-law; and (d) interference through allocation of emission rights, which arose where the State allocated GHG emission rights to emitters and thus it should take responsibility for these emissions. The interveners further submitted that there were seven dimensions of causality in the present context: (a) certainty, which arose in relation to the IPCC reports establishing that climate change and its effects were uncontested with highest confidence; (b) individualisation of the effects on the applicant; (c) intensity, which related to the severity of the interference and which should be determined concerning effects on human health and the environment as collective goods; (d) the time element, requiring the interference to be present or imminent or immediate; (e) interdependence with the environment "as such", which, irrespective of whether the Court were to recognise the existence of a right to a healthy environment, related to the fact that its case-law had recognised a link between the Convention rights and the environment as such; (f) attribution to a State, relating to three types of emissions – emissions from the territory of a State impacting on the same territory, emissions from the territory of a State impacting abroad, and external emissions originating in/resulting from human activities in the relevant State; and (g) "drop in the ocean" or shared contributions, whereby any extent of contribution should be considered as being relevant.

409. The interveners considered that there were three criteria which could be applied to determine the level of GHG emission reduction necessary to abide by fundamental rights: (a) fair shares in the global emissions budget, which was to be established by first determining the global budget, and then determining the allocation of budgets to States that could be done either through the model used by the CAT or on the basis of the equal per capita model; (b) modelled emission pathways (which were to be derived from the measures that were consistent with the upper temperature limits) and the model of differing budgets and insufficiency of mere financial compensation in this context; or (c) exploration of the technical, economic and social capabilities, which would correspond to an obligation of the respondent State to do whatever was technically, economically and socially feasible to reduce GHG emissions. The interveners were also of the view that the principles concerning attribution and jurisdiction should be developed and refined to cover emissions caused abroad.

C. The Court's assessment

1. Preliminary points

410. At the outset, the Court notes that climate change is one of the most pressing issues of our times. While the primary cause of climate change arises from the accumulation of GHG in the Earth's atmosphere, the resulting consequences for the environment, and its adverse effects on the living conditions of various human communities and individuals, are complex and multiple. The Court is also aware that the damaging effects of climate change raise an issue of intergenerational burden-sharing (see paragraph 420 below) and impact most heavily on various vulnerable groups in society, who need special care and protection from the authorities.

411. The Court, however, can deal with the issues arising from climate change only within the limits of the exercise of its competence under Article 19 of the Convention, which is to ensure the observance of the engagements undertaken by the High Contracting Parties to the Convention and the Protocols thereto. In this regard, the Court is, and must remain, mindful of the fact that to a large extent measures designed to combat climate change and its adverse effects require legislative action both in terms of the policy framework and in various sectoral fields. In a democracy, which is a fundamental feature of the European public order expressed in the Preamble to the Convention together with the principles of subsidiarity and shared responsibility (see, *inter alia*, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 45, *Reports* 1998-I, and *Grzęda v. Poland* [GC], no. 43572/18, § 324, 15 March 2022), such action thus necessarily depends on democratic decision-making.

412. Judicial intervention, including by this Court, cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government. However, democracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law. The remit of domestic courts and the Court is therefore complementary to those democratic processes. The task of the judiciary is to ensure the necessary oversight of compliance with legal requirements. The legal basis for the Court's intervention is always limited to the Convention, which empowers the Court to also determine the proportionality of general measures adopted by the domestic legislature (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013 (extracts)). The relevant legal framework determining the scope of judicial review by domestic courts may be considerably wider and will depend on the nature and legal basis of the claims introduced by litigants.

413. At the same time, the Court must also be mindful of the fact that the widely acknowledged inadequacy of past State action to combat climate change globally entails an aggravation of the risks of its adverse

consequences, and the ensuing threats arising therefrom, for the enjoyment of human rights – threats already recognised by governments worldwide. The current situation therefore involves compelling present-day conditions, confirmed by scientific knowledge, which the Court cannot ignore in its role as a judicial body tasked with the enforcement of human rights. Given the necessarily primary responsibility of the legislative and executive branches and the inherently collective nature of both the consequences and the challenges arising from the adverse effects of climate change, however, the question of who can seek recourse to judicial protection under the Convention in this context is not just a question of who can seek to address this common problem through the courts, first domestically and subsequently by engaging the Court, but raises wider issues of the separation of powers.

414. The present case, and the two other cases heard by the same composition of the Grand Chamber (see paragraph 5 above), raise unprecedented issues before the Court. The particular nature of the problems arising from climate change in terms of the Convention issues raised has not so far been addressed in the Court's case-law. While the Court's environmental case-law to date (see, in particular, paragraph 538 below) can offer guidance up to a point, there are important differences between the legal questions raised by climate change and those addressed until now.

415. The Court's existing case-law in environmental matters concerns situations involving specific sources from which environmental harm emanates. Accordingly, those exposed to that particular harm can be localised and identified with a reasonable degree of certainty, and the existence of a causal link between an identifiable source of harm and the actual harmful effects on groups of individuals is generally determinable. Furthermore, the measures taken, or omitted, with a view to reducing the impugned harm emanating from a given source, whether at the regulatory level or in terms of implementation, can also be specifically identified. In short, there is a nexus between a source of harm and those affected by the harm, and the requisite mitigation measures may be identifiable and available to be applied at the source of the harm.

416. In the context of climate change, the key characteristics and circumstances are significantly different. First, there is no single or specific source of harm. GHG emissions arise from a multitude of sources. The harm derives from aggregate levels of such emissions[184]. Secondly, CO_2 – the primary GHG – is not toxic *per se* at ordinary concentrations[185]. The emissions produce harmful consequences as a result of a complex chain of effects. These emissions have no regard for national borders.

417. Thirdly, that chain of effects is both complex and more unpredictable in terms of time and place than in the case of other emissions of specific toxic

[184] See, for instance, AR6 WGIII, Summary for policymakers, p. 8.
[185] See IPCC, "Carbon Dioxide Capture and Storage" (2005), Annex I, pp. 385-95.

pollutants. Aggregate levels of CO_2 give rise to global warming and climate change, which in turn cause incidents or periods of extreme weather; these in turn cause various harmful phenomena such as excessive heatwaves, droughts, excessive rainfall, strong winds and storms, which in turn give rise to disasters such as wildfires, floods, landslides and avalanches. The immediate danger to humans arises from those kinds of consequences in the given climate conditions. In the longer term, some of the consequences risk destroying the basis for human livelihoods and survival in the worst affected areas. Whole populations are, or will be, affected, albeit in varying ways, to varying degrees and with varying severity and imminence of consequences.

418. Fourthly, the sources of GHG emissions are not limited to specific activities that could be labelled as dangerous. In many places, the major sources of GHG emissions are in fields such as industry, energy, transport, housing, construction and agriculture, and thus arise in the context of basic activities in human societies. Consequently, mitigation measures cannot generally be localised or limited to specific installations from which harmful effects emanate. The mitigation measures are necessarily a matter of comprehensive regulatory policies in various sectors of activity[186]. Adaptation measures may to a greater extent depend on local action[187]. However, without effective mitigation (which is at the centre of the applicants' arguments in the present case; see paragraphs 304, 306 and 335 above), adaptation measures cannot in themselves suffice to combat climate change (see paragraph 115 above).

419. Fifthly, combating climate change, and halting it, does not depend on the adoption of specific localised or single-sector measures. Climate change is a polycentric issue. Decarbonisation of the economies and ways of life can only be achieved through a comprehensive and profound transformation in various sectors. Such "green transitions" necessarily require a very complex and wide-ranging set of coordinated actions, policies and investments involving both the public and the private sectors. Individuals themselves will be called upon to assume a share of responsibilities and burdens as well. Therefore, policies to combat climate change inevitably involve issues of social accommodation and intergenerational burden-sharing, both in regard to different generations of those currently living and in regard to future generations.

420. In this connection, the Court notes that, in the specific context of climate change, intergenerational burden-sharing assumes particular importance both in regard to the different generations of those currently living and in regard to future generations. While the legal obligations arising for States under the Convention extend to those individuals currently alive who, at a given time, fall within the jurisdiction of a given Contracting Party, it is

[186] See further AR6 WGIII.
[187] See further AR6 WGII.

clear that future generations are likely to bear an increasingly severe burden of the consequences of present failures and omissions to combat climate change (see paragraph 119 above) and that, at the same time, they have no possibility of participating in the relevant current decision-making processes. By their commitment to the UNFCCC, the States Parties have undertaken the obligation to protect the climate system for the benefit of present and future generations of humankind (see paragraph 133 above; Article 3 of the UNFCCC). This obligation must be viewed in the light of the already existing harmful impacts of climate change, as well as the urgency of the situation and the risk of irreversible harm posed by climate change. In the present context, having regard to the prospect of aggravating consequences arising for future generations, the intergenerational perspective underscores the risk inherent in the relevant political decision-making processes, namely that short-term interests and concerns may come to prevail over, and at the expense of, pressing needs for sustainable policy-making, rendering that risk particularly serious and adding justification for the possibility of judicial review.

421. Lastly, while the challenges of combating climate change are global, both the relative importance of various sources of emissions and the necessary policies and measures required for achieving adequate mitigation and adaptation may vary to some extent from one State to another depending on several factors such as the structure of the economy, geographical and demographic conditions and other societal circumstances. Even if in the longer term, climate change poses existential risks for humankind, this does not detract from the fact that in the short term the necessity of combating climate change involves various conflicts, the weighing-up of which falls, as stated previously, within the democratic decision-making processes, complemented by judicial oversight by the domestic courts and this Court.

422. Because of these fundamental differences, it would be neither adequate nor appropriate to follow an approach consisting in directly transposing the existing environmental case-law to the context of climate change. The Court considers it appropriate to adopt an approach which both acknowledges and takes into account the particularities of climate change and is tailored to addressing its specific characteristics. In the present case, therefore, while drawing some inspiration from the principles set out in the Court's existing case-law, the Court will seek to develop a more appropriate and tailored approach as regards the various Convention issues which may arise in the context of climate change.

2. General considerations relating to climate-change cases

423. Before proceeding with the assessment of the legal issues arising in the present case, the Court finds it necessary to address at the outset some of the general considerations relating to climate-change cases.

(a) Questions of causation

424. As indicated above, the specificity of climate-change disputes, in comparison with classic environmental cases, arises from the fact that they are not concerned with single-source local environmental issues but with a more complex global problem. In the context of human rights-based complaints against States, issues of causation arise in different respects which are distinct from each other and have a bearing on the assessment of victim status as well as the substantive aspects of the State's obligations and responsibility under the Convention.

425. The first dimension of the question of causation relates to the link between GHG emissions – and the resulting accumulation of GHG in the global atmosphere – and the various phenomena of climate change. This is a matter of scientific knowledge and assessment. The second relates to the link between the various adverse effects of the consequences of climate change, and the risks of such effects on the enjoyment of human rights at present and in the future. In general terms, this issue pertains to the legal question of how the scope of human rights protection is to be understood as regards the impacts arising for human beings from an existing degradation, or risk of degradation, in their living conditions. The third concerns the link, at the individual level, between a harm, or risk of harm, allegedly affecting specific persons or groups of persons, and the acts or omissions of State authorities against which a human rights-based complaint is directed. The fourth relates to the attributability of responsibility regarding the adverse effects arising from climate change claimed by individuals or groups against a particular State, given that multiple actors contribute to the aggregate amounts and effects of GHG emissions.

426. The Court will address these issues in turn in paragraphs 427 to 444 below.

(b) Issues of proof

427. One of the key features of climate-change cases is the necessity for the relevant court to engage with a body of complex scientific evidence. In the context of environmental cases, as regards general principles on the standard and burden of proof, the Court has held as follows (see *Fadeyeva v. Russia*, no. 55723/00, § 79, ECHR 2005-IV):

> "The Court reiterates at the outset that, in assessing evidence, the general principle has been to apply the standard of proof 'beyond reasonable doubt'. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. It should also be noted that it has been the Court's practice to allow flexibility in this respect, taking into consideration the nature of the substantive right at stake and any evidentiary difficulties involved. In certain instances, only the respondent Government have access to information capable of corroborating or refuting the applicant's allegations; consequently, a rigorous application of the principle *affirmanti, non neganti, incumbit probatio* is impossible ..."

428. A mere allegation that the State failed to comply with certain domestic rules and environmental or technical standards is not in itself sufficient to ground the assertion that the applicant's rights have been affected in a manner giving rise to an issue under the Convention (compare, for instance, *Fägerskiöld v. Sweden* (dec.), no. 37664/04, 26 February 2008, and *Ivan Atanasov v. Bulgaria*, no. 12853/03, § 75, 2 December 2010). Nevertheless, the Court attaches importance to the fact that the situation complained of breached the relevant domestic law (see, for instance, *Yevgeniy Dmitriyev v. Russia*, no. 17840/06, § 33, 1 December 2020). Moreover, in some cases, the Court may need to have regard to the relevant international standards concerning the effects of environmental pollution when ascertaining whether the rights of an individual have been affected (see, for instance, *Oluić v. Croatia*, no. 61260/08, § 60, 20 May 2010; *Hardy and Maile v. the United Kingdom*, no. 31965/07, § 191, 14 February 2012; and *Thibaut v. France* (dec.), nos. 41892/19 and 41893/19, § 42, 14 June 2022).

429. The Court also relies on studies and reports by relevant international bodies as regards the environmental impacts on individuals (see *Tătar*, cited above, § 95). As regards climate change, the Court points to the particular importance of the reports prepared by the IPCC, as the intergovernmental body of independent experts set up to review and assess the science related to climate change, which are based on comprehensive and rigorous methodology, including in relation to the choice of literature, the process of review and approval of its reports as well as the mechanisms for the investigation and, if necessary, correction of possible errors in the published reports. These reports provide scientific guidance on climate change regionally and globally, its impact and future risks, and options for adaptation and mitigation[188].

430. Lastly, the Court attaches particular importance to the findings of the domestic courts and other competent authorities in establishing the factual circumstances of the case (see, for instance, *Taşkın and Others*, cited above, § 112). As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them. However, it reiterates in this connection that, while sensitive to the subsidiary nature of its role and cautious about taking on the role of a first-instance tribunal of fact, the Court is nevertheless not bound by the findings of domestic courts and may depart from them where this is rendered unavoidable by the circumstances of a particular case. It is the Court's function to review the reasoning adduced by domestic judicial authorities from the point of view of the Convention and to determine whether the national authorities have struck a fair balance between the competing

[188] See, for further details, www.ipcc.ch/about; last accessed 14.02.2024.

interests at stake (see *Pavlov and Others*, cited above, § 76, with further references).

(c) Effects of climate change on the enjoyment of Convention rights

431. In recent times there has been an evolution of scientific knowledge, social and political attitudes and legal standards concerning the necessity of protecting the environment, including in the context of climate change. There has also been a recognition that environmental degradation has created, and is capable of creating, serious and potentially irreversible adverse effects on the enjoyment of human rights. This is reflected in the scientific findings, international instruments and domestic legislation and standards, and is being recognised in domestic and international case-law (see paragraphs 173, 176, 225 and 236-267 above).

432. The findings of the IPCC reports noted in paragraphs 107 to 120 above have not been challenged or called into doubt by the respondent or intervening States. It should also be noted that the clear indications as regards the adverse effects of climate change, both existing and those associated with an overshoot of 1.5°C global temperature rise, noted by the IPCC, have been shared by many environmental experts and scientists intervening as third parties in the present proceedings before the Court (see, for instance, paragraphs 392-393, 397, 399, 404-405 and 406 above).

433. Moreover, the IPCC findings correspond to the position taken, in principle, by the States in the context of their international commitments to tackle climate change. They also underpin the general policy aims in the respondent State in terms of the urgency of addressing climate change and its adverse effects on the lives, health and well-being of individuals (see paragraphs 84-102 above)[189]. This also includes the activities of the environmental bodies – such as the FOEN – which follow climate-change developments and regularly issue alerts as to the adverse effects which climate change creates for individuals. Moreover, the respondent Government in the present case, as well as the many third-party intervener Governments, have not contested that there is a climate emergency (see paragraphs 337, 367 and 373-375 above).

434. The Court cannot ignore the above-noted developments and considerations. On the contrary, it should be recalled that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 146, ECHR 2008). Indeed, an

[189] For a global database of climate laws see www.climate-laws.org; last accessed 14.02.2024).

appropriate and tailored approach as regards the various Convention issues which may arise in the context of climate change, required for the reasons set out in paragraph 422 above, needs to take into account the existing and constantly developing scientific evidence on the necessity of combating climate change and the urgency of addressing its adverse effects, including the grave risk of their inevitability and their irreversibility, as well as the scientific, political and judicial recognition of a link between the adverse effects of climate change and the enjoyment of (various aspects of) human rights.

435. As the Court has already recognised, Article 8 is capable of being engaged because of adverse effects not only on individuals' health but on their well-being and quality of life (see paragraph 514 below) and not only because of actual adverse effects but also sufficiently severe risks of such effects on individuals (see paragraph 470 below). The Court has already established that Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly (see, for instance, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 98, ECHR 2003-VIII). It has also held that the duty to regulate not only relates to actual harm arising from specific activities but extends to the inherent risks involved (see, for instance, *Di Sarno and Others v. Italy*, no. 30765/08, § 106, 10 January 2012). In other words, issues of causation must always be regarded in the light of the factual nature of the alleged violation and the nature and scope of the legal obligations at issue.

436. In sum, on the basis of the above findings, the Court will proceed with its assessment of the issues arising in the present case 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, that the relevant risks are projected to be lower if the rise in temperature is limited to 1.5°C above pre-industrial levels and if action is taken urgently, and that current global mitigation efforts are not sufficient to meet the latter target.

(d) The question of causation and positive obligations in the climate-change context

437. In its case-law relating to adverse effects arising from environmental harm, the Court has often merged the assessment of the questions of victim status and the applicability of Article 8 (see, for instance, *Hardy and Maile v. the United Kingdom*, no. 31965/07, §§ 187-92, 14 February 2012). It has also not articulated the issue of causality in specific terms. This is linked with the following circumstances. First, the applicability of Article 8 – as indicated above – is triggered not only by actual damage to the health or well-being of an applicant but by the risk of such effects, where such risks present

a sufficiently close link with the applicant's enjoyment of his or her rights under Article 8. Secondly, the complaints in such cases have concerned alleged failures by the authorities to comply with positive obligations directed at the avoidance or reduction of harm. Thirdly, such obligations have been formulated in terms of a duty to take measures to ensure the effective protection of those who might be endangered by the risks inherent in the harmful activity (see paragraph 538 below).

438. The notion of measures to ensure effective protection as far as positive obligations are concerned may vary considerably from case to case, depending on the gravity of the impact on an applicant's Convention rights and the extent of any burden the obligation would impose on the State. Nonetheless, certain factors relevant for the assessment of the content of those positive obligations on States in the context of environmental harm have been identified by the Court (see paragraphs 538-539 below). In any event, for a State's positive obligations to be engaged there has to be evidence of a risk meeting a certain threshold. There must be a relationship of causation between the risk and the alleged failure to fulfil positive obligations.

439. In the context of climate change, the particularity of the issue of causation becomes more accentuated. The adverse effects on and risks for specific individuals or groups of individuals living in a given place arise from aggregate GHG emissions globally, and the emissions originating from a given jurisdiction make up only part of the causes of the harm. Accordingly, the causal link between the acts or omissions on the part of State authorities in one country, and the harm, or risk of harm, arising there, is necessarily more tenuous and indirect compared to that in the context of local sources of harmful pollution. Furthermore, from the perspective of human rights, the essence of the relevant State duties in the context of climate change relates to the reduction of the risks of harm for individuals. Conversely, failures in the performance of those duties entail an aggravation of the risks involved, although the individual exposures to such risks will vary in terms of type, severity and imminence, depending on a range of circumstances. Accordingly, in this context, issues of individual victim status or the specific content of State obligations cannot be determined on the basis of a strict *conditio sine qua non* requirement.

440. It is therefore necessary to further adapt the approach to these matters, taking into account the special features of the problem of climate change in respect of which the State's positive obligations will be triggered, depending on a threshold of severity of the risk of adverse consequences on human lives, health and well-being. This will be developed in detail in the Court's assessment of victim status and the applicability of the relevant Convention provisions (see paragraphs 478-488 and 507-520 below) and in the determination of the content of the States' positive obligations in this context (see paragraphs 544-554 below).

(e) The issue of the proportion of State responsibility

441. The respondent Government raised an issue concerning the proportion of the respondent State's contributions to global GHG emissions and the capacity of individual States to take action and to bear responsibility for a global phenomenon that requires action by the community of States (see paragraph 346 above). Such arguments have been examined and rejected by the domestic courts in some national climate-change cases (see paragraphs 253 and 257 above).

442. For its part, the Court notes that while climate change is undoubtedly a global phenomenon which should be addressed at the global level by the community of States, the global climate regime established under the UNFCCC rests on the principle of common but differentiated responsibilities and respective capabilities of States (Article 3 § 1). This principle has been reaffirmed in the Paris Agreement (Article 2 § 2) and endorsed in the Glasgow Climate Pact (cited above, paragraph 18) as well as in the Sharm el-Sheikh Implementation Plan (cited above, paragraph 12). It follows, therefore, that each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State (see *Duarte Agostinho and Others*, cited above, §§ 202-03). The Court considers that a respondent State should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not.

443. This position is consistent with the Court's approach in cases involving a concurrent responsibility of States for alleged breaches of Convention rights, where each State can be held accountable for its share of the responsibility for the breach in question (see, albeit in other contexts, *M.S.S. v. Belgium and Greece*, cited above, §§ 264 and 367, and *Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia*, nos. 75734/12 and 2 others, §§ 160-61 and 179-81, 19 November 2019). It is also consistent with the principles of international law relating to the plurality of responsible States, according to which the responsibility of each State is determined individually, on the basis of its own conduct and by reference to its own international obligations (see ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Commentary on Article 47, paragraphs 6 and 8). Similarly, the alleged infringement of rights under the Convention through harm arising from GHG emissions globally and the acts and omissions on the part of multiple States in combating the adverse effects of climate change may engage the responsibility of each Contracting Party, subject to it having jurisdiction within the meaning of Article 1 of the Convention (see *Duarte Agostinho and Others*, cited above). Indeed, given that the Article 1 jurisdiction is principally territorial, each State has its own responsibilities within its own territorial jurisdiction in respect of climate change.

444. Lastly, as regards the "drop in the ocean" argument implicit in the Government's submissions – namely, the capacity of individual States to affect global climate change – it should be noted that in the context of a State's positive obligations under the Convention, the Court has consistently held that it need not be determined with certainty that matters would have turned out differently if the authorities had acted otherwise. The relevant test does not require it to be shown that "but for" the failing or omission of the authorities the harm would not have occurred. Rather, what is important, and sufficient to engage the responsibility of the State, is that reasonable measures which the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm (see, among many other authorities, *O'Keeffe v. Ireland* [GC], no. 35810/09, § 149, ECHR 2014 (extracts), and *Bljakaj and Others v. Croatia*, no. 74448/12, § 124, 18 September 2014, with further references). In the context of climate change, this principle should also be understood in the light of Article 3 § 3 of the UNFCCC according to which States should take measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects.

(f) Scope of the Court's assessment

445. The Court has repeatedly stressed that no Article of the Convention is specifically designed to provide general protection of the environment as such (see *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI (extracts), and *Cordella and Others*, cited above, § 100). To that effect, other international instruments and domestic legislation are more adapted to dealing with such protection.

446. At the same time, the Court has often dealt with various environmental problems deemed to *affect* the Convention rights of individuals, particularly Article 8 (see *Hatton and Others*, cited above, § 96). It has, however, explained that in contrast with *actio popularis* type of complaints – which are not permitted in the Convention system (see paragraph 460 below) – the crucial element which must be present in determining whether, in the circumstances of a given case, an environmental harm has adversely affected one of the rights safeguarded by the Convention is the existence of a harmful effect on a person and not simply the general deterioration of the environment (see, for instance, *Di Sarno and Others*, cited above, §§ 80-81).

447. While the Court has on occasion referred to "the right of the people concerned ... to live in a safe and healthy environment" (see *Tătar*, cited above, § 112, and *Di Sarno and Others*, cited above, § 110), this language cannot be understood without regard to the distinction that must be made between, on the one hand, the rights protected under the Convention and, on the other hand, the weight of environmental concerns in the assessment of legitimate aims and the weighing-up of rights and interests in the context of

the application of the Convention. In this latter context, the Court has, for instance, in the context of Article 1 of Protocol No. 1 held as follows (see *Turgut and Others v. Turkey*, no. 1411/03, § 90, 8 July 2008):

> "[I]n today's society the protection of the environment is an increasingly important consideration ... The Court notes that it has on various occasions dealt with questions relating to environmental protection and stressed the importance of this issue ... The protection of nature and forests, and, more generally, the environment, is a cause whose defence arouses the constant and sustained interest of the public, and consequently the public authorities. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations ..."

448. It is also from this dual perspective of the Court's engagement with environmental issues – namely, ensuring the protection of Convention rights and having due regard for environmental concerns in the assessment of legitimate aims and the weighing-up of rights and interests in the context of the application of the Convention – that the relevance of the recent international initiatives for the recognition of the human right to a clean, healthy and sustainable environment (see, in particular, UN General Assembly Resolution 76/300, and Committee of Ministers Recommendation CM/Rec(2022)20, both cited above) should be understood from the perspective of the Convention. It is therefore not for the Court to determine whether the general trends regarding the recognition of such a right give rise to a specific legal obligation (see paragraph 372 above concerning the arguments raised by the intervening Norwegian Government). Such a development forms part of the international-law context in which the Court assesses Convention issues before it (see *Demir and Baykara*, cited above, § 76), notably as regards the recognition by the Contracting Parties of a close link between the protection of the environment and human rights.

449. The Court is mindful of the fact that in a context such as the present one it may be difficult to clearly distinguish issues of law from questions of policy and political choices and, therefore, of the fundamentally subsidiary role of the Convention, particularly given the complexity of the issues involved with regard to environmental policy-making (see *Dubetska and Others v. Ukraine*, no. 30499/03, § 142, 10 February 2011). It 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. In matters of general policy, or political choices, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker is given special weight (see *Hatton and Others*, cited above, § 97).

450. However, this does not exclude the possibility that where complaints raised before the Court relate to State policy with respect to an issue affecting the Convention rights of an individual or group of individuals, this subject matter is no longer merely an issue of politics or policy but also a matter of

law having a bearing on the interpretation and application of the Convention. In such instances, the Court retains competence, albeit with substantial deference to the domestic policy-maker and the measures resulting from the democratic process concerned and/or the judicial review by the domestic courts. Accordingly, the margin of appreciation for the domestic authorities is not unlimited and goes hand in hand with a European supervision by the Court, which must be satisfied that the effects produced by the impugned national measures were compatible with the Convention.

451. It follows from the above considerations that the Court's competence in the context of climate-change litigation cannot, as a matter of principle, be excluded. Indeed, given the necessity of addressing the urgent threat posed by climate change, and bearing in mind the general acceptance that climate change is a common concern of humankind (see paragraphs 420 and 436 above), there is force in the argument put forward by the UN Special Rapporteurs that the question is no longer whether, but how, human rights courts should address the impacts of environmental harms on the enjoyment of human rights (see paragraph 379 above).

(g) Relevant principles regarding the interpretation of the Convention

452. The well-established case-law principles regarding the interpretation of the Convention as an international treaty have been summarised by the Court in *Magyar Helsinki Bizottság v. Hungary* ([GC], no. 18030/11, §§ 118-25, 8 November 2016, with further references) and *Slovenia v. Croatia* ((dec.) [GC], no. 54155/16, § 60, 18 November 2020).

453. The Court must address the concerns expressed by the respondent Government about the harmonious and evolutive interpretation of the Convention in the light of the developing rules and principles of international environmental law (see paragraphs 352 and 355 above). In the view of the respondent Government, supported by most of the intervening Governments, the principles of the harmonious and evolutive interpretation of the Convention should not be used to interpret the Convention as a mechanism of international judicial enforcement in the field of climate change and to transform the rights enshrined in the Convention into rights to combat climate change (see paragraphs 366, 368, 371-373 and 375 above).

454. The Court reiterates that it only has the authority to ensure that the Convention is complied with. This is the instrument which the Court is entrusted to interpret and apply. The Court does not have the authority to ensure compliance with international treaties or obligations other than the Convention. Thus, the Court has acknowledged that while other instruments can offer wider protection than the Convention, it is not bound by interpretations given to similar instruments by other bodies, having regard to possible differences in the content of the provisions of other international instruments and/or possible differences in the role of the Court and the other

bodies (see *Caamaño Valle v. Spain*, no. 43564/17, §§ 53-54, 11 May 2021, with further references).

455. Nevertheless, the interpretation and application of the rights provided for under the Convention can and must be influenced both by factual issues and developments affecting the enjoyment of the rights in question and also by relevant legal instruments designed to address such issues by the international community. The Court has consistently held that the Convention should be interpreted, as far as possible, in harmony with other rules of international law (ibid.). Moreover, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, § 167, 17 January 2023).

456. The Court cannot ignore the pressing scientific evidence and the growing international consensus regarding the critical effects of climate change on the enjoyment of human rights (see paragraph 436 above). This consideration relates, in particular, to the consensus flowing from the international-law mechanisms to which the member States voluntarily acceded and the related requirements and commitments which they undertook to respect (see *Demir and Baykara*, cited above, §§ 85-86; compare *Guberina v. Croatia*, no. 23682/13, § 92, 22 March 2016), such as those under the Paris Agreement. The Court must bear these considerations in mind when conducting its assessment under the Convention (see paragraphs 445-451 above).

457. At the same time, the Court must also bear in mind its subsidiary role and the necessity of affording the Contracting States a margin of appreciation in the implementation of policies and measures to combat climate change, as well as the need to observe appropriate respect for the prevailing constitutional principles, such as those relating to the separation of powers.

3. Admissibility

(a) Victim status/*locus standi* (representation)

458. There are, in general, three possible approaches in the Court's case-law to examining the existence of victim status under Article 34 of the Convention. It may be examined as a separate preliminary issue in the case (see, for instance, *S.A.S. v. France* [GC], no. 43835/11, §§ 53-58, ECHR 2014 (extracts)); it may be examined in the context of an assessment of the applicability of the relevant Convention provision (see, for instance, *Greenpeace e.V. and Others v. Germany* (dec.), no. 18215/06, 12 May 2009); or it may be considered to be "closely bound up with" the issues to be considered on the merits and thus joined to the examination of the complaint on the merits (see, for instance, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 111, ECHR 2012).

459. For the sake of methodological clarity, and having regard to the fact that the issue of victim status is one of the salient issues of the climate-change cases, the Court finds it necessary at this point to elaborate on the general principles concerning victim status separately. However, given the close link between victim status and the applicability of the relevant Convention provisions (see paragraphs 513 and 519 below), whether the applicants have victim status in the present case will be examined together with the Court's assessment of the applicability of Articles 2 and 8 of the Convention.

(i) General principles

460. The Convention does not provide for the institution of an *actio popularis*. The Court's task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention (see, for instance, *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, ECHR 2015, with further references). Accordingly, a person, non-governmental organisation or group of individuals must be able to claim to be a victim of a violation of the rights set forth in the Convention. The Convention does not permit individuals or groups of individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention (see *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, §§ 50-51, ECHR 2012).

461. The Court has repeatedly stressed that the victim-status criterion is not to be applied in a rigid, mechanical and inflexible way (see *Albert and Others v. Hungary* [GC], no. 5294/14, § 121, 7 July 2020). Moreover, like the other provisions of the Convention, the term "victim" in Article 34 must also be interpreted in an evolutive manner in the light of conditions in contemporary society (see *Gorraiz Lizarraga and Others*, cited above, § 38, and *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey* (dec.), no. 37857/14, § 39, 7 December 2021). In this context, the Court has cautioned that any excessively formalistic interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory (see *Gorraiz Lizarraga and Others*, cited above, § 38).

462. The Court interprets the concept of "victim" autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act, even though the Court should have regard to the fact that an applicant was a party to the domestic proceedings (see *Aksu*, cited above, § 52). Moreover, the existence of victim status does not necessarily imply the existence of prejudice (see *Brumărescu v. Romania* [GC], no. 28342/95, § 50, ECHR 1999-VII).

463. In general, the word "victim" under Article 34 denotes the following categories of persons (see *Centre for Legal Resources on behalf of Valentin*

Câmpeanu v. Romania [GC], no. 47848/08, §§ 96-101, ECHR 2014): those *directly* affected by the alleged violation of the Convention (the direct victims); those *indirectly* affected by the alleged violation of the Convention (the indirect victims); and those *potentially* affected by the alleged violation of the Convention (the potential victims). In *Mansur Yalçın and Others v. Turkey* (no. 21163/11, § 40 *in fine*, 16 September 2014) the Court noted that, in any event, whether the victim is direct, indirect or potential, there must be a link between the applicant and the harm which he or she claims to have sustained as a result of the alleged violation.

464. The Court reiterates that the issue of victim status should be distinguished from the issue of *locus standi*. The latter relates to the questions of representation of the (direct) victims' complaints before the Court. It may therefore also be referred to as "representation" (see *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, §§ 102-03).

(α) Victim status of individuals

465. In order to fall into the category of direct victims, the applicant must be able to show that he or she was "directly affected" by the measure complained of (see *Lambert and Others v. France* [GC], no. 46043/14, § 89, ECHR 2015 (extracts)). This implies that the applicant has been personally and actually affected by the alleged violation of the Convention, which is normally the result of a measure applying the relevant law or a decision allegedly in breach of the Convention or, in some instances, of the acts or omissions of State authorities or private parties allegedly infringing the applicant's Convention rights (see, for instance, *Aksu*, cited above, § 51; see also *Karner v. Austria*, no. 40016/98, §§ 24-25, ECHR 2003-IX, and *Berger-Krall and Others v. Slovenia*, no. 14717/04, § 258, 12 June 2014).

466. However, this does not necessarily mean that the applicant needed to be personally targeted by the act or omission complained of. What is important is that the impugned conduct personally and directly affected him or her (see, for instance, *Aksu*, cited above, §§ 51-54).

467. The issues relating to the category of indirect victims normally concern the question of the standing of the direct victim's next of kin to submit or pursue an application before the Court concerning issues affecting the direct victim (see *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, §§ 97-100, with further references).

468. The Court has consistently held that "Article 34 concerns not just the direct victim or victims of the alleged violation, but also any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end" (see *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 47, ECHR 2013 (extracts), and the cases cited therein). Thus, indirect victims must demonstrate a "ricochet effect" created by the alleged violation affecting one person (the direct victim) on the Convention rights of another person (the

indirect victim) in order for the latter to demonstrate harm or a valid personal interest in bringing the situation complained of to an end.

469. Two types of potential victim status may be found in the case-law (see, for instance, *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom* (dec.) [GC], no. 56672/00, ECHR 2004-IV). The first type concerns persons who claim to be presently affected by a particular general legislative measure. The Court has specified that it may accept the existence of victim status where applicants contend that a law violates their rights, in the absence of an individual measure of implementation, if they belong to a class of people who risk being directly affected by the legislation, or if they are required either to modify their conduct or risk being prosecuted (see *Tănase v. Moldova* [GC], no. 7/08, § 104, ECHR 2010, and *Sejdić and Finci*, cited above, § 28).

470. The second type concerns persons who argue that they may be affected at some future point in time. The Court has made clear that the exercise of the right of individual petition cannot be used to prevent a potential violation of the Convention and that, in theory, the Court cannot examine a violation other than *a posteriori*, once that violation has occurred. It is only in highly exceptional circumstances that an applicant may nevertheless claim to be a victim of a violation of the Convention owing to the risk of a future violation (see *Berger-Krall and Others*, cited above, § 258, with further references). In general, the relevant test to examine the existence of such victim status is that the applicant must produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur; mere suspicion or conjecture being insufficient in this regard (see *Asselbourg and Others v. Luxembourg* (dec.), no. 29121/95, ECHR 1999-VI, and *Senator Lines GmbH*, cited above).

471. The term "potential" therefore refers, in some circumstances, to victims who claim that they are at present, or have been, affected by the general measure complained of, and, in other circumstances, to those who claim that they might be affected by such a measure in the future. In some instances, these two types of situations may coexist or may not be easily distinguishable (see, for instance, *Tănase*, cited above, § 108) and the relevant case-law principles may apply interchangeably (see, for instance, *Shortall and Others v. Ireland* (dec.), no. 50272/18, §§ 50-61, 19 October 2021).

472. In environmental cases, the Court has not considered it sufficient for an applicant to complain of general damage to the environment (see *Di Sarno and Others*, cited above, § 80). According to the Court's existing case-law in this context, in order to claim victim status, the applicant needs to show that he or she is impacted by the environmental damage or risk complained of. The criteria on which the Court has relied to establish victim status includes most notably issues such as the minimum level of severity of the harm in question, its duration and the existence of a sufficient link with the applicant

or applicants, including, in some instances, the geographical proximity between the applicant and the impugned environmental harm (see, for instance, *Tătar*, cited above, §§ 95-97; *Greenpeace e.V. and Others*, cited above; *Caron and Others v. France* (dec.), no. 48629/08, 29 June 2010; *Hardy and Maile*, cited above, §§ 190-92; *Cordella and Others*, cited above, §§ 104-08; and *Pavlov and Others*, cited above, §§ 64-70).

(β) *Locus standi* (representation) by associations

473. In accordance with the Court's case-law, an association is in principle not in a position to rely on health considerations to allege a violation of Article 8 (see *Greenpeace e.V. and Others*, cited above) and in general it cannot complain of nuisances or problems which can only be encountered by natural persons (see *Besseau and Others v. France* (dec.), no. 58432/00, 7 February 2006).

474. Most recently, in an environmental context, the Court reasoned as follows as regards the victim status of associations (see *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği*, cited above, § 41):

> "The first reason is the prohibition on the bringing of an *actio popularis* under the Convention system; this means that an applicant cannot lodge a claim in the public or general interest if the impugned measure or act does not affect him or her directly. It follows that in order for an applicant to be able to argue that he is a victim, he must produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient in this respect ... The second reason concerns the nature of the Convention right at stake and the manner in which it has been invoked by the applicant association in question. Certain Convention rights, such as those under Article 2, 3 and 5, by their nature, are not susceptible of being exercised by an association, but only by its members ... In *Asselbourg and Others* (cited above), when declining to grant victim status to the applicant association, the Court noted that the applicant association could only act as a representative of its members or employees, in the same way as, for example, a lawyer represented his client, but could not itself claim to be the victim of a violation of Article 8."

475. However, although in the absence of a measure directly affecting them the Court does not normally grant victim status to associations, even if the interests of their members could be at stake, there may be "special considerations" where an association represents individuals, even in the absence of a measure directly affecting the association in question.

476. In *Centre for Legal Resources on behalf of Valentin Câmpeanu* (cited above, §§ 103 and 105), the Court found that there might be "special considerations" where it could be accepted that applications could be lodged by others on behalf of the victims without a specific authority to act. The Court stressed that its judgments "[served] not only to decide those cases brought before [it] but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance

by the States of the engagements undertaken by them as Contracting Parties". At the same time, the Court was mindful of the need to ensure that the conditions of admissibility governing access to it were interpreted in a consistent manner.

477. On the basis of the case-law principles set out in *Centre for Legal Resources on behalf of Valentin Câmpeanu*, in several similar subsequent cases the Court accepted the *locus standi* of associations to lodge or pursue applications on behalf of direct victims, including where the victim had been able, while alive, to lodge complaints himself or herself (see *Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania*, no. 2959/11, §§ 42-46, 24 March 2015).

*(ii) Victim status/*locus standi *in the climate-change context*

(α) Victim status of individuals

478. The Court notes that there is cogent scientific evidence demonstrating that climate change has already contributed to an increase in morbidity and mortality, especially among certain more vulnerable groups, that it actually creates such effects and that, in the absence of resolute action by States, it risks progressing to the point of being irreversible and disastrous (see paragraphs 104-120 above). At the same time, the States, being in control of the causes of anthropogenic climate change, have acknowledged the adverse effects of climate change and have committed themselves – in accordance with their common but differentiated responsibilities and their respective capabilities – to take the necessary mitigation measures (to reduce GHG emissions) and adaptation measures (to adapt to climate change and reduce its impacts). These considerations indicate that a legally relevant relationship of causation may exist between State actions or omissions (causing or failing to address climate change) and the harm affecting individuals, as noted in paragraph 436 above.

479. Given the nature of climate change and its various adverse effects and future risks, the number of persons affected, in different ways and to varying degrees, is indefinite. The resolution of the climate crisis requires, and depends on, a comprehensive and complex set of transformative policies involving legislative, regulatory, fiscal, financial and administrative measures as well as both public and private investment. The critical issues arise from failures to act, or inadequate action. In other words, they arise from omissions. In key respects, the deficiencies reside at the level of the relevant legislative or regulatory framework. The need, in this context, for a special approach to victim status, and its delimitation, therefore arises from the fact that complaints may concern acts or omissions in respect of various types of general measures, the consequences of which are not limited to certain identifiable individuals or groups but affect the population more widely. The outcome of legal proceedings in this context will inevitably have an effect

beyond the rights and interests of a particular individual or group of individuals, and will inevitably be forward-looking, in terms of what is required to ensure effective mitigation of the adverse effects of climate change or adaptation to its consequences.

480. That being said, the Court notes that the assessment of victim status in the present context of complaints concerning alleged omissions in general measures relating to the prevention of harm, or the reduction of the risk of harm, affecting indefinite numbers of persons is without prejudice to the determination of victim status in circumstances where complaints by individuals concern alleged violations arising from a specific individual loss or damage already suffered by them (see, for instance, *Kolyadenko and Others*, cited above, §§ 150-55).

481. The question for the Court in the present case is how and to what extent allegations of harm linked to State actions and/or omissions in the context of climate change, affecting individuals' Convention rights (such as the right to life under Article 2 and/or the right to respect for private and family life under Article 8), can be examined without undermining the exclusion of *actio popularis* from the Convention system and without ignoring the nature of the Court's judicial function, which is by definition reactive rather than proactive.

482. In this connection, the Court has already accepted, albeit in the context of the application of Article 6 in an environmental context, that the issue of victim status must be interpreted in an evolutive manner in the light of conditions in contemporary society and that any excessively formalistic interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory (see *Gorraiz Lizarraga and Others*, cited above, § 38).

483. The Court's case-law on victim status is premised on the existence of a direct impact of the impugned action or omission on the applicant or a real risk thereof. However, in the climate-change context, everyone may be, one way or another and to some degree, directly affected, or at a real risk of being directly affected, by the adverse effects of climate change. Leaving aside the issue of jurisdiction, the fact remains that potentially a huge number of persons could claim victim status under the Convention on this basis. While it is true that in the context of general situations/measures, the class of persons who could claim victim status "may indeed be very broad" (see *Shortall and Others*, cited above, § 53), it would not sit well with the exclusion of *actio popularis* from the Convention mechanism and the effective functioning of the right of individual application to accept the existence of victim status in the climate-change context without sufficient and careful qualification.

484. If the circle of "victims" within the overall population of persons under the jurisdiction of the Contracting Parties actually or potentially adversely affected is drawn in a wide-ranging and generous manner, this

would risk disrupting national constitutional principles and the separation of powers by opening broad access to the judicial branch as a means of prompting changes in general policies regarding climate change. If, on the other hand, this circle is drawn too tightly and restrictively, there is a risk that even obvious deficiencies or dysfunctions in government action or democratic processes could lead to the Convention rights of individuals and groups of individuals being affected without them having any judicial recourse before the Court. In addition, in view of the considerations of intergenerational burden-sharing related to the impacts and risks of climate change, the members of society who stand to be most affected by the impact of climate change can be considered to be at a distinct representational disadvantage (see paragraph 420 above). The need to ensure, on the one hand, effective protection of the Convention rights, and, on the other hand, that the criteria for victim status do not slip into *de facto* admission of *actio popularis* is particularly acute in the present context.

485. In this regard, although the lack of State action, or insufficient action, to combat climate change does entail a situation with general effect, the Court does not consider that the case-law concerning "potential" victims under which victim status could be claimed by a "class of people" who have "a legitimate personal interest" in seeing the impugned situation being brought to an end (see paragraphs 471 above), could be applied here. In the context of climate change, this could cover virtually anybody and would therefore not work as a limiting criterion. Everyone is concerned by the actual and future risks, in varying ways and to varying degrees, and may claim to have a legitimate personal interest in seeing those risks disappear.

486. Therefore, having regard to the special features of climate change, when determining the criteria for victim status – which is premised on the existence of a real risk of a "direct impact" on the applicant (see paragraphs 465-466 and 483 above) – the Court will rely on distinguishing criteria such as a particular level and severity of the risk of adverse consequences of climate change affecting the individual(s) in question (see paragraph 440 above), taking into account the pressing nature of their need for individual protection.

487. In sum, the Court finds that in order to claim victim status under Article 34 of the Convention in the context of complaints concerning harm or risk of harm resulting from alleged failures by the State to combat climate change, an applicant needs to show that he or she was personally and directly affected by the impugned failures. This would require the Court to establish, having regard to the principles concerning issues of proof set out in paragraphs 427 to 430 above, the following circumstances concerning the applicant's situation:

(a) the applicant must be subject to a high intensity of exposure to the adverse effects of climate change, that is, the level and severity of (the risk

of) adverse consequences of governmental action or inaction affecting the applicant must be significant; and

(b) there must be a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm.

488. The threshold for fulfilling these criteria is especially high. In view of the exclusion of *actio popularis* under the Convention, as discussed in paragraphs 483 to 484 above, whether an applicant meets that threshold will depend on a careful assessment of the concrete circumstances of the case. In this connection, the Court will have due regard to circumstances such as the prevailing local conditions and individual specificities and vulnerabilities. The Court's assessment will also include, but will not necessarily be limited to, considerations relating to: the nature and scope of the applicant's Convention complaint, the actuality/remoteness and/or probability of the adverse effects of climate change in time, the specific impact on the applicant's life, health or well-being, the magnitude and duration of the harmful effects, the scope of the risk (localised or general), and the nature of the applicant's vulnerability.

(β) Standing of associations

489. As the Court already noted in *Gorraiz Lizarraga and Others* (cited above, § 38), in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. This is especially true in the context of climate change, which is a global and complex phenomenon. It has multiple causes and its adverse effects are not the concern of any one particular individual, or group of individuals, but are rather "a common concern of humankind" (see the Preamble to the UNFCCC). Moreover, in this context where intergenerational burden-sharing assumes particular importance (see paragraph 420 above), collective action through associations or other interest groups may be one of the only means through which the voice of those at a distinct representational disadvantage can be heard and through which they can seek to influence the relevant decision-making processes.

490. These general observations concerning the importance of recourse to collective entities such as associations to defend the rights and interests of affected or concerned individuals, as far as issues of the environment are concerned, are reflected in international instruments such as the Aarhus Convention. That Convention recognises that "every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations" (see paragraph 141 above).

491. The Aarhus Convention also emphasises the importance of the role which non-governmental organisations play in the context of environmental protection. It envisages the need to ensure that non-governmental organisations have wide access to justice in matters concerning environmental protection (see, in particular, the Preamble and Article 9 of the Aarhus Convention). Article 2 § 5 of the Aarhus Convention explicitly incorporates within the category of "the interested public" non-governmental organisations whose statutory goals include the promotion of environmental protection, provided that they also meet "any requirements under national law". According to the Implementation Guide[190], whether a non-governmental organisation promotes environmental protection or not can be ascertained in a variety of ways, such as through its charter, by-laws or activities. In this context, "environmental protection" may concern any purpose consistent with the implied definition of environment found in Article 2 § 3. Moreover, it is specified that the reference to "meeting any requirements under national law" should not be read as leaving absolute discretion to States in defining these requirements, but rather in the context of the important role the Aarhus Convention assigns to non-governmental organisations.

492. The Court further notes that the EU has developed a set of legal instruments concerning the implementation of the Aarhus Convention (see paragraphs 212-214 above). The CJEU has found that Article 9 § 3 of the Aarhus Convention must be read in conjunction with Article 47 of the Charter of Fundamental Rights in ensuring that "a duly constituted environmental organisation operating in accordance with the requirements of national law" is able to contest a measure affecting the environment[191].

493. In this connection, it should also be noted that a comparative study from 2019 found that broad legal standing was granted by law and in practice in a number of EU member States (thirteen out of twenty-eight at the time). In addition, while access had broadened over the years in some countries, either through jurisprudence (Austria, Belgium) or by law (Greece, Ireland, Slovakia, Slovenia, Sweden), in some others, recent jurisprudence (Slovenia) or legal reforms planned (the United Kingdom) or enacted (the Netherlands) aimed to restrict access to courts[192]. An earlier comparative study from 2013 had found that the EU member States' legislation required one or more of the following conditions to be met for the legal standing of associations before the courts to be recognised: the condition that the statutes of the organisation

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[190] Cited above, pp. 57-58 and 194-95; see also Maastricht Recommendations, cited above, p. 12.

[191] Judgment of 20 December 2017 in *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, C-664/15, EU:C:2017:987, paragraph 58. See also, more recently, judgment of 8 November 2022 in *Deutsche Umwelthilfe eV v Bundesrepublik Deutschland*, C-873/19, EU:C:2022:857, paragraph 81.

[192] Implementation Study, cited above, pp. 102-06.

should cover environmental protection or whatever was relevant for the challenged decision; a requirement of activity in the area in question; geographical proximity; a certain number of years of registration and activity; a certain number of members; representation of a significant percentage of the population or the existence of support from the public; openness and democratic structure; and non-profit activity[193].

494. The findings of the above studies were confirmed by a broader comparative survey conducted by the Court for the purposes of the present proceedings (see paragraphs 232-234 above). This survey found that there was a nearly universal ratification of the Aarhus Convention by Council of Europe member States and that associations – meeting certain criteria noted in paragraph 233 above – were generally granted standing to bring court cases in the interests of the protection of the environment and/or in the interests of private individuals who may be affected by specific environmental hazards or industrial projects. While the standing of associations in the context of climate-change litigation – which is not covered by the Aarhus Convention – was still a developing issue, it would appear that in most member States there may at least be a theoretical possibility for environmental associations to bring a climate-change case, and in some States the criteria for such standing have already been established either in domestic legislation or in the domestic courts' case-law (see paragraph 234 above).

495. In the light of the above considerations, in order to devise an approach to the matter in the present case, in which the applicant association also claims victim status, the Court notes some key principles which must guide its decision in that respect.

496. First, it is necessary to make, and to maintain, the distinction between the victim status of individuals and the legal standing of representatives who are acting on behalf of persons whose Convention rights are alleged to be violated (see paragraphs 465-477 above). In regard to the former, there seems to be no reason to call into question the principle in the case-law that an association cannot rely on health considerations or nuisances and problems associated with climate change which can only be encountered by natural persons (see paragraph 474 above). This, by the nature of things, places a constraint on the possibility of granting victim status to an association with regard to any substantive issue under Articles 2 and/or 8 of the Convention.

497. Secondly, there has been an evolution in contemporary society as regards recognition of the importance of associations to litigate issues of climate change on behalf of affected persons. Indeed, climate-change litigation often involves complex issues of law and fact, requiring significant financial and logistical resources and coordination, and the outcome of a dispute will inevitably affect the position of many individuals (see

[193] "Effective Justice?", Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union (2013), pp. 14-15.

paragraph 410 above). As is apparent from the circumstances of domestic climate-change litigation (see, for instance, paragraphs 258, 260 and 262 above; see also *Carême*, cited above), associations regularly appear as one of the applicants, or sometimes the sole applicant, or as a key intervener in the case.

498. The specific considerations relating to climate change weigh in favour of recognising the possibility for associations, subject to certain conditions, to have standing before the Court as representatives of the individuals whose rights are or will allegedly be affected. Indeed, as the Court noted previously in *Asselbourg and Others* and *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği* (cited above, §§ 41 and 43), it may be possible for an association to have standing before the Court despite the fact that it cannot itself claim to be the victim of a violation of the Convention.

499. Moreover, the special feature of climate change as a common concern of humankind and the necessity of promoting intergenerational burden-sharing in this context (see paragraph 489 above), speak in favour of recognising the standing of associations before the Court in climate-change cases. In view of the urgency of combating the adverse effects of climate change and the severity of its consequences, including the grave risk of their irreversibility, States should take adequate action notably through suitable general measures to secure not only the Convention rights of individuals who are currently affected by climate change, but also those individuals within their jurisdiction whose enjoyment of Convention rights may be severely and irreversibly affected in the future in the absence of timely action. The Court therefore considers it appropriate in this specific context to acknowledge the importance of making allowance for recourse to legal action by associations for the purpose of seeking the protection of the human rights of those affected, as well as those at risk of being affected, by the adverse effects of climate change, instead of exclusively relying on proceedings brought by each individual on his or her own behalf.

500. However, similarly to what was observed above concerning the victim status of natural persons in this context (see paragraph 483 *in fine* above), the exclusion of *actio popularis* under the Convention requires that the possibility for associations to lodge applications before the Court be subject to certain conditions. It is clear that the Convention mechanism cannot accept an abstract complaint about a general deterioration of the living conditions of people without considering its impact on a particular person or group of persons.

501. In this connection, when devising the test for the standing of associations in climate-change litigation under the Convention, the Court finds it pertinent to have regard to the Aarhus Convention, the importance of which has already been noted in its case-law (see *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox et*

Mox v. France (dec.), no. 75218/01, 28 March 2006). The Court must, however, be mindful of the difference between the basic nature and purpose of the Aarhus Convention, which is designed to enhance public participation in environmental matters, and that of the Convention, which is designed to protect individuals' human rights. It must also bear in mind the specific features of climate-change litigation (see paragraphs 410-422 above) and the difference between climate change and the more linear and localised (traditional) environmental issues which the Aarhus Convention is designed to address. Moreover, in so far as the Aarhus Convention provides for a very broad standing of associations where the existence of an effect on the "public concerned" is assumed to exist (provided that the association is duly established under domestic law), the Court must be mindful of the fact that its own approach cannot result in an acceptance of *actio popularis* which, as a matter of principle and established case-law, is not provided for in the Convention system.

502. Thus, taking into account the above-noted considerations, the following factors will determine the standing of associations before the Court in the present context.

In order to be recognised as having *locus standi* to lodge an application under Article 34 of the Convention on account of the alleged failure of a Contracting State to take adequate measures to protect individuals against the adverse effects of climate change on human lives and health, the association in question must be: (a) lawfully established in the jurisdiction concerned or have standing to act there; (b) able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights against the threats arising from climate change; and (c) able to demonstrate that it can be regarded as genuinely qualified and representative to act on behalf of members or other affected individuals within the jurisdiction who are subject to specific threats or adverse effects of climate change on their lives, health or well-being as protected under the Convention.

In this connection, the Court will have regard to such factors as the purpose for which the association was established, that it is of non-profit character, the nature and extent of its activities within the relevant jurisdiction, its membership and representativeness, its principles and transparency of governance and whether on the whole, in the particular circumstances of a case, the grant of such standing is in the interests of the proper administration of justice.

In accordance with the specific features of recourse to legal action by associations in this context (see paragraphs 497-499 above), the standing of an association to act on behalf of the members or other affected individuals within the jurisdiction concerned will not be subject to a separate requirement

of showing that those on whose behalf the case has been brought would themselves have met the victim-status requirements for individuals in the climate-change context as established in paragraphs 487 to 488 above.

503. In the event of existing limitations regarding the standing before the domestic courts of associations meeting the above Convention requirements, the Court may also, in the interests of the proper administration of justice, take into account whether, and to what extent, its individual members or other affected individuals may have enjoyed access to a court in the same or related domestic proceedings.

(iii) Application of these principles to the present case

504. The respondent Government challenged the standing/victim status of all the applicants as regards the substantive Convention provisions relied on, namely Articles 2 and 8 (see paragraphs 341 and 345 above).

505. Having regard to the approach outlined in paragraph 459 above, the Court will examine the issues of the victim status of applicants nos. 2-5 and the standing of the applicant association in the context of its assessment of the applicability of Articles 2 and 8 of the Convention.

(b) Applicability of the relevant Convention provisions

506. Similarly to what was observed above concerning victim status (see paragraph 458 above), the issue of applicability of the relevant Convention provisions may be examined separately as an issue of admissibility or in the context of the examination of the complaint on the merits (compare, for instance, *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, § 146, ECHR 2008 (extracts), and *M. Özel and Others v. Turkey*, nos. 14350/05 and 2 others, § 171 *in fine*, 17 November 2015). For the sake of methodological clarity, the Court will elaborate on the general principles concerning applicability separately (see the approach adopted in paragraph 459 above).

(i) General principles

(α) Article 2

507. In *Nicolae Virgiliu Tănase v. Romania* ([GC], no. 41720/13, §§ 140-41, 25 June 2019), the Court elaborated on the general principles for the applicability of Article 2 in instances where the right to life was at stake and where the person concerned did not die. In so far as may be relevant for the present case, the Court reasoned as follows:

> "140. It further emerges from the Court's case-law that, where the victim was not killed but survived and where he or she does not allege any intent to kill, the criteria for a complaint to be examined under this aspect of Article 2 are, firstly, whether the person was the victim of an activity, whether public or private, which by its very nature put his or her life at real and imminent risk and, secondly, whether he or she has suffered injuries that appear life-threatening as they occur. Other factors ... may also come into

play. The Court's assessment depends on the circumstances. While there is no general rule, it appears that if the activity involved by its very nature is dangerous and puts a person's life at real and imminent risk ... the level of injuries sustained may not be decisive and, in the absence of injuries, a complaint in such cases may still fall to be examined under Article 2 (see ... *Kolyadenko and Others*, cited above, § 155, in the context of natural disasters).

141. The Court has found this positive procedural obligation to arise under Article 2 in regard to a number of different kinds of activities, such as, for example, ... in respect of the management of dangerous activities resulting in industrial or environmental disasters (see *Öneryıldız* [*v. Turkey* [GC], no. 48939/99, ECHR 2004 XII], and *Budayeva and Others*, cited above) ... [This] list is not exhaustive ..."

508. The common thread in the relevant principles under Article 2 in the existing case-law concerning environmental degradation is that in order for a positive obligation to arise for the State, a threat to the right to life must be at stake. This flows from the case-law cited in *Nicolae Virgiliu Tănase* (see, for instance, *Öneryıldız*, cited above, § 71, and *Budayeva and Others*, cited above, § 130). This may then apply, for instance, to the case of industrial activities, which by their very nature are dangerous (see *Kolyadenko and Others*, cited above, § 158) or to instances where the right to life is threatened by a natural disaster (see *M. Özel and Others*, cited above, § 170).

509. It follows from the above-noted general principles that complaints concerning the alleged failures of the State to combat climate change most appropriately fall into the category of cases concerning an activity which is, by its very nature, capable of putting an individual's life at risk. Indeed, the applicants referred the Court to compelling scientific evidence showing a link between climate change and an increased risk of mortality, particularly in vulnerable groups (see paragraphs 65-68 above). At present, there is nothing in the arguments provided by the respondent Government or the intervening Governments to call into question the relevance and reliability of this evidence.

510. Thus, the IPCC has found (with *medium confidence*) that anthropogenic climate change, particularly through increased frequency and severity of extreme events, increases heat-related human mortality[194]. Other scientific studies have also found that heatwaves have caused tens of thousands of premature deaths in Europe since 2000[195]. In this context, the IPCC has also found (with *high confidence*) that populations at "highest risk" of temperature-related morbidity and mortality include older adults, children, women, those with chronic diseases, and people taking certain medications[196].

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[194] AR6 WGII, Summary for policymakers, p. 9.

[195] European Environment Agency, "Extreme temperatures and health" (2021). See also the study published in the *Lancet Countdown* (Vol 400, 2022, p. 1619) which found that, globally, heat-related deaths increased by 68% between 2000-04 and 2017-21, a death toll that was significantly exacerbated by the confluence of the COVID-19 pandemic.

[196] IPCC 2018 Special report, pp. 240-41.

511. The applicability of Article 2, however, cannot operate *in abstracto* in order to protect the population from any possible kind of environmental harm arising from climate change. In accordance with the case-law cited in paragraph 507 above, in order for Article 2 to apply in the context of an activity which is, by its very nature, capable of putting an individual's life at risk, there has to be a "real and imminent" risk to life. This may accordingly extend to complaints of State action and/or inaction in the context of climate change, notably in circumstances such as those in the present case, considering that the IPCC has found with high confidence that older adults are at "highest risk" of temperature-related morbidity and mortality.

512. It may be impossible to devise a general rule on what constitutes a "real and imminent" risk to life, as that will depend on the Court's assessment of the particular circumstances of a case. However, the Court's case-law indicates that the term "real" risk corresponds to the requirement of the existence of a serious, genuine and sufficiently ascertainable threat to life (see, for instance, *Fadeyeva v. Russia* (dec.), no. 55723/00, 16 October 2003, and *Brincat and Others*, cited above, §§ 82-84). The "imminence" of such a risk entails an element of physical proximity of the threat (see, for instance, *Kolyadenko and Others*, cited above, §§ 150-55) and its temporal proximity (see *Brincat and Others*, cited above, § 84).

513. In sum, in order for Article 2 to apply to complaints of State action and/or inaction in the context of climate change, it needs to be determined that there is a "real and imminent" risk to life. However, such risk to life in the climate-change context must be understood in the light of the fact that there is a grave risk of inevitability and irreversibility of the adverse effects of climate change, the occurrences of which are most likely to increase in frequency and gravity. Thus, the "real and imminent" test may be understood as referring to a serious, genuine and sufficiently ascertainable threat to life, containing an element of material and temporal proximity of the threat to the harm complained of by the applicant. This would also imply that where the victim status of an individual applicant has been established in accordance with the criteria set out in paragraphs 487 to 488 above, it would be possible to assume that a serious risk of a significant decline in a person's life expectancy owing to climate change ought also to trigger the applicability of Article 2.

(β) Article 8

514. According to the existing case-law, in order to fall within the scope of Article 8 of the Convention, complaints relating to environmental nuisances have to show, first, that there was an "actual interference" with the applicant's enjoyment of his or her private or family life or home, and, secondly, that a certain level of severity was attained. In other words, they have to show that the alleged environmental nuisance was serious enough to affect adversely, to a sufficient extent, the applicants' enjoyment of their right

to respect for their private and family life and their home (see *Pavlov and Others*, cited above, § 59, with further references; see also *Çiçek and Others v. Turkey* (dec.), no. 44837/07, § 22, 4 February 2020, with further references).

515. The question of "actual interference" in practice relates to the existence of a direct and immediate link between the alleged environmental harm and the applicant's private or family life or home (see *Ivan Atanasov*, cited above, § 66, and *Hardy and Maile*, cited above, § 187). In this context, the general deterioration of the environment is not sufficient. There must be a negative effect on an individual's private or family sphere (see *Kyrtatos*, cited above, § 52), which is essentially a matter to be decided on the basis of the criteria set out in paragraphs 487 to 488 above concerning the existence of victim status.

516. As regards the question of the seriousness of the interference, the Court has held that the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8 (see, for instance, *Yevgeniy Dmitriyev*, cited above, § 32). The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental impact on the applicant's health or quality of life (see *Çiçek and Others*, cited above, § 22). Moreover, breaches of the right to respect for one's home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious interference may result in the breach of a person's right to respect for his or her home if it prevents him or her from enjoying the amenities of his or her home (see *Udovičić v. Croatia*, no. 27310/09, § 136, 24 April 2014).

517. The Court has made clear that there will be no arguable claim under Article 8 if the detriment complained of is negligible in comparison to the environmental hazards inherent in life in every modern city. Conversely, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes, in such a way as to affect their private and family life adversely, without, however, seriously endangering their health (see *Jugheli and Others v. Georgia*, no. 38342/05, § 62, 13 July 2017, with further references). Moreover, the Court has explained that it is often impossible to quantify the effects of the environmental nuisance at issue in each individual case and to distinguish them from the influence of other relevant factors such as age, profession or personal lifestyle. The same applies to the possible worsening of quality of life, which is a subjective characteristic that hardly lends itself to a precise definition (ibid., § 63).

518. It should further be noted that, in some instances, the exposure of a person to a serious environmental risk may be sufficient to trigger the applicability of Article 8. For instance, in *Hardy and Maile* (cited above,

§§ 189-92), the Court found that Article 8 applied where the dangerous effects of an activity to which the individuals concerned could potentially be exposed established a sufficiently close link with private and family life for the purposes of that provision. In *Jugheli and Others* (cited above, § 71), the Court found that even assuming that the air pollution complained of had not caused any quantifiable harm to the applicants' health, "it [could] have made them more vulnerable to various illnesses". In *Dzemyuk v. Ukraine* (no. 42488/02, §§ 82-84, 4 September 2014), the Court found that the available evidence confirmed the existence of potential risks to the environment caused by the location of a cemetery close to the applicant's house with the consequent impact on the environment and the applicant's "quality of life" under Article 8 of the Convention.

519. Drawing on the above considerations, and having regard to the causal relationship between State actions and/or omissions relating to climate change and the harm, or risk of harm, affecting individuals (see paragraphs 435, 436 and 478 above), Article 8 must be seen as encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life.

520. However, in this context, the question of "actual interference" or the existence of a relevant and sufficiently serious risk entailing the applicability of Article 8 essentially depends on the assessment of similar criteria to those set out in paragraphs 487 to 488 above concerning the victim status of individuals, or in paragraph 502 above concerning the standing of associations. These criteria are therefore determinative for establishing whether Article 8 rights are at stake and whether this provision applies. In each case, these are matters that remain to be examined on the facts of a particular case and on the basis of the available evidence.

(ii) Application of these principles to the present case

(α) Article 8 of the Convention

– *The applicant association*

521. Having regard to the criteria set out in paragraph 502 above, the Court notes that the applicant association, according to its Statute, is a non-profit association established under Swiss law to promote and implement effective climate protection on behalf of its members. It has more than 2,000 female members who live in Switzerland and whose average age is 73. Close to 650 members are 75 or older. The applicant association's Statute further provides that it is committed to engaging in various activities aimed at reducing GHG emissions in Switzerland and addressing their effects on global warming. It acts not only in the interest of its members, but also in the interest of the general public and future generations, with the aim of ensuring effective climate protection. The applicant association pursues its aims

through various actions, including by taking legal action to address the effects of climate change in the interests of its members (see paragraph 10 above).

522. The FSC and the FAC limited their assessment of standing to the individual applicants, considering it unnecessary to examine that of the applicant association. As a result, the Court does not have the benefit of the assessment of the legal status of the applicant association under domestic law or of the nature and extent of its activities within the respondent State.

523. The Court further notes that in its submissions before the Court, the applicant association explained that it acted to ensure that its members were able to exercise their rights regarding the effects of climate change on them (see paragraph 307 above). Given the membership basis and representativeness of the applicant association, as well as the purpose of its establishment, the Court accepts that it represents a vehicle of collective recourse aimed at defending the rights and interests of individuals against the threats of climate change in the respondent State (see paragraph 497 above). The Court, furthermore, notes that the individual applicants did not have access to a court in the respondent State. Thus, viewed overall, the grant of standing to the applicant association before the Court is in the interests of the proper administration of justice.

524. Having regard to the above considerations, the Court finds that the applicant association is lawfully established, it has demonstrated that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members and other affected individuals against the threats arising from climate change in the respondent State and that it is genuinely qualified and representative to act on behalf of those individuals who may arguably claim to be subject to specific threats or adverse effects of climate change on their life, health, well-being and quality of life as protected under the Convention (see paragraph 519 above).

525. In these circumstances, the Court finds that the complaints pursued by the applicant association on behalf of its members fall within the scope of Article 8.

526. Accordingly, it follows that the applicant association has the necessary *locus standi* in the present proceedings and that Article 8 is applicable to its complaint. The Government's objections must therefore be dismissed.

– *Applicants nos. 2-5*

527. Two key criteria have been set out for recognising the victim status of natural persons in the climate-change context: (a) high intensity of exposure of the applicant to the adverse effects of climate change; and (b) a pressing need to ensure the applicant's individual protection (see paragraphs 487-488 above). The threshold for fulfilling these criteria is especially high (see paragraph 488 above).

528. The applicants' complaint before the Court in the present case concerns the adverse effects of climate change which they, as older women, suffer as a result of the respondent State's allegedly inadequate action concerning climate change. The factual circumstances underlying their complaint may be seen as being localised and focused on the specific circumstances – namely, the past, present and future adverse effects of climate change and, in particular, heatwaves – prevailing at their places of residence in Switzerland.

529. In this connection, the applicants provided information and evidence showing how climate change affects older women in Switzerland, in particular in relation to the increasing occurrence and intensity of heatwaves. The data provided by the applicants, emanating from domestic and international expert bodies – the relevance and probative value of which has not been called into question – shows that several summers in recent years have been among the warmest summers ever recorded in Switzerland and that heatwaves are associated with increased mortality and morbidity, particularly in older women (see paragraphs 65-67 above).

530. Older people have been found by the IPCC to belong to some of the most vulnerable groups in relation to the harmful effects of climate change on physical and mental health[197]. Similar findings were made by the Swiss FOEN, which noted, more specifically, that heatwaves placed strain on the human body and that they could cause dehydration and the impairment of heart and lung function, leading to an increase in emergency hospital admissions. In this context, older people were found to be particularly at risk[198]. Moreover, the adverse effects of climate change on older women, and the need to protect them from the adverse effects of climate change, have been stressed in many international documents[199].

531. While the above findings undoubtedly suggest that the applicants belong to a group which is particularly susceptible to the effects of climate change, that would not, in itself, be sufficient to grant them victim status within the meaning of the criteria set out in paragraphs 487 to 488 above. It is necessary to establish, in each applicant's individual case, that the requirement of a particular level and severity of the adverse consequences affecting the applicant concerned is satisfied, including the applicants'

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[197] See AR6 WGII, Technical summary, p. 50.

[198] FOEN "Climate change in Switzerland", Management Summary (2020), p. 9.

[199] See, for instance, Reports of the Office of the United Nations High Commissioner for Human Rights: "Analytical study on gender-responsive climate action for the full and effective enjoyment of the rights of women", A/HRC/41/26, 1 May 2019, and "Analytical study on the promotion and protection of the rights of older persons in the context of climate change", A/HRC/47/46, 30 April 2021; Note by the Secretary General "Human rights of older women: the intersection between ageing and gender", A/76/157, 16 July 2021, paragraph 61; and Report of the Secretary General "The impacts of climate change on the human rights of people in vulnerable situations", A/HRC/50/57, 6 May 2022, paragraph 4.

individual vulnerabilities which may give rise to a pressing need to ensure their individual protection.

532. In this connection, as regards applicants nos. 2-4, it should be noted that in their written declarations and their medical records they provided accounts of the various difficulties they encountered during heatwaves, including the effects on their medical conditions. They also submitted that they needed to take various personal adaptation measures during heatwaves.

533. However, while it may be accepted that heatwaves affected the applicants' quality of life, it is not apparent from the available materials that they were exposed to the adverse effects of climate change, or were at risk of being exposed at any relevant point in the future, with a degree of intensity giving rise to a pressing need to ensure their individual protection, not least given the high threshold which necessarily applies to the fulfilment of the criteria set out in paragraphs 487 to 488 above. It cannot be said that the applicants suffered from any critical medical condition whose possible aggravation linked to heatwaves could not be alleviated by the adaptation measures available in Switzerland or by means of reasonable measures of personal adaptation given the extent of heatwaves affecting that country (see paragraphs 88-90 above). It should also be reiterated that victim status in relation to future risk is only exceptionally admitted by the Court and the individual applicants have failed to demonstrate that such exceptional circumstances exist in their regard (see paragraph 470 above).

534. Finally, the fifth applicant provided a very general declaration not indicating any particular morbidity or other serious adverse effects created by heatwaves that would go beyond the usual effects which any person belonging to the group of older women might experience. Moreover, while she provided a medical certificate attesting that she suffered from asthma, in her declaration she stated that she had never seen a doctor concerning heatwaves (see paragraphs 20-21 above). It is therefore not possible to establish a correlation between the applicant's medical condition and her complaints before the Court.

535. It follows from the above considerations that applicants nos. 2-5 do not fulfil the victim-status criteria under Article 34 of the Convention. This suffices for the Court to conclude that their complaints should be declared inadmissible as being incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3.

(β) Article 2 of the Convention

536. While Article 8 undoubtedly applies in the circumstances of the present case as regards the complaints of the applicant association concerning the effects of the alleged shortcomings on the part of the respondent State in its measures to combat the adverse effects and threats of climate change on human health, whether those alleged shortcomings also had such life-threatening consequences as could trigger the applicability of Article 2 is

more questionable. However, for the reasons stated in paragraphs 537 and 538 below, the Court finds it unnecessary to analyse further the issues pertinent to the threshold of applicability of Article 2. The Court also finds that, having regard to the reasons set out in paragraphs 527 to 535 above, the complaints of applicants nos. 2-5 under Article 2 should be declared inadmissible as being incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3.

(γ) Conclusion

537. The Court finds it appropriate to examine the applicant association's complaint from the angle of Article 8 alone. That said, in its case-law analysis below it will have regard to the principles developed also under Article 2, which to a very large extent are similar to those under Article 8 (see paragraph 292 above) and which, when seen together, provide a useful basis for defining the overall approach to be applied in the climate-change context under both provisions.

4. Merits

(a) General principles

538. To a great extent the Court has applied the same principles as those set out in respect of Article 2 when examining cases involving environmental issues under Article 8, notably by affirming that:

(a) The States have a positive obligation to put in place the relevant legislative and administrative framework designed to provide effective protection of human health and life. In particular, States have an obligation to put in place regulations geared to the specific features of the activity in question, particularly with regard to the level of risk potentially involved. They must govern the licensing, setting-up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of the citizens whose lives might be endangered by the inherent risks (see, for instance, *Jugheli and Others*, cited above, § 75; *Di Sarno and Others*, cited above, § 106; and *Tătar*, cited above, § 88).

(b) The States also have an obligation to apply that framework effectively in practice; indeed, regulations to protect guaranteed rights serve little purpose if they are not duly enforced and the Convention is intended to protect effective rights, not illusory ones. The relevant measures must be applied in a timely and effective manner (see *Cuenca Zarzoso v. Spain*, no. 23383/12, § 51, 16 January 2018).

(c) In assessing whether the respondent State complied with its positive obligations, the Court must consider whether, in the manner of devising and/or implementing the relevant measures, the State remained within its margin of appreciation. In cases involving environmental issues, the State

must be allowed a wide margin of appreciation (see *Hardy and Maile*, cited above, § 218, with further references), in particular with regard to the substantive aspect (see *Hatton and Others*, cited above, § 100).

(d) The choice of means is in principle a matter that falls within the State's margin of appreciation; even if the State has failed to apply one particular measure provided for by domestic law, it may still fulfil its positive duty by other means. An impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources (see *Kolyadenko and Others*, cited above, § 160, and *Kotov and Others v. Russia*, nos. 6142/18 and 13 others, § 134, 11 October 2022).

(e) While it is not in the Court's remit to determine what exactly should have been done, it can assess whether the authorities approached the matter with due diligence and gave consideration to all competing interests (see *Mileva and Others v. Bulgaria*, nos. 43449/02 and 21475/04, § 98, 25 November 2010).

(f) The State has a positive obligation to provide access to essential information enabling individuals to assess risks to their health and lives (see *Guerra and Others v. Italy*, 19 February 1998, §§ 57-60, *Reports* 1998-I, developing *López Ostra v. Spain*, 9 December 1994, § 55, Series A no. 303-C; see, further, *McGinley and Egan v. the United Kingdom*, 9 June 1998, §§ 98-104, *Reports* 1998-III, and *Roche v. the United Kingdom* [GC], no. 32555/96, §§ 157-69, ECHR 2005-X).

(g) In assessing whether the respondent State complied with its positive obligations, the Court must consider the particular circumstances of the case. The scope of the positive obligations imputable to the State in the particular circumstances will depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation (see *Kolyadenko and Others*, cited above, § 161, and *Brincat and Others*, cited above, §§ 101-02).

539. In environmental cases examined under Article 8 of the Convention, the Court has frequently reviewed the domestic decision-making process, taking into account that the procedural safeguards available to the individual will be especially material in determining whether the respondent State has remained within its margin of appreciation (see, for instance, *Flamenbaum and Others v. France*, nos. 3675/04 and 23264/04, § 137, 13 December 2012). In this context, the Court has had particular regard to the following principles and considerations:

(a) The complexity of the issues involved with regard to environmental policy-making renders the Court's role primarily a subsidiary one. The Court must therefore first examine whether the decision-making process was adequate (see *Taşkın and Others*, cited above, §§ 117-18);

(b) The Court is required to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making

procedure, and the procedural safeguards available (see *Hatton and Others*, cited above, § 104).

(c) In particular, a governmental decision-making process concerning complex issues such as those in respect of environmental and economic policy must necessarily involve appropriate investigations and studies in order to allow the authorities to strike a fair balance between the various conflicting interests at stake. However, this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided (ibid., § 128). What is important is that the effects of activities that might harm the environment and thus infringe the rights of individuals under the Convention may be predicted and evaluated in advance (see *Hardy and Maile*, cited above, § 220, with further references).

(d) The public must have access to the conclusions of the relevant studies, allowing them to assess the risk to which they are exposed (see *Tătar*, cited above, § 113, with further references). Moreover, in some instances, relying on the Aarhus Convention, the Court has noted the obligation that in the event of any imminent threat to human health or the environment, whether caused by human activities or owing to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and which is held by a public authority be disseminated immediately and without delay to members of the public who may be affected (see *Di Sarno and Others*, cited above, § 107).

(e) The individuals concerned must have an opportunity to protect their interests in the environmental decision-making process, which implies that they must be able to participate effectively in relevant proceedings and to have their relevant arguments examined, although the actual design of the process is a matter falling within the State's margin of appreciation (see, for instance, *Flamenbaum and Others*, cited above, § 159).

540. It is with these principles in mind that the Court will proceed by identifying the content of the State's positive obligations under Articles 2 and 8 of the Convention in the context of climate change (see paragraphs 292 and 537 above) However, given the special nature of the phenomenon as compared with the isolated sources of environmental harm previously addressed in the Court's case-law, the general parameters of the positive obligations must be adapted to the specific context of climate change.

(b) The States' positive obligations in the context of climate change

(i) The States' margin of appreciation

541. In accordance with the principle of subsidiarity, the national authorities have the primary responsibility to secure the rights and freedoms defined in the Convention, and in doing so they enjoy a margin of appreciation, subject to the Court's supervisory jurisdiction (see, among

many other authorities, *Garib v. the Netherlands* [GC], no. 43494/09, § 137, 6 November 2017; see also see the Preamble to the Convention, introduced on the basis of Article 1 of Protocol No. 15).

542. Having regard, in particular, to the scientific evidence as regards the manner in which climate change affects Convention rights, and taking into account the scientific evidence regarding the urgency of combating the adverse effects of climate change, the severity of its consequences, including the grave risk of their reaching the point of irreversibility, and the scientific, political and judicial recognition of a link between the adverse effects of climate change and the enjoyment of (various aspects of) human rights (see paragraph 436 above), the Court finds it justified to consider that climate protection should carry considerable weight in the weighing-up of any competing considerations. Other factors militating in the same direction include the global nature of the effects of GHG emissions, as opposed to environmental harm that occurs solely within a State's own borders, and the States' generally inadequate track record in taking action to address the risks of climate change that have become apparent in the past several decades, as evidenced by the IPCC's finding of "a rapidly closing window of opportunity to secure a liveable and sustainable future for all" (see paragraph 118 above), circumstances which highlight the gravity of the risks arising from non-compliance with the overall global objective (see also paragraph 139 above).

543. Taking as a starting-point the principle that States must enjoy a certain margin of appreciation in this area, the above considerations entail a distinction between the scope of the margin as regards, on the one hand, the State's commitment to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives in this respect, and, on the other hand, the choice of means designed to achieve those objectives. As regards the former aspect, the nature and gravity of the threat and the general consensus as to the stakes involved in ensuring the overarching goal of effective climate protection through overall GHG reduction targets in accordance with the Contracting Parties' accepted commitments to achieve carbon neutrality, call for a reduced margin of appreciation for the States. As regards the latter aspect, namely their choice of means, including operational choices and policies adopted in order to meet internationally anchored targets and commitments in the light of priorities and resources, the States should be accorded a wide margin of appreciation.

(ii) Content of the States' positive obligations

544. As stated above, the Court already held long ago that the scope of protection under Article 8 of the Convention extends to adverse effects on human health, well-being and quality of life arising from various sources of environmental harm and risk of harm. Similarly, the Court derives from Article 8 a right for individuals to enjoy effective protection by the State

authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change (see paragraph 519 above).

545. Accordingly, the State's obligation under Article 8 is to do its part to ensure such protection. In this context, the State's primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change. This obligation flows from the causal relationship between climate change and the enjoyment of Convention rights, as noted in paragraphs 435 and 519 above, and the fact that the object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied such as to guarantee rights that are practical and effective, not theoretical and illusory (see, for instance, *H.F. and Others v. France*, cited above, § 208 *in fine*; see also paragraph 440 above).

546. In line with the international commitments undertaken by the member States, most notably under the UNFCCC and the Paris Agreement, and the cogent scientific evidence provided, in particular, by the IPCC (see paragraphs 104-120 above), the Contracting States need to put in place the necessary regulations and measures aimed at preventing an increase in GHG concentrations in the Earth's atmosphere and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights, notably the right to private and family life and home under Article 8 of the Convention.

547. Bearing in mind that the positive obligations relating to the setting-up of a regulatory framework must be geared to the specific features of the subject matter and the risks involved (see paragraphs 107-120 and 440 above) and that the global aims as to the need to limit the rise in global temperature, as set out in the Paris Agreement, must inform the formulation of domestic policies, it is obvious that the said aims cannot of themselves suffice as a criterion for any assessment of Convention compliance of individual Contracting Parties to the Convention in this area. This is because each individual State is called upon to define its own adequate pathway for reaching carbon neutrality, depending on the sources and levels of emissions and all other relevant factors within its jurisdiction.

548. It follows from the above considerations that effective respect for the rights protected by Article 8 of the Convention requires that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades. In this context, in order for the measures to be effective, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner (see, *mutatis mutandis*, *Georgel and Georgeta Stoicescu v. Romania*, no. 9718/03, § 59, 26 July 2011).

549. Moreover, in order for this to be genuinely feasible, and to avoid a disproportionate burden on future generations, immediate action needs to be taken and adequate intermediate reduction goals must be set for the period leading to net neutrality. Such measures should, in the first place, be incorporated into a binding regulatory framework at the national level, followed by adequate implementation. The relevant targets and timelines must form an integral part of the domestic regulatory framework, as a basis for general and sectoral mitigation measures. Accordingly, and reiterating the position taken above, namely that the margin of appreciation to be afforded to States is reduced as regards the setting of the requisite aims and objectives, whereas in respect of the choice of means to pursue those aims and objectives it remains wide, the Court finds it appropriate to outline the States' positive obligations (see paragraph 440 above) in this domain as follows.

550. When assessing whether a State has remained within its margin of appreciation (see paragraph 543 above), the Court will examine whether the competent domestic authorities, be it at the legislative, executive or judicial level, have had due regard to the need to:

(a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;

(b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;

(c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets (see sub-paragraphs (a)-(b) above);

(d) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and

(e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.

551. The Court's assessment of whether the above requirements have been met will, in principle, be of an overall nature, meaning that a shortcoming in one particular respect alone will not necessarily entail that the State would be considered to have overstepped its relevant margin of appreciation (see paragraph 543 above).

552. Furthermore, effective protection of the rights of individuals from serious adverse effects on their life, health, well-being and quality of life requires that the above-noted mitigation measures be supplemented by adaptation measures aimed at alleviating the most severe or imminent consequences of climate change, taking into account any relevant particular needs for protection. Such adaptation measures must be put in place and

effectively applied in accordance with the best available evidence (see paragraphs 115 and 119 above) and consistent with the general structure of the State's positive obligations in this context (see paragraph 538 (a) above).

553. Lastly, it has already been noted in the Court's case-law that the procedural safeguards available to those concerned will be especially material in determining whether the respondent State has remained within its margin of appreciation (see paragraph 539 above). This is also true in matters of general policy, which include the approach to the choice of means to combat climate change through mitigation and adaptation.

554. In this context, drawing on the approach taken in environmental cases (see paragraph 539 above), and noting the specific features and complexities of the issues concerning climate change, the following types of procedural safeguards are to be taken into account as regards the State's decision-making process in the context of climate change:

(a) The information held by public authorities of importance for setting out and implementing the relevant regulations and measures to tackle climate change must be made available to the public, and in particular to those persons who may be affected by the regulations and measures in question or the absence thereof. In this connection, procedural safeguards must be available to ensure that the public can have access to the conclusions of the relevant studies, allowing them to assess the risk to which they are exposed.

(b) Procedures must be available through which the views of the public, and in particular the interests of those affected or at risk of being affected by the relevant regulations and measures or the absence thereof, can be taken into account in the decision-making process.

(c) Application of the above principles to the present case

(i) Preliminary remarks

555. In the present case, and having regard to the nature of the complaint of the applicant association, acting on behalf of its members (see paragraph 296 above), the Court will assess the respondent State's compliance with its duty to put in place, and effectively apply in practice, the relevant mitigation measures. Failure by the State to comply with this aspect of its positive obligations would suffice for the Court to conclude that the State failed to comply with its positive obligations under Article 8 of the Convention without it being necessary to examine whether the ancillary adaptation measures were put in place (see paragraph 552 above).

556. Moreover, having regard to the nature of the applicant association's complaint relating to the existing and future adverse effects of climate change on the rights of the individuals on whose behalf it acts, and contrary to the arguments of the respondent Government (see paragraph 338 *in fine* above), the Court's assessment may take into account the overall situation in the respondent State, including any relevant information that has come to light as

regards the situation since the completion of the domestic proceedings. However, noting the currently ongoing domestic legislative process (see paragraph 97 above), the Court's assessment is limited to examining the domestic legislation as it stands on the date of adoption of the present judgment, namely 14 February 2024, and on which the parties have provided their submissions.

557. The Court also takes note of the applicant association's reference to several studies suggesting deficiencies in Switzerland's measures to tackle climate change (see paragraph 325 above), which the Government challenged, considering them to be based in essence on subjective hypotheses. For its part, and having regard to its findings in paragraph 573 below, the Court does not find it necessary for its determination of the present case to resolve the disagreements between the parties concerning the findings made in those studies.

(ii) The respondent State's compliance with its positive obligations

558. At the outset, the Court notes that the currently existing 2011 CO_2 Act (in force since 2013) required that by 2020 GHG emissions should be reduced overall by 20% compared with 1990 levels (see paragraph 84 above). However, as pointed out by the applicants, in an assessment dating back to August 2009, the Swiss Federal Council[200] found that at that time the existing scientific evidence[201] relating to the limitation of global warming to 2 to 2.4°C above pre-industrial levels (thus above the currently required 1.5°C limit) required a reduction in global emissions of at least 50-85% by 2050 compared with 1990 levels. This meant that the industrialised countries (such as the respondent State) had to reduce their emissions by 25-40% by 2020 compared to 1990 levels. The study in question also found that in order for the UNFCCC commitments (which were higher than the 1.5°C limit) to be met, GHG emissions would have to decline continuously in order not to exceed 1 to 1.5 tonnes of CO_2eq per capita at the end of the century. However, the pathway which targeted a reduction of 20% by 2020 was considered to be insufficient to achieve that objective in the long term, which required an additional effort for the period after 2020.

559. Moreover, as the Government acknowledged, the relevant domestic assessments found that even the GHG reduction target for 2020 had been missed. Indeed, on average over the period between 2013 and 2020, Switzerland reduced its GHG emissions by around 11% compared with 1990 levels (see paragraph 87 above), which indicates the insufficiency of the

[200] FF 2009 6723 "Message relatif à la politique climatique suisse après 2012 (Révision de la loi sur le CO2 et initiative populaire fédérale « pour un climat sain »)" (2009), pp. 6737-38 and 6757.
[201] See AR4 "Climate Change 2007: Impacts, Adaptation, and Vulnerability".

authorities' past action to take the necessary measures to address climate change.

560. In December 2017, for the period from 2020 to 2030, the Federal Council tabled a revision of the 2011 CO_2 Act, proposing an overall reduction of 50% of GHG emissions, which included a domestic reduction of 30% by 2030 compared with 1990 levels, while the rest was to be achieved by measures to be taken abroad ("external emissions").

561. However, this proposed revision of the 2011 CO_2 Act was rejected in a popular referendum in June 2021. According to the Government, this did not suggest that citizens rejected the necessity of combating global warming or reducing national GHG emissions but rather the proposed means to do so (see paragraph 357 above). In this connection, the Court reiterates that with respect to the choice of means to tackle climate change, the States are accorded a wide margin of appreciation (see paragraph 543 above). In any event, and irrespective of the way in which the legislative process is organised from the domestic constitutional point of view (see *G.S.B. v Switzerland*, no. 28601/11, §§ 72-73, 22 December 2015; see also *Humpert and Others v. Germany* [GC], nos. 59433/18 and 3 others, §§ 71-72, 14 December 2023), the fact is that after the referendum a legislative lacuna existed for the period after 2020. The State sought to address this lacuna by enacting, on 17 December 2021, a partial revision of the existing 2011 CO_2 Act, according to which the reduction target for the years 2021 to 2024 was set at 1.5% per year compared with 1990 levels, on the understanding that from 2022 onwards, a maximum of 25% of this reduction could be achieved by measures implemented abroad (see paragraph 95 above). This also left the period after 2024 unregulated and thus incompatible with the requirement of the existence of general measures specifying the respondent State's mitigation measures in line with a net neutrality timeline (see paragraph 550 (a) above).

562. These lacunae point to a failure on the part of the respondent State to fulfil its positive obligation derived from Article 8 to devise a regulatory framework setting the requisite objectives and goals (see paragraph 550 (a)-(b) above). In this context, it should be noted that in its latest AR6 Synthesis Report (Climate Change 2023) the IPCC stressed that the choices and actions implemented in this decade would have impacts now and for thousands of years (see paragraphs 118-119 above).

563. There have, however, been other developments and regulatory initiatives at the domestic level in relation to climate change. In December 2021 Switzerland submitted an updated NDC undertaking to comply with the targets set out in the Paris Agreement.[202] Switzerland therefore aligned its climate policy with the international commitments set

[202] See UNFCCC, Nationally Determined Contributions Registry, available at www.unfccc.int/NDCREG; last accessed 14.02.2024.

out in that agreement. In particular, the commitments under this updated NDC were summarised in a subsequent communication[203] as follows:

> "Switzerland is committed to following the recommendations of science in order to limit warming to 1.5 degrees Celsius. In view of its climate neutrality target by 2050, Switzerland's NDC is to reduce its [GHG] emissions by at least 50 percent by 2030 compared with 1990 levels, corresponding to an average reduction of [GHG] emissions by at least 35 percent over the period 2021-2030. By 2025, a reduction of [GHG] by at least 35 percent compared with 1990 levels is anticipated. Internationally transferred mitigation outcomes (ITMOs) from cooperation under Article 6 of the Paris Agreement will partly be used."

564. On 30 September 2022, reflecting the commitments in the updated NDC, the Climate Act[204] was enacted (see paragraph 93 above). This Act – which was confirmed in a referendum only on 18 June 2023 but has not yet come into force – envisages the principle of a net-zero emissions target by 2050 by providing that the GHG emissions should be reduced "as far as possible". It also provides for an intermediate target for 2040 (75% reduction compared with 1990 levels) and for the years 2031 to 2040 (average of at least 64%) and 2041 to 2050 (average of at least 89% compared with 1990 levels). It also set indicative values for the reduction of emissions in the building, transport and industrial sectors for the years 2040 and 2050.

565. In this connection, the Court notes that the Climate Act sets out the general objectives and targets but that the concrete measures to achieve those objectives are not set out in the Act but rather remain to be determined by the Federal Council and proposed to Parliament "in good time" (section 11(1) of the Climate Act). Moreover, the adoption of the concrete measures is to be provided under the 2011 CO_2 Act (section 11(2) of the Climate Act), which, as already noted in paragraphs 558 to 559 above, in its current form cannot be considered as providing for a sufficient regulatory framework.

566. It should also be noted that the new regulation under the Climate Act concerns intermediate targets only for the period after 2031. Given the fact that the 2011 CO_2 Act provides for legal regulation of the intermediate targets only up until 2024 (see paragraph 561 above), this means that the period between 2025 and 2030 still remains unregulated pending the enactment of new legislation.

567. In these circumstances, given the pressing urgency of climate change and the current absence of a satisfactory regulatory framework, the Court has difficulty accepting that the mere legislative commitment to adopt the concrete measures "in good time", as envisaged in the Climate Act, satisfies the State's duty to provide, and effectively apply in practice, effective

[203] See the Report "Switzerland's information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 of its updated and enhanced nationally determined contribution (NDC) under the Paris Agreement (2021 – 2030)".

[204] FF 2022 2403 Loi fédérale sur les objectifs en matière de protection du climat, sur l'innovation et sur le renforcement de la sécurité énergétique.

protection of individuals within its jurisdiction from the adverse effects of climate change on their life and health (see paragraph 555 above).

568. While acknowledging the significant progress to be expected from the recently enacted Climate Act, once it has entered into force, the Court must conclude that the introduction of that new legislation is not sufficient to remedy the shortcomings identified in the legal framework applicable so far.

569. The Court further observes that the applicant association has provided an estimate of the remaining Swiss carbon budget under the current situation, also taking into account the targets and pathways introduced by the Climate Act (see paragraph 323 above). Referring to the relevant IPCC assessment of the global carbon budget, and the data of the Swiss greenhouse gas inventory[205], the applicant association provided an estimate according to which, assuming the same per capita burden-sharing for emissions from 2020 onwards, Switzerland would have a remaining carbon budget of 0.44 $GtCO_2$ for a 67% chance of meeting the 1.5°C limit (or 0.33 $GtCO_2$ for an 83% chance). In a scenario with a 34% reduction in CO_2 emissions by 2030 and 75% by 2040, Switzerland would have used the remaining budget by around 2034 (or 2030 for an 83% chance). Thus, under its current climate strategy, Switzerland allowed for more GHG emissions than even an "equal per capita emissions" quantification approach would entitle it to use.

570. The Court observes that the Government relied on the 2012 Policy Brief to justify the absence of any specific carbon budget for Switzerland. Citing the latter, the Government suggested that there was no established methodology to determine a country's carbon budget and acknowledged that Switzerland had not determined one. They argued that Swiss national climate policy could be considered as being similar in approach to establishing a carbon budget and that it was based on relevant internal assessments prepared in 2020 and expressed in its NDCs (see paragraph 360 above). However, the Court is not convinced that an effective regulatory framework concerning climate change could be put in place without quantifying, through a carbon budget or otherwise, national GHG emissions limitations (see paragraph 550 (a) above).

571. In this regard the Court cannot but note that the IPCC has stressed the importance of carbon budgets and policies for net-zero emissions (see paragraph 116 above), which can hardly be compensated for by reliance on the State's NDCs under the Paris Agreement, as the Government seemed to suggest. The Court also finds convincing the reasoning of the GFCC, which rejected the argument that it was impossible to determine the national carbon budget, pointing to, *inter alia*, the principle of common but differentiated responsibilities under the UNFCCC and the Paris Agreement (see *Neubauer and Others*, cited in paragraph 254 above, paragraphs 215-29). This principle

[205] See FOEN, Switzerland's greenhouse gas inventory, available at www.bafu.admin.ch; last accessed 14.02.2024.

requires the States to act on the basis of equity and in accordance with their own respective capabilities. Thus, for instance, it is instructive for comparative purposes that the European Climate Law provides for the establishment of indicative GHG budgets (see paragraph 211 above).

572. In these circumstances, while acknowledging that the measures and methods determining the details of the State's climate policy fall within its wide margin of appreciation, in the absence of any domestic measure attempting to quantify the respondent State's remaining carbon budget, the Court has difficulty accepting that the State could be regarded as complying effectively with its regulatory obligation under Article 8 of the Convention (see paragraph 550 above).

(iii) Conclusion

573. In conclusion, there were some critical lacunae in the Swiss authorities' process of putting in place the relevant domestic regulatory framework, including a failure by them to quantify, through a carbon budget or otherwise, national GHG emissions limitations. Furthermore, the Court has noted that, as recognised by the relevant authorities, the State had previously failed to meet its past GHG emission reduction targets (see paragraphs 558 to 559 above). By failing to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework, the respondent State exceeded its margin of appreciation and failed to comply with its positive obligations in the present context.

574. The above findings suffice for the Court to find that there has been a violation of Article 8 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

575. The applicants complained that they had not had access to a court, for the purposes of Article 6 § 1 of the Convention, concerning the State's failure to take the necessary action to address the adverse effects of climate change.

576. The relevant part of Article 6 § 1 of the Convention reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. The parties' submissions

1. The applicants

577. The applicants stressed that access to a court was crucial in climate cases. In their view, given their participation in the domestic proceedings, there was no doubt that they had victim status for the purposes of their

complaint under Article 6 § 1 of the Convention. They also considered that the civil limb of Article 6 was applicable in the present case. In particular, the protection of physical integrity was a "civil right" within the meaning of Article 6. The dispute concerned the right to life under Article 10 § 1 of the Swiss Constitution as well as the rights under Articles 2 and 8 of the Convention (all of which had a legal basis in domestic law) in relation to the inadequate enforcement of the CO_2 Act and the inadequacy of the climate targets. The dispute at issue was about the scope of the above-mentioned rights.

578. The dispute in question was genuine and serious, and the outcome of the proceedings was directly decisive for the rights in question. There was a clear connection, and thus more than a tenuous connection or remote consequences, between the rights invoked, on the one hand, and the reduction of GHG (outcome of the proceedings), on the other. In the domestic proceedings, the applicants had sought an order which would force the respondent State to take the necessary action to tackle dangerous climate change. This would have gone hand in hand with a reduction of GHG emissions and the heatwaves linked to them, a matter which had a clear connection to the protection of their rights. In the domestic proceedings they had not merely complained about hypothetical consequences for the environment and human health but had pointed to concrete health risks from excessive GHG emissions which they faced as members of a particularly vulnerable group and which had also materialised for some of the applicants. Thus, the outcome of the domestic proceedings had affected the very substance of their rights to life and private life.

579. The applicants contended that they had not had an effective judicial remedy at their disposal by which to assert their civil rights. The domestic authorities had declared their claims inadmissible on the grounds that they lacked standing under section 25a of the APA, and the domestic courts had upheld that decision. The domestic courts had not assessed the applicants' claim or, alternatively, had only done so arbitrarily. Specifically, none of the courts had effectively analysed the merits of the critical questions, such as those relating to the applicants' vulnerability to extreme heatwaves, the harm from heat-related afflictions suffered by applicants nos. 2-5, and the legislative and administrative framework necessary to protect the applicants' rights to life and their family and private life.

580. In the applicants' view, the domestic courts had applied the standing requirements arbitrarily and in a manifestly unreasonable way, impairing the very essence of their right of access to a court. The assessment of the FAC that the applicants were not "particularly" affected by the impacts of climate change had been in clear contrast to the best available scientific evidence and the medical certificates submitted by the applicants. Moreover, the FSC's conclusion that there was still some time available to combat dangerous climate change had been arbitrary and contrary to any scientific evidence. It

had been the result of the judges' own fact-finding exercise without the involvement of (climate) scientists and despite the fact that the FSC's appellate function was normally limited to the examination of breaches of the law. In any event, that finding had been based on a false premise and was manifestly unreasonable.

581. The applicants also submitted that the domestic courts had applied the standing requirements disproportionately, given their duty to consider the nature of the rights at stake, and the fact that on the basis of their interpretation of the standing requirements, acts and failures by the State in fighting climate change would remain entirely outside the scope of human rights law. This would be an unacceptable consequence in the light of the magnitude of the threat posed by climate change and the practice in comparable environmental-law cases. Moreover, the domestic courts' arbitrary application of the standing requirements was inconsistent with the respondent State's commitments under the Aarhus Convention.

2. The Government

582. For the reasons set out in paragraphs 340 to 341 above concerning the applicant association's victim status under the substantive provisions (Articles 2 and 8), the Government argued that the applicant association could also not be considered to have victim status under Article 6 § 1 of the Convention. On the other hand, the Government did not contest that applicants nos. 2-5 could claim victim status under that provision.

583. Relying on the findings of the domestic courts, the Government submitted that the applicants had not been affected with the required intensity in the enjoyment of their rights arising from Article 10 § 1 of the Constitution and Articles 2 and 8 of the Convention to claim victim status for the purposes of Article 34 of the Convention. Their request had been of an *actio popularis* nature and they could not arguably claim that there had been a dispute over a right recognised in domestic law. The Government also stressed that neither the Swiss Constitution nor any other domestic legislation recognised the right to a clean, healthy and sustainable environment.

584. The Government further stressed that the applicants had not established the existence of a sufficient link between the alleged omissions and the rights invoked. Moreover, they had not demonstrated that there had been a serious and imminent threat to the rights invoked, and the requested actions had not been likely to immediately contribute to the reduction of CO_2 emissions in Switzerland. Consequently, neither the threat nor the actions requested presented a degree of probability making the outcome of the dispute directly decisive for the rights invoked by the applicants. The link between the alleged omissions and the rights invoked by the applicants was therefore too tenuous and remote.

585. In the present case, in reality, the applicants had sought to obtain the replacement of the CO_2 Act by a law providing for stricter measures. It was

therefore the general interest in protection of the climate that had constituted the object of the proceedings and the issue at stake, and not a dispute over a civil right of the applicants. The Government therefore argued that Article 6 § 1 was not applicable.

586. Furthermore, the Government pointed out that the applicants had had access to two levels of domestic jurisdiction. Both the FAC and the FSC had carefully examined the applicants' case and had provided duly reasoned decisions. Moreover, in the Government's view, the domestic administrative procedure was not particularly complex and was based on the inquisitory principle whereby the domestic authorities sought to establish the facts of their own motion. However, in order to bring an action under section 25a of the APA certain conditions needed to be fulfilled so as to avoid *actio popularis* claims.

587. In the Government's view, the conditions laid down by the procedural law to allow an authority to examine a particular matter served the proper administration of justice. The requirement for the person making the claim to be affected to some extent in his or her personal legal sphere resulted from the fact that section 25a of the APA was a means of individual legal protection. This allowed for a delimitation in relation to *actio popularis* claims. This requirement also contributed to respect for the separation of powers. It could not therefore be said to restrict access to a court in such a way that the individual's right to a court would be impaired in its very essence. Moreover, there was a reasonable relationship of proportionality between this requirement and the aims pursued.

588. The careful examination of the case carried out by the FSC with regard to the formal criterion of an interest worthy of protection, as well as the characteristics of the political system specific to Switzerland, demonstrated that the courts could not play a determining role in the sphere of climate change, and could certainly not themselves define the measures to be taken. In the view of the Government, the FSC had therefore rightly considered that the applicants' complaints should not be answered by judicial means, but rather by political means. Their appeal had not served the purpose of individual legal protection but rather had aimed to examine in an abstract manner the current climate protection measures, and those planned up to 2030. This element in particular had led the FSC to find that the applicants' appeal was of an *actio popularis* nature, which was incompatible with the means of individual legal protection. These findings were neither arbitrary nor manifestly unreasonable and the Court should not therefore call them into question.

589. In sum, in the Government's view, there had been no disproportionate restriction on the applicants' right of access to the domestic courts in a manner impairing the very essence of that right. The applicants' Article 6 § 1 complaint was therefore manifestly ill-founded.

B. The Court's assessment

1. Admissibility

(a) Victim status

590. In order to claim to be a "victim" in the context of an alleged violation of Article 6 of the Convention, and to complain of alleged procedural shortcomings under that provision, it is normally sufficient that the applicant was affected as a party to the proceedings brought by him or her before the domestic courts. This is true for individuals (see, for instance, *Balmer-Schafroth and Others v. Switzerland*, 26 August 1997, § 26, *Reports* 1997-IV, and *Çöçelli and Others v. Türkiye*, no. 81415/12, §§ 39-40, 11 October 2022) and for associations (see, for instance, *Gorraiz Lizarraga and Others*, cited above, § 36, and *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği*, cited above, § 40, with further references).

591. Where the *locus standi* of an applicant has been denied at the domestic level (see, for instance, *Bursa Barosu Başkanlığı and Others v. Turkey*, no. 25680/05, §§ 114-16, 19 June 2018), including in instances where the applicant was not recognised as possessing an interest in bringing an action, and where the applicant complains of a lack of access to a court or of another procedural deficiency in that respect, the matter of victim status may more appropriately be examined in the context of the assessment of the applicability of Article 6 to the dispute in question (see, for instance, *Asselbourg and Others*, cited above; *Folkman and Others v. the Czech Republic* (dec.), no. 23673/03, 10 July 2006; *Sarl du Parc d'Activités de Blotzheim v. France*, no. 72377/01, §§ 18-20, 11 July 2006; and *Association Burestop 55 and Others*, cited above, §§ 52-60).

592. In the present case, the Government challenged the standing/victim status of all the applicants as regards the substantive Convention provisions (Articles 2 and 8), whereas they did not challenge the victim status of applicants nos. 2-5 under the procedural provisions (Articles 6 and 13) (see paragraphs 341 and 345 above).

593. Having regard to the fact that the issue of victim status under Article 34 is, in any event, a matter that goes to the Court's jurisdiction and which the Court examines of its own motion (see *Fedotova and Others*, cited above, § 88), the issue of the victim status of the applicants under Article 6 § 1 of the Convention will be examined by joining it to the assessment of the applicability of that provision.

(b) Applicability of Article 6 § 1 of the Convention

(i) General principles

594. Article 6 of the Convention does not guarantee a right of access to a court with power to invalidate or override a law enacted by the legislature

(see, for example, *Ruiz-Mateos v. Spain*, no. 14324/88, Commission decision of 19 April 1991, Decisions and Reports 69, p. 22; *Posti and Rahko v. Finland*, no. 27824/95, § 52, ECHR 2002 VII; and *Project-Trade d.o.o. v. Croatia*, no. 1920/14, § 68, 19 November 2020).

595. For Article 6 § 1 in its civil limb to be applicable, there must be a "dispute" ("*contestation*" in French) over a right which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The provision does not in itself guarantee any particular content for (civil) "rights and obligations" in the substantive law of the Contracting States. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play. Lastly, the right must be a "civil" right (see, most recently, *Grzęda*, cited above, § 257, with further references; see also, in the environmental context, *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 43, ECHR 2000-IV, and *Association Burestop 55 and Others*, cited above, § 52).

596. As indicated previously, the Convention does not recognise a right to bring an *actio popularis*, this prohibition being intended to avoid cases being brought before the Court by individuals complaining of the mere existence of a law applicable to any citizen of a country, or of a judicial decision to which they are not party (see *L'Erablière A.S.B.L. v. Belgium*, no. 49230/07, § 29, ECHR 2009 (extracts)). Thus, an environmental association relying on Article 6 must show that the dispute or claim raised by it has a sufficient link with a specific civil right on which the association itself can rely (see *Association Burestop 55 and Others*, cited above, § 55).

(α) The existence of a "right" and its "civil" nature

597. The notion of "civil" rights is an autonomous one. The Court has held that the character of the legislation which governs how the matter is to be determined or that of the authority invested with jurisdiction in the matter are of little consequence (see *Ivan Atanasov*, cited above, § 90). Thus, the classification of the legislation (civil, commercial, administrative or other), or of the competent tribunal (ordinary, administrative court or other) are not as such decisive. What matters is that the right is exercisable by the person in question and can be characterised as a "civil" right.

598. Article 6 § 1 does not guarantee any particular content for "civil rights and obligations" in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned. In order to decide whether the right in question has a basis in domestic law, the starting-point must be the provisions of the relevant law and their interpretation by the

domestic courts. It is primarily for the national authorities, in particular the courts, to resolve problems of interpretation of domestic legislation. Unless the interpretation is arbitrary or manifestly unreasonable, the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention (see *Grzęda*, cited above, §§ 258-59).

599. When carrying out its assessment, the Court needs to establish whether the applicant's claim was frivolous or vexatious or otherwise lacking in foundation (see, for instance, *Miller v. Sweden*, no. 55853/00, § 28, 8 February 2005). Moreover, it is necessary for the Court to look beyond the appearances and the language used and to concentrate on the realities of the situation (see *Boulois v. Luxembourg* [GC], no. 37575/04, § 92, ECHR 2012, with further references).

600. In the environmental context, the Court has recognised the existence of a civil right where the domestic law recognises an individual right to environmental protection where the rights to life, to physical integrity and of property are at stake (see, for instance, *Zander v. Sweden*, 25 November 1993, § 24, Series A no. 279-B; *Balmer-Schafroth and Others*, cited above, §§ 33-34; *Athanassoglou and Others*, cited above, § 44; and *Taşkın and Others*, cited above, §§ 132-33).

601. As regards associations, in *Gorraiz Lizarraga and Others* (cited above, §§ 45-47), Article 6 was found to apply with respect to proceedings intended to defend certain specific interests of the association's members, namely their lifestyle and properties. The Court noted that the applicant association had complained of a direct and specific threat hanging over its members' personal assets and lifestyles, which, without a doubt, had an economic and civil dimension. While the relevant domestic proceedings had "ostensibly [borne] the hallmark of public-law proceedings", the final outcome of the proceedings had nonetheless been decisive for the applicants' complaints of interference with their property and lifestyles. Thus, the Court found that the proceedings as a whole could be considered to concern the civil rights of the members of the association (see also, for similar considerations, *L'Erablière A.S.B.L.*, cited above, §§ 29-30).

602. It is also clear that associations can rely on Article 6 in disputes concerning their own "civil" rights (see *Association Burestop 55 and Others*, cited above, § 55). In the context of environmental litigation, the Court has remarked that on a strict reading, Article 6 would not be applicable to proceedings aimed at environmental protection as a public-interest value as there would not be a dispute over a civil right which the association itself could claim. However, relying on the case-law in *Gorraiz Lizarraga and Others* (cited above), the Court considered that such an approach would be at variance with the realities of today's civil society, where associations play an important role, *inter alia* by defending specific causes before the domestic authorities or courts, particularly in the environmental-protection sphere (see *Collectif national d'information et d'opposition à l'usine Melox – Collectif*

Stop Melox et Mox, cited above). In this connection, the Court has also relied on the principles flowing from the Aarhus Convention (see *Association Burestop 55 and Others*, cited above, § 54; see also paragraph 491 above).

(β) The existence of a genuine and serious dispute

603. In order for Article 6 to apply there has to be a dispute, which must be genuine and serious and which may relate not only to the actual existence of a right but also to its scope and the manner of its exercise (see paragraph 596 above). The existence of a dispute ("*contestation*" in French) implies the existence of a disagreement. However, conformity with the spirit of the Convention requires that this word should not be construed too technically and that it should be given a substantive rather than a formal meaning (see *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 45, Series A no. 43, and *Cipolletta v. Italy*, no. 38259/09, §§ 31-32, 11 January 2018, with further references).

604. In the environmental context, the Court has been prepared to accept that disputes concerning environmental matters were genuine and serious. It has drawn that conclusion from, in particular, the fact that the relevant appeal had been declared admissible at the domestic level (see, for instance, *Balmer-Schafroth and Others*, cited above, § 38, and *Athanassoglou and Others*, cited above, § 45), from the substance of the applicant's pleadings before the domestic courts (see *Association Burestop 55 and Others*, cited above, § 59), or from the arguments used by the domestic courts to dismiss a given action (see *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox et Mox*, cited above).

(γ) Whether the outcome of the proceedings is "directly decisive" for the applicant's right

605. Whether the result of the proceedings can be considered directly decisive for the right in question depends on the nature of the right relied on as well as on the object of the proceedings in question.

606. In the environmental context, the Court considered in *Balmer-Schafroth and Others* (cited above, § 40) that the applicants had failed to demonstrate that the operation of the power station had exposed them personally to a danger that was not only serious but also specific and, above all, imminent. The Court reached a similar conclusion in *Athanassoglou and Others* (cited above, §§ 53-54), in which it held that the applicants had in reality sought to contest the very principle of the use of nuclear energy, which was a policy decision for each Contracting State to take according to its democratic processes and not an issue to be examined under Article 6 § 1. The Court followed the same approach in several other cases where the applicants essentially complained of a hypothetical environmental impact rather than a specific infringement of, or an adverse impact on, their rights (see, for instance, *Folkman and Others*, cited above; *Zapletal v. the Czech*

Republic (dec.), no. 12720/06, 30 November 2010; and *Ivan Atanasov*, cited above, § 92).

607. By contrast, where the adverse environmental effects on an applicant's rights were immediate and certain, the Court considered that the dispute concerning the matter fell under Article 6 § 1 (see, for instance, *L'Erablière A.S.B.L.*, cited above, §§ 28-29; *Zander*, cited above, § 26; *Taşkın and Others*, cited above, § 133; and *Association Burestop 55 and Others*, cited above, § 59).

(ii) Applicability of Article 6 § 1 in the climate-change context

608. The above-noted general principles concerning the applicability of Article 6 § 1 also prevail in the present climate-change context, it being understood that their application may need to take into account the specificities of climate-change litigation. In other words, while characteristics of the subject matter do not at present prompt the Court to revise its firmly established case-law on Article 6, they will nonetheless inevitably have implications for the application of that case-law, both in regard to the conditions for its applicability and to the assessment of compliance with the requirements flowing from that provision.

609. As pointed out above, Article 6 does not guarantee a right of access to a court with power to invalidate or override laws enacted by Parliament (see paragraphs 594 and 600 above). This accordingly means that Article 6 cannot be relied upon to institute an action before a court for the purpose of compelling Parliament to enact legislation. However, where domestic law does provide for individual access to proceedings before a Constitutional Court or another similar superior court which does have the power to examine an appeal lodged directly against a law, Article 6 may be applicable (see *Xero Flor w Polsce sp. Z o.o. v. Poland*, no. 4907/18, § 190, 7 May 2021, with further references).

610. As already addressed above, a legally relevant relationship of causation may exist between State actions and/or omissions and the harm, or risk of harm, affecting individuals (see paragraphs 431 and 519 above). Where such rights are recognised under domestic law, a "civil" right within the meaning of Article 6 may be at issue. Moreover, it is important to note that in so far as participation of the public and access to information in matters concerning the environment (as widely acknowledged in international environmental law) constitute rights recognised in domestic law, this may lead to a conclusion that there is a "civil" right within the meaning of Article 6. Thus, in so far as such rights can be found in domestic law, this may also lead to a conclusion that a "civil" right within the meaning of Article 6 § 1 is at issue.

611. As to the further question – whether there is a genuine and serious dispute or disagreement over the manner of ensuring respect for such a right

– this is a matter to be determined on the facts of each particular case (see paragraphs 603 to 604 above).

612. As regards, lastly, the requirement that the outcome of the proceedings in question must be "directly decisive" for the applicant's right, the Court notes that there is a certain link between the requirement under Article 6 that the outcome of the proceedings must be directly decisive for the applicants' rights relied on under domestic law, and the considerations it has found relevant with a view to setting out criteria for victim status as well as those relating to the applicability of Article 8 (see, for instance, the approach in *Athanassoglou and Others*, cited above, § 59, and *Ivan Atanasov*, cited above, §§ 78 and 93).

613. Furthermore, the object of the proceedings also has a bearing on whether the outcome can be considered decisive for the right relied on. In this connection, in most of the environmental cases examined by the Court so far, the proceedings have concerned issues relating to the operating permits for specific facilities, or the conditions for their operation. In such circumstances, where the harmful operation or its continuation depends on the outcome of the proceedings, it may often be clear that the outcome of the proceedings would be directly decisive for the rights relied on by the affected individuals who have victim status (see, for instance, *Zander*, cited above, § 24 *in fine*; see also, by contrast, *Balmer-Schafroth and Others*, cited above, § 40, and *Athanassoglou and Others*, cited above, §§ 54-55). In the context of climate litigation, however, the object of the proceedings may well be broader, which is why the question whether their object can be considered directly decisive for the rights relied on becomes more critical and distinct.

614. At the same time, the various elements of the analysis under this limb of the test, and in particular the notion of imminent harm or danger, cannot be applied without properly taking into account the specific nature of climate change-related risks, including their potential for irreversible consequences and corollary severity of harm. Where future harms are not merely speculative but real and highly probable (or virtually certain) in the absence of adequate corrective action, the fact that the harm is not strictly imminent should not, on its own, lead to the conclusion that the outcome of the proceedings would not be decisive for its alleviation or reduction. Such an approach would unduly limit access to a court for many of the most serious risks associated with climate change. This is particularly true for legal actions instituted by associations. In the climate-change context, their legal actions must be seen in the light of their role as a means through which the Convention rights of those affected by climate change, including those at a distinct representational disadvantage, can be defended and through which they can seek to obtain an adequate corrective action for the alleged failures and omissions on the part of the authorities in the field of climate change.

(iii) Application of the above principles and considerations to the present case

615. The Court notes that the applicants' action instituted at the domestic level largely concerned requests for legislative and regulatory action falling outside the scope of Article 6 § 1 (see points 1-3 and some items under point 4 of their claims in paragraph 22 above). In part, however, the action concerned the implementation of measures within the competence of the respective authorities, required to achieve the current reduction target of 20%, and thus for ending the unlawful omissions (see the opening part of point 4 in paragraph 22 above). They also requested a declaratory ruling of unlawfulness of the alleged governmental omissions in the field of climate change (see point 5 of the request). The applicants have acknowledged this dual nature of the complaint they raised in their legal action before the FAC (see paragraph 33 above).

616. While the complaint concerning policy decisions that are subject to the relevant democratic processes is not a matter falling within the scope of Article 6 (see paragraph 594 above), the applicants' complaint concerning effective implementation of the mitigation measures under existing law is a matter capable of falling within the scope of that provision, provided that the other conditions for the applicability of Article 6 § 1 are satisfied.

617. As to the "civil" nature of the right, the applicants relied, *inter alia*, on the right to life under Article 10 of the Swiss Constitution (see paragraph 121 above), which the Court has previously found to be a right from which not only the right to life but also the right to the protection of physical integrity can be derived (see *Balmer-Schafroth and Others*, cited above, §§ 33-34). In accordance with the Court's well-established case-law these are rights which are civil in nature for the purpose of the first limb of the test for the applicability of Article 6 (see paragraph 600 above).

618. In this regard the Court notes that the FSC did not reject the legal action of applicants nos. 2-5 for lack of a right on which they could rely, but rather because it considered their action to be of an *actio popularis* nature and that the individual applicants were not affected with sufficient intensity (see paragraph 59 above). In sum, it cannot be said that the individual applicants' claim was frivolous or vexatious or otherwise lacking in foundation in terms of the relevant domestic law (see paragraph 599 above). The Court is unable to agree with the finding of the FSC that the individual applicants' claim could not be considered arguable for the purposes of Article 6 § 1 of the Convention (see paragraph 61 above). Moreover, as regards the applicant association, while the FSC left open whether it had legal standing before it, the Court notes that the association's action was based on the threat arising from the adverse effects of climate change as they affected its members' health and well-being (see *Gorraiz Lizarraga and Others*, cited above, § 46). The Court is satisfied that the interests defended by the association are such that the "dispute" raised by it had a direct and sufficient link to its members'

rights in question, bearing in mind the specific role of associations in the climate-change context (see paragraph 614 above).

619. The above considerations are also important for informing the second criterion for the applicability of Article 6, namely the existence of a genuine and serious dispute or disagreement over respect for the relevant right (see paragraph 611 above), which undoubtedly existed in the present case.

620. Lastly, as regards the third criterion – whether the outcome of the proceedings was "directly decisive" for the applicants' rights – the Court notes the following.

621. As regards the dispute brought by the applicant association, and in so far as that dispute arose out of a relevant part of its claim at the domestic level – namely, the complaint concerning the failure to effectively implement mitigation measures under the existing law (see paragraph 615 above) – the applicant association has demonstrated that it had an actual and sufficiently close connection to the matter complained of and to the individuals seeking protection against the adverse effects of climate change on their lives, health and quality of life. In other words, the applicant association sought to defend the specific civil rights of its members in relation to the adverse effects of climate change (see also paragraphs 521-526 above). It acted as a means through which the rights of those affected by climate change could be defended and through which they could seek to obtain an adequate corrective action for the State's failure to effectively implement mitigation measures under the existing law (see paragraph 614 above).

622. In this connection, the Court refers to its above findings regarding the applicant association's standing for the purposes of the complaint under Article 8 of the Convention (see paragraphs 521-526 above). It reiterates the important role of associations in defending specific causes in the sphere of environmental protection, as already found in its case-law (see paragraph 601 above), as well as the particular relevance of collective action in the context of climate change, the consequences of which are not specifically limited to certain individuals. Similarly, in so far as a dispute reflects this collective dimension, the requirement of a "directly decisive" outcome must be taken in the broader sense of seeking to obtain a form of correction of the authorities' actions and omissions affecting the civil rights of its members under national law.

623. Article 6 § 1 therefore applies to the complaint of the applicant association and it can be considered to have victim status under that provision regarding its complaint of lack of access to a court (see paragraph 593 above). The Government's preliminary objection in that regard is therefore dismissed.

624. With respect to applicants nos. 2-5, it cannot be considered that the dispute they had brought concerning the failure to effectively implement mitigation measures under the existing law was or could have been directly decisive for their specific rights. For similar reasons as those stated above

with respect to Article 8 of the Convention (see paragraphs 527-535 above), it cannot be held that applicants nos. 2-5 have made out a case demonstrating that the requested action by the authorities – namely, effectively implementing mitigation measures under the existing national law – alone would have created sufficiently imminent and certain effects on their individual rights in the context of climate change. It therefore follows that their dispute had a mere tenuous connection with, or remote consequences for, their rights relied upon under national law (compare *Balmer-Schafroth and Others*, cited above). Thus, the outcome of the dispute was not directly decisive for their civil rights (see paragraph 612 above).

625. Against this background the Court finds that the complaint of applicants nos. 2-5 is inadmissible as being incompatible *ratione materiae* with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. Merits

(a) General principles

626. In the present case, an issue under Article 6 § 1 arises in relation to the requirement of access to a court. The relevant general principles concerning this matter are as follows (see *Zubac v. Croatia* [GC], no. 40160/12, §§ 76-79, 5 April 2018):

> "76. The right of access to a court was established as an aspect of the right to a tribunal under Article 6 § 1 of the Convention in *Golder v. the United Kingdom* (21 February 1975, §§ 28-36, Series A. no. 18). In that case, the Court found the right of access to a court to be an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlay much of the Convention. Thus, Article 6 § 1 secures to everyone the right to have a claim relating to his civil rights and obligations brought before a court (see *Roche v. the United Kingdom* [GC], no. 32555/96, § 116, ECHR 2005-X; see also *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 91, ECHR 2001-V; *Cudak v. Lithuania* [GC], no. 15869/02, § 54, ECHR 2010; and *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 84, ECHR 2016 (extracts)).
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> 77. The right of access to a court must be 'practical and effective', not 'theoretical or illusory' (see, to that effect, *Bellet v. France*, 4 December 1995, § 36, Series A no. 333-B). This observation is particularly true in respect of the guarantees provided for by Article 6, in view of the prominent place held in a democratic society by the right to a fair trial (see *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 45, ECHR 2001-VIII, and *Lupeni Greek Catholic Parish and Others*, cited above, § 86).
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> 78. However, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, which regulation may vary in time and in place according to the needs and resources of the community and of individuals (see *Stanev v Bulgaria* [GC], no. 36760/06, § 230, ECHR 2012). In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court,

it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field. Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Lupeni Greek Catholic Parish and Others*, cited above, § 89, with further references).

79. The Court would also stress that it is not its function to deal with errors of fact or law allegedly made by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, *inter alia*, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I; and *Perez v. France* [GC], no. 47287/99, § 82, ECHR 2004-I). Normally, issues such as the weight attached by the national courts to given items of evidence or to findings or assessments in issue before them for consideration are not for the Court to review. The Court should not act as a fourth instance and will not therefore question under Article 6 § 1 the judgment of the national courts, unless their findings can be regarded as arbitrary or manifestly unreasonable (see *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 61, ECHR 2015)."

627. It should also be reiterated that Article 6 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the grounds of being incompatible with the Convention or to equivalent domestic legal norms (see *Berger-Krall and Others*, cited above, § 322, with further references, and paragraph 600 above). Furthermore, the Court has also accepted, albeit in another context, that maintaining the separation of powers between the legislature and the judiciary is a legitimate aim as regards limitations on the right of access to a court (see *A. v. the United Kingdom*, no. 35373/97, § 77, ECHR 2002-X).

628. The relevant principles concerning limitations on the right of access to a court reflect the process, inherent in the Court's task under the Convention, of striking a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see *Fayed*, cited above, § 65 *in fine*). It thus remains to be determined, on the facts of the particular case, whether there has been a disproportionate limitation on the right of access to a court (see *Association Burestop 55 and Others*, cited above, §§ 71-72).

(b) Application of the above principles to the present case

629. At the outset, the Court reiterates that the right of access to a court includes not only the right to institute proceedings but also the right to obtain a determination of the dispute by a court. This flows from the fact that the right of access to a court must be "practical and effective", not theoretical or illusory (see, for instance, *Lupeni Greek Catholic Parish and Others*, cited above, § 86).

630. In the present case, the applicant association's legal action was rejected, first by an administrative authority, the DETEC, and then by the domestic courts at two levels of jurisdiction, without the merits of its

complaints being assessed (see paragraphs 28-31, 34-42 and 52-63 above). There was therefore a limitation on the right of access to a court and the Court must assess whether the manner in which the limitation at issue operated in the present case restricted the applicant association's access to a court in such a way or to such an extent that the very essence of the right was impaired (see paragraphs 626 to 628 above).

631. As regards the legitimate aim pursued by the limitation at issue, in so far as the decisions of the domestic courts sought to distinguish the issue of individual protection from the relevant democratic processes and general challenges to legislation, thereby preventing *actio popularis* complaints, it should be reiterated that the Court has previously accepted that maintaining the separation of powers between the legislature and the judiciary is a legitimate aim as regards limitations on the right of access to a court (see paragraph 627 above). Moreover, as already discussed in paragraphs 596 and 627 to 628 above, Article 6 § 1 does not require the provision of access to a court as regards challenges to the state of domestic legislation, or for *actio popularis* complaints.

632. However, and as the last step of the relevant test, it remains to be seen whether the limitation on the applicant association's right of access to a court, to the extent that the proceedings did not fall outside the scope of Article 6, was proportionate, namely whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved (see paragraph 626 above).

633. In this connection, it should be reiterated that the action which the applicant association instituted at the domestic level could be seen as being hybrid in nature. In its main part, it clearly concerned issues pertaining to the democratic legislative process and falling outside the scope of Article 6 § 1, but it also concerned issues pertaining specifically to alleged failures in the enforcement of the existing domestic law affecting the protection of the rights defended by the applicant association. Some of the claims thus raised issues going to the lawfulness of the impugned governmental actions or omissions, alleging adverse effects on the right to life and the protection of physical integrity, which are enshrined in the domestic law, notably in Article 10 of the Constitution (see paragraphs 615-617 above).

634. To the extent that it was seeking to vindicate these rights in the face of the threats posed by the allegedly inadequate and insufficient action by the authorities to implement the relevant measures for the mitigation of climate change already required under the existing national law, this kind of action cannot automatically be seen as an *actio popularis* or as involving a political issue which the courts should not engage with. This position is consistent with the reasoning set out in paragraph 436 above as regards the manner in which climate change may affect human rights and the pressing need to address the threats posed by climate change.

635. The Court is not persuaded by the domestic courts' findings that there was still some time to prevent global warming from reaching the critical limit (see paragraphs 56-59 above). This was not based on sufficient examination of the scientific evidence concerning climate change, which was already available at the relevant time, as well as the general acceptance that there is urgency as regards the existing and inevitable future impacts of climate change on various aspects of human rights (see paragraph 436 above; see also paragraph 337 above as regards the respondent Government's acceptance that there was a climate emergency). Indeed, the existing evidence and the scientific findings on the urgency of addressing the adverse effects of climate change, including the grave risk of their inevitability and their irreversibility, suggest that there was a pressing need to ensure the legal protection of human rights as regards the authorities' allegedly inadequate action to tackle climate change.

636. The Court further notes that the domestic courts did not address the issue of the standing of the applicant association, an issue which warranted a separate assessment irrespective of the domestic courts' position as regards the individual applicants' complaints. The domestic courts did not engage seriously or at all with the action brought by the applicant association.

637. What is more, before resorting to the courts the applicant association, and its members, had raised their complaints before various expert and specialised administrative bodies and agencies, but none of them dealt with the substance of their complaints (see paragraph 22 above). Despite the fact that such an examination by the administrative authorities alone could not satisfy the requirements of access to a court under Article 6, the Court notes that, judging by the DETEC's decision, the rejection of the applicants' complaint by the administrative authorities would seem to have been based on inadequate and insufficient considerations similar to those relied upon by the domestic courts (see paragraphs 28-31 above). The Court notes, furthermore, that individual applicants/members of the association were not given access to a court, and nor was there any other avenue under domestic law through which they could bring their complaints to a court. There were therefore no other relevant safeguards to be taken into account in its assessment of the proportionality of the limitation on the applicant association's right of access to a court (see paragraph 628 above).

638. The foregoing considerations are sufficient to enable the Court to conclude that, to the extent that the applicant association's claims fell within the scope of Article 6 § 1, its right of access to a court was restricted in such a way and to such an extent that the very essence of the right was impaired.

639. In this connection, the Court considers it essential to emphasise the key role which domestic courts have played and will play in climate-change litigation, a fact reflected in the case-law adopted to date in certain Council of Europe member States, highlighting the importance of access to justice in this field. Furthermore, given the principles of shared responsibility and

subsidiarity, it falls primarily to national authorities, including the courts, to ensure that Convention obligations are observed.

640. In the present case, the Court finds that there has been a violation of Article 6 § 1 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

641. The applicants complained that they had not had an effective remedy at their disposal, within the meaning of Article 13 of the Convention, concerning their complaints about the authorities' omission to address the adverse effects of climate change.

642. Article 13 of the Convention reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

643. The Government contested the applicants' complaint.

644. The Court notes that the role of Article 6 in relation to Article 13 is that of a *lex specialis*, the requirements of Article 13 being absorbed by the more stringent requirements of Article 6 (see, for instance, *Baka v. Hungary* [GC], no. 20261/12, § 181, 23 June 2016). Given the Court's findings under Article 6 § 1 of the Convention concerning the applicant association (see paragraph 640 above), the present complaint does not give rise to any separate issue in its regard. Consequently, the Court holds that it is not necessary to examine the complaint under Article 13 of the Convention separately.

645. As regards applicants nos. 2-5, having regard to its findings in paragraphs 527 to 535 and 625 above, the Court finds that they have no arguable claim under Article 13 and that their complaint is incompatible *ratione materiae* with the provisions of the Convention (see, for instance, *Athanassoglou and Others*, cited above, §§ 59-60) and must be rejected in accordance with Article 35 § 4 of the Convention.

VI. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

A. Article 41 of the Convention

646. Article 41 of the Convention provides as follows:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. Damage

647. The applicant association did not submit a claim for damages. The Court therefore makes no award under this head.

2. Costs and expenses

648. In the Chamber proceedings the applicant association claimed a total amount of 324,249.25 Swiss Francs (CHF) in respect of cost and expenses. The sum comprised, first, lawyers' fees (CHF 315,249.25), and, secondly, the costs imposed by the Swiss courts at the domestic level (totalling CHF 9,000). In the proceedings before the Grand Chamber, the applicant association submitted a claim for newly incurred costs and expenses in the amount of CHF 187,988.45. It also provided invoices and supporting documents in relation to the payments made by the applicant association. Subsequently, the applicant association submitted additional fee notes and invoices for services provided by the legal representatives to the applicant association totalling CHF 79,181.50, 63,057.92 euros (EUR) and 27,504.50 British pounds (GBP).

649. The Government contested the applicant association's claim as being unsubstantiated and excessive. They considered that the claim should be rejected or, in the alternative, that a maximum amount of CHF 13,000 should be awarded.

650. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum (see, for instance, *Halet v. Luxembourg* [GC], no. 21884/18, § 214, 14 February 2023). Having regard to the above criteria, the Court is not convinced that all the costs and expenses incurred in the proceedings before it were necessarily incurred and considers it reasonable to award EUR 80,000 covering all costs and expenses under this head. The remainder of the applicant association's claim for costs and expenses is rejected.

3. Default interest

651. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

B. Article 46 of the Convention

652. The relevant parts of Article 46 of the Convention provide as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

1. The parties' submissions

653. The applicants submitted that in the event of a finding of a violation by the Court, Article 46 of the Convention should also be applied. However,

given that the choice of means to implement the Court's judgment was primarily for the respondent State, the Court should not specify the measures to be taken. It should rather indicate that the State would need to take all suitable measures to allow it to achieve a level of annual emissions compatible with its target of attaining a minimum reduction of 40% in GHG emissions by 2030, and carbon neutrality by 2050.

654. The Government pointed out that the applicants had not requested before the domestic courts or before the Court that any specific general measures be indicated to the State. They had in fact accepted that there were several measures available to the respondent State to ensure compliance with the relevant carbon budget. The Government further noted that various mitigation measures had been developed at the international level, notably by the IPCC. In the Government's view, it was also important to bear in mind the wide margin of appreciation accorded to the State in a complex and technical area such as climate change, Moreover, indicating any specific measures under Article 46 would run counter to the principle of subsidiarity and the necessary separation of powers. In any event, there was no systemic issue at the domestic level that would warrant the application of Article 46. The Government therefore submitted that the Court should not indicate any general measures under that provision.

2. The Court's assessment

655. The Court reiterates that under Article 46 of the Convention the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects (see, among other authorities, *H.F. and Others v. France* [GC], nos. 24384/19 and 44234/20, § 293, 14 September 2022).

656. The Court further points out that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions and spirit of the Court's judgment. However, in certain special circumstances the Court has found it useful to indicate to a respondent State the type of measure – individual and/or general – that might be taken to put an end to the situation which has given rise to the finding of a violation (ibid., § 294).

657. In the present case, having regard to the complexity and the nature of the issues involved, the Court is unable to be detailed or prescriptive as regards any measures to be implemented in order to effectively comply with the present judgment. Given the differentiated margin of appreciation accorded to the State in this area (see paragraph 543 above), the Court considers that the respondent State, with the assistance of the Committee of Ministers, is better placed than the Court to assess the specific measures to be taken. It should thus be left to the Committee of Ministers to supervise, on the basis of the information provided by the respondent State, the adoption of measures aimed at ensuring that the domestic authorities comply with Convention requirements, as clarified in the present judgment.

FOR THESE REASONS, THE COURT,

1. *Holds*, unanimously, that the second applicant's son and heir has standing to continue the present proceedings in the applicant's stead;

2. *Dismisses*, unanimously, the Government's preliminary objections concerning the scope of the complaint, jurisdiction, and compliance with the six-month time-limit;

3. *Joins*, by sixteen votes to one, the issue of the victim status/*locus standi* of the applicants under Articles 2 and 8 of the Convention to the assessment of the applicability of those provisions;

4. *Holds*, by sixteen votes to one, that the applicant association has *locus standi* in the present proceedings and that its complaint should be examined under Article 8 of the Convention alone, and *dismisses* the Government's objection in that regard;

5. *Upholds*, unanimously, the Government's objection as regards the victim status of applicants nos. 2-5 under Articles 2 and 8 of the Convention, and *declares* their complaints inadmissible;

6. *Holds*, unanimously, that it is not necessary to examine the applicability of Article 2 of the Convention;

7. *Holds*, by sixteen votes to one, that there has been a violation of Article 8 of the Convention;

8. *Joins*, by sixteen votes to one, the issue of the victim status of the applicants under Article 6 § 1 of the Convention to the assessment of the applicability of that provision;

9. *Holds*, by sixteen votes to one, that Article 6 § 1 of the Convention applies to the complaint of the applicant association and that it can be considered to have victim status under that provision, and *dismisses* the Government's objection in that regard;

10. *Holds*, by sixteen votes to one, that Article 6 § 1 of the Convention is not applicable to the complaint of applicants nos. 2-5, and *declares* their complaint inadmissible;

11. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention;

12. *Holds*, unanimously, that there is no need to examine separately the applicant association's complaint under Article 13 of the Convention, and *declares* the complaints of applicants nos. 2-5 inadmissible;

13. *Holds*, unanimously,
    (a) that the respondent State is to pay the applicant association, within three months, EUR 80,000 (eighty thousand euros), plus any tax that may be chargeable, in respect of costs and expenses;
    (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

14. *Dismisses*, unanimously, the remainder of the applicant association's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 9 April 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Prebensen	Síofra O'Leary
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Eicke is annexed to this judgment.

S.O.L.
S.P.R.

PARTLY CONCURRING PARTLY DISSENTING OPINION OF JUDGE EICKE

INTRODUCTION

1. To my regret, I am unable to agree with the majority either in relation to the methodology they have adopted or on the conclusions which they have come to both in relation to the admissibility (and, in particular, the question of "victim" status) as well as on the merits. In so far as I have voted for a violation of Article 6, the right of access to court, as I will explain in a little more detail below, my conclusion was reached on the basis of a very different (and, arguably, a more orthodox) approach to the Convention and the case-law thereunder.

2. Despite a careful and detailed engagement with the arguments advanced both by the parties and interveners in this case (and those in the two linked cases of *Carême v. France*, app. no. 7189/21, and *Duarte Agostinho and Others v. Portugal and 32 Others*, app. no. 39371/20) as well as by my colleagues in the course of the deliberations, I find myself in a position where my disagreement goes well beyond a mere difference in the assessment of the evidence or a minor difference as to the law. The disagreement is of a more fundamental nature and, at least in part, goes to the very heart of the role of the Court within the Convention system and, more generally, the role of a court in the context of the unique and unprecedented challenges posed to humanity (including in but also across our societies) by anthropogenic climate change.

3. It is, of course, perfectly understood and accepted that, under Article 32 of the Convention, the Court's jurisdiction extends to "all matters concerning the interpretation and application of the Convention" (Article 32 § 1) and that "[i]n the event of dispute as to whether the Court has jurisdiction, the Court shall decide" (Article 32 § 2). However, it is equally clear that this ultimate interpretative authority comes with immense responsibility; a responsibility which, in my view, is reflected in the Court's normally careful, cautious and gradual approach to the evolutive interpretation of the Convention under what is frequently described as the "living instrument" doctrine. Unfortunately, for the reasons set out in a little more detail below, I have come to the conclusion that the majority in this case has gone well beyond what I consider to be, as a matter of international law, the permissible limits of evolutive interpretation.

4. In doing so, it has, in particular, unnecessarily expanded the concept of "victim" status/standing under Article 34 of the Convention and has created a new right (under Article 8 and, possibly, Article 2) to "effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change" (§§ 519 and 544 of the Judgment) and/or imposed

a new "primary duty" on Contracting Parties "to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change" (§ 545, emphasis added), covering both emissions emanating from within their territorial jurisdiction as well as "embedded emissions" (i.e. those generated through the import of goods and their consumption); none of which have any basis in Article 8 or any other provision of or Protocol to the Convention.

BACKGROUND

5. It is worth repeating that, my disagreement with the majority does not relate in any way to the nature or magnitude of the risks and the challenges posed by anthropogenic climate change. I completely share their understanding of the urgent need to address this issue, both on its own and, perhaps as importantly, as (a major) aspect of what the Reykjavík Declaration "United around our values", adopted at the end of the 4th Summit of Heads of State and Government of the Council of Europe (Reykjavík, 16-17 May 2023), refers to as the "triple planetary crisis of pollution, climate change and loss of biodiversity" (see § 200 of the judgment)[1] currently confronting humanity. In fact, it seems clear to me that this is not just a question of ultimately achieving the target of limiting the temperature increase to 1.5°C above pre-industrial levels identified in the Paris Agreement (important though that is). After all, every tenth of a degree increase has an immediate impact and leads to an increase in the damage and danger created by climate change and, in fact, we all need to take immediate and effective steps to avoid any further increase. My principal disagreement with the majority therefore solely relates to the role this Court can play at this point in time in identifying and taking the steps necessary – and frequently already overdue – to ensure the survival of our planet.

6. In fact, the assessment set out by the European Environment Agency's ("EEA") "European climate risk assessment", published shortly after this judgment was adopted,[2] serves to confirm our shared understanding. In its Executive Summary, the EEA identified its "key takeaways" as follows:

> "-Human-induced climate change is affecting the planet; globally, 2023 was the warmest year on record, and the average global temperature in the 12-month period between February 2023 and January 2024 exceeded pre-industrial levels by 1.5°C.
>
> -Europe is the fastest-warming continent in the world. Extreme heat, once relatively rare, is becoming more frequent while precipitation patterns are changing. Downpours and other precipitation extremes are increasing in severity, and recent years have seen catastrophic floods in various regions. At the same time, southern Europe can expect considerable declines in overall rainfall and more severe droughts.

[1] https://rm.coe.int/4th-summit-of-heads-of-state-and-government-of-the-council-of-europe/1680ab40c1

[2] EEA Report No 1/2024, published on 11 March 2024

-These events, combined with environmental and social risk drivers, pose major challenges throughout Europe. Specifically, they compromise food and water security, energy security and financial stability, and the health of the general population and of outdoor workers; in turn, this affects social cohesion and stability. In tandem, climate change is impacting terrestrial, freshwater and marine ecosystems.

-Climate change is a risk multiplier that can exacerbate existing risks and crises. Climate risks can cascade from one system or region to another, including from the outside world to Europe. Cascading climate risks can lead to system-wide challenges affecting whole societies, with vulnerable social groups particularly affected. Examples include mega-droughts leading to water and food insecurity, disruptions of critical infrastructure, and threats to financial markets and stability.

-When applying the scales of severity used in the European climate risk assessment, several climate risks have already reached critical levels. If decisive action is not taken now, most climate risks identified could reach critical or catastrophic levels by the end of this century. Hundreds of thousands of people would die from heatwaves, and economic losses from coastal floods alone could exceed EUR 1 trillion per year.

-Climate risks to ecosystems, people and the economy depend on non-climatic risk drivers as much as on the climate-related hazards themselves. Effective policies and action at European and national levels can therefore help reduce these risks to a very significant degree. The extent to which we can avoid damages will largely depend on how quickly we can reduce global greenhouse gas emissions, and how fast and effectively we can prepare our societies and adapt to the unavoidable impacts of climate change.

-The EU and its Member States have made considerable progress in understanding the climate risks they are facing and preparing for them. National climate risk assessments are increasingly used to inform adaptation policy development. However, societal preparedness is still low, as policy implementation is lagging substantially behind quickly-increasing risk levels. Most of the climate risks are co-owned by the EU and its Member States; therefore, coordinated and urgent additional action is required at all governance levels.

-Most policies and actions to strengthen Europe's resilience to climate change are made for the long term, and some actions have long lead times. Urgent action is needed now to prevent rigid choices that are not fit for the future in a changing climate, such as in land-use planning and long-lived infrastructure. We must prevent locking ourselves into maladaptive pathways and avoid potentially catastrophic risks.

-Adaptation policies can both support and conflict with other environmental, social and economic policy objectives. Thus, an integrated policy approach considering multiple policy objectives is essential for ensuring efficient adaptation."

7. The two major aspects of this challenge one can derive from all the evidence, however, are (a) the absolute need for urgent action and (b) the sheer complexity of the challenges climate change (and the other aspects of the "triple planetary crisis") pose (geo-)politically, practically, logistically as well as legal.

8. In relation to the latter, Sir David Attenborough, the British biologist, natural historian, broadcaster and author, in his address to the UN Security

Council on 23 February 2021,[3] expressed the challenge in these stark (but realistic) terms:

> "Perhaps the most significant lesson brought by these last 12 months has been that we are no longer separate nations, each best served by looking after its own needs and security. We are a single truly global species whose greatest threats are shared and whose security must ultimately come from acting together in the interests of us all.
>
> Climate change is a threat to global security that can only be dealt with by unparalleled levels of global co-operation. It will compel us to: question our economic models and where we place value; invent entirely new industries; recognise the moral responsibility that wealthy nations have to the rest of the world; and put a value on nature that goes far beyond money."

9. It is also this spirit of global (rather than merely regional or bilateral) cooperation which has underpinned the increasingly detailed treaty regime addressing climate change as well as other, frequently interlinked or overlapping, aspects of the "triple planetary crisis". These, of course, include the UN Framework Convention on Climate Change ("UNFCCC") and the subsequent Protocols and other agreements concluded by or under the auspices of its annual Conference of the Parties ("COP"), including the Paris Agreement adopted at COP21. As the German Constitutional Court (*Bundesverfassungsgericht*) rightly stated, in § 204 of its judgment of 24 March 2021 (referred to in the judgment as *Neubauer and Others v. Federal Republic of Germany*):

> "The Paris Agreement very much relies on mutual trust as a precondition for effectiveness. In Art. 2(1)(a) PA, the Parties agreed on a climate target (well below 2°C and preferably 1.5°C) without committing themselves to any specific reduction measures. In this respect, the Paris Agreement establishes a voluntary mechanism by which the Parties determine their own measures for reaching the agreed temperature target. These measures must, however, be made transparent. The purpose of the transparency provisions is to ensure that all states are able to trust that other states will act in conformity with the target ([...]). Creating and fostering trust in the willingness of the Parties to achieve the target is therefore seen as a key to the effectiveness of the Paris Agreement. Indeed, the Agreement is highly reliant on the individual states making their own contributions."

10. It is in this context and in light of the need, in order to address the issue effectively, for mutual trust and cooperation amongst all the nations of the World or at least the now 198 Contracting Parties to the UNFCCC (including other major GHG emitters such as the United States, China and India) that it seems to me that this Court should act with extreme caution and prudence. This is even more so where:

(a) as it has repeatedly acknowledged, the Convention is not "specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more

[3] https://www.gov.uk/government/speeches/pm-boris-johnsons-address-to-the-un-security-council-on-climate-and-security-23-february-2021

pertinent in dealing with this particular aspect" (*Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI (extracts)); and

(b) none of the proposals of the Parliamentary Assembly of the Council of Europe ("PACE")[4] to provide the Court with an express competence in relation to a clean and healthy environment through the adoption of a protocol or otherwise have so far[5] found the approval of the Contracting Parties to the Convention.

11. Furthermore, it seems to me that the potentially enormous evidential and scientific complexities which, by definition, have to inform any effective – cross-sectoral and cross-border – engagement with the issue of anthropogenic climate change also pose a very real question as to whether (and, if so, how) this Court (and, on the majority's approach, the Committee of Ministers in the context of the execution of judgments under Article 46 of the Convention), can adequately or at all contribute to (rather than hinder) the fight against climate change in the absence of any clear or agreed measures or guidelines. After all, the necessary (and detailed) engagement with scientific evidence in the context of what the Court in *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 44, Series A no. 172 described (in the context of the arguably simpler issue of aircraft noise) as "this difficult social and technical sphere" is not currently part of the Court's working practices.

12. Just by way of example, in the week between 29 January and 2 February 2024, i.e. shortly before this judgment was adopted, an expert review team of the Subsidiary Body for Implementation ("SBI"),[6] set up to assist the governing bodies of the UNFCCC,[7] the Kyoto Protocol[8] and the Paris Agreement,[9] was due to review Switzerland's Eighth National

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[4] Parliamentary Assembly of the Council of Europe, *Future Action to be Taken by the Council of Europe in the Field of Environment Protection* (4 November 1999) Recommendation 1431 (1999); Parliamentary Assembly of the Council of Europe, *Environment and Human Rights* (27 June 2003) Recommendation 1614 (2003); Parliamentary Assembly of the Council of Europe, *Drafting an Additional Protocol to the European Convention on Human Rights Concerning the Right to a Healthy Environment* (30 September 2009) Recommendation 1885 (2009).

[5] That said, the need for and feasibility of a further instrument or instruments on human rights and the environment has, of course, been under active consideration by CDDH-ENV at least since September 2022 which, at its last meeting on 19-21 March 2024, adopted its draft report with a view to it being transmitted to the CDDH for adoption at the latter's meeting in June 2024 (https://rm.coe.int/steering-committee-for-human-rights-comite-directeur-pour-les-droits-h/1680aefdb5).

[6] Status of submission and review of national communications and biennial reports - Note by the secretariat (FCCC/SBI/2023/INF.8 of 22 September 2023)

[7] Conference of the Parties ("COP")

[8] Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol ("CMP")

[9] Conference of the Parties serving as the meeting of the Parties to the Paris Agreement ("CMA")

Communication and Fifth Biennial Report under the UNFCCC/Fifth National Communication under the Kyoto Protocol to the UNFCCC, of 16 September 2022.[10] This report, which runs to 297 densely typed pages, covers *inter alia* detailed evidence in relation to Switzerland's compliance with the clearly quantified emissions limitations and reduction commitments incumbent upon it as an Annex I Party to the Kyoto Protocol. The expert review team which considered and reported on Switzerland's previous (2022) Submissions consisted of 21 experts from different Contracting Parties covering six specialist review areas ("Generalist", "Energy", "IPPU" (industrial processes and product use), "Agriculture", "LULUCF and KP-LULUCF" (land use, land-use change and forestry; and activities under Article 3, paragraphs 3–4, of the Kyoto Protocol) and "Waste") with two lead reviewers.[11]

13. It seems to me to be clear that the Court (or the Committee of Ministers) does not, in fact, have the capacity to engage in anything approaching such a review process to ensure, as the majority seems to envisage, that Contracting Parties have "adopt[ed], and ... effectively appl[ied] in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change".

14. As an aside, it is also noteworthy – and serves to reinforce the point made by the *Bundesverfassungsgericht* (above) – that the move, in the context of the Paris Agreement, away from binding and specific reduction measures (binding only on some Contracting Parties, i.e. the Annex I Parties to the Kyoto Protocol) to the voluntary mechanism by which the (all) Contracting Parties determine their own Nationally Determined Contributions (NDC)appears to have been a deliberate shift in approach. This shift was intended to ensure that this "common concern of mankind" is addressed by all States on the basis of "the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances" (Article 2(2) Paris Agreement); a principle or concept which seems to be difficult to reconcile (if not wholly inconsistent) with the Court's primary role of ensuring observance of a common minimum standard of protection applicable equally to all Contracting Parties (see § 20(b) below).

15. In relation to the clear need for "urgent" action, it also seems to me that, even more so in light of the political complexities arising in the context of identifying and implementing the necessary measures to counter climate change effectively and swiftly, there must be significant doubt that proceedings before this Court can make a meaningful contribution. In fact, there must be a real risk that

(a) as is frequently the case when the Court is concerned with an "abstract" review of a legislative or regulatory regime, the

[10] https://unfccc.int/documents/614139

[11] Report on the individual review of the annual submission of Switzerland submitted in 2022 (FCCC/ARR/2022/CHE of 24 February 2023)

legislation/regulatory regime before the Court (as considered, where applicable, by the national courts in the process of exhausting domestic remedies, as required under Article 35 § 1 of the Convention) has long been replaced or changed substantially (see by way of recent example *Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13 and 2 others, §§ 269-270, 25 May 2021); and/or

(b) in any event, proceedings before this Court are much more likely to distract the Contracting Parties and slow down the necessary processes and, even if a judgment is obtained, any delay and/or failure in the implementation of any judgment is only likely to undermine the need for urgent action and, potentially, the rule of law.

THE COURT'S ROLE AND EVOLUTIVE INTERPRETATION

16. As the Court has consistently made clear, its principal role is "to ensure the observance of the engagements undertaken by the Contracting States (Article 19 of the Convention). In accordance with Article 32 of the Convention, the Court provides the final authoritative interpretation of the rights and freedoms defined in Section I of the Convention" (see most recently *Humpert and Others v. Germany* [GC], nos. 59433/18 and 3 others, § 69, 14 December 2023).

17. The applicable principles of interpretation applied by the Court in this context were recently summarised in *Slovenia v. Croatia* (dec.) [GC], no. 54155/16, § 60, 18 November 2020 (based on the judgment in *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, §§ 118-22 and 125, 8 November 2016; with further references):

> "(a) As an international treaty, the Convention must be interpreted in the light of the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969 (...). In accordance with those provisions, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn.
>
> (b) Regard must also be had to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions.
>
> (c) The object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. Moreover, as an instrument for the protection of human rights, the Convention comprises more than mere reciprocal engagements between Contracting States.
>
> (d) When interpreting the Convention, recourse may also be had to supplementary means of interpretation, including the travaux préparatoires of the treaty, either to confirm a meaning determined in accordance with other methods, or to establish the meaning where it would otherwise be ambiguous, obscure, or manifestly absurd or unreasonable."

18. However, the Court has also always explained that there are clear limits as to what can legitimately be achieved by means of interpretation; limits which flow from the fact that its role is limited to interpreting the provisions of the Convention (and its Protocols):

(a) while it must take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part (see *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, § 235, 29 January 2019 and authorities cited there; and Article 31 § 3 (c) of the Vienna Convention of 23 May 1969 on the Law of Treaties), the Court only "has authority to ensure that the text of the European Convention on Human Rights is respected (...). It is the Convention which the Court can interpret and apply; it does not have authority to ensure respect for international treaties or obligations other than the Convention (...)" (*Caamaño Valle v. Spain*, no. 43564/17, § 53, 11 May 2021); and

(b) "the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate" (see *Johnston and Others v. Ireland*, 18 December 1986, § 53, Series A no. 112; *Austin and Others v. the United Kingdom* [GC], nos. 39692/09 and 2 others, § 53, ECHR 2012; and *Ferrazzini v. Italy* [GC], no. 44759/98, § 30, ECHR 2001-VII).

19. As is clear from the historic refusal of the Contracting Parties to the Convention to respond positively to the repeated calls by the Parliamentary Assembly of the Council of Europe for the adoption of an additional protocol to the Convention which would provide for (and give the Court jurisdiction to ensure the observance of) a right to a clean and healthy environment (see above) and was, again, clear from the submissions of those Contracting Parties who were third party interveners in this case[12] and/or defendants in *Duarte Agostinho and Others* (cited above),[13] even if this issue was not, perhaps, considered at the time of the drafting of the original Convention, the omission from the Convention as it stands today of such a right was not coincidental.

20. In the context of the present case it is further important to have regard to the following:

(a) the Court has consistently recognised the fundamental (foundational) importance within the Convention system of the concept of "effective political democracy" governed by the rule of law as reflected in the Court's approach to subsidiarity and the (usually wide) margin of appreciation:

[12] Austria, Ireland, Italy, Latvia, Norway, Portugal, Romania and Slovakia

> "... the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (...). In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight (see James and Others v. the United Kingdom, judgment of 21 February 1986, Series A no. 98, p. 32, § 46, where the Court found it natural that the margin of appreciation "available to the legislature in implementing social and economic policies should be a wide one")" (*Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII with further authorities, see also *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 54, ECHR 2000-IV);

(b) while "nothing prevents the Contracting States from adopting a broader interpretation entailing a stronger protection of the rights and freedoms in question within their respective domestic legal systems (Article 53 of the Convention)" (see e.g. *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], nos. 68273/14 and 68271/14, § 93, 22 December 2020) or through other international treaties or European Union law (*Krombach v. France* (Dec), no. 67521/14, § 39, 20 February 2018), the role of the Convention (and within it the Court) is clearly to lay down (and to ensure observance of) minimum standards of human rights protection; and

(c) as the principles of subsidiarity and the margin of appreciation (both now, following the entry into force of Protocol No 15, provided for in the Preamble of the Convention and reflected, even if not exactly, in domestic law by the principle of the separation of powers between the legislature and the judiciary (see *A. v. the United Kingdom*, no. 35373/97, § 77, ECHR 2002-X)) make clear that, in relation to questions of social and economic policy requiring the careful weighing up of competing rights and interests (frequently, if not invariably in this context, including the rights and interests of parties not before the court), in a functioning democracy as envisaged by the Convention, this Court (and the courts more generally) take a subsidiary role to the democratically legitimated legislature and executive (or, in the context of an international treaty, the authorities of the Contracting Parties).

21. This latter point is, of course, of particular relevance in the present case where the most recent 2020 (Third) CO_2 Act, though adopted by Parliament, was expressly rejected by a popular vote in the course of a referendum in June 2021 (see e.g. §§ 92 and 94 of the judgment). It seems to me that great care is required in such a context not to be perceived to be relying (at least in part) on this very expression of the democratic will of the people of Switzerland as a basis for finding a violation of Article 8.

"VICTIM" STATUS/STANDING

22. When considering the question of "victim" status in this case, it is important to note at the outset that there was, in fact, no dispute and no uncertainty about the "victim" status of the individual applicants in relation

to the Article 6 § 1 complaint in this case; and therefore no need to join that question to the merits. The only real issue on this question arose in relation to the complaints brought under Article 2 and/or 8 of the Convention.

23. This is, of course, not surprising. After all, as the majority note in § 590 of the judgment, relying *inter alia* on the judgment in *Balmer-Schafroth and Others v. Switzerland*, 26 August 1997, § 26, *Reports of Judgments and Decisions* 1997-IV, "[i]n order to claim to be a 'victim' in the context of an alleged violation of Article 6 of the Convention, and to complain of alleged procedural shortcomings under that provision, it is normally sufficient that the applicant was affected as a party to the proceedings brought by him or her before the domestic courts". In *Balmer-Schafroth and Others* the Court was concerned with an objection to the extension of an operating licence for a nuclear power station. Rejecting the Government's objection that the applicants in that case were not victims, the Court expressly confirmed that:

> "Under the Court's case-law, for the purposes of Article [34] the word "victim" means the person directly affected by the act or omission in issue....
>
> In the instant case, the fact that the Federal Council declared admissible the objections the applicants wish to raise before a tribunal (...) justifies regarding them as victims. The first preliminary objection must therefore be dismissed."

24. This rationale, of course, applies with equal force in the present case where the Federal Administrative Court, at first instance, expressly recognised that the individual applicants had "an 'interest worthy of protection' in the revocation or amendment of the impugned DETEC decision, which made the appeal admissible from that perspective" (§ 35).

25. Furthermore and in any event,

(a) the Swiss Government (perhaps as a result of the judgment in *Balmer-Schafroth and Others*) did not, in fact, challenge the "victim" status of the individual applicants (§ 592); and

(b) in § 618, the majority expressly asserts that "the interests defended by the association are such that the 'dispute' raised by it had a direct and sufficient link to its members' rights in question", sufficient to confirm the latter as the real "victims" (see also § 621).

26. In light of this clear and uncontested position as to the "victim" status of the individual applicants under Article 6 § 1 it would, in my view, have been more obvious and more appropriate to address the complaint about the denial of access to court first; before then, if necessary, moving on to consider the complaint(s) under Articles 2 and 8 of the Convention.

27. Nevertheless, the majority decided to approach the latter issue(s) first and, as a result, once they came to consider Article 6, were inevitably compelled to join the question of "victim" status under Article 6 § 1 to the question of the admissibility of that provision (§ 593) and to conclude, ultimately, that only the association has "victim" status (§ 623).

28. This approach and conclusion was, in my view, the inevitable consequence of the novel approach the majority decided to take to the

question of "victim" status under Article(s 2 and) 8 and the resulting need to find a way to reconcile this approach with both the existing case-law on "victim" status and the uncontested "victim" status of the individual applicants under Article 6.

29. In relation to the approach to "victim" status more generally, the judgment rightly notes (§ 460) that:

> "The Convention does not provide for the institution of an *actio popularis*. The Court's task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention (see, for instance, *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, ECHR 2015, with further references). Accordingly, a person, non-governmental organisation or group of individuals must be able to claim to be a victim of a violation of the rights set forth in the Convention. The Convention does not permit individuals or groups of individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention (see *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, §§ 50-51, ECHR 2012)."

30. As the Court confirmed this position again in *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey* (dec.), no. 37857/14, § 41, 7 December 2021, this time in relation to associations:

> "... there are two principal reasons why an association may not be considered to be a direct victim of an alleged violation of the Convention. The first reason is the prohibition on the bringing of an *actio popularis* under the Convention system; this means that an applicant cannot lodge a claim in the public or general interest if the impugned measure or act does not affect him or her directly. It follows that in order for an applicant to be able to argue that he is a victim, he must produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient in this respect (...). ..."

31. In *Asselbourg and Others v. Luxembourg (dec.),* no. 29121/95, ECHR 1999-VI, in the specific context of environmental protection, the Court further explained that:

> "From the terms "victim" and "violation" in Article 34 of the Convention, like the underlying philosophy of the obligation to exhaust all domestic remedies imposed by Article 35, it can be deduced that, in the system for the protection of human rights as envisaged by the framers of the Convention, exercise of the right of individual petition cannot have the aim of preventing a violation of the Convention. It is only in wholly exceptional circumstances that the risk of a future violation may nevertheless confer the status of "victim" on an individual applicant, and **only then if he or she produces reasonable and convincing evidence of the probability of the occurrence of a violation concerning him or her personally: mere suspicions or conjectures are not enough in that respect**.
>
> In the instant case, the Court considers that the mere mention of the pollution risks inherent in the production of steel from scrap iron is not enough to justify the applicants' assertion that they are the victims of a violation of the Convention. **They must be able to assert, arguably and in a detailed manner, that for lack of adequate precautions taken by the authorities the degree of probability of the occurrence of damage is such that it can be considered to constitute a violation, on condition that the**

consequences of the act complained of are not too remote (see, mutatis mutandis, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 33, § 85 (emphasis added))."

32. This approach was developed further, in relation to non-governmental organisations, in *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey* (dec.), § 41, cited above:

"... there are two principal reasons why an association may not be considered to be a direct victim of an alleged violation of the Convention. .... The second reason concerns the nature of the Convention right at stake and the manner in which it has been invoked by the applicant association in question. Certain Convention rights, such as those under Article 2, 3 and 5, by their nature, are not susceptible of being exercised by an association, but only by its members (...). In Asselbourg and Others (cited above), when declining to grant victim status to the applicant association, the Court noted that the applicant association could only act as a representative of its members or employees, in the same way as, for example, a lawyer represented his client, but could not itself claim to be the victim of a violation of Article 8."

33. In fact the Court, in *Asselbourg and Others*, cited above, explained its conclusion on the basis that:

"With regard to the association Greenpeace-Luxembourg, the Court considers that a non-governmental organisation cannot claim to be the victim of an infringement of the right to respect for its "home", within the meaning of Article 8 of the Convention, merely because it has its registered office close to the steelworks that it is criticising, where the infringement of the right to respect for the home results, as alleged in this case, from nuisances or problems which can be encountered only by natural persons. In so far as Greenpeace-Luxembourg sought to rely on the difficulties suffered by its members or employees working or spending time at its registered office in Esch-sur-Alzette, the Court considers that the association may only act as a representative of its members or employees, in the same way as, for example, a lawyer represents his client, but it cannot itself claim to be the victim of a violation of Article 8 (...)."

34. As a result it is only in "highly exceptional circumstances" that a person can either (a) seek a review of the relevant law and practice *in abstracto* or (b) claim to be a "victim" in relation to the risk of a "future violation". As the Court summarised the position in relation to the latter in *Berger-Krall and Others v. Slovenia*, no. 14717/04), § 258, 12 June 2014:

"... the exercise of the right of individual petition [under Article 34] cannot be used to prevent a potential violation of the Convention: in theory, the Court cannot examine a violation other than a posteriori, once that violation has occurred."

There is, therefore, other than in "highly exceptional circumstances" no basis on which the applicants in this case can be the victim of a "future risk" under Articles 2 and/or 8 or seek an *in abstracto* review of the relevant law and practice.

35. The principal examples of such "highly exceptional circumstances" recognised to date are

(a) in relation to "future" risk,

(i) complaints concerning a *prima facie* risk of inhuman and degrading treatment faced by the individual applicant in the receiving country in case of expulsion or extradition (starting with *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161); and

(ii) where, in the context of a negative obligation arising under the Convention, "a person [...] contend[s] that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct or risk being prosecuted (...) or if he is a member of a class of people who risk being directly affected by the legislation" (*Burden v. the United Kingdom* [GC], no. 13378/05, § 34, ECHR 2008; see also *Norris v. Ireland*, 26 October 1988, § 32, Series A no. 142); and

(b) in relation to an alleged present or past risk, in cases of secret surveillance (also primarily a question of the negative obligation of the state not to interfere with the applicant's right to respect for private life) where "an exception to the rule denying individuals the right to challenge a law *in abstracto* is justified ... only if [the individual] is able to show that, due to his personal situation, he is potentially at risk of being subjected to such measures" (see e.g. *Roman Zakharov v. Russia* [GC], no. 47143/06, § 171, ECHR 2015).

36. By contrast, the Commission decision in *Noël Narvii Tauira and 18 Others v. France* (application no. 28204/95, Commission decision of 4 December 1995, Decisions and Reports (DR) 83-B, p. 112), expressly relied on by the Court in *Berger-Krall and Others*, did not fall within this category of "highly exceptional circumstances". In that case, the Commission declared inadmissible for lack of "victim" status complaints concerning the decision of the French President to resume nuclear testing in Tahiti. It explained that in order for applicants to be able to claim to be victims of a violation of the Convention, they must have "an arguable and detailed claim that, owing to the authorities' failure to take adequate precautions, the degree of probability that damage will occur is such that it may be deemed to be a violation, on condition that the consequences of the act complained of are not too remote". Despite having been provided with a whole series of scientific reports and evidence of the experience of past Nuclear tests, it concluded that the applicants had failed to satisfy this test and that the application was therefore inadmissible for lack of "victim status".

37. The one crucial factor which is common to these very few recognised and legitimate cases of "highly exceptional circumstances" permitting apparent derogation from the mandatory requirement for the alleged victim to have been "directly affected" (in the past) by the measure in question, or, in so far as applicable in cases of positive obligations, by the respondent government's failure to act, seems to be that identified by Mr. Justice Clarke, the then Chief Justice of Ireland, in his judgment in *Friends of the Irish Environment v The Government of Ireland & Ors* [2020] IESC 49 (31 July 2020) at § 7.21:

> "... there are circumstances in which an overly strict approach to standing could lead to important rights not being vindicated. However, that does not take away from the importance of standing rules in our constitutional order. The underlying position was reiterated in the recent decision of this Court in Mohan, which re-emphasised the need, ordinarily, for a plaintiff to be able to demonstrate that they have been affected in reality or as a matter of fact by virtue of the measure which they seek to challenge on the basis that it breaches rights. That remains the fundamental proposition. The circumstances in which it is permissible to accord standing outside the bounds of that basic principle must necessarily be limited and involve situations where there would be a real risk that important rights would not be vindicated unless a more relaxed attitude to standing were adopted."

38. This is, of course, also the underlying rationale for granting standing for associations who are not (or cannot be) direct victims such as in *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, §§ 111 - 113, ECHR 2014, where "the Court [was] satisfied that in the exceptional circumstances of this case and bearing in mind the serious nature of the allegations, it should be open to the CLR to act as a representative of Mr Câmpeanu, notwithstanding the fact that it had no power of attorney to act on his behalf and that he died before the application was lodged under the Convention".

39. As a consequence, I fully accept that it might, in principle, be permissible, exceptionally and subject to clear conditions including the availability and effectiveness of the available domestic remedies, for the Court to recognise an exception to the established rules on "victim" status and standing under Article 34 of the Convention. This is, of course, little more than an expression of the principle of effectiveness, seeking "to render [the Convention] safeguards practical and effective, not theoretical and illusory" (see *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, § 122, 15 October 2020 with further authorities).

40. However, it is also absolutely clear from the Court's case-law that this could only be the case (again following the approach identified) where it is accepted – as I think it has to be in the context of climate change – that, in fact, no individual applicant complaining about a State's failure to take adequate mitigation measures is likely ever to be able to establish that "for lack of adequate precautions taken by the authorities the degree of probability of the occurrence of damage is such that it can be considered to constitute a violation, on condition that the consequences of the act complained of are not too remote" (*Asselbourg and Others,* cited above and *Noël Narvii Tauira and 18 Others*).

41. Unfortunately, rather than go down this path, the majority has chosen what, in my view, is the worst of both worlds. After all, the majority has (at least implicitly) accepted that the application of the established "victim" test would not, in fact, lead to a situation where there would be a real risk that important rights of the individual applicants "would not be vindicated" at all as:

(a) the reasons given for the conclusion that the individual applicants in the present case did not satisfy the "victim" test neither rely on nor establish any such impossibility. In fact, the only reason given is that these individual applicants had failed to produce sufficient evidence to establish the necessary "direct impact" (§§ 532 -533 "... as regards applicants nos. 2-4 ... it is not apparent from the available materials that they were exposed to the adverse effects of climate change, or were at risk of being exposed at any relevant point in the future, with a degree of intensity giving rise to a pressing need to ensure their individual protection" and § 534 "... the fifth applicant provided a very general declaration not indicating any particular morbidity or other serious adverse effects created by heatwaves that would go beyond the usual effects which any person belonging to the group of older women might experience. ... It is therefore not possible to establish a correlation between the applicant's medical condition and her complaints before the Court"); and

(b) the test laid down in §§ 486 – 488 for the assessment of "a real risk of a 'direct impact' on the applicant", while described in § 488 as "especially high", does not, in fact, seem to me to differ significantly (if at all) from the test summarised in *Asselbourg and Others,* cited above.

42. Of course, I also, in principle, perfectly understand (and share) the majority's desire to ensure inter-generational justice and to "avoid a disproportionate burden on future generations" (§ 549). However, not having sought (or having been unable) to establish the necessary "highly exceptional circumstances" to justify the need for an exception to the traditional "victim"/standing test and absent an express provision in the Convention akin to Article 20a of the German Basic Law (*Grundgesetz*) (as considered by the *Bundesverfassungsgericht* in *Neubauer*) or Articles 2 and 3 of the proposed text for an additional protocol to the European Convention on Human Rights set out in the Appendix to PACE Recommendation 2211 (2021) *Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe*, the inevitable conclusion is that there is no basis for drawing any enforceable obligation from the current text of the Convention to combat "future risk" in respect of the applicants before the Court and even less to combat a "future risk" in respect of "future generations", i.e. by or on behalf of individuals who are, by definition, not even before the Court.

43. That being the case, the conclusions reached in §§ 532 – 534 of the judgment should have led the Court to declare this part of the application (under Articles 2 and/or 8) inadmissible; leaving the issues raised in relation to the alleged failure to take the necessary and/or appropriate mitigation measures in relation to the risks created by climate change for an appropriate future case in which the applicants could show, by reference either to the traditional test or the test identified in the judgment, that they were "directly affected" (or, of course, in the context of a request for an advisory opinion under Protocol No 16).

44. A further result of the approach adopted by the majority in relation to the individual applicants was that there was no need and no justification for the innovation of granting "victim" status/standing to the applicant association whether "as representatives of the individuals whose rights are or will allegedly be affected" (§ 498) or at all:

(a) such a development has no basis in the language of Article 34 of the Convention, which expressly makes the standing of a "non-governmental organisation or group of individuals" subject to them "claiming to be victims of a violation" themselves;

(b) for the reasons set out above, there is no justification in terms of the need to ensure effective access to the Court for creating such a right to bring proceedings before the Court, effectively by means of law making rather than interpretation; and

(c) the fact that "climate-change litigation often involves complex issues of law and fact, requiring significant financial and logistical resources and coordination, and the outcome of a dispute will inevitably affect the position of many individuals", while perhaps justifying allowing associations to act as legal representatives of individual "victims" (which they, of course, can and do already), cannot justify giving them standing in their own right (and, even less so, giving them standing independently of whether their members are "victims" or not).

45. Nevertheless, that is exactly what the majority did and, in my view, in doing so, they created exactly what the judgment repeatedly asserts it wishes to avoid, namely a basis for *actio popularis* type complaints (see e.g. §§ 446, 481, 484, 488, 500 and 596). After all:

(a) the majority recognise that

(i) "[g]iven the nature of climate change and its various adverse effects and future risks, the number of persons affected, in different ways and to varying degrees, is indefinite" (§ 479);

(ii) "the fact that complaints may concern acts or omissions in respect of various types of general measures, the consequences of which are not limited to certain identifiable individuals or groups but affect the population more widely. The outcome of legal proceedings in this context will inevitably have an effect beyond the rights and interests of a particular individual or group of individuals, and will inevitably be forward-looking, in terms of what is required to ensure effective mitigation of the adverse effects of climate change or adaptation to its consequences" (§ 479); and

(iii) "in the climate-change context, everyone may be, one way or another and to some degree, directly affected, or at a real risk of being directly affected, by the adverse effects of climate change. Leaving aside the issue of jurisdiction, the fact remains that potentially a huge number of persons could claim victim status under the Convention on this basis" (§ 483); and

(b) while purporting to maintain the principle in the case-law that an association cannot, itself, rely on health considerations or nuisances and

problems associated with climate change which can only be encountered by natural persons (§ 496), associations are nevertheless now granted the broadest standing "for the purpose of seeking the protection of the human rights of those affected, as well as those at risk of being affected, by the adverse effects of climate change" (§ 499), without, however, even being limited to protecting the rights of/representing their members. After all, the test for such standing laid down in § 502 expressly

(i) extends the remit of their standing to representing "members or other affected individuals within the jurisdiction"; and

(ii) does not require that those "members or other affected individuals within the jurisdiction", on whose behalf the case has been brought, have to meet the "victim" status requirements for individuals. This aspect is further underlined by the fact that, in relation to the applicant association in the present case, the majority considered it enough to be satisfied that the association "represents a vehicle of collective recourse aimed at defending the rights and interests of individuals against the threats of climate change in the respondent State" (§ 523, emphasis added).

46. This, of course, has to be read in light of the stated overall rationale (§ 499) that "[i]n view of the urgency of combating the adverse effects of climate change and the severity of its consequences, including the grave risk of their irreversibility, States should take adequate action notably through suitable general measures to secure not only the Convention rights of individuals who are currently affected by climate change, but also those individuals within their jurisdiction whose enjoyment of Convention rights may be severely and irreversibly affected in the future in the absence of timely action."

47. There is one further aspect of the issue of "victim" status/standing of associations, alluded to in § 503, which is worth noting. The majority there recognises that there exist in numerous Contracting Parties "existing limitations regarding the standing before the domestic courts of associations". This, of course, potentially raises difficulties in relation to the requirement (under Article 35 § 1 of the Convention) that "the Court may only deal with the matter after all domestic remedies have been exhausted", an essential component of the principle of subsidiarity. How is the Court to deal with an application brought before it by an association against a Contracting Party whose domestic procedural law does not provide for standing to be accorded to associations (generally or, at least, outside the very clear and narrow confines of the Aarhus Convention)?

48. The traditional answer would, of course, be that, unless there are domestic remedies which are available in theory and in practice at the relevant time and which the applicant (association) can directly institute themselves, an application can be made directly to the Court which would then, effectively, act as a first instance court. However, the majority seeks to answer this question by stating that "the Court may also, in the interests of

the proper administration of justice, take into account whether, and to what extent, its individual members or other affected individuals may have enjoyed access to a court in the same or related domestic proceedings" (§ 503, emphasis added). The weakness of this "may" is clearly demonstrated by the facts of this case. After all, not only is the applicant association granted standing despite the fact that neither it nor its "individual members or other affected individuals" had effective access to court before applying to the Court; in fact, the very absence of access to court for the individual applicants in this case is used as the final justification for granting it standing "in the interests of the proper administration of justice" (§ 523).

49. Furthermore, even if this criterion were to be taken "into account" in future cases it will remain to be seen whether (and, if so, how) the Court is going to determine whether the exhaustion requirement has been fulfilled by reference to possible domestic litigation brought by "other affected individuals" over which litigation, by definition, the association will not have had any control or influence (for an example of the inverse situation in this context see *Kósa v. Hungary (Dec.)*, no. 53461/15, §§ 59-63, 21 November 2017). After all, the Grand Chamber has only recently had cause to reaffirm that "[i]n order to be able to lodge an application in accordance with Article 34 of the Convention, an individual must be able to show that he or she was directly affected by the measure complained of; this is indispensable for putting the protection mechanism of the Convention into motion (...). Likewise, the Court can base its decision only on the facts complained of (...). Therefore, it is not sufficient that a violation of the Convention is 'evident' from the facts of the case or the applicant's submissions. Rather, the applicant must complain that a certain act or omission entailed a violation of the rights set forth in the Convention or the Protocols thereto (...), in a manner which should not leave the Court to second-guess whether a certain complaint was raised or not (...)" (*Grosam v. the Czech Republic* [GC], no. 19750/13, § 90, 1 June 2023).

50. As a consequence, it seems to me that a very real question that arises is whether the approach adopted by the majority means that:

(a) Contracting Parties will ultimately feel the need, or even be required, to introduce rules to permit such standing under domestic law, whether as a matter of strict legal obligation (under Articles 2, 8 and/or 13) or "just" in order to ensure that their national courts can consider the Convention complaint before it is brought before and considered by the Court (in application of the principle of subsidiarity); or

(b) where no such standing for an association is provided for in national law, the Court will, in fact, find itself having to consider these applications as a court of first instance and without the benefit of any prior consideration by the national courts. While this is clearly a role which this Court is not designed and is generally ill equipped to fulfil, this would be even more challenging when confronted with the inevitably detailed and complex

evidence seeking to establish whether or not the respondent State has "adopted, and effectively applied in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change", as envisaged by the majority.

51. This dilemma, of course, assumes a yet further relevance – especially in relation to the question of "adoption" of regulations and measures - for those 27 Contracting Parties to the Convention who are also member states of the European Union ("EU") and, in case of the planned accession by the EU to the Convention, the EU itself. After all,

(a) as the EU Commission stated in their intervention in the case of *Duarte Agostinho and Others*, "the EU sets Union-wide binding targets for climate and energy that all Member States have to comply with and achieve through national implementation", under the umbrella of, *inter alia*, Regulation (EU) 2018/1999 *on the Governance of the Energy Union and Climate Action* and/or Regulation (EU) 2021/1119 *establishing the framework for achieving climate neutrality* ("European Climate Law") as well as a broad range of individual (general and sectoral) legislative acts;[14] and

(b) as the judgment records in §§ 215–220, as the law stands it appears that individuals and associations only have very limited standing before the Court of Justice of the European Union ("CJEU") under Article 263 TFEU.

ARTICLE 6 – ACCESS TO COURT

52. In relation to the substantive complaint under Article 6 concerning the alleged denial of access to court, it is perhaps helpful that the leading authorities on this question are, in fact, two Grand Chamber cases against Switzerland (and in the context of environment law): *Balmer-Schafroth and Others*, and *Athanassoglou and Others v. Switzerland* [GC], both cited above.

53. Before considering (briefly) the individual components required to be satisfied in relation to the applicability and a finding of a violation of Article 6 § 1, I want to make it clear that I agree with the majority (see e.g. §§ 594, 609, 616 and 627) that Article 6 § 1 does not guarantee a right of access to a court with power to invalidate or override laws enacted by parliament and/or to compel the adoption of laws. In fact, the Grand Chamber in *Athanassoglou and Others*, § 54, cited above expressly underlined that the question "how best to regulate the use of nuclear power is a policy decision for each Contracting State to take according to its democratic processes". As a result, I also agree that only the "applicants' complaint concerning effective implementation of the mitigation measures under existing law is a matter

[14] the EU Commission identified, in form of a non-exhaustive list, legislative acts such as "the Emission Trading System ("ETS"), Effort Sharing Regulation ("ESR"), Land Use, Land Change and Forestry Regulation ("LULUCF") and Regulation setting CO_2 emission performance standards for new passenger cars and for new light commercial vehicles"

capable of falling within the scope of that provision" (§ 616) while those seeking "legislative and regulatory action" fall outside the scope of Article 6 § 1 (§ 615, referring to e.g. points 1-3 and some items under point 4 of the applicants' claims identified in § 22 of the judgment).

54. The majority of the questions concerning the applicability of (the civil limb of) Article 6 § 1 are readily answered by reference to the Court's judgments in the two previous cases against Switzerland, mentioned above, which apply with equal force in the present case:

(a) in relation to the necessary "existence of one or more 'rights' recognised under domestic law", the judgment in *Balmer-Schafroth and Others*, cited above, § 34, held that "the right to have their physical integrity adequately protected", in that case from the risks entailed by the use of nuclear energy, "is recognised in Swiss law, as is apparent in particular from section 5 (1) of the Nuclear Energy Act – to which both the applicants and the Federal Council expressly referred – and from the constitutional right to life, on which the Federal Council commented in its decision". This was, again, confirmed in *Athanassoglou and Others*, § 44, cited above, where the Court noted that these rights "are, as the Government have always conceded, ones accorded to individuals under Swiss law, notably in the Constitution and in the provisions of the Civil Code governing neighbours' rights". Just as in *Balmer-Schafroth and Others* and *Athanassoglou and Others* there would seem to me to be no reason why the "civil right" in this case could not also be defined not only as enshrined in Article 10 of the Federal Constitution (the right to life and to personal freedom) but also by reference to the CO_2 legislation (i.e. the CO_2 Act and the CO_2 Ordinance) as invoked by the applicants before the domestic authorities and courts and as summarised in §§ 123 – 126 of the judgment; and

(b) in relation to the existence of a "genuine and serious" dispute ("*contestation*") of a justiciable nature over those "rights", the Court, in *Balmer-Schafroth and Others*, §§ 37 – 38, cited above, confirmed that "[i]nasmuch as it sought to review whether the statutory requirements had been complied with, the Federal Council's decision was therefore more akin to a judicial act than to a general policy decision ... Moreover, in the light of the above considerations and the fact that the Federal Council declared the applicants' objection admissible, there can be no doubt that the dispute was genuine and serious". In *Athanassoglou and Others*, § 45, cited above, the Court recorded that "[i]t was not contested by the Government in the light of the Court's *Balmer-Schafroth and Others* judgment that there was a 'genuine and serious' dispute of a justiciable nature between the applicants and the decision-making authorities ...". Applying these *dicta* to the present case, it is clear from the facts that "the FAC held that applicants nos. 2-5 had an 'interest worthy of protection' in the revocation or amendment of the impugned DETEC decision, which made the appeal admissible from that perspective" (§ 35). A similar approach was taken by the Federal Supreme

Court: "The FSC considered that applicants nos. 2-5 had standing to lodge an appeal against the FAC's judgment. The FSC, however, left it open whether the applicant association also had standing to lodge the appeal and considered it more appropriate to limit its considerations to applicants nos. 2-5." (§ 53).

55. The only question which remains open, in light of the fact that the Court in both *Balmer-Schafroth and Others* and *Athanassoglou and Others* answered this question in the negative, is whether the outcome of the "dispute"/procedure was directly decisive for those domestic-law rights.

56. In *Balmer-Schafroth and Others* § 40, cited above, the Court based its conclusion on the fact that the applicants "did not for all that establish a direct link between the operating conditions of the power station which were contested by them and their right to protection of their physical integrity, as they failed to show that the operation of Mühleberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent. In the absence of such a finding, the effects on the population of the measures which the Federal Council could have ordered to be taken in the instant case therefore remained hypothetical". In *Athanassoglou and Others*, § 48, cited above, the Court identified the "remoteness" test to be applied as being "whether the applicants' arguments were sufficiently tenable; it does not have to decide whether they were well-founded in terms of the applicable Swiss legislation". After a detailed consideration of the assessment and inspection reports concerning the relevant power plant as well as the back-fitting to address the major on-going developments in nuclear power plant safety technology, the Court, nevertheless and contrary to the conclusion reached by the Commission (reported as *Greenpeace Schweiz and others v Switzerland* (Dec), no. 27644/95, 7 April 1997), concluded (at § 51) that "the facts of the present case provide an insufficient basis for distinguishing it from the *Balmer-Schaffroth and Others* case". By contrast, the Commission, relying on the Court's judgment in *Zander v. Sweden*, 25 November 1993, § 25, Series A no. 279-B, had concluded that "the Federal Council's discretion was not unfettered and there was serious disagreement between the authorities and the applicants. Finally, the outcome of the dispute was directly decisive for the applicants' entitlement to protection against the effects of the nuclear power plant".

57. In the context of the present case, it seems to me that the conclusion of the majority set out in § 618 would – *mutatis mutandis* – equally justify concluding that the outcome of the proceedings brought by the individual applicants was directly decisive for those domestic-law "civil" rights. The majority there held that "the association's action was based on the threat arising from the adverse effects of climate change as they affected its members' health and well-being (see *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 46, ECHR 2004-III). The Court is satisfied that the interests defended by the association are such that the "dispute" raised by it had a direct

and sufficient link to its members' [i.e. including the individual applicants'] rights in question". This is further underlined by the fact that it would ultimately only have been through these proceedings before the national courts that the applicants could have sought a remedy e.g. in relation to the acknowledged failure by the Swiss authorities to meet even the GHG reduction target for 2020 (referred to in § 559).

58. Having established that Article 6 § 1, the right of access to court, was, in principle, applicable to the individual applicants it seems to me that, applying the reasoning of the majority in §§ 629 – 637 *mutatis mutandis*, to the extent that the applicants claims fell within the scope of Article 6 § 1, their "right of access to a court was restricted in such a way and to such an extent that the very essence of the right was impaired" (§ 638).

ARTICLES 2 AND 8 – THE CREATION OF A NEW RIGHT

59. Turning to the substantive complaints under Articles 2 and/or 8, it is telling of the majority's whole approach, in the context of Article 2, that the reasoning moves from a quote taken from *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, 25 June 2019 (in § 507) requiring evidence of an individual having been "the victim of an activity, whether public or private, which by its very nature put his or her life at real and imminent risk" (§ 140, emphasis added) to the (first, but in my view, questionable) conclusion (at § 509) that "the alleged failures of the State to combat climate change most appropriately fall into the category of cases concerning an activity which is, by its very nature, capable of putting an individual's life at risk". In so far as there is a causal connection at all, for the reasons set out above (when considering the question of "victim" status/standing) this is plainly too remote to be capable of engaging Article 2.

60. Having, therefore, at this early stage significantly underplayed (if not ignored) the need for any such risk to life to be "real and imminent" in order to fall within the competence of the Court, this question is then later addressed in §§ 512 – 513 of the judgment but not by reference to the further clarification provided in *Nicolae Virgiliu Tănase* at § 142. Recapitulating and rationalising the then (2019) existing case-law of the Court, the Grand Chamber in that case had made clear that "[w]here the real and imminent risk of death stemming from the nature of an activity is not evident, the level of the injuries sustained by the applicant takes on greater prominence. In such cases a complaint falls only to be examined under Article 2 where the level of the injuries was such that the victim's life was put in serious danger". Again, this is clearly not the scenario presented by these applicants. In legal terms, this difficulty is also not overcome by reference (in § 512) to the decisions in *Kolyadenko and Others v. Russia*, nos. 17423/05 and 5 others, 28 February 2012 (determining "imminence" of risk by reference to whether applicants were present or absent when their homes were flooded on

7 August 2001) or *Brincat and Others v. Malta*, nos. 60908/11 and 4 others, 24 July 2014 (where a complaint about exposure to asbestos was rejected on the basis that "[i]t can neither be said that their conditions constitute an inevitable precursor to the diagnosis of that disease, nor that their current conditions are of a life-threatening nature"). If anything, these decision confirm that any risk created by the alleged failure to act in this case cannot satisfy the "real and imminent" test.

61. Furthermore, even subject to this higher threshold, the test quoted – by its position in the reasoning in the *Nicolae Virgiliu Tănase* judgment - clearly only relates to "this procedural obligation" (§ 141), namely the "procedural obligation" identified in § 137 of that judgment: "Thirdly, the Court reiterates that the State's duty to safeguard the right to life must be considered to involve not only these substantive positive obligations, but also, in the event of death, the procedural positive obligation to have in place an effective independent judicial system". It does not and cannot relate to the separate "substantive positive obligation" entailing "a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life", identified much earlier (in § 135) of *Nicolae Virgiliu Tănase* but which forms the blueprint for the positive obligation ultimately imposed by the majority under Article 8.

62. Arguably, therefore, (always assuming admissibility) the "procedural obligation" referred to in § 507 of the judgment (by reference to §§ 140 – 141 of *Nicolae Virgiliu Tănase*) might have been capable of being considered together with the complaint under Article 6 of the Convention and, if they had wanted to, enabled the majority to find a procedural violation of Article 2 and/or 8. However, the substantive violation of Article 8 which the majority seeks to construct from this starting premise has no basis either in the text of the Convention nor in any of the Court's case-law.

63. As the judgment rightly notes (§ 445), the Court has repeatedly stressed that no Article of the Convention is specifically designed to provide general protection of the environment as such (see *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI (extracts), and *Cordella and Others*, cited above, § 100) and that, to that effect, other international instruments and domestic legislation are more adapted to dealing with such protection. In *Jugheli and Others v. Georgia*, no. 38342/05, § 62, 13 July 2017 the Court further clarified that:

> "The Court reiterates at the outset that Article 8 is not violated every time an environmental pollution occurs. There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8 (...). Furthermore, the adverse effects of the environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8 (...). The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or psychological effects. There would be no

> arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city (...)."

64. It is, of course, one of the characteristics of climate change that, in fact, its effects have become – at least by reference to any comparators within the respondent State – "environmental hazards inherent to life in every modern city" and, as such, no applicability of Article 8 is capable of being derived from such a comparison which, in the Court's case-law, tended to be tied to or triggered by an identified source of (potential) pollution within the geographical vicinity.

65. Nevertheless, the majority went on, by reference to some of that very case-law, to

(a) create a new "right for individuals to effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change" (§§ 519 and 544 of the judgment); and

(b) impose a new "primary duty" on High Contracting Parties "to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change" (§ 545, emphasis added), an obligation which the majority translates into a requirement "that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades" (§ 548); neither of which have any basis in Article 8 or any other provision of or Protocol to the Convention.

66. Not only that, but the majority, in what seems to me to be a clear break with the Court's traditional approach in relation to "difficult social and technical spheres" developed in the context of, arguably, (much) less complex spheres than the fight against anthropogenic climate change (see e.g. *Powell and Rayner v. the United Kingdom*, § 44, cited above and *Hatton and Others*, cited above, § 100), also considered that, in relation to this new obligation imposed on Contracting States, at least as far as "the State's commitment to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives in this respect" is concerned Contracting States will only be accorded a "reduced margin of appreciation" (§ 543). Only when concerned with the "choice of means, including operational choices and policies adopted in order to meet internationally anchored targets and commitments in the light of priorities and resources" does the majority allow for a "wide margin of appreciation".

67. Compliance with either margin of appreciation will now be supervised by the Court (by means of an overall assessment relating both to mitigation as well as adaptation measures) and, it is to be assumed (in light of the requirement for exhaustion of domestic remedies under Article 35 § 1 of the Convention (see the discussion at §§ 47 *et seq* above) and the principle of subsidiarity) national courts and tribunals. This assessment is due to be

carried out by reference to a detailed catalogue of criteria set out in § 550, including by reference to "the need to ... keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence" (§ 550 (d)), an assessment which, in my respectful view, the Court is ill-equipped and ill-suited to perform. The nature of this part of the test alone, of course, underlines why "the nature and gravity of the threat and the general consensus as to the stakes involved in ensuring the overarching goal of effective climate protection through overall GHG reduction targets in accordance with the Contracting Parties' accepted commitments to achieve carbon neutrality" (§ 543) is wholly inadequate to explain or justify the adoption of such a fundamentally different approach to the margin of appreciation than the one Court has hitherto adopted.

CONCLUSION

68. In light of the above, and plainly recognising the nature or magnitude of the risks and the challenges posed by anthropogenic climate change and the urgent need to address them, the Court would already have achieved much if it had focussed on a violation of Article 6 of the Convention and, at a push, a procedural violation of Article 8 relating in particular to (again) the right of access to court and of access to information necessary to enable effective public participation in the process of devising the necessary policies and regulations and to ensure proper compliance with and enforcement of those policies and regulations as well as those already undertaken under domestic law. However, in my view, the majority clearly "tried to run before it could walk" and, thereby, went beyond what was legitimate for this Court, as the court charged with ensuring "the observance of the engagements by the High Contracting Parties in the Convention" (Article 19) by means of "interpretation and application of the Convention" (Article 32), to do.

69. I also do worry that, in having taken the approach and come to the conclusion they have, the majority are, in effect, giving (false) hope that litigation and the courts can provide "the answer" without there being, in effect, any prospect of litigation (especially before this Court) accelerating the taking of the necessary measures towards the fight against anthropogenic climate change. In fact, there is a significant risk that the new right/obligation created by the majority (alone or in combination with the much enlarged standing rules for associations) will prove an unwelcome and unnecessary distraction for the national and international authorities, both executive and legislative, in that it detracts attention from the on-going legislative and negotiating efforts being undertaken as we speak[15] to address the – generally

[15] Including (but not exclusively) under the auspices of the Council of Europe. In this context it is worth noting again that the CDDH-ENV has, in fact, been engaged in actively considering the need for and feasibility of a further instrument or instruments on human rights and the environment since at least September 2022: see footnote 5 above

accepted – need for urgent action. Not only will those authorities now have to assess and, if considered necessary, design and adopt (or have adopted) new "regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change" but there is also a significant risk that they will now be tied up in litigation about whatever regulations and measures they have adopted (whether as a result or independently) or how those regulations and measures have been applied in practice and, where an applicant was successful, lengthy and uncertain execution processes in relation to any judgments. After all, under Article 46 § 2 of the Convention supervision of the execution of any judgment of the Court lies with the Committee of Ministers, i.e. representatives of the very states who have now, contrary to their "intention" as reflected in the terms of the Convention, had significant new obligations imposed on them by the Court. In this context, I would note that the Committee of Ministers is also not likely to be helped in any way by the generality of the majority's conclusion under Article 46 (§ 657).

70. Consequently, while I understand and share the very real sense of and need for urgency in relation to the fight against anthropogenic climate change, I fear that in this judgment the majority has gone beyond what it is legitimate and permissible for this Court to do and, unfortunately, in doing so, may well have achieved exactly the opposite effect to what was intended.

TAB F

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 149/2021
[2024] NZSC 5

BETWEEN	MICHAEL JOHN SMITH Appellant
AND	FONTERRA CO-OPERATIVE GROUP LIMITED First Respondent
	GENESIS ENERGY LIMITED Second Respondent
	DAIRY HOLDINGS LIMITED Third Respondent
	NEW ZEALAND STEEL LIMITED Fourth Respondent
	Z ENERGY LIMITED Fifth Respondent
	CHANNEL INFRASTRUCTURE NZ LIMITED Sixth Respondent
	BT MINING LIMITED Seventh Respondent

Hearing:	15–17 August 2022
Further Submissions:	2 September 2022
Court:	Winkelmann CJ, Glazebrook, Ellen France, Williams and Kós JJ
Counsel:	D M Salmon KC, D A C Bullock, N R Coates and N T Sussman for Appellant D R Kalderimis, N K Swan and T A T K Dewes for First Respondent S J P Ladd and T M J Shiels for Second Respondent B G Williams and J P Papps for Third Respondent D T Broadmore and C T Ottow for Fourth Respondent T D Smith and A M Lampitt for Fifth Respondent A J Horne and J S Hofer for Sixth Respondent

R J Gordon and A S Dawson-Swale for Seventh Respondent
J S Cooper KC, J D Every-Palmer KC and J P Cundy for Lawyers for Climate Action NZ Incorporated as Intervener
M K Mahuika and H K Irwin-Easthope for Te Hunga Rōia Māori o Aotearoa | The Māori Law Society as Intervener
A S Butler, R A Kirkness and H Z Yang for Human Rights Commission | Te Kāhui Tika Tangata as Intervener

Judgment: 7 February 2024

JUDGMENT OF THE COURT

A The appeal is allowed.

B The appellant's claim is reinstated.

C There is no order as to costs.

REASONS
(Given by Williams and Kós JJ)

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Introduction

[1] This appeal concerns strike out of a claim in tort (comprised of three causes of action) relating to damage caused by climate change. The question is whether the plaintiff's claim should be allowed to proceed to trial, or whether, regardless of what might be proved at trial, it is bound to fail and should be struck out now.

[2] The Court of Appeal considered the claim bound to fail. Differing from that Court, we consider the application of orthodox, long-settled principles governing strike out means this claim should be allowed to proceed to trial, rather than being struck out pre-emptively. As we observe later in the judgment, reinstatement of the claim and allowing it to proceed to trial is not a commentary on whether or not it will ultimately succeed.

[3] The plaintiff, Mr Smith, is an elder of Ngāpuhi and Ngāti Kahu, and a climate change spokesperson for the Iwi Chairs Forum, a national forum of tribal leaders. In August 2019 he filed a statement of claim in the High Court, against the seven

respondents. Each is a New Zealand company said to be involved in an industry that either emits greenhouse gases (GHGs) or supplies products which release GHGs when burned.[1] Mr Smith alleges that the respondents have contributed materially to the climate crisis and have damaged, and will continue to damage, his whenua and moana, including places of customary, cultural, historical, nutritional and spiritual significance to him and his whānau.

[4] Mr Smith raises three causes of action in tort: public nuisance, negligence and a proposed new tort involving a duty, cognisable at law, to cease materially contributing to: damage to the climate system; dangerous anthropogenic interference with the climate system; and the adverse effects of climate change.[2] He seeks a declaration that the respondents have (individually and/or collectively) unlawfully either breached a duty owed to him or caused or contributed to a public nuisance, and have caused or will cause him loss through their activities. Injunctions also are sought requiring the respondents to produce or cause a peaking of their emissions by 2025, a particularised reduction in their emissions by the ends of 2030 and 2040 (by linear reductions in net emissions each year until those times), and zero net emissions by 2050. Alternatively, a (potentially suspended) injunction requiring the respondents to immediately cease emitting (or contributing to) net emissions is sought.[3]

[5] A distinctive aspect of the proceeding in this Court is that Mr Smith pleads that tikanga Māori should inform the reach and content of his causes of action, this in accordance with the general proposition that tikanga should inform the common law of New Zealand generally. He does not allege that the respondents directly owed, or violated, any obligations under tikanga Māori.

[6] The respondents applied to strike out the proceeding. Each broadly argued that Mr Smith's statement of claim raised no reasonably arguable cause of action. The claim related to complex policy matters best addressed by Parliament (and having been addressed by Parliament). As part of their application, the respondents filed affidavit

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1 The sixth and seventh respondents, Channel Infrastructure NZ Ltd and BT Mining Ltd, filed separate submissions, claiming that they are differently placed to the other respondents.

2 We will refer to the last of these as the "proposed climate system damage tort".

3 This language comes from Mr Smith's amended draft statement of claim. It differs from his written submissions, which refer to (potentially suspended) "injunctions requiring the respondents to *cease their emissions-creating activities* immediately" (emphasis added).

evidence that each is operating within the relevant statutory and regulatory requirements. That is not disputed by Mr Smith.

[7] In the High Court, Wylie J determined that the claims in public nuisance and negligence were not reasonably arguable and struck them out.[4] He declined to strike out the claim based on the proposed climate system damage tort.

[8] Mr Smith appealed and the respondents cross-appealed. The Court of Appeal struck out all three causes of action.[5] Its overarching view was that:[6]

> … the magnitude of the crisis which is climate change simply cannot be appropriately or adequately addressed by common law tort claims pursued through the courts. It is quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination.

[9] The Court nevertheless addressed each cause of action in more detail. For various reasons, the Court concluded that the causes of action in public nuisance and negligence could not be made out. In relation to the proposed climate system damage tort, the Court's view was that the "bare assertion of the existence of a new tort without any attempt to delineate its scope" was insufficient to withstand strike out "on the basis of speculation that science may evolve by the time the matter gets to trial".[7]

[10] Mr Smith appeals. He submits his claim fits within the traditional role of the courts, the common law and the law of torts. As he puts it, the respondents are wronging him, and he seeks the courts' aid to have them stop. No re-invention of tort law is required. The questions raised warrant a trial and determination upon evidence.

[11] The respondents submit that Mr Smith's claim requires this Court to stretch, bend and invent tort law to injunct sectors of the New Zealand economy.[8] The respondents say that while the common law may be flexible, it cannot and ought not

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4 *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394 [HC judgment].
5 *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] NZLR 284 (French, Cooper and Goddard JJ) [CA judgment].
6 At [16].
7 At [124].
8 As noted above at n 1, the sixth and seventh respondents filed separate submissions (arguing they were differently placed to the other respondents) but otherwise adopted the submissions of the first to fifth respondents.

to respond to this situation. They say climate change raises insurmountable problems for liability—particularly ones of standing and causation—where everyone both contributes to, and is adversely affected by, GHG emissions, and where it is not possible to link, evidentially, emissions to the harm suffered by plaintiffs. They say that for the law to evolve in the way advanced by Mr Smith would introduce open-ended liability for defendants and dramatically disrupt economies. They also say the courts are ill-suited to deal with a systemic problem of this nature with all the complexity entailed. Instead, it is best left to Parliament; indeed, Parliament can be seen already to have addressed the situation and settled upon a detailed and coherent legislative response.

[12] We also received submissions from Lawyers for Climate Action NZ Incorporated, Te Hunga Rōia Māori o Aotearoa | The Māori Law Society, and the Human Rights Commission | Te Kāhui Tika Tangata as interveners. The former aligned itself substantially with Mr Smith; the latter two made submissions on discrete issues. We were assisted by receipt of all these submissions.

Climate change

[13] The following points may be taken as common ground or indisputable.[9]

[14] Climate change threatens human well-being and planetary health.[10] As the Intergovernmental Panel on Climate Change (IPCC) observes, the window of opportunity to ensure a liveable and sustainable future for all is rapidly closing.[11] The choices made, and actions implemented, in this decade will have impacts both now and for thousands of years.[12]

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9 This section draws on the Intergovernmental Panel on Climate Change's (IPCC's) Sixth Assessment Report [AR6], which summarises the current state of knowledge of climate change, its widespread impacts and risks, and the areas of mitigation and adaptation. The reports of the three Working Groups that contributed to AR6 were admitted into evidence by minute of this Court dated 28 June 2022. Two of the three Special Reports that contributed to AR6 were admitted into evidence by minute of this Court dated 3 August 2022. The other was admitted into evidence at the High Court hearing. Following a minute of this Court dated 1 June 2023, the parties confirmed that the AR6 Synthesis Report (both the Summary for Policymakers and the Longer Report) could also be admitted into evidence.

10 IPCC *Climate Change 2023: Synthesis Report – Summary for Policymakers* (20 March 2023) [AR6 Synthesis Report Summary] at [C.1]. The IPCC uses calibrated language to express a level of confidence in statements of facts; this was said with very high confidence.

11 At [C.1] (very high confidence).

12 At [C.1] (high confidence).

[15] A recent IPCC report summarised its findings in this way:[13]

> The report confirms the strong interactions of the natural, social and climate systems and that human-induced climate change has caused widespread adverse impacts to nature and people. It is clear that across sectors and regions, the most vulnerable people and systems are disproportionately affected and climate extremes have led to irreversible impacts. The assessment underscores the importance of limiting global warming to 1.5°C if we are to achieve a fair, equitable and sustainable world. While the assessment concluded that there are feasible and effective adaptation options which can reduce risks to nature and people, it also found that there are limits to adaptation and that there is a need for increased ambition in both adaptation and mitigation. These and other findings confirm and enhance our understanding of the importance of climate resilient development across sectors and regions and, as such, demands the urgent attention of both policymakers and the general public.

[16] The evidence is "unequivocal" that humans have warmed the atmosphere, ocean and land, principally through the emission of GHGs.[14] The best estimate of global surface temperature increase from 1850–1900 to 2010–2019 is 1.07°C.[15] Atmospheric concentrations of carbon dioxide (CO_2) in 2019 were higher than at any point in the last two million years.[16] Concentrations of methane (CH_4) and nitrous oxide (N_2O) were higher than at any time in at least the last 800,000 years.[17]

[17] Human-caused climate change is the "consequence of more than a century of net GHG emissions from unsustainable energy use, land-use and land use change, lifestyle and patterns of consumption and production".[18] Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have already occurred.[19] Human-caused climate change is already "affecting" climate and weather extremes in

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13 IPCC *Climate Change 2022: Impacts, Adaptation and Vulnerability – Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 28 February 2022) [AR6 Working Group II] at vii.

14 At [A.2.1] (high confidence). See also IPCC *Climate Change 2021: The Physical Science Basis – Working Group I Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 9 August 2021) [AR6 Working Group I] at [A.1], ch 3 and ch 5.

15 AR6 Synthesis Report Summary, above n 10, at [A.1.2.]. See also AR6 Working Group I, above n 14, at [A.1.3].

16 AR6 Synthesis Report Summary, above n 10, at [A.1.3] (high confidence). See also AR6 Working Group I, above n 14, at [A.2.1].

17 AR6 Synthesis Report Summary, above n 10, at [A.1.3] (very high confidence). See also AR6 Working Group I, above n 14, at [A.2.1].

18 IPCC *Climate Change 2022: Mitigation of Climate Change – Working Group III contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 4 April 2022) [AR6 Working Group III] at [D.1.1].

19 AR6 Synthesis Report Summary, above n 10, at [A.2] (high confidence).

every region in the world.[20] It has caused widespread adverse impacts, losses and damage to nature and people.[21] Indeed, evidence of observed changes in extremes—such as heavy precipitation, droughts, heatwaves and tropical cyclones—and in particular their attribution to human influence, strengthened since the IPCC's Fifth Assessment Report, released in 2014.[22]

[18] Between 3.3 and 3.6 billion people "live in contexts that are highly vulnerable to climate change".[23] Vulnerable communities, which historically have contributed the least to the problem, are being "disproportionately affected" by climate change.[24] Many of the impacts of warming, and some of the potential impacts of mitigation actions required to limit warming, "fall disproportionately on the poor and vulnerable".[25] Between 2010 and 2020, for example, human mortality resulting from droughts, storms and floods was 15 times higher in highly vulnerable regions than in regions with very low vulnerability.[26]

[19] Some of the impacts of climate change are locked in; "[m]any changes due to past and future greenhouse gas emissions are irreversible for centuries to millennia, especially changes in the ocean, ice sheets and global sea level."[27]

[20] The IPCC recently summarised the impact of continued warming in the near term:[28]

> Continued greenhouse gas emissions will lead to increasing global warming, with the best estimate of reaching 1.5°C in the near term in considered scenarios and modelled pathways. Every increment of global warming will intensify multiple and concurrent hazards (*high confidence*).

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20 At [A.2] (high confidence). See also AR6 Working Group I, above n 14, at [A.3].

21 AR6 Synthesis Report Summary, above n 10, at [A.2] (high confidence). See also AR6 Working Group II, above n 13, at [B.1].

22 AR6 Working Group I, above n 14, at [A.3].

23 AR6 Synthesis Report Summary, above n 10, at [A.2.2] (high confidence).

24 At [A.2] (high confidence). See also AR6 Working Group II, above n 13, at [B.1].

25 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* (Cambridge University Press, October 2018) at 31 (high confidence, said in the context of limiting warming to 1.5°C).

26 AR6 Synthesis Report Summary, above n 10, at [A.2.2] (high confidence).

27 AR6 Working Group I, above n 14, at [B.5]. See also AR6 Synthesis Report Summary, above n 10, at [B.3] (high confidence).

28 AR6 Synthesis Report Summary, above n 10, at [B.1] (emphasis in original).

[21] Such future warming would have widespread impacts:[29]

> In the near term, every region in the world is projected to face further increases in climate hazards (*medium* to *high confidence*, depending on region and hazard), increasing multiple risks to ecosystems and humans (*very high confidence*). Hazards and associated risks expected in the near term include an increase in heat-related human mortality and morbidity (*high confidence*), food-borne, water-borne, and vector-borne diseases (*high confidence*), and mental health challenges (*very high confidence*), flooding in coastal and other low-lying cities and regions (*high confidence*), biodiversity loss in land, freshwater and ocean ecosystems (*medium* to *very high confidence*, depending on ecosystem), and a decrease in food production in some regions (*high confidence*). Cryosphere-related changes in floods, landslides, and water availability have the potential to lead to severe consequences for people, infrastructure and the economy in most mountain regions (*high confidence*). The projected increase in frequency and intensity of heavy precipitation (*high confidence*) will increase rain-generated local flooding (*medium confidence*).

[22] Moreover, as the planet continues to warm, climate change risks "will become increasingly complex and more difficult to manage".[30] The probability of "abrupt and/or irreversible changes" increases with higher global warming levels,[31] as does the probability of low-likelihood outcomes that have potentially "very large adverse impacts".[32]

[23] Limiting human-caused global warming requires net zero CO_2 emissions combined with strong reductions in other GHG emissions.[33] Cumulative CO_2 emissions before reaching this point, and the level of GHG emissions reductions made this decade, will "largely determine whether warming can be limited to 1.5°C or 2°C".[34]

[24] All global modelled pathways that involve limiting warming to 1.5°C with no or only limited overshoot, and those that involve limiting warming to 2°C, involve "rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade".[35] On these pathways, net zero CO_2 emissions are reached

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29 At [B.2.1] (footnote omitted and emphasis in original).
30 At [B.2.3] (high confidence).
31 At [B.3] (high confidence).
32 At [B.3] (high confidence).
33 At [B.5] and [B.5.1] (high confidence).
34 At [B.5] (high confidence).
35 At [B.6] (high confidence).

in the early 2050s and around the early 2070s respectively.[36] The following table from the IPCC (beginning at the year 2019) summarises the position:[37]

		Reductions from 2019 emission levels (%)			
		2030	2035	2040	2050
Limit warming to1.5°C (>50%) with no or limited overshoot	GHG	43 [34-60]	60 [49-77]	69 [58-90]	84 [73-98]
	CO_2	48 [36-69]	65 [50-96]	80 [61-109]	99 [79-119]
Limit warming to 2°C (>67%)	GHG	21 [1-42]	35 [22-55]	46 [34-63]	64 [53-77]
	CO_2	22 [1-44]	37 [21-59]	51 [36-70]	73 [55-90]

[25] The respondents emphasise that responding to climate change requires profound societal transformation: "having depended on carbon for all aspects of our social and economic life, we must now transition to low-carbon societies". The IPCC has described the drivers for, and constraints on, "low-carbon societal transitions" as comprising:[38]

> … *economic and technological* factors (the means by which services such as food, heating and shelter are provided and for whom, the emissions intensity of traded products, finance and investment), *socio-political issues* (political economy, equity and fairness, social innovation and behaviour change), and *institutional factors* (legal framework and institutions, and the quality of international cooperation).

[26] The IPCC has also reported on the specific effects of climate change in New Zealand.[39] Mr Smith's submissions summarised those findings in this way:

> Temperatures have increased by 1.1°C over the last 110 years with more extreme hot days. Oceans have risen, acidified and warmed significantly with longer and more frequent marine heat waves. Snow depths have declined and glaciers have receded. Most of northern New Zealand (where Mahinepua C [the land block in question] is situated) has become drier, while also seeing more extreme flooding. Wildfire conditions have increased. Effects on marine, terrestrial and freshwater ecosystems are already evident, including the expansion of invasive plants, animals and pathogens. Erosion, coastal flooding and insurance losses for floods have all increased.

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36 At [B.6] (high confidence).
37 At 21.
38 AR6 Working Group III, above n 18, at [TS.2] (emphasis added).
39 AR6 Working Group II, above n 13, at ch 11.

Statutory response to climate change

[27] The United Nations Framework Convention on Climate Change (UNFCCC), which was opened for signature at the Rio de Janeiro United Nations Conference on Environment and Development (Earth Summit) in 1992, is the foundational international treaty on climate change.[40] Its "ultimate objective" is:[41]

> … to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

[28] The Kyoto Protocol to the UNFCCC was adopted at the third session of the Conference of the Parties (COP 3) in 1997 and came into force on 16 February 2005.[42] For the first time, legally binding limits were placed on "developed" countries' GHG emissions.[43]

[29] The Paris Agreement is a binding international treaty that came into force on 4 November 2016.[44] It "aims to strengthen the global response to the threat of climate change" by, among other things:[45]

> Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change …

Under the Agreement, party countries are to communicate a Nationally Determined Contribution (NDC) to the global response to climate change every five years.[46]

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40 United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994).

41 Article 2.

42 Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 162 (opened for signature 16 March 1998, entered into force 16 February 2005).

43 For Annex I countries, which includes New Zealand: see art 3(1).

44 Paris Agreement 3156 UNTS 79 (opened for signature 22 April 2016, entered into force 4 November 2016).

45 Article 2(1)(a).

46 Articles 3, 4(2) and 4(9).

[30] In December 2020, Parliament passed a motion declaring a climate emergency in New Zealand. New Zealand's first NDC, required under the Paris Agreement, was updated in October 2021. It sets a headline target of a 50 per cent reduction of net emissions below gross 2005 levels by 2030.

[31] Parliament, through legislation, has put in place measures which seek to regulate New Zealand's GHG emissions.[47] The essential purpose of this legislation is to limit GHG emissions in order to contribute to the global effort to limit global temperature increase to 1.5°C above pre-industrial levels.

Climate Change Response Act 2002

[32] The Climate Change Response Act 2002 (CCRA) is the centrepiece of Parliament's response. The CCRA provides the legal framework for New Zealand to meet its international emissions reduction obligations.

[33] The CCRA has been through of series of amendments as Parliament has developed and tweaked New Zealand's climate change framework and policies. As Wylie J said in the High Court, these amendments collectively:[48]

> … represent the balance that Parliament has struck, and continues to strike, between environmental, technical, social and economic considerations, and the anticipated effects, costs and benefits of various alternative options considered in the process.

[34] The purpose of the CCRA—updated by one of those amendments, the Climate Change Response (Zero Carbon) Amendment Act 2019, which passed with cross-party support—is set out in s 3. In short, it is to provide a framework by which New Zealand can develop and implement clear and stable climate change policies that contribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5°C above pre-industrial levels, and allow New Zealand to prepare for, and adapt to, the effects of climate change; enable New Zealand to meet its international obligations; provide for the implementation, operation, and

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47 We draw hereafter on the summary given by Wylie J in the High Court, updated to take account of subsequent developments: HC judgment, above n 4, at [34]–[52].

48 At [35].

administration of a GHG emissions trading scheme; and provide for the imposition, operation, and administration of specific levies.

[35] The CCRA establishes targets for emissions reductions requiring the net accounting of GHGs in a calendar year (excluding biogenic methane) to be zero by the calendar year beginning on 1 January 2050 (and for each subsequent calendar year); and requiring the yearly emissions of biogenic methane to be (i) 10 per cent less than 2017 emissions by 2030 and (ii) 24 per cent to 47 per cent less than 2017 emissions by 2050 (and for each subsequent calendar year).[49] No remedy or relief is available for failure by the government to meet the 2050 target (or an emissions budget), but a court may make a declaration to that effect.[50]

(a) The Climate Change Commission

[36] The Climate Change Commission, established by the 2019 Amendment Act, is a Crown entity, which is required to act independently.[51] Its purposes are to provide independent, expert advice to the government on mitigating climate change (including through reducing GHG emissions) and adapting to the effects of climate change; and to monitor and review the government's progress towards its emissions reduction and adaptation goals.[52]

(b) Emissions budgets

[37] The responsible Minister is required to set economy-wide, mandatory emissions budgets for each emissions budget period (beginning with the period 2022–2025, and then for five-yearly periods until 2050).[53] Each emissions budget must state the total GHG emissions permitted for the budget period, expressed as a net quantity of CO_2 equivalent.[54] Budgets are to be met, so far as is possible, through domestic emissions reductions and removals.[55] Budgets can be understood as

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49 Climate Change Response Act 2002 [CCRA], s 5Q.
50 Section 5ZM.
51 Sections 5A, 5C and 5O.
52 Section 5B.
53 Section 5X. The Minister must also have regard to particular matters set out in s 5ZC.
54 Section 5Y. "Permitted" is not used here in the sense of "authorised": see [45] and [99] below.
55 Section 5Z(1). Offshore mitigation may be used in particular circumstances: s 5Z(2).

"stepping stones" to the 2050 target.[56] The Commission must advise the Minister on matters relevant to setting an emissions budget.[57]

(c) Emissions reduction plans

[38] For each emissions budget period, the Minister must prepare and make publicly available an emissions reduction plan (ERP) setting out the policies and strategies for meeting the relevant emissions budget.[58] The plan must include sector-specific policies; a multi-sector strategy; a strategy mitigating the impacts that reducing emissions and increasing removals will have on employees and employers, regions, iwi and Māori, and wider communities; and any other policies or strategies the Minister considers necessary.[59] The Commission must provide the Minister with advice on the direction of the policy required in an ERP.[60] In May 2022 the Government published the first three emissions budgets (2022–2025, 2026–2030 and 2031–2035), and published its first ERP, setting the direction for climate action for the next 15 years in New Zealand.

(d) Monitoring

[39] The CCRA contains comprehensive monitoring and enforcement provisions. The Commission, for example, performs a monitoring role, regularly monitoring and reporting on progress regarding national adaptation plans,[61] emissions budgets and the 2050 target.[62] It can recommend changes or amendments to the 2050 target and emissions budgets.[63] The Act also provides for an inventory agency,[64] with inspectors holding comprehensive powers to enter land or premises to collect information to estimate emissions or removals of GHGs.[65]

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56 Climate Change Response (Zero Carbon) Amendment Bill 2019 (136-1) (explanatory note) at 3.
57 CCRA, s 5ZA(1). The Commission must also have regard to particular matters set out in s 5ZC.
58 Section 5ZG.
59 Section 5ZG(3).
60 Section 5ZH. The matters that the Commission is required to have regard to in providing advice on emissions budgets also apply to advice on ERPs: s 5ZH(3).
61 See ss 5J(h), 5ZS, 5ZT and 5ZU. The first national adaptation plan was published in August 2020.
62 Sections 5ZJ, 5ZK and 5ZL.
63 Section 5J(a) and (c).
64 The inventory agency means the chief executive of the Ministry for the Environment: ss 4(1) and 9A(b).
65 Part 3.

(e) The Emissions Trading Scheme (ETS)

[40] The ETS, established by the Climate Change Response (Emissions Trading) Amendment Act 2008, was the result of an extensive process of policy formulation and consultation.[66] A range of options, including a carbon tax, were considered.[67] The ETS emerged as the "consensus solution".[68] It is New Zealand's "main tool" for reducing GHG emissions.[69] Most of the key CO_2-emitting sectors of New Zealand's economy are subject to the ETS, including liquid fossil fuels, stationary energy (including importing and mining coal), industrial processes (such as producing iron or steel) and agriculture (although agricultural emissions do not at present trigger surrender obligations).[70]

[41] The architecture of the ETS is found in Part 4 of the CCRA. "Participants" must notify the Environmental Protection Agency (EPA) that they are required to participate in the ETS and then open a holding account.[71] That account is used to surrender, repay and receive emissions "units".[72] An emissions unit represents a metric tonne of CO_2 equivalent.

[42] Participants in the scheme are liable to surrender one unit for each whole tonne of emissions from listed activities that the participant carries out.[73] Conversely, participants are entitled to receive one unit for each whole tonne of removals from removal activities.[74] Participants are required to submit annual emissions returns to the EPA.[75] Those returns must contain an assessment of the participant's liability to surrender units and/or entitlement to receive units.[76] Participants must then, if

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66 See, for example, Catherine Leining *Time-travelling on the New Zealand Emissions Trading Scheme* (Motu Economic and Public Policy Research, Note 22, 2016) at 2.

67 At 2.

68 HC judgment, above n 4, at [51].

69 Climate Change Response (Emissions Trading Reform) Amendment Bill 2019 (186-1) (explanatory note) at 1.

70 HC judgment, above n 4, at [44]. Schedule 3 of the CCRA lists the activities with respect to which persons must be participants. Schedule 4 lists activities with respect to which persons may be participants.

71 Section 56.

72 Section 61.

73 Section 63.

74 Section 64.

75 Section 65(1).

76 Section 65(2)(c).

necessary, surrender the required number of units to the government to cover their emissions.[77] Failure to do so results in liability for penalties.[78]

[43] The ETS is a market-based scheme. Units are tradeable, and participants with insufficient units must purchase units from other participants to cover their emissions. The price of units, often referred to as the carbon price, is broadly set by supply and demand. The government, however, allocates emissions units to industry for activities that are emission-intensive and trade-exposed (an industrial allocation).[79]

[44] The ETS attempts to drive efficient behaviour change. The logic is that sellers of surplus units are rewarded and further encouraged to reduce emissions or increase removal activities to obtain more sellable units. Buyers, on the other hand, are encouraged to reduce emissions to limit the number of units they must buy to cover their emissions. It is expected that the price signal the scheme sends should lead to emissions reductions that may not otherwise occur.[80]

[45] Importantly, and as Mr Salmon submitted for Mr Smith, the CCRA does not "permit" emissions or create a "right to emit". It neither authorises nor immunises. Instead, it places obligations on ETS participants who emit, requiring them to surrender units matching their emissions.[81] Mr Salmon submitted the distinction is subtle, but important. The respondents did not contend to the contrary but submitted that for the common law to intervene in controlling GHGs would create a parallel and inconsistent regulatory regime. Their point is that Parliament has *not prohibited* GHG emissions and has thus allowed emitting activities to continue. We will return to this issue.[82]

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77 Section 65(4).

78 Section 134.

79 Ministry for the Environment | Manatū Mō Te Taiao "Overview of industrial allocation" (10 October 2023) <https://environment.govt.nz>. See also CCRA, ss 80, 81 and 85. The Climate Change Response (Late Payment Penalties and Industrial Allocation) Amendment Act 2023 introduced changes to the industrial allocation policy in the ETS.

80 Alastair Cameron *Climate Change and Emissions Trading: Environmental Handbook* (online ed, Thomson Reuters) at [CC3.01].

81 CCRA, s 63.

82 See below at [99].

Other statutory responses

[46] The CCRA is part of a broader regulatory structure, which includes the Resource Management Act 1991[83] (RMA) and more specific Acts such as the Crown Minerals (Petroleum) Amendment Act 2018 (which banned new offshore oil and gas exploration) and the Land Transport (Clean Vehicles) Amendment Act 2022 (which aims to achieve a rapid reduction in CO_2 emissions from light vehicles imported into New Zealand).[84]

[47] The relationship between the RMA and climate change is complex.[85] Since 2004, climate change has been an express relevant consideration for RMA decision-makers. For example, s 7(i) of the RMA provides that decision-makers must have "particular regard to … the effects of climate change".[86] But until relatively recently, environmental regulation of GHG discharges was solely a matter for central government via the promulgation of National Environmental Standards (NES) under s 43 of that Act.[87] Local and regional councils regulated human interaction with the effects of climate change—for example, sea level rise—but they had no direct role in controlling GHG emissions.[88] With effect from 2022, that constraint was removed and replaced with a requirement on local and regional councils to have regard to CCRA emissions reduction plans and national adaptation plans when exercising their own

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83 The new resource management legislative framework will also form part of this matrix.

84 We note that while the current Government has discussed the potential repeal of the ban on offshore oil and gas exploration, as at the date of judgment a ban is still in force. The clean vehicle discount scheme introduced by the Land Transport (Clean Vehicles) Amendment Act 2022 was repealed on 1 January 2024 by the Land Transport (Clean Vehicle Discount Scheme Repeal) Amendment Act 2023, but other sections relating to clean vehicle standards remain in force.

85 For more on the Resource Management Act 1991 [RMA] see below at [95]–[96].

86 Inserted by s 5(2) of the Resource Management (Energy and Climate Change) Amendment Act 2004 [RMA 2004 Amendment].

87 Until recently, no comprehensive NES for climate change had been promulgated. In June 2023 a NES for GHG emissions from industrial process heat was made under s 43: Resource Management (National Environmental Standards for Greenhouse Gas Emissions from Industrial Process Heat) Regulations 2023 [GHG emissions NES]. That will be binding notwithstanding anything in CCRA plans and targets.

88 See RMA, ss 70A, 70B, 104E and 104F (all now repealed). See also *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32, in which this Court considered the effect of the RMA 2004 Amendment on the content and structure of the RMA's rulemaking and consenting functions. The majority held that the effect of these sections was to remove from regional councils the ability to control GHG emissions via the discharge to air controls referred to in s 15 (see [160] and [168] per McGrath, William Young and Glazebrook JJ). See also *Genesis Power Ltd v Greenpeace New Zealand Inc* [2007] NZCA 569, [2008] 1 NZLR 803. The repeal of ss 70A, 70B, 104E and 104F restored the status quo ante, subject to the amendments referred to in the following footnote which brought the RMA and CCRA closer together.

rulemaking and consenting functions.[89] It may be noted that, in contrast to the relationship between NES and regional or local planning instruments, these CCRA plans are relevant for RMA decision-makers but not expressly binding. But while they remain in place, the practical effect of the GHG emissions NES, emissions budgets and the ERP will be that GHG emissions will be managed to a significant extent through planning instruments and resource consents.[90]

[48] We will address later the interrelationship between statute and common law.[91]

The claim

[49] We summarise here the claim made by Mr Smith. We do so by reference to a draft amended statement of claim tendered by his counsel.[92] The draft amended claim differs in certain respects from the pleading considered in the Courts below, particularly as regards the alleged consequences of the release of GHGs into the atmosphere, the tikanga pleading and the relief sought.

Parties

[50] Mr Smith claims customary interests in lands and other resources and sites situated in or around Mahinepua in Northland. In particular, he claims an interest according to custom and tikanga in the Mahinepua C block, an approximately 91-ha block of Māori freehold land situated on the coast of Wainui Bay, Northland. He says he is a representative of the interests of his whānau and descendants in that land. He says that this land and its surroundings possess sites of customary, cultural, historical, nutritional and spiritual significance to him, including tauranga ika (fishing places), tauranga waka (landing places), ara moana (pathways to the ocean), wāhi tapu (burial

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89 See ss 61(2)(d)–(e), 66(2)(f)–(g) and 74(2)(d)–(e), inserted by the Resource Management Amendment Act 2020. RMA plans and policies drafted in light of CCRA emissions reduction plans and national adaptation plans would then be reflected in resource consent decisions.

90 For example, the GHG emissions NES will render GHG discharges from fossil fuel industrial heat processes ("heat devices" such as furnaces) either prohibited activities or restricted discretionary activities for which discharge consent applicants must prepare emissions plans by which GHG emissions are reduced and managed.

91 See below at [92]–[101].

92 This was furnished in sufficient time ahead of the hearing, and there was no substantive objection by counsel for the respondents. That is appropriate: strike out is more concerned with what can and will be pleaded, rather than what has been pleaded: *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [123] per Blanchard, Tipping and McGrath JJ.

caves, cemeteries and sacred trees), rivers, streams, wetlands, seasonal food gathering camps, pā sites, battle sites, and other sites of historical significance. Many of these sites are situated in close proximity to the coast and waterways or are in the sea itself.

[51] Mr Smith alleges that:[93]

(a) Fonterra owns and operates eight dairy factories in New Zealand that burn coal (in excess of 520,000 tonnes per annum) to generate energy. Fonterra will continue to burn coal in its factories for the foreseeable future, and the combustion of coal releases GHGs.

(b) Genesis operates the Huntly Power Station, the largest thermal power station in New Zealand. It is fuelled by the combustion of coal and natural gases, which releases GHGs.

(c) Dairy Holdings Ltd operates 59 dairy farms in the South Island, with some 50,000 milking cows. These cows release methane as a result of enteric fermentation, and nitrogen dioxide is also released from nitrogen-based fertiliser use on the farms.

(d) New Zealand Steel Ltd operates the Glenbrook Steel Mill, which is primarily fuelled by the combustion of coal and has the capacity to burn 800,000 tonnes of coal per annum. The combustion of coal releases GHGs.

(e) Z Energy Ltd supplies retail and commercial customers with petroleum-related fuel products. It knows that these products are burned by its customers, resulting in the release of GHGs.

(f) Channel Infrastructure NZ Ltd (previously known as The New Zealand Refining Company Ltd) operates the Marsden Point oil refinery and import terminal, and the Refinery to Auckland Pipeline. It imports and

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[93] We omit from this summary pleaded mitigations engaged or intended by the respondents—for instance as to reduction in consumption of fossil fuels by certain dates.

supplies the majority of petroleum-related fuel products consumed in New Zealand. The refining process at Marsden Point causes the release of GHGs.[94] Channel Infrastructure knows that its products are burned by others to power combustion engines, or to generate electricity, resulting in the release of GHGs.

(g) BT Mining Ltd owns and operates the Stockton Mine, north of Westport, the largest opencast mine in New Zealand. It produces bituminous, coking and thermal coal,[95] the majority of which is exported, much of it to China, where it is primarily burned in the production of steel. BT Mining knows that the burning of the coal it produces releases GHGs.

Alleged consequences of the release of GHGs into the atmosphere

[52] Mr Smith next alleges that:

(a) In 2020–2021, the respondents were together responsible for more than one-third of New Zealand's total reported GHG emissions (and that just 15 companies were responsible for more than 75 per cent).

(b) The release of GHGs into the atmosphere from human activities (including the respondents' activities) increases the natural greenhouse effect, and causes, among other things, the warming of the planet.

(c) Climate change from the release of GHGs into the atmosphere from human activities (including the respondents' activities) will result in the additional warming of the Earth's surface and atmosphere, and will adversely affect natural ecosystems and humankind.

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94 Channel Infrastructure's submissions state that: "On 31 March 2022, Channel closed its refining operations permanently. In doing so, by its estimate, Channel reduced its CO_2 emissions by 98% – or by more than 1 million tonnes per annum – from its 2019 levels."

95 It is alleged that the Stockton Mine produced and exported approximately 0.8 million tonnes of coal in 2018, and 1.1 million tonnes was forecast to be produced and exported in 2019.

(d) The release of GHGs into the atmosphere from human activities (including the respondents' activities) will result in dangerous anthropogenic interference with the climate system and adverse effects—including increased temperatures; a loss of biodiversity and biomass; a loss of land (including as a result of sea level rise); risks to food and water security; increased extreme weather events; ocean acidification; geopolitical instability and population displacement; adverse health consequences; economic losses; the reaching of tipping points which may cause the catastrophic breakdown of crucial environmental systems; and an unacceptable and escalating risk of social and economic collapse and mass loss of human life.

(e) Poor and minority communities will be disproportionately burdened by the adverse effects of climate change.

(f) The current scientific consensus as to the nature, effects and mitigation requirements of climate change is set out in recent reports of the IPCC from between 2014 and 2022, which are relied upon by Mr Smith.

(g) It is necessary to limit warming caused by climate change to 1.5°C to avoid dangerous anthropogenic interference with the climate system and to minimise the long-term and irreversible adverse effects from climate change.

[53] Mr Smith then alleges that, according to the most recent science from the IPCC, to avoid dangerous climate change:

(a) By 2025, at the latest, global GHG emissions must peak.

(b) By 2030, global CO_2 emissions must be reduced by 48 per cent, and global CH_4 emissions by 34 per cent, compared to 2019 levels.

(c) By 2040, global CO_2 emissions must be reduced by 80 per cent, and global CH_4 emissions by 44 per cent, compared to 2019 levels.

(d) By 2050, global GHG emissions must be net zero (meaning that after 2050 no more net anthropogenic emissions can be added to the atmosphere anywhere in the world).

[54] Mr Smith pleads that it is possible for the respondents to reduce the emissions from their activities and products to reflect these required reductions, and that requiring them to cease or reduce their GHG emissions (or contribution to emissions from producing and selling fossil fuels) will materially reduce the adverse effects of climate change. He pleads that these reductions cannot be achieved without the contribution of non-state actors, including the respondents.

[55] Mr Smith then pleads that despite enacting the CCRA, since 2002 New Zealand's net and gross GHG emissions have increased and not reduced. Current and proposed measures under that Act will not result in New Zealand achieving reductions in GHG emissions, or the respondents being required to reduce emissions, in line with a proportionate contribution to minimum required reductions.

[56] Mr Smith pleads that the respondents have variously:

(a) failed to credibly commit to voluntary measures that would see them contribute proportionately (or better) to the minimum required reductions; and

(b) actively lobbied against regulatory measures that would require them to reduce their emissions to contribute proportionately (or better) to the minimum required reductions.

[57] Mr Smith further pleads that the GHG emissions of several of the respondents are actually or effectively unconstrained by the current regulatory regime. Agricultural GHG emissions are not part of the ETS; BT Mining exports coal to jurisdictions where there is no credible regulation of GHG emissions; some respondents (including NZ Steel) have received substantial allocations of "free" units under the ETS, impeding a reduction in their emissions; and aspects of the ETS do not

incentivise or require the respondents participating in that scheme to reduce their emissions in a manner consistent with the minimum reductions required.

[58] Mr Smith pleads:

> The consequence, in fact and law, of the [respondents'] actions is that Mr Smith, his wh[ā]nau, his descendants and others will bear the cost of dealing with harms contributed to by the [respondents'] historical, current and future [GHG] emissions.

He further pleads that:

> The orders sought in this proceeding will cause rapid sectoral change that will lead to other major New Zealand emitters taking similar steps to reduce their emissions in a manner that will materially mitigate the harm faced by Mr Smith, his wh[ā]nau and his descendants.

Tikanga pleading

[59] Mr Smith relies on principles of tikanga Māori to "inform the legal basis of the pleaded causes of action and the development of the common law of New Zealand".

[60] The principles pleaded are that tikanga Māori has its own system of obligations and recognition of wrongs arising from those obligations; that such obligations are grounded in whakapapa (genealogical) and whanaungatanga (kinship) relationships; that these relationships include a connection to whenua (land and the environment) through whakapapa, giving rise to corresponding obligations of kaitiakitanga (loosely, to care for or nurture); and that breaching tikanga creates a hara or take (issue or cause) requiring utu (compensatory action) to restore ea (a state of harmony or balance).

[61] He further claims that, under tikanga, environmental harm is a harm in and of itself, creating corresponding harm to those who have interests in the environment, including kaitiaki (loosely, those whose role it is to care for the environment) and mana whenua (again loosely, those with traditional authority in the particular environment). Where the environment has suffered damage, the principle of kaitiakitanga requires steps to be taken to restore balance, such as imposing rāhui (traditional use and impact controls). Finally, Mr Smith argues, tikanga Māori recognises that hara (in this context, environment-damaging wrong) has both a collective and an individual dimension as to those responsible for it and those who suffer it.

First cause of action: public nuisance

[62] The first cause of action pleaded is public nuisance.

[63] Mr Smith claims that he will suffer harm from the effects of dangerous anthropogenic interference with the climate system caused or contributed to by the respondents jointly and separately. In particular, he pleads that climate change will:

(a) result in increasing sea levels, irrevocably damaging his family land at Mahinepua C by the physical loss of land from erosion and inundation, the loss of productive land, the loss of economic value, and the loss of sites of cultural and spiritual significance;

(b) irrevocably damage customary resources and sites, including traditional or customary fisheries, landing sites and burial caves and cemeteries;

(c) result in ocean warming and acidification which will adversely impact coastal and freshwater fisheries he customarily uses;

(d) result in the irrevocable and irreplaceable loss of land, resources and species that are economically, culturally and spiritually significant to him as tangata whenua; and

(e) result in increasing adverse health impacts to which he and Māori communities have particular vulnerability.

[64] It is then said that the respondents' actions have interfered with or will interfere with the following public rights: the rights to public health, public safety, public comfort, public convenience, public peace, and a safe and habitable climate system. Mr Smith pleads that the respondents' interference with these public rights is substantial, material and unreasonable and that they knew, or ought reasonably to have known, since at least the release of the IPCC's Fourth Assessment Report in 2007, that (a) their activities were contributing to dangerous anthropogenic interference with the climate system and (b) it was necessary for them to immediately and significantly

reduce their GHG emissions (or production and supply of products which result in GHG emissions) in order to avoid causing or contributing to dangerous anthropogenic interference in the climate system and the adverse consequences of climate change. He pleads that despite that knowledge, the respondents have continued to emit GHGs into the atmosphere (or to produce and supply products which result in GHG emissions) and have failed to significantly reduce their GHG emissions (and have, in some instances, increased them). He further pleads that requiring the respondents to reduce, or cease, their GHG emissions (directly or arising from their fossil fuel products) will reduce the injury that will otherwise be suffered by him and his descendants as a result of the adverse effects of climate change.

[65] We set the relief sought out in full, which is essentially the same in each cause of action:[96]

> **Relief sought**
>
> (a) A declaration that the defendants have (individually and/or collectively) unlawfully caused or contributed to a public nuisance through their emitting activities (or their production of coal in the case of BT Mining; and their production or supply of [f]uel [p]roducts in the case of Channel and Z Energy);
>
> (b) An injunction requiring … each of the defendants to produce (or cause in relation to the products they sell, in the case of BT Mining, Channel and Z Energy):
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> (i) A peaking of their emissions by 2025; and
>
> (ii) A reduction in their emissions in the amount of the Minimum 2030 Reductions[97] by the end of 2030, by linear reductions in net emissions each year until that time (to be supervised by the Court);
>
> (iii) A reduction in their emissions in the amount of the Minimum 2040 Reductions[98] by the end of 2040, by linear reductions in net emissions each year until that time (to be supervised by the Court);
>
> (iv) [Z]ero net [GHG] emissions from their activities by 2050 by continued linear reductions (to be supervised by the Court);

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96 Emphasis in original. The negligence prayer for declaration is cast in terms of the loss caused by unlawful breach of a duty (the proposed climate system damage tort claim is also cast in terms of unlawful breach of a duty).

97 See above at [53](b).

98 See above at [53](c).

(c) Alternatively, an injunction (which may be suspended) requiring the defendants to immediately cease emitting net [GHG] emissions, or contributing to the net emission of [GHGs] through the sale of their products;

(d) Such other relief as the Court determines appropriate to enable the mitigation of or [adaptation] to damage to climate systems contributed to by the [respondents];

(e) [Mr Smith] brings this proceeding in the public interest, and with the assistance of *pro bono* legal representation, and for that reason does not seek costs.

Second cause of action: negligence

[66] The second (additional or alternative) cause of action is negligence.

[67] Mr Smith alleges that the respondents owe him, and persons like him, a duty to take reasonable care not to operate their businesses in a way that will cause him loss by contributing to dangerous anthropogenic interference in the climate system.

[68] He claims that the respondents have breached this duty by doing acts that have contributed to, and will continue to contribute to, dangerous anthropogenic interference in the climate system; that they knew, or ought reasonably to have known from 2007, that their activities would contribute to such interference; that they then knew, or ought reasonably to have known, that it was necessary for them to immediately and significantly reduce their GHG emissions; and that, despite that knowledge, they have continued to emit GHGs into the atmosphere (or to produce and supply products which result in the emission of GHGs) and have failed to significantly reduce their GHG emissions (and have, in some instances, increased them).

[69] Mr Smith claims that the respondents' breach of duty has or will cause him harm; that the respondents' contribution to that harm is material; and that requiring cessation or reduction of the respondents' GHG emissions will reduce that harm.

[70] The relief sought is cast in similar terms to that sought for the first cause of action.

Third cause of action: proposed climate system damage tort

[71] The third cause of action advances the novel, proposed climate system damage tort. We set the draft amended pleading out in full:

> The defendants owe a duty, cognisable at law, to cease materially contributing to damage to the climate system, dangerous anthropogenic interference with the climate system, and the [a]dverse [e]ffects of climate change through their emission of [GHGs] into the atmosphere (or their production or exportation of coal in the case of BT Mining; and their production and supply of [f]uel [p]roducts in the case of Channel and Z Energy).
>
> The defendants have breached, and will continue to breach, the duty by [emitting GHGs] into the atmosphere (or [causing] the emission of [GHGs] through the sale of fossil fuel products) for their own profit and knowing that those emissions will contribute to damage to the climate system, dangerous anthropogenic interference with the climate system, the [a]dverse [e]ffects of climate change, and injury to the plaintiff and people like him.

[72] The relief sought is cast in similar terms to that sought for the first cause of action.

Strike out

[73] As we have noted, the respondents applied to strike out Mr Smith's proceeding on the basis that it raises no reasonably arguable cause of action.

General principles

[74] Rule 15.1(1)(a) of the High Court Rules 2016 provides that the court may strike out all or part of a pleading if it "discloses no reasonably arguable cause of action". Addressing that provision, the Court of Appeal said:[99]

> [38] We [address each cause of action] through the lens of well-established strike out principles. That is to say, we assume the pleaded material facts are true save for those that are entirely speculative and without foundation and we also bear in mind that the strike out jurisdiction is to be exercised sparingly and only in clear cases. We must be certain the claim is so untenable it cannot succeed and slow to strike out claims in any developing area of law. The fact a claim involves a complex question of law which requires extensive argument should be no bar provided we have the requisite materials and assistance to determine the matter. We must also be mindful of the well established principle that if any deficiencies can be cured by an amendment to the

[99] Footnotes omitted.

> pleadings, allowing the claim to proceed on condition the necessary amendments are made, is preferable to strike out.

[75] Mr Smith accepts that to be a correct statement of principle, drawing as it does directly on the decision of the Court of Appeal in *Attorney-General v Prince*, delivered a quarter-century ago.[100] But he complains the Court did not apply it correctly.

[76] Our focus here is on this passage in the reasoning above: "We must be certain the claim is so untenable it cannot succeed and slow to strike out claims in any developing area of law." In *Prince*, the Court of Appeal explained that last principle as follows:[101]

> It is only where, on the facts alleged in the statement of claim, and however broadly they are stated, no private law claim of the kind or kinds advanced can succeed that it is appropriate to strike out the proceedings at a preliminary stage. And in that assessment the public policy considerations must be solidly founded in the relevant legislation, other relevant material, or the experience of the Courts.

As the Court went on to say, in some cases aspects of policy may require the kind of analysis and testing of expert evidence, including evidence of economic and social analysis, that is available only at trial. In other cases, however, policy considerations are patent—explicit or implicit in the relevant legislation or reflected in other areas of the law.[102] Alternatively, a court may feel the considerations are readily identifiable and capable of evaluation without the testing of evidence at trial.[103]

[77] In some cases, summary resolution may be appropriate, despite the novelty of the claim. In *Burns v National Bank of New Zealand Ltd*, the Court of Appeal felt able to strike out a novel claim for "spoliation".[104] This cause of action, concerning alleged destruction or concealment of documentary evidence in litigation, found some support in Canada and some states in the United States. It had not been recognised in either the United Kingdom or Australia. In declining to recognise it in this jurisdiction, the Court of Appeal noted that remedies already exist to address the same conduct—under the High Court Rules, law of contempt of court, professional disciplinary rules and

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100 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA).
101 At 267 per Richardson P, Thomas and Keith JJ, 285 per Henry J and 291 per Tipping J.
102 At 267 per Richardson P, Thomas and Keith JJ, 285 per Henry J and 291 per Tipping J.
103 At 267–268 per Richardson P, Thomas and Keith JJ, 285 per Henry J and 291 per Tipping J.
104 *Burns v National Bank of New Zealand Ltd* [2004] 3 NZLR 289 (CA).

criminal law—and the case for recognition of the new tort was not made out.[105] The Court noted:[106]

> This case is distinct from, say, a negligence claim alleging a novel duty of care where the exact relationship between the parties is required to be determined in order to decide whether a duty should be imposed.

[78] A decade after *Prince* this Court endorsed the approach taken in that case. *Couch v Attorney-General* dealt with a relatively novel duty of care alleging responsibility on the part of the Department of Corrections for the supervision of a paroled violent offender who had been assessed by the Probation Service psychologists as having a high risk of reoffending.[107] The Attorney-General's strike out application succeeded in the Court of Appeal. This Court unanimously allowed the plaintiff's appeal.

[79] Blanchard, Tipping and McGrath JJ concluded that "the case should be allowed to go to trial, unless as a matter of law the pleaded facts are incapable of giving rise to the duty of care asserted".[108] Discussing the relevance of policy matters at this point of the proceedings, they said:[109]

> The claim should be struck out on the ground that policy militates against a duty of care only if, at this stage of the proceedings, it can be said that this is undoubtedly so. Claims in tort relying on breach of a duty of care have of course been struck out in the past on this basis. But everything depends on the circumstances and, in particular, on whether it is necessary or desirable for the case to go to trial to enable a fair and fully informed policy determination to be made.

[80] That case involved a balance between two main policy considerations: protection of citizens and rehabilitation of offenders.[110] While the policy arguments against imposing a duty of care had force, they could not be said to preclude a duty of care pre-emptively.[111] Even though the policy arguments for both sides were capable of being weighed up on an abstract basis, it was "necessary and, if not necessary,

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105 At [74], [80] and [91].
106 At [89].
107 *Couch*, above n 92.
108 At [118].
109 At [126].
110 At [128] per Blanchard, Tipping and McGrath JJ.
111 At [129] per Blanchard, Tipping and McGrath JJ.

desirable to make the ultimate determination when all relevant facts ha[d] been examined and conclusions [could] be reached upon them".[112]

[81] Concurring, but writing separately, Elias CJ and Anderson J noted that:[113]

> [32] It is often not easy to decide whether a duty of care not previously recognised by authority is owed to the plaintiff, as Woodhouse J in *Takaro*[114] acknowledged and as is amply demonstrated on the authorities. It may be unrealistic to expect that the pleadings and arguments to support a claim will always be adequate at an early stage of the proceedings. Caution in disposing of such cases on a summary basis is necessary both to prevent injustice to claimants and to avoid skewing the law with confident propositions of legal principle or assumptions about policy considerations, undisciplined by facts.
>
> [33] It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must be "so certainly or clearly bad" that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing. …

[82] Elias CJ and Anderson J referred to the decision of the House of Lords in *X (Minors) v Bedfordshire County Council* where Lord Browne-Wilkinson (with whom the other Judges agreed) observed that where "the law is not settled but is in a state of development … it is normally inappropriate to decide novel questions on hypothetical facts"—and particularly so where the question is whether a common law duty of care exists.[115] Lord Browne-Wilkinson went on to note it might be otherwise if evident that, whatever the facts, no duty could exist. But if, on the facts alleged, it was not possible to give a certain answer whether the claim was maintainable, it would not be appropriate to strike it out.[116]

Our approach

[83] These authorities articulate what are long-established principles: a measured approach to strike out is appropriate where a claim—whether in negligence, nuisance or otherwise—is novel, but at least founded on seriously arguable non-trivial harm. That is so even if attribution to individual respondents remains difficult. In such a

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112 At [130] per Blanchard, Tipping and McGrath JJ.
113 Footnotes omitted.
114 *Takaro Properties Ltd (in rec) v Rowling* [1978] 2 NZLR 314 (CA).
115 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 740–741.
116 At 741.

case the common law should lean towards receipt of the claim, and full evaluation based on evidence and argument at trial, over pre-emptive elimination.

[84] Such an approach is consistent with fully informed access to civil justice by those who have a tenable case that they have been harmed, and who will otherwise go without remedy based on a pre-emptive evaluation only. And, as was observed in *Couch*, a refusal to strike out a cause of action "says little about its eventual merit".[117] That is to say, it is not a commentary on whether or not the claim will ultimately succeed.

[85] Pre-emptive elimination is only appropriate where it can be said that whatever the facts proved, or arguments and policy considerations advanced at trial, a case is bound to fail.

Are common law actions over GHG emissions excluded by statute?

[86] We deal with this question first, because if the respondents are correct that the statutory scheme displaces the operation of the common law, that is dispositive of the appeal—none of the causes of action could succeed and the claim would have to be struck out.

[87] The High Court Judge considered one of the policy factors that negated the imposition of a duty of care was that the alleged duty was "inconsistent with Parliament's regulation of emissions".[118] The Judge continued:[119]

> Recognising a liability in negligence would potentially compromise Parliament's response, and would require the Courts to engage in complex polycentric issues, which are more appropriately left to Parliament. It is an area where the authority of Parliament should be respected. This is not to say that climate change is a "no go" area. Rather, the better course is for aggrieved victims of climate change to seek to hold the Government responsible. The provisions of s 5ZM of the [CCRA] … are directly in point.

[88] The Court of Appeal agreed, holding that a critical factor telling against the imposition of a duty of care was the "existence of international obligations and a

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117 *Couch*, above n 92, at [37] per Elias CJ and Anderson J.
118 HC judgment, above n 4, at [98](e).
119 At [98](f) (footnotes omitted).

comprehensive legislative framework", and that to "superimpose a common law duty of care [was] likely to cut across that framework, not enhance or supplement it".[120]

[89] Speaking more generally, the Court of Appeal was also of the view that Mr Smith's claims were "not consistent with the policy goals and scheme of the legislation and in particular the goals of ensuring that this country's response to climate change is effective, efficient and just".[121] Private litigation could mean emitters are required to "comply with requirements that are more stringent than those imposed by statute".[122] The Court's role was instead to "[support] and [enforce] the statutory scheme for climate change responses and [hold] the Government to account".[123]

Submissions

[90] Counsel for Mr Smith submitted that his claim does not cut across New Zealand's international commitments or domestic climate policies but rather supports them. A finding that there can never be tortious liability connected to GHG emissions cuts across the statutory scheme because it takes away a mechanism that could contribute to those reductions. There is nothing uncommon in using tort law to support statutory regulation.[124] Moreover, the CCRA and ETS do not "permit" emissions, a point we will discuss further below.[125] And finally, a number of the respondents do not have obligations, or have limited obligations, under the ETS. This means the CCRA is not a complete answer.

[91] Mr Kalderimis and Ms Swan, for the respondents, submitted that the pleaded claim invites judicial criticism of the efficacy of that statutory framework, and requires the creation of a parallel, and inconsistent, regulatory regime. Mr Smith's claim would render some respondents liable in tort despite compliance with the ETS, or despite not

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120 CA judgment, above n 5, at [116]. These sentiments were also reflected by the United States Federal Court of Appeals (2nd Circuit) in *City of New York v Chevron Corp* 993 F 3d 81 (2d Cir 2021), where that Court found that the Federal Clean Air Act 42 USC § 7401 displaced the common law in so far as control of GHGs was concerned.

121 At [33].

122 At [33].

123 At [35].

124 Mr Smith gives the example of tortious liability running alongside the disciplinary regime in the Lawyers and Conveyancers Act 2006.

125 See below at [99].

being subject to the ETS. And, they say, it risks distorting the market-based operation of the ETS by targeting only selected emitters.

Our assessment

[92] Statute law has been active in New Zealand in displacing or modifying the application of the common law of torts.[126] To state the obvious, statutory reform alters context, and may thereby necessitate reform of existing and related common law principles.[127] In that instance, statute's impact is indirect. Some statutory reforms may however displace tort directly.

[93] The best-known (and most dramatic) example is the Accident Compensation Act 2001 (and its predecessor Acts) proscribing claims for damages for personal injuries covered by the legislative compensation scheme. Exemplary damages were retained to perform tort law's deterrent function, and in the workplace context, the Health and Safety at Work Act 2015 supplies the missing deterrent function in the absence of workplace personal injury liability.[128]

[94] There are also other important, targeted examples: statutory immunities in the Biosecurity Act 1993 in favour of biosecurity officials barred the claim by kiwifruit growers against the Crown in *Attorney-General v Strathboss Kiwifruit Ltd.*[129] Statutory immunities of varying extent in favour of persons undertaking statutory functions can be found throughout New Zealand legislation.[130] A rather different example of a proscriptive statutory provision is to be found in the Harmful Digital

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126 Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at 19. Professor John Burrows KC has observed that the common law and statute occasionally overlap, sometimes with a "jagged and awkward" interface, and at other times they run in parallel. The common law has shown "remarkable vitality" in the face of areas already regulated by statute: John Burrows "Common Law among the Statutes: The Lord Cooke Lecture 2007" (2008) 39 VUWLR 401 at 410–411.

127 Lord Sales "Exploring the Interface Between the Common Law of Tort and Statute Law" (Annual Richard Davies Lecture, London, 29 November 2023).

128 Early on, the Court of Appeal determined that personal injury claims for exemplary damages could still be brought: *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA). See now: Accident Compensation Act 2001, s 319.

129 Section 163; and *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98, [2020] 3 NZLR 247 at [124]–[147].

130 See the discussion in *Strathboss Kiwifruit Ltd*, above n 129, at [138].

Communications Act 2015, which prevents civil (and criminal) actions being brought against an online content host if it takes certain action in responding to a complaint.[131]

[95] But statutory reform may also supplement common law causes of action in a way that has a partial but significant displacement effect. The RMA is a good example of this effect, and, as summarised above, it has particular relevance to climate change issues. The RMA regulates the environmental effects of human activity and, conversely, mitigation of the effects of environmental processes on humans. It does this through environmental policies, standards, and rules, and through local authority consenting functions. These controls tend to reduce, but not completely remove, the potential for nuisance and the need for resort to environmental tort actions. The RMA also provides enforcement controls in relation to environmental effects. These perform the same function as actions in nuisance did historically. For example, s 17 entitles local authorities and the EPA (through abatement notices) or the Environment Court (through enforcements orders) to prevent any person from doing anything where its effect on the environment "is or is likely to be noxious, dangerous, offensive, or objectionable". Only enforcement officers[132] can issue abatement notices, but private parties may apply to the Environment Court for an enforcement order under ss 17 and 316(1).

[96] Yet, although Parliament saw fit to make the RMA enforcement regime accessible to public authorities and private citizens, s 23 expressly preserves access to common law rights of action:

> **23 Other legal requirements not affected**
>
> (1) Compliance with this Act does not remove the need to comply with all other applicable legislation and other rules of law.
>
> (2) The duties and restrictions described in this Part shall only be enforceable against any person through the provisions of this Act; and no person shall be liable to any other person for a breach of any such duty or restriction except in accordance with the provisions of this Act.

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131 Section 24.

132 An "enforcement officer" is defined in s 2(1) (so far as is relevant for the purposes of s 17) as an "enforcement officer authorised under section 38 or 343I". Section 38 empowers local authorities to authorise their officers to carry out the functions and powers of an enforcement officer. Section 343I empowers the EPA to authorise a person to be an enforcement officer for the purpose of carrying out its enforcement functions under the RMA.

> (3) Nothing in subsection (2) limits or affects any right of action which any person may have independently of the provisions of this Act.

This is perhaps unsurprising given the antiquity of environmental nuisance actions and the continuing resort to them.[133]

[97] What then is the effect of the CCRA on tort actions? Was the former intended to exclude the latter? Unless there is reasonably clear language in the CCRA to that effect, or it is a necessary implication of the CCRA's operation, that seems inherently unlikely for two reasons.

[98] First, as this Court said in the *Sunset Terraces* case, in the context of the Building Act 1991:[134]

> [25] Nothing in the 1991 Act signalled with the necessary clarity that the Act was intended to remove the common law duty affirmed in *Hamlin*. … What is clear is that the common law duty was not expressly removed. Nor can it be said that the duty was removed by necessary implication. If Parliament had meant to achieve the outcome for which the Council contended, it would have done so in clear and unmistakeable terms.

Similarly, Tipping J remarked in *Hosking v Runting*, in the context of the Privacy Act 1993:[135]

> [228] If Parliament wishes a particular field to be covered entirely by an enactment, and to be otherwise a no-go area for the Courts, it would need to make the restriction clear. I am unpersuaded by the view that if Parliament has only gone so far, this is an implicit message to the Courts to stay their hands. Any such implication would have to be both clear and necessary … Here the posited implication is far from clear or necessary.

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133 See, for example, *Hawkes Bay Protein Ltd v Davidson* [2003] 1 NZLR 536 (HC); and *Semple v Wilson* [2018] NZHC 992, [2018] NZAR 1025.

134 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*] per Blanchard, Tipping, McGrath and Anderson JJ. See also *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

135 *Hosking v Runting* [2005] 1 NZLR 1 (CA). In Andrew Burrows "The Relationship Between Common Law and Statute Law in the Law of Obligations" (2012) 128 LQR 232 at 239, he observed that, "given that the common law is a carefully developed evolutionary system of law, the default position should be that, unless the exclusion of the common law is express or is very clearly implied, there should be no such exclusion".

This is entirely orthodox. Lord Reid expressed the point in similar terms in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*:[136]

> There is a presumption which can be stated in various ways. One is that in the absence of any clear indication to the contrary Parliament can be presumed not to have altered the common law further than was necessary to remedy the "mischief."

[99] Second, as we have noted, the ETS neither authorises nor immunises GHG emissions. It merely facilitates state-introduced market signals via a trading scheme in emissions units. There is provision in the CCRA for fines and other sanctions for failing to register as a participant, for under reporting emissions or for holding insufficient emissions units,[137] but there is no power in the EPA or any other CCRA agency to forbid an emitter from discharging GHGs for want of emissions units. In fact, as already discussed, policing the actual environmental effects of the activities of individual emitters is primarily the province of the RMA, not the CCRA.

[100] The last point is important to grasp. The CCRA does not purport to cover the entire field. It is a companion measure designed to operate alongside the RMA in relation to GHG emissions. As we noted at [47], RMA amendments in 2004 and 2022 required all decision-makers to have particular regard to the effects of climate change, and regional and local authorities to have regard to CCRA emissions reduction plans and national adaptation plans. We also referred to the recent NES on GHG emissions, which provides for consent authority control of GHGs emitted by industrial process heat devices such as boilers and furnaces.[138] At the risk of labouring the point, resort to common law actions in relation to adverse environmental effects is expressly preserved in the RMA within this overlapping system of legislative controls. Parliament has not pre-emptively excluded a common law response to damage caused by GHG emissions. On the contrary, it has retained that possibility.

[101] There is therefore no basis to conclude that Parliament has displaced the law of torts in the realm of climate change in New Zealand. Rather, it has left a pathway

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136 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL) at 614. See also Lord Hutton's observations in *Regina (Rottman) v Commissioner of Police of the Metropolis* [2002] UKHL 20, [2002] 2 AC 692 at 720.

137 See generally s 129 of the CCRA and the Climate Change Response (Infringement Offences) Regulations 2021, made under s 30M of the CCRA.

138 GHG emissions NES, above n 87.

open for the common law to operate, develop and evolve (if that is thought to be required in this case) amid a statutory landscape that does not displace the common law by the interposition of permits, immunities, policies, rules and resource consents.[139]

Is the public nuisance claim bound to fail?

[102] The question we address here is whether it can be said that, whatever the facts proved or policy arguments advanced at trial, the pleaded public nuisance claim is bound to fail.

Evolution and elements of the tort

[103] In the early years of the common law, it became clear that there were socially objectionable actions and omissions that could not found a private nuisance action because the harm was suffered by a "community as a whole rather than by individual victims and because members of the public suffered injury to their rights as such rather than as private owners or occupiers".[140] As a result, conduct of this nature began to be treated as criminal.[141] The Star Chamber, and later the King's Bench and its successors, held the "residual power to punish any misconduct that threatened the public good".[142] Thus the term "public nuisance" (or common nuisance) came to be used to describe the power of these courts to punish behaviour which was harmful to the public.[143]

[104] The offence of public nuisance was concerned with actions or omissions that obstructed or caused "inconvenience or damage to the public in the exercise of rights

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139 That is not to say that the statutory regime cannot be called upon by the parties at trial in framing the common law pathway and its remedies.

140 *Regina v Rimmington* [2005] UKHL 63, [2006] 1 AC 459 at [6] per Lord Bingham.

141 At [6] per Lord Bingham. The "court leet" was one forum in which this assortment of offences was dealt with: JR Spencer "Public Nuisance—A Critical Examination" (1989) 48 CLJ 55 at 59–60.

142 Spencer, above n 141, at 61.

143 At 63. The examples referred to by Spencer (at 63, n 32) include "concealment of treasure trove, digging up the wall of a church, making off with the property of a Royal foundation; and also stopping up the highway". See also William Hawkins *A Treatise of the Pleas of the Crown: Or a System of the Principal Matters relating to that Subject, digested under their proper Heads* (printed by Eliz Nutt for J Walthoe, London, 1716) vol 1. Hawkins defined a common nuisance as "an offence against the public, either by doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires" (at 197, spelling and grammar updated to reflect modern usage).

common to all His Majesty's subjects".[144] It was traditionally used to deal with the obstruction of public highways and rivers, and activities that caused a loss of amenity in a neighbourhood (for example through noises or smells).[145] It was often invoked to prosecute harms to the community that were otherwise not punishable.[146]

[105] The reach of public nuisance remained "exclusively criminal" until the 16th century.[147] The transformative case, an anonymous 1535 decision published in the Yearbooks, involved a plaintiff who could not access his close due to a blocked highway.[148] Fitzherbert J concluded that a plaintiff who "has suffered greater hurt or inconvenience than the generality have … can have an action to recover the damage which he has by reason of this special hurt".[149] This approach to public nuisance, which became known as the "special damage" rule, was adopted expressly in New Zealand in 1869 in *Mayor of Kaiapoi v Beswick*.[150]

[106] The first reported attempt to obtain an injunction to restrain a public nuisance seems to have occurred in the 1752 decision *Baines v Baker*.[151] There, the plaintiff sought to stop the building of an inoculation hospital for smallpox. He lived nearby and was concerned about catching the disease. The Lord Chancellor denied the injunction, in part because the case should have been an "information in the name of the Attorney-General".[152] Leaving redress for public nuisances to the

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144 James Fitzjames Stephen and Lewis Frederick Sturge *A Digest of the Criminal Law (Indictable Offences)* (9th ed, Sweet & Maxwell, London, 1950) at 179 (cited with approval in *Rimmington*, above n 140, at [10] and [36] per Lord Bingham and [45] per Lord Rodger). This definition is unchanged from the original definition provided in the first edition published in 1877: *Rimmington*, above n 140, at [10] per Lord Bingham. See also Bill Atkin "Nuisance" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 579 at 644–645.

145 Law Commission (of England and Wales) *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 4 June 2015) at [2.21].

146 John Murphy *The Law of Nuisance* (Oxford University Press, Oxford, 2010) at [7.14] citing, among other things, *Rex v Crunden* (1809) 2 Camp 89, 170 ER 1091.

147 Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (10th ed, Thomson Reuters, Sydney, 2011) [Fleming] at [21.20].

148 *Anonymous* (1535) YB Mich 27 Hen 8, f 27, pl 10 (cited in CHS Fifoot *History and Sources of the Common Law: Tort and Contract* (Stevens & Sons, London, 1949) at 98).

149 Fifoot, above n 148, at 98. Baldwin CJ denied the claim but it was Fitzherbert J who was later followed: William L Prosser "Private Action for Public Nuisance" (1966) 52 Va L Rev 997 at 1005 citing, among other things, *Rose v Miles* (1815) 4 M & S 101, 105 ER 773 (KB).

150 *Mayor of Kaiapoi v Beswick* (1869) 1 NZCA 192. Arney CJ, for instance, canvassed the English case law before summarising it in this way (at 207): "In all these examples the damage was particular, direct, and following upon the individual immediately from the obstruction".

151 Spencer, above n 141, at 67. See *Baines v Baker* (1752) 3 Atk 750, 27 ER 105 (Ch) at 106.

152 *Baines*, above n 151, at 106. See also Spencer, above n 141, at 67.

Attorney-General as the public representative was historically justified on the basis that:[153]

> … common [nuisances] are such inconvenient or troublesome offences, as annoy the whole community in general, and not merely some particular person; and … it would be unreasonable to multiply suits, by giving every man a separate right of action.

[107] Common law crimes were abolished in New Zealand in the Criminal Code Act 1893.[154] The statutory offence of criminal nuisance established by that same Act was significantly retrenched by the addition of a knowledge requirement in the Crimes Act 1961.[155] Neither development was "treated as removing the jurisprudential foundation of the tort of public nuisance" in New Zealand, which survives as a "self-sustaining common law action".[156]

[108] The leading authority in New Zealand on public nuisance—*Attorney-General v Abraham and Williams Ltd*, which concerned noise, odour and pests emitted from a long-established insanitary stockyard in a once-rural, suburbanised location—was delivered by the Court of Appeal almost 75 years ago.[157] Most of the case law cited within it was English. O'Leary CJ posed the core issue on appeal in these terms:[158]

> … whether the yards do constitute a public nuisance, which, of course, in brief terms means that there are acts or omissions which endanger the lives, safety, health, property, or comfort of the public. The escape of deleterious things, such as smells, noxious air, noises, and the like, clearly constitutes a nuisance.

[109] The principal English authority on public nuisance is now *Regina v Rimmington*.[159] Lord Bingham gave the leading speech, in which he canvassed a variety of different formulations of the criminal offence of public nuisance

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153 William Blackstone *Commentaries on the Laws of England: Book the Fourth – A Reprint of the First Edition with Supplement* (Dawsons of Pall Mall, London, 1966) at 167.

154 Criminal Code Act 1893, s 6. See now s 9(1) of the Crimes Act 1961.

155 Compare Crimes Act 1961, s 145 with Criminal Code Act, s 140; and Crimes Act 1908, s 158.

156 Atkin, above n 144, at [9.3.1]. See, for example, *Attorney-General v Abraham and Williams Ltd* [1949] NZLR 461 (CA); *Amalgamated Theatres Ltd v Charles S Luney Ltd* [1962] NZLR 226 (SC); *Hankins v The King* (1905) 25 NZLR 787 (CA); and *Lower Hutt City Council v Attorney-General ex rel Moulder* [1977] 1 NZLR 184 (CA).

157 *Abraham and Williams Ltd*, above n 156.

158 At 473.

159 *Rimmington*, above n 140. See also *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169 (CA), which Lord Bingham in *Rimmington* called the "leading modern authority on public nuisance" (at [18]); and *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 AC 617 (PC) [*The Wagon Mound (No 2)*].

before arriving at the definition in *Archbold: Criminal Pleading, Evidence and Practice*:[160]

> … a person is guilty of a public nuisance (also known as common nuisance), who–
>
> (a) does an act not warranted by law, or
>
> (b) omits to discharge a legal duty,
>
> if the effect of the action or omission is to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects …

Although expressed in a criminal context, it is now widely acknowledged that the analysis applies also to civil claims.

[110] Thus stated, the tort of public nuisance is subject to a number of important limits particular to it. First, while the tort is one of strict liability, meaning negligence is not required, a defendant will only be liable if the kind of harm suffered was a reasonably foreseeable consequence of the defendant's conduct, meaning there was a real risk of damage.[161]

[111] Second, the defendant's act or omission must substantially and unreasonably interfere with public rights.[162] As to the need for an unreasonable interference, Romer LJ observed, in the context of a footpath obstruction case, that the "law relating to the user of highways is in truth the law of give and take".[163] The Court of Appeal in the present case observed that the two elements—"substantially and unreasonably"—are conjunctive,[164] a point also made by this Court in *Wu v Body*

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160 This is from the current edition: see Mark Lucraft (ed) *Archbold 2024* (Sweet & Maxwell, London, 2024) at [31-40]. At the time of *Rimmington*, the *Archbold* formulation was identical save that it read "life, health, property, *morals* or comfort". The House of Lords rejected the reference to morals (at [10] and [36] per Lord Bingham and [45] per Lord Rodger), and it is no longer included in the *Archbold* formulation. The remainder of the formulation was described as "clear, precise, adequately defined and based on a discernible rational principle" (at [36] per Lord Bingham).

161 *Hamilton v Papakura District Council* [2002] UKPC 9, [2002] 3 NZLR 308 at [39] per Lord Nicholls, Sir Andrew Leggatt and Sir Kenneth Keith referring to *The Wagon Mound (No 2)*, above n 159, at 639–640.

162 *Harper v G N Haden and Sons Ltd* [1933] Ch 298 (CA) at 304 per Lord Hanworth MR; Fleming, above n 147, at [21.50]; and Allen M Linden and others *Canadian Tort Law* (12th ed, LexisNexis, Toronto, 2022) at 573–574.

163 *Harper*, above n 162, at 320.

164 CA judgment, above n 5, at [41].

Corporate 36661, a private nuisance case.[165] But in *Fearn v Board of Trustees of the Tate Gallery*, the United Kingdom Supreme Court held, in the context of private nuisance at least, that the unreasonableness element added nothing of substance to the evaluative process.[166] The leading public nuisance cases, *Rimmington* and, in New Zealand, *Abraham and Williams Ltd*, remain opaque on whether an unreasonableness requirement adds ballast or not. That question remains one for judicial determination in New Zealand in due course.

[112] Third, the tort does not generally depend on any particular person suffering damage. However, private actionability may be limited to persons who can demonstrate they have suffered some damage particular to them arising from the interference. This is the so-called "special damage" rule, and we return to it later in this judgment.[167]

[113] A fourth particular limit arguably may exist: that of independent illegality (that is, illegality apart from the tort itself). For reasons given later, we conclude that limit does not apply in New Zealand.[168]

High Court and Court of Appeal

[114] In the High Court, Wylie J concluded four fundamental obstacles lay in the way of the tenability of the public nuisance claim. First, the damage claimed by Mr Smith was neither particular nor direct, and not appreciably more serious or substantial in degree than that suffered by the public generally.[169] It may be suffered by many others, including iwi, hapū and other landowners and members of the public who live in or use the coastal marine area around New Zealand. Second, the pleaded harm was consequential and not the direct result of the respondents' activities.[170] As the Judge put it, even if Mr Smith were to obtain the relief he sought, it would not

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165 *Wu v Body Corporate 366611* [2014] NZSC 137, [2015] 1 NZLR 215, where it was noted that "[o]ften the concepts of substantial and unreasonable will overlap" (at [130], n 117 per Elias CJ, McGrath, Glazebrook and Tipping JJ).

166 *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4, [2024] AC 1 at [18]–[21] per Lord Leggatt SCJ (with whom Lord Reed P and Lord Lloyd-Jones SCJ agreed).

167 See above at [105] and below at [148]–[152].

168 See below at [146]–[147].

169 HC judgment, above n 4, at [62].

170 At [63].

prevent the damage he claimed he would suffer. Mr Smith did not and could not plead that but for the respondents' activities, he would not suffer the claimed damage.[171] Third, the underlying acts or omissions of the respondents were lawful, because they complied with all relevant statutory and regulatory requirements.[172] Contrary to Mr Smith's submission, there was a requirement for independent unlawfulness. Finally, there were also significant problems with the relief sought.[173]

[115] The Court of Appeal analysed Mr Smith's public nuisance claim by reference to four questions:

(a) whether actionable public rights were pleaded;

(b) whether independent illegality was required;

(c) whether the special damage rule was met or required; and

(d) whether there was a "sufficient connection" between the pleaded harm and the respondents' activities.

Ultimately it found for Mr Smith on the first two questions, and for the respondents on the last two. As we consider those were the correct questions to address, we will apply the same framework later in this judgment.[174]

[116] The Court of Appeal's analysis began with the observation that it was "fair to describe the law of public nuisance as lacking some precision".[175] This was essentially the result of its history and "its application to a number of disparate situations at a time when there was no perceived need to define its boundaries with any precision".[176]

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171 At [67].
172 At [69].
173 At [73] and [105]–[108].
174 Beginning below at [143].
175 CA judgment, above n 5, at [58].
176 At [58] (footnote omitted).

[117] On the first question, the Court concluded that a nuisance was public if either or both of the following conditions were satisfied:[177]

(a) The nuisance must affect a class of the public such as the inhabitants of a local neighbourhood or a representative cross-section of them. The adverse effects need not extend to a public place.

(b) The nuisance must infringe rights belonging to the public as such.

The former, particularly, related to acts which endangered the life, health, property, or comfort of the public. On that basis, the rights pleaded in the statement of claim appeared to be consistent with the tort of public nuisance, and it was not necessary to plead them as established public rights.

[118] On the second question, the Court of Appeal disagreed with the High Court Judge's assessment that the interference with the public right must be independently unlawful, in addition to interfering with public rights.[178] It said:[179]

> What matters is that the act or omission causes common injury. To put it another way, the focus as a matter of principle is not on the legal character of the act or omission complained of but rather its adverse effect.

[119] On the third question, the Court of Appeal said that it was willing to adopt the "most liberal formulation of the special damage rule" and therefore only looked to see whether the pleaded harm was capable of being viewed as appreciably exceeding that suffered by the general public.[180] The Court concluded:[181]

> In our view the harm suffered by those interests [Mr Smith claims to represent] does not sufficiently exceed the degree of harm to very many other people in New Zealand (or elsewhere in the world) who suffer the same interference, including landowners, other iwi and hapū.

The Court went on to observe that in very many places throughout New Zealand there would be sites of historical, nutritional, spiritual and cultural significance at risk or

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177 At [67]. See generally at [60]–[68].
178 See generally at [69]–[74].
179 At [72].
180 At [82]. See generally at [75]–[87].
181 At [82].

under threat, and the harm there was substantially the same. That was not a contestable fact, and not something that could be overcome by re-pleading or involving concepts of tikanga.

[120] The Court acknowledged that the special damage rule had been criticised by some commentators but did not reach a conclusion as to whether it should be retained. That was because it was satisfied that, even if the rule were abolished, the claim in public nuisance was "still doomed to fail" and should therefore be struck out for reasons we now explain.[182]

[121] Finally, the Court of Appeal concluded that a fatal obstacle lying in the path of Mr Smith was the lack of a sufficient connection between the pleaded harm and the respondents' activities.[183] The Court continued:

> [92] … All of the cases which have invoked this aggregation principle [the proposition that a defendant will not be exempted from liability on the grounds that they were simply one of many causing a nuisance] have involved a finite number of known contributors to the harm, all of whom were before the Court. That is no accident. It is a critical factor. None of the cases involved the sort of situation before us where there is in fact no identifiable group of defendants that can be brought before the Court to stop the pleaded harm. In none of the "Nuisance due to many" cases did the Court grant the claimant or the Attorney-General an injunction knowing it would do nothing to stop or even abate the nuisance. Indeed, we know of no public nuisance case where an injunction has been issued in those circumstances. And none was cited to us.
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> [93] We therefore agree with the High Court that the claim in public nuisance is clearly untenable and should be struck out. To allow it to proceed would not extend the existing law but distort it.

Submissions

[122] We now review the key submissions made to us.

(a) For Mr Smith

[123] In terms of the first question, Mr Bullock argued that the Court of Appeal was right to find that Mr Smith's claim involved a tenable interference with public rights. Further, it was also right to find that interferences with rights pleaded in the claim were

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182 At [87].
183 See generally at [88]–[93].

tenable foundations for a claim in public nuisance and consistent with general formulations of the tort of public nuisance. He submitted that the pleaded conduct is tenably a public nuisance either because it unreasonably causes or contributes to widespread harm that materially affects the reasonable comfort or convenience of the public (including Mr Smith)—a question of fact and tenable on the pleaded claim—and/or that there is a common law public right "requiring those using the atmosphere to dispose of their GHGs in a manner that does not interfere with the continued existence of a safe and habitable climate system". This latter option was said to be a logical extension of recognised common law public rights to access roads, fisheries and watercourses.[184] Protection of a safe and habitable climate system was also said to be essential to, and a prior condition of, the exercise of all other common law rights.

[124] On the second question, Mr Bullock submitted that the Court of Appeal was plainly right to reject a requirement for independent illegality. Such a requirement was said to have been rejected by leading texts and the England and Wales Law Commission.[185]

[125] On the third question, Mr Bullock noted that the common law has confined standing to bring private claims in public nuisance to only those who suffered a particular (or "special") injury from an interference with rights.[186] The concern was to ensure that only plaintiffs who had suffered an actual injury (including property damage and economic loss) from an interference with the public right could bring a claim. All a plaintiff must show is an injury that is "more than mere infringement of a theoretical right which the plaintiff shares with everyone else".[187] In view of these "well-established" principles, Mr Smith's claim to standing was said to be plainly tenable. Physical damage to property has always been sufficient particular damage to found standing for a claim in public nuisance. In the alternative, Mr Bullock submitted that this Court should either abolish or relax the special damage rule in this context.

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184 This submission drew on the scholarship of Arthur Ripstein *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, Cambridge, 2009); and also JW Neyers "Reconceptualising the Tort of Public Nuisance" (2017) 76 CLJ 87.

185 Counsel cited, among other things, Murphy, above n 146, at 138; *Halsbury's Laws of England* (5th ed, 2018, online ed) vol 78 Nuisance at [105]; and Law Commission, above n 145, at [2.4].

186 Counsel cited, among other things, *Anonymous*, above n 148.

187 Counsel cited Fleming, above n 147, at 491.

[126] On the fourth question, Mr Bullock submitted that public nuisance is a tort engaging collective action problems. It often arises where the injury at issue was caused by "very many people in a small amount much like the case before the Court now". Mr Bullock submitted that it was important to recall that a public nuisance is established by a defendant's material contribution to a state of affairs that amounts to an unreasonable interference with a public right or with the comfort or convenience of a class of subjects. The relevant causal question is whether the defendant contributed to that rights-interfering state of affairs. A plaintiff does not need to prove that they were harmed *by the defendant* directly. All a plaintiff must establish is that they suffered a particular injury from the state of affairs to which the defendant contributed. Asked where this approach left the *de minimis* principle,[188] Mr Bullock submitted that only unreasonable users commit public nuisances.

[127] The Court of Appeal had acknowledged that there were a number of English cases standing for the proposition that a defendant will not be exempted from liability on the grounds that they were simply one of many causing a nuisance. That would be so even if the defendant's actions in isolation would not amount to a nuisance or of itself cause any harm—the nuisance consisting "in the aggregation".[189] The Court of Appeal accepted those principles could be part of New Zealand law, albeit they had not been explicitly endorsed.

[128] But Mr Bullock submitted that the Court of Appeal then erred in distinguishing those cases on the basis that they involved a finite number of known contributors to the harm, all of whom were before the Courts. He submitted that distinction does not bear scrutiny. There are numerous cases where defendants have been found to have caused a public nuisance for discharges into rivers, despite individual householders being the actual contributors of the discharge or the waterways having been polluted

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188 "De minimis", or "de minimis non curat lex", is a legal doctrine that translates as "the law cares not for small things". In the context of tort law, it means that a defendant cannot be said to have caused a harm if their contribution was so small as to be considered trivial: see Todd, above n 126, at [19.2.2].

189 CA judgment, above n 5, at [90].

by numerous other non-party sources (including other industrial users).[190] Mr Bullock submits that it is irrelevant that there are other contributors not before the Court, and that, if the respondents consider others should be put before the Court, it is open to them to join them. He concluded, on this point, "Mr Smith is entitled to restrain anyone doing him wrong, and he is not required to identify and restrain *everyone* doing so".

[129] Finally, on relief, counsel for Mr Smith submitted that the injunctions sought are effective and open to the court, the relief sought still enables policy questions to be left to the policy-makers, and declaratory relief is important even if an injunction is not granted.

[130] Ultimately, Mr Bullock submitted that policy concerns have never been a reason to deny a plaintiff recourse to the courts where public nuisance is alleged. The courts have long used the tort to address complex, polycentric and regulation-laden problems. The proper approach is to identify whether the plaintiff has been wronged and to grant relief. Policy implications can be tackled by the executive and the legislature. Injunctive relief might be suspended in anticipation of such action. But that is a matter for the trial judge.

(b) For the respondents

[131] We start by noting that, at a broad level, counsel for the respondents, led by Mr Kalderimis, submitted that the Court ought not to engage in a judicial response to climate change, because it is not equipped to design or implement one. The problem is polycentric and political; there are a broad range of interests and trade-offs at issue; and complex scientific and economic judgements are required.[191] They submit that

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190 Mr Bullock cited, for example, *Attorney-General v Leeds Corp* (1870) LR 5 Ch App 583 (Court of Appeal in Chancery); *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch App 146 (Court of Appeal in Chancery); *Rex v Neil* (1826) 2 Car & P 485, 172 ER 219; *Woodyear v Schaefer* 57 Md 1 (Court of Appeals of Maryland 1881); *Blair v Deakin* (1887) 57 LT 522 (Ch); *Crossley and Sons Ltd v Lightowler* (1867) LR 2 Ch App 478 (Court of Appeal in Chancery); *The Attorney-General for the Dominion of Canada v Ewen* (1895) 3 BCR 468 (BCSC); *Thorpe v Brumfitt* (1873) LR 8 Ch App 650 (Court of Appeal in Chancery); and *Lambton v Mellish* (1894) 3 Ch 163 (Ch).

191 Among other authorities, the respondents refer to the decision of the Federal Court of Australia, Full Court in *Minister for Environment v Sharma* [2022] FCAFC 35, (2022) 291 FCR 311 at [228] and [253]—a claim in negligence.

Mr Smith's claim is legally incoherent and would damage the integrity of tort law. Tort law is founded, they say, on a relational connection between plaintiff and tortfeasor.[192] Mr Smith's claim, involving no relationship with the respondents, "would do violence to New Zealand's law of obligations". It would abrogate "the relational underpinnings that are fundamental to tort law".[193] They argue that the fact that the appeal is to the courts' rights-protection function, rather than to the executive or legislative branches, should of itself be a warning sign. It is a departure from the common law's "incremental method of development", and an invitation to the judiciary to "rewrite the foundations of tort law, and to step beyond tort law and into the domain of the political branches". They contrast the development of the common law in invasion of privacy in *Hosking v Runting*,[194] which they say was a "logical development" from United States and British jurisprudence.

[132] Taking the first and second questions together, on the basis that they are related issues, Mr Kalderimis and Mr T D Smith submitted the Court of Appeal was wrong to accept that interests in "public health, property or comfort" are public rights protected by the law of public nuisance, without an identified, independent illegality. The cases involving a public nuisance are said to fall into two categories: (1) those involving a specific established public right, such as to navigation of the highway; and (2) those involving independently *unlawful* interferences to public health, safety or comfort. The latter also involve public rights, "as the public have a right in common to be free of the effects of unlawful conduct". The cases relied on by Mr Smith were said to involve interference with the use of a public highway or widespread private nuisances, themselves independently unlawful, or cases of public mischief.

[133] On the third question, counsel for the respondents submitted that the special damage rule is a long-established requirement and should be retained. Public rights are vested in the Attorney-General, which is a constitutional protection. They submit that although Mr Smith asserts that it is sufficient for him to have suffered an actual injury, that does not constitute special damage if others suffer the same harm, because

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192 Counsel cited *MacPherson v Buick Motor Co* 217 NY 382 (Court of Appeals of New York 1916) at 385, referred to in *M'Alister v Stevenson* [1932] AC 562 (HL) (commonly known as *Donoghue v Stevenson*).

193 Citing CA judgment, above n 5, at [113].

194 *Hosking v Runting*, above n 135, at [117] per Gault P and Blanchard J.

it is insufficiently particular. They submit Mr Smith's pleaded damage is not sufficiently particular or direct; it is no different in kind from damage that will be suffered by many thousands of others—and nor is it significantly different in degree. The respondents submit that if any public rights require vindication here, this should be done by the Attorney-General or through a relator action with the Attorney-General's consent.

[134] On the fourth question, Mr Kalderimis and Mr T D Smith submitted that the core of public nuisance lies where there is a clear analogy with private nuisance.[195] In this context, the requirement for "emanation"—transferral of the nuisance—creates a relational and causal connection between plaintiff and defendant, while enabling identification of a finite class of defendants over which the court could have jurisdiction.[196] Those defendants must have made a direct and serious contribution to the relevant harm. As climate change is a "phenomenon caused by the global combination of all emission activities over decades", the respondents' future net emissions, either individually or collectively, cannot be said to "cause the nuisance".

[135] Counsel for the respondents submitted that the factual and legal analogy between the 19th-century sewage cases and climate change is untenable. Counsel submitted those cases involved an emanation (1) physically traceable to the defendant, reflecting a close analogy with private nuisance or a direct obstruction of a right of way, so that an injunction would remove the emanation or obstruction; and (2) which was either itself a nuisance or substantially aggravated the interference with the plaintiff's rights.

[136] In contrast, the effects of climate change are the products of emissions from millions of sources, located globally, over many decades. The sewage cases involved established private or public rights, discrete and identifiable defendants subject to the courts' jurisdiction, a simple physical connection between the activities of the

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195 Counsel submitted that courts draw heavily on the more frequent private nuisance cases in considering public nuisance cases, citing as authority Spencer, above n 141, at 58; and Law Commission, above n 145, at [3.12].

196 Counsel emphasised the discussion of emanation by this Court in *Wu*, above n 165, at [122]–[124] per Elias CJ, McGrath, Glazebrook and Tipping JJ. Counsel also submitted that exceptions to a requirement for emanation were rare and concerned direct obstruction to the use and enjoyment of land.

defendant and the interference with the established rights, and a simple relationship between relief and abatement of the harm. None of these qualities, the respondents say, exist in the case of climate change and public nuisance.

[137] Counsel for the respondents submitted that indeterminacy issues arise by the very vagueness of a "materiality" threshold. The respondents are not responsible for at least 99.8 per cent of global emissions. Harm to Mr Smith will not be avoided if emitters elsewhere are permitted to emit at levels above the reductions said to be essential.[197] They submit there is no principled reason why materiality should be assessed by reference to New Zealand, rather than global, emissions. As Mr Kalderimis put it, none of the respondents are among the world's major emitters, and to capture them, Mr Smith would need to bring his claim against foreign corporations and state entities.

[138] Relatedly, counsel submitted that public and private nuisance claims do not extend to *suppliers* of products used to create a nuisance. In the present case those suppliers (and/or producers) are the respondents Z Energy, Channel Infrastructure and BT Mining. In this instance, the alleged nuisance is said to be caused by users of the products, rather than those respondents.[198] The respondents rely on overseas authorities that have struck out public and private nuisance claims in such cases.[199]

[139] Finally, on relief, the respondents submitted that the relief sought is contrived, which points to deeper problems with Mr Smith's claim. The fact that, on examination, the claim boils down to essentially symbolic relief indicates that the rights sought to be created are inconsistent with the law of private obligations.

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197 See above at [53].

198 BT Mining also made the point that the emissions complained of in relation to them occur exclusively overseas and that they did not exist until 2016. Channel Infrastructure argued that it was further removed than the other parties because it is simply a carrier of products.

199 Counsel cited, among other things, *Budden v BP Oil Ltd* (1980) 124 SJ 376 (CA); *Hoffman v Monsanto Canada Inc* 2005 SKQB 225, (2005) 15 CELR (3d) 42 (affirmed in 2007 SKCA 47, (2007) 283 DLR (4th) 190, and leave to appeal refused in [2007] SCCA 347); and *Re Syngenta AG Mir 162 Corn Litigation* 131 F Supp 3d 1177 (D Kan 2015).

(c) For the interveners

[140] On behalf of Lawyers for Climate Action, Ms Cooper KC submitted that Mr Smith's claims are arguable and should therefore go to trial. His claims were said to be based on the "unremarkable proposition" that those causing him harm should be held responsible. Ms Cooper submitted that one of the functions of tort law is to promote efficiency by requiring people to internalise the costs of harms from accidents and pollutants. To that end, holding a polluting factory owner responsible for damage the factory causes to the environment will encourage appropriate steps to be taken to reduce that damage. Absent liability, the factory owner would likely continue to damage the environment because the costs are externalised. There is an argument, it was said, that climate change is a paradigmatic case for tort law to make emitters bear the true costs of their GHG emissions and drive necessary steps to reduce GHG emissions.

[141] Ms Cooper submitted that climate change has much in common with the pollution nuisance cases relied on by Mr Smith, and that his claim falls within the orthodox principles of public nuisance. As to causation, Ms Cooper submitted that this Court should now recognise an alternative approach to causation whereby multiple contributors who factually contribute to a harm bear causal responsibility even if the harm would have occurred without that contributor's particular contribution. Ms Cooper submitted that even if this Court considers that "but for" causation is a requirement of the current law, it should expressly recognise that it is no longer required in cases such as Mr Smith's. Those who materially contribute to environmental harm should be responsible even if the harm would still have been suffered but for their individual contributions.

[142] Finally, on behalf of the Human Rights Commission, Mr Butler first submitted that development of the common law torts is an act done by the judicial branch of government of New Zealand, within the meaning of s 3(a) of the New Zealand Bill of Rights Act 1990 (NZBORA). The courts are therefore required to ensure that those torts are developed in a manner not inconsistent with the rights and freedoms protected by NZBORA. Here, at least the right not to be deprived of life in s 8 and the right of minorities to enjoy their culture in s 20 of NZBORA appeared to be engaged. Second,

Mr Butler submitted that even if s 3(a) is not engaged (or neither of the two rights is directly implicated), as a matter of common law methodology, the courts apply a strong presumption that New Zealand's domestic law, including the common law of torts, should be compatible with New Zealand's international obligations, including under both international human rights law and the international law of environmental protection. Third, Mr Butler submitted that, in any event, the Court might also have regard to relevant international materials and comparative jurisprudence relating to human-induced climate change, to the extent it assists the Court with its consideration of the present claim, particularly in considering a potential novel duty of care and potential recognition of a new tort.

Our assessment

[143] As noted earlier, we are satisfied that the four questions posed by the Court of Appeal—see at [115] above—are the right questions to address on strike out. But we are not satisfied that the Court reached the right conclusion on each of them. In the end, we consider the standard for strike out of this cause of action—the standard prescribed at [83]–[85] above—is not met. Because the matter must now proceed to trial and may yet return to us with the benefit of evidence and fuller argument, we must express our reasons succinctly. The test for strike out is either met or it is not. Here it is not, and Mr Smith now gets his day in court. Were this a substantive judgment, rather than an interlocutory appeal, we would say more. But we reiterate the point made above at [84]—a refusal to strike out a cause of action is not a commentary on whether or not the claim ultimately will succeed.

(a) The "first question": actionable public rights tenably pleaded

[144] We agree with the Court of Appeal's approach to the first question—whether actionable public rights are tenably pleaded. The Court concluded that a nuisance is public if it (1) affects a class of the public, such as the inhabitants of a local neighbourhood or a representative cross-section of them (the adverse effects need not extend to a public place); and/or (2) infringes rights belonging to the public as such.[200] That analysis drew on the approach taken by the House of Lords in *Rimmington*—

[200] CA judgment, above n 5, at [67].

which in turn drew on a definition of the "cognate offence" given by *Archbold.*[201] Thus expressed, they are alternative formulations.[202]

[145] For present purposes it is sufficient to observe that rights pleaded by Mr Smith—the rights to public health, public safety, public comfort, public convenience and public peace—fall tenably within (or bear sufficient relation to) the particular rights identified in *Rimmington* as providing foundation for a public nuisance pleading: i.e. public rights to life, health, property or comfort. Similar rights were relied on by our Court of Appeal in *Abraham and Williams Ltd*.[203]

(b) The "second question": independent illegality not required

[146] We turn now to the second question posed by the Court of Appeal—whether independent illegality is required. It will be recalled that the Court of Appeal concluded that it was not necessary for the act or omission to be in itself a legal wrong separate from the alleged nuisance, and that what mattered was that the act or omission caused common injury. This raises a question of law.

[147] Here English law is less relevant to the analysis, for the tort of public nuisance there arose (as we noted earlier) largely in lockstep with the parallel common law criminal offence. The criminal law of this country has been codified by statute for 130 years, since the Criminal Code Act 1893. We consider that parallel unlawfulness is not a prerequisite in New Zealand, and it may be doubted that it still is in England.[204] Nor is it readily apparent why, as a matter of policy, liability in tort for public nuisance—i.e. a substantial common injury to rights to life, health, property or comfort of the public—should need to be dependent on an alternative underlying illegality. The primary limit noted at [111] above still applies: the defendant's act or omission must substantially and unreasonably interfere with public rights before it is actionable. We agree, therefore, with the Court of Appeal's observation that what really matters is that the act or omission causes common injury. As that Court put it, "the focus as a

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201 *Rimmington*, above n 140, at [10] and [36] per Lord Bingham and [45] per Lord Rodger. See above at [109].

202 See Law Commission, above n 145, at [3.36].

203 *Abraham and Williams Ltd*, above n 156, at 484 per Gresson J.

204 *Halsbury's Laws of England*, above n 185, at [105]; Murphy, above n 146, at 138; and Law Commission, above n 145, at [2.4].

matter of principle is not on the legal character of the act or omission complained of but rather its adverse effect".[205] The tort can stand on its own two feet. Its development in New Zealand does not require the act or omission complained of to be independently unlawful.

(c) The "third question": special damage rule requires reconsideration

[148] We turn now to the special damage rule. Correctly for a strike out, the Court of Appeal said that it was willing to adopt the "most liberal formulation of the special damage rule" and would only look to see whether the pleaded harm was "capable of being viewed as appreciably exceeding that suffered by the general public".[206] However, the Court then took the view that the harm suffered by Mr Smith's interests did not sufficiently exceed the degree of harm to very many other people in New Zealand (or elsewhere in the world) who suffer the same interference, including landowners, other iwi and hapū.[207]

[149] The special damage rule is a rule of standing. It is said to come down to a "simple question": whether the damage suffered by the plaintiff is different from that suffered by other members of the community.[208] Its justifications are broadly two: a proposition that relief for common injury should be in the hands of the Crown, and a concern about potential multiplicity of actions.[209] The former is logically connected to the 18th- and 19th-century connections made between the tort and crime of public nuisance, which no longer apply in New Zealand, and the latter concern predates 20th-century developments in class actions and case management. As the authors of *Fleming's The Law of Torts* suggest, the rationales for the standing rule are not now particularly convincing:[210]

> The mere fact that a great number of people have cause to complain is not otherwise recognised as a disqualification from bringing suit; indeed, if the complainants could establish their standing to sue for private nuisance, it would not matter how many there were who shared the same plight. Besides, the requirement ill befits our renewed consciousness for safeguarding the

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205 CA judgment, above n 5, at [72].
206 At [82].
207 See above at [119].
208 *Stein v Gonzales* (1985) 14 DLR (4th) 263 (BCSC) at 267–277.
209 See, for example, Fleming, above n 147, at 490.
210 At 490 (footnote omitted). See also Murphy, above n 146, at 144–147.

> environment and the desirability of encouraging private initiative against polluters.

[150] Modern authority suggests a rather more nuanced question than the "simple" question suggested above lies at the heart of the special damage rule. *Fleming's The Law of Torts* identifies a "clear modern tendency to reject the elusive distinction between difference in kind and in degree, and to allow recovery if the obstruction causes more than mere infringement of a theoretical right which the plaintiff shares with everyone else".[211] A similar point is made by the authors of *Fridman's The Law of Torts in Canada*:[212]

> Although arguments can be made in support of each view [whether difference in kind or in degree is required], [a] liberal approach to the special damage requirement [where a difference in degree suffices] is preferable. This is because it coheres better with the traditional understanding of the requirements of particularity and directness. The particularity requirement is best interpreted as requiring that an individual plaintiff bringing an action for public nuisance has suffered some loss over and above the mere interference with his or her rights as a member of the public, and this is captured by a difference in degree or extent rather than by a difference in kind. And the directness requirement, which can be traced back to *Ricket v Directors of the Metropolitan Railway Company*, is nothing but the requirement that the damages in question must flow from an interference with the plaintiff's exercise of his or her public rights, rather than from an interference with the public rights of somebody else. The directness requirement, in short, is a matter of privity.

[151] As noted, the authoritative requirement for special damage in New Zealand dates back to a 19th-century decision of the Court of Appeal, *Mayor of Kaiapoi v Beswick*.[213] Even then the Court of Appeal observed that "[t]o reconcile the authorities [on the special damage rule] would be difficult, perhaps impossible".[214] We consider the special damage rule requires reconsideration in a 21st century context, in which the implications of ubiquitous harms such as pollution (including from GHGs) are more evident and better understood, and in which class actions and active judicial case management have developed and are better able to meet fears of an oppressive multiplicity of actions. In public law, for instance, New Zealand takes a

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211 Fleming, above n 147, at 211.

212 Erika Chamberlain and Stephen GA Pitel (eds) *Fridman's The Law of Torts in Canada* (4th ed, Thomson Reuters, Toronto, 2020) at 238 (footnotes omitted) citing *Ricket v Metropolitan Railway Co* (1867) LR 2 HL 175 (HL).

213 *Beswick*, above n 150, at 207 per Arney CJ. Mr Bullock submitted that it is far from clear that *Beswick* remains good law, if it ever was.

214 At 206 per Arney CJ.

liberal approach to standing in cases involving the public interest.[215] Whether the special damage requirement, if such it be, should remain part of New Zealand law, and whether it should require difference in kind and/or degree from damage suffered by other members of the community generally, needs review in the context of full evidence and associated argument (including, as we note later, as to the implications of tikanga on such a requirement).[216]

[152] However, regardless of whether the standing rule is revoked, retained or reformed, we consider Mr Smith has a tenable claim to meeting its present requirements because of his pleading of damage to coastal land at Mahinepua C in which he and others he represents claim both a legal interest and distinct tikanga interests. If the interests of many others, whether proprietary or tikanga, are likewise affected, that may say more about the gravity of the alleged tort than the propriety of entertaining it. While the effects of human-caused climate change are ubiquitous and grave for humanity, their precise impact is distributed and different. The pleaded effects, including inundation of coastal land and impacts on fishing and cultural interests, go beyond a wholly common interference with public rights.

(d) The "fourth question": sufficient connection, or causation

[153] Finally, we turn to the question of sufficient connection, or causation. The Court of Appeal's conclusion on this issue—which it said presented a fatal obstacle for Mr Smith—is set out at paragraph [121] above.

[154] Ultimately, the Court of Appeal considered that "climate change simply cannot be appropriately or adequately addressed by common law tort claims". It was, it said, "quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination".[217] It may indeed be beyond the capacity of the common law to resolve climate change in fact, but we are not presently convinced, at this stage of the proceeding, addressing only strike out, that the common law is incapable of addressing tortious aspects of climate change.

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215 See, for example, *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 (CA); and *Budget Rent-A-Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414 (CA).

216 At [182] below.

217 CA judgment, above n 5, at [16].

[155] Climate change was described to us as an existential crisis, and the respondents would have it that its range and diffuse and disparate causes exceed the capacity of the common law for response. The Court of Appeal appeared to share that view. Another assessment, that might arise after the benefit of evidence and a full trial, may be that climate change is different in scale, but a consequence of a continuum of human activities that may or may not remain lawful depending on whether the harm they cause to others is capable of assessment and attribution. It is here beyond question that the respondents are either very substantial emitters of GHGs or are (or have been) very substantial suppliers of fossil fuels that release GHGs when burned by others. Further, as we are dealing with a strike out application, where pleaded facts are assumed to be capable of proof, we have been required to assume for present purposes that the consequence of those emissions attributable to the respondents' activities is harm to the land and other pleaded interests held by Mr Smith.

[156] The common law has not previously grappled with a crisis as all-embracing as climate change. But in the 19th and early 20th centuries it had to deal with another existential crisis, albeit one of lesser scale, when the industrial revolution dramatically enlarged the risk of accidents through the mechanisation of factories, transportation and mining.[218] The law's response was a mixture of the flawed (e.g. the common employment rule restricting claims by employees for injury)[219] and the inspired (e.g. the duty of care based on neighbourhood, expounded by Lord Atkin in *Donoghue v Stevenson*).[220] Importantly, where the common law's response proved flawed, it was revised by the legislature either enlarging or limiting its reach (e.g. via the Factory Acts, workers' compensation and ultimately in this country by the accident compensation scheme).

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218 See, for example, WR Cornish and G de N Clark *Law and Society in England 1750–1950* (Sweet & Maxwell, London, 1989) at 483–541.

219 See, for example, Ken Oliphant "Tort Law, Risk and Technological Innovation in England" (2014) 59 McGill LJ 819; and Michael Ashley Stein "Victorian Tort Liability for Workplace Injuries" [2008] U Ill L Rev 933. Oliphant observes (at 834, footnotes omitted) that "claims by injured workers ran into an obdurate judiciary that contrived to insulate employers from the costs of workplace accidents through the application of an 'unholy trinity' of defences: contributory negligence (which was then a complete defence), *volenti non fit injuria* (voluntary acceptance of risk) and common employment. … Essentially, the common employment rule provided that an employer could not be held vicariously liable for tortious injury caused by one employee to another, as every employee is deemed to accept the risk of negligence by a fellow servant."

220 *Donoghue v Stevenson*, above n 192.

[157] As a consequence of the long, global industrial revolution, the common law had to deal with new, widespread risk and damage caused by air and water pollution and the escape of biohazards.[221] We note two well-known, mid-19th-century examples.[222] First, *Attorney-General v Council of the Borough of Birmingham*, in which a wealthy landowner obtained an injunction against the local authority in Birmingham restraining it from discharging the town's sewage into the River Tame, despite the difficulties that might cause the city.[223] Seven years later, in *St Helen's Smelting Co v Tipping*, the House of Lords held a factory owner liable in private nuisance for noxious discharges from a copper smelting chimney that diffused over the plaintiff's country estate on the outskirts of the heavily industrialised town of St Helens.[224] An injunction was ultimately granted in separate Chancery proceedings.[225] In these activities (sewage disposal and smelting) there is a mix of public and private harm and public and private good, and the common law (revised sometimes by statute) has had to mediate liability for the former. Climate change engages comparable complexities, albeit at a quantum leap scale enlargement.

[158] In the appeal now before us, the Court of Appeal said that:[226]

> All of the cases which have invoked this aggregation principle have involved a finite number of known contributors to the harm, all of whom were before the Court. That is no accident. It is a critical factor.

[159] As Mr Bullock submitted, however, there are numerous cases where defendants have been found to have caused public nuisances by discharging into

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221 The efficacy of the common law's response to these harms is often debated: see, for example, Joel Franklin Brenner "Nuisance Law and the Industrial Revolutions" (1974) 3 JLS 403; John PS McLaren "Nuisance Law and the Industrial Revolution—Some Lessons from Social History" (1983) 3 Oxford Journal of Legal Studies 155; Ben Pontin "Nuisance Law and the Industrial Revolution: A Reinterpretation of Doctrine and Institutional Competence" (2012) 75 MLR 1010; and David Bullock "Public Nuisance and Climate Change: The Common Law's Solutions to the Plaintiff, Defendant and Causation Problems" (2022) 85 MLR 1136 at 1159–1160.

222 Other examples include *Bamford v Turnley* (1862) 3 B & S 66, 122 ER 27 (KB); *Crossley and Sons Ltd*, above n 190; *Colney Hatch Lunatic Asylum*, above n 190; *Leeds Corp*, above n 190; *Blair*, above n 190; *Pride of Derby and Derbyshire Angling Association LD v British Celanese LD* [1953] Ch 149 (CA); *Southport Corp v Esso Petroleum Co Ltd* [1954] 2 QB 182 (CA) (reversed on appeal in *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 216 (HL)); and *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 (QB).

223 *Attorney-General v Council of the Borough of Birmingham* (1858) 4 K & J 528, 70 ER 220 (Ch) at 225–226.

224 *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642 (HL).

225 Ben Pontin *Nuisance Law and Environmental Protection: A study of nuisance injunctions in practice* (Lawtext Publishing, Oxfordshire, 2013) at 88–94.

226 CA judgment, above n 5, at [92].

rivers, despite individual householders being the actual contributors to the discharge or the waterways having been polluted by numerous other non-party sources (including other industrial users). As he says, in these cases not all of the contributing polluters were before the court, and nor was it realistic to identify any meaningful finite number of known contributors. It will suffice to refer to four authorities.

[160] In *Crossley and Sons Ltd v Lightowler*, the plaintiff was a manufacturer claiming that the waters of the River Hebble, on which it depended, had been polluted by the defendant's dye works upstream.[227] One defence advanced was that the water had already been fouled by other manufacturers, so an injunction would be immaterial and would not stop the harm experienced by the plaintiff.[228] An injunction having been issued at first instance, Baron Chelmsford LC said on appeal: "Where there are many existing nuisances, either to the air, or to water, it may be very difficult to trace to its source the injury occasioned by any one of them."[229] The defendant could not "add to the former foul state of the water" and then assert that they "are not to be responsible on account of its previous condition".[230] As the Lord Chancellor noted, that would effectively make the defendant's pollution lawful, so that it might continue even if the plaintiff succeeded in getting the other polluters to stop.[231] As a matter of evidence, the Court was satisfied that non-parties had not polluted to the extent alleged by the defendant, meaning the defendant was a significant cause, but not necessarily the exclusive cause of the nuisance.[232]

[161] *Blair v Deakin* was another case of a dye works upstream impacting upon plaintiffs' factories downstream.[233] Opposing an injunction and damages, the defendants argued that its pollution was diluted to the point of being innocuous by the

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227 *Crossley and Sons Ltd*, above n 190.
228 At 478.
229 At 481.
230 At 481.
231 At 481–482.
232 *Crossley & Sons Ltd v Lightowler* (1866) LR 3 Eq 279 at 289–290 (seemingly unchallenged on appeal).
233 *Blair*, above n 190.

time it reached the plaintiffs' intakes, and that the effect experienced by the plaintiffs was caused by other factories along the brook. Granting an injunction, Kay J asked:[234]

> … is it the law that, supposing it is impossible to say that any one of those persons pours into this stream foul matter enough by itself to create a nuisance, but that what they all pour in together does create a nuisance, that the plaintiffs cannot sue any one of them? If that were so I suppose a plaintiff who lost that which is his natural right—namely, to have the water of the stream pass in its original pure condition—might lose that right entirely by the combined action of a number of manufacturers above him. They might all laugh at him and say, "You cannot sue any one of us because you cannot prove that what each one of us does would of itself be enough to cause you damage." All I can observe is that, in my opinion, it would be a most unjust law if there were such a law.

[162] In *The Attorney-General for the Dominion of Canada v Ewen*, the defendant's canning factory was depositing fish waste material into a river to, as the plaintiffs claimed, "the detriment of navigation and the annoyance of the public".[235] The defendant contended the waste material only became a nuisance (if at all) because of a number of other factories doing the same thing. The Supreme Court of British Columbia held, following, among other cases, *Blair*, that "[everyone] who contributes to a nuisance is liable, if in the aggregate a nuisance is proved".[236]

[163] Finally, in *Woodyear v Schaefer* the Court of Appeals of Maryland issued an injunction restraining a slaughterhouse from dumping blood products in a river, despite the defence run that many other slaughterhouses were contributors.[237] Relying in part on *Crossley*, the Court held:[238]

> It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream. Each and every one is liable to a separate action, and to be restrained.

[164] There are several other authorities to the same effect.[239] It is not, therefore, the case that all defendants causing or contributing to a nuisance must be before the court

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234 At 525.
235 *Ewen*, above n 190, at 468.
236 At 471.
237 *Woodyear*, above n 190.
238 At 9 (citations omitted).
239 See, for example, *Leeds Corp*, above n 190; and *Colney Hatch Lunatic Asylum*, above n 190, where the fact there were other contributors did not prevent an injunction being issued. See also, in the private nuisance context, *St Helen's Smelting Co*, above n 224, where the defendants unsuccessfully submitted that no material damage was done by whatever the defendants might be doing (such being the district) and that other chimneys were contributory.

(or capable of being so). Further, the waterway cases suggest it is certainly arguable that in the case of public nuisance, a defendant must take responsibility for its contribution to a common interference with public rights; its responsibility should not be contingent on the absence of co-contribution or be in effect discharged by the equivalent acts of others.[240]

[165] As noted earlier, the respondents submit that an emanation, in the form of a physical, traceable transferral of the nuisance, is required in most public nuisance cases. Mr T D Smith gave the example, in the context of the historic waterway cases, of taking a particle of effluent discharged from a defendant's sewer outlet and tracing it all the way down the waterway to where it interfered with the plaintiff's rights. Whether this is so, or should as a matter of principle remain so, is open to argument. It does not follow that the "but for" causation reasoning that dominates the tort of negligence should serve the same function in the tort of public nuisance.

[166] How the law of torts should respond to cumulative causation in a public nuisance case involving newer technologies and newer harms (GHGs, rather than sewage and other water pollution) is a matter that should not be answered pre-emptively, without evidence and policy analysis exceeding that available on a strike out application. Accordingly, suppliers of fuels producing GHGs—here the fifth, sixth and seventh respondents, who supply retail and commercial customers with fuel products; operate a shipping terminal, storage tanks and a pipeline that carries fuel; and who mine coal principally for export, respectively—should not in our view be eliminated as parties until these difficult but fact- and policy-driven questions have been resolved by full trial and (potential) appeal.[241]

[167] In any case, and as we have already said, we must assume for present purposes that the consequence of those emissions attributable to the respondents' activities is harm to the land and other pleaded interests held by Mr Smith. Likely evidence at trial will include evidence as to the scientific attribution of climate change to the

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240 See, for example, Jane Stapleton "Unnecessary Causes" (2013) 129 LQR 39 at 60–61 and 64–65; and Jane Stapleton "An 'Extended But-For' Test for the Causal Relation in the Law of Obligations" (2015) 35 Oxford Journal of Legal Studies 697.

241 See also above at [138].

respondents' activities,[242] bearing in mind that Mr Smith submits that these contributions collectively represent about one-third of New Zealand's total reported GHG emissions, but that New Zealand's GHG emissions are a fractional proportion of the global total and that historic emissions remain substantially contributory. One question that will need to be considered at trial, on the basis of evidence and policy analysis, is whether New Zealand's law of public nuisance should sanction GHG emissions here, given this state of affairs.

[168] It is also the case, as we have already established, that a defendant's actions or omissions must amount to a substantial and unreasonable interference with public rights. Even allowing for the uncertainty noted there as to the impact (if any) of the unreasonableness element, this limit still creates a significant threshold for plaintiffs. Only some emitters will cross it. Patently, ordinary domestic activities involving individuals travelling, warming their houses and cooking food, will not do so and may be *de minimis*, albeit collective actions of individuals are causative of climate change. As Romer LJ said, there must be "give and take".[243] Such actions, undertaken by individuals, may simply be a part of the price of living in society.

[169] Whether the respondents' actions amount to a substantial and unreasonable interference with public rights remains a fundamental issue of fact for trial. We do not prejudge that issue here. As just noted, it will depend on evidence, including (as we note shortly) of tikanga, and also analysis of policy factors and consideration of the human rights obligations Mr Butler referred to in his submissions on behalf of the Human Rights Commission. These last-mentioned obligations may be found, it was submitted, in both domestic rights legislation and international instruments such as the International Covenant on Civil and Political Rights and the United Nations Declaration on the Rights of Indigenous Peoples.[244] It would be inappropriate to express any view at this stage on the possible merits of the propositions advanced by

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242 For the developing literature on attribution science see, for example, Sophie Marjanac and Lindene Patton "Extreme weather event attribution science and climate change litigation: an essential step in the causal chain?" (2018) 36 JERL 265; and Michael Burger, Jessica Wentz and Radley Horton "The Law and Science of Climate Change Attribution" (2020) 45 Colum J Envtl L 57.

243 See above at [111].

244 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); and *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).

Mr Butler, except to suggest that these too will be matters with which the court will be required to grapple, as have courts in other jurisdictions.[245]

[170] Logic and experience suggest the fundamental battleground between the parties lies in this part of the case: causation, substantiality and unreasonableness, and (by association) remedy—to which we now turn.

[171] As to remedy, we acknowledge that Mr Smith may face obstacles in obtaining any remedy requiring cessation (by injunction). But on the other hand, it might also be thought that closer, more conventional examination of causation is commanded by a claim for compensation, requiring attribution of particular loss to a particular action or omission. A claim for damages is not a feature of this proceeding. Injunctive relief involves a rather different inquiry: if liability for public nuisance is established (including sufficient connection, substantiality and unreasonableness), the question turns to whether such rights-infringing activity may continue at all, and if so, on what terms.[246] As an equitable remedy involving a substantial measure of discretion in the calibration of remedial impact, a somewhat different approach to connection and causation may be available, as compared to a common law claim for compensatory damages. Nor do we overlook the declaratory remedy sought. The utility of the declaration of inconsistency jurisdiction in public law suggests the court should not dismiss the power of purely declaratory relief in private law. That itself was a motivating factor in the enlargement of remedies created by the Defamation Act 1992.[247]

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245 See, for example, the cases referred to in United Nations Environment Programme *Global Climate Litigation Report: 2023 Status Review* (2023) at 50–53; and *Vereniging Milieudefensie v Royal Dutch Shell plc* (District Court, The Hague, C/09/571932, 26 May 2021) (decision under appeal).

246 As, for example, in *Abraham and Williams Ltd*, above n 156, where injunctive relief against the public nuisance was suspended for 12 months to permit the operators "to rectify the position" of the stockyard, so as to avert further nuisance to the plaintiff, and with leave to apply to extend further (at 476 per O'Leary).

247 In *Recommendations on the Law on Defamation: Report of the Committee on Defamation* (December 1977) (often called the McKay Committee Report), which preceded the current legislation, it was said at [401] that: "Although the court already possesses the power to make a declaratory judgment, it is a discretionary remedy and is so far untried as a remedy for defamation. There is considerable doubt whether a judge would be prepared to grant it. We consider that use of this avenue by plaintiffs who merely sought to clear their name would be encouraged by making specific statutory reference to it as a remedy for defamation." A draft declaration provision was included in the McKay Committee Report which formed the basis of s 24 of the Defamation Act 1992: at 158.

Concluding observations

[172] As we have said already, real caution is necessary before pre-emptively disposing of a claim where seriously arguable non-trivial harm is in issue. The courts in New Zealand have barely touched (let alone grappled with) the law of public nuisance in the last century.[248] The leading authority in this country—*Abraham and Williams Ltd*—was delivered by the Court of Appeal almost 75 years ago, and most of the case law cited within it was English.[249] The principles governing public nuisance ought not to stand still in the face of massive environmental challenges attributable to human economic activity. The common law, where it is not clearly excluded, responds to challenge and change in a considered way, through trials involving the testing of evidence.

[173] In sum, we do not consider the obstacles are so overwhelming as to meet the standard for strike out stated at [83]–[85] above. The courts must be measured as to the pre-emptive denial of access to justice where it is incontestable that the respondents' actions form a part of a collective activity causing a plaintiff substantial harm. The consequence, therefore, is that they must now submit to argument, and evidence, at trial. In this area, the common law must develop, if at all, in the fertile fields of trial, not on the barren rocks of a strike out application.

What about the remaining causes of action?

[174] Where the primary cause of action is not struck out, the authorities generally discourage striking out any remaining causes of action as a point of principle, unless it can be said they both meet the criteria for striking out *and* are likely to add materially to costs, hearing time and deployment of other court resources.[250]

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248 For a rare excursion see, for example, *Coldicutt v Ffowcs-Williams* HC Auckland AP 130-SW00, 8 February 2001.

249 *Abraham and Williams Ltd*, above n 156.

250 See, for example, *Jull v Little* [2012] NZCA 364 (affirming *Little v Jull* [2012] NZCCLR 3 (HC)); *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368 (HL); *Lonrho plc v Fayed* [1992] 1 AC 448 (HL); *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 (HL); *Sun Earth Homes Pty Ltd v Australian Broadcasting Corp* (1990) 98 ALR 101 (FCA); and *John Holland Pty Ltd v Maritime Union of Australia* [2009] FCA 437.

[175] In this case, there are good reasons to follow that approach. As the pleading itself demonstrates, the same facts are alleged, and are alleged to be relevant, in all three causes of action. Striking out the remaining claims in negligence and the proposed climate system damage tort would be unlikely to produce a material saving in hearing time or other court resources. And, although each cause of action has its own doctrinal underpinning, the deeper questions of necessary relationship, proximity, causation, disproportionality and indeterminacy raise issues common to all. Any added burden the respondents may be required to bear in confronting two additional causes of action will not be significant. Counsel for the respondents did not suggest otherwise.

[176] It follows that it is neither necessary nor appropriate that this Court traverse the remaining claims struck out in the Courts below, and we do not do so.

Can tikanga inform the formulation of tort claims?

[177] Mr Smith claims, in accordance with tikanga, a whakapapa (genealogical) and whanaungatanga (kinship) connection to the subject whenua (land), wai (fresh water) and moana (sea) in and around Mahinepua C. He claims that the respondents have contributed to climate change effects that are causing ongoing injury to the customary, cultural, historical, spiritual and nutritional values associated with these places. He alleges that his tikanga-based connection to the subject environment provides a foundation for the claim that the injury to place is also an injury to himself, his whānau (extended family) and descendants. It is alleged that the respondents must bear some responsibility for these harms.

[178] The Court of Appeal found these matters did not assist in formulating a claim in tort. To the contrary, the Court considered that "controlling climate change through regulatory means [such as the CCRA] is consistent with kaitiakitanga".[251] In other words, legislative regulation was already consistent with the responsibility, according to tikanga, of traditional owners to care for their lands and, implicitly, tort-based controls were not. The Court also commented, in relation to the special damage rule,

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[251] CA judgment, above n 5, at [34]. The Court also rejected Mr Smith's argument that striking out his claims would be a breach of the Treaty of Waitangi.

that Mr Smith could not overcome this by "re-pleading or invoking concepts of tikanga".[252]

Submissions

[179] For Mr Smith, Ms Coates submitted that caution should be exercised in striking out claims that involve the application of tikanga to areas of law to which it has not previously been applied. Expert evidence will generally be required. She argued that the essence of Mr Smith's case is not that tikanga Māori creates direct obligations on the parties to this case; rather it is that its principles must inform tort law's development in New Zealand in relation to climate change. There are aspects of tikanga, she submitted, that speak to the existing torts of public nuisance and negligence but, in particular, tikanga principles would assist in framing the proposed climate system damage tort. For example, she argued, tikanga would push against a narrow conception of proximity founded on individualism.

[180] Mr Kalderimis submitted that Mr Smith's generalised references to tikanga principles do not, any more than generalised allusions to values underlying the English common law, salvage Mr Smith's claim. What is missing from Mr Smith's claim is any adequate articulation of how tikanga principles work coherently within the framework and principles of tort law to bridge the gaps to an arguable claim. For example, there is no existing principle of tikanga, he argued, that imposes obligations on one party where they have no relational proximity to the alleged wrongdoer.

[181] On behalf of Te Hunga Rōia Māori o Aotearoa, Mr Mahuika submitted that the common law must evolve within the context and needs of New Zealand, of which tikanga forms a part. He submitted that tikanga was clearly relevant to the development of the common law, and to the development of any new tort, although it may also have relevance to the application of the established torts of public nuisance and negligence. Further, assessing the application of tikanga and its precise relevance will require an evidentiary inquiry, and evidence (including tikanga evidence) would be critical at trial. A broad approach, he argued, that accords with principles of tikanga

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252 At [82].

Māori, should be applied to standing, including in respect of public nuisance—that being a reference to the special damage rule in that context.

Our assessment

[182] It is important to keep to the fore that the specific loss pleaded by Mr Smith in this case is in part tikanga-based. Since that form of loss is an essential fact, in addressing this part of the claim the trial court will be required to engage with tikanga. Apart from any more conceptual impact tikanga may be argued to have on the framing of particular causes of action, that engagement will need to consider the potential effect of tikanga on any special damage requirement in public nuisance (if in fact special damage is required) and, with regard to all causes of action, whether tikanga-related harm is a cognisable form of loss.

[183] This is not a new phenomenon. Tikanga has in fact been applied to tort actions as required by the case and the evidence since the early days of the common law's operation in this country. Two examples will suffice: one concerning pounamu (greenstone) and the other about whales.

[184] In the 1866 case of *Reynolds v Tuangau*, there was a dispute over title to a pounamu boulder weighing "considerably more than a ton".[253] Mr Reynolds said that he had found it in a West Coast river. He broke the boulder up and had it removed in 16 bags by horse and boat to the mouth of the Taramakau river. The bags were seized by the police at the direction of the local mining warden who considered the pounamu belonged to one Simon Tuangau.

[185] Mr Reynolds sued Mr Tuangau in the Hokitika Supreme Court in trover, detinue and conversion, seeking return of the pounamu. Mr Tuangau contended the pounamu was his according to tikanga as he had worked the boulder and had left his mark on it to render it tapu (restricted) to him alone. Counsel for Mr Reynolds argued that evidence of tikanga was inadmissible "on English territory". Gresson J

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253 "James Reynolds v Simon Tuangau" *West Coast Times* (New Zealand, 8 August 1866) at 2–3. It was common in the 19th century for newspapers to report court proceedings in detail. A summary of this case is provided in *Reynold v Tuangau* SC Wellington, 7 August 1866 available at www.wgtn.ac.nz/law/nzlostcases/.

nonetheless admitted independent evidence about tikanga rendering objects tapu to their owner in this way. He directed the jury that this tikanga had been proved for the purpose of their consideration of the case.[254] While the first jury was unable to reach a verdict, a second returned a "special verdict", finding that Mr Tuangau was the "first discoverer" of the pounamu, had worked it, and had not abandoned it by the time Mr Reynolds claimed it. Mr Reynolds' claim was summarily dismissed by a five-judge appellate bench (which included Gresson J).[255]

[186] Better known is the 1910 case of *Baldick v Jackson*.[256] In that case Stout CJ dismissed an appeal by Mr Baldick and others, who were whalers, against a judgment in the Magistrate's Court in Blenheim in favour of the plaintiff, Mr Jackson, also a whaler. Mr Jackson had filed a plaint note in conversion. He claimed that Mr Baldick and company had converted the carcass of a right whale belonging to him, valued at £200. In response, the appellants argued that a 14th-century statute affirmed that the King owned all whales, meaning Mr Jackson could not establish a proprietary interest in the whale sufficient to maintain an action in conversion.[257] Stout CJ held that this statute did not apply to the circumstances of the colony of New Zealand because "Maoris … were accustomed to engage in whaling" and such activity was protected by Article Two of the Treaty of Waitangi.[258] Judgment was entered for Mr Jackson.

[187] In more recent times, the common law has re-engaged with tikanga. For example, in 2003, a five-judge bench in the Court of Appeal affirmed that Māori land rights (including in the foreshore and seabed) derived from tikanga were cognisable at common law.[259] Citing extensive authority, the Court found that this had been the position since the common law's arrival in 1840. And in *Takamore v Clarke*,[260] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*[261] and

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254 "The Supreme Court" *West Coast Times* (New Zealand, 11 August 1866) at 5.

255 See "Court of Appeal" *Daily Southern Cross* (New Zealand, 9 November 1866) at 6.

256 *Baldick v Jackson* (1910) 30 NZLR 343 (SC).

257 It is unclear whether the statute was enacted in 1322: Statute of the King's Prerogative (Eng) 15 Edw II c 2; or 1324: Statute of the King's Prerogative (Eng) 17 Edw II c 2. But in any event, s 13 provided that "the King shall have" shipwrecks, sturgeons and whales taken in the sea.

258 *Baldick*, above n 256, at 344–345. The other ground of appeal, that Mr Jackson had abandoned the whale, also failed.

259 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

260 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

261 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801.

Ellis v R (Continuance)[262] this Court considered the relationship between tikanga and the common law as it operates outside the sphere of customary title.[263] To summarise the essential conclusions reached, tikanga was the first law of New Zealand, and it will continue to influence New Zealand's distinctive common law as appropriate according to the case and to the extent appropriate in the case.[264] The respondents do not challenge these propositions. As noted, their argument is not with the relationship between tikanga and the common law, but with its practical utility in the circumstances of this case.

[188] So, to return to the starting point, whatever the cause of action, the trial court will need to grapple with the fact that Mr Smith purports to bring proceedings not merely as an alleged proprietor who has suffered loss, but as a kaitiaki acting on behalf of the whenua, wai and moana—distinct entities in their own right.[265] And it must consider some tikanga conceptions of loss that are neither physical nor economic. In other words, addressing and assessing matters of tikanga simply cannot be avoided.

[189] The analytical methodology outlined in *Ellis (Continuance)* will assist the court in this respect,[266] but more neither can nor need be said at this early stage since all we have are factual assertions that must be accepted for strike out purposes. Mr Smith's ultimate prospects at trial will depend, in part, on the quality of the evidence, including that in relation to tikanga.

Conclusion

[190] For the above reasons, the appeal is allowed and the appellant's claim is reinstated.

[191] Mr Smith is represented on a pro bono basis and does not seek costs. Whatever the outcome, he sought that costs lie where they fall in this Court, as they have done

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262 *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

263 Customary title is also known as "native title" in Australia and "aboriginal title" in Canada.

264 The past and present interface of tikanga and the common law was recently discussed in: Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023).

265 We note that a proprietary interest in the affected land is not an element of public nuisance: see Kit Barker and others *The Law of Torts in Australia* (5th ed, Oxford University Press, Melbourne, 2012) at 219–220.

266 See *Ellis (Continuance)*, above n 262, at [121]–[125] per Glazebrook J, [181] per Winkelmann CJ and [261]–[273] per Williams J.

in the Courts below, because the proceeding is brought on a public interest basis and has wider implications beyond the case at hand. We agree.

Result

[192] The appeal is allowed.

[193] The appellant's claim is reinstated.

[194] There is no order as to costs.

Solicitors:
LeeSalmonLong, Auckland for Appellant
Chapman Tripp, Wellington for First, Third and Fifth Respondents
Bell Gully, Auckland for Second Respondent
Buddle Findlay, Auckland for Fourth Respondent
MinterEllisonRuddWatts, Auckland for Sixth Respondent
MinterEllisonRuddWatts, Wellington for Seventh Respondent
J P Cundy, Auckland for Lawyers for Climate Action NZ Incorporated as Intervener
Kāhui Legal, Wellington and Whāia Legal, Wellington for Te Hunga Rōia Māori o Aotearoa | The Māori Law Society as Intervener
J S Hancock, Auckland for Human Rights Commission | Te Kāhui Tika Tangata as Intervener

TAB G

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all

persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4. 2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The

election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Twelve members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1.

(a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on tie basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

1. Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

TAB H

United Nations CCPR/C/GC/36

International Covenant on Civil and Political Rights

Distr.: General
3 September 2019

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Human Rights Committee

General comment No. 36

Article 6: right to life*, **

I. General remarks

1. This general comment replaces general comments No. 6, adopted by the Committee at its sixteenth session (1982), and No. 14, adopted by the Committee at its twenty-third session (1984).

2. Article 6 of the International Covenant on Civil and Political Rights recognizes and protects the right to life of all human beings. The right to life is the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation.[1] The right to life has crucial importance both for individuals and for society as a whole. It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right,[2] the effective protection of which is the prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights.

3. The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Article 6 of the Covenant guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes.

4. Paragraph 1 of article 6 of the Covenant provides that no one shall be arbitrarily deprived of life and that this right shall be protected by law. It lays the foundation for the obligation of States parties to respect and ensure the right to life, to give effect to it through legislative and other measures, and to provide effective remedies and reparation to all victims of violations of the right to life.

5. Paragraphs 2, 4, 5 and 6 of article 6 of the Covenant set out specific safeguards to ensure that in States parties that have not yet abolished the death penalty, death sentences are not applied except for the most serious crimes, and then only in the most exceptional cases and under the strictest limits (see part IV below). The prohibition on arbitrary deprivation of life contained in article 6 (1) further limits the ability of States parties to apply the death penalty. The provisions in paragraph 3 regulate specifically the relationship between article 6 of the Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide.

* Adopted by the Committee at its 124th session (8 October–2 November 2018).
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6. Deprivation of life involves intentional[3] or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission. It goes beyond injury to bodily or mental integrity or a threat thereto.[4]

7. States parties must respect the right to life. This entails the duty to refrain from engaging in conduct resulting in arbitrary deprivation of life. States parties must also ensure the right to life and exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities whose conduct is not attributable to the State.[5] The obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of article 6 even if such threats and situations do not result in loss of life.[6]

8. Although States parties may adopt measures designed to regulate voluntary termination of pregnancy, those measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant. Thus, restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering that violates article 7 of the Covenant, discriminate against them or arbitrarily interfere with their privacy. States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable.[7] In addition, States parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their abortion laws accordingly.[8] For example, they should not take measures such as criminalizing pregnancy of unmarried women or applying criminal sanctions to women and girls who undergo abortion[9] or to medical service providers who assist them in doing so, since taking such measures compels women and girls to resort to unsafe abortion. States parties should remove existing barriers[10] to effective access by women and girls to safe and legal abortion,[11] including barriers caused as a result of the exercise of conscientious objection by individual medical providers,[12] and should not introduce new barriers. States parties should also effectively protect the lives of women and girls against the mental and physical health risks associated with unsafe abortions. In particular, they should ensure access for women and men, and especially girls and boys,[13] to quality and evidence-based information and education on sexual and reproductive health[14] and to a wide range of affordable contraceptive methods,[15] and prevent the stigmatization of women and girls who seek abortion.[16] States parties should ensure the availability of, and effective access to, quality prenatal and post-abortion health care for women and girls,[17] in all circumstances and on a confidential basis.[18]

9. While acknowledging the central importance to human dignity of personal autonomy, States should take adequate measures, without violating their other Covenant obligations, to prevent suicides, especially among individuals in particularly vulnerable situations,[19] including individuals deprived of their liberty. States parties that allow medical professionals to provide medical treatment or the medical means to facilitate the termination of life of afflicted adults, such as the terminally ill, who experience severe physical or mental pain and suffering and wish to die with dignity,[20] must ensure the existence of robust legal and institutional safeguards to verify that medical professionals are complying with the free, informed, explicit and unambiguous decision of their patients, with a view to protecting patients from pressure and abuse.[21]

II. Prohibition against arbitrary deprivation of life

10. Although it inheres in every human being,[22] the right to life is not absolute. While the Covenant does not enumerate the permissible grounds for deprivation of life, by requiring that deprivations of life must not be arbitrary, article 6 (1) implicitly recognizes that some deprivations of life may be non-arbitrary. For example, the use of lethal force in self-defence, under the conditions specified in paragraph 12 below, would not constitute an arbitrary deprivation of life. Even those exceptional measures leading to deprivations of life that are not arbitrary per se must be applied in a manner that is not arbitrary in fact. Such exceptional

measures should be established by law and accompanied by effective institutional safeguards designed to prevent arbitrary deprivations of life. Furthermore, States that have not abolished the death penalty and that are not parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, or other treaties providing for the abolition of the death penalty can apply the death penalty only in a non-arbitrary manner, for the most serious crimes and subject to a number of strict conditions elaborated in part IV below.

11. The second sentence of article 6 (1) requires that the right to life be protected by law, while the third sentence requires that no one be arbitrarily deprived of life. The two requirements partly overlap in that a deprivation of life that lacks a legal basis or is otherwise inconsistent with life-protecting laws and procedures is, as a rule, arbitrary in nature. For example, a death sentence issued following legal proceedings conducted in violation of domestic laws of criminal procedure or evidence will generally be both unlawful and arbitrary.

12. Deprivation of life is, as a rule, arbitrary if it is inconsistent with international law or domestic law.[23] A deprivation of life may, nevertheless, be authorized by domestic law and still be arbitrary. The notion of "arbitrariness" is not to be fully equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law,[24] as well as elements of reasonableness, necessity and proportionality. In order not to be qualified as arbitrary under article 6, the application of potentially lethal force by a private person acting in self-defence, or by another person coming to his or her defence, must be strictly necessary in view of the threat posed by the attacker; it must represent a method of last resort after other alternatives have been exhausted or deemed inadequate;[25] the amount of force applied cannot exceed the amount strictly needed for responding to the threat;[26] the force applied must be carefully directed, only against the attacker; and the threat responded to must involve imminent death or serious injury.[27] The use of potentially lethal force for law enforcement purposes is an extreme measure[28] that should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat.[29] It cannot be used, for example, in order to prevent the escape from custody of a suspected criminal or a convict who does not pose a serious and imminent threat to the lives or bodily integrity of others.[30] The intentional taking of life by any means is permissible only if it is strictly necessary in order to protect life from an imminent threat.[31]

13. States parties are expected to take all necessary measures to prevent arbitrary deprivation of life by their law enforcement officials, including soldiers charged with law enforcement missions. These measures include putting in place appropriate legislation controlling the use of lethal force by law enforcement officials, procedures designed to ensure that law enforcement actions are adequately planned in a manner consistent with the need to minimize the risk they pose to human life,[32] mandatory reporting, review and investigation of lethal incidents and other life-threatening incidents, and supplying forces responsible for crowd control with effective, less-lethal means and adequate protective equipment in order to obviate their need to resort to lethal force (see also para. 14 below).[33] In particular, all operations of law enforcement officials should comply with relevant international standards, including the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,[34] and law enforcement officials should undergo appropriate training designed to inculcate these standards[35] so as to ensure, in all circumstances, the fullest respect for the right to life.

14. While preferable to more lethal weapons, States parties should ensure that less-lethal weapons are subject to strict independent testing and evaluate and monitor the impact on the right to life of weapons such as electro-muscular disruption devices (Tasers),[36] rubber or foam bullets, and other attenuating energy projectiles,[37] which are designed for use or are actually used by law enforcement officials, including soldiers charged with law enforcement missions.[38] The use of such weapons must be restricted to law enforcement officials who have undergone appropriate training, and must be strictly regulated in accordance with applicable international standards, including the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[39] Furthermore, less-lethal weapons must be employed only subject to strict requirements of necessity and proportionality, in situations in which other less harmful measures have proven to be or clearly are ineffective to address the

threat.[40] States parties should not resort to less-lethal weapons in situations of crowd control that can be addressed through less harmful means,[41] especially situations involving the exercise of the right to peaceful assembly.

15. When private individuals or entities are empowered or authorized by a State party to employ force with potentially lethal consequences, the State party is under an obligation to ensure that such employment of force actually complies with article 6 and the State party remains responsible for any failure to comply.[42] Among other things, a State party must rigorously limit the powers afforded to private actors and ensure that strict and effective measures of monitoring and control, as well as adequate training, are in place in order to guarantee, inter alia, that the powers granted are not misused and do not lead to arbitrary deprivation of life. For example, a State party must take adequate measures to ensure that persons who were involved or are currently involved in serious human rights violations or abuses are excluded from private security entities empowered or authorized to employ force.[43] It must also ensure that victims of arbitrary deprivation of life by private individuals or entities empowered or authorized by the State party are granted an effective remedy.[44]

16. Paragraphs 2, 4 and 5 of article 6 implicitly recognize that countries that have not abolished the death penalty and have not ratified the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, are not legally barred under the Covenant from applying the death penalty with regard to the most serious crimes, subject to a number of strict conditions. Other procedures regulating activity that may result in deprivation of life, such as protocols for administering new drugs, must be established by law, accompanied by effective institutional safeguards designed to prevent arbitrary deprivation of life, and must be compatible with other provisions of the Covenant.

17. The deprivation of life of individuals through acts or omissions that violate provisions of the Covenant other than article 6 is, as a rule, arbitrary in nature. This includes, for example, the use of force resulting in the death of demonstrators exercising their right to freedom of assembly[45] and the passing of a death sentence following a trial that failed to meet the due process requirements of article 14 of the Covenant.[46]

III. Duty to protect life

18. The second sentence of article 6 (1) provides that the right to life "shall be protected by law". This implies that States parties must establish a legal framework to ensure the full enjoyment of the right to life by all individuals as may be necessary to give effect to the right to life. The duty to protect the right to life by law also includes an obligation for States parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats, including from threats emanating from private persons and entities.

19. The duty to protect by law the right to life requires that any substantive ground for deprivation of life must be prescribed by law and must be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.[47] Since deprivation of life by the authorities of the State is a matter of the utmost gravity, the law must strictly control and limit the circumstances in which a person may be deprived of his or her life by those authorities,[48] and States parties must ensure full compliance with all of the relevant legal provisions. The duty to protect by law the right to life also requires States parties to organize all State organs and governance structures through which public authority is exercised in a manner consistent with the need to respect and ensure the right to life,[49] including establishing by law adequate institutions and procedures for preventing deprivation of life, investigating and prosecuting potential cases of unlawful deprivation of life, meting out punishment and providing full reparation.

20. States parties must enact a protective legal framework that includes effective criminal prohibitions on all manifestations of violence or incitement to violence that are likely to result in deprivation of life, such as intentional and negligent homicide, unnecessary or disproportionate use of firearms,[50] infanticide,[51] "honour" killings,[52] lynching,[53] violent hate crimes,[54] blood feuds,[55] ritual killings,[56] death threats and terrorist attacks. The criminal sanctions attached to these crimes must be commensurate with their gravity,[57] while remaining compatible with all the provisions of the Covenant.

21. The duty to take positive measures to protect the right to life derives from the general duty to ensure the rights recognized in the Covenant, which is articulated in article 2 (1) when read in conjunction with article 6, as well as from the specific duty to protect the right to life by law, which is articulated in the second sentence of article 6. States parties are thus under a due diligence obligation to take reasonable, positive measures that do not impose disproportionate burdens on them[58] in response to reasonably foreseeable threats to life originating from private persons and entities whose conduct is not attributable to the State.[59] Hence, States parties are obliged to take adequate preventive measures in order to protect individuals against reasonably foreseen threats of being murdered or killed by criminals and organized crime or militia groups, including armed or terrorist groups (see also para. 23 below).[60] States parties should also disband irregular armed groups, such as private armies and vigilante groups, that are responsible for deprivations of life[61] and reduce the proliferation of potentially lethal weapons to unauthorized individuals.[62] States parties must further take adequate measures of protection, including continuous supervision,[63] in order to prevent, investigate, punish and remedy arbitrary deprivation of life by private entities, such as private transportation companies, private hospitals[64] and private security firms.

22. States parties must take appropriate measures to protect individuals against deprivation of life by other States, international organizations and foreign corporations operating within their territory[65] or in other areas subject to their jurisdiction. They must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities undertaken by corporate entities based in their territory or subject to their jurisdiction,[66] are consistent with article 6, taking due account of related international standards of corporate responsibility[67] and of the right of victims to obtain an effective remedy.

23. The duty to protect the right to life requires States parties to take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats[68] or pre-existing patterns of violence. Such persons include human rights defenders (see also para. 53 below),[69] officials fighting corruption and organized crime, humanitarian workers, journalists,[70] prominent public figures, witnesses to crime[71] and victims of domestic and gender-based violence and human trafficking. They may also include children,[72] especially children in street situations, unaccompanied migrant children and children in situations of armed conflict, members of ethnic and religious minorities,[73] indigenous peoples,[74] lesbian, gay, bisexual, transgender and intersex persons,[75] persons with albinism,[76] alleged witches,[77] displaced persons, asylum seekers, refugees[78] and stateless persons. States parties must respond urgently and effectively in order to protect individuals who find themselves under a specific threat, by adopting special measures such as the assignment of around-the-clock police protection, the issuance of protection and restraining orders against potential aggressors and, in exceptional cases, and only with the free and informed consent of the threatened individual, protective custody.

24. Persons with disabilities, including psychosocial or intellectual disabilities, are also entitled to specific measures of protection so as to ensure their effective enjoyment of the right to life on an equal basis with others.[79] Such measures of protection must include the provision of reasonable accommodation when necessary to ensure the right to life, such as ensuring access of persons with disabilities to essential facilities and services,[80] and specific measures designed to prevent unwarranted use of force by law enforcement agents against persons with disabilities.[81]

25. States parties also have a heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty by the State,[82] since by arresting, detaining, imprisoning or otherwise depriving individuals of their liberty, States parties assume the responsibility to care for their lives[83] and bodily integrity, and they may not rely on lack of financial resources or other logistical problems to reduce this responsibility.[84] The same heightened duty of care attaches to individuals held in private incarceration facilities operating pursuant to an authorization by the State. The duty to protect the life of all detained individuals includes providing them with the necessary medical care and appropriate regular monitoring of their health,[85] shielding them from inter-prisoner violence,[86] preventing

suicides and providing reasonable accommodation for persons with disabilities.[87] A heightened duty to protect the right to life also applies to individuals quartered in liberty-restricting State-run facilities, such as mental health facilities,[88] military camps,[89] refugee camps and camps for internally displaced persons,[90] juvenile institutions and orphanages.

26. The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include high levels of criminal and gun violence,[91] pervasive traffic and industrial accidents,[92] degradation of the environment (see also para. 62 below),[93] deprivation of indigenous peoples' land, territories and resources,[94] the prevalence of life-threatening diseases, such as AIDS, tuberculosis and malaria,[95] extensive substance abuse, widespread hunger and malnutrition and extreme poverty and homelessness.[96] The measures called for to address adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as food,[97] water, shelter, health care,[98] electricity and sanitation, and other measures designed to promote and facilitate adequate general conditions, such as the bolstering of effective emergency health services, emergency response operations (including firefighters, ambulance services and police forces) and social housing programmes. States parties should also develop strategic plans for advancing the enjoyment of the right to life, which may comprise measures to fight the stigmatization associated with disabilities and diseases, including sexually transmitted diseases, which hamper access to medical care;[99] detailed plans to promote education for non-violence; and campaigns for raising awareness of gender-based violence[100] and harmful practices,[101] and for improving access to medical examinations and treatments designed to reduce maternal and infant mortality.[102] Furthermore, States parties should also develop, when necessary, contingency plans and disaster management plans designed to increase preparedness and address natural and man-made disasters that may adversely affect enjoyment of the right to life, such as hurricanes, tsunamis, earthquakes, radioactive accidents and massive cyberattacks resulting in disruption of essential services.

27. An important element of the protection afforded to the right to life by the Covenant is the obligation on the States parties, where they know or should have known of potentially unlawful deprivations of life, to investigate and, where appropriate, prosecute the perpetrators of such incidents, including incidents involving allegations of excessive use of force with lethal consequences (see also para. 64 below).[103] The duty to investigate also arises in circumstances in which a serious risk of deprivation of life was caused by the use of potentially lethal force, even if the risk did not materialize (see also para. 7 above). This obligation is implicit in the obligation to protect and is reinforced by the general duty to ensure the rights recognized in the Covenant, which is articulated in article 2 (1), when read in conjunction with article 6 (1), and the duty to provide an effective remedy to victims of human rights violations[104] and their relatives,[105] which is articulated in article 2 (3) of the Covenant, when read in conjunction with article 6 (1). Investigations and prosecutions of potentially unlawful deprivations of life should be undertaken in accordance with relevant international standards, including the Minnesota Protocol on the Investigation of Potentially Unlawful Death, and must be aimed at ensuring that those responsible are brought to justice,[106] at promoting accountability and preventing impunity,[107] at avoiding denial of justice[108] and at drawing necessary lessons for revising practices and policies with a view to avoiding repeated violations.[109] Investigations should explore, inter alia, the legal responsibility of superior officials with regard to violations of the right to life committed by their subordinates.[110] Given the importance of the right to life, States parties must generally refrain from addressing violations of article 6 merely through administrative or disciplinary measures, and a criminal investigation is normally required, which should lead, if enough incriminating evidence is gathered, to a criminal prosecution.[111] Immunities and amnesties provided to perpetrators of intentional killings and to their superiors, and comparable measures leading to de facto or de jure impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy.[112]

28. Investigations into allegations of violations of article 6 must always be independent,[113] impartial,[114] prompt,[115] thorough,[116] effective,[117] credible[118] and transparent (see also para. 64 below).[119] In the event that a violation is found, full reparation must be provided, including,

in view of the particular circumstances of the case, adequate measures of compensation, rehabilitation and satisfaction.[120] States parties are also under an obligation to take steps to prevent the occurrence of similar violations in the future.[121] Where relevant, the investigation should include an autopsy of the victim's body,[122] whenever possible, in the presence of a representative of the victim's relatives.[123] States parties need to take, among other things, appropriate measures to establish the truth relating to the events leading to the deprivation of life, including the reasons and legal basis for targeting certain individuals and the procedures employed by State forces before, during and after the time at which the deprivation occurred,[124] and identify the bodies of the individuals who have lost their lives.[125] States parties should also disclose relevant details about the investigation to the victim's next of kin,[126] allow the next of kin to present new evidence, afford the next of kin legal standing in the investigation,[127] and make public information about the investigative steps taken and the findings, conclusions and recommendations emanating from the investigation,[128] subject to absolutely necessary redactions justified by a compelling need to protect the public interest or the privacy and other legal rights of directly affected individuals. States parties must also take the necessary steps to protect witnesses, victims and their relatives and persons conducting the investigation from threats, attacks and any act of retaliation. An investigation into violations of the right to life should commence when appropriate ex officio.[129] States should support and cooperate in good faith with international mechanisms of investigation and prosecutions addressing possible violations of article 6.[130]

29. Loss of life occurring in custody, in unnatural circumstances, creates a presumption of arbitrary deprivation of life by State authorities, which can only be rebutted on the basis of a proper investigation that establishes the State's compliance with its obligations under article 6.[131] States parties also have a particular duty to investigate allegations of violations of article 6 whenever State authorities have used or appear to have used firearms or other potentially lethal force outside the immediate context of an armed conflict, for example, when live fire has been used against demonstrators,[132] or when civilians have been found dead in circumstances fitting a pattern of alleged violations of the right to life by State authorities.[133]

30. The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that their right to life under article 6 of the Covenant would be violated.[134] Such a risk must be personal in nature[135] and cannot derive merely from the general conditions in the receiving State, except in the most extreme cases.[136] For example, as explained in paragraph 34 below, it would be contrary to article 6 to extradite an individual from a country that had abolished the death penalty to a country in which he or she might face the death penalty.[137] Similarly, it would be inconsistent with article 6 to deport an individual to a country in which a fatwa had been issued against him or her by local religious authorities, without verifying that the fatwa was not likely to be followed;[138] or to deport an individual to an extremely violent country in which he or she had never lived, had no social or family contacts and could not speak the local language.[139] In cases involving allegations of risk to the life of the removed individual emanating from the authorities of the receiving State, the situation of the removed individual and the conditions in the receiving States need to be assessed, inter alia, based on the intent of the authorities of the receiving State, the pattern of conduct they have shown in similar cases,[140] and the availability of credible and effective assurances about their intentions. When the alleged risk to life emanates from non-State actors or foreign States operating in the territory of the receiving State, credible and effective assurances for protection by the authorities of the receiving State may be sought and internal flight options could be explored. When relying upon assurances from the receiving State of treatment upon removal, the removing State should put in place adequate mechanisms for ensuring compliance with the issued assurances from the moment of removal onwards.[141]

31. The obligation not to extradite, deport or otherwise transfer, pursuant to article 6 of the Covenant, may be broader than the scope of the principle of non-refoulement under international refugee law, since it may also require the protection of aliens not entitled to refugee status. States parties must, however, allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee or other individualized or group status determination procedures that could offer them protection against refoulement.[142]

IV. Imposition of the death penalty

32. Paragraphs 2, 4, 5 and 6 of article 6 regulate the imposition of the death penalty by those countries that have not yet abolished it.

33. Paragraph 2 of article 6 strictly limits the application of the death penalty, firstly, to States parties that have not abolished the death penalty, and secondly, to the most serious crimes. Given the anomalous nature of regulating the application of the death penalty in an instrument enshrining the right to life, the contents of paragraph 2 have to be narrowly construed.[143]

34. States parties to the Covenant that have abolished the death penalty, through amending their domestic laws, becoming parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, or adopting another international instrument obligating them to abolish the death penalty, are barred from reintroducing it. Like the Covenant, the Second Optional Protocol does not contain termination provisions and States parties cannot denounce it. Abolition of the death penalty is therefore legally irrevocable. Furthermore, States parties may not transform into a capital offence any offence that, upon ratification of the Covenant or at any time thereafter, did not entail the death penalty. Nor can they remove legal conditions from an existing offence with the result of permitting the imposition of the death penalty in circumstances in which it was not possible to impose it before. States parties that have abolished the death penalty cannot deport, extradite or otherwise transfer persons to a country in which they are facing criminal charges that carry the death penalty, unless credible and effective assurances against the imposition of the death penalty have been obtained.[144] In the same vein, the obligation not to reintroduce the death penalty for any specific crime requires States parties not to deport, extradite or otherwise transfer an individual to a country in which he or she is expected to stand trial for a capital offence, if the same offence does not carry the death penalty in the removing State, unless credible and effective assurances against exposing the individual to the death penalty have been obtained.

35. The term "the most serious crimes" must be read restrictively[145] and appertain only to crimes of extreme gravity[146] involving intentional killing.[147] Crimes not resulting directly and intentionally in death,[148] such as attempted murder,[149] corruption and other economic and political crimes,[150] armed robbery,[151] piracy,[152] abduction,[153] drug[154] and sexual offences, although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty. In the same vein, a limited degree of involvement or of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission of murder, cannot justify the imposition of the death penalty. States parties are under an obligation to review their criminal laws so as to ensure that the death penalty is not imposed for crimes that do not qualify as the most serious crimes.[155] They should also revoke death sentences issued for crimes not qualifying as the most serious crimes and pursue the necessary legal procedures to resentence those convicted for such crimes.

36. Under no circumstances can the death penalty ever be applied as a sanction against conduct the very criminalization of which violates the Covenant, including adultery, homosexuality, apostasy,[156] establishing political opposition groups[157] or offending a head of State.[158] States parties that retain the death penalty for such offences commit a violation of their obligations under article 6, read alone and in conjunction with article 2 (2) of the Covenant, as well as of other provisions of the Covenant.

37. In all cases involving the application of the death penalty, the personal circumstances of the offender and the particular circumstances of the offence, including its specific attenuating elements,[159] must be considered by the sentencing court. Hence, mandatory death sentences that leave domestic courts with no discretion as to whether to designate the offence as a crime warranting the death penalty, and whether to issue the death sentence in the particular circumstances of the offender, are arbitrary in nature.[160] The availability of a right to seek pardon or commutation on the basis of the special circumstances of the case or the accused is not an adequate substitute for the need for judicial discretion in the application of the death penalty.[161]

38. Article 6 (2) also requires States parties to ensure that any death sentence would be "in accordance with the law in force at the time of the commission of the crime". This application of the principle of legality complements and reaffirms the application of the principle of *nulla poena sine lege* found in article 15 (1) of the Covenant. As a result, the death penalty can never be imposed if it was not provided by law for the offence at the time of its commission. Nor can the imposition of the death penalty be based on vaguely defined criminal provisions,[162] whose application to the convicted individual depend on subjective or discretionary considerations,[163] the application of which is not reasonably foreseeable.[164] On the other hand, the abolition of the death penalty should apply retroactively to individuals charged or convicted of a capital offence in accordance with the retroactive leniency (*lex mitior*) principle, which finds partial expression in the third sentence of article 15 (1), requiring States parties to grant offenders the benefit of lighter penalties adopted after the commission of the offence. The retroactive application of the abolition of the death penalty to all individuals charged or convicted of a capital crime also derives from the fact that the need for applying the death penalty cannot be justified once it has been abolished.

39. Article 6 (3) reminds all States parties that are also parties to the Convention on the Prevention and Punishment of the Crime of Genocide of their obligations to prevent and punish the crime of genocide, which include the obligation to prevent and punish all deprivations of life, which constitute part of a crime of genocide. Under no circumstances can the death penalty be imposed as part of a policy of genocide against members of a national, ethnic, racial or religious group.

40. States parties that have not abolished the death penalty must respect article 7 of the Covenant, which prohibits certain methods of execution. Failure to respect article 7 would inevitably render the execution arbitrary in nature and thus also in violation of article 6. The Committee has already opined that stoning,[165] injection of untested lethal drugs,[166] gas chambers,[167] burning and burying alive[168] and public executions[169] are contrary to article 7. For similar reasons, other painful and humiliating methods of execution are also unlawful under the Covenant. Failure to provide individuals on death row with timely notification about the date of their execution constitutes, as a rule, a form of ill-treatment, which renders the subsequent execution contrary to article 7 of the Covenant.[170] Extreme delays in the implementation of a death penalty sentence that exceed any reasonable period of time necessary to exhaust all legal remedies[171] may also entail the violation of article 7 of the Covenant, especially when the long time on death row exposes sentenced persons to harsh[172] or stressful conditions, including solitary confinement,[173] and when sentenced persons are particularly vulnerable due to factors such as age, health or mental state.[174]

41. Violation of the fair trial guarantees provided for in article 14 of the Covenant in proceedings resulting in the imposition of the death penalty would render the sentence arbitrary in nature, and in violation of article 6 of the Covenant.[175] Such violations might involve the use of forced confessions;[176] the inability of the accused to question relevant witnesses;[177] lack of effective representation involving confidential attorney-client meetings during all stages of the criminal proceedings, [178] including criminal interrogation, [179] preliminary hearings,[180] trial[181] and appeal;[182] failure to respect the presumption of innocence, which may manifest itself in the accused being placed in a cage or being handcuffed during the trial;[183] lack of an effective right of appeal;[184] lack of adequate time and facilities for the preparation of the defence, including the inability to access legal documents essential for conducting the legal defence or appeal, such as official prosecutorial applications to the court,[185] the court's judgment[186] or the trial transcript; lack of suitable interpretation;[187] failure to provide accessible documents and procedural accommodation for persons with disabilities; excessive and unjustified delays in the trial[188] or the appeal process;[189] and general lack of fairness of the criminal process,[190] or lack of independence or impartiality of the trial or appeal court.

42. Other serious procedural flaws not explicitly covered by article 14 of the Covenant may nonetheless render the imposition of the death penalty contrary to article 6. For example, a failure to promptly inform detained foreign nationals of their right to consular notification pursuant to the Vienna Convention on Consular Relations, resulting in the imposition of the death penalty,[191] and failure to afford individuals about to be deported to a country in which

their lives are claimed to be at real risk the opportunity to avail themselves of available appeal procedures[192] would violate article 6 (1) of the Covenant.

43. The execution of sentenced persons whose guilt has not been established beyond reasonable doubt also constitutes an arbitrary deprivation of life. States parties must therefore take all feasible measures in order to avoid wrongful convictions in death penalty cases,[193] to review procedural barriers to reconsideration of convictions and to re-examine past convictions on the basis of new evidence, including new DNA evidence. States parties should also consider the implications for the evaluation of evidence presented in capital cases of new reliable studies, including studies suggesting the prevalence of false confessions and the unreliability of eyewitness testimony.

44. The death penalty must not be imposed in a discriminatory manner contrary to the requirements of articles 2 (1) and 26 of the Covenant. Data suggesting that members of religious, racial or ethnic minorities, indigent persons or foreign nationals are disproportionately likely to face the death penalty may indicate an unequal application of the death penalty, which raises concerns under article 2 (1) read in conjunction with article 6, as well as under article 26.[194]

45. According to the last sentence of article 6 (2), the death penalty can only be carried out pursuant to a judgment of a competent court. Such a court must be established by law within the judiciary, be independent of the executive and legislative branches and be impartial.[195] It should be established before the commission of the offence. As a rule, civilians must not be tried for capital crimes before military tribunals[196] and military personnel can be tried for offences carrying the death penalty only before a tribunal affording all fair trial guarantees. Furthermore, the Committee does not consider courts of customary justice to constitute judicial institutions offering sufficient fair trial guarantees to enable them to try capital crimes. The issuance of a death penalty without any trial, for example in the form of a religious edict[197] or military order that the State plans to carry out or allows to be carried out, violates both articles 6 and 14 of the Covenant.

46. Any penalty of death can be carried out only pursuant to a final judgment, after an opportunity to resort to all judicial appeal procedures has been provided to the sentenced person, and after petitions to all other available non-judicial avenues have been resolved, including supervisory review by prosecutors or courts, and consideration of requests for official or private pardon. Furthermore, death sentences must not be carried out as long as international interim measures requiring a stay of execution are in place. Such interim measures are designed to allow review of the sentence before international courts, human rights courts and commissions, and international monitoring bodies, such as the United Nations treaty bodies. Failure to implement such interim measures is incompatible with the obligation to respect in good faith the procedures established under the specific treaties governing the work of the relevant international bodies.[198]

47. States parties are required pursuant to article 6 (4) to allow individuals sentenced to death to seek pardon or commutation, to ensure that amnesties, pardons and commutation can be granted to them in appropriate circumstances, and to ensure that sentences are not carried out before requests for pardon or commutation have been meaningfully considered and conclusively decided upon according to applicable procedures.[199] No category of sentenced persons can be a priori excluded from such measures of relief, nor should the conditions for attainment of relief be ineffective, unnecessarily burdensome, discriminatory in nature or applied in an arbitrary manner.[200] Article 6 (4) does not prescribe a particular procedure for the exercise of the right to seek pardon or commutation and States parties consequently retain discretion in spelling out the relevant procedures.[201] Still, such procedures should be specified in domestic legislation,[202] and they should not afford the families of victims of crime a preponderant role in determining whether the death sentence should be carried out.[203] Furthermore, pardon or commutation procedures must offer certain essential guarantees, including certainty about the processes followed and the substantive criteria applied and the rights for individuals sentenced to death to initiate pardon or commutation procedures and to make representations about their personal or other relevant circumstances, to be informed in advance when the request will be considered, and to be informed promptly about the outcome of the procedure.[204]

48. Article 6 (5) prohibits the imposition of the death penalty for crimes committed by persons below the age of 18 at the time of the offence.[205] This necessarily implies that such persons can never face the death penalty for that offence, regardless of their age at the time of sentencing or at the time foreseen for carrying out the sentence.[206] If there is no reliable and conclusive proof that the person was not below the age of 18 at the time the crime was committed, he or she will have the right to the benefit of the doubt and the death penalty cannot be imposed.[207] Article 6 (5) also prohibits States parties from carrying out the death penalty on pregnant women.

49. States parties must refrain from imposing the death penalty on individuals who face special barriers in defending themselves on an equal basis with others, such as persons whose serious psychosocial or intellectual disabilities impede their effective defence,[208] and on persons who have limited moral culpability. They should also refrain from executing persons who have a diminished ability to understand the reasons for their sentence, and persons whose execution would be exceptionally cruel or would lead to exceptionally harsh results for them and their families, such as persons of advanced age,[209] parents of very young or dependent children, and individuals who have suffered serious human rights violations in the past.[210]

50. Article 6 (6) reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable[211] and necessary for the enhancement of human dignity and progressive development of human rights.[212] It is contrary to the object and purpose of article 6 for States parties to take steps to increase de facto the rate of use of and the extent to which they resort to the death penalty,[213] or to reduce the number of pardons and commutations they grant.

51. Although the allusion to the conditions for application of the death penalty in article 6 (2) suggests that when drafting the Covenant, the States parties did not universally regard the death penalty as a cruel, inhuman or degrading punishment per se,[214] subsequent agreements by the States parties or subsequent practice establishing such agreements may ultimately lead to the conclusion that the death penalty is contrary to article 7 of the Covenant under all circumstances.[215] The increasing number of States parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, other international instruments prohibiting the imposition or carrying out of the death penalty, and the growing number of non-abolitionist States that have nonetheless introduced a de facto moratorium on the exercise of the death penalty, suggest that considerable progress may have been made towards establishing an agreement among the States parties to consider the death penalty as a cruel, inhuman or degrading form of punishment.[216] Such a legal development is consistent with the pro-abolitionist spirit of the Covenant, which manifests itself, inter alia, in the texts of article 6 (6) and the Second Optional Protocol.

V. Relationship of article 6 with other articles of the Covenant and other legal regimes

52. The standards and guarantees of article 6 both overlap and interact with other provisions of the Covenant. Some forms of conduct simultaneously violate both article 6 and another article. For example, applying the death penalty in response to a crime that does not constitute a most serious crime (see also para. 35 above) would violate both article 6 (2) and, in light of the extreme nature of the punishment, article 7.[217] At other times, the contents of article 6 (1) are informed by the contents of other articles. For example, application of the death penalty may amount to an arbitrary deprivation of life under article 6 by virtue of the fact that it represents a punishment for exercising freedom of expression, in violation of article 19.

53. Article 6 also reinforces the obligations of States parties under the Covenant and the Optional Protocol to protect individuals against reprisals for promoting and striving to protect and realize human rights, including through cooperation or communication with the Committee.[218] States parties must take the necessary measures to respond to death threats and

to provide adequate protection to human rights defenders,[219] including the creation and maintenance of a safe and enabling environment for defending human rights.

54. Torture and ill-treatment, which may seriously affect the physical and mental health of the mistreated individual, could also generate the risk of deprivation of life. Furthermore, criminal convictions resulting in the death penalty that are based on information procured by torture or cruel, inhuman or degrading treatment of interrogated persons would violate articles 7 and 14 (3) (g) of the Covenant, as well as article 6 (see also para. 41 above).[220]

55. Returning individuals to countries where there are substantial grounds for believing that they face a real risk to their lives violates articles 6 and 7 of the Covenant (see also para. 31 above).[221] In addition, making an individual who has been sentenced to death believe that the sentence has been commuted only to inform him or her later that it has not, [222] and placing an individual on death row pursuant to a death sentence that is void ab initio,[223] would run contrary to both articles 6 and 7.

56. The arbitrary deprivation of life of an individual may cause his or her relatives mental suffering, which could amount to a violation of their own rights under article 7 of the Covenant. Furthermore, even when the deprivation of life is not arbitrary, failure to provide relatives with information on the circumstances of the death of an individual may violate their rights under article 7,[224] as could failure to inform them of the location of the body,[225] and, where the death penalty is applied, of the date on which the State party plans to carry out the death penalty.[226] Relatives of individuals deprived of their life by the State must be able to receive the remains, if they so wish.[227]

57. The right to life guaranteed by article 6 of the Covenant, including the right to protection of life under article 6 (1), may overlap with the right to security of person guaranteed by article 9 (1). Extreme forms of arbitrary detention that are themselves life-threatening, in particular enforced disappearances, violate the right to personal liberty and personal security and are incompatible with the right to life (see also para. 58 below).[228] Failure to respect the procedural guarantees found in article 9 (3) and (4), designed inter alia to prevent disappearances, could also result in a violation of article 6.[229]

58. Enforced disappearance constitutes a unique and integrated series of acts and omissions representing a grave threat to life.[230] The deprivation of liberty, followed by a refusal to acknowledge that deprivation of liberty or by concealment of the fate of the disappeared person, in effect removes that person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable.[231] It thus results in a violation of the right to life as well as other rights recognized in the Covenant, in particular, article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment), article 9 (liberty and security of person) and article 16 (right to recognition as a person before the law). States parties must take adequate measures to prevent the enforced disappearance of individuals, and conduct an effective and speedy inquiry to establish the fate and whereabouts of persons who may have been subject to enforced disappearance. States parties should also ensure that the enforced disappearance of persons is punished with appropriate criminal sanctions, and introduce prompt and effective procedures for cases of disappearance to be investigated thoroughly by independent and impartial bodies[232] that operate, as a rule, within the ordinary criminal justice system. They should bring to justice the perpetrators of such acts and omissions and ensure that victims of enforced disappearance and their relatives are informed about the outcome of the investigation and are provided with full reparation. [233] Under no circumstances should families of victims of enforced disappearance be obliged to declare them dead in order to be eligible for reparation.[234] States parties should also provide families of victims of disappeared persons with the means to regularize their legal status in relation to the disappeared persons after an appropriate period of time.[235]

59. A particular connection exists between article 6 and article 20, which prohibits any propaganda for war and certain forms of advocacy constituting incitement to discrimination, hostility or violence. Failure to comply with these obligations under article 20 may also constitute a failure to take the necessary measures to protect the right to life under article 6.[236]

60. Article 24 (1) of the Covenant entitles every child to such measures of protection as are required by his or her status as a minor, on the part of his or her family, society and the

State. This article requires adoption of special measures designed to protect the life of every child, in addition to the general measures required by article 6 for protecting the lives of all individuals.[237] When taking special measures of protection, States parties should be guided by the best interests of the child,[238] and by the need to ensure all children's survival, development[239] and well-being.[240]

61. The right to life must be respected and ensured without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or any other status, including caste,[241] ethnicity, membership of an indigenous group, sexual orientation or gender identity,[242] disability,[243] socioeconomic status,[244] albinism[245] and age.[246] Legal protections for the right to life must apply equally to all individuals and provide them with effective guarantees against all forms of discrimination, including multiple and intersectional forms of discrimination.[247] Any deprivation of life based on discrimination in law or in fact is ipso facto arbitrary in nature. Femicide, which constitutes an extreme form of gender-based violence that is directed against girls and women, is a particularly grave form of assault on the right to life.[248]

62. Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.[249] The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.[250] Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.[251]

63. In light of article 2 (1) of the Covenant, a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control.[252] This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner (see para. 22 above).[253] States also have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life.[254] Furthermore, States parties must respect and protect the lives of individuals located in places that are under their effective control, such as occupied territories, and in territories over which they have assumed an international obligation to apply the Covenant. States parties are also required to respect and protect the lives of all individuals located on marine vessels and aircraft registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea.[255] Given that the deprivation of liberty brings a person within a State's effective control, States parties must respect and protect the right to life of all individuals arrested or detained by them, even if held outside their territory.[256]

64. Like the rest of the Covenant, article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities.[257] While rules of international humanitarian law may be relevant for the interpretation and application of article 6 when the situation calls for their application, both spheres of law are complementary, not mutually exclusive.[258] Use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary. By contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and other persons protected by international humanitarian law, including the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure

to apply the principles of precaution and proportionality, and the use of human shields would also violate article 6 of the Covenant.[259] States parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used,[260] and whether less harmful alternatives were considered. They must also investigate alleged or suspected violations of article 6 in situations of armed conflict in accordance with the relevant international standards (see paras. 27–28 above).[261]

65. States parties engaged in the deployment, use, sale or purchase of existing weapons and in the study, development, acquisition or adoption of weapons, and means or methods of warfare, must always consider their impact on the right to life.[262] For example, the development of autonomous weapon systems lacking in human compassion and judgment raises difficult legal and ethical questions concerning the right to life, including questions relating to legal responsibility for their use. The Committee is therefore of the view that such weapon systems should not be developed and put into operation, either in times of war or in times of peace, unless it has been established that their use conforms with article 6 and other relevant norms of international law.[263]

66. The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale, is incompatible with respect for the right to life and may amount to a crime under international law. States parties must take all necessary measures to stop the proliferation of weapons of mass destruction, including measures to prevent their acquisition by non-State actors, to refrain from developing, producing, testing, acquiring, stockpiling, selling, transferring and using them, to destroy existing stockpiles, and to take adequate measures of protection against accidental use, all in accordance with their international obligations.[264] They must also respect their international obligations to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control,[265] and to afford adequate reparation to victims whose right to life has been or is being adversely affected by the testing or use of weapons of mass destruction, in accordance with principles of international responsibility.[266]

67. Article 6 is included in the list of non-derogable rights in article 4 (2) of the Covenant. Hence, the guarantees against arbitrary deprivation of life contained in article 6 continue to apply in all circumstances, including in situations of armed conflict and other public emergencies.[267] The existence and nature of a public emergency that threatens the life of the nation may, however, be relevant to a determination of whether a particular act or omission leading to deprivation of life is arbitrary and to a determination of the scope of the positive measures that States parties must take. Although some Covenant rights other than the right to life may be subject to derogation, derogable rights that support the application of article 6 must not be diminished by measures of derogation.[268] Such rights include procedural guarantees, such as the right to fair trial in death penalty cases, and accessible and effective measures to vindicate rights, such as the duty to take appropriate measures to investigate, prosecute, punish and remedy violations of the right to life.

68. Reservations with respect to the peremptory and non-derogable obligations set out in article 6 are incompatible with the object and purpose of the Covenant. In particular, no reservation is permitted to the prohibition against arbitrary deprivation of life of persons and to the strict limits provided in article 6 with respect to the application of the death penalty.[269]

69. Wars and other acts of mass violence continue to be a scourge of humanity resulting in the loss of many thousands of lives every year.[270] Efforts to avert the risks of war and any other armed conflict, and to strengthen international peace and security, are among the most important safeguards of the right to life.[271]

70. States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant. At the same time, all States are reminded of their responsibility as members of the international community to protect lives and to oppose widespread or systematic attacks on the right to life,[272] including acts of aggression, international terrorism, genocide, crimes against humanity and war crimes, while

respecting all of their obligations under international law. States parties that fail to take all reasonable measures to settle their international disputes by peaceful means might fall short of complying with their positive obligation to ensure the right to life.

Notes

[1] International Covenant on Civil and Political Rights, art. 4; Human Rights Committee, general comment No. 6 (1982) on the right to life, para. 1; general comment No. 14 (1984) on the right to life, para. 1; *Camargo v. Colombia*, communication No. 45/1979, para. 13.1; *Baboeram-Adhin et al. v. Suriname*, communications Nos. 146/1983 and 148–154/1983, para. 14.3.
[2] Universal Declaration of Human Rights, preamble.
[3] *Camargo v. Colombia*, para. 13.2.
[4] Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, paras. 9 and 55.
[5] Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 8. See also European Court of Human Rights, *Osman v. United Kingdom* (case No. 87/1997/871/1083), judgment of 28 October 1998, para. 116.
[6] *Chongwe v. Zambia* (CCPR/C/70/D/821/1998), para. 5.2. See also European Court of Human Rights, *İlhan v. Turkey* (application No. 22277/93), judgment of 27 June 2000, paras. 75–76; Inter-American Court of Human Rights, *Rochela massacre v. Colombia*, judgment of 11 May 2007, para. 127.
[7] *Mellet v. Ireland* (CCPR/C/116/D/2324/2013), paras. 7.4–7.8; CCPR/C/IRL/CO/4, para. 9.
[8] Human Rights Committee, general comment No. 28 (2000) on the equality of rights between men and women, para. 10. See also, e.g., CCPR/C/ARG/CO/4, para. 13; CCPR/C/JAM/CO/3, para. 14; CCPR/C/MDG/CO/3, para. 14.
[9] CCPR/C/79/Add.97, para. 15.
[10] See, e.g., CCPR/CO/79/GNQ, para. 9; CCPR/C/ZMB/CO/3, para. 18; CCPR/C/COL/CO/7, para. 21; CCPR/C/MAR/CO/6, para. 22; CCPR/C/CMR/CO/5, para. 22.
[11] See, e.g., CCPR/C/PAN/CO/3, para. 9; CCPR/C/MKD/CO/3, para. 11. See also World Health Organization, *Safe abortion: technical and policy guidance for health systems*, 2nd ed. (Geneva, 2012), pp. 96–97.
[12] CCPR/C/POL/CO/7, para. 24; CCPR/C/COL/CO/7, para. 21.
[13] CCPR/C/CHL/CO/6, para. 15; CCPR/C/KAZ/CO/1, para. 11; CCPR/C/ROU/CO/5, para. 26.
[14] CCPR/C/LKA/CO/5, para. 10; CCPR/C/MWI/CO/1/Add.1, para. 9; CCPR/C/ARG/CO/5, para. 12.
[15] CCPR/C/POL/CO/6, para. 12; CCPR/C/COD/CO/4, para. 22.
[16] CCPR/C/PAK/CO/1, para. 16; CCPR/C/BFA/CO/1, para. 20; CCPR/C/NAM/CO/2, para. 16.
[17] CCPR/C/PAK/CO/1, para. 16.
[18] Committee on the Rights of the Child, general comment No. 4 (2003) on adolescent health and development in the context of the Convention, para. 11.
[19] CCPR/C/79/Add.92, para. 11.
[20] Committee on Economic, Social and Cultural Rights' general comment No. 14 (2000) on the right to the highest attainable standard of health, para. 25.
[21] CCPR/C/NLD/CO/4, para. 7.
[22] Universal Declaration of Human Rights, preamble.
[23] African Commission on Human and Peoples' Rights, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)* (2015), para. 12.
[24] *Gorji-Dinka v. Cameroon* (CCPR/C/83/D/1134/2002), para. 5.1; *Van Alphen v. Netherlands*, communication No. 305/1988, para. 5.8.
[25] *Camargo v. Colombia*, para. 13.2.
[26] Ibid., paras. 13.2–13.3.
[27] A/HRC/17/28, para. 60.
[28] Code of Conduct for Law Enforcement Officials, commentary to art. 3.
[29] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, para. 9.
[30] African Commission on Human and Peoples' Rights, *Kazingachire et al v. Zimbabwe* (communication No. 295/04), decision of 12 October 2013, paras. 118–120.
[31] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, para. 9.
[32] European Court of Human Rights, *McCann and others v. United Kingdom* (application No. 18984/91), judgment of 27 September 1995, para. 150.
[33] A/HRC/31/66, para. 54.
[34] CCPR/C/NPL/CO/2, para. 10; CCPR/CO/81/LIE, para. 10.
[35] CCPR/C/KEN/CO/3, para. 11; CCPR/C/CAF/CO/2, para. 12.
[36] CCPR/C/USA/CO/4, para. 11; CCPR/C/USA/CO/3/Rev.1, para. 30.
[37] CCPR/C/GBR/CO/6, para. 11.
[38] Code of Conduct for Law Enforcement Officials, commentary to art. 1.

[39] A/HRC/31/66, para. 55.
[40] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), para. 14.
[41] CCPR/CO/74/SWE, para. 10.
[42] See, in the context of armed conflicts, the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict (A/63/467-S/2008/636, annex).
[43] CCPR/C/GTM/CO/3, para. 16.
[44] Ibid.; Human Rights Committee, general comment No. 31, para. 15.
[45] A/HRC/26/36, para. 75.
[46] See, e.g., *Burdyko v. Belarus* (CCPR/C/114/D/2017/2010), para. 8.6.
[47] Human Rights Committee, general comment No. 35, para. 22.
[48] Human Rights Committee, general comment No. 6, para. 3; *Camargo v. Colombia*, para. 13.1.
[49] Inter-American Court of Human Rights, *González et al. ("Cotton Field") v. Mexico*, judgment of 16 November 2009, para. 236.
[50] CCPR/CO/81/LIE, para. 10.
[51] CCPR/C/MDG/CO/3, para. 17.
[52] CCPR/C/TUR/CO/1, para. 13.
[53] CCPR/C/MOZ/CO/1, para. 12; CCPR/C/GTM/CO/3, para. 18.
[54] CCPR/C/IDN/CO/1, para. 17; CCPR/C/RUS/CO/6 and Corr.1, para. 11.
[55] CCPR/C/ALB/CO/2, para. 10.
[56] A/HRC/24/57, para. 31.
[57] CCPR/C/RUS/CO/6 and Corr.1, para. 14.
[58] Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, judgment of 29 March 2006, para. 155.
[59] *Peiris et al. v. Sri Lanka* (CCPR/C/103/D/1862/2009), para. 7.2.
[60] CCPR/C/79/Add.93, para. 17.
[61] CCPR/C/PHL/CO/4, para. 14.
[62] CCPR/C/AGO/CO/1, para. 12; CCPR/C/USA/CO/4, para. 10.
[63] Inter-American Court of Human Rights, *Ximenes-Lopes v. Brazil*, judgment of 4 July 2006, para. 96.
[64] *Da Silva Pimentel v. Brazil* (CEDAW/C/49/D/17/2008), para. 7.5; European Court of Human Rights, *Nitecki v. Poland* (application No. 65653/01), admissibility decision of 21 March 2002, and *Calvelli and Ciglio v. Italy* (application No. 32967/96), judgment of 17 January 2002, para. 49.
[65] CCPR/C/POL/CO/6, para. 15.
[66] *Yassin et al. v. Canada* (CCPR/C/120/D/2285/2013), para. 6.5; CCPR/C/CAN/CO/6, para. 6; CCPR/C/DEU/CO/6, para. 16; CCPR/C/KOR/CO/4, para. 10.
[67] Guiding Principles on Business and Human Rights, principle 2.
[68] Inter-American Court of Human Rights, *Barrios Family v. Venezuela*, judgment of 24 November 2011, para. 124.
[69] CCPR/C/PRY/CO/3, para. 15.
[70] CCPR/C/SRB/CO/2, para. 21; A/HRC/20/22 and Corr.1, para. 105.
[71] CCPR/C/COL/CO/6, para. 14.
[72] CCPR/C/HND/CO/1, para. 9.
[73] CCPR/C/FRA/CO/4, para. 24.
[74] Inter-American Court of Human Rights, *Yakye Axa Indigenous Community v. Paraguay*, judgment of 17 June 2005, para. 167.
[75] CCPR/C/COL/CO/6, para. 12.
[76] CCPR/C/TZA/CO/4, para. 15.
[77] A/HRC/11/2, para. 68.
[78] CCPR/C/KEN/CO/3, para. 12.
[79] Convention on the Rights of Persons with Disabilities, art. 10.
[80] Ibid., arts. 5 (3) and 9.
[81] CCPR/C/AUS/CO/5, para. 21.
[82] *Leach v. Jamaica* (CCPR/C/57/D/546/1993), para. 9.5.
[83] *Zhumbaeva v. Kyrgyzstan* (CCPR/C/102/D/1756/2008), para. 8.6; Human Rights Committee, *Dermit Barbato v. Uruguay*, communication No. 84/1981, para. 9.2.
[84] *Lantsova v. Russian Federation* (CCPR/C/74/D/763/1997), para. 9.2.
[85] Ibid.
[86] European Court of Human Rights, *Edwards v. United Kingdom* (application No. 46477/99), judgment of 14 June 2002, para. 60.
[87] Convention on the Rights of Persons with Disabilities, art. 14.
[88] European Court of Human Rights, *Câmpeanu v. Romania* (application No. 47848/08), judgment of 17 July 2014, para. 131.
[89] CCPR/C/ARM/CO/2, para. 15.
[90] CCPR/C/UNK/CO/1, para. 14.

[91] CCPR/C/USA/CO/4, para. 10.
[92] European Court of Human Rights, *Öneryildiz v. Turkey* (application No. 48939/00), judgment of 30 November 2004, para. 71.
[93] African Commission on Human and Peoples' Rights, *Social and Economic Rights Centre (SERAC) and Centre for Economic and Social Rights (CESR) v. Nigeria* (communication No. 155/96), decision of 27 October 2001, para. 67.
[94] Inter-Agency Support Group on Indigenous Peoples' Issues, "Lands, territories and resources", thematic paper towards the preparation of the 2014 World Conference on Indigenous Peoples, 22–23 September 2014, p. 4.
[95] CCPR/C/KEN/CO/3, para. 9.
[96] Human Rights Committee, general comment No. 6, para. 5; CCPR/C/79/Add.105, para. 12.
[97] CCPR/CO/72/PRK, para. 12.
[98] *Toussaint v. Canada* (CCPR/C/123/D/2348/2014), para. 11.3. See also CCPR/C/ISR/CO/4, para. 12.
[99] CCPR/C/JAM/CO/3, para. 9.
[100] CCPR/CO/71/UZB, para. 19.
[101] Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2014) on harmful practices, para. 56.
[102] Human Rights Committee, general comment No. 6, para. 5; CCPR/C/COD/CO/3, para. 14.
[103] CCPR/C/KGZ/CO/2, para. 13.
[104] Human Rights Committee, general comment No. 31, paras. 15 and 19; *Pestaño and Pestaño v. Philippines* (CCPR/C/98/D/1619/2007), para. 7.2; *González v. Argentina* (CCPR/C/101/D/1458/2006), para. 9.4; CCPR/C/JAM/CO/3, para. 16. See also European Court of Human Rights, *Calvelli and Ciglio v. Italy*, para. 51.
[105] CCPR/C/ISR/CO/3, para. 12.
[106] *Sathasivam and Saraswathi v. Sri Lanka* (CCPR/C/93/D/1436/2005), para. 6.4; *Amirov v. Russian Federation* (CCPR/C/95/D/1447/2006), para. 11.2. See also Human Rights Committee, general comment No. 31, paras. 16 and 18.
[107] CCPR/C/AGO/CO/1, para. 14.
[108] *Marcellana and Gumanjoy v. Philippines* (CCPR/C/94/D/1560/2007), para. 7.4.
[109] E/CN.4/2006/53, para. 41.
[110] A/HRC/26/36, para. 81.
[111] *Andreu v. Colombia* (CCPR/C/55/D/563/1993), para. 8.2; *Marcellana and Gumanjoy v. Philippines*, para. 7.2.
[112] Human Rights Committee, general comment No. 31, para. 18; Inter-American Court of Human Rights, *Barrios Altos v. Peru*, judgment of 14 March 2001, para. 43.
[113] CCPR/C/CMR/CO/4, para. 15.
[114] CCPR/C/BOL/CO/3, para. 15.
[115] *Novaković and Novaković v. Serbia* (CCPR/C/100/D/1556/2007), para. 7.3; CCPR/C/RUS/CO/6 and Corr.1, para. 14.
[116] CCPR/C/MRT/CO/1, para. 13.
[117] CCPR/C/GBR/CO/7, para. 8.
[118] CCPR/C/ISR/CO/3, para. 9.
[119] CCPR/C/GBR/CO/7, para. 8.
[120] *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)* (United Nations publication, Sales No. E.17.XIV.3), para. 10.
[121] *Camargo v. Colombia*, para. 15.
[122] *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, para. 25; Inter-American Court of Human Rights, *Kawas-Fernández v. Honduras*, judgment of 3 April 2009, para. 102.
[123] *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, para. 37.
[124] A/HRC/14/24/Add.6, para. 93.
[125] A/HRC/19/58/Rev.1, para. 59.
[126] European Court of Human Rights, *Oğur v. Turkey* (application No. 21594/93), judgment of 20 May 1999, para. 92.
[127] *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, para. 35.
[128] Ibid., para. 13; European Court of Human Rights, *Ramsahai and others v. Netherlands* (application No. 52391/99), judgment of 15 May 2007, para. 353 (requiring sufficient public scrutiny of inquiry proceedings).
[129] European Court of Human Rights, *Tanrikulu v. Turkey* (application No. 23763/94), judgment of 8 July 1999, para. 103.
[130] CCPR/C/KEN/CO/3, para. 13.
[131] *Eshonov v. Uzbekistan* (CCPR/C/99/D/1225/2003), para. 9.2; *Zhumbaeva v. Kyrgyzstan*, para. 8.8; *Khadzhiyev v. Turkmenistan* (CCPR/C/122/D/2252/2013), para. 7.3.

[132] *Umetaliev and Tashtanbekova v. Kyrgyzstan* (CCPR/C/94/D/1275/2004), para. 9.4; *Olmedo v. Paraguay* (CCPR/C/104/D/1828/2008), para. 7.5.
[133] *Amirov v. Russian Federation*, para. 11.4.
[134] *Kindler v. Canada* (CCPR/C/48/D/470/1991), paras. 13.1–13.2.
[135] *Dauphin v. Canada* (CCPR/C/96/D/1792/2008), para. 7.4.
[136] European Court of Human Rights, *N.A. v. United Kingdom* (application No. 25904/07), judgment of 17 July 2008, para. 115.
[137] *Yin Fong v. Australia* (CCPR/C/97/D/1442/2005), para. 9.7.
[138] *Shakeel v. Canada* (CCPR/C/108/D/1881/2009), para. 8.5.
[139] *Warsame v. Canada* (CCPR/C/102/D/1959/2010), para. 8.3.
[140] *T. v. Australia* (CCPR/C/61/D/706/1996), para. 8.4; *A.R.J. v. Australia* (CCPR/C/60/D/692/1996), para. 6.12; *Israil v. Kazakhstan* (CCPR/C/103/D/2024/2011), para. 9.5.
[141] CCPR/CO/74/SWE, para. 12; *Alzery v. Sweden* (CCPR/C/88/D/1416/2005), para. 11.5.
[142] CCPR/C/TJK/CO/2, para. 11; CCPR/CO/77/EST, para. 13.
[143] *Judge v. Canada* (CCPR/C/78/D/829/1998), para. 10.5.
[144] Ibid., para. 10.6; *Yin Fong v. Australia*, para. 9.7.
[145] *Chisanga v. Zambia* (CCPR/C/85/D/1132/2002), para. 7.4.
[146] Safeguards guaranteeing protection of the rights of those facing the death penalty, para. 1.
[147] *Kindler v. Canada*, para. 14.3; A/67/275, para. 35.
[148] CCPR/C/79/Add.25, para. 8.
[149] *Chisanga v. Zambia*, paras. 2.2 and 7.4.
[150] CCPR/C/79/Add.101, para. 8; CCPR/C/79/Add.25, para. 8; CCPR/C/79/Add.85, para. 8.
[151] *Chisanga v. Zambia*, para. 7.4; *Lubuto v. Zambia* (CCPR/C/55/D/390/1990/Rev.1), para. 7.2; *Johnson v. Ghana* (CCPR/C/110/D/2177/2012), para. 7.3.
[152] CCPR/CO/73/UK-CCPR/CO/73/UKOT, para. 37.
[153] CCPR/CO/72/GTM, para. 17.
[154] CCPR/CO/84/THA, para. 14.
[155] Human Rights Committee, general comment No. 6, para. 6.
[156] CCPR/C/MRT/CO/1, para. 21.
[157] CCPR/C/LBY/CO/4, para. 24.
[158] CCPR/C/79/Add.84, para. 16.
[159] *Lubuto v. Zambia*, para. 7.2.
[160] *Chisanga v. Zambia*, para. 7.4; *Larrañaga v. Philippines* (CCPR/C/87/D/1421/2005), para. 7.2; *Carpo et al. v. Philippines* (CCPR/C/77/D/1077/2002), para. 8.3.
[161] *Thompson v. Saint Vincent and the Grenadines* (CCPR/C/70/D/806/1998), para. 8.2; *Kennedy v. Trinidad and Tobago* (CCPR/C/74/D/845/1998), para. 7.3.
[162] CCPR/C/DZA/CO/3, para. 17; CCPR/C/79/Add.116, para. 14.
[163] CCPR/CO/72/PRK, para. 13.
[164] European Court of Human Rights, *S.W. v. United Kingdom* (application No. 20166/92), judgment of 22 November 1995, para. 36.
[165] CCPR/C/IRN/CO/3, para. 12.
[166] CCPR/C/USA/CO/4, para. 8.
[167] *Ng v. Canada* (CCPR/C/49/D/469/1991), para. 16.4.
[168] African Commission on Human and Peoples' Rights, *Malawi African Association and others v. Mauritania*, 11 May 2000, para. 120.
[169] CCPR/CO/72/PRK, para. 13.
[170] CCPR/C/JPN/CO/6, para. 13.
[171] *Johnson v. Jamaica* (CCPR/C/56/D/588/1994), para. 8.5; *Kindler v. Canada*, para. 15.2; *Martin v. Jamaica* (CCPR/C/47/D/317/1988), para. 12.2.
[172] *Brown v. Jamaica* (CCPR/C/65/D/775/1997), para. 6.13.
[173] CCPR/C/JPN/CO/6, para. 13.
[174] *Kindler v. Canada*, para. 15.3.
[175] *Kurbanov v. Tajikistan* (CCPR/C/79/D/1096/2002), para. 7.7.
[176] *Gunan v. Kyrgyzstan* (CCPR/C/102/D/1545/2007), para. 6.2; *Chikunova v. Uzbekistan* (CCPR/C/89/D/1043/2002), paras. 7.2 and 7.5; *Yuzepchuk v. Belarus* (CCPR/C/112/D/1906/2009), paras. 8.2 and 8.6.
[177] *Yuzepchuk v. Belarus*, paras. 8.4 and 8.6.
[178] *Chikunova v. Uzbekistan*, paras. 7.4 and 7.5.
[179] *Gunan v. Kyrgyzstan*, para. 6.3.
[180] *Levy v. Jamaica* (CCPR/C/64/D/719/1996), paras. 7.2–7.3.
[181] *Brown v. Jamaica*, para. 6.15.
[182] *Leach v. Jamaica*, para. 9.4.
[183] *Kovaleva and Kozyar v. Belarus* (CCPR/C/106/D/2120/2011), para. 11.4; *Grishkovtsov v. Belarus* (CCPR/C/113/D/2013/2010), para. 8.4.

[184] *Judge v. Canada*, paras. 10.8–10.9.
[185] *Gunan v. Kyrgyzstan*, para. 6.3.
[186] *Champagnie et al. v. Jamaica* (CCPR/C/51/D/445/1991), paras. 7.3–7.4.
[187] Safeguards guaranteeing protection of the rights of those facing the death penalty, para. 4; *Ambaryan v. Kyrgyzstan* (CCPR/C/120/D/2162/2012), para. 9.2.
[188] *Francis v. Jamaica* (CCPR/C/54/D/606/1994), para. 9.3.
[189] *Kamoyo v. Zambia* (CCPR/C/104/D/1859/2009), paras. 6.3–6.4.
[190] *Yuzepchuk v. Belarus*, paras. 8.5–8.6.
[191] Vienna Convention on Consular Relations, art. 36 (1) (b). See also Inter-American Court of Human Rights, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, 1 October 1999, para. 137.
[192] *Judge v. Canada*, para. 10.9.
[193] CCPR/C/USA/CO/4, para. 8.
[194] Ibid.
[195] African Commission on Human and Peoples' Rights, *Egyptian Initiative for Personal Rights and Interights v. Egypt* (communication No. 334/06), decision of 1 March 2011, para. 204; International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Prosecutor v. Furundžija* (case No. IT-95-17/1-A), Appeals Chamber, judgment of 21 July 2000, para. 189.
[196] Human Rights Committee, general comment No. 35, para. 45.
[197] Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 22; CCPR/C/MDG/CO/3, para. 16; CCPR/C/79/Add.25, para. 9.
[198] Human Rights Committee, general comment No. 33 (2008) on the obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, para. 19.
[199] *Chikunova v. Uzbekistan*, para. 7.6.
[200] *Chisanga v. Zambia*, para. 7.5.
[201] *Kennedy v. Trinidad and Tobago*, para. 7.4.
[202] CCPR/CO/72/GTM, para. 18.
[203] CCPR/CO/84/YEM, para. 15.
[204] A/HRC/8/3 and Corr.1, para. 67.
[205] CCPR/C/YEM/CO/5, para. 14.
[206] Committee on the Rights of the Child, general comment No. 10 (2007) on children's rights in juvenile justice, para. 75.
[207] Ibid., paras. 35 and 39.
[208] CCPR/C/JPN/CO/6, para. 13. See also *R.S. v. Trinidad and Tobago* (CCPR/C/74/D/684/1996), para. 7.2.
[209] CCPR/C/JPN/CO/5, para. 16.
[210] CCPR/C/35/D/210/1986, para. 15.
[211] Human Rights Committee, general comment No. 6, para. 6.
[212] Second Additional Protocol to the Covenant, aiming at the abolition of the death penalty, preamble.
[213] CCPR/C/TCD/CO/1, para. 19.
[214] *Kindler v. Canada*, para. 15.1.
[215] *Ng v. Canada*, para. 16.2; European Court of Human Rights, *Öcalan v. Turkey* (application No. 46221/99), judgment of 12 May 2005, paras. 163–165.
[216] *Judge v. Canada*, para. 10.3; A/HRC/36/27, para. 48; African Commission on Human and Peoples' Rights, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, para. 22.
[217] Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 5; European Court of Human Rights, *Gatt v. Malta* (application No. 28221/09), judgment of 27 July 2010, para. 29.
[218] Human Rights Committee, general comment No. 33, para. 4; *Birindwa and Tshisekedi v. Zaire*, communications Nos. 241 and 242/1987, para. 12.5; CCPR/C/MDV/CO/1, para. 26; Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, art. 9 (4).
[219] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, art. 12 (2).
[220] *Aboufaied v. Libya* (CCPR/C/104/D/1782/2008), paras. 7.4 and 7.6; *El-Megreisi v. Libyan Arab Jamahiriya* (CCPR/C/50/D/440/1990), para. 5.4.
[221] Human Rights Committee, general comment No. 31, para. 12.
[222] *Chisanga v. Zambia*, para. 7.3.
[223] *Johnson v. Jamaica* (CCPR/C/64/D/592/1994), para. 10.4.
[224] *Eshonov v. Uzbekistan*, para. 9.10.
[225] *Kovaleva and Kozyar v. Belarus*, para. 11.10.
[226] CCPR/C/JPN/CO/6, para. 13.

[227] CCPR/C/BWA/CO/1, para. 13.
[228] *Mojica v. Dominican Republic* (CCPR/C/51/D/449/1991), para. 5.4; *Guezout et al. v. Algeria* (CCPR/C/105/D/1753/2008), paras. 8.4 and 8.7.
[229] Human Rights Committee, general comment No. 35, para. 58.
[230] *Bousroual v. Algeria* (CCPR/C/86/D/992/2001), para. 9.2; *Katwal v. Nepal* (CCPR/C/113/D/2000/2010), para. 11.3.
[231] *El Boathi v. Algeria* (CCPR/C/119/D/2259/2013), para. 7.5.
[232] Human Rights Committee, *Herrera Rubio v. Colombia*, communication No. 161/1983, para. 10.3; general comment No. 6, para. 4.
[233] International Convention for the Protection of All Persons from Enforced Disappearance, art. 24.
[234] *Prutina et al. v. Bosnia and Herzegovina* (CCPR/C/107/D/1917/2009,1918/2009,1925/2009 and 1953/2010), para. 9.6.
[235] International Convention for the Protection of All Persons from Enforced Disappearance, art. 24.
[236] International Criminal Tribunal for Rwanda, *Prosecutor v. Ruggiu* (case No. ICTR-97-32-1), Trial Chamber, judgment of 1 June 2000, para. 22.
[237] See Human Rights Committee, general comments No. 17 (1989) on the rights of the child, para. 1, and No. 32, paras. 42–44; *Prutina et al. v. Bosnia and Herzegovina*, para. 9.8.
[238] Convention on the Rights of the Child, art. 3 (1).
[239] Ibid., art. 6 (2).
[240] Ibid., art. 3 (2).
[241] CCPR/C/79/Add.81, para. 15.
[242] CCPR/C/IRN/CO/3, para. 10.
[243] CCPR/CO/72/NET, para. 6.
[244] *Whelan v. Ireland* (CCPR/C/119/D/2425/2014), para. 7.12.
[245] E/C.12/COD/CO/4, para. 19.
[246] Inter-American Court of Human Rights, *Yakye Axa Indigenous Community v. Paraguay*, para. 175.
[247] CCPR/C/USA/CO/4, para. 8.
[248] A/HRC/20/16, para. 21.
[249] Declaration of the United Nations Conference on the Human Environment, para. 1; Rio Declaration on Environment and Development, principle 1; United Nations Framework Convention on Climate Change, preamble.
[250] Paris Agreement, preamble.
[251] Rio Declaration on Environment and Development, principles 1–2, 11, 15 and 17–18; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.
[252] Human Rights Committee, general comment No. 31, para. 10; CCPR/C/GBR/CO/6, para. 14.
[253] CCPR/C/USA/CO/4, para. 9.
[254] Responsibility of States for internationally wrongful acts, art. 16; International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, judgment of 26 February 2007, para. 420.
[255] CCPR/C/MLT/CO/2, para. 17; United Nations Convention on the Law of the Sea, art. 98; International Convention for the Safety of Life at Sea, chap. V, regulation 10.
[256] Human Rights Committee, general comment No. 31, para. 10; *Saldías de López v. Uruguay*, communication No. R.12/52, paras. 12.1–13; *Celiberti de Casariego v. Uruguay*, communication No. R.13/56, paras. 10.1–11; *Domukovsky v. Georgia* (CCPR/C/62/D/623/1995, 624/1995, 626/1995 and 627/1995), para. 18.2.
[257] Human Rights Committee, general comments No. 31, para. 11, and No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency, para. 3.
[258] Human Rights Committee, general comments No. 31, para. 11, and No. 29, paras. 3, 12 and 16.
[259] CCPR/C/ISR/CO/3, paras. 9–10.
[260] CCPR/C/USA/CO/4, para. 9.
[261] *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, paras. 20–22.
[262] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), art. 36.
[263] A/HRC/23/47, paras. 113–114.
[264] See Treaty on the Non-Proliferation of Nuclear Weapons; Comprehensive Nuclear-Test-Ban Treaty; Treaty on the Prohibition of Nuclear Weapons (not yet in force); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.
[265] Human Rights Committee, general comment No. 14, para. 7; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996 of the International Court of Justice.
[266] CCPR/C/FRA/CO/5, para. 21.
[267] Human Rights Committee, general comment No. 29, para. 7.

[268] Ibid., para. 16.
[269] Human Rights Committee, general comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to the declarations under article 41 of the Covenant, para. 8.
[270] Human Rights Committee, general comment No. 14, para. 2.
[271] Human Rights Committee, general comment No. 6, para. 2.
[272] General Assembly resolution 60/1, paras. 138–139.

TAB I

United Nations A/RES/76/300

General Assembly

Distr.: General
1 August 2022

Seventy-sixth session
Agenda item 74 (b)
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Resolution adopted by the General Assembly on 28 July 2022

[*without reference to a Main Committee (A/76/L.75 and A/76/L.75/Add.1)*]

76/300. The human right to a clean, healthy and sustainable environment

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations,

Reaffirming the Universal Declaration of Human Rights [1] and the Vienna Declaration and Programme of Action, [2] recalling the Declaration on the Right to Development, [3] the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), [4] the Rio Declaration on Environment and Development, [5] and relevant international human rights treaties, and noting other relevant regional human rights instruments,

Reaffirming also that all human rights are universal, indivisible, interdependent and interrelated,

Reaffirming further its resolution 70/1 of 25 September 2015, entitled "Transforming our world: the 2030 Agenda for Sustainable Development", in which it adopted a comprehensive, far-reaching and people-centred set of universal and transformative Sustainable Development Goals and targets, its commitment to working tirelessly for the full implementation of the Agenda by 2030 ensuring that

[1] Resolution 217 A (III).
[2] A/CONF.157/24 (Part I), chap. III.
[3] Resolution 41/128, annex.
[4] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (A/CONF.48/14/Rev.1), part one, chap. I.
[5] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I, *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I.

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no one is left behind, its recognition that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development, and its commitment to achieving sustainable development in its three dimensions – economic, social and environmental – in a balanced and integrated manner,

Recalling States' obligations and commitments under multilateral environmental instruments and agreements, including on climate change, and the outcome of the United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil, in June 2012, and its outcome document entitled "The future we want",[6] which reaffirmed the principles of the Rio Declaration on Environment and Development,

Recalling also Human Rights Council resolution 48/13 of 8 October 2021, entitled "The human right to a clean, healthy and sustainable environment",[7]

Recalling further all Human Rights Council resolutions on human rights and the environment, including resolutions 44/7 of 16 July 2020,[8] 45/17 of 6 October 2020,[9] 45/30 of 7 October 2020[10] and 46/7 of 23 March 2021,[11] and relevant resolutions of the General Assembly,

Recognizing that sustainable development, in its three dimensions (social, economic and environmental), and the protection of the environment, including ecosystems, contribute to and promote human well-being and the full enjoyment of all human rights, for present and future generations,

Recognizing also that, conversely, the impact of climate change, the unsustainable management and use of natural resources, the pollution of air, land and water, the unsound management of chemicals and waste, the resulting loss of biodiversity and the decline in services provided by ecosystems interfere with the enjoyment of a clean, healthy and sustainable environment and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights,

Reaffirming that international cooperation has an essential role in assisting developing countries, including highly indebted poor countries, least developed countries, landlocked developing countries, small island developing States, as well as the specific challenges faced by middle-income countries, in strengthening their human, institutional and technological capacity,

Recognizing that, while the human rights implications of environmental damage are felt by individuals and communities around the world, the consequences are felt most acutely by women and girls and those segments of the population that are already in vulnerable situations, including indigenous peoples, children, older persons and persons with disabilities,

Recognizing also the importance of gender equality, gender-responsive action to address climate change and environmental degradation, the empowerment, leadership, decision-making and full, equal and meaningful participation of women and girls, and the role that women play as managers, leaders and defenders of natural resources and agents of change in safeguarding the environment,

Recognizing further that environmental degradation, climate change, biodiversity loss, desertification and unsustainable development constitute some of

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[6] Resolution 66/288, annex.

[7] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 53A* (A/76/53/Add.1), chap. II.

[8] Ibid., *Seventy-fifth Session, Supplement No. 53* (A/75/53), chap. V, sect. A.

[9] Ibid., *Supplement No. 53A* (A/75/53/Add.1), chap. III.

[10] Ibid.

[11] Ibid., *Seventy-sixth Session, Supplement No. 53* (A/76/53), chap. V, sect. A.

the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights,

Recognizing that the exercise of human rights, including the rights to seek, receive and impart information, to participate effectively in the conduct of government and public affairs and to an effective remedy, is vital to the protection of a clean, healthy and sustainable environment,

Reaffirming that States have the obligation to respect, protect and promote human rights, including in all actions undertaken to address environmental challenges, and to take measures to protect the human rights of all, as recognized in different international instruments, and that additional measures should be taken for those who are particularly vulnerable to environmental degradation, noting the framework principles on human rights and the environment,[12]

Recalling the Guiding Principles on Business and Human Rights,[13] which underscore the responsibility of all business enterprises to respect human rights,

Affirming the importance of a clean, healthy and sustainable environment for the enjoyment of all human rights,

Taking note of all the reports of the Special Rapporteur (formerly the Independent Expert) on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,[14]

Noting "The highest aspiration: a call to action for human rights", which the Secretary-General presented to the Human Rights Council on 24 February 2020,

Noting also that a vast majority of States have recognized some form of the right to a clean, healthy and sustainable environment through international agreements, their national constitutions, legislation, laws or policies,

1. *Recognizes* the right to a clean, healthy and sustainable environment as a human right;

2. *Notes* that the right to a clean, healthy and sustainable environment is related to other rights and existing international law;

3. *Affirms* that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law;

4. *Calls upon* States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.

97th plenary meeting
28 July 2022

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[12] A/HRC/37/59, annex.
[13] A/HRC/17/31, annex.
[14] A/73/188, A/74/161, A/75/161, A/76/179, A/HRC/22/43, A/HRC/25/53, A/HRC/28/61, A/HRC/31/52, A/HRC/31/53, A/HRC/34/49, A/HRC/37/58, A/HRC/37/59, A/HRC/40/55, A/HRC/43/53, A/HRC/43/54, A/HRC/46/28 and A/HRC/49/53.

TAB J

United Nations CCPR/C/135/D/3624/2019

International Covenant on Civil and Political Rights

Distr.: General
18 September 2023

Original: English

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019*, **, ***

Communication submitted by:	Daniel Billy and others (represented by counsel, ClientEarth)
Alleged victims:	The authors and six of their children
State party:	Australia
Date of communication:	13 May 2019 (initial submission)
Document reference:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 18 June 2019 (not issued in document form)
Date of adoption of Views:	21 July 2022
Subject matter:	Failure to take mitigation and adaptation measures to combat the effects of climate change
Procedural issues:	Admissibility: incompatibility; manifestly ill-founded; *ratione materiae*; victim status
Substantive issues:	Arbitrary/unlawful interference; children's rights; effective remedy; family rights; home; Indigenous Peoples; minorities' right to enjoy own culture; privacy; right to life
Articles of the Covenant:	2, read alone and in conjunction with 6, 17, 24 (1) and 27; 24 (1), read alone and in conjunction with 6, 17 and 27; and 6, 17 and 27, each read alone
Articles of the Optional Protocol:	1, 2 and 3

* Adopted by the Committee at its 135th session (27 June–27 July 2022).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

*** Individual opinions by Committee members Carlos Gómez Martínez (dissenting), Duncan Laki Muhumuza (dissenting), Hernán Quezada Cabrera (partially dissenting) and Gentian Zyberi (concurring) and a joint opinion by Committee members Arif Bulkan, Marcia V.J. Kran and Vasilka Sancin (partially dissenting) are annexed to the present Views and are circulated in the languages of submission only.

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1.1 The eight authors of the communication are Daniel Billy, Ted Billy, Nazareth Fauid, Stanley Marama, Yessie Mosby, Keith Pabai, Kabay Tamu and Nazareth Warria, born in 1983, 1957, 1965, 1967, 1982, 1964, 1991 and 1973, respectively. They are nationals of Australia and residents of the Torres Strait region. They act in their own names and on behalf of five children of Yessie Mosby[1] and the son of Kabay Tamu.[2] The authors claim that the State party has violated their rights under article 2 of the Covenant, read alone and in conjunction with articles 6, 17 and 27; and articles 6, 17 and 27, each read alone. They also claim violations of the rights of the six children under article 24 (1), read alone and in conjunction with articles 6, 17 and 27 of the Covenant. The Optional Protocol entered into force for the State party on 25 September 1991. The authors are represented by counsel.

1.2 Out of four requests received from third parties to submit interventions, the Committee granted two requests and denied two requests as out of time.[3]

The facts as submitted by the authors

2.1 The authors belong to the Indigenous minority group of the Torres Strait islands and live on the four islands of Boigu (Stanley Marama and Keith Pabai), Masig (Yessie, Genia, Ikasa, Awara, Santoi and Baimop Mosby and Nazareth Warria), Warraber (Daniel and Ted Billy and Kabay and Tyrique Tamu) and Poruma (Nazareth Fauid).[4] The Indigenous People of the Torres Strait islands, especially the authors who reside in low-lying islands, are among the populations most vulnerable to the impact of climate change.

2.2 The Torres Strait Regional Authority, a government body, has stated that "the effects of climate change threaten the islands themselves as well as marine and coastal ecosystems and resources, and therefore the life, livelihoods and unique culture of Torres Strait Islanders". The Regional Authority also noted that "even small increases in sea level due to climate change will have an immense impact on Torres Strait communities, potentially threatening their viability" and that "large increases would result in several Torres Strait islands being completely inundated and uninhabitable".[5]

2.3 Sea-level rise has already caused flooding and erosion on the authors' islands, and higher temperature and ocean acidification has produced coral bleaching, reef death and the decline of seagrass beds and other nutritionally and culturally important marine species. According to the Torres Strait Regional Authority, in the Torres Strait region, sea level has risen at the rate of approximately 0.6 cm per year from 1993 to 2010 (compared with the global average of 3.2 mm per year).

2.4 With respect to the impact of climate change on the islands, the village on Boigu, one of five communities particularly vulnerable to inundation, is flooded each year. Erosion has caused the shoreline to advance and has detached a small area from the island. On Masig in March 2019, a cyclone caused severe flooding and erosion and destroyed buildings. The cyclone resulted in the loss of three metres of shoreline. Approximately one metre of land is lost every year. In addition, in recent years a tidal surge has destroyed family graves, scattering human remains. On Warraber, high tides and strong winds cause seawater to flood the village centre every two to three years. On Poruma, erosion has washed away much of the island's sand over the past few decades.

2.5 Sea-level rise has caused saltwater to penetrate the soil of the islands, with the result that areas previously used for traditional gardening can no longer be cultivated. On Masig, rising sea level has caused coconut trees to become diseased, so that they do not produce fruits or coconut water, which are part of the authors' traditional diet. Such changes make the

[1] Genia, Ikasa, Awara, Santoi and Baimop Mosby (born in 2010, 2012, 2014, 2015 and 2017, respectively).

[2] Tyrique Tamu (born in 2010).

[3] Requests from Martin Scheinin and David R. Boyd and John H. Knox were granted; requests from Christina Voigt and Olivier de Frouville and Nadia Seqat were denied.

[4] The authors state that, while Torres Strait islanders constitute 0.14 per cent of the total population of Australia, they represent almost the totality of the settled population of the Torres Strait region. Each island has its own distinctive culture.

[5] Torres Strait Regional Authority, "Torres Strait Climate Change Strategy 2014-2018: Building community adaptive capacity and resilience", July 2014, p. iii.

authors reliant on expensive imported goods, which they often cannot afford. Seasonal and wind patterns play a key role in ensuring the authors' livelihoods and subsistence, but are no longer predictable. Precipitation, temperature and monsoon seasons have been subject to change, making it harder for the authors to pass on their traditional ecological knowledge. Seagrass beds and dependent species have disappeared. While crayfish is a fundamental source of food and income for the authors, they no longer find crayfish in areas where coral bleaching has occurred.

2.6 Referring to the Torres Strait Regional Authority report, the authors predict that the severe impacts on their traditional ways of life, subsistence and culturally important living resources will present significant social, cultural and economic challenges, have effects on infrastructure, housing, land-based food production systems and marine industries, and cause health-related problems such as an increased incidence of disease and heat-related illness.

2.7 The State party has failed to implement an adaptation programme to ensure the long-term habitability of the islands. Despite numerous requests for assistance and funding made to the State and federal authorities by or on behalf of the islanders, the State party has not responded promptly or adequately. Although some works were carried out on Boigu and Poruma between 2017 and 2018, many of the priority actions identified in the Torres Strait regional adaptation and resilience plan 2016–2021 remain unfunded. At present, no further government funding has been confirmed. Local authorities have taken a triage approach to saving homes and infrastructure, while residents of Warraber and Masig have taken matters into their own hands, using green waste and debris to secure fragile coastal ecosystems from erosion.

2.8 The State party has failed to mitigate the impact of climate change. In 2017, the State party's per capita greenhouse gas emissions were the second highest in the world. Those emissions increased by 30.72 per cent between 1990 and 2016. The State party ranked forty-third among 45 developed countries in reducing its greenhouse gas emissions during that period. Since 1990, the State party has actively pursued policies that have increased emissions by promoting the extraction and use of fossil fuels, in particular thermal coal for electricity generation.

2.9 There are no available or effective domestic remedies to enforce the rights of Torres Strait islanders under articles 2, 6, 17, 24 and 27 of the Covenant. The authors' rights under the Covenant are not protected in the Constitution or any other legislation applicable to the federal Government. The High Court of Australia has ruled that State organs do not owe a duty of care for failing to regulate environmental harm.[6]

Complaint

3.1 The authors claim that the State party has violated their rights under articles 2, read alone and in conjunction with articles 6, 17 and 27; and articles 6, 17 and 27, each read alone. They also claim violations of the rights of their children identified above under article 24 (1), read alone and in conjunction with articles 6, 17 and 27 of the Covenant. The State party has failed to adopt adaptation measures (infrastructure to protect the lives of the authors and their way of life, homes and culture against the impacts of climate change, especially sea-level rise). The State party has also failed to adopt mitigation measures to reduce greenhouse gas emissions and stop the promotion of fossil fuel extraction and use. As indicated in the Committee's general comment No. 36 (2018) on the right to life (para. 62), climate change is a matter of fundamental human rights.

3.2 The State party's obligations under international climate change treaties constitute part of the overarching system that is relevant to the examination of its violations under the Covenant.[7]

[6] High Court of Australia, *Graham Barclay Oysters Pty Ltd v. Ryan*, 2002.

[7] Vienna Convention on the Law of Treaties, art. 31.

Article 2

3.3 The State party has failed to adopt laws or other measures necessary to give effect to the authors' Covenant rights, including those under articles 6, 17, 24 and 27 of the Covenant.

Article 6

3.4 In violation of article 6 (1) of the Covenant, the State party has failed to prevent a foreseeable loss of life from the impacts of climate change,[8] and to protect the authors' right to life with dignity. The State party has not taken adaptation and mitigation measures, has not provided resources to adopt measures identified as necessary by the Torres Strait Island Regional Council and the Torres Strait Regional Authority, and has not met its obligations under the Paris Agreement. The State party has failed to respect the authors' right to a healthy environment, which is part of the right to life.[9] The State party must devote maximum available resources and all appropriate means to reducing emissions in order to comply with its obligations under article 6 of the Covenant.

Article 27

3.5 The authors' minority culture depends on the continued existence and habitability of their islands and on the ecological health of the surrounding seas.[10] Climate change already compromises the authors' traditional way of life and threatens to displace them from their islands. Such displacement would result in the infliction of egregious and irreparable harm with respect to their ability to enjoy their culture.

Article 17

3.6 Climate change already affects the private, family and home life of the authors, who face the prospect of having to abandon their homes within the lifetime of community members who are currently alive (including the authors). The State party has failed to take any or adequate adaptation and mitigation measures. When climate change threatens disruption to privacy, family and the home, States must prevent serious interference with the privacy, family and home of individuals under their jurisdiction.

Article 24 (1)

3.7 The State party has failed to take adequate steps to protect the rights of future generations of the authors' community, including the six above-mentioned children, who are the most vulnerable and affected by climate change. The future of their survival and culture is uncertain. Future generations, including the children named in the complaint, have a fundamental right to a stable climate system capable of sustaining human life, based on children's right to a healthy environment. Yessie Mosby fears that his children will have to live on another person's land and will not have anything reserved for themselves or their children, as the Masigalgal culture will be extinct.

State party's observations on admissibility and the merits

4.1 In its submission of 29 May 2020, the State party maintains that the communication is inadmissible. The alleged violations of international climate change treaties such as the Paris Agreement and other international treaties such as the International Covenant on Economic, Social and Cultural Rights are inadmissible, *ratione materiae*, because they are outside the scope of the present Covenant. Moreover, there is no basis for the authors' argument that international climate change treaties are relevant to the interpretation of the Covenant, because there are stark and significant differences between the Paris Agreement and the Covenant. The two instruments have different aims and scopes. Sixteen States that have signed the Agreement have not signed the Covenant. Accordingly, interpreting the Covenant through the Paris Agreement would be contrary to the fundamental principles of

[8] The Hague Court of Appeal, *Urgenda Foundation v. The State of the Netherlands*, Case No. 200.178.245/01, Judgment, 9 October 2018.

[9] Inter-American Court of Human Rights, Advisory Opinion OC-23/17, 15 February 2017, para. 59.

[10] For example, *Lubicon Lake Band v. Canada* (CCPR/C/38/D/167/1984), paras. 32.2 and 33.

international law.[11] The ordinary meaning of one treaty cannot be used to override the clear language of the Covenant.[12]

4.2 The authors have not substantiated their claim that they are victims of violations within the meaning of article 1 of the Optional Protocol.[13] There is no evidence that the authors face any current or imminent threat of a violation of any of the rights they have invoked.[14] Moreover, the authors have not shown any meaningful causation or connection between the alleged violations of their rights and the State party's measures or alleged failure to take measures. To demonstrate victim status, the authors must show that an act or omission by the State party has already adversely affected their enjoyment of a right under the Covenant or that such an effect is imminent. By their own admission, the authors have not met that test. It is not possible, under the rules of State responsibility under international law, to attribute climate change to Australia. Relying on the Committee's position in *Teitiota v. New Zealand*, the State party asserts that the authors invoke a risk that has not yet materialized.[15]

4.3 The authors' claims are also without merit. None of the alleged failures to take mitigation measures fall within the scope of the Covenant. It is not possible under international human rights law to attribute climate change to the State party.[16] It is not possible as a legal matter to trace causal links between the State party's contribution to climate change, its efforts to address climate change and the alleged effects of climate change on the enjoyment of the authors' rights. The Office of the United Nations High Commissioner for Human Rights has stated that "it is virtually impossible to disentangle the complex causal relationships linking historical greenhouse gas emissions of a particular country with a specific climate change-related effect, let alone with the range of direct and indirect implications for human rights" and that "it is often impossible to establish the extent to which a concrete climate change-related event with implications for human rights is attributable to global warming".[17]

4.4 The authors' claims with respect to adaptation measures are also without merit, as the authors have yet to suffer the alleged adverse effects of climate change, if at all, and such alleged violations are not imminent.

4.5 The State party describes in detail the adaptation and mitigation measures it is taking with respect to climate change.[18] The Torres Strait Regional Authority coordinates climate change programmes and policies for the benefit of the region and its communities. It consists of both an elected arm of 20 Torres Strait islanders and Aboriginal representatives from the region and an administrative arm comprising a chief executive officer and staff who implement and manage Regional Authority programmes. To respond to coastal management and climate change issues in the Torres Strait, the Regional Authority established a committee from 2006 to 2013, which included representatives from the communities worst affected by coastal erosion and inundation, including Boigu, Warraber, Masig and Poruma, State and federal agencies and various research institutions. The committee enabled a whole-of-government coordinated response to coastal and climate change issues in the Torres Strait region and secured funds to progress identified priority coastal works. The State party describes in detail the Torres Strait Climate Strategy 2014–2018, and the Torres Strait Regional Adaptation and Resilience Plan 2016–2021. The Regional Authority continues to

[11] Vienna Convention on the Law of Treaties, art. 31 (3) (c).

[12] Ibid.

[13] The State party argues both that the communication is insufficiently substantiated and that the authors lack victim status.

[14] For example, *E.W. et al. v. Netherlands* (CCPR/C/47/D/429/1990), para. 6.4.

[15] *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016), para. 9.12.

[16] See the report of the International Law Commission on the work of its fifty-third session (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10)), draft articles on responsibility of States for internationally wrongful acts, article 4 (chap. IV.E.1).

[17] A/HRC/10/61, para. 70.

[18] The State party provides extensive information in its submission regarding its efforts to reduce greenhouse gas emissions.

be directly involved with communities in the Torres Strait to enable them to respond to climate change impacts.

4.6 The Torres Strait Regional Authority also played a lead role in securing the information and funding to progress the construction of a new sea wall for the low-lying island of Saibai. The Regional Authority is working with local councils to progress a more detailed assessment of coastal hazards that would inform coastal adaptation measures and actively seeks opportunities to reduce the region's carbon footprint through the uptake of clean energy technologies.

Article 6

4.7 Article 6 (1) of the Covenant requires States to protect against arbitrary deprivation of life for persons within its jurisdiction, but does not require States to protect those persons from the general effects of climate change.[19] The authors do not claim that they have been arbitrarily deprived of their lives. The *Urgenda* case was based on negligence provisions in the Dutch Civil Code.[20] Establishing factual causation under international law is a nearly impossible barrier to such tort claims. As in the *Teitiota* case, the State party is taking adaptation measures in the Torres Strait, thus rendering the harm invoked by the authors too remote to demonstrate a violation of the right to life.

4.8 The authors have failed to demonstrate that article 6 (1) of the Covenant includes a generalized right of protection against the effects of climate change and that relevant domestic legislation is manifestly insufficient or lacking altogether.[21] The extension of article 6 (1) of the Covenant to a right to life with dignity, although a laudable policy objective shared by the State party, is unsupported by the rules of treaty interpretation, the ordinary meaning of article 6 (1) and any relevant jurisprudence.

4.9 Alternatively, if the Committee maintains the right to a life with dignity, it should only be recognized in limited and particular circumstances. In contrast to the situation in the Committee's recent Views on *Portillo Cáceres et al. v. Paraguay*,[22] the actions in the present case were not attributable to the State party, which did not fail to enforce domestic law or infringe any domestic laws. The authors in the present case have not suffered any poor health, let alone poisoning or death.

Article 27

4.10 The State party has enacted laws to protect the survival and continued development of the Torres Strait islanders' cultural identity. The authors merely assert future hypothetical violations of this right. All of the cases in which the Committee has found violations of this right relate to existing, not future violations. Article 27 of the Covenant was never intended to protect against the effects of climate change.

Article 17

4.11 The authors focus entirely on the future disruptions to family life that climate change may cause. The authors have not made any claim that their families (including relatives in extended families) have experienced arbitrary or unlawful interference by the State party. The interference prohibited under article 17 of the Covenant must be real and effective, not potential or future, and must emanate from State authorities or natural or legal persons authorized by the State. The authors' allegation that they could be relocated in the future is speculative.

[19] General comment No. 36 (2018), para. 20.

[20] Supreme Court of the Netherlands, *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Urgenda Foundation*, Case No. 19/00135, Judgment, 20 December 2019.

[21] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised ed. (N.P. Engel, Kehl am Rhein, 2005), p. 123.

[22] CCPR/C/126/D/2751/2016.

Article 24

4.12 The authors have not demonstrated that the wide range of legislative and other measures put in place by the State party to protect Australian children fail to comply with the obligation under article 24 (1) of the Covenant. In article 24 (1), which measures of protection are required are not specified; States parties have broad discretion in this regard.

Authors' comments on the State party's observations on admissibility and the merits

5.1 In their comments submitted on 29 September 2020, the authors maintain that the State party did not challenge their arguments regarding several issues, including the science of climate change and its current and future impacts on the islands on which they live; and the interdependency between the authors' unique and vulnerable culture and the surrounding ecosystem of the islands.

5.2 The State party erred in asserting that the authors have yet to suffer the adverse effects of climate change, if at all. This contradicts the evidence that the authors already provided and the reports of the Torres Strait Regional Authority, a State agency. Moreover, the State party has already violated its duty to avert devastating and future irreversible impacts on rights protected by the Covenant, including impacts caused by existing greenhouse gas emissions. Protective measures must be initiated today.[23] Climate change is a slow-onset process. Thus, a State party may violate its obligations before the worst effects occur. The authors' claims are based on both current violations and an imminent threat of violations. They already experience severe impacts arising from climate change, including damage to their homes and disruption of their family life. In their combined statements, the authors describe experiencing the following problems: flooding and inundation of villages; flooding and inundation of ancestral burial lands; loss by erosion of their traditional lands, including plantations and gardens; destruction or withering of traditional gardens through salinification caused by flooding or seawater ingress; decline of nutritionally and culturally important marine species caused by climate change, and associated coral bleaching (reef death) and ocean acidification; and a reduced ability to practise their traditional culture and pass it on to the next generation. They also experience anxiety and distress owing to erosion which is approaching some homes in the community. For six of the authors, upkeep of ancestral graveyards and visiting and feeling communion with deceased relatives is at the heart of their cultures and the most important ceremonies (such as coming-of-age and initiation ceremonies) are culturally meaningful only if performed on the native lands of the community observing the ceremony.

5.3 The authors living on Boigu and Masig face a real prospect of displacement and loss of culture within the next 10 years unless urgent and significant action is taken to enable the islands to withstand expected sea-level rise. The authors living on Warraber and Poruma face such a prospect within their lifetimes unless urgent action is taken within 10 to 15 years. Such displacement can be prevented with reasonable adaptation and mitigation measures. If the State party's interpretation of imminence were followed, the authors would be forced to wait until their culture and their land were lost in order to submit a claim under the Covenant.

5.4 The authors have identified specific acts and omissions by the State party (relating to adaptation and mitigation) instead of relying on abstract arguments. Those acts and omissions have already impaired and will continue to impair the authors' rights in ways that will worsen over time, because of the latent and/or irreversible nature of climate change.

5.5 The State party is responsible for its own emissions contribution, lack of due diligence and failure to take adaptation measures to protect the authors' rights and fulfil its obligation to reduce emissions. The protection of the right to life requires States to review their energy policies and prevent the dangerous emission of greenhouse gases.

[23] According to land and sea profiles published in 2015 and 2016, the Torres Strait Regional Authority assigned to the four islands where the authors live ratings of either high vulnerability to sea-level rise (Masig, Poruma and Warraber) or very high vulnerability (Boigu) and considered them to have low (Masig and Warraber), very low (Boigu) or medium (Poruma) sea-level rise response options.

5.6 International environmental legal obligations of States are indeed relevant to interpreting the scope of their duties under the Covenant. Treaties should be interpreted in the context of their normative environment.

5.7 The State party has not so far taken any adequate concrete measures to prevent the authors' islands from becoming uninhabitable or to address the real and foreseeable threat of the complete loss of the authors' cultures. The Committee's jurisprudence supports the notion that environmental harm can lead to violations of fundamental human rights, given the dependence of Indigenous minority cultures on a healthy environment and the strong cultural and spiritual link between Indigenous Peoples and their traditional lands.

5.8 With respect to article 24 of the Covenant, the principle of intergenerational equity places a duty on current generations to act as responsible stewards of the planet and ensure the rights of future generations to meet their developmental and environmental needs. The remedies requested by the authors are reasonable and proportionate.

State party's additional observations

6.1 In its additional observations, submitted on 5 August 2021, the State party maintains that the authors' allegations (changes to seasonal patterns; erosion of ancestral land; saltwater intrusion; and damage to cultural practices, species and homes) represent possible impacts of climate change but not existing or imminent violations of Covenant rights caused by the State party, either through act or omission. Those impacts only suggest that current adverse effects may, subject to contingencies, worsen in the future. The possible impacts of a slow-onset process do not confer victim status on the authors.

6.2 The authors acknowledge that there is still a window of time in which adaptation measures can be planned and implemented. The authors themselves contemplate the consequences that might arise if and when their islands become unviable for habitation.

6.3 Climate change is a global phenomenon attributable to the actions of many States. Unlike other environmental issues previously considered by the Committee, it requires global action. The general effects of climate change and the effectiveness of any mitigation or adaptation measures to address those effects are not within the complete control of any State.[24]

6.4 The State party's position is not, as the authors allege, that they must simply wait and suffer increasingly severe climate impacts. The international community has sought to address climate change primarily, and rightly, as a matter requiring international cooperation under international environmental agreements. Notwithstanding the authors' dissatisfaction with the pace and nature of the State party's efforts, this does not mean that the State party's response to the threat of climate change, and consequently the response of many other States, amounts to a violation of the Covenant.

6.5 In applying the principle of systemic integration described by the International Law Commission, relevant rules for the purpose set out in article 31 (3) (c) of the Vienna Convention on the Law of Treaties must concern the subject matter of the treaty term at issue.[25] Climate change treaties do not provide evidence of the object and purpose of the Covenant or the meaning of its terms.

6.6 Regarding the exhaustion of domestic remedies, States parties to the Covenant are not required to make available a domestic remedy for the purposes under article 2 (3) of the Covenant where: (a) the alleged violations are outside the scope of the Covenant (as is the case here, since the allegations relate to the compliance of Australia with international climate change treaties); or (b) there is no breach of rights recognized by the Covenant as properly understood, as is the case for the allegations in the present communication.

6.7 The obligation to respect under article 2 (1) of the Covenant is a positive obligation of non-interference with Covenant rights that extends only to real risks against which a State

[24] See *Poma Poma v. Perú* (CCPR/C/95/D/1457/2006).

[25] Report of the International Law Commission on the work of its fifty-eighth session (A/61/10), pp. 180 and 413.

party can offer protection.[26] The alleged threat to the authors' rights is a global phenomenon arising from myriad acts committed by innumerable private and State entities over decades which, unquestionably, are beyond the jurisdiction and control of the State party. It would be perverse if, to ensure that climate change does not impair the authors' rights, the Covenant were to impose a duty or obligation on the State party that the State party could not hope to fulfil. Moreover, the authors acknowledge the multiplicity of global causes of climate change, and that there is still the opportunity for mitigating factors at the national and global levels to intervene in order to allay the threat posed by its future impacts.

6.8 Any positive obligation that arises under the Covenant is limited principally to the threat posed by the acts of private persons or entities within a State party's jurisdiction and control. This could also extend to positive obligations in respect of environmental issues that pose a direct, specific and objective threat to the enjoyment of Covenant rights, such as the use of pesticides (as in *Portillo Cáceres et al. v. Paraguay*), where it is within the scope of a State's power to avert that risk. It does not, however, create an obligation to protect generally against the future effects of climate change, which, as a matter of international law, extend well beyond the scope of a single State party's jurisdiction and control.

6.9 Academic scholars have noted that "causal pathways involving anthropogenic climate change, and especially its impacts, are intricate and diffuse" and that human rights law "cannot actually address the depth and breadth of the causes and impacts of climate change".[27] A threat that is not attributable to a State cannot be ensured or protected against by that State in cases where such protection cannot be achieved by the State alone.

6.10 Positive obligations under the Covenant do not require the maximum deployment of possible resources or the realization of the highest possible ambition. To adopt such an unprecedented test would not only place an impossible burden on States but also displace reasonable policy choices made in good faith by States as they assess a range of threats and challenges that have an impact on the enjoyment of human rights under the Covenant and decide how to distribute limited resources to address them.

6.11 It would be both inappropriate and unfounded for the Committee to interpret the Covenant in such a way as to allow it to remake the informed, good faith and difficult policy decisions of a democratically elected Government which inherently involve compromises, trade-offs and the allocation of limited resources across the range of challenges to the full enjoyment of human rights. In urging the Committee to adopt an unduly broad interpretation of a positive obligation, the authors invite the Committee to disregard States' discretion in making relevant decisions, even if exercised in good faith. Fulfilment of positive obligations under the Covenant must recognize competing challenges to limited State resources.

6.12 The authors' claims under article 27 of the Covenant are both factually and legally incorrect. The State party is taking measures to prevent the islands from becoming unviable for habitation through the adaptation and mitigation measures described at length in its observations. The State party provides detailed information on legislation, policies and practices designed to protect the cultural rights of Torres Strait islanders. Such measures include the Torres Strait Islander Cultural Heritage Act 2003 (Qld), the Torres Strait Islander Traditional Child Rearing Practice Act 2020 (Qld), the Traditional Ecological Knowledge Project of the Torres Strait Regional Authority, the declaration of three Indigenous protected areas in the Torres Strait region, the use of Torres Strait infrastructure and housing, Indigenous land-use agreements, and the Local Thriving Communities programme. As a matter of international law, article 27 of the Covenant does not involve any positive obligation to prevent slow-onset risks that might arise in the future. A breach of article 27 of the Covenant arises only at the time of any denial; it does not convert a risk of future denial into a present breach. Even if the Committee were to admit an intergenerational element of

[26] The State party provided detailed information in its submission on the measures it has taken to address the harmful effects of climate change.

[27] For example, Fanny Thornton, "The absurdity of relying on human rights law to go after emitters", in *Debating Climate Law*, Benoit Mayer and Alexander Zahar, eds. (Cambridge, United Kingdom, Cambridge University Press, 2021), p. 159.

cultural transmission, there is nothing to suggest that the State party has directly interfered in or failed to protect the authors' ability to transmit their culture across generations.

6.13 Article 24 (1) of the Covenant does not itself set out the rights of children but refers to necessary measures of protection for children. Instead of identifying any measures specifically sought by the authors to obtain such protection for children, their comments only describe climate change impacts that affect the Torres Strait population generally, adults and children alike. The special measures warranted by article 24 of the Covenant seek to protect children because of their status as minors. The effects of climate change do not depend upon a person's status as a minor.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee recalls the requirement under article 5 (2) (b) of the Optional Protocol that the author of a communication must exhaust all judicial or administrative domestic remedies, insofar as such remedies offer a reasonable prospect of redress and are de facto available to the author.[28] The Committee recalls that for the purpose of article 5 (2) (b) of the Optional Protocol, authors must make use only of all those avenues that offer them a reasonable prospect of redress, that relate to the alleged violation and that offer redress that would be proportionate to the harm done.[29] In this regard, the Committee notes the authors' uncontested statement that the highest court in Australia has ruled that State organs do not owe a duty of care for failing to regulate environmental harm. The Committee takes note of the State party's position that States parties to the Covenant are not required to make available domestic remedies in cases where, as in the present case, there is no breach of rights recognized by the Covenant as properly understood. With due regard for its remaining findings on admissibility in the paragraphs below, the Committee considers that the issue of whether the authors' Covenant rights were breached cannot be dissociated from the merits of the case. In the above circumstances, and in the absence of information from the State party indicating that effective and available domestic remedies existed at the relevant time for the authors to raise the alleged Covenant violations before competent State bodies, the Committee considers that article 5 (2) (b) of the Covenant does not preclude it from examining the communication.

7.4 The Committee notes the authors' claims under article 2, read alone and in conjunction with articles 6, 17, 24 (1) and 27 of the Covenant. The Committee recalls that according to its jurisprudence, the provisions of article 2 of the Covenant lay down a general obligation for States parties and do not give rise, when invoked separately, to a claim in a communication under the Optional Protocol. Furthermore, article 2 of the Covenant may not be invoked in a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim.[30] In the present case, the Committee observes that the authors' claims under article 2, read in conjunction with articles 6, 17, 24 (1) and 27 of the Covenant lie in the alleged failure of the State party's policies to give effect to their rights in relation to life, private life, family, home and culture. The Committee notes, however, that the authors have already alleged violations of their rights under articles 6, 17, 24 (1) and 27, resulting from alleged defects in the legislative and policy framework and

[28] For example, *D.G. et al. v. Philippines* (CCPR/C/128/D/2568/2015), para. 6.3.
[29] *Portillo Cáceres et al. v. Paraguay*, para. 6.5.
[30] For example, *Devi Maya Nepal v. Nepal* (CCPR/C/132/D/2615/2015), para. 6.6.

practices of the State party regarding causes, effects and responses relating to climate change. The Committee considers that an examination of whether the State party violated its general obligations under article 2 of the Covenant, read in conjunction with articles 6, 17, 24 (1) or 27 of the Covenant would not be distinct from the examination of the violation of the authors' rights under articles 6, 17, 24 (1) or 27 of the Covenant. The Committee therefore considers that the authors' claims under article 2, read alone and in conjunction with articles 6, 17, 24 (1) and 27 of the Covenant are inadmissible under article 3 of the Optional Protocol.

7.5 The Committee takes note of the State party's argument that the authors' claims under other international treaties are inadmissible, *ratione materiae*, because they lie outside the scope of the Covenant. The Committee observes that it is not competent to determine compliance with other international treaties or agreements. However, to the extent that the authors are not seeking relief for violations of the other treaties before the Committee but rather refer to them in interpreting the State party's obligations under the Covenant, the Committee considers that the appropriateness of such interpretations relates to the merits of the authors' claims under the Covenant. Accordingly, the Committee considers that in this respect, article 3 of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

7.6 The Committee notes the State party's position that the communication is inadmissible under articles 1 and 2 of the Optional Protocol because the State party cannot be held responsible, as a legal or practical matter, for the climate change impacts that the authors allege in their communication. The arguments raised by the parties require the Committee to contemplate whether, under article 1 of the Optional Protocol, a State party may be considered to have committed a violation of the rights of an individual under the Covenant, where the harm to the individual allegedly resulted from the failure of the State party to implement adaptation and/or mitigation measures to combat adverse climate change impacts within its territory.

7.7 With respect to adaptation measures, the Committee recalls that the authors in the present communication have invoked articles 6, 17, 24 (1) and 27, each of which entails positive obligations of States parties to ensure the protection of individuals under their jurisdiction against violations of those provisions.[31]

7.8 With respect to mitigation measures, although the parties differ as to the amount of greenhouse gases emitted within the State party's territory and as to whether those emissions are significantly decreasing or increasing, the information provided by both parties indicates that the State party is and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been produced. The Committee notes that the State party ranks high on world economic and human development indicators. In view of the above, the Committee considers that the alleged actions and omissions fall under the State party's jurisdiction under articles 1 or 2 of the Optional Protocol and therefore that it is not precluded from examining the present communication.

7.9 The Committee notes the State party's position that the communication is inadmissible under articles 1 and 2 of the Optional Protocol because the authors invoke potential future harms and have not sufficiently substantiated their claim that they are victims of a past or existing violation or imminent threat of a violation of their rights by the State party. The Committee recalls its jurisprudence in which it stated that a person can claim to be a victim in the sense of article 1 of the Optional Protocol only if he or she is actually affected. How concretely that requirement should be met is a matter of degree. Individuals claiming to be a victim of a violation of a right protected under the Covenant must demonstrate, however, either that a State party has, by act or omission, already impaired the exercise of their right or that such impairment is imminent, basing their arguments for example on legislation in force or on a judicial or administrative decision or practice. If the law or practice has not already been concretely applied to the detriment of such an individual,

[31] General comments No. 36 (2018), para. 21; No. 16 (1988), para. 1; No. 17 (1989), para. 1; and No. 23 (1994), para. 6.1; and *Abdoellaevna and Y v. Netherlands* (CCPR/C/125/D/2498/2014), para. 7.3.

it must in any event be applicable in such a way as to indicate that the individual's risk of being affected is more than a theoretical possibility.[32]

7.10 The Committee notes that the authors presented in their communication information indicating the existence of real predicaments that they have experienced personally and actually owing to disruptive climate events and slow-onset processes such as flooding and erosion. The authors argue in part that those predicaments have already compromised their ability to maintain their livelihoods, subsistence and culture. While noting the State party's argument that the authors have not substantiated that present and future climate change impacts and the State party's role in mitigating those impacts have violated the authors' rights under the Covenant, the Committee observes that the authors, as members of peoples who are the long-standing inhabitants of traditional lands consisting of small, low-lying islands which presumably offer scant opportunities for safe internal relocation, are highly exposed to adverse climate change impacts. It is uncontested that the authors' lives and cultures are highly dependent on the availability of the limited natural resources to which they have access and on the predictability of the natural phenomena that surround them. The Committee observes that in the light of their limited resources and location, the authors would be unlikely to be able to finance adequate adaptation measures themselves, on an individual or community level, to adjust to actual or expected climate change and its effects in order to moderate harm. The Committee therefore considers that the authors are among those who are extremely vulnerable to experiencing severely disruptive climate change impacts intensely. The Committee considers, based on the information provided by the authors, that the risk of impairment of those rights, owing to alleged serious adverse impacts that have already occurred and are ongoing, is more than a theoretical possibility. The Committee accordingly considers that articles 1 and 2 of the Optional Protocol do not constitute an obstacle to the admissibility of the claims under articles 6, 17, 24 (1) and 27 of the Covenant.

7.11 The Committee therefore declares the authors' claims under articles 6, 17, 24 (1) and 27 of the Covenant admissible and proceeds to examine them on the merits.

Consideration of the merits

8.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

8.2 The Committee notes the authors' claim that, by failing to implement adequate mitigation and adaptation measures to prevent negative climate change impacts on the authors and the islands where they live, the State party has violated their rights under the Covenant.

Article 6

8.3 The Committee notes the authors' claim that the events in this case constitute a violation by act and omission of their right to a life with dignity under article 6 of the Covenant, owing to the State party's failure to perform its duty to provide adaptation and mitigation measures to address climate change impacts that adversely affect their lives, including their way of life. With respect to the State party's position that article 6 (1) of the Covenant does not obligate it to prevent foreseeable loss of life from climate change, the Committee recalls that the right to life cannot be properly understood if it is interpreted in a restrictive manner and that the protection of that right requires States parties to adopt positive measures to protect the right to life.[33] The Committee also recalls its general comment No. 36 (2018) on the right to life, in which it established that the right to life also includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death (para. 3).[34] The Committee further recalls that the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life.[35] States parties

[32] For example, *Teitiota v. New Zealand*, para. 8.4.

[33] For example, *Teitiota v. New Zealand*, para. 9.4; and *Toussaint v. Canada* (CCPR/C/123/D/2348/2014), para. 11.3.

[34] See also *Portillo Cáceres et al. v. Paraguay*, para. 7.3.

[35] *Toussaint v. Canada*, para. 11.3; and *Portillo Cáceres et al. v. Paraguay*, para. 7.5.

may be in violation of article 6 of the Covenant even if such threats and situations do not result in the loss of life.[36] The Committee considers that such threats may include adverse climate change impacts and recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.[37] The Committee recalls that States parties should take all appropriate measures to address the general conditions in society that may give rise to direct threats to the right to life or prevent individuals from enjoying their right to life with dignity.[38]

8.4 The Committee takes note of the State party's position that the extension of article 6 (1) of the Covenant to a right to life with dignity through general comment No. 36 (2108) is unsupported by the rules of treaty interpretation, with reference to article 31 of the Vienna Convention on the Law of Treaties (1969). However, the Committee is of the view that the language at issue is compatible with the latter provision, which requires that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In this regard, the Committee notes that under article 31 of the Convention, the context for interpretation of a treaty includes in the first place the text of the treaty, including its preamble and annexes. In the preamble of the Covenant, it is recognized initially that the inherent dignity and the equal and inalienable rights of all members of the human family are the foundation of freedom, justice and peace in the world and it is also recognized that those rights derive from the inherent dignity of the human person. While the State party notes that socioeconomic entitlements are protected under a separate Covenant, the Committee observes that the preamble of the present Covenant recognizes that the ideal of free human beings enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy their civil and political rights, as well as their economic, social and cultural rights.

8.5 The Committee observes that both it and regional human rights tribunals have established that environmental degradation can compromise effective enjoyment of the right to life and that severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life.[39] In the present case, the Committee notes that the Torres Strait Regional Administration, a government agency, recognized in its report entitled "Torres Strait Climate Change Strategy 2014–2018" the vulnerability of the Torres Strait islands to significant and adverse climate change impacts that affect ecosystems and the livelihoods of the islands' inhabitants.[40] The Committee also notes the authors' claims regarding their islands' exposure to flood-related damage, sea wall breaches, coral bleaching, increasing temperatures, erosion, reduction of the number of coconut trees and marine life used for food and cultural purposes, and a lack of rain and its effect on crop cultivation (paras. 2.3–2.5 and 5.2).

8.6 The Committee recalls that in certain places, the lack of alternatives to subsistence livelihoods may place individuals at a heightened risk of vulnerability to the adverse effects of climate change.[41] The Committee takes into account the authors' argument that the health of their islands is closely tied to their own lives. The Committee notes, however, that while the authors attest to feelings of insecurity engendered by a loss of predictability of seasonal weather patterns, seasonal timing, tides and availability of traditional and culturally important food sources, they have not indicated that they have faced or currently face adverse impacts on their own health or a real and reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life, including their right to a life with dignity. The Committee also notes that the authors' claims under article 6 of the Covenant relate mainly to their ability to maintain their culture, which falls under the scope of article 27 of the Covenant.

[36] General comment No. 36 (2018), para. 7.

[37] Ibid., para. 62.

[38] Ibid., para. 26.

[39] *Portillo Cáceres et al. v. Paraguay*, para. 7.4 and footnotes 45 and 46.

[40] Land and Sea Management Unit, Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014–2018*, July 2014.

[41] *Teitiota v. New Zealand*, para. 9.9.

8.7 Regarding the authors' assertion that their islands will become uninhabitable in 10 years (Boigu and Masig) or in 10 to 15 years (Poruma and Warraber) in the absence of urgent action, the Committee recalls that without robust national and international efforts, the effects of climate change may expose individuals to a violation of their rights under article 6 of the Covenant.[42] Furthermore, given that the risk of an entire country's becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.[43] The Committee notes that, under the Torres Strait sea walls programme (2019–2023), multiple infrastructures will be constructed and upgraded to address ongoing coastal erosion and storm surge impacts on Poruma, Warraber, Masig, Boigu and Iama. The Committee notes that by 2022, several coastal mitigation works had been completed on Boigu with funding of $A 15 million: the construction of a 1,022 metre-long wave return wall, the raising and extension of an existing bund wall to 450 metres and the upgrading of stormwater drainage infrastructure. The Committee observes that under the programme, coastal mitigation works on Poruma, Warraber and Masig were scheduled to begin in 2021 or 2022 and to be completed by 2023. The Committee takes note of the other adaptation and mitigation measures mentioned by the State party. The Committee considers that the time frame of 10 to 15 years, as suggested by the authors, could allow for intervening acts by the State party involving taking affirmative measures to protect and, where necessary, relocate the alleged victims. The Committee also considers that the information provided by the State party indicates that it is taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms on the islands. Based on the information made available to it, the Committee is not in a position to conclude that the adaptation measures taken by the State party would be insufficient and therefore represent a direct threat to the authors' right to life with dignity.

8.8 In view of the foregoing, the Committee considers that the information before it does not disclose a violation by the State party of the authors' rights under article 6 of the Covenant.

Article 17

8.9 The Committee notes the authors' claims that climate change already affects their private, family and home life, as they face the prospect of having to abandon their homes. The Committee also notes that the erosion of their islands causes the authors significant distress and that flooding occurs on the islands. The Committee further notes the allegation of Stanley Marama that his home was destroyed owing to flooding in 2010. The Committee recalls that States parties must prevent interference with a person's privacy, family or home that arises from conduct not attributable to the State, at least where such interference is foreseeable and serious.[44] Thus, when environmental damage threatens disruption to privacy, family and the home, States parties must prevent serious interference with the privacy, family and home of individuals under their jurisdiction.

8.10 The Committee recalls that the authors depend on fish, other marine resources, land crops and trees for their subsistence and livelihoods and depend on the health of their surrounding ecosystems for their own well-being. The State party has not contested the authors' assertions in that regard. The Committee considers that the aforementioned elements constitute components of the traditional Indigenous way of life of the authors, who enjoy a special relationship with their territory, and that these elements can be considered to fall within the scope of protection under article 17 of the Covenant.[45] In addition, the Committee considers that the application of article 17 should be understood not as being limited to the act of refraining from arbitrary interference; but rather as also obligating States parties to adopt positive measures that are needed to ensure the effective exercise of the rights under

[42] Ibid., para. 9.11.
[43] Ibid.
[44] General comment No. 16 (1988), paras. 1 and 9.
[45] *Benito Oliveira et al. v. Paraguay* (CCPR/C/132/D/2552/2015), para. 8.3; and *Portillo Cáceres et al. v. Paraguay*, para. 7.8.

article 17 in the presence of interference by the State authorities and physical or legal persons.[46]

8.11 The Committee takes note of the State party's extensive and detailed information that it has taken numerous actions to address adverse impacts caused by climate change and carbon emissions generated within its territory. Those actions include, with relevance to the authors' claims, release of the Torres Strait Regional Adaptation and Resilience Plan 2016–2021, which focused both on climate impacts and reducing vulnerability through resilience; direct involvement of the Regional Authority with communities in the region to enable them to respond to climate change impacts; community heat mapping to monitor and reduce heat risk; installation of monitoring sites relating to tides, sea level, temperature and rainfall; commitment of over $A 15 billion for country-wide natural resource management, water infrastructure, drought and disaster resilience and recovery funding; investment of $A 100 million for management of ocean habitats and coastal environments; provision of regional and global climate finance of $A 1.4 billion (2015–2020) and $A 1.5 billion (2020–2025), with a strong focus on achieving adaptation outcomes; reduction of its carbon emissions by 20.1 per cent (from 2005 to 2020) and by 46.7 per cent per person (from 1990 to 2020); investment of an estimated $A 20 billion in low emissions technologies (2020–2030) and $A 3.5 billion in the Emissions Reduction Fund; initiation or completion of 58 actions identified in the Torres Strait Regional Adaptation and Resilience Plan 2016–2021; development of local adaptation and resilience plans for the 14 outer island communities; development by the Torres Strait Regional Authority of a draft regional resilience framework to help build greater local and regional resilience to climate change impacts, informed by discussions with community representatives; ongoing assessment of climate change impacts for Torres Strait communities; coastal mapping on the Torres Strait islands to inform coastal adaptation planning; continuation of coastal protection initiatives by the Regional Authority to address erosion and storm surge impacts on local communities; and investment of $A 40 million in stage 2 of the Torres Strait sea walls programme (2019–2023). The Committee recalls the information contained in paragraph 8.7 concerning the State party's completed and ongoing efforts to build new or updated sea walls on the islands where the authors live and notes that the sea walls are all expected to be completed by 2023.

8.12 However, the Committee notes that the State party has not specifically commented on the authors' allegations that they attempted to request the construction of adaptation measures, in particular upgraded sea walls, at various points over the last decades. While welcoming the new construction of sea walls on the four islands at issue, the Committee observes that the State party has not explained the delay in sea wall construction with respect to the islands where the authors live. It has not contested the factual allegations set forth by the authors concerning the concrete climate change impacts on their home, private life and family. The Committee notes that the State party has not provided alternative explanations concerning the reduction of marine resources used for food and the loss of crops and fruit trees on the land on which the authors live and grow crops, elements that constitute components of the authors' private life, family and home. The Committee also notes the authors' specific descriptions of the ways in which their lives have been adversely affected by flooding and inundation of their villages and ancestral burial lands; destruction or withering of their traditional gardens through salinification caused by flooding or seawater ingress; and decline of nutritionally and culturally important marine species and associated coral bleaching and ocean acidification. The Committee further notes the authors' allegations that they experience anxiety and distress owing to erosion that is encroaching on some homes in their communities and that the upkeep and visiting of ancestral graveyards is associated with the very heart of their culture, which requires experiencing feelings of communion with deceased relatives. The Committee notes the authors' statement that their most important cultural ceremonies are meaningful only if performed on native community lands. The Committee considers that when climate change impacts, including environmental degradation on traditional (Indigenous) lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable, have direct repercussions on the right to one's home, and the adverse consequences of those impacts are serious because of their intensity or duration and the

[46] General comment No. 16 (1988), para. 1.

physical or mental harm that they cause, the degradation of the environment may then adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home.[47] The Committee concludes that the information made available to it indicates that, by failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family, the State party violated the authors' rights under article 17 of the Covenant.

Article 27

8.13 The Committee recalls that article 27 establishes and recognizes a right which is conferred on individuals belonging to minority Indigenous groups and which is distinct from, and additional to, the other rights that all persons are entitled to enjoy under the Covenant.[48] The Committee also recalls that, in the case of Indigenous Peoples, the enjoyment of culture may relate to a way of life which is closely associated with territory and the use of its resources, including such traditional activities as fishing or hunting.[49] Thus, the protection of this right is directed towards ensuring the survival and continued development of cultural identity.[50] The Committee further recalls that article 27 of the Covenant, interpreted in the light of the United Nations Declaration on the Rights of Indigenous Peoples, enshrines the inalienable right of Indigenous Peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion.[51]

8.14 The Committee notes the authors' assertion that their ability to maintain their culture has already been impaired by the reduced viability of their islands and the surrounding seas, owing to climate change impacts. The Committee also notes the authors' claim that those impacts have eroded their traditional lands and natural resources that they use for traditional fishing and farming and for cultural ceremonies that can be performed only on the islands. The Committee further notes their claim that the health of their land and the surrounding seas is closely linked to their cultural integrity. The Committee notes that the State party has not refuted the authors' arguments that they could not practise their culture on mainland Australia, where they would not have land that would allow them to maintain their traditional way of life. The Committee considers that the climate impacts mentioned by the authors represent a threat that could have reasonably been foreseen by the State party, as the authors' community members began raising the issue in the 1990s. While noting the completed and ongoing sea wall construction on the islands where the authors live, the Committee considers that the delay in initiating these projects indicates an inadequate response by the State party to the threat faced by the authors. With reference to its findings in paragraph 8.14, the Committee considers that the information made available to it indicates that the State party's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life and to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture. Accordingly, the Committee considers that the facts before it amount to a violation of the authors' rights under article 27 of the Covenant.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of articles 17 and 27 of the Covenant.

10. Having found a violation of articles 17 and 27, the Committee does not deem it necessary to examine the authors' remaining claims under article 24 (1) of the Covenant.

11. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is

[47] See, mutatis mutandis, *Benito Oliveira et al. v. Paraguay* (CCPR/C/132/D/2552/2015); and general comment No. 23 (1994).
[48] General comment No. 23 (1994), paras. 1 and 6.1.
[49] *Benito Oliveira et al. v. Paraguay*, para. 8.6.
[50] Ibid., para. 8.3.
[51] *Käkkäläjärvi et al. v. Finland* (CCPR/C/124/D/2950/2017), para. 9.9.

obligated, inter alia, to provide adequate compensation to the authors for the harm that they have suffered; engage in meaningful consultations with the authors' communities in order to conduct needs assessments; continue its implementation of measures necessary to secure the communities' continued safe existence on their respective islands; and monitor and review the effectiveness of the measures implemented and resolve any deficiencies as soon as practicable. The State party is also under an obligation to take steps to prevent similar violations from occurring in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the official language of the State party.

Annex I

[Spanish only]

Voto individual (disidente) de Carlos Gómez Martínez, miembro del Comité

1. El calentamiento global coloca en situación de grave riesgo la vida familiar de los autores (artículo 17 del Pacto) y también la supervivencia de las comunidades indígenas a las que pertenecen (artículo 27 del Pacto), dada la circunstancia de que habitan islas de muy escasa altitud en el estrecho de Torres, fácilmente inundables por la subida del nivel del mar. Este hecho evidencia su extrema vulnerabilidad y les sitúa como víctimas potenciales de violación de los derechos humanos apenas mencionados y de los que son titulares.

2. Sin embargo, la evitación total del riesgo y de los daños derivados del cambio climático está fuera del alcance de la actuación aislada del Estado parte, dado que el calentamiento de la tierra es un fenómeno global al que solo se puede dar respuesta mundial en una lucha en la que han de implicarse todos o, al menos, una parte significativa de los Estados del planeta. Por ello no puede concluirse que el Estado parte haya violado los derechos de los autores por no haber evitado los riesgos o no haber eliminado totalmente los daños que puedan sufrir, derivados del cambio climático.

3. Por esta razón, el Comité se centra en las medidas de adaptación al cambio climático. El Comité admite, en los párrafos 8.7 y 8.11 de su dictamen, que el Estado parte ha llevado a cabo acciones concretas para la adaptación de la vida de los autores al nuevo entorno que traerá consigo el cambio climático, siendo de especial relevancia la construcción de muros de contención de las aguas del mar, obras ya iniciadas y cuya finalización se espera en 2023.

4. Cuestión distinta es si las medidas de adaptación son o no las exigibles hasta el punto de que, por no ser suficientes, puedan suponer la violación de los derechos humanos de los autores. La adaptación al cambio climático es un concepto indeterminado que puede ir desde una leve acomodación hasta la drástica configuración de un nuevo entorno plenamente resiliente que permita la vida en plenitud de los autores en las nuevas circunstancias climáticas. En cualquier caso, corresponde al Estado parte decidir el curso de acción que debe emprender para adaptar su país al cambio climático atendiendo a los intereses de toda la ciudanía y a la posible opción por políticas tanto ambientales, como la reforestación con especies resistentes o la facilitación de la transición energética, como de otra índole, como la reducción de la pobreza, que también tiene importante repercusión en el disfrute de los derechos humanos.

5. En el propio dictamen se señala, en el párrafo 8.7, que el Comité no está en condiciones de concluir que las medidas de adaptación adoptadas por el Estado parte sean insuficientes para representar una amenaza directa al derecho de los autores a una vida digna, por lo que se excluye la violación del artículo 6 del Pacto. Si ello es así, no se entiende cómo el Comité sí se considera en condiciones de concluir que las medidas de adaptación emprendidas por el Estado parte sean insuficientes a los efectos de apreciar una violación de los artículos 17 y 27 del Pacto. No se explica por qué el juicio de suficiencia no es válido a unos efectos (no violación del artículo 6) y sí lo es a otros (violación de los artículos 17 y 27).

6. En definitiva, en el dictamen no se explica la razón por la cual el Comité considera que las medidas de adaptación llevadas a cabo por el Estado parte —la construcción de diques de contención del agua del mar—, o el retraso en ejecutarlas —iniciadas en 2017 y 2018 en los malecones de Boigu y Poruma (véase el párr. 2.7)—, han sido insuficientes hasta el punto de constituir una violación de los artículos 17 y 27 del Pacto. Asimismo, tampoco se explica qué otra actuación suplementaria hubiera sido exigible al Estado parte para poder concluir que no se produjo dicha violación.

Annex II

[English only]

Individual opinion of Committee member Duncan Laki Muhumuza (dissenting)

1. The Committee found that there was no violation of article 6 of the Covenant based on the information provided by the State party.

2. I have comprehensively perused the information provided by both the authors and the State party and I am convinced that there is a violation of article 6 of the Covenant, which states that: "Every human being has the inherent right to life … protected by law. No one shall be arbitrarily deprived of his life."

3. The Committee found that there was no violation of article 6 by the State party based on the information provided by the State party. The Committee considered the information provided by the State party insofar as adaptative measures were put in place to reduce the existing vulnerabilities and build resilience to climate change-related harms to the islands and it was on those grounds that the Committee found that there was no violation of article 6.

4. I am cognizant of the adaptive measures that the State party has taken under the Torres Strait sea walls programme (2019–2023), and, in this regard, that:

(a) Multiple infrastructures will be constructed and upgraded to address ongoing coastal erosion and storm surge impacts on Poruma, Warraber, Masig, Boigu and Iama;

(b) By 2022, several coastal mitigation works had been completed on Boigu with funding of $A 15 million, as well as the construction of a 1,022 metre-long wave return wall, the raising and extension of an existing bund wall to 450 metres and the upgrading of stormwater drainage infrastructure;

(c) Coastal mitigation works on Poruma, Warraber and Masig were scheduled to begin in 2021 or 2022 and to be completed by 2023.

5. While these efforts and measures taken and/or yet to be taken are commendable and appreciated, there has been an outcry from the authors that has not been addressed and hence the authors' right to life will continue, appallingly, to be violated and their lives endangered.

6. I am of the considered view that the State party has failed to prevent a foreseeable loss of life from the impact of climate change. As highlighted by the *Urgenda Foundation v. the State of Netherlands* case,[1] the State party is tasked with an obligation to prevent a foreseeable loss of life from the impacts of climate change, and to protect the authors' right to life with dignity.

7. In the instant case, the State party has not taken any measures to reduce greenhouse gas emissions and cease the promotion of fossil fuel extraction and use, which continue to affect the authors and other islanders and endanger their livelihood, resulting in the violation of their rights under article 6 of the Covenant.

8. The citizens of the Torres Strait islands have also lost their livelihoods on the islands owing to ongoing climate changes and the State party has not taken any measures to mitigate this factor. As a result of the rise in the sea level, saltwater has penetrated the soils of the islands and as a result lands previously used for traditional gardening can no longer be cultivated. The coral bleaching that occurred has led to the disappearance of crayfish which are a fundamental source of food and income for the authors.

9. These factors combined point to the imminent danger or threat posed to people's lives, which is already affecting their lives; yet, while the State party is aware, it has not taken effective protective measures to enable the people to adapt to climate change.

[1] The Hague Court of Appeal, *Urgenda Foundation v. The State of the Netherlands*, Case No. 200.178.245/01, Judgment, 9 October 2018.

10. In the *Urgenda* case, The Hague Court of Appeal characterized climate change as "a real and imminent threat" requiring the State to "take precautionary measures to prevent infringement of rights as far as possible" (para. 43).

11. The Court further held that "it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life" (para. 45).

12. The authors have ably informed the Committee that the current state of affairs and existence in the Torres Strait islands is under imminent threat owing to ongoing climate change and therefore the State party should take immediate adaptive precautionary measures to thwart climate changes and preserve the lives of the islanders, including their health and livelihood. Any further delays or non-action by the State party will continue to put the lives of the citizens at risk, which is a blatant violation of article 6 (1) of the Covenant.

13. Accordingly, I find that there is a violation of article 6 and as a Committee, we should implore the State party to take immediate measures to protect and preserve the lives of the people of the Torres Strait islands. In order to uphold the right to life, States must take effective measures (which cannot be taken individually) to mitigate and adapt to climate change and prevent foreseeable loss of life.

Annex III

[Spanish only]

Voto individual (parcialmente disidente) de Hernán Quezada Cabrera, miembro del Comité

1. Respecto de la comunicación núm. 3624/2019, comparto la decisión del Comité en el sentido de que los hechos examinados ponen de manifiesto una violación de los derechos de los autores en virtud de los artículos 17 y 27 del Pacto, al no cumplir el Estado parte con su obligación de aplicar medidas adecuadas para proteger el hogar, la vida privada y la familia de los autores, y para proteger el derecho de los autores a disfrutar de su cultura minoritaria.

2. Sin embargo, en lo relativo al derecho a la vida, lamento no poder unirme a la mayoría del Comité, la cual concluyó que la información disponible no revela una violación por el Estado parte de los derechos de los autores en virtud del artículo 6 del Pacto.

3. El propio Comité entiende (véase el párr. 8.3) que el derecho a la vida no debe interpretarse de forma restrictiva y que su protección requiere de la adopción de medidas positivas[1]. En este sentido el Comité ha establecido en su observación general núm. 36 (2018) que las amenazas al derecho a la vida pueden incluir los efectos adversos del cambio climático, lo que obliga a los Estados partes a "adoptar medidas apropiadas para abordar las condiciones generales en la sociedad que puedan suponer amenazas directas a la vida o impedir a las personas disfrutar con dignidad de su derecho a la vida"[2]. Al respecto, debe tenerse presente que el Estado parte es y ha sido, durante las últimas décadas, uno de los países que han producido grandes cantidades de emisiones de gases de efecto invernadero (véase el párr. 7.8).

4. Según los hechos denunciados, y no rebatidos por el Estado parte, los autores han experimentado y experimentan una serie de problemas derivados de los efectos del cambio climático que afectan sus vidas y la existencia misma de las islas que habitan: la inundación de aldeas y de tierras funerarias ancestrales; la pérdida por erosión de sus tierras tradicionales, incluidas las plantaciones y los jardines; la destrucción o marchitamiento de los jardines tradicionales por la salinización causada por las inundaciones o la entrada de agua de mar; la disminución de especies marinas de importancia nutricional y cultural; la decoloración de los corales, y la acidificación de los océanos, entre otros. A todo ello se suma el riesgo de inhabitabilidad de sus islas debido al persistente aumento del nivel del mar.

5. Si bien el Estado parte ha adoptado en los últimos años diversas medidas para hacer frente a los efectos adversos del cambio climático y las emisiones de carbono generadas en su territorio, dichas medidas son aún insuficientes para garantizar a los autores el disfrute de una vida digna en las islas que habitan en el estrecho de Torres. En efecto, el Comité ha constatado (véase el párr. 8.12) que el Estado parte no ha respondido a varias alegaciones de los autores en este sentido, en particular a la no construcción de medidas de adaptación para mejorar los malecones y el retraso en la construcción de diques, así como tampoco ha dado explicaciones alternativas sobre la reducción de los recursos marinos necesarios para la alimentación y la pérdida de cultivos y árboles frutales. Aun cuando dichas constataciones del Comité están relacionadas con la violación del artículo 17 del Pacto, la falta o la insuficiencia de medidas de adaptación para enfrentar las consecuencias adversas del cambio climático ha repercutido negativamente en las condiciones de vida de los autores. Por lo demás, las amenazas que se ciernen sobre sus medios de subsistencia y sobre la existencia misma de las islas han creado una situación de incertidumbre y, en consecuencia, afectan su salud mental y su bienestar, impidiendo el derecho a disfrutar de una vida digna[3]. En este

[1] *Portillo Cáceres y otros c. Paraguay* (CCPR/C/126/D/2751/2016), párr. 7.3.

[2] Observación general núm. 36 (2018), párrs. 26 y 62.

[3] Según el Comité en su observación general núm. 36 (2018), el derecho a la vida es "el derecho a no ser objeto de acciones u omisiones que causen o puedan causar una muerte no natural o prematura y a disfrutar de una vida digna" (párr. 3).

contexto, los autores y sus familias ya han sufrido y aún sufren una violación del derecho a la vida, en el sentido de "vida digna", lo que es una realidad concreta que requiere reparación, independientemente de las futuras mejoras que puedan lograrse con las medidas de mitigación y adaptación que el Estado parte ha comenzado a implementar en los últimos años o que estarían por iniciarse, según la información obtenida por el Comité (véase el párr. 8.7).

6. Con respecto al calendario de adopción de medidas, cabe tener presente que la comunicación de los autores (presentación inicial) es de fecha 13 de mayo de 2019, cuando los efectos adversos del cambio climático en las islas del Estrecho de Torres ya habían producido, durante largo tiempo, serios impactos negativos en sus vidas. Sin embargo, la mayor parte de las obras de mitigación costera emprendidas por el Estado parte, según lo constatado por el Comité, estaban programadas para comenzar recién en 2021 o 2022 y estar terminadas en 2023 (islas Masig, Poruma y Warraber). Solamente en la costa de una de las islas (Boigu) se habían completado en 2022 varias obras de mitigación.

Annex IV

[English only]

Individual opinion of Committee member Gentian Zyberi (concurring)

1. I am generally in agreement with the Committee's findings.[1] In this individual opinion, I explain my position on adaptation and mitigation measures, the law on international responsibility for countering climate change effects and adequate measures, and the violation of article 27.

2. After having acknowledged climate change as a common concern of humankind in the preamble to the 2015 Paris Agreement, the Conference of the Parties to the United Nations Framework Convention on Climate Change address mitigation and adaptation under, respectively, articles 4 and 7 of the Agreement. Mitigation efforts are aimed at addressing the causes of climate change by preventing or reducing the emission of greenhouse gases into the atmosphere. Adaptation efforts are aimed towards adjusting to the current and future effects of climate change. Both types of measures are intrinsically connected and require action by States (and non-State actors), individually and jointly through international cooperation.

3. The State party in this case has taken both mitigation and adaptation measures. When it comes to mitigation measures, assessing the nationally determined contributions taken by States parties to the International Protocol on Civil and Political Rights under the 2015 Paris Agreement, when the State is party to both treaties, is an important starting point. States are under a positive obligation to take all appropriate measures to ensure the protection of human rights. In this context, the due diligence standard requires States to set their national climate mitigation targets at the level of their highest possible ambition and to pursue effective domestic mitigation measures with the aim of achieving those targets.[2] When a State is found to not have fulfilled these commitments, such a finding should constitute grounds for satisfaction for the complainants, while the State concerned should be required to step up its efforts and prevent similar violations in the future. The requirement of due diligence applies also to adaptation measures.

4. It has been 30 years since, at the 1992 United Nations Conference on Environment and Development (Earth Summit) States recognized climate change as a cause for common concern and action, but despite important developments in the context of the 1992 United Nations Framework Convention on Climate Change , the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change and the 2015 Paris Agreement, individual and joint State efforts at addressing the climate crisis remain insufficient.[3] Over the years, the law on international responsibility on climate change has developed progressively.[4]

5. A clear limitation of the law on international responsibility in cases of climate change and related litigation is the difficulty involved in addressing what constitutes shared responsibility.[5] Since it is the atmospheric accumulation of carbon dioxide and other

[1] On article 6, the Committee follows largely its reasoning in *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016), para. 9.12.

[2] Paris Agreement, arts. 4 (3) and 4 (2).

[3] For more information on the United Nations Framework Convention on Climate Change and related documents and activities, see https://unfccc.int.

[4] See, e.g., Christina Voigt, "State responsibility for damages associated with climate change", in *Research Handbook on Climate Change Law and Loss & Damage*, Meinhard Douelle and Sara L. Seck, eds. (Cheltenham, Edward Elgar Publishing, 2021).

[5] See, e.g., article 47 of the draft articles on responsibility of States for internationally wrongful acts and related commentary, adopted by the International Law Commission at its fifty-third session (2001); and André Nollkaemper and others, "Guiding principles on shared responsibility in

greenhouse gases that gives rise over time to global warming and climate change,[6] States should act with due diligence based on the best science when taking mitigation and adaptation action. This is an individual responsibility of the State, relative to the risk at stake and its capacity to address it. A higher standard of due diligence applies in respect of those States with significant total emissions or very high per capita emissions (whether these are past or current emissions), given the greater burden that their emissions place on the global climate system, as well as in respect of States with higher capacities for taking highly ambitious mitigation action.[7] This higher standard applies to the State party in this case.

6. The Committee has significant practice on article 27 of the Covenant, with much of its case law concerning the rights of Indigenous Peoples.[8] In this case, it has found a violation because of the State party's failure to adopt timely adequate adaptation measures to protect the authors' right to enjoy their minority culture under article 27. In my view, the Committee should have linked the State obligation to "protect the authors' collective ability to maintain their traditional way of life and to transmit to their children and future generations their culture and traditions and use of land and sea resources" (para. 8.14 of the Views) more clearly to mitigation measures, based on national commitments and international cooperation, as it is mitigation actions which are aimed at addressing the root cause of the problem and not just remedying the effects. If no effective mitigation actions are taken in a timely manner, adaptation will eventually become impossible. Such land and sea resources will not be available for Indigenous Peoples or even for humanity more generally, without diligent national efforts, as well as joint and concerted mitigation actions of the organized international community.

7. Climate change concerns have been addressed over the years by the Committee and other United Nations human rights treaty bodies,[9] the special procedures of the Human Rights Council[10] and more generally by the United Nations.[11] This case shows the possibilities and limitations of human rights-based litigation. That said, alongside other general or specific institutional arrangements addressing climate change issues, the Committee provides a suitable venue for addressing some concerns, especially under articles 6, 7, 17 and 27, both under the Optional Protocol and under article 41 of the Covenant.

international law", *European Journal of International Law*, vol. 31, No. 1 (February 2020), (see principles 2, 4, 10, 11 and 14).

[6] Jacqueline Peel, "Climate change", in *The Practice of Shared Responsibility in International Law*, André Nollkaemper and Ilias Plakokefalos, eds. (Cheltenham, Cambridge University Press, 2017), p. 1031.

[7] Ibid., p. 1035.

[8] For example, William A. Schabas, *Nowak's CCPR Commentary*, 3rd revised ed. (Kehl am Rhein, N.P. Engel, 2019), pp. 809–812.

[9] *Teitiota v. New Zealand*, E/C.12/2018/1 and HRI/2019/1. See also *M.K.A.H. v. Switzerland* (CRC/C/88/D/95/2019), *Sacchi et al. v. Argentina* (CRC/C/88/D/104/2019), *Sacchi et al. v. Brazil* (CRC/C/88/D/105/2019), *Sacchi et al. v. France* (CRC/C/88/D/106/2019), *Sacchi et al. v. Germany* (CRC/C/88/D/107/2019) and *Sacchi et al. v. Turkey* (CRC/C/88/D/108/2019).

[10] See A/70/287, A/74/161, A/HRC/40/55, A/HRC/41/39, A/HRC/43/53 and Human Rights Council resolution 48/14.

[11] See www.un.org/en/climatechange. See also A/HRC/50/57.

Annex V

[English only]

Joint opinion of Committee members Arif Bulkan, Marcia V.J. Kran and Vasilka Sancin (partially dissenting)

1. In addition to a violation of articles 17 and 27 found by the majority of the Committee, we would also find a violation of the right to life under article 6 of the Covenant.

2. The majority opinion correctly states that article 6 should not be interpreted in a restrictive manner (see para 8.3 of the Views).[1] Yet, the "real and foreseeable risk" standard employed by the majority interprets article 6 restrictively and was borrowed from the dissimilar context of refugee cases.[2] In *Teitiota v. New Zealand*, the Committee concluded that, owing to insufficient information from the author, climate change was not a real or foreseeable enough risk to require the State party to grant him refugee status. In contrast, here the primary question is whether the alleged violations of article 6 themselves ensue from inadequate mitigation and/or adaptation measures on climate change by the State party. Using a more accurate standard, from a factually similar case relating to environmental damage by pesticides, the question becomes whether there is "a reasonably foreseeable threat" to the authors' right to life.[3] The authors detail flood-related damage, water temperature increases and loss of food sources and, most importantly, they explain that the islands they live on will become uninhabitable in a mere 10 to 15 years, according to the Torres Strait Regional Authority, a governmental body. Together, this provides evidence of a reasonably foreseeable threat, constituting a violation of article 6.

3. Using the "real and foreseeable risk" standard, the majority opinion requires adverse health impacts to demonstrate an article 6 violation. Not finding such impacts, the majority fails to find a violation of article 6. Nonetheless, the authors detail real and foreseeable risks to their lives resulting from the flooding of the Torres Strait islands. First, the authors provide evidence of significant loss of food sources on which they rely to sustain themselves and their families. The crops lost include sweet potato, coconut and banana, which are required food sources and livelihood for the authors. The authors demonstrate that flooding has caused land erosion, making food production impossible. They also explain that warmer waters resulting from climate change reduced the availability of crayfish, another primary food source. Second, the authors detail repeated damage to their homes, including significant water damage to the foundation of one author's home. Thus, the authors have demonstrated real and foreseeable risks to their lives through significant loss of food sources, livelihood and shelter.

4. In the majority opinion, article 6 is interpreted restrictively and it is observed that the authors conflate violations of the guarantee under article 27 of the rights of persons belonging to minorities to enjoy their own culture with violations of the guarantee under article 6 of every human being's inherent right to life (see para. 8.6). Accordingly, the majority finds a violation of article 27, but not of article 6. While the authors do discuss these violations as related, citing similar facts, the Committee's jurisprudence does not require that facts relating to different violations arise from different sets of facts. The risks to the authors' right to life are independent and qualitatively different from the risks to their right to enjoy their culture. Consequently, we are unable to agree that a violation of article 27 sufficiently addresses the authors' claims.

5. We endorse the view that integral to article 6 is the right to live with dignity (see paras. 8.3 and 8.4). It is critical, however, to do more than simply reference the Committee's jurisprudence: it must also be used progressively, based on current realities. This

[1] William A. Schabas, *Nowak's CCPR Commentary*, 3rd revised ed. (Kehl am Rhein, N.P. Engel, 2019), p 122.

[2] *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016), para. 8.4.

[3] *Portillo Cáceres et al. v. Paraguay* (CCPR/C/126/D/2751/2016), para. 7.5.

jurisprudence unequivocally notes that no derogation is permitted from article 6.[4] Moreover, it clarifies the direct connection between environmental harms, the right to life and the right to live with dignity;[5] and that State parties must duly consider the precautionary approach on climate change.[6] Given the urgency and permanence of climate change, the need to adhere to the precautionary approach is imperative. In addition, the singular focus on the future obscures consideration of the harms being experienced by the authors, which negatively impact their right to a life with dignity in the present. The unfortunate outcome is that the Committee's jurisprudence promises far more than the majority delivers.

6. While we agree that the State party is not solely responsible for climate change, the main question before the Committee is significantly narrower: has the State party violated the Covenant by failing to implement adaptation and/or mitigation measures to combat the adverse impacts of climate change within its territory, resulting in harms to the authors? The majority opinion relies on projects initiated by the State party since 2019, which might be completed by 2023 (see para. 8.7). While these measures help build climate change resilience, the majority does not sufficiently consider the violations of article 6 that had already occurred at the time of the filing of this communication. Indeed, promises of future projects are insufficient remedies, as they have not yet occurred, whereas damage to the foundation of the authors' homes has already occurred. Soil where the authors grow food for subsistence has already been eroded, and crops have been lost. These violations are a direct result of flooding which could have been prevented by adaptation measures, including the timely construction of a sea wall to protect the islands where the authors live. Indeed, in its 2014 report, the Torres Strait Regional Authority concluded that Australia had yet to take any steps on 33 out of the 34 adaptation measures suggested.

7. The State party has a positive obligation to minimize "reasonably foreseeable threats to life"[7] and should remedy these violations by implementing adaptation measures including those identified by the Torres Strait Regional Authority in 2019. Despite multiple requests and knowledge of the ongoing impacts on the lives of the authors, the State party did not take adaptation measures in a timely manner. Consequently, we would find that the State party violated the authors' right to life under article 6 of the Covenant in addition to being responsible for the violations found by the majority.

[4] General comment No. 36 (2108), para. 2.
[5] Ibid., para. 62.
[6] Ibid., paras. 62 and 64.
[7] Ibid., para. 21.

TAB K

The National Human Rights Commission of the Republic of Korea

Decision

Subject: Submission of Opinion to the Constitutional Court of Korea Regarding Article 8, Section 1 of the Framework Act on Carbon Neutrality and Green Growth for Coping with Climate Crisis and Article 3, Section 1 of the Enforcement Decree of the Act

Order

The National Human Rights Commission of the Republic of Korea hereby submits the following opinion to the Constitutional Court panel adjudicating the constitutional petition case regarding the Framework Act on Carbon Neutrality and Green Growth for Coping with Climate Crisis (Case Nos. 2021HunMa1264, 2022HunMa854 and 2020HunMa389, and additional claim in 2020HunMa1516):

Article 8, Section 1 of the Framework Act on Carbon Neutrality and Green Growth for Coping with Climate Crisis and Article 3, Section 1 of the Enforcement Decree of the Framework Act on Carbon Neutrality and Green Growth for Coping with Climate Crisis fail to implement the minimum protective measures required for the freedoms and rights of both current and future generations that are compromised due to climate change, which violates the State's fundamental duty to protect basic rights, the principles of the prohibition of blanket delegation, legislative reservation, and equality, thus being contrary to the Constitution of the Republic of Korea.

Reasoning

I. Background of Opinion Submission

The global average temperature has been consistently on the rise, and the warming of the Earth has led to frequent manifestations of climatic anomalies, including extreme heatwaves, droughts, wildfires, cold spells, and heavy snowfall, whose climatic irregularities have a direct impact on human life, physical well-being, and health. Despite global efforts to combat climate change since the enactment of the United Nations Framework Convention on Climate Change (hereinafter referred to as the Climate Change Convention) in 1994, the total greenhouse gas emissions have not been reduced. Thus, the evaluations by the United Nations Environment Programme, which consolidated each parties' National Greenhouse Gas Reduction Goals (or Nationally Determined Contribution, hereinafter referred to as NDC), found that the global temperature is projected to rise by approximately 3.2℃ by the end of the 21st century, even if all the current NDCs set by parties are fully implemented. In November 2019, over 11,000 scientists from 153 countries formally declared a Climate Emergency and warned that if the world fails to undertake significant measures, it would face unparalleled suffering due to the climate crisis.

While the impacts of climate change are scientifically substantiated, and the ensuing damages are becoming evident, efforts in greenhouse gas reduction are lagging, with over 2,000 lawsuits challenging government responses to the climate crisis (hereinafter referred to as Climate Litigation) filed globally. As judgments, inter alia, from countries such as the Netherlands and Germany have acknowledged the imperative need for proactive governmental measures against the climate crisis, significant attention is drawn to the utility of Climate Litigation.

Currently, in the Republic of Korea, four constitutional petitions concerning the climate crisis are underway, all contending that the NDCs set by the statutes are understated, rendering the achievement of the goals stipulated by the Paris Agreement [1]challenging and excessively infringing upon the basic rights of the petitioners.

Specifically, the repercussions of climate change transcend the infringement of property rights, exerting both direct and indirect extensive impacts on the right to life, health, and housing, and given considerations including the limited carbon budget, it is

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[1] The Paris Agreement (multilateral treaty, No.2315, adopted on Nov.10, 2016, effective on Dec. 3, 2016). The Paris Agreement was adopted at the United Nations Climate Change Conference of the Parties held in Paris on Dec.12, 2015, was reviewed at the 38th cabinet meeting on Aug.30, 2016, received ratification consent from the 346th regular session of the National Assembly at its 11th plenary meeting on Nov.3, 2016, had the instrument of ratification deposited with the Secretary-General of the United Nations on Nov.3, 2016, and came into force on Dec.3, 2016.

posited that the current NDCs transfer a severe burden to future generations, violating intergenerational equity. After assessing that the matter significantly influences the protection and enhancement of human rights, the National Human Rights Commission of the Republic of Korea (hereinafter referred to as the Commission) has contemplated submitting its opinion to the Constitutional Court in accordance with Article 28, Section 1 of the National Human Rights Commission of the Republic of Korea Act.

II. Basis for Judgment and Reference

1. Basis for Judgment

As the basis for the judgment herein, the following statutes and provisions were cited: Articles 10, 11, 23, 34, 35, 36, 37, and 75 of the Constitution of the Republic of Korea (hereinafter referred to as the Constitution); the Paris Agreement; Articles 3 and 6 of the Convention on the Rights of the Child; Article 1 of the International Covenant on Civil and Political Rights; Articles 1 and 6 of the International Covenant on Economic, Social and Cultural Rights; Articles 1, 3, and 8 of the Framework Act on Carbon Neutrality and Green Growth for Coping with Climate Crisis (hereinafter referred to as the Framework Act on Carbon Neutrality); and Articles 1 and 3 of the Enforcement Decree of the Framework Act on Carbon Neutrality and Green Growth for Coping with Climate Crisis (hereinafter referred to as the Enforcement Decree of the Framework Act on Carbon Neutrality).

2. Basis for Reference

As the basis for the reference herein, the following judgments, agreements, reports, and resolutions were taken into consideration: Federal Constitutional Court of Germany Ruling (BVerfG. Order of the First Senate of 24 March_78); Supreme Court of Netherlands Judgment in the Urgenda Case (Urgenda v State of the Netherlands, ECLI:NL:HR:2019:2007); Glasgow Climate Pact; Decision adopted at the 26th Conference of the Parties to the Climate Change Convention; Special Report on Global Warming of 1.5°C by the Intergovernmental Panel on Climate Change (hereinafter referred to as IPCC, 2018); IPCC Fifth Assessment Report (2014) and Sixth Assessment Report (2023); Emissions Gap Report (United Nations Environment Programme, 2022); Report on Climate Change (Philippine Human Rights Commission, 2022); General Comments No.15 (2020) of the UN Committee on Economic, Social, and Cultural Rights; General Comment No.15 (2013) of the UN Committee on the Rights of the Child; General Comment No.7 (2018) of the UN Committee on the Rights of Persons with Disabilities; FAQ on Human Rights and Climate Change (Office of the UN High Commissioner for Human Rights, 2021); UN Human Rights Council Resolutions 7/23 (2008), 10/24 (2009), 18/22 (2011), 26/27 (2014), 29/15

(2015), 32/33 (2016), 34/20 (2017), 38/4 (2018), 42/12 (2019), 44/7 (2020), 27/24 (2021); General Comment on Article 6 (Right to Life) of the International Covenant on Civil and Political Rights (2019); Special Report on Environmental and Human Rights Obligations (2019); Report on the Relationship between Climate Change and Human Rights (Office of the UN High Commissioner for Human Rights, 2009); Recommendations on Disaster Risk Reduction in the Context of Gender and Climate Change (UN Committee on the Elimination of Discrimination against Women, 2018); Report of the Conference of the Parties to the Climate Change Convention on its sixth session (2010); and Comparative Legal Review on Climate Litigation (Constitutional Court Research Institute, Constitutional Court of Korea, 2021).

III. Backgrounds for Judgment

1. Trends Pertaining to Responses to Climate Change both Domestically and Abroad

A. Domestic Developments

1) Climate Anomalies in the Republic of Korea

In accordance with the National Carbon Neutral and Green Growth Strategy announced in April 2023, the average annual temperature in the Republic of Korea has been increasing consistently at approximately 0.2℃ per decade, with a significant elevation of 1.6℃ over the three-decade period (1991 to 2020) compared to the same period in the past (1912 to 1940). In addition, in 2020, a historically prolonged monsoon persisted (for 54 days in the central regions), culminating in the unfortunate loss or disappearance of 46 citizens, with the number of drought days surging to an annual average of 95 days in the 2010s from the 1970s average of 29 days.

The Republic of Korea experienced simultaneous phenomena of anomalously high and low temperatures in 2022, torrential downpours inundating the metropolitan regions south of the Han River, and in the month of August in the same year, endured its most extended drought since the year 1974 in the southern territories. In early 2022, catastrophic wildfires ravaged the Uljin and Samcheok areas for nine days, marking the most extended wildfire incident on record since 1986, which resulted in the annihilation of approximately 20,000 hectares of forest.

Climate change has direct repercussions on the right to health, with an annual average temperature elevation of 1.2℃ resulting in an approximate 6% increment in the incidence rate of food poisoning, augmented instances of food poisoning due to the proliferation of temperature-sensitive bacteria and parasites coupled with the

escalation of diseases and pests raising the utilization of pesticides, and elevating hazardous chemical risks. Heatwaves and cold snaps have exacerbated instances of thermal and hypothermic ailments, which caused 15,564 cases of heat-related ailments and 300 cases of cold-related conditions recorded in the Republic of Korea in the year 2022 alone. In the case that global warming persists unabated, projections indicate a potential surge of 60.7 cases of malarial pandemic, indigenous to tropical regions, in the Korean Peninsula by the 2080s, with chances of tropical malaria becoming endemic within the ROK jurisdiction.

2) Past Measures in Response to Climate Change

The Republic of Korea acceded as a Party to the Climate Change Convention in the subsequent year of its adoption in 1992. The Kyoto Protocol to the Climate Change Convention (hereinafter referred to as the Kyoto Protocol) came into effect in 2005, followed by the enforcement of the Paris Agreement in 2016. While the ROK was not included in Annex I on Countries Obligated to Reduce Greenhouse Gases of the Kyoto Protocol and, thus, did not bear any international legal responsibility to meet the greenhouse gas reduction targets, Article 4, Section 9 of the Paris Agreement imposes an obligation upon parties to submit their NDC every five years, thereby mandating the ROK to undertake greenhouse gas reduction obligations.

Following the establishment of the Committee on Green Growth in 2009, the Republic of Korea, in its endeavors to respond to climate change and greenhouse gas reduction, announced its NDC to reduce emissions by 30% compared to the Projected Emissions in the Absence of Reduction Efforts (known as the Business-As-Usual, hereinafter referred to as BAU) by 2020, and, for the first time, in 2010, legislated the NDC “to reduce total nationwide emissions of greenhouse gases of 2020 by 30/100 below the estimated greenhouse gas emissions for 2020” in Article 42 of the Framework Act on Low Carbon, Green Growth and in Article 42 of the Enforcement Decree. Subsequently, in 2016, the aforementioned Enforcement Decree was revised “to reduce total nationwide emissions of greenhouse gases of 2030 by 37/100 below the estimated greenhouse gas emissions for 2030,” extending the goal achievement period to 2030, and was revised again in 2019 “to reduce the 2030 NDC by 244/1000 below the total national greenhouse gas emissions of 2017.”

In September 2020, the National Assembly passed a resolution urging an “Emergency Response to the Climate Crisis,” with the President proclaiming the national objective to achieve Carbon Neutrality by 2050 in October of the same year, and the Framework Act on Carbon Neutrality legislated in September 2021, followed by the enactment of its Enforcement Decree in 2022. The Framework Act on Carbon Neutrality explicitly mandates a reduction of greenhouse gas emissions “by at least 35% by the year 2030 compared to the national greenhouse gas emissions of 2018,” and Article 3, Section 1 of the Enforcement Decree of the Framework Act on Carbon

Neutrality stipulates that the "percentage determined by the Presidential Decree mentioned in Article 8, Section 1 of the Act refers to 40%." Commenting on the matter, the non-profit organization Climate Action Tracker, which has assessed the NDCs of various countries, has previously evaluated that should all nations set their NDCs at the level of the Republic of Korea, the global temperature could rise to an "insufficient" level up to 3℃.

Among the OECD countries, from 2009 to 2018, only the Republic of Korea, Mexico, and Turkey failed to reduce their greenhouse gas emissions and increased them instead, making the ROK the only developed country of the three that has increased its greenhouse gas emissions given that the per capita gross national income of Mexico and Turkey is about one-third of that of the ROK.

< Table: Trends in the ROK's Greenhouse Gas Emissions >

(Unit: Million tons CO_2eq[2])

Year	1990	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Emissions	292.1	656.1	684.7	688	697.2	692	692.6	693.6	710.6	726.9	701.2	656.2

※ Based on KOSIS statistics as of November 29, 2022.

In 2022, the Commission, after taking account of the international standards of the IPCC Working Group III report, expressed its opinion to the Government of the Republic of Korea (President) that it needs to raise the target for national greenhouse gas reductions by 2030 set out in the Enforcement Decree of the Framework Act on Carbon Neutrality and to clearly specify reduction obligations for the protection of the fundamental rights of future generations by setting reduction targets beyond 2030. The Commission specified several key reasons, such as that ROK's NDC, which is determined in the Enforcement Decree of the Framework Act on Carbon Neutrality (a 40% reduction by 2030 compared to 2018), fails to meet the criteria set by the IPCC in 2018 (a 45% reduction by 2030 compared to 2010); that the NDC falls further short in meeting the IPCC's 2022 standards (a 43% reduction by 2030 compared to 2019); that the ROK, as a developed country with significant responsibility for carbon emissions, has a duty to reduce emissions beyond the global target; and that it needs to consider several other factors including the proportionality of greenhouse gas reduction burdens between the current and future generations.

B. International Developments

1) Global Climate Anomalies

[2] CO_2 Equivalent: The amount of greenhouse gas emissions, converted to the equivalent amount of carbon dioxide as a representative measure.

In 2022, Europe experienced its worst drought in 500 years, with approximately 47% of its territory under 'Drought Alert' where soil moisture content is insufficient, and about 17% under 'Red Alert' where crops suffer stress-induced damage.

In December of the same year, the United States witnessed a cold wave not seen in 40 years (with wind chills of -59℃ in Montana and -50℃ in Chicago), and Wyoming recorded a historically rapid temperature drop of 20℃ within 30 minutes in the afternoon on December 21st. China observed its highest temperature and lowest rainfall in 61 years and suffered severe damage to its crops and freshwater supply due to the most severe drought since 1972 (with 80% less precipitation than the 30-year average), while Pakistan experienced what was described as its most severe flooding in history between June and October, resulting in the death of over 1,739 individuals.

2) International Laws on Climate Change

The Climate Change Convention was established in 1992 on the basis of the global consensus that a collective response is imperative to ensure the survival of humanity against the threats posed by greenhouse gases. Ratified in 1994, the Convention currently has 197 signatories, including the European Union, with its objective being the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system" (Article 2). In 1997, at the Third Conference of the Parties to the Climate Change Convention (Kyoto, Japan), the Kyoto Protocol was adopted to specify the objectives of the Climate Change Convention, imposing obligations to reduce greenhouse gas emissions on developed countries responsible for climate change. The Paris Agreement, adopted at the Twenty-First Conference of the Parties (COP21) in Paris, France, in 2015, mandates that all Parties shall hold the increase in the global average temperature to well below 2°C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels (Article 2, Section 1), that each Party shall set its emissions reduction targets voluntarily considering its circumstances and establish and implement an NDC to reduce its greenhouse gas emissions (Article 4, Section 2), and that each party shall communicate an improved NDC every five years that includes the information necessary for clarity, transparency, and understanding (Article 4, Sections 8 and 9).

3) Litigation Pertaining to Climate Change

According to the 2022 policy report on Climate Litigation by the Grantham Research Institute on Climate Change, approximately 2,002 Climate Litigation cases

have been filed from 1986 to May 31, 2022, with the Urgenda case in the Netherlands and the Neubauer case in Germany being noteworthy examples.

A. The Urgenda Case, Netherlands

In 2007, the IPCC recommended a 25-40% reduction in greenhouse gas emissions by 2020 compared to 1990 levels for developed countries to achieve the 2℃ global temperature increase limit, prompting the EU to establish a target of a 30% reduction in greenhouse gas emissions by 2020 compared to 1990 levels. The Netherlands, participating in the EU's Emissions Trading System, set its only greenhouse gas reduction target, which, when translated, implies a reduction of 14-17% of 1990 greenhouse gas emissions by 2020.

In November 2012, the civil organization Urgenda (Urgent Agenda) sent a letter to the Dutch government urging an elevation of their greenhouse gas reduction target to a maximum of 40% compared to 1990 levels, and while the Minister of the Environment acknowledged the urgency and challenges of climate change, he responded that there are various policy means to address the issue and, therefore, the Netherlands would not amend its greenhouse gas reduction target. In response, Urgenda contended that the fact that the Netherlands' greenhouse gas reduction target falls short of the 25-40% reduction demanded by the international community represents a dereliction of national responsibility and violates the state's fundamental duty to protect its citizens' rights, consequently initiating a lawsuit demanding an upward revision of the greenhouse gas reduction target.

The Supreme Court of the Netherlands recognized the gravity of the situation, citing the impending peril of hazardous climate changes for forthcoming generations from a climatological standpoint and the rise of global temperatures by 1.1°C in the last half-century since industrialization, with the biggest increase of 0.7°C occurring in the recent 40 years, and asserted that based on the IPCC's estimations and considering the 1.5°C target, even with a maximum of 40% reduction by the Dutch government, there remains an approximate 50% probability of failing to maintain the 2°C objective, deeming a 25% reduction the minimum obligation the Dutch government must uphold.

The Court, asserting that the government had neglected its active duty to protect its nationals in connection with the damages from climate change, ruled that, based on the 'European Convention for the Protection of Human Rights and Fundamental Freedoms' (hereinafter referred to as the European Human Rights Convention), the state is obliged to take appropriate measures when there exists a tangible and immediate threat to human life or well-being, a duty which persists even if the environmental risks manifest after an extended period.

B. Federal Constitutional Court of Germany: The Neubauer Case

Pursuant to Article 3.1.2 of the German Federal Climate Protection Act[3], a target has been set to reduce greenhouse gas emissions by at least 55% by the year 2030 compared to 1990 levels. Additionally, Article 4.1.3 and Addenda 2 of the same Act define the permitted sectoral and yearly reduction target allocations up to the year 2030. However, provisions concerning the reduction of greenhouse gas emissions post-2030 are notably absent, with Article 4.[4]6 mandating that the Federal Government determines the reduction amounts for the period after 2030 through a regulatory order in 2025. The plaintiffs[5] contended that the aforementioned provisions are insufficient reduction targets that do not consider the objectives of the Paris Agreement, and thus, initiated the lawsuit claiming infringement upon their fundamental rights under Articles 1 (Dignity of Man)[6], 2 (Right to Life and Physical Integrity)[7], and 20a (Responsibility for future generations[8]) of the German Basic Law.

The German Federal Constitutional Court ruled that since the Federal Climate Protection Act does not establish specific targets for the period after 2031, the lack of which inherently necessitates more abrupt reductions in the years following 2030, and nearly every aspect of human life is intertwined with greenhouse gas emissions, in the court's view, excessive reductions in the future would infringe upon the fundamental rights (rights to freedom) of the next generation, leading to a mandate for the legislature to delineate consistent reduction targets for the period starting in 2031 by no later than December 31, 2022.

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3 Article 3, Section 1 of the Climate Protection Act on National Climate Objectives:
Emissions of greenhouse gases shall undergo a phased reduction compared to the levels of 1990. By the target year of 2030, the minimum rate of reduction shall be 55%.

4 Article 4, Section 6 of the Climate Protection Act:
By 2025, the federal government shall, by way of a regulatory order, establish the emission levels that are to be reduced post-2030. The emissions slated for reduction shall be in line with both the climate protection objectives of this Act and the requirements of European Union Law. Once the annual reduction quotas for the period post-2030 are determined, such a regulatory order shall require the consent of the German Federal Parliament. Should the Federal Parliament not address the regulatory order within six weeks of its receipt during a session, it shall be deemed to have granted its approval without any amendments.

5 The plaintiffs comprised a youthful cohort ranging between the ages of 15 and 32, including farmers who faced challenges in agriculture due to rising sea levels, a considerable number of children and teenagers, and children and teenagers of Nepalese and Bangladeshi nationality.

6 Article 1.1 of the German Basic Law
Human dignity shall be inviolable.

7 Article 2.1 of the German Basic Law
Every person shall have the right to free development of his or her personality insofar as they do not violate the rights of others and do not offend against the constitutional order or the moral law. Article 2.2
Every person shall have the right to life and physical integrity.

8 Article 20a of the German Basic Law
The state, recognizing its responsibility towards future generations, shall protect the natural foundations of life and animals within the framework of the constitutional order, through legislation, and in accordance with the law and justice
through executive and judicial action.

Furthermore, given the inevitable infringement on the rights of future generations by current greenhouse gas emission regulations, the proportionality of such future infringements must be assessed as of the current moment, and from the standpoint of ensuring inter-temporal freedom, the legislature is mandated to facilitate a balanced allocation of the necessary reductions for achieving greenhouse gas neutrality by 2050, respecting the freedoms of both present and forthcoming generations, rendering the Federal Climate Protection Act unconstitutional as it only contains regulatory provisions up to 2030, resulting in a disproportionate infringement on fundamental rights.

Additionally, the delegation of authority to the federal government to determine allowable greenhouse gas emissions post-2030 through a legislative directive in 2025 was deemed problematic due to the legislation's lack of clear guidance on the intervals at which future allowable emissions should be established and the nature of post-2030 reduction plans, resulting in a violation of the principles of clarity and reservation of law as determined by the court.

C. Other Climate Litigations

In 2017, Hu Honua, a Hawaiian bioenergy company focusing on logging and wood combustion for electricity production, entered into a power purchase agreement to sell electricity to the Hawaiian electric company HELCO, an arrangement subsequently approved by the Public Utilities Commission (PUC) of Hawaii. Following a challenge to this approval by the environmental group Life of the Land, the Supreme Court of the State of Hawaii directed the PUC to reconsider its decision, leading to the ultimate denial of the power purchase agreement by the PUC. Accordingly, Hu Honua appealed the decision, but in March 2023, the Supreme Court of the State of Hawaii rejected the appeal stating the current situation as a climate crisis emergency and stressing the life-threatening situation for children and teenagers.

In Ireland, the environmental group Friends of the Irish Environment alleged that the Irish government's 2017 national greenhouse gas reduction plan violated domestic climate change laws established in 2015 and the European Convention on Human Rights. In 2020, the Supreme Court of Ireland determined that the government's greenhouse gas reduction plan lacked the specificity required by the higher-level Climate Change Act, declaring it unlawful and, consequently, mandating the Irish government to formulate new reduction targets.

In France, four environmental organizations initiated a lawsuit against the government, claiming one euro in damages, alleging a lack of effort to uphold the Paris Agreement, and in 2021, the Paris Administrative Court ruled that the French government must bear responsibility for the ecological damage incurred due to its

inadequate response to the climate crisis including its failure to meet the 2020 energy efficiency and greenhouse gas reduction targets.

Additionally, there have been rulings such as the decision by the Supreme Court of Chile, which stated the necessity of the phased withdrawal of coal-fired power plants for carbon neutrality (2022); the decision by the Land and Environment Court of New South Wales in Australia, directing the development of environmental quality objectives and policies to protect the environment amidst climate change (2021); and the decision by the Supreme Court of Colombia, declaring that Amazon deforestation constitutes a fundamental infringement on the rights of future generations (2018), with similar lawsuits currently underway in various countries.

D. Philippines Commission on Human Rights Investigation Report

According to the 2022 investigative report by the Philippines Commission on Human Rights regarding the petition case filed in 2015 against 47 major fossil fuel-producing companies, “climate change is a matter of human rights, affecting not only the rights of future generations but also impacting vulnerable populations including women, children, indigenous peoples, the elderly, and people with disabilities. [Climate change] acts as a major cause of migration and poses a threat to global security,” and “governments must make policy decisions that allow for the fulfillment of international obligations, including those related to climate change.” The report also stressed that “Philippine courts should interpret laws in accordance with international norms.”

2. Developments in the International Community, including the UN Human Rights Council

A. The United Nations Human Rights Council

The United Nations Human Rights Council first addressed the issue of climate change in 2008, passing a resolution recognizing that climate change poses an immediate and comprehensive threat to people and communities worldwide, affecting the full enjoyment of human rights. To date, it has adopted 12 resolutions emphasizing the relationship between climate change and human rights obligations, states’ duties, businesses’ responsibilities, and international accountability.

In 2016, the United Nations Human Rights Council, expressing concern over the discriminatory damage to future generations subject to climate change, adopted a special rapporteur report on the enjoyment of a sustainable environment and a clean life, emphasizing that the impacts of climate change and loss of biodiversity affect

children and adolescents more severely than adults, intensifying long-term damage and cumulative impact.

B. The United Nations General Assembly

On March 29, 2023, the UN General Assembly adopted a resolution that "requests an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change," in accordance with Article 96 of the UN Charter.[9]

C. The United Nations Human Rights Treaty Bodies

Five UN human rights treaty bodies (CEDAW[10], CESCR[11], CMW[12], CRC[13], CRPD[14]) jointly declared that parties have the obligation to respect, protect, and fulfill the human rights of all individuals, and to meet the targets set in the Paris Agreement, they must adopt and implement emission reduction target policies.

3. IPCC Reports

A. Fourth Assessment Report (2007)

The Fourth Assessment Report of the IPCC suggested that to limit the increase in global temperature to 2°C above pre-industrial levels, the concentration of greenhouse gases should not exceed 450 ppm. The report recommended a reduction of greenhouse gas emissions by 25-40% from 1990 levels by 2020 and by 80-90% by 2050 for the countries listed in Annex I.

B. Fifth Assessment Report (2013)

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[9] This resolution takes into consideration the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework, Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the Universal Declaration of Human Rights, the Montreal Protocol, and resolutions of the Human Rights Council.

[10] Committee on the Elimination of Discrimination against Women

[11] Committee on Economic, Social and Cultural Rights

[12] Committee on the Protection of the Rights of All Migrant Workers and Members of their Families

[13] Committee on the Rights of the Child

[14] Committee on the Rights of Persons with Disabilities

The Fifth Assessment Report by the IPCC stated that the voluntary emission reduction targets set by countries fall short of the goal to cap global warming at 2°C and warned that unless each country achieves a substantial reduction in greenhouse gas emissions by 2030, temperatures would escalate to perilous levels post that year, thereby urging member nations to intensify their efforts in reducing emissions. Furthermore, the report emphasized that to achieve the 2°C warming limit, zero-emission should be achieved where global greenhouse gas emissions converge to zero by 2100. The report additionally asserted that the maximum allowable carbon emission to maintain a 50% probability of restraining the temperature rise below 2°C is 820 million tons CO_2eq, and with the Earth having already emitted 515 million tons CO_2eq as of 2013, the carbon budget is projected to be depleted by 2035 potentially encountering a pivotal threshold in the climate system with severe repercussions for humanity should emissions continue at the current rate.

C. Special Report on Global Warming of 1.5°C (2018)

According to the IPCC Special Report on Global Warming of 1.5°C, the Earth's temperature has experienced approximately a 1°C increase in the past 100 years since the Industrial Revolution and is anticipated to reach a 1.5°C increase around 2040 (with the window extending between 2030 and 2052), if the current rate persists. With even a 1°C rise, severe damages from climate change, including flooding, droughts, typhoons, wildfires, heatwaves, and desertification, are already occurring, and a 2°C increase would cause polar ice to melt to an irreversible level, accelerating sea-level rise and potentially quadrupling the threats to humanity's water, food, and health due to predicted increases in meteorological anomalies, causing a tenfold drop in grain harvest yields. Additionally, the report outlined a trajectory where emissions of carbon dioxide must be reduced by 45% by 2030 compared to 2010 levels to limit global temperature increases to 1.5℃, and a 'Net-Zero' emissions level is achieved by 2050 off-setting carbon dioxide emissions and natural absorption, specifying a carbon budget of 420 million tons of CO_2eq estimated with a 67% confidence level.

D. Sixth Assessment Report (2023)

The Sixth Assessment Report by the IPCC assessed that sudden and irreversible drastic changes to the Earth's climate system cannot be ruled out. Analyzing the NDCs submitted by countries for 2030, it was determined that under all reduction scenarios, global average temperatures would exceed a 1.5°C rise by 2040 and would likely increase by about 2.8°C by 2100, possibly even up to 4.4°C. Furthermore, the IPCC has officially announced that, as of 2022, the Earth's temperature has already risen by 1.1℃ compared to pre-industrial levels (1850), and

current plans are insufficient to address climate change and prevent a 1.5℃ rise in global temperatures, requiring more stringent policy measures.

IV. Judgment

1. Examination of the Legal Requirements for the Constitutional Petition

A. Potential Violation of Fundamental Rights

The Fifth Assessment Report (2013), the Special Report on 1.5℃ (2018), and the Working Group III Report of the Sixth Assessment (2022) by the IPCC scientifically clarify that the causes of climate change originate from human activities and delineate the damages that may occur in the absence of sufficient mitigation efforts. Anticipated damages include extreme weather phenomena, natural disasters, sea level rise, ecological disturbances, reduction in species diversity, water scarcity, and food shortage. Taking into account the comprehensive nature of climate change impacts across ecosystems, society, and the economy, it appears that there is a potential violation of the fundamental rights of the petitioners in this constitutional case.

B. Self-Relevance

Article 8, Section 1 of the Framework Act on Carbon Neutrality and Article 3, Section 1 of its Enforcement Decree designate the government as the direct violator of the reduction duty of greenhouse gas emissions, and thus, the petitioners in this constitutional case are not direct subjects of the exercise of governmental power but rather a third party. However, even as a third party, if the exercise of public power directly and legally infringes upon the fundamental rights of that third party, self-relevance can exceptionally be recognized.

The provisions for the reduction of greenhouse gases aim to protect the rights of the general public, including the petitioners, from the problems of global warming due to the rise in greenhouse gases by explicitly stating the government's obligation to reduce emissions, and given that the petitioners are exposed to 'irreversible risk' of being deprived of their life, safety, freedom, and happiness due to the continuous accumulation of greenhouse gas emissions and the dangers of global warming, it can be said that the degree of effect and seriousness that the said legal provisions have on the constitutional petitioners in this case is extremely high.

Furthermore, given that the government, being the direct subject of the

Framework Act on Carbon Neutrality and its Enforcement Decree, experiences reduced economic, social, and political regulatory burdens when the level of obligation to reduce greenhouse gases is low, it is difficult to expect that the government would actively seek a constitutional review regarding the appropriateness of the greenhouse gas reduction targets. Therefore, considering the legislative purpose of the greenhouse gas reduction target provision, the effect or severity of greenhouse gas reduction control on the petitioners, and the possibility of a constitutional petition raised by a direct violator, it is determined that self-relevance is substantiated in relation to the infringement of the fundamental rights of the petitioners in this case.

C. Immediacy

The Constitutional Court has established the legal principle that, in principle, it requires the infringement of basic rights to be currently existing, but exceptionally recognizes imminence in cases where the infringement of basic rights is 'clearly anticipated' in the future[15]. Considering that the greenhouse gas reduction target set by the government is markedly low, and when energy policies and greenhouse gas reduction policies are pursued based on such a reduction target, it is clearly anticipated that greenhouse gas emissions will increase by the late 21st century; especially considering that the temperature rise effect due to greenhouse gas emissions is irreversible and the impact of current greenhouse gas emissions occurs over decades, necessitating immediate action to prevent future infringements, and considering the characteristic that, once the infringement of basic rights has materialized, there are no opportunities to prevent it, the immediacy of the matter needs to be recognized more comprehensively.

D. Directness

The Constitutional Court has ruled that the law that may be the subject of a constitutional petition should be a law that directly infringes upon the basic rights of the people without waiting for another executive action based on that law; however, it does not always necessarily negate the legality of a constitutional petition for a review of the law itself, even when a specific executive action exists. The Court has previously ruled that, exceptionally, even when an executive action exists, if no remedial procedure against that action is available, or even if such a procedure exists, there is no possibility of expected rights remedy, and it does nothing but impose unnecessary detour procedures on those whose basic rights have been infringed upon, then when the relevance to the law in question is acknowledged to be clear, the law may be deemed a direct subject of a constitutional petition.[16]

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[15] Constitutional Court, Jul.18, 2002, 2001HunMa605.

[16] Constitutional Court , Apr.14, 1992, 90HunBa82.

Given that the NDC, the core national protective measure against climate change, is regulated by Article 8 of the Framework Act on Carbon Neutrality and Article 3 of its Enforcement Decree, and that the contribution determines the direction and intensity of various detailed policy means such as energy policies and emission regulations to substantially achieve greenhouse gas reduction, it can be said that the level of infringement on basic rights due to climate change arises directly from the national contribution provision, not from individual policy means or executive actions. Even if individual energy policy means or actions based on Article 8 of the Framework Act on Carbon Neutrality and Article 3 of its Enforcement Decree are considered 'executive actions,' the possibility of challenging them through administrative or civil litigation due to plaintiff qualifications is very low, and even if litigation is possible, it may be considered an unnecessary detour. Especially considering that even if the NDC specified in the current Framework Act on Carbon Neutrality Enforcement Decree is achieved, it would not prevent climate change and is currently evaluated as being at a 'very insufficient' level, the state's inadequate greenhouse gas reduction target setting may be seen as 'directly' infringing on the petitioners' fundamental rights.

E. Preliminary Conclusion

In the case of a decision by the Federal Constitutional Court of Germany, which is most analogous to the present matter, the constitutional petition case was also acknowledged as a legitimate claim. Similar to the constitutional petitions in the Republic of Korea, the German constitutional petition requires self-relevance, imminence, directness, and the supplementary nature of the claim, and the German Federal Constitutional Court adjudged it as a lawful claim. Given that this constitutional petition bears similar issues to the constitutional petition litigation in Germany, it is reasonable to judge that the requirements for this constitutional petition have been met.

2. The Constitutionality of Article 8, Section 1 of the Framework Act on Carbon Neutrality, and Article 3, Section 1 of the Enforcement Decree

A. Evaluation Pertaining to Intergenerational Equity (Proportionality)

The Preamble of the Constitution declares, "With a commitment to secure the safety, freedom, and happiness of our descendants eternally," emphasizing the basic principle that the Constitution must advocate for the safety and freedom of both the current and future generations. Article 1 (Objective) of the Framework Act on Carbon Neutrality stipulates its objective as, "Enhancing the quality of life for the current and future generations, protecting the ecosystem and climate system, and contributing to

the sustainable development of the international community," thus highlighting the goal of improving "the quality of life for future generations." Article 2 (Fundamental Concepts) of the Framework Act on Environmental Policy stipulates that "The State, local governments, business entities and citizens shall ensure that the current generation of citizens can fully enjoy environmental benefits and future generations will continue to enjoy such benefits by endeavoring to maintain and create a better environment, by considering environmental conservation first while engaging in any activities utilizing the environment and by combining their efforts to prevent any environmental harms on the earth, such as climate changes," thereby adopting "the inheritance of benefits of preventing hazards to the global environment for future generations" as its basic ideology.

The Supreme Court en banc made a decision to dismiss the case for the suspension of execution on the Four Major Rivers lawsuit, where a dissenting opinion stated: "Considering the characteristics of environmental issues such as latency, resilience, and irreversibility, special attention needs to be paid to ensure that the environment, which will become an important foundation of life for our descendants, the future generations, is not polluted or damaged." This can be interpreted as emphasizing the need to safeguard basic rights across generations, particularly in light of potential environmental rights infringements on future generations.

The Office of the United Nations High Commissioner for Human Rights, in its Analytical Study on the Relationship between Climate Change and the Rights of the Child (2017), [17] elucidated that "Young children, because of their less developed physiology and immune systems, will experience most intensely the effects of climate change-related stresses. Climate change and the impacts of traumatic stress connected to climate change, such as war/insecurity, sexual and physical violence, and witnessing deaths and injuries related to extreme weather disasters, negatively affect children's mental health. Hence, the principle of intergenerational equity must be strictly upheld under the Climate Change Convention and the Paris Agreement, and nations have an obligation to place the needs of younger and future generations at the core of climate change policies and related actions."

The Federal Constitutional Court of Germany, in adjudicating the partial unconstitutionality of the Federal Climate Protection Act, underscored the implication that should the majority of the carbon budget be expended by 2030, ensuing generations residing between 2030 and 2050 would be relegated to subsisting on a markedly diminished carbon budget, a circumstance necessitating an abrupt curtailment in socio-economic activities and, given the extensive influence of economic- activity-related greenhouse gas emissions on freedoms spanning all sectors, this disproportionate budget allocation infringes upon the principle of proportionality that mandates the equitable preservation of the freedom rights of both contemporary

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[17] Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child (A/HRC/35/13).

and succeeding generations.

Utilizing the "population-proportional residual carbon budget estimation" method that the Federal Constitutional Court of Germany employed in its main judgment to allocate the Republic of Korea's carbon budget, it becomes evident that the burden imposed on future generations is egregiously excessive. The IPCC Special Report on Global Warming of 1.5℃ proposes a pathway stipulating that, in order to limit the average global temperature increase to within 1.5℃, net carbon dioxide emissions must reach zero by 2050, and, by retroactively calculating this, it has assessed the remaining carbon budget as of 2018 to be approximately 420 billion CO_2eq. Calculating ROK's 2018 carbon budget (allocating the global carbon budget in proportion to the population), given that the total global population in 2018 was approximately 7.68 billion and ROK's population constituted about 50.98 million (representing roughly 0.66% of the global population), the carbon budget of the ROK is then estimated to be approximately 2,772 million tons CO_2eq (derived from 420 billion CO_2eq multiplied by 0.66%). This measure is based solely on carbon dioxide, and given that carbon dioxide constitutes about 91% of ROK's greenhouse gas emissions, the total greenhouse gas emissions in 2018 should be less than 2,772 million tons CO_2eq. According to the national greenhouse gas inventory provided by the Ministry of Environment's Greenhouse Gas Information Center, the average greenhouse gas emissions in the ROK from 2018 to 2020 were approximately 694.7 million tons CO_2eq [(726.9+701.2+656.2)/3], and thus, subtracting the aforementioned annual greenhouse gas emission figure (694.7 million tons CO_2eq) from the 2018 residual carbon budget, it can be estimated that ROK's carbon budget will be entirely depleted by 2022 (2,772 million tons = 694.7 million tons × χ years, where χ is roughly 3.99 years).

Pursuant to Article 3, Section 1 of the Enforcement Decree of the Framework Act on Carbon Neutrality, even if carbon is reduced by 290.7 million tons CO_2eq by 2030 (based on 726.9 million tons in 2018 x 0.4), there is an absence of a staged reduction target from 2018 to 2030 in the legislation, rendering ambiguity in the yearly greenhouse gas reduction targets. Assuming that the greenhouse gas reduction target set out in the Enforcement Decree of the Framework Act on Carbon Neutrality was already met in 2019 (726.9 million tons in 2018 minus the reduction target of 290.7 million tons = 436.2 million tons) and that such a level is maintained annually, the total carbon emissions by 2030 would amount to 5,961.3 million tons CO_2eq (726.9 million tons in 2018 and 436.2 million tons annually for the following twelve years from 2019 to 2030), which significantly exceeds our nation's carbon budget of approximately 2,772 million tons CO_2eq. If the enhanced standards presented in the IPCC Sixth Assessment Report are applied, it can be surmised that there is almost no carbon budget left for future generations.

By the carbon budget calculation method adopted by the Federal Constitutional Court of Germany, it is anticipated that the Republic of Korea's carbon budget will be

entirely exhausted before 2030, predicting a situation where future generations must drastically reduce greenhouse gas emissions.

The Federal Constitutional Court of Germany has held that "When envisioning the two timeframes of the present and the future, and given a finite total budget of freedom that can be utilized collectively, actions taken in the present can restrict the freedom of the future, thereby necessitating the equitable and proportionate allocation of the carbon budget. Since human existence is directly and indirectly tied to carbon emissions, curbing such emissions would extensively limit the freedom guaranteed under Article 2, Section 1 of the German Basic Law (General Freedom of Action), rendering provisions that deplete the carbon budget a legal threat to the freedom of the future. Limitations on freedom must be rational, requiring that unilateral sacrifices across generations are prevented, and given that the amount of carbon that can be emitted is predetermined, the current permissible emission standards should be evaluable at this point in time for their impact on the freedoms of the future and must be adjusted to ensure proportionality."

Thus, as climate change impacts the entirety of human life's freedoms which are fundamental rights to be jointly enjoyed by the present and future generations, transferring an unequal burden to the future generations constitutes an irrational and discriminatory treatment, which may be deemed a violation of the constitutional principle of equality.

Moreover, it is imperative to remember that the current law's inequitable method of allocating reduction burdens is an extension of the infringement on fundamental rights that has occurred in the past. In 2010, the government had legislated intermediate-term goals to be achieved from 2009 to 2020, for which it failed to reduce emission levels as per the established reduction targets, instead experiencing a consistent increase in greenhouse gas emissions, leading to the eventual removal of the 2020 targets from the enforcement decree and their amendment to 2030 targets. This can be seen as the government, even after setting the greenhouse gas reduction targets, being primarily preoccupied with reducing the burden on the current generation and failing to meet the reduction targets, consequently shifting the reduction burden to future generations. Reflecting on such past experiences of the Korean government, the current setting of relatively low targets by 2030, with no reduction targets established for post-2031, deferring the anticipated extremely challenging tasks to future generations after 2030 is in violation of intergenerational equity and does not conform to the constitutional principle of equality.

B. Examination in relation to the State's Obligation to Protect Fundamental Rights (Principle Against Insufficient Protection[18])

[18] When the Constitutional Court reviews whether the state has fulfilled its duty to protect the right of the citizens to live in a healthy and

The Constitutional Court clarified that "Article 10 of the Constitution stipulates that the state acknowledges the inviolable fundamental rights of individuals and has the duty to guarantee them, thus, not only prohibiting the infringement of citizens' basic rights by state power but also imposing an obligation to actively protect and realize the basic rights of its citizens[19]." In this context, the Constitution mandates, under Article 34, Section 1, that "All citizens shall be entitled to a life worthy of human beings," and under Section 6 of the same article, it mandates that "The State shall endeavor to prevent disasters and to protect citizens from harm therefrom," while Article 35 asserts, "All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment," and Article 36, Section 3, further provides that "The health of all citizens shall be protected by the State," hence, although there is no explicit provision in the constitution addressing the state's obligation for greenhouse gas reduction, it is possible to deduce, through constitutional interpretation, the state's inherent obligation to protect its citizens from the disasters and threats that emanate from climate change and to secure their safety.

In its resolution of July 2021, the United Nations Human Rights Council articulated that "the ramifications of climate change affect rights to food, life, physical and mental health, housing, self-determination, work, and development,[20]" and in the 2018 General Comment No. 36 on Article 6 (Right to Life) of the International Covenant on Civil and Political Rights, it was assessed that climate change represents "the most pressing and severe threat to the enjoyment of the right to life by present and future generations.[21]" Substantiating this assertion, five United Nations human rights treaty bodies, in a declaration on human rights and climate change in May 2020, proclaimed that "the failure to implement measures to forestall foreseeable human rights harms engendered by climate change, or to regulate activities contributing to

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pleasant environment, it must use the so-called 'principle against insufficient protection' as a standard, assessing whether the state has taken at least appropriate and efficient minimal protective measures to ensure this protection (Constitutional Court. Jul. 31, 2008, 2006HunMa711; Constitutional Court, Dec. 27, 2019, 2018HunMa730).

19 Constitutional Court, Oct. 27, 2016, 2012HunMa121

20 Resolution 24 (2021), 'Human Rights and Climate Change,' Human Rights Council, 47th Session, Working Paper.

21 In the 2018 General Comment No. 36, Article 6: Right to life, the United Nations Human Rights Committee delineates, "The most pressing and serious threat posed by climate change is to the right to life of present and future generations," exemplifying this assertion by referencing the over 7,500 residents of economically vulnerable regions in the Philippines who perished due to Typhoon Haiyan (Yolanda), a climatic anomaly in 2013, and highlighting the imminent risk of the entire island of Kiribati in the South Pacific disappearing due to sea-level rise, thereby underlining how the climate crisis, through diverse mechanisms such as drought and disease amplification, endangers life, with predictions estimating that the crisis will result in the loss of over 700,000 lives by 2030, leading the Committee to conceptualize the linkage between the climate crisis and human rights as primarily an issue of the right to life—a conventional freedom right—and concluding that climate change and unsustainable development constitute the most immediate and severe threats to the ability of present and future generations to enjoy the right to life, positing therefore, that the obligations under international environmental law incumbent upon the states parties should extend to Article 6 (Right to life) of the Covenant on Civil and Political Rights, and affirming that, since the duty of states to respect and guarantee the right to life is inherent under the Covenant on Civil and Political Rights, states are deemed to be fulfilling their obligations when they uphold and ensure the right to life by proactively executing their duties to combat climate change."

such harms, can constitute a violation of the state's human rights obligations.[22]" Additionally, the Convention on the Rights of the Child specifies in Article 3 that "States have the responsibility to take all measures to respect, protect, and fulfill children's rights" and in Article 6 that "States Parties shall ensure to the maximum extent possible the survival and development of the child."

Considering instruments such as the Climate Change Convention, the Kyoto Protocol, and the Paris Agreement, it appears evident that states bear an obligation to protect their citizens' fundamental rights regarding their response to climate change. Specifically recalling Article 2 of the Paris Agreement, which sets a primary goal "to hold the increase in the global average temperature to well below 2℃ above pre-industrial levels" and an additional objective "to pursue efforts to limit the temperature increase to 1.5℃ above pre-industrial levels," there may be a discernible international consensus for greenhouse gas reductions to "well below 2℃". Therefore, given that individual countries are setting and implementing greenhouse gas reduction targets to avert the current state of imminent disasters due to climate change, establishing greenhouse gas reduction targets that exceed the minimum standards to prevent impending risks due to climate change in consideration of internationally stipulated standards may be deemed the minimal necessary measure to fulfill the state's obligation to protect basic rights.

In this regard, in the Urgenda case, the Dutch court, addressing the Netherlands government's contention that the setting and implementation of greenhouse gas reduction duties are fundamentally within the discretionary domain of the state, judged that, "Considering the reduction path proposed by the IPCC, which suggests that developed countries, including the Netherlands, should reduce by 25-40% compared to 1990 levels by 2020, the greenhouse gas reduction target of the Dutch government at the time was inadequate, and the reduction target should be at least 25% compared to 1990 levels." The court also ruled that "The Netherlands government constitutes an illegal act by not fulfilling the state's duty of care to protect the lives and well-being of its citizens." In the Neubauer case, the Federal Constitutional Court of Germany judged that "From the perspective that the progressively serious climate change may pose substantial risks such as heatwaves, floods, or hurricanes to basic rights, the state has the duty to provide protection to the current population, and even to future generations according to objective legal requirements."

Measures taken under Article 8 of the Framework Act on Carbon Neutrality, which sets the lower limit for greenhouse gas reduction targets at 35%, and Article 3 of its Enforcement Decree, which mandates a 40% reduction by 2030 compared to 2018 levels, fail to meet the 2018 IPCC standard (45% reduction by 2030 compared to 2010)

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[22] Statement on Human Rights and Council Change, Committee on the Elimination of Discrimination Against Women Committee on Economic, Social and Culture Rights· Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families· Committee on the Rights of the Child ·Committee on the Rights of Persons with Disabilities, (2020), para, 5

and fall even further short of the strengthened 2022 IPCC standard (43% reduction by 2030 compared to 2019 levels).

Even under the best-case scenario set out in the Framework Act on Carbon Neutrality and its Enforcement Decree (achieving a 40% reduction in greenhouse gas emissions by 2018, as targeted in the Enforcement Decree, from 2019), the carbon budget of the Republic of Korea is projected to be exhausted by 2022, necessitating that the state take required legislative measures to equitably distribute the remaining greenhouse gas emissions across generations, and ensure future generations can seamlessly transition to a carbon-neutral lifestyle. However, the Framework Act on Carbon Neutrality grants broad discretion to the government in setting and achieving reduction targets, without providing clear guiding principles. In this regard, there is broad recognition for the executive branch's discretion that may lead to conservatively set emission reduction targets considering domestic economic and social conditions and the state of technological advancement, in determining the stages and methods of implementing greenhouse gas reduction targets. Thus, it is difficult to view it as taking the minimum measures to protect fundamental rights, as the law only stipulates a floor of above 35%, a standard significantly falling short of international agreements, without specifying any content that can be applied as the minimal standard in the legislation.

Furthermore, although Article 7 of the Framework Act on Carbon Neutrality explicitly sets the goal of carbon neutrality by 2050, it does not provide sufficient protective measures for the period from 2031 to 2050 when carbon neutrality is to be achieved, potentially resulting in the petitioners, who are minors, bearing a relatively greater burden of greenhouse gas reduction obligations post-2031. This may hardly be seen as the state taking the minimum measures necessary to protect the fundamental rights that are infringed upon by the abrupt burden of greenhouse gas reduction imposed on the petitioners from 2031, thereby violating the principle against insufficient protection.

C. Examination on the Principles of Prohibition of Blanket Delegation and Legislative Reservation

Article 75 of the Constitution explicitly states the principle of prohibition of blanket delegation, and the Constitutional Court has adjudged that "in principle, restrictions on basic rights are only possible by law," and has elucidated that "what is meant by matters delegated with a specific scope in the law, under Article 75 of the Constitution, implies that basic matters regarding the content and scope to be stipulated in the presidential decree are specifically regulated in the law, enabling anyone to predict the general content to be stipulated in the presidential decree from

the law[23].” This means that in regulations that have the potential to directly restrict or infringe upon the basic rights of citizens, the requirements of concreteness and clarity are intensified, and the conditions and scope of such delegation should be more strictly and narrowly defined than in the cases of general administrative grants[24], with the Constitutional Court affirming the principle of legislative reservation by ruling that “in areas related to the realization of the basic rights of citizens, the legislators themselves must decide on the essential matters.[25]”

Given that the greenhouse gas reduction target establishes national and long-term emission limits for greenhouse gases, which are factors causing climate change, and is a critical matter for protecting the lives and safety of the citizens from greenhouse gas emissions and the resulting climate change, it can be asserted that, in cases where it is delegated to a regulatory order, there may be a stricter requirement for clarity and specificity in the delegation. However, the Framework Act on Carbon Neutrality does not specify the greenhouse gas reduction target after 2031 in the law, and Article 8, Section 1 only stipulates a lower limit by stating that “the government shall reduce the national greenhouse gas emissions by a presidential decree-determined ratio within a range of at least 35 percent compared to the national greenhouse gas emissions of 2018 by 2030,” delegating the setting of specific targets to subordinate legislation, thus, it examines whether this is in violation of the constitutional principles of prohibition of blanket delegation and legislative reservation.

Regarding this matter, the German Federal Constitutional Court has previously rendered a decision on a similar issue. The Federal Constitutional Court of Germany determined that the Federal Climate Protection Act sets overarching goals of temperature limit objectives of the Paris Agreement and carbon neutrality by 2050 and directly stipulates the greenhouse gas reduction goals from 2020 to 2030 in the law. However, it mandates that the government set the annual greenhouse gas emission levels after 2030. Thus, based on Article 80 of the Basic Law for the Federal Republic of Germany[26] and the requirements for statutory orders (the principle that when legislating provisions affect human freedom and equal rights, the essential matters must be clearly detailed by the parliament regarding their content, purpose, and the scope of authority to enact statutory orders), it was judged “to be in violation of the principle that ‘the determination of emissions after 2030 is inherently a matter that the

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23 Constitutional Court, Aug. 19, 2013, 2011HunBa390.

24 Constitutional Court, Oct. 26, 1995, 93HunBa62; Constitutional Court, Jul. 21, 2005, 2004HunGa30, etc.

25 Constitutional Court, May 27, 1999, 98HunBa70 “Today, the principle of reservation of law is to be understood not merely as being sufficient if the administrative action is based on the law, but it also inherently requires that, in areas that hold basic and important significance to the national community and its members, especially areas related to the realization of citizens' basic rights, the matters of essence should not be left to the administration but should be decided by the legislators, the representatives of the citizens, themselves.”

26 Article 80 of the Basic Law for the Federal Republic of Germany:

1. The authority to enact legislative decrees can be delegated to the Federal Government, Federal Ministers, or state governments by law. In such cases, the content, purpose, and scope of the delegation must be specified in the law. The decrees must cite their legal basis. Where re-delegation is permissible by law, such re-delegation requires a delegated legislative decree.

parliament must decide by law as it is directly related to how much the freedoms are restricted after 2030, and in cases where the content is delegated to statutory orders, the scope and decision criteria for the delegation must be very specifically stipulated."

Article 8, Section 1 of the Framework Act on Carbon Neutrality sets the lower limit of the NDC at 35%, and the Enforcement Decree of the Framework Act on Carbon Neutrality stipulates a 40% reduction by 2030 compared to 2018 levels, which does not meet the 2018 IPCC standard (a 45% reduction by 2030 compared to 2010) and falls even shorter of the strengthened 2022 IPCC standard (a 43% reduction by 2030 compared to 2019), rendering it effectively equivalent to the law not specifying the NDC standards. Furthermore, the law lacks any discernible content, even in broad terms, on whether the state will implement greenhouse gas reductions incrementally up to 2030 or drastically approach compliance near 2030, and aside from the national vision articulated in Article 7, Section 1 of the Framework Act on Carbon Neutrality, which states an objective "to achieve carbon neutrality by 2050," the law fails to mention the greenhouse gas reduction plan post-2031, leaving a legislative void for the greenhouse gas reduction targets from 2031 to 2050 (the targeted year for carbon neutrality).

In a context where there is a certain consensus on the climate crisis situation and the necessity and urgency of greenhouse gas reductions from both climate scientific and international normative perspectives, the fact that the state, despite the need to stipulate predictable minimum standards in the law and to set specific greenhouse gas reduction targets considering these, enables discretionary law enforcement by the administrative authority by extensively delegating the setting of reduction targets to presidential decrees and inadequately stipulates reduction targets only up to 2030 in the law without regulating greenhouse gas reduction targets after 2031 may be a violation of the principles of prohibition of excessive delegation and reservation of parliament, having failed to take legislative measures for the implementation of the Paris Agreement and the protection of the basic rights of the citizens.

D. Preliminary Conclusion

Given the climate-scientific predictions that the Republic of Korea's climate crisis will intensify in the future, and in a context where the domestic carbon budget is constrained, the failure of the Framework Act on Carbon Neutrality to establish phased carbon reduction targets post-2031 without considering the proportional allocation of the carbon budget for future generations amounts to a premature and excessive limitation and infringement on the freedom and rights of these future generations, thereby violating the principle of equality between current and future generations. Additionally, by only setting a minimum threshold of at least 35% for greenhouse gas emission reductions up to 2030, which significantly falls short of international

consensus standards, and by delegating to the executive branch the discretion to determine the specific 2030 emission reduction target (40% compared to 2018) without establishing phased greenhouse gas reduction targets leading up to the 2050 carbon neutrality goal, the act contravenes the principles of legislative reservation and prohibition of blanket delegation, fails to adequately reflect international standards and the urgency of the impending climate crisis, and neglects the minimum protective measures necessary to safeguard the freedoms and rights of both current and future generations, thus being deemed a violation of the state's fundamental duty to protect basic rights.

V. Conclusion

For the reasons stated above, it is resolved to submit an opinion as prescribed in Article 28, Section 1 of the Commission Act. There was a dissenting opinion from Commissioner Han Seok-hoon, and Commissioner Lee Chung-sang expressed his intention to abstain.

VI. Dissenting Opinion of Commissioner Han Seok-hoon

1. Summary of Majority Opinion

Article 8, Section 1 of the Framework Act on Carbon Neutrality states, "The Government shall set a national medium- and long-term greenhouse gas emission reduction target (hereinafter referred to as 'mid-to long-term reduction target') to reduce national greenhouse gas emissions by a ratio prescribed by Presidential Decree to the extent of not less than 35 percent from the 2018 levels by 2030," with Article 3, Section 1 of its Enforcement Decree setting the mid-to long-term reduction target a 40%.

In this regard, the majority opinion asserts that given the baseline greenhouse gas emissions for the year 2018 stood at 726.9 million tons CO_2eq, and even if the stipulated medium-to-long-term reduction target of 40% by 2030 is achieved, the 2030 emissions would still amount to 436 million tons (726.9 million tons – 726.9 million tons x 0.4) CO_2eq, which not only falls short of the global average reduction trajectory proposed by the IPCC for the attainment of the 2050 carbon neutrality goal but also does not meet the reduction standard (a 43% reduction from 2019 levels by 2030) under the IPCC Sixth Assessment Report's Working Group III Report approved at its 56th Session, with no set reduction targets post-2031, thus is deemed unreasonable. Therefore, it is claimed that this violates the state's duty to protect fundamental rights in order to safeguard the rights to freedom of the current and future generations against

climate change. Moreover, the majority opinion has assessed that the Framework Act on Carbon Neutrality, by not only stipulating only the minimum limit for the mid-to long-term reduction goals and delegating the setting of specific targets to subordinate legislation but also by failing to specify the annual phased greenhouse gas reduction targets from 2018 to 2030, and not establishing reduction targets for post-2031, has consequently configured a framework where the burden of reducing greenhouse gas emissions falls relatively heavily on future generations. This is deemed to violate the principles of prohibition of blanket delegation and reserving matters to the legislature, and it induces intergenerational inequality by disproportionately infringing on the freedom rights of future generations more than the current one, violating the principle against insufficient protection and the principle of equality.

While the majority opinion expresses the view that Article 8, Section 1 of the Framework Act on Carbon Neutrality and Article 3, Section 1 of the Enforcement Decree are unconstitutional based on the above rationale, Commissioner Han Seok-hoon is of the opinion that they cannot be seen as unconstitutional, for the reasons mentioned below.

2. Examination of whether the mid-to long-term reduction targets meet the IPCC reduction standards

A. IPCC's Reduction Standards

According to the Sixth Assessment Report approved at the 58th IPCC Plenary in 2023 (hereinafter referred to as the Sixth Assessment Report), the analysis found that human activities emitting greenhouse gases have caused the Earth's surface temperature between 2011 and 2020 to be 1.1℃ higher compared to the temperatures in the early days of the Industrial Revolution between 1850 and 1900. Furthermore, the report projects that the intensification of global warming due to greenhouse gas emissions will reach a 1.5℃ increase in global surface temperature in the near future (between 2021 and 2040), and as a result, more human and natural systems are predicted to reach their adaptation limits. There are scientific disagreements regarding the accuracy of such projections,[27] and whether the emissions of carbon and other

[27] Michael Shellenberger, who was named an Environmental Hero by the American magazine TIME in 2008, asserts in 'Apocalypse Never: Why Environmental Alarmism Hurts Us All' that "while global warming exists, it is merely a manageable environmental issue, not an existential threat leading to the end of the world" [https://en.wikipedia.org/wiki/Michael_Shellenberger (verified on July 9, 2023)]. John Francis Clauser, the laureate of the 2022 Nobel Prize in Physics, contends that "I think there is no climate crisis due to climate change, as the current climate science holds significant misconceptions in its main explanations. Politicians and researchers with political motives are exploiting science for opportunistic goals and disseminating incorrect information" ("Politicians Misuse Science, Spread Incorrect Information... Harsh Words from Nobel Laureate

substances due to industrial development are the sole cause of the observed climate change remains a matter of dispute. However, considering that the view that carbon emissions are a major cause of climate change is commonly held, and that the Framework Act on Carbon Neutrality is enacted based on the trust in the reports approved by the IPCC, to which the Republic of Korea is a member, there is a need to scrutinize the position of the IPCC and the content of the Sixth Assessment Report, assuming the reliability of the IPCC's reports.

The IPCC, in the Paris Agreement, which came into effect in 2016, established the objective of "Holding the increase in the global average temperature to well below 2℃ above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5℃ above pre-industrial levels" as a measure to address the climate crisis, and Parties, determining the base year among other things independently, have the duty to prepare and implement the NDC for greenhouse gas reduction, with the obligation to renew the NDC every five years and notify the IPCC with reports of the status of its implementation. Subsequently, the IPCC's 2018 Special Report (IPCC Special Report: Global Warming of 1.5) outlined a path that requires Net-Zero emissions to be achieved by 2050, where carbon dioxide emissions and natural absorption are offset to limit global average temperature rise to within 1.5℃.

The Sixth Assessment Report briefly mentions the necessity of the aforementioned Net-Zero and only posits that, to that end, global net greenhouse gas emissions need to be reduced by 43% by 2030 compared to 2019 levels, not specifying the exact percentages by which each country's net greenhouse gas emissions should be reduced.

B. Mid-to Long Term Reduction Targets Under the Framework Act on Carbon Neutrality

According to the IPCC's reduction standards, in order to achieve Net-Zero by 2050[28], each party must determine its NDCs based on a benchmark year they set independently, most participating countries designate the year in which greenhouse gas emissions (primarily CO_2) peak, or a year close to it, as their benchmark year and then select for their NDC a linear pathway that either falls between the linear reduction trajectory from this peak year to carbon neutrality by 2050 (referred to as the Peak-Based Linear Trajectory) and the linear trajectory from the year NDCs were revised upwards in 2018 to carbon neutrality by 2050 (referred to as the 2018-Based Linear

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Physicist who Visited Korea", Dong-A Ilbo, June 27, 2023).

[28] Carbon Neutrality' refers to a state where the net emissions, offset by the amount of greenhouse gases absorbed from the amount of greenhouse gases emitted, leaked, or released into the atmosphere, are zero (Article 2, Section 3 of the Framework Act on Carbon Neutrality).

Trajectory)[29] or lies below the peak-based trajectory, ensuring even greater annual reductions in greenhouse gas emissions.[30]

Similar to the EU and Japan, the Republic of Korea also determined 2018, when greenhouse gas (CO_2) emissions peaked, as its base year.[31] Accordingly, while the 2018-Based Linear Trajectory aligns with the Peak-Based Linear Trajectory, making it a viable choice for the NDC, a linear trajectory was chosen for the NDC that ensures even greater reductions in greenhouse gas emissions than either of those paths. Given that the Republic of Korea's benchmark year of 2018 had greenhouse gas emissions of 727.6 million tons CO_2eq,[32] the Peak-Based Linear Trajectory would result in 454.8 million tons CO_2eq by 2030. ROK, however, in alignment with international efforts to combat the climate crisis, set a more ambitious medium to long-term reduction target of 40% by 2030, aiming for emissions of 436.6 million tons CO_2eq by that year.[33] The above-mentioned legislative background of the mid-to long-term reduction target under the Framework Act on Carbon Neutrality is also recorded in the plenary session minutes of the National Assembly at the time the Law was enacted in 2021.[34]

Given that the Republic of Korea's reduction period from its greenhouse gas

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29 In a coordinate plane with the year on the x-axis and greenhouse gas emissions on the y-axis, the vertex year is before 2018, and as the greenhouse gas emission restraint was inadequate in each country until 2018, the linear path based on the year 2018 is located below the vertex-based linear path.

30 The 2030 National Greenhouse Gas Reduction Target (NDC) Enhancement Plan (Joint related ministries, Oct. 18, 2021) (hereinafter referred to as Enhancement Plan), pages 2-4.

31 The United States has set the year 2005, and Japan the year 2013—each being the year when greenhouse gas emissions peaked—as their respective baseline years. Developed countries, having advanced industrially earlier than the Republic of Korea and possessing larger populations and economies, have significantly higher absolute amounts of greenhouse gas emissions. Therefore, the regulations for greenhouse gas emission reductions started earlier, around the end of the 20th century or the beginning of the 21st century, making their peak years of greenhouse gas emissions much earlier than the ROK's. Therefore, the IPCC has allowed each country to set their baseline year independently, mandating the establishment of a linear path to reduce greenhouse gas equally every year until the target year of carbon neutrality in 2050. The majority opinion evaluates that the Republic of Korea is "the only one among developed countries to have increased greenhouse gas emissions," commenting on the later peak year of greenhouse gas emissions compared to those of developed countries, which is not a valid assessment.

32 While the majority opinion cites the Republic of Korea's 2018 greenhouse gas emissions as 726.9 million tons of CO_2eq, the ROK government's revised proposal indicates 727.6 million tons of Co_2eq, the latter of which will be adhered here.

33 Revised Plan, pages 4 and 6.

34 According to the minutes of the 390th National Assembly (Provisional Session) on August 31, 2021, at the time, Representative Yoon Jun-byung of the Democratic Party also stated, "In the case of NDC, even within the opposition party (People Power Party), one side denied the feasibility itself, and the other side insisted on specifying more than 50% based on the unrealistic year 2010. Developed countries are following a linear path with a target of carbon neutrality by 2050. Developed countries have been consistently reducing since 2010. However, we have not been able to do so. In the case of our country, following the linear path for the 2050 carbon neutrality goal, the 2030 NDC is 37.5% compared to 2018. Therefore, a minority opinion recommending more than a realistic 40%, specifying a minimum of more than 35% compared to 2018, a realistic goal close to the linear path, was included." Accordingly, Article 8, Section 1 of the Framework Act on Carbon Neutrality stipulates that the Government shall set a national medium- and long-term greenhouse gas emission reduction target to reduce national greenhouse gas emissions by a ratio prescribed by Presidential Decree to the extent of not less than 35 percent from the 2018 levels by 2030, which resulted in Article 3, Section 1 of the Enforcement Decree of the Framework Act on Carbon Neutrality setting such a reduction ratio at 40%. For reference, the voting results at the time of the above-mentioned National Assembly main session on August 31, 2021, were overwhelmingly in favor, with 109 in favor, 42 against, and 16 abstentions out of the 167 present, and thus the Framework Act on Carbon Neutrality bill was passed.

peak year in 2018 to its carbon neutrality target year of 2050 is shorter than other nations, the average annual reduction rate from the base year to 2030 is 4.17%, rather significantly higher than other countries (EU 1.98%, UK 2.81%, US 2.81%, Canada 2.19%, Japan 3.56%).[35] Furthermore, considering that the ROK has a relatively high proportion of GDP from the manufacturing sector, which is a major emitter of greenhouse gases, achieving the reduction targets set forth in the Framework Act on Carbon Neutrality poses a formidable challenge.[36]

C. Preliminary Conclusion

In essence, by setting the year 2018 as the base year in Article 8, Section 1 of the Framework Act on Carbon Neutrality and Article 3, Section 1 of its Enforcement Decree, and committing to reduce greenhouse gas emissions by 40% by 2030, the nation's determination of the 2030NDC faithfully adheres to the linear trajectory towards the 2050 carbon neutrality goal, thus, is consistent with the IPCC reduction standards deemed internationally recognized.

Additionally, NDC, which is the national greenhouse gas reduction target, is subject to periodic changes depending on the industrial sector's carbon reduction status and the development of technologies such as carbon capture technologies, hence, each country must renew its NDC every five years and notify the IPCC. Therefore, even if the greenhouse gas emission reduction ratio by 2030 is set as mentioned above, it is scheduled that the NDC will be renewed every five years thereafter, aiming for carbon neutrality by 2050. Thus, although the aforementioned Framework Act on Carbon Neutrality only definitively regulates the mid-to long-term reduction target by 2030, the 2030 NDC is based on a linear trajectory aimed at carbon neutrality by 2050, implying that subsequent NDCs towards carbon neutrality by 2050 are also anticipated.[37] Consequently, the majority opinion contends that establishing only the mid-to long-term reduction target by 2030 in the aforementioned Framework Act on Carbon Neutrality and not setting a reduction target after 2031 is deferring the post-2031 reduction targets to subsequent generations and thus violates the principle of equality due to breach of intergenerational equity is a misunderstanding stemming from a failure to properly understand the meaning of the linear trajectory of the 2030 NDC.

Furthermore, the majority opinion criticizes the absence of phased reduction targets from 2018 to 2030 in the legislation, questioning the clarity of when and how much greenhouse gas should be reduced annually. However, the aforementioned 2030

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35 Revised Plan, pages 2 and 4.

36 Revised Plan, page 6.

37 In fact, as detailed later, the government has established the highest-level master plan for carbon neutrality by 2050, spanning 20 years from 2023 to 2042, as confirmed in the National Strategy and First National Basic Plan for Carbon Neutrality and Green Growth finalized in April 2023.

NDC, being aligned with the linear path targeting carbon neutrality by 2050, inherently entails a consistent annual reduction in greenhouse gas emissions, effectively setting predetermined reductions for each year. Accordingly, the government, following the resolution of the 2050 Carbon Neutrality Green Growth Committee in April 2023 [38]and the deliberation and decision of the State Council, has established and implemented the National Strategy for Carbon Neutrality and Green Growth and the First National Basic Plan (including the mid-to long-term greenhouse gas reduction target), which explicitly presents sectoral and annual greenhouse gas reduction targets and implementation strategies up to 2030, as well as formulating and executing the paramount basic plan for carbon neutrality from 2023 to 2042 (20 years).[39] The majority opinion's assertion that such detailed plans should be enshrined in legislation or its regulations is an impractical and unjust criticism. Moreover, the majority opinion compares the Republic of Korea's 40% reduction rate with the IPCC's announced global reduction rates of 45% by 2030 compared to 2010 emissions and 43% compared to 2019 emissions, deeming it subpar. While the aforementioned IPCC reduction rate only refers to a global percentage, according to the IPCC's standards, each country is only limited to ensure the achievement of the Net-Zero carbon goal by 2050, provided that it has the discretion to determine its base year and reduction rate for greenhouse gas emissions. Therefore, given their peak years of greenhouse gas emissions and corresponding emission volumes, each party will inevitably have different linear trajectories leading to the 2050 Net-Zero carbon goal. Therefore, comparing the global 2030 greenhouse gas reduction rates relative to 2010 or 2019 with individual party's NDC reduction rates is not appropriate.

3. Regarding the Violation of Principles of Prohibition of Blanket Delegation, Legislative Reservation, and Equality

The majority opinion argues that the Framework Act on Carbon Neutrality, by merely stipulating a lower limit for the mid-to long-term reduction target, delegating specific target setting to its implementing ordinance, failing to specify yearly incremental greenhouse gas reduction targets from 2018 to 2030, and neglecting to set a reduction target for after 2031, thereby broadly granting the executive branch discretion to set and fulfill greenhouse gas emission reduction targets, violates the principles of prohibition of blanket delegation and legislative reservation. Furthermore, the Framework Act on Carbon Neutrality, by contravening IPCC's international norms and failing to set a reduction target for post-2031, consequently places a disproportionately larger burden on future generations for greenhouse gas emission reductions than the current generation, thereby violating the principle against

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38 The 2050 Carbon Neutrality Green Growth Committee is an organization established under the President according to Article 15 of the Framework Act on Carbon Neutrality. It deliberates and decides on major policies, plans, and their implementations for the transition to a carbon-neutral society and the promotion of green growth by the government.

39 https://www.2050cnc.go.kr/base/main/view/ (as of Jul. 9, 2023) http://www.2050cnc.go.kr/base/main/view/

insufficient protection, excessively infringing upon the freedoms of future generations compared to the present, and inducing intergenerational inequality, thus breaching the principle of equality.

However, the Framework Act on Carbon Neutrality explicitly designates the carbon neutrality in 2050 as a policy objective in Article 7 and mandates the government to formulate the National Carbon Neutrality Green Growth Strategy, which includes specific sectoral strategies and key initiatives, to be finalized after reviews by the 2050 Carbon Neutrality Green Growth Committee and the State Council. Moreover, under Article 8, Section 1 of the Framework Act on Carbon Neutrality, when choosing a linear path that equally reduces greenhouse gases each year leading up to 2050 carbon neutrality setting the base year as 2018, the government shall establish a lower limit for the mid-to long-term reduction target by 2030 at "35% or more" compared to 2018, with the specific reduction percentage to be determined in its Enforcement Decree, which subsequently set the reduction rate a 40%. Furthermore, Article 8, Sections 2, 3, and 4 of the Framework Act on Carbon Neutrality stipulate that sectoral and annual reduction targets must be established to achieve the aforementioned mid- to long-term reduction targets, which must be reset every five years in accordance with the Paris Agreement, and under the same law, Article 9 mandates the chairperson of the 2050 Carbon Neutrality Green Growth Committee to annually review and disclose the progress towards these reduction targets. Consequently, the government has specified sectoral and annual greenhouse gas reduction targets and implementation plans up to 2030, as described herein, and is implementing the First Basic Plan for 2042 (for the next 20 years).

Given that the Framework Act on Carbon Neutrality explicitly sets a goal of carbon neutrality by 2050 and establishes a mid-to long-term reduction target based on the linear trajectory from the base year of 2018, it cannot be argued that the law has failed to set reduction targets for the period after 2031. Furthermore, the Framework Act on Carbon Neutrality imposes on the government the duty to establish and implement the National Carbon Neutrality Green Growth Strategy and the sectoral and annual reduction targets for achieving the aforementioned mid- to long-term reduction targets, and accordingly, the government has formulated the Highest-Level Master Plan for the next 20 years as well as the sectoral and annual reduction targets from 2018 to 2030. Given this, the annual phased greenhouse gas reduction targets from 2018 to 2030 should be determined as specific policy objectives, taking into account the circumstances of the industrial sector, the level of carbon capture technology, and other relevant conditions, whose feasible contents should be set after review by the 2050 Carbon Neutrality Green Growth Committee and related agencies, thus making such contents neither appropriate nor feasible to be specified in advance within the Framework Act on Carbon Neutrality and its Enforcement Decree.

Therefore, the majority opinion that asserts the Framework Act on Carbon Neutrality violates the principles of prohibition of blanket delegation and legislative reservation, based on the premise that the law should have specified the annual phased

greenhouse gas reduction targets from 2018 to 2030 or that it failed to set post-2031 greenhouse gas reduction targets, is predicated on a flawed premise. Furthermore, the claim that the Framework Act on Carbon Neutrality violates the principle against insufficient protection, as well as the principle of equality between the current and future generations in terms of the protection of freedom rights, predicated on the premise that the law contravenes the IPCC's international standards and does not set post-2031 reduction targets, is erroneous, as previously examined.

4. Regarding the Legal Requirements for a Constitutional Petition

For a law to be the subject of a constitutional petition, it must directly and currently, infringe upon the petitioner's basic rights without any specific act of enforcement. The majority opinion argues, assuming that the mid-to long-term reduction targets of the Framework Act on Carbon Neutrality are at a grossly inadequate level contrary to the international standards of the IPCC, that it directly and currently infringes the petitioners' basic rights. However, as examined in the above Section 2, the Framework Act on Carbon Neutrality conforms to the international reduction standards of the IPCC, thus the majority opinion's argument regarding the requirements for a constitutional petition is also based on a mistaken premise.

5. Conclusion

Commissioner Han Seok-hoon, contrary to the majority opinion, believes that Article 8, Section 1 of the Framework Act on Carbon Neutrality and Article 3, Section 1 of its Enforcement Decree are in line with the international reduction standards of the IPCC, and do not violate the principle of prohibition of blanket delegation, the principle of legislative reservation, the principle against insufficient protection, and the principle of equality, thus, do not infringe upon the Constitution, and the constitutional petition concerning the matters herein fails to meet the necessary requirements for its claim.

2023. 6. 12.

Chairperson Song Doo-hwan

Commissioner Nam Kyusun

Commissioner Lee Choong Sang

Commissioner Kim Yong Won (absent)

Commissioner Seo Mi-hwa

Commissioner Seok Won-jeong

Commissioner Yoon Seug-Hee

Commissioner Kim Soo-jung

Commissioner Han Seok-hoon

Commissioner Kim Jong Min

Commissioner Han Suwoong (absent)

TAB L

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2024

21 May 2024

List of cases:
No. 31

REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE COMMISSION OF SMALL ISLAND STATES ON CLIMATE CHANGE AND INTERNATIONAL LAW

ADVISORY OPINION

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ADVISORY OPINION

Present: *President* HOFFMANN; *Vice-President* HEIDAR; *Judges* JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDO, CABELLO, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCIOLO, KAMGA; *Registrar* HINRICHS OYARCE.

On the Request submitted to the Tribunal by the Commission of Small Island States on Climate Change and International Law,

THE TRIBUNAL,

composed as above,

gives the following Advisory Opinion:

I. Introduction

A. Request

1. By letter dated 12 December 2022, received electronically by the Registry of the Tribunal on the same day, the Co-Chairs of the Commission of Small Island States on Climate Change and International Law (hereinafter "the Commission") transmitted to the Tribunal a request for an advisory opinion (hereinafter "the Request"), pursuant to a decision of the third meeting of the Commission held on 26 August 2022. The originals of that letter and of the decision of the Commission were filed with the Registry on 20 December 2022.

2. The Commission was created pursuant to the Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law (hereinafter the "COSIS Agreement"), which was concluded on 31 October 2021 and entered into force on the same date. At the time of the filing of the Request, Antigua and Barbuda, Tuvalu, the Republic of Palau, Niue, the

Republic of Vanuatu and Saint Lucia were parties to the COSIS Agreement. Subsequently, Saint Vincent and the Grenadines, Saint Christopher (Saint Kitts) and Nevis, and the Commonwealth of the Bahamas also acceded to it. All parties to the COSIS Agreement are also States Parties to the United Nations Convention on the Law of the Sea (hereinafter "the Convention").

3. At its third meeting, the Commission adopted the following decisions:

DECISIONS OF THE THIRD MEETING OF THE COMMISSION OF SMALL ISLAND STATES ON CLIMATE CHANGE AND INTERNATIONAL LAW (*)

Virtual Meeting 26 August 2022

The Commission of Small Island States, pursuant to Article 3(5) of the Agreement of 31 October 2021, has decided as follows:

1. Further to the Co-Chairs' 24 November 2022 request for a recommendation regarding an Advisory Opinion from the International Tribunal for the Law of the Sea (ITLOS), the Commission notes with appreciation the work of the Sub-Committee on Protection and Preservation of the Marine Environment and approves the 18 June 2022 *Recommendation CLE. 1/2022/Rec* of the Committee of Legal Experts to request the following Advisory Opinion from ITLOS consistent with Article 2(2) of the Agreement:

   "What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea ('UNCLOS'), including under Part XII:

   (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?

   (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?"

2. The Commission expresses it support for the initiative of Vanuatu to request an Advisory Opinion on climate change from the International Court of Justice ("ICJ") and decides that the Committee of Legal Experts should assist members of the Commission in making submissions to the ICJ as appropriate.

3. The Commission requests the Sub-Committees on Sea-Level Rise, Human Rights, and Loss and Damages respectively, to propose further activities that the Commission may undertake to contribute

> to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, consistent with its mandate under Article 1(3) of the Agreement.
>
> *(*) Adopted unanimously by COSIS Members meeting virtually: (1) Hon. Gaston Browne, Prime Minister of Antigua and Barbuda; (2) Hon. Kausea Natano, Prime Minister of Tuvalu; and (3) Hon. Surangel Whipps Jr., President of the Republic of Palau.*
>
> *Vote recorded by Meeting Chair, Eselealofa Apinelu, High Commissioner of Tuvalu to Fiji*
>
> *(Signed)* *(Signed)* *(Signed)*
> *(Eselealofa Apinelu)* *(Gaston Browne)* *(Surangel Whipps Jr.)*
>
> *(Signed)*
> *(Kausea Natano)*

4. In their letter dated 12 December 2022, the Co-Chairs of the Commission stated that they were "representing the Commission pursuant to Article 3(3) of the Agreement for the Establishment of the Commission" and were "hereby submit[ting] a request for an advisory opinion". The Co-Chairs of the Commission also referred to article 21 of the Statute of the Tribunal (hereinafter "the Statute") and article 138 of the Rules of the Tribunal (hereinafter "the Rules") and noted that,

> [i]n this respect, Article 2(2) of the Agreement provides (emphasis added):
>
> > Having regard to the fundamental importance of oceans as sinks and reservoirs of greenhouse gases and the direct relevance of the marine environment to the adverse effects of climate change on Small Island States, *the Commission shall be authorized* to request advisory opinions from the International Tribunal for the Law of the Sea ("ITLOS") on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules.

5. In the same letter, the Co-Chairs informed the Tribunal of the appointment of Mr Payam Akhavan and Ms Catherine Amirfar as the Representative and Co-representative, respectively, of the Commission for the proceedings.

6. Together with the said letter, the Co-Chairs of the Commission transmitted to the Tribunal documents likely to throw light upon the questions contained in the request for an advisory opinion, pursuant to article 131 of the Rules. All these documents were posted on the website of the Tribunal.

7. On 12 December 2022, the Request was entered into the List of cases as Case No. 31, which was named “Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law”. By letter of the same date, the Registrar of the Tribunal informed the Co-Chairs that the Request had been filed with the Registry on 12 December 2022 and entered into the List of cases as Case No. 31.

8. By a communication dated 19 December 2022, the Representative of the Commission corrected the date in paragraph 1, first line, of the decisions of 26 August 2022 adopted by the Commission to read 24 November 2021 instead of 24 November 2022.

B. Chronology of the procedure

9. By notes verbales dated 13 December 2022, in accordance with article 133, paragraph 1, of the Rules, the Registrar notified all States Parties to the United Nations Convention on the Law of the Sea (hereinafter “States Parties”) of the Request.

10. By letter of the same date, pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Registrar notified the Secretary-General of the United Nations of the Request.

11. By Order dated 16 December 2022, pursuant to article 133, paragraph 2, of the Rules, the President of the Tribunal decided “that the intergovernmental organizations listed in the annex to the … order are considered likely to be able to furnish information on the questions submitted to the Tribunal for an advisory opinion”. By the same Order, pursuant to article 133, paragraph 3, of the Rules, the President invited the States Parties, the Commission and the aforementioned intergovernmental organizations to present written statements on those questions and fixed 16 May 2023 as the time limit within which written statements could be presented to the Tribunal. By the same Order, the President decided that, in accordance with article 133, paragraph 4, of the Rules, oral proceedings would be

held. The Order was notified to the States Parties, the Commission and the intergovernmental organizations listed in its annex.

12. By letter dated 31 January 2023, the African Union requested that it be identified, pursuant to article 133, paragraph 2, of the Rules, “as an intergovernmental organization able to furnish information on the questions submitted to the Tribunal for an advisory opinion, thereby permitting [the African Union] to participate in the proceedings”. By letter dated 2 February 2023, the Registrar informed the African Union of the decision of the President to consider the African Union as such an intergovernmental organization and invited the African Union to furnish information within the time limit fixed by the Order of 16 December 2022.

13. By letter dated 3 February 2023, the European Commission requested the President “to extend the deadline to present written statements pursuant to Order 2022/4 by one month, until 16 June 2023.” By Order dated 15 February 2023, the President extended, pursuant to article 133, paragraph 3, of the Rules, to 16 June 2023 the time limit within which written statements could be presented to the Tribunal. The same Order recorded the President’s decision to consider the African Union as an intergovernmental organization likely to be able to furnish information on the questions submitted to the Tribunal for an advisory opinion. The Order was notified to the States Parties, the Commission, the intergovernmental organizations listed in the annex to the Order of 16 December 2022, and the African Union.

14. By letter dated 20 February 2023, the International Seabed Authority (hereinafter “the Authority”) requested the President “to consider the Authority as one of the intergovernmental organizations … likely to be able to furnish information on the questions submitted to the Tribunal and therefore to invite the Authority to present its written statement within the time limit as extended by the President of the Tribunal.” By letter dated 24 February 2023, the Registrar informed the Authority of the decision of the President to consider it as an intergovernmental organization likely to be able to furnish such information and invited the Authority to do so within the extended time limit fixed by the Order of 15 February 2023.

15. By letter dated 31 May 2023, received by the Registry on 8 June 2023, the Pacific Community requested, in accordance with article 133, paragraph 2, of the Rules, “the Tribunal’s authorisation to present observations on the questions submitted by the Commission … for an advisory opinion” and that the Tribunal include the Pacific Community “among those intergovernmental organisations invited to present observations in Case No. 31”. By letter dated 8 June 2023, the Registrar informed the Pacific Community of the decision of the President to consider the Pacific Community as an intergovernmental organization likely to be able to furnish information on the questions submitted to the Tribunal for an advisory opinion and invited it to do so within the extended time limit fixed by the Order of 15 February 2023.

16. By note verbale dated 5 June 2023, the Permanent Mission of India to the United Nations requested that “the deadline to submit written statement[s] to the Tribunal … further be extended for at least two months or as appropriate to enable member states to furnish written statements to the Tribunal.” By letter dated 6 June 2023, the Registrar informed the Permanent Mission of India, at the request of the President, that “at this stage of the written proceedings it is not contemplated to grant a further extension of the time limit prescribed” and invited India “to submit a written statement as soon as possible.”

17. Within the time limit fixed by the President in his Order dated 15 February 2023, written statements were submitted by the following 31 States Parties, which are listed in the order in which their statements were received: the Democratic Republic of the Congo, Poland, New Zealand, Japan, Norway, Germany, Italy, China, the European Union, Mozambique, Australia, Mauritius, Indonesia, Latvia, Singapore, the Republic of Korea, Egypt, Brazil, France, Chile, Bangladesh, Nauru, Belize, Portugal, Canada, Guatemala, the United Kingdom, the Netherlands, Sierra Leone, Micronesia (Federated States of) and Djibouti. Within the same time limit, written statements were also submitted by the Commission and the following seven intergovernmental organizations, which are listed in the order in which their statements were received: the United Nations; the International Union for Conservation of Nature (hereinafter “the IUCN”); the International Maritime

Organization (hereinafter “the IMO”); the Pacific Community; the United Nations Environment Programme; the African Union and the Authority.

18. By letter dated 20 June 2023, in accordance with article 133, paragraph 3, of the Rules, the Registrar notified the States Parties, the Commission and the intergovernmental organizations that had submitted written statements of the list of those participants. By the same letter, the Registrar also informed them that these statements were accessible in a dedicated section of the Tribunal’s website.

19. In addition, statements were submitted by the following entities: the United Nations Special Rapporteurs on Human Rights and Climate Change, Toxics and Human Rights and Human Rights and the Environment (on 31 May 2023); the High Seas Alliance (on 15 June 2023); ClientEarth (on 15 June 2023); Opportunity Green (on 15 June 2023); the Center for International Environmental Law and Greenpeace International (on 15 June 2023); the Advisory Committee on Protection of the Sea (on 16 June 2023); the World Wide Fund for Nature (on 16 June 2023); Our Children’s Trust and Oxfam International (on 16 June 2023); the Observatory for Marine and Coastal Governance (on 16 June 2023); and One Ocean Hub (on 17 June 2023).

20. The statements from the High Seas Alliance, Opportunity Green, the Center for International Environmental Law and Greenpeace International, and Our Children’s Trust and Oxfam International were accompanied by a petition to be granted permission to act as amici curiae in the proceedings. Furthermore, in a communication transmitting its statement, ClientEarth sought permission to “[i]ntervene in the Advisory Proceedings of Case No. 31”.

21. At the request of the President, the Registrar, by separate letters dated 5, 15, 16 and 19 June 2023, respectively, informed the entities mentioned in paragraph 20 above that their statements would not be included in the case file since they had not been transmitted under article 133 of the Rules; the statements would, however, be transmitted to the States Parties, the Commission and the intergovernmental organizations that had presented written statements, and also posted on the website of the Tribunal in a separate section of documents relating to the case. By letter

dated 20 June 2023, the aforementioned States Parties, the Commission and the intergovernmental organizations were informed thereof.

22. By note verbale dated 19 June 2023, after the expiry of the time limit for the submission of written statements, Rwanda submitted a written statement. By the said note verbale, Rwanda also transmitted a letter dated 17 June 2023 from the Minister of Justice/Attorney-General of Rwanda. Therein, the Minister of Justice/Attorney-General stated that "Rwanda recognises the slight delay in this submission, owing to the fact that the Convention did not enter into force for Rwanda until today." By note verbale of the Tribunal dated 20 June 2023, Rwanda was informed that, in light of the reasons provided in the letter dated 17 June 2023, the President had decided that the written statement of Rwanda should be admitted and included in the case file.

23. By communication dated 21 June 2023, after the expiry of the time limit for the submission of written statements, the Food and Agriculture Organization of the United Nations (hereinafter "the FAO") submitted a written statement. By letter of the same date, the Registrar informed the FAO that, although the statement had reached the Registry after the expiry of the time limit for the submission of statements, the President had decided that the statement should be admitted and included in the case file.

24. By communication dated 23 June 2023, the Registrar informed the States Parties, the Commission and the intergovernmental organizations that had presented written statements of the submission of the statements of Rwanda and of the FAO. These statements were posted on the Tribunal's website in a section entitled "Statements received after the expiry of the time limit fixed by Order 2023/1 of 15 February 2023".

25. On 26 June 2023, pursuant to article 134 of the Rules, all written statements submitted to the Tribunal were made accessible to the public on the Tribunal's website.

26. By Order dated 30 June 2023, in accordance with article 133, paragraph 4, of the Rules, the President fixed 11 September 2023 as the date for the opening of the hearing at which oral statements could be made by the States Parties, the Commission and the intergovernmental organizations listed in the annex to the Order of the President of 16 December 2022, as well as the African Union, the Authority and the Pacific Community. The same Order recorded the President's decisions to consider the Authority and the Pacific Community as intergovernmental organizations likely to be able to furnish information on the questions submitted to the Tribunal for an advisory opinion (see paras. 14 and 15 above). By the same Order, the States Parties, the Commission and the above-mentioned intergovernmental organizations were invited to indicate to the Registrar, no later than 4 August 2023, their intention to make oral statements at the hearing. The Order was notified to the States Parties, the Commission and the above-mentioned intergovernmental organizations.

27. By note verbale dated 30 June 2023, after the expiry of the time limit for the submission of written statements, Viet Nam submitted a written statement. By note verbale of the Tribunal dated 13 July 2023, Viet Nam was informed that, although the statement had reached the Registry after the expiry of the time limit for the submission of statements, the President had decided that the statement should be admitted and included in the case file. By communication dated 14 July 2023, the Registrar informed the States Parties, the Commission and the intergovernmental organizations that had presented written statements of the submission of the statement of Viet Nam. The statement was posted on the Tribunal's website in a section entitled "Statements received after the expiry of the time limit fixed by Order 2023/1 of 15 February 2023".

28. Within the time limit prescribed by the Order of the President of 30 June 2023, 34 States Parties, listed as follows in alphabetical order, expressed their intention to participate in the oral proceedings: Argentina, Australia, Bangladesh, Bolivia, Chile, China, Comoros, the Democratic Republic of Congo, Djibouti, the European Union, France, Germany, Guatemala, India, Indonesia, Italy, Latvia, Mauritius, Mexico, Micronesia (Federated States of), Mozambique, Nauru, the Netherlands, New Zealand, Norway, the Philippines, Portugal, the Republic of Korea, Saudi Arabia,

Sierra Leone, Singapore, Timor-Leste, the United Kingdom and Viet Nam. Within the same time limit, the Commission, the African Union, the IUCN and the Pacific Community also expressed their intention to participate in the oral proceedings.

29. By separate notes verbales dated 18 July 2023, the United Kingdom and the Netherlands, respectively, requested the Tribunal "to order a second round of written statements and to revise the date for the oral hearings accordingly". Both States Parties stated that "introducing a second round of written statements is necessary and appropriate in a case of this significance and complexity", that "[t]his would allow participating States and intergovernmental organizations to respond in writing to statements" already made, and that it would facilitate "narrowing of the issues before the Tribunal", leading to "a more efficient oral phase of the proceedings". In their respective notes verbales, the United Kingdom and the Netherlands further stated that, should the Tribunal decline to accede to that request, they invited it "to bear firmly in mind the lack of opportunity afforded to States Parties and participating intergovernmental organizations to respond in writing to the written statements when the Tribunal comes to consider the appropriate procedure for the hearing, including in particular a fair allocation of time", and that "all participants should be accorded an equal allocation of time at the hearing", which "includes the Commission of Small Island States on Climate Change and International Law (COSIS)". They added that "the status of COSIS as the international organization requesting the advisory opinion should give it no greater procedural rights, including in particular time allocation for oral submissions, than any of the participating States Parties to UNCLOS."

30. By letter dated 20 July 2023, France requested a postponement of the hearing by a few weeks to allow States more time to prepare the oral statements, taking account of the number of written statements made and the importance and complexity of the legal issues raised in the Request. By letter dated 21 July 2023, Italy suggested a postponement of the hearing "by a few weeks, in consideration of the significant number of statements filed and of the complexity of the issues raised by the Request of Advisory Opinion."

31. By separate notes verbales of the Tribunal dated 7 August 2023, the United Kingdom and the Netherlands were informed that the matter raised in their respective notes verbales had been brought to the attention of the Tribunal, that the Tribunal had concluded that a second round of written statements was not required, and that no further time limit would be fixed pursuant to article 133, paragraph 3, of the Rules within which States Parties and the intergovernmental organizations which had made written statements could present written statements on the statements made. The United Kingdom and the Netherlands were further informed that the Tribunal would allow delegations sufficient time at the hearing to make their oral submissions and also to respond to the written statements made by other participants.

32. By letters dated 7 and 8 August 2023 addressed to Italy and France, respectively, the Registrar, at the request of the President, informed the two States that the matter raised in their respective letters had been brought to the attention of the Tribunal and that, in the view of the Tribunal, a postponement of the date for the opening of the hearing was not required. The Registrar further indicated that the Tribunal however considered that the schedule of the hearing should be organized in such a manner so as to grant delegations sufficient time to make their oral statements and also to respond to the written statements made by other participants.

33. By letter dated 28 July 2023, the Commission “provide[d] notice of its intention to examine two expert witnesses, Dr. Sarah Cooley and Dr. Shobha Maharaj, each of whom ha[d] submitted a report annexed to the Commission’s written statement, and request[ed] permission to proceed as such at the hearing under Articles 73(2), 77(2), and 78(1) of the Rules of the Tribunal.” By letter dated 8 August 2023, the Registrar, at the request of the President, invited the Commission to include Dr Cooley and Dr Maharaj as members of its delegation in order to allow them to address the Tribunal.

34. By letter dated 21 August 2023, the Sub-Regional Fisheries Commission (hereinafter “the SRFC”) requested permission to make oral statements at the hearing. By letter dated 28 August 2023, the Registrar informed the SRFC, at the

request of the President, that since the SRFC was not included in the Order of 30 June 2023, its request to participate in the oral proceedings was not granted.

35. By note verbale dated 28 August 2023, after the expiry of the time limit for the submission of written statements, India submitted a written statement. By note verbale of the Tribunal dated 8 September 2023, India was informed that although the statement had reached the Registry after the expiry of the time limit for the submission of statements, the Tribunal had decided that the statement should be admitted and included in the case file. By communication of the same date, the States Parties, the Commission and the intergovernmental organizations that had presented written statements were informed of the submission of the statement of India. The statement was posted on the Tribunal's website in a section entitled "Statements received after the expiry of the time limit fixed by Order 2023/1 of 15 February 2023".

36. By note verbale dated 5 September 2023, Belize informed the Tribunal of its intention to participate in the hearing. By note verbale of the Tribunal dated 8 September 2023, Belize was informed that, "[w]hile noting that the note verbale dated 5 September 2023 was received after the date fixed in the Order of the President of 30 June 2023 for a State Party to indicate its intention to make an oral statement at the hearing, the Tribunal nevertheless decided to allow Belize to make an oral statement at the hearing."

37. Prior to the opening of the oral proceedings, the Tribunal held initial deliberations on 7 and 8 September 2023.

38. The Tribunal held 18 public sittings on 11, 12, 13, 14, 15, 18, 19, 20, 21 and 25 September 2023, at which it heard oral statements, in the following order, from:

For the Commission of Small Island States on Climate Change and International Law:	Mr Gaston Browne, Prime Minister of Antigua and Barbuda, Co-Chair of COSIS, Mr Kausea Natano, Prime Minister of Tuvalu, Co-Chair of COSIS,

Mr Arnold Kiel Loughman, Attorney General, Republic of Vanuatu,

Mr Payam Akhavan, SJD OOnt FRSC, Professor of International Law, Chair in Human Rights, and Senior Fellow, Massey College, University of Toronto; member, Permanent Court of Arbitration; associate member, Institut de droit international; member, Bar of New York; member, Law Society of Ontario,

Ms Naima Te Maile Fifita, Founder, Moana Tasi Project; 2023 Sue Taei Ocean Fellow,

Ms Phoebe Okowa, Professor of International Law, Queen Mary University, London; member, International Law Commission; advocate, High Court of Kenya,

Ms Sarah Cooley, Director of Climate Science, Ocean Conservancy,

Ms Shobha Maharaj, Science Director, Terraformation,

Ms Margaretha Wewerinke-Singh, Associate Professor of Sustainability Law, University of Amsterdam; Adjunct Professor of Law, University of Fiji; member, Bar of Vanuatu; Blue Ocean Law,

Mr Makane Moïse Mbengue, Professor of International Law, University of Geneva; member, Curatorium of the Hague Academy of International Law; associate member, Institut de droit international,

Mr Brian McGarry, Assistant Professor of Public International Law, Grotius Centre for International Legal Studies, Leiden University; member, Bar of New York,

Ms Jutta Brunnée, Dean, Faculty of Law, University of Toronto; University Professor; associate member, Institut de droit international,

Mr Jean-Marc Thouvenin, Professor, University Paris Nanterre; Secretary-General, The Hague Academy of International Law; associate member, Institut de droit international; member, Paris Bar; Sygna Partners,

Ms Catherine Amirfar, Debevoise & Plimpton LLP; member, Bars of New York and of the Supreme Court of the United States; Immediate Past President, American Society of International Law,

Ms Philippa Webb, Professor of Public International Law, King's College, London; Barrister, Twenty Essex; member, Bar of England and Wales; member, Bar of New York; member, Bar of Belize,

Ms Nilüfer Oral, Director, Centre for International Law, National University of Singapore; member, International Law Commission; associate member, Institut de droit international,

Mr Conway Blake, Debevoise & Plimpton LLP; solicitor advocate of the senior courts of England and Wales; member, Bar of the Eastern Caribbean Supreme Court,

Mr Eden Charles, Special Representative of the Secretary-General, International Seabed Authority; Lecturer of Law, University of the West Indies; Chair, Advisory Board, One Ocean Hub, UK Research and Innovation,

Mr Zachary Phillips, Crown Counsel, Attorney General's Chambers, Ministry of Legal Affairs, Antigua and Barbuda; member, Bar of Antigua and Barbuda,

and

Mr Vaughan Lowe KC, Emeritus Chichele Professor of International Law, University of Oxford; barrister, Essex Court Chambers; member, Institut de droit international; member, Bar of England and Wales;

For Australia:

Mr Jesse Clarke, General Counsel (International Law), Office of International Law, Attorney-General's Department,

Mr Stephen Donaghue KC, Solicitor-General of Australia,

and

Ms Kate Parlett, member of the Bar of England and Wales, Twenty Essex;

For Germany:	Ms Tania Freiin von Uslar-Gleichen, Legal Adviser, Federal Foreign Office;
For Saudi Arabia:	Ms Noorah Mohammed S. Algethami, Legal Consultant;
For Argentina:	Mr Gabriel Herrera, Minister, Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship;
For Bangladesh:	Mr Md. Khurshed Alam, Rear Admiral (Retd.), BN, Secretary, Maritime Affairs Unit, Ministry of Foreign Affairs, Ms Catherine Amirfar, Debevoise & Plimpton LLP; member, Bars of New York and of the Supreme Court of the United States; Immediate Past President, American Society of International Law, and Mr Payam Akhavan, SJD OOnt FRSC, Professor of International Law, Chair in Human Rights, and Senior Fellow, Massey College, University of Toronto; member, Permanent Court of Arbitration; associate member, Institut de droit international; member, Bar of New York; member, Law Society of Ontario;
For Chile:	Ms Ximena Fuentes Torrijo, Representative;
For Portugal:	Ms Patrícia Galvão Teles, Director-General for Legal Affairs, Ministry of Foreign Affairs;
For Djibouti:	Mr Yacin Houssein Doualé, Ambassador of the Republic of Djibouti, Germany, and Mr Guled Yusuf, Partner, Allen & Overy LLP;
For Guatemala:	Mr Lesther Antonio Ortega Lemus, Minister Counsellor and Chargé d'Affaires, Embassy of the Republic of Guatemala in the Kingdom of the Netherlands, and

Mr Alfredo Crosato Neumann, PhD, Geneva Graduate Institute; Member, Bar of Lima;

For India: Mr Luther M. Rangreji, Joint Secretary (L&T), Ministry of External Affairs;

For Nauru: Ms Anastasia Francilia Adire, Legal Advisor, Permanent Mission of the Republic of Nauru to the United Nations, New York,

and

Mr Eirik Bjorge, Professor of International Law, University of Bristol, United Kingdom;

For Indonesia: Mr L. Amrih Jinangkung, Director General for Legal Affairs and International Treaties, Ministry of Foreign Affairs;

For Latvia: Ms Kristīne Līce, Legislation and International Law Adviser to the President of Latvia,

and

Mr Mārtiņš Paparinskis, Professor of Public International Law, University College London; member, International Law Commission; member, Permanent Court of Arbitration;

For Mauritius: Mr Jagdish Dharamchand Koonjul, G.C.S.K., G.O.S.K., Ambassador and Permanent Representative of the Republic of Mauritius to the United Nations, New York,

Mr Philippe Joseph Sands KC, G.C.S.K., Professor of International Law, University College London; Barrister, 11 King’s Bench Walk, London,

and

Ms Kate Cook, Barrister, Matrix Chambers, London;

For Micronesia: Mr Clement Yow Mulalap, Adviser (Legal), Permanent Mission of the Federated States of Micronesia to the United Nations, New York;

For New Zealand:	Ms Victoria Hallum, Deputy Secretary, Multilateral and Legal Affairs Group, Ministry of Foreign Affairs and Trade, and Ms Charlotte Skerten, Lead Adviser, Legal Division, Ministry of Foreign Affairs and Trade;
For the Republic of Korea:	Mr Hwang Jun-shik, Director-General for International Legal Affairs, Ministry of Foreign Affairs;
For China:	Mr Ma Xinmin, Director-General, Department of Treaty and Law, Ministry of Foreign Affairs;
For Mozambique:	Ms Paula da Conceição Machatine Honwana, Representative, Mr Charles C. Jalloh, Professor, Florida International University; Member, Special Rapporteur and Second-Vice Chairperson, International Law Commission, Ms Phoebe Okowa, Professor, Queen Mary University, London; Member, International Law Commission, and Mr Andrew Loewenstein, Partner, Foley Hoag LLP;
For Norway:	Mr Andreas Motzfeldt Kravik, State Secretary, Ministry of Foreign Affairs;
For Belize:	Mr Lennox Gladden, Chief Climate Change Officer, National Climate Change Office, Ministry of Sustainable Development, Climate Change and Disaster Risk Management, Mr Sean Aughey, Barrister, Essex Court Chambers, member of the Bar of England and Wales, and Mr Sam Wordsworth KC, Barrister, Essex Court Chambers, member of the Bar of England and Wales, member of the Paris Bar;

For the Philippines:	Mr Carlos D. Sorreta, Permanent Representative, Permanent Mission to the United Nations, Geneva, Mr Gilbert U. Medrano, Assistant Solicitor General, Office of Solicitor General, and Ms Maria Angela A. Ponce, Assistant Secretary, Maritime and Ocean Affairs Office, Department of Foreign Affairs;
For Sierra Leone:	Mr Alpha Sesay, Deputy Minister of Justice, Mr Dire D. Tladi, Professor, University of Pretoria; former Member, Special Rapporteur and Chair, International Law Commission, Mr Charles C. Jalloh, Professor, Florida International University; Member, Special Rapporteur and Second-Vice Chairperson (74th session), International Law Commission, and Ms Christina Hioureas, Partner, Foley Hoag LLP;
For Singapore:	Mr Lionel Yee, Deputy Attorney-General, Attorney-General's Chambers;
For Timor-Leste:	Ms Elizabeth Exposto, Chief of Staff to the Prime Minister; Chief Executive Officer, Land and Maritime Boundary Office, Mr John Middleton AM KC, Senior Advisor, DLA Piper; Former Judge, Federal Court of Australia, and Mr Eran Sthoeger, Legal Counsel;
For the European Union:	Mr André Bouquet, Legal Adviser, Legal Service, European Commission, and

Ms Margherita Bruti Liberati, Member, Legal Service, European Commission;

For Viet Nam: Ms Le Duc Hanh, Director-General, Department of International Law and Treaties, Ministry of Foreign Affairs;

For the Pacific Community: Ms Rhonda Robinson, Director, SPC Geoscience, Energy and Maritime Division,

and

Ms Kathy Jetñil-Kijiner, Climate Envoy;

For Comoros: Mr Youssouf Mondoha Assoumani, Ambassador of the Union of Comoros to the Federal Democratic Republic of Ethiopia; Permanent Representative to the African Union,

Mr Iain Sandford, Partner, Sidley Austin LLP, Geneva; Barrister and Solicitor, High Court of Australia, Supreme Court of the Australian Capital Territory and High Court of New Zealand,

Mr Dominic Coppens, Senior Managing Associate, Sidley Austin LLP, Brussels; Professor, Department of International and European Law, Maastricht University; Member, Brussels Bar – A list,

and

Ms Katherine Connolly, Senior Managing Associate, Sidley Austin LLP, Geneva; Barrister and Solicitor, Supreme Court of New South Wales;

For the Democratic Republic of the Congo: Mr Ivon Mingashang, Professor of International Law, Law Faculty, University of Kinshasa; member of the International Law Commission; member, Kinshasa/Gombe Bar,

Mr Sylvain Lumu Mbaya, Professor of International Law, Law Faculty, University of Kinshasa; Judge at the Constitutional Court of the DRC,

Mr Jean-Paul Segihobe Bigira, Professor of International Law, Department of Public International Law and International Relations, Law Faculty, University of Kinshasa; Member of Parliament; member, Kinshasa/Gombe Bar,

and

Mr Nicolas Angelet, Professor of International Law, Université libre de Bruxelles; member, Brussels Bar;

For the International Union for Conservation of Nature:

Ms Christina Voigt, Chair, IUCN World Commission on Environmental Law (WCEL); Co-Chair, Paris Agreement Implementation and Compliance Committee; Professor, Department of Public and International Law, University of Oslo,

Ms Cymie R. Payne, Chair, IUCN-WCEL Ocean Law Specialist Group; Associate Professor, Rutgers University, New Jersey,

and

Ms Tara Davenport, Assistant Professor, Faculty of Law, National University of Singapore (NUS); Co-Head, Oceans Law and Policy Programme, Centre for International Law, Singapore;

For the African Union:

Mr Tordeta Ratebaye, Ambassador, Deputy Chief of Staff, Cabinet of the Chairperson, African Union Commission,

Mr Mohamed Salem Boukhari Khalil, Acting Legal Counsel, Director of Legal Affairs, African Union Commission,

Mr Nicolas J.S. Lockhart, Partner, Sidley Austin LLP, Geneva; Solicitor (Scotland),

Mr Deepak Raju, Senior Managing Associate, Sidley Austin LLP, Geneva; Solicitor (England and Wales); Advocate (Maharashtra and Goa, India),

and

Mr Mamadou Hébié, Associate Professor of International Law, Grotius Centre for International Legal Studies, Leiden University; Member, Bar of the State of New York;

For France:

Ms Sandrine Barbier, Deputy Director of Legal Affairs, Ministry for Europe and Foreign Affairs,

and

	Mr Mathias Forteau, Professor, University of Paris Nanterre;
For Italy:	Mr Stefano Zanini, Head, Service for Legal Affairs, Diplomatic Disputes and International Agreements, Ministry of Foreign Affairs and International Cooperation,
	and
	Mr Roberto Virzo, Professor of International Law, University of Messina;
For the Netherlands:	Mr René J.M. Lefeber, Legal Adviser, Ministry of Foreign Affairs;
For the United Kingdom:	Mr Ben Juratowitch KC, Barrister, Essex Court Chambers,
	and
	Ms Amy Sander, Barrister, Essex Court Chambers.

39. The hearing was broadcast on the Internet as a webcast.

40. On 11 September 2023, the Registrar communicated questions posed by Judge Kittichaisaree pursuant to article 76 of the Rules to the Commission and to the IUCN. The question posed to the Commission was as follows:

> In light of Chapters 6, 7 and 8 of your Written Statement, could you please clarify further which specific obligations mentioned by you insofar as they are relevant to the Request for an Advisory Opinion are, in your view, obligations of conduct and which ones are obligations of result, and why?

The question posed to the IUCN was as follows:

> In light of paragraph 74 *et seq.* of your Written Statement, could you please clarify further which specific obligations mentioned by you insofar as they are relevant to the Request for an Advisory Opinion are, in your view, obligations of conduct and which ones are obligations of result, and why?

The Commission and the IUCN were requested to respond to the respective questions orally during the oral arguments and/or in writing by the end of the hearing.

41. By letter dated 24 September 2023, the Commission transmitted a written response to the question put to it. During the sitting held on 21 September 2023, the IUCN provided a response to the question put to it. The written response of the Commission and a transcript of the oral response of the IUCN were posted on the Tribunal's website.

42. By communication dated 25 September 2023, the Registrar invited the States Parties, the Commission and the intergovernmental organizations that had participated in the oral proceedings to submit comments on the responses of the Commission and the IUCN by 2 October 2023. Comments were received from Australia, France, Latvia, the Netherlands and the United Kingdom by separate communications dated 2 October 2023 and from Timor-Leste by letter dated 4 October 2023. By communication dated 16 October 2023, the Registrar informed the States Parties, the Commission and the intergovernmental organizations that had participated in the hearing of the comments received. These comments were posted on the Tribunal's website.

43. By communications dated 18 and 20 September 2023, the IMO transmitted two documents to the Tribunal and requested that those documents be considered documents in support of the written statement submitted by the IMO on 16 June 2023. By letter dated 13 October 2023, the Registrar informed the IMO that the Tribunal had decided, on 12 October 2023, to admit the two documents in support of the IMO's written statement and therefore considered them as part of the case file.

44. In accordance with article 17 of the Rules, President Hoffmann and Judges Pawlak, Yanai, Kateka, Paik and Gómez-Robledo, whose term of office expired on 30 September 2023, having participated in the meeting mentioned in article 68 of the Rules, continued to sit in the case until its completion. President Hoffmann continued to preside over the Tribunal in the present case until completion, pursuant to article 16, paragraph 2, of the Rules.

II. Background

45. The Tribunal notes that the Request submitted by the Commission has scientific aspects. It further notes that various international instruments have been adopted to address climate change. The Tribunal thus finds it appropriate to provide at the outset an overview of the science and legal regime relating to climate change as a background to the Request.

A. Scientific aspects

46. The phenomenon of climate change is central to the Request and the questions contained therein necessarily have scientific aspects. In their written and oral submissions, the participants in the present proceedings addressed at length scientific aspects related to climate change and the ocean, and submitted or referred to abundant materials on scientific issues.

47. In relation to the phenomenon of climate change, the Tribunal notes that, in its resolution 43/53 of 6 December 1988, the United Nations General Assembly (hereinafter “the General Assembly”) recognized, for the first time, that “climate change is a common concern of mankind”. In the same resolution, the General Assembly stated that “the emerging evidence indicates that continued growth in atmospheric concentrations of ‘greenhouse’ gases could produce global warming with an eventual rise in sea levels, the effects of which could be disastrous for mankind if timely steps are not taken at all levels”. In this resolution, the General Assembly also endorsed the action of the World Meteorological Organization and the United Nations Environment Programme in jointly establishing an Intergovernmental Panel on Climate Change (hereinafter “the IPCC”) to provide “internationally coordinated scientific assessments of the magnitude, timing and potential environmental and socio-economic impact of climate change and realistic response strategies”. At present, there are 195 member countries of the IPCC. In its resolution 67/210 of 21 December 2012, the General Assembly declared that “climate change is one of the greatest challenges of our time”. This statement has been subsequently reaffirmed by the General Assembly in several resolutions. The Tribunal further notes that, in its resolution 76/296 of 25 July 2022, the General

Assembly endorsed the declaration adopted by the 2022 United Nations Ocean Conference that it was “deeply alarmed by the adverse effects of climate change on the ocean and marine life”.

48. Since its establishment in 1988, the IPCC has produced several assessment reports on climate change, the latest within the sixth assessment cycle concluded in 2023. This cycle produced several special reports, such as the 2018 Special Report on Global Warming of 1.5°C (hereinafter “the 2018 Report”) and the 2019 Special Report on the Ocean and Cryosphere in a Changing Climate (hereinafter “the 2019 Report”). The sixth assessment cycle also produced three separate working group reports – the Working Group I report entitled “Climate Change 2021: The Physical Science Basis” finalized on 6 August 2021 (hereinafter “the WGI 2021 Report”), the Working Group II report entitled “Climate Change 2022: Impacts, Adaptation and Vulnerability” finalized on 27 February 2022 (hereinafter “the WGII 2022 Report”), and the Working Group III report entitled “Climate Change 2022: Mitigation of Climate Change” finalized on 4 April 2022 – and a Synthesis Report published in March 2023 (hereinafter “the 2023 Synthesis Report”).

49. The Tribunal notes that the IPCC reports are subject to review and endorsement by the IPCC member countries. According to the IPCC, such endorsement “acknowledges that the report is a definitive assessment that has been developed following the IPCC’s defined procedures, underpinning the report’s authority” (IPCC Factsheet, “How does the IPCC approve reports?”, first paragraph). Different levels of formal endorsement apply to the different types of materials prepared by the IPCC. The summary for policymakers, which is prepared for each IPCC report, including for synthesis reports, is submitted for “approval”, where approval means that the summary has been subject to detailed, line-by-line discussion and agreement during an IPCC plenary session. The body of the underlying reports is subject to “acceptance” by the plenary. “Acceptance” means that, while “the material has not been subject to line by line discussion and agreement, it nevertheless presents a comprehensive, objective and balanced view of the subject matter” (Principles Governing IPCC Work, Appendix A, p. 2). The synthesis report of an IPCC cycle summarizes the key findings of the working group reports and any special reports of that cycle. While its summary for policymakers is

again approved line by line, the body of the synthesis report is subject to “adoption”, section by section and not line by line.

50. With regard to the confidence levels used in IPCC reports, the IPCC explains the following:

> A level of confidence is expressed using five qualifiers: very low, low, medium, high and very high, and typeset in italics, for example, *medium confidence*. The following terms have been used to indicate the assessed likelihood of an outcome or result: virtually certain 99–100% probability; very likely 90–100%; likely 66–100%; about as likely as not 33–66%; unlikely 0–33%; very unlikely 0–10%; and exceptionally unlikely 0–1%. Additional terms (extremely likely 95–100%; more likely than not >50–100%; and extremely unlikely 0–5%) are also used when appropriate. Assessed likelihood is typeset in italics, for example, *very likely*.
> (WGI 2021 Report, p. 4, fn. 4)

51. The Tribunal observes that most of the participants in the proceedings referred to reports of the IPCC, recognizing them as authoritative assessments of the scientific knowledge on climate change, and that none of the participants challenged the authoritative value of these reports.

52. The Tribunal notes that the IPCC defines climate change as:

> A change in the state of the *climate* that can be identified (e.g., by using statistical tests) by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer. *Climate change* may be due to natural internal processes or external forcings such as modulations of the solar cycles, volcanic eruptions and persistent *anthropogenic* changes in the composition of the *atmosphere* or in *land use*.
> (WGII 2022 Report, p. 2902)

53. Successive IPCC reports provide important findings in relation to the changes of the Earth’s climate that have occurred over time and their causes. The 2023 Synthesis Report states that “[w]idespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred”, and that “[h]uman-caused climate change is already affecting many weather and climate extremes in every region across the globe” (2023 Synthesis Report, p. 46). The same report further states that “[i]t is unequivocal that human influence has warmed the atmosphere, ocean and land” and that “[t]he scale of recent changes across the climate system as a whole

and the present state of many aspects of the climate system are unprecedented over many centuries to many thousands of years" (2023 Synthesis Report, p. 46).

54. The IPCC affirms in its 2023 Synthesis Report that human activities, principally through greenhouse gases (hereinafter "GHGs"), "have unequivocally caused global warming" (2023 Synthesis Report, p. 42). Greenhouse gases are "[g]aseous constituents of the *atmosphere*, both natural and *anthropogenic*, that absorb and emit radiation at specific wavelengths within the spectrum of radiation emitted by the Earth's *ocean* and *land* surface, by the *atmosphere* itself and by clouds" (WGII 2022 Report, p. 2911). The most common GHGs in the Earth's atmosphere include carbon dioxide, methane and nitrous oxide. The IPCC explains that GHGs "absorb infrared radiation, emitted by the Earth's surface, the atmosphere and clouds", and "[t]hey emit in turn infrared radiation in all directions including downward to the Earth's surface" (Climate Change 2001, The Scientific Basis, pp. 89-90). According to the IPCC, GHGs thus "trap heat within the atmosphere" (Climate Change 2001, The Scientific Basis, p. 90). Anthropogenic GHG emissions, according to the Climate Change 2014 Synthesis Report of the IPCC (hereinafter "the 2014 Synthesis Report"), "have increased since the pre-industrial era, driven largely by economic and population growth, and are now higher than ever", and this "has led to atmospheric concentrations of carbon dioxide, methane and nitrous oxide that are unprecedented in at least the last 800,000 years" (2014 Synthesis Report, p. 4). In this regard, the Tribunal notes that the IPCC defines the term "anthropogenic" as "[r]esulting from or produced by human activities" which "include the burning of *fossil fuels, deforestation, land use* and land use changes …, livestock production, fertilisation, waste management, and industrial processes," and the term "anthropogenic emissions" as "[e]missions of *greenhouse gases (GHGs), precursors* of GHGs, and *aerosols*, caused by human activities" (2019 Report, p. 679).

55. The IPCC has also assessed the role of the ocean in the climate system. The 2019 Report observes that the ocean is "a fundamental climate regulator on seasonal to millennial time scales" (2019 Report, p. 78). This role is twofold: the ocean "stores heat trapped in the atmosphere caused by increasing concentrations of greenhouse gases" and thus "masks and slows surface warming"; at the same time, it also stores excess carbon dioxide (*ibid*., p. 456), and such carbon storage

represents a major control on atmospheric carbon dioxide. According to the IPCC, "[a]bout a quarter of carbon dioxide (CO_2) released by human activities is taken up by the ocean" (*ibid*., p. 218) and "[a]bsorption by the ocean and uptake by plants and soils are the primary natural CO_2 sinks on decadal to centennial time scales" (WGI 2021 Report, p. 179).

56. The IPCC observes that "[c]oastal blue carbon ecosystems, such as mangroves, salt marshes and seagrasses, can help reduce the risks and impacts of climate change, with multiple co-benefits" (WGII 2022 Report, p. 2692). These coastal habitats "are characterised by high, yet variable, organic carbon storage in their soils and sediments" (2019 Report, p. 522) and "have sequestered carbon dioxide from the atmosphere continuously over thousands of years, building stocks of carbon in biomass and organic rich soils" (WGII 2022 Report, p. 1480). The IPCC further observes that "the protection and enhancement of coastal blue carbon can be an important contribution to both mitigation and adaptation at the national scale" (2019 Report, p. 454), while noting that "[t]he potential climatic benefits of blue carbon ecosystems can only be a very modest addition to, and not a replacement for, the very rapid reduction of greenhouse gas emissions" (*ibid.*, p. 454).

57. The reports of the IPCC indicate that the accumulation of anthropogenic GHGs in the atmosphere has had numerous effects on the ocean. The 2023 Synthesis Report states that climate change has caused "substantial damages and increasingly irreversible losses", including in "cryospheric and coastal and open ocean ecosystems (*high confidence*)" (2023 Synthesis Report, p. 46). According to the 2019 Report, "[c]limate change-related effects in the ocean include sea level rise, increasing ocean heat content and marine heat waves, ocean deoxygenation, and ocean acidification" (2019 Report, p. 79).

58. With respect to ocean warming, the WGI 2021 Report observes that "the dominant effect of human activities is apparent not only in the warming of global surface temperature, but also in … the warming of the ocean" (WGI 2021 Report, p. 515). The 2019 Report states that "[i]t is virtually certain that the global ocean has warmed unabated since 1970 and has taken up more than 90% of the excess heat in the climate system (*high confidence*)" (2019 Report, p. 9). The report further states

that “[s]ince 1993, the rate of ocean warming has more than doubled (*likely*). Marine heatwaves have very likely doubled in frequency since 1982 and are increasing in intensity (*very high confidence*)” (*ibid*., p. 9). The report states that “[w]arming of the ocean reduces not only the amount of oxygen it can hold, but also tend[s] to stratify it” and that, “[a]s a result, less oxygen is transported to depth, where it is needed to support ocean life” (2019 Report, p. 113). It further states that “[i]n response to ocean warming and increased stratification, open ocean nutrient cycles are being perturbed” (*ibid*., p. 450) and that “[w]arming-induced changes in spatial distribution and abundance of fish stocks have already challenged the management of some important fisheries and their economic benefits (*high confidence*)” (*ibid*., p. 451).

59. Regarding sea level rise, the WGI 2021 Report indicates that “[h]eating of the climate system has caused global mean sea level rise through ice loss on land and thermal expansion from ocean warming” (WGI 2021 Report, p. 11). According to the 2023 Synthesis Report, “[g]lobal mean sea level increased by 0.20 [0.15 to 0.25] m between 1901 and 2018” and “[h]uman influence was *very likely* the main driver of these increases since at least 1971” (2023 Synthesis Report, p. 46). Among other effects, the 2019 Report indicates that “[g]lobal mean sea level rise will cause the frequency of extreme sea level events at most locations to increase”, that “[c]oastal tidal amplitudes and patterns are projected to change”, that “[r]ising mean sea levels will contribute to higher extreme sea levels associated with tropical cyclones”, and that “[c]oastal hazards will be exacerbated by an increase in the average intensity, magnitude of storm surge and precipitation rates of tropical cyclones” (2019 Report, pp. 20-21). The 2019 Report also states that “[c]oastal ecosystems are observed to be under stress from ocean warming and SLR [sea level rise] that are exacerbated by non-climatic pressures from human activities on ocean and land (*high confidence*)” (*ibid*., p. 451). The WGII 2022 Report notes that “[s]ea level rise poses an existential threat for some Small Islands and some low-lying coasts (*medium confidence*)” (WGII 2022 Report, p. 15).

60. The IPCC defines ocean acidification as follows:

> A reduction in the *pH* of the *ocean*, accompanied by other chemical changes (primarily in the levels of carbonate and bicarbonate ions), over an extended period, typically decades or longer, which is caused primarily

> by *uptake* of *carbon dioxide (CO_2)* from the *atmosphere*, but can also be caused by other chemical additions or subtractions from the ocean. *Anthropogenic* OA [ocean acidification] refers to the component of pH reduction that is caused by human activity.
> (2019 Report, p. 693)

A 2001 IPCC report notes that, "[b]ecause of its solubility and chemical reactivity, CO_2 is taken up by the ocean much more effectively than other anthropogenic gases" (Climate Change 2001, The Scientific Basis, p. 197). The IPCC, in its WGI 2021 Report, explains that, "[o]nce dissolved in seawater, CO_2 reacts with water and forms carbonic acid" (WGI 2021 Report, p. 714) and that, as it explains in a 2007 report, as carbon dioxide increases, the pH decreases and therefore the ocean becomes more acidic. According to the 2014 Synthesis Report, "[s]ince the beginning of the industrial era, oceanic uptake of CO_2 has resulted in acidification of the ocean; the pH of ocean surface water has decreased by 0.1 (*high confidence*), corresponding to a 26% increase in acidity" (2014 Synthesis Report, p. 41).

61. Regarding the effects of ocean acidification, the same report indicates that "[m]arine ecosystems, especially coral reefs and polar ecosystems, are at risk" from this process, which "has impacts on the physiology, behaviour and population dynamics of organisms" and "acts together with other global changes (e.g., warming, progressively lower oxygen levels) and with local changes (e.g., pollution, eutrophication) (*high confidence*), leading to interactive, complex and amplified impacts for species and ecosystems" (*ibid*., p. 67). With regard to the effects on species, a 2014 IPCC report states that "the absorption of rising atmospheric CO_2 by … organisms changes carbonate system variables … in organism internal fluids" and that "[a]ccumulation of CO_2 and the resulting acidification can also affect a wide range of organismal functions" (Climate Change 2014, Impacts, Adaptation, and Vulnerability, p. 436). As to species producing calcified exoskeletons, the 2019 Report states that dissolved carbon dioxide taken up by the ocean "makes the water more corrosive for marine organisms that build their shells and structures out of mineral carbonates, such as corals, shellfish and plankton" (2019 Report, p. 113). According to the same report, "[b]iogenic shallow reefs with calcified organisms (e.g., corals, mussels, calcified algae) are particularly sensitive to ocean acidification" (*ibid*., p. 502). The 2019 Report further states that "[p]rojected ocean acidification

and oxygen loss will also affect deep ocean biodiversity and habitats that are linked to provisioning services in the deep ocean" (*ibid*., p. 509). Furthermore, as stated in the 2018 Report, "[l]arge-scale changes to foodweb structure are occurring in all oceans" (2018 Report, p. 227).

62. With regard to climate-related risks, the IPCC, in its 2023 Synthesis Report, concludes that "[r]isks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming (*very high confidence*)" (2023 Synthesis Report, p. 14), and, in the 2018 Report, states that they "are higher for global warming of 1.5°C than at present, but lower than at 2°C (*high confidence*)" (2018 Report, p. 5). The WGI 2021 Report also indicates that "[m]any changes due to past and future greenhouse gas emissions are irreversible for centuries to millennia, especially changes in the ocean, ice sheets and global sea level" (WGI 2021 Report, p. 21). In addition, the 2019 Report anticipates that, "[o]ver the 21st century, the ocean is projected to transition to unprecedented conditions with increased temperatures (*virtually certain*), greater upper ocean stratification (*very likely*) [and] further acidification (*virtually certain*)" (2019 Report, p. 18). According to the 2023 Synthesis Report, the "[i]ncreasing frequency of marine heatwaves will increase risks of biodiversity loss in the oceans, including from mass mortality events (*high confidence*)" (2023 Synthesis Report, p. 98). In particular, "[w]arm-water corals are at high risk already and are projected to transition to very high risk even if global warming is limited to 1.5°C (*very high confidence*)" (2019 Report, p. 24).

63. In the 2018 Report, the IPCC states that "[l]imiting warming to 1.5°C implies reaching net zero CO_2 emissions globally around 2050 and concurrent deep reductions in emissions of non-CO_2 forcers, particularly methane (*high confidence*)" (2018 Report, p. 95). As to what is required to reach this goal, in the same report, the IPCC further states:

> Such mitigation pathways are characterized by energy-demand reductions, decarbonization of electricity and other fuels, electrification of energy end use, deep reductions in agricultural emissions, and some form of CDR [carbon dioxide removal] with carbon storage on land or sequestration in geological reservoirs. Low energy demand and low demand for land- and GHG-intensive

> consumption goods facilitate limiting warming to as close as possible to 1.5°C. (*Ibid*., p. 95)

64. Furthermore, the 2018 Report observes that "1.5°C implies very ambitious, internationally cooperative policy environments that transform both supply and demand (*high confidence*)" (2018 Report, p. 95) and that, "[i]n comparison to a 2°C limit, the transformations required to limit warming to 1.5°C are qualitatively similar but more pronounced and rapid over the next decades (*high confidence*)" (*ibid*., p. 95).

65. The IPCC concludes, in its 2023 Synthesis Report, that "[g]lobal warming will continue to increase in the near term in nearly all considered scenarios and modelled pathways" (2023 Synthesis Report, p. 68). With regard to climate change mitigation, i.e., "human intervention to reduce emissions or enhance the sinks of greenhouse gases" (2023 Synthesis Report, Annex I, p. 126), the IPCC finds in the same report that "[d]eep, rapid, and sustained GHG emissions reductions, reaching net zero CO_2 emissions and including strong emissions reductions of other GHGs, in particular CH_4, are necessary to limit warming to 1.5°C … or less than 2°C … by the end of century *(high confidence*)" (2023 Synthesis Report, p. 68).

66. The Tribunal notes that the IPCC, in its 2023 Synthesis Report, states that "climate change is a threat to human well-being and planetary health" (2023 Synthesis Report, p. 89), and that "[v]ulnerable communities who have historically contributed the least to current climate change are disproportionately affected (*high confidence*)" (2023 Synthesis Report, p. 5). The 2019 Report observes that "[h]uman communities in close connection with coastal environments … are particularly exposed to ocean and cryosphere change" (2019 Report, p. 5). For instance, the same report identifies future shifts in fish distribution and decreases in fisheries which would affect "income, livelihoods, and food security of marine resource-dependent communities", as well as impacts on marine ecosystems which would put "key cultural dimensions of lives and livelihoods at risk" (*ibid*., p. 26). In addition, the WGII 2022 Report indicates that "[c]limate hazards are a growing driver of involuntary migration and displacement" and that "[c]limate-related illnesses … and threats to mental health and well-being are increasing" (WGII 2022 Report, p. 1044).

In this respect, the Tribunal notes that climate change represents an existential threat and raises human rights concerns.

B. International instruments on climate change

67. The Tribunal notes that various international agreements and other instruments have been negotiated and adopted to address the issue of climate change. At the core of these agreements is the United Nations Framework Convention on Climate Change (hereinafter "UNFCCC"), which opened for signature in June 1992 at the United Nations Conference on Environment and Development in Rio de Janeiro and entered into force on 21 March 1994. To date, there are 198 Parties to the UNFCCC, including all States Parties to the Convention.

68. The objective of the UNFCCC, as set out in its Article 2, is to achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." This provision further specifies that such a level should be achieved "within a timeframe sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner." The UNFCCC defines climate change in Article 1, paragraph 2, as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods." In Article 1, paragraph 4, the term "[e]missions" is defined as "the release of greenhouse gases and/or their precursors into the atmosphere over a specified area and period of time." In Article 1, paragraph 5, the term "[g]reenhouse gases" is defined as "those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation." The use by the UNFCCC of the plural ("emissions") and of the qualifier "over a period of time" suggests that these are multiple and, to a certain extent, lasting releases of GHGs, which, *inter alia*, indicates their eventual accumulation or concentration.

69. With a view to achieving the objective of the UNFCCC and the implementation of its provisions, the Parties to the UNFCCC are guided by the provisions of Article 3.

These provisions refer, *inter alia*, to common but differentiated responsibilities and respective capabilities, specific needs and special circumstances of developing country Parties, precautionary measures, sustainable development and cooperation. Article 4, paragraph 1, contains general commitments for all Parties to the UNFCCC, while paragraph 2 of the same article formulates specific commitments applicable only to Parties listed in Annex I to the UNFCCC (hereinafter “Annex I Parties”), which includes developed country Parties and country Parties that are undergoing the process of transition to a market economy. These commitments relate to all GHGs not controlled by the Montreal Protocol on Substances that Deplete the Ozone Layer (hereinafter “the Montreal Protocol”). The UNFCCC also establishes the Conference of the Parties (hereinafter “COP”), which, in accordance with Article 7, is entrusted to “keep under regular review the implementation of the [UNFCCC] and any related legal instruments that the [COP] may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the [UNFCCC].” In the implementation of commitments, “full consideration” is to be given to the specific needs and concerns of developing country Parties arising from the adverse effects of climate change or the impact of the implementation of response measures (see Article 4, para. 8). Low-lying and other small island countries, countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification, and developing countries with fragile mountainous ecosystems are identified as those particularly vulnerable to the adverse effects of climate change (see nineteenth preambular paragraph).

70. On 11 December 1997, the third COP adopted the Kyoto Protocol to the UNFCCC, which entered into force on 16 February 2005. To date, there are 192 Parties to it, including 167 States Parties to the Convention. The Kyoto Protocol operationalizes the UNFCCC by setting quantified emission reduction targets for Annex I Parties. It establishes commitments for these Parties to limit and reduce their GHG emissions in accordance with agreed individual targets over a first commitment period from 2008 to 2012 (see Article 3, para. 1). Moreover, the Kyoto Protocol introduces flexible market-based mechanisms that rely on the trade of emissions permits (see Articles 6, 12 and 17) and establishes an extensive monitoring, review and verification system for ensuring compliance with commitments (see Articles 5, 7, 8 and 18). The Doha Amendment, which was

adopted on 8 December 2012, *inter alia*, established a second commitment period for Annex I Parties from 2013 until 2020.

71. Under the Kyoto Protocol, Annex I Parties are also required to limit or reduce GHG emissions from aviation and marine bunker fuels. This commitment is to be achieved by "working through" the International Civil Aviation Organization (hereinafter "ICAO") and the IMO, respectively (see Article 2, para. 2, of the Kyoto Protocol).

72. On 12 December 2015, the twenty-first COP adopted the Paris Agreement, which entered into force on 4 November 2016. To date, there are 195 Parties to it, including 168 States Parties to the Convention. The Paris Agreement aims to strengthen the global response to the threat of climate change, including by setting a temperature goal which is defined in Article 2, paragraph 1(a), as follows:

> Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.

73. In order to achieve the temperature goal set out in Article 2 of the Paris Agreement, Article 4, paragraph 1, thereof provides that

> Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.

74. In accordance with Article 4, paragraph 2, of the Paris Agreement, the temperature and emissions goals of this treaty are to be attained, *inter alia*, through the preparation, communication and maintenance of successive nationally determined contributions that each Party intends to achieve and the pursuance of domestic mitigation measures. In accordance with Article 4, paragraph 3,

> [e]ach Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common

> but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

Article 4, paragraph 6, provides that the least developed countries and Small Island Developing States "may" prepare and communicate strategies, plans and actions for low GHG emissions development reflecting their special circumstances.

75. A further aim of the Paris Agreement is to increase the ability to adapt to the adverse impacts of climate change and foster climate resilience and low GHG emissions development in a manner that does not threaten food production (see Article 2, para. 1(b)). Accordingly, each Party is required, as appropriate, to engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions (see Article 7, para. 9).

76. Making finance flows consistent with a pathway towards low GHG emissions and climate-resilient development is another aim of the Paris Agreement (see Article 2, para. 1(c)). In this regard, Article 9, paragraph 1, of the Paris Agreement requires developed country Parties to provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the UNFCCC.

77. The Tribunal also notes that the COP has adopted numerous decisions in relation to the UNFCCC, the Kyoto Protocol and the Paris Agreement. Thus, on 20 November 2022, the twenty-seventh COP adopted the Sharm el-Sheikh Implementation Plan, in which it "[*r*]*ecognizes* that limiting global warming to 1.5°C requires rapid, deep and sustained reductions in global greenhouse gas emissions of 43 per cent by 2030", "[*a*]*lso recognizes* that this requires accelerated action" and "*requests* Parties that have not yet done so to revisit and strengthen the 2030 targets in their nationally determined contributions as necessary to align with the Paris Agreement temperature goal by the end of 2023, taking into account different national circumstances" (Decision 1/CMA.4 of 20 November 2022, paras. 15, 16 and 23). In its decision 1/CP.27 of 20 November 2022, the COP "[*r*]*eiterates* that the impacts of climate change will be much lower at the temperature increase of 1.5°C

compared with 2 °C and *resolves* to pursue further efforts to limit the temperature increase to 1.5 °C". On 13 December 2023, the twenty-eighth COP adopted the First Global Stocktake, where it, *inter alia*, in paragraph 28, recognized "the need for deep, rapid and sustained reductions in greenhouse gas emissions in line with 1.5°C pathways" and called on Parties to contribute to certain global efforts enumerated therein (Decision FCCC/PA/CMA/2023/L.17 of 13 December 2023). Several COP decisions address matters relating to climate change and the ocean (Decision 1/CP.25 of 15 December 2019, para. 31; Decision 1/CP.26 of 12 November 2021, paras. 60-61; Decision 1/CP.27 of 20 November 2022, paras. 49-50; Decision 1/CMA.4 of 20 November 2022, para. 79).

78. The Tribunal further notes that international instruments adopted within the framework of the IMO, ICAO and the Montreal Protocol also address matters related to climate change.

79. On 15 July 2011, the IMO adopted amendments to Annex VI to the International Convention for the Prevention of Pollution from Ships of 2 November 1973, as modified by the Protocol of 1978 (hereinafter "MARPOL"). Annex VI deals with the prevention of air pollution from ships. The 2011 amendments were made with a view to reducing GHG emissions from ships through the inclusion of regulations concerning energy efficiency (Resolution MEPC.203(62), Annex). Pursuant to the regulations, new ships engaged in international voyages are required to meet gradually increasing levels of energy efficiency. In 2018, the IMO introduced the Initial IMO Strategy on reduction of GHG emissions from ships. In 2021, the IMO adopted amendments to Annex VI (Resolution MEPC.328(76), Annex), which entered into force in November 2022. Regulation 20 of Annex VI, as amended, states that the goal of the relevant regulations "is to reduce the carbon intensity of international shipping, working towards the levels of ambition set out in the *Initial IMO Strategy on reduction of GHG emissions from ships* [adopted in 2018]."

80. On 7 July 2023, the IMO adopted the 2023 IMO Strategy on Reduction of GHG Emissions from Ships (hereinafter "the 2023 IMO GHG Strategy"). It seeks to enhance IMO's contribution to global efforts by addressing GHG emissions from international shipping. The 2023 IMO GHG Strategy identifies a set of levels of

ambition for the sector, notably “to peak GHG emissions from international shipping as soon as possible and to reach net-zero GHG emissions by or around, i.e. close to, 2050, taking into account different national circumstances” (see paras. 1.10.1, 3.1 and 3.3.4 of the 2023 IMO GHG Strategy).

81. In 2017 and 2018, the ICAO adopted Volumes III and IV, respectively, of Annex 16 to the Convention on International Civil Aviation (hereinafter “the Chicago Convention”). Annex 16 to the Chicago Convention contains international standards and recommended practices that govern the environmental impacts of international aviation. Volumes III and IV of Annex 16 relate to climate change mitigation. Volume III concerns the certification of aeroplane carbon dioxide emissions, while Volume IV establishes a carbon offsetting and reduction scheme for international aviation.

82. On 16 September 1987, the Montreal Protocol was adopted as a protocol to the Vienna Convention for the Protection of the Ozone Layer and entered into force on 1 January 1989. To date, there are 197 Parties to it, including all States Parties to the Convention. The Montreal Protocol deals with the phase-out of the production and consumption of chemicals that deplete the ozone layer, including chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs), which are GHGs. An amendment to the Montreal Protocol adopted on 15 October 2016 (hereinafter “the Kigali Amendment”) provides for the phase-down of hydrofluorocarbons (HFCs), used to replace HCFCs, and which are substances that are not ozone depleting but are potent GHGs. The Kigali Amendment entered into force on 1 January 2019 (with the exception of the amendment to article 4 of the Montreal Protocol (control of trade with non-parties) which will enter into force on 1 January 2033). To date, there are 159 Parties to the Kigali Amendment.

III. Jurisdiction and discretion

83. The Tribunal will now proceed to the issue of jurisdiction and discretion. It will first consider whether it has jurisdiction to give the advisory opinion requested by the

Commission and, if so, whether there is any reason the Tribunal should, in the exercise of its discretion, decline to answer the Request.

A. Jurisdiction

84. The Tribunal's jurisdiction to render an advisory opinion is based on article 21 of its Statute. This provision reads: "The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal."

85. In *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (hereinafter "the *SRFC Advisory Opinion*"), the Tribunal stated that its jurisdiction comprises three elements:

> (i) all "disputes" submitted to the Tribunal in accordance with the Convention; (ii) all "applications" submitted to the Tribunal in accordance with the Convention; and (iii) all "matters" ("toutes les fois que cela" in French) specifically provided for in any other agreement which confers jurisdiction on the Tribunal
> (*Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015,* p. 4, at p. 21, para. 54).

86. The Tribunal further stated that the term "all matters" ("*toutes les fois que cela*" in French) includes advisory opinions, if specifically provided for in "any other agreement which confers jurisdiction on the Tribunal" (*Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at p. 21, para. 56).

87. The Tribunal also clarified that the expression "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal" does not by itself establish the advisory jurisdiction of the Tribunal. In terms of article 21 of the Statute, it is the "other agreement" which confers such jurisdiction on the Tribunal. When the "other agreement" confers advisory jurisdiction on the Tribunal, the Tribunal is then rendered competent to exercise such jurisdiction with regard to "all matters" specifically provided for in the "other agreement". Article 21 and the

"other agreement" conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal (*Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at p. 22, para. 58).

88. Article 2, paragraph 2, of the COSIS Agreement states:

> Having regard to the fundamental importance of oceans as sinks and reservoirs of greenhouse gases and the direct relevance of the marine environment to the adverse effects of climate change on Small Island States, the Commission shall be authorized to request advisory opinions from the International Tribunal for the Law of the Sea ("ITLOS") on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules.

The Tribunal considers that by providing for authorization enabling the Commission to request advisory opinions from the Tribunal, the COSIS Agreement "confers jurisdiction on the Tribunal" within the meaning of article 21 of the Statute.

89. Thus, article 21 of the Statute and the COSIS Agreement conferring jurisdiction on the Tribunal constitute the substantive legal basis of the advisory jurisdiction of the Tribunal in this case.

90. The Tribunal notes that its finding in the *SRFC Advisory Opinion* regarding the legal basis of its advisory jurisdiction has been supported by most States Parties to the Convention.

91. The Tribunal further notes that most participants in the current proceedings expressed the view that the Tribunal has jurisdiction to render the advisory opinion requested by the Commission.

92. The Tribunal also observes that the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (hereinafter "the BBNJ Agreement"), the latest agreement adopted to ensure the effective

implementation of the Convention, specifically provides that the Conference of the Parties may request the Tribunal to give an advisory opinion. This Agreement was adopted by consensus on 19 June 2023 and has not yet entered into force.

93. The Tribunal now turns to the prerequisites to be satisfied in order for the Tribunal to exercise its jurisdiction. Article 138, paragraphs 1 and 2, of the Rules reads as follows:

> 1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.
>
> 2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.

94. As the Tribunal clarified in the *SRFC Advisory Opinion*, article 138 of the Rules does not establish the jurisdiction of the Tribunal but only furnishes the prerequisites that must be met before the Tribunal can exercise its advisory jurisdiction (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at p. 22, para. 59).

95. These prerequisites are as follows: (a) there is an international agreement related to the purposes of the Convention which specifically provides for the submission to the Tribunal of a request for an advisory opinion; (b) the request has been transmitted to the Tribunal by a body authorized by or in accordance with the agreement; and (c) the request submitted to the Tribunal concerns a legal question.

96. As regards the first prerequisite, the Tribunal notes that the COSIS Agreement is an international agreement which entered into force on 31 October 2021 and to which six States were Parties at the time the Request was filed.

97. As set out in its preamble, the basis for the COSIS Agreement is the need to address the adverse effects that GHG emissions have on the marine environment,

including marine living resources, and their devastating impact for small island States. Furthermore, the Commission's mandate, as stated in article 1, paragraph 3, of the COSIS Agreement, is "to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, including, but not limited to, the obligations of States relating to the protection and preservation of the marine environment and their responsibility for injuries arising from internationally wrongful acts in respect of the breach of such obligations."

98. Considering that one of the main objectives of the Convention is the protection and preservation of the marine environment, to which Part XII is dedicated, it is clear that the COSIS Agreement is an international agreement related to the purposes of the Convention.

99. In article 1, paragraph 1, the COSIS Agreement establishes the Commission of Small Island States on Climate Change and International Law as an intergovernmental organization with international legal personality. Pursuant to article 3, membership of the Commission is open to all members of the Alliance of Small Island States (AOSIS) that become parties to the COSIS Agreement.

100. The Tribunal further observes that article 2, paragraph 2, of the COSIS Agreement specifically states that "the Commission shall be authorized to request advisory opinions from the International Tribunal for the Law of the Sea ("ITLOS") on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules."

101. As to the second prerequisite whereby the request must be transmitted to the Tribunal by a body authorized by or in accordance with the COSIS Agreement, the Tribunal notes that the Commission, during its Third Meeting, convened on 26 August 2022, unanimously decided to submit to the Tribunal a request for an advisory opinion pursuant to article 3, paragraph 5, of the Agreement. The Request was subsequently transmitted to the Tribunal by the Co-Chairs of the Commission (see paras. 1 and 3 above).

102. The Tribunal now turns to the third prerequisite whereby the request for an advisory opinion must concern a legal question. The questions read as follows:

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea ('UNCLOS'), including under Part XII:
>
> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
>
> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

103. The Tribunal considers that these questions have been framed in terms of law. To respond to these questions, the Tribunal is called upon to interpret the relevant provisions of the Convention and of the COSIS Agreement and to identify other relevant rules of international law (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at pp. 23-24, para. 65).

104. The Tribunal therefore concludes that the questions raised by the Commission are of a legal nature.

105. In addition to the aforementioned prerequisites, article 21 of the Statute lays down that the jurisdiction of the Tribunal extends to "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal." Accordingly, it is necessary for the Tribunal to assess whether the questions posed by the Commission constitute matters which fall within the framework of the COSIS Agreement (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at p. 24, para. 67).

106. In this regard, the questions need not necessarily be limited to the interpretation or application of any specific provision of the COSIS Agreement. It is

enough if the questions have a “sufficient connection” with the purpose of the COSIS Agreement (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at p. 24, para. 68).

107. The Tribunal notes that article 2, paragraph 1, of the COSIS Agreement provides that the purpose of the Commission is to, *inter alia*, “[assist] Small Island States to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, in particular the protection and preservation of the marine environment”.

108. The Tribunal is satisfied in the present case that the questions posed by the Commission (see para. 102 above) have a sufficient connection with the purpose of the COSIS Agreement. The questions are directly relevant to matters which fall within the framework of the Agreement.

109. For the aforementioned reasons, the Tribunal finds that it has jurisdiction to give the advisory opinion requested by the Commission.

B. Discretion

110. Having found that it has jurisdiction to entertain the Request, the Tribunal will now turn to the issue of its discretionary power to decline to render an advisory opinion in the present case.

111. The Tribunal stated in the *SRFC Advisory Opinion* that “[a]rticle 138 of the Rules, which provides that ‘the Tribunal may give an advisory opinion’, should be interpreted to mean that the Tribunal has a discretionary power to refuse to give an advisory opinion even if the conditions of jurisdiction are satisfied” (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at p. 25, para. 71). The Tribunal further stated that “[i]t is well settled that a request for an advisory opinion should not in principle be refused except for ‘compelling reasons’” (see *ibid*.; see also *Legality of*

the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 235, para. 14).

112. Some participants in the present proceedings expressed the view that the lack of consent of States not party to the COSIS Agreement to any aspect of the Request might constitute a ground for the Tribunal to decline to give an advisory opinion.

113. Contrary to this view, it was contended that the fact that the advisory opinion has been requested by some States Parties to the Convention, and not by all, cannot be a reason for the Tribunal to refrain from giving the opinion. The lack of consent, it was stated, has no bearing on the discretionary power of the Tribunal to refuse to give an advisory opinion to an entity entitled to request it.

114. The Tribunal notes that an advisory opinion is given to the requesting entity, which considers it desirable in order to obtain enlightenment as to the course of action it should take. An advisory opinion as such has no binding force and the consent of States not members of the requesting entity is not relevant (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at p. 26, para. 76).

115. The Tribunal observes that, in response to its invitation, a large number of participants in the written and oral proceedings furnished the Tribunal with information relevant to the Request. A vast majority of the participating States Parties expressed support for an advisory opinion to be rendered by the Tribunal and were of the view that the present proceedings did not give rise to any compelling reasons for the Tribunal to exercise its discretion to decline to give an advisory opinion. Some participants drew attention to the urgency of the threat of climate change to member States of the Commission and also to the collective interest of States Parties to the Convention in emphasizing that there were compelling reasons for the Tribunal to proceed expeditiously to answer the questions.

116. Another reason the Tribunal might decline to exercise its jurisdiction is the possibility that the questions raised in the Request may be closely related to questions which are the subject of a dispute affecting the rights and obligations of

third States that have not consented to the Request (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at pp. 25-26, para. 75). The Tribunal is not aware of any legal dispute between the members of the Commission and any other States relating to the subject matter of the advisory opinion which would require the latter's consent.

117. Some participants expressed the view that the Commission, in this case, was not seeking guidance in respect of its own actions but rather clarification in respect of the obligations of States Parties to the Convention regarding the protection and preservation of the marine environment.

118. In this regard, the Tribunal is aware of the importance of the questions in the Request for the members of the Commission and that by answering the questions, the Tribunal would be assisting the Commission in the performance of its activities and contributing to the fulfilment of its mandate, including the implementation of the Convention.

119. It was further argued by some participants that the Request contains questions that are wide, abstract and of a general nature and that since the Request is framed in broad terms, the Tribunal should have careful regard to the parameters of its judicial function. On the other hand, it was contended that the questions in the Request are clear enough and that there is sufficient information and evidence to enable the Tribunal to give an advisory opinion.

120. The Tribunal is of the view that the questions raised by the Commission are clear and specific enough to enable it to give an advisory opinion. The Tribunal considers that sufficient information and evidence have been made available on which to base its findings. The Tribunal further finds that the Request is compatible with its judicial functions, as it is called upon to clarify and provide guidance concerning the specific obligations of States Parties to the Convention by interpreting and applying the provisions of the Convention, in particular the provisions of Part XII, and other relevant rules of international law. As the Tribunal made clear in the *SRFC Advisory Opinion*, it "does not take a position on issues beyond the scope of its

judicial functions" (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at p. 25, para. 74).

121. In light of the foregoing, the Tribunal deems it appropriate to render the advisory opinion requested by the Commission.

122. The Tribunal is mindful of the fact that climate change is recognized internationally as a common concern of humankind. The Tribunal is also conscious of the deleterious effects climate change has on the marine environment and the devastating consequences it has and will continue to have on small island States, considered to be among the most vulnerable to such impacts. Bearing this in mind, the Tribunal will provide clarification on the issues raised by the Commission.

IV. Applicable law

123. The Tribunal will now address the applicable law in this case. Article 138, paragraph 3, of the Rules states that "[t]he Tribunal shall apply *mutatis mutandis* articles 130 to 137" of the Rules in the exercise of its functions relating to advisory opinions. These articles are those which lay down the rules applicable to the Seabed Disputes Chamber in the exercise of its functions relating to advisory opinions.

124. Article 130, paragraph 1, of the Rules states:

> In the exercise of its functions relating to advisory opinions, the Seabed Disputes Chamber shall apply this section and be guided, to the extent to which it recognizes them to be applicable, by the provisions of the Statute and of these Rules applicable in contentious cases.

125. The Tribunal refers in this regard to article 23 of the Statute, which provides that "[t]he Tribunal shall decide all disputes and applications in accordance with article 293."

126. Article 293, paragraph 1, of the Convention reads:

> A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

127. Therefore, the Tribunal concludes that the Convention, the COSIS Agreement and other relevant rules of international law not incompatible with the Convention constitute the applicable law in this case.

V. Interpretation of the Convention and the relationship between the Convention and external rules

128. Having addressed the applicable law, the Tribunal will now proceed to the question of the interpretation of the Convention and the relationship between the Convention and other relevant rules of international law (external rules). The questions posed by the Commission to the Tribunal relate to the interpretation of the Convention. The rules governing treaty interpretation are codified in articles 31 to 33 of the Vienna Convention on the Law of Treaties (hereinafter "VCLT") and form part of the applicable law in this case.

129. The general rule of treaty interpretation is contained in article 31 of the VCLT and reads:

> *General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

130. The Tribunal notes that many participants in the present proceedings have emphasized the open character of the Convention and its constitutional and framework nature. In the Tribunal's view, coordination and harmonization between the Convention and external rules are important to clarify, and to inform the meaning of, the provisions of the Convention and to ensure that the Convention serves as a living instrument. The relationship between the provisions of Part XII of the Convention, entitled "Protection and Preservation of the Marine Environment", and external rules is of particular relevance in this case.

131. In this regard, the Tribunal points out the following mechanisms through which a relationship between the provisions of Part XII of the Convention and external rules is formed. First, the Convention contains certain provisions – also called rules of reference – that refer to external rules. These rules of reference employ different terms and have both a different scope and legal effect.

132. Second, article 237 of the Convention clarifies the relationship of Part XII of the Convention with other treaties relating to the protection and preservation of the marine environment. Article 237 reads:

> *Obligations under other conventions on the protection and preservation of the marine environment*
>
> 1. The provisions of this Part are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.

> 2. Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention.

133. Article 237 of the Convention reflects the need for consistency and mutual supportiveness between the applicable rules. On the one hand, Part XII of the Convention is without prejudice to the specific obligations of States under special conventions and agreements concluded previously in this field and to agreements which may be concluded in furtherance of the general principles of the Convention. On the other hand, such specific obligations should be carried out in a manner consistent with the general principles and objectives of the Convention.

134. The rules of reference contained in Part XII of the Convention and article 237 of the Convention demonstrate the openness of Part XII to other treaty regimes.

135. Third, article 31, paragraph 3(c), of the VCLT (see para. 129 above) requires that account be taken, together with the context, of any relevant rules of international law applicable in the relations between the parties. This method of interpretation ensures, as observed by the International Court of Justice (hereinafter “the ICJ”), that treaties do not operate in isolation but are “interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 31, para. 53). The term “any relevant rules of international law“ includes both relevant rules of treaty law and customary law.

136. The Tribunal is of the view that, subject to article 293 of the Convention, the provisions of the Convention and external rules should, to the extent possible, be interpreted consistently. In this context, the Tribunal notes that the Study Group of the International Law Commission (hereinafter “the ILC”), in its 2006 Report on the Fragmentation of International Law, concluded that “[i]t is a generally accepted principle that when several norms bear on a single issue they should, to the extent

possible, be interpreted so as to give rise to a single set of compatible obligations" (Fragmentation of International Law, Report of the Study Group of the ILC, 2006, p. 8; see also Guideline 9 of the 2021 ILC Guidelines on the protection of the atmosphere).

137. As reflected in paragraphs 67 to 82 above, there is an extensive treaty regime addressing climate change that includes the UNFCCC, the Kyoto Protocol, the Paris Agreement, Annex VI to MARPOL, Annex 16 to the Chicago Convention, and the Montreal Protocol, including the Kigali Amendment. The Tribunal considers that, in the present case, relevant external rules may be found, in particular, in those agreements.

VI. Scope of the Request and relationship between the questions

A. Scope of the Request

138. Before responding to the questions submitted to it, the Tribunal wishes to examine the scope of the Request.

139. There are two questions before the Tribunal:

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea ('UNCLOS'), including under Part XII:
>
> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
>
> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

The phrase: "What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea …, including under Part XII", applies both to Question (a) and Question (b). As the Tribunal has stated above, the questions raised by the Commission are clear enough to enable it to give an advisory opinion

(see para. 120 above). However, certain elements of that phrase have elicited divergent views in the present proceedings. Since the phrase is important to the scope of the Request, the Tribunal will now address these elements.

140. The questions posed to the Tribunal are concerned with the specific obligations "of State Parties to the United Nations Convention on the Law of the Sea". This wording suggests that the Commission seeks an opinion from the Tribunal on the specific obligations under the Convention. However, in the present proceedings, certain participants invited the Tribunal to provide guidance on States Parties' obligations under international law to curb anthropogenic GHG emissions into the atmosphere and the marine environment. In particular, it was suggested that the Tribunal could determine specific obligations assumed by States under the UNFCCC and the Paris Agreement.

141. Article 2, paragraph 2, of the COSIS Agreement authorizes the Commission to request advisory opinions from the Tribunal "on any legal question *within the scope of the 1982 United Nations Convention on the Law of the Sea*, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules" (emphasis added). The Commission itself has suggested that both questions concern States Parties' obligations under the Convention. Specifically, in its final oral statement in the present proceedings, the Commission asked the Tribunal "to state, clearly and objectively *what the current legal duties of States Parties are under UNCLOS* in relation to the impact of climate change on the marine environment" (emphasis added).

142. The Tribunal concludes that it is requested to render an advisory opinion on the specific obligations of States Parties under the Convention. In order to identify these obligations and clarify their content, the Tribunal will have to interpret the Convention and, in doing so, also take into account external rules, as appropriate.

143. The questions posed to the Tribunal refer to the specific obligations of States Parties to the Convention, "including under Part XII". Many participants focused their pleadings on the obligations contained in Part XII. However, other participants noted

that the questions are not limited to the obligations under Part XII of the Convention and addressed obligations under other parts of the Convention as well.

144. The Tribunal is of the view that, as a matter of ordinary interpretation, the word “including” in the above phrase indicates that the Tribunal is requested to provide guidance as to the specific obligations of the States Parties under Part XII as well as other relevant provisions of the Convention.

145. The Tribunal will now consider whether the issues of responsibility and liability fall within the scope of the Request. Some participants in the present proceedings have stated that issues of responsibility and liability are relevant, in particular because the Request refers to obligations without characterizing them as primary or secondary. In contrast, it has been argued that the Request concerns only primary obligations and does not involve issues of responsibility and liability, nor does it invite the Tribunal to consider legal consequences arising from the breach of obligations. The Commission, for instance, has explained that it is asking the Tribunal to state what the legal duties of States Parties are in relation to the impacts of climate change on the marine environment and not for which acts or omissions injunctive relief or compensation is available.

146. The Commission asks the Tribunal to identify specific “obligations” under the Convention; terms such as “responsibility” and “liability” do not appear in the Request. The Tribunal notes that article 1, paragraph 3, of the COSIS Agreement clearly distinguishes between the obligations, on the one hand, and responsibility for their breaches, on the other (see para. 97 above). Considering the Request against the backdrop of this provision, the Tribunal is of the view that if the Commission had intended for the Tribunal to address issues of responsibility and liability, it would have expressly formulated the Request accordingly.

147. In this regard, the Request is notably different from the requests for advisory opinion previously dealt with by the Seabed Disputes Chamber and the Tribunal. The request submitted to the Seabed Disputes Chamber explicitly asked not only about the responsibilities and obligations of States Parties with respect to the sponsorship of activities in the Area but also, *inter alia*, about the extent of liability of a State Party

for any failure to comply with the provisions of the Convention and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 by an entity it has sponsored (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 15, para. 1). The request to the Tribunal for an advisory opinion submitted by the SRFC expressly asked not only about the obligations of the flag State but also, *inter alia,* about the extent to which a State should be held liable for illegal, unreported and unregulated fishing activities conducted by vessels under its flag (*Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission,* Advisory Opinion*, 2 April 2015, ITLOS Reports 2015*, p. 4, at p. 8, para. 2).

148. In both previous advisory opinions, a distinction has been made between primary and secondary obligations under international law (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at pp. 30-31, paras. 64-71; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4, at p. 44, para. 145). In the present case, the Tribunal will confine itself to primary obligations. However, to the extent necessary to clarify the scope and nature of primary obligations, the Tribunal may have to refer to responsibility and liability.

149. The Tribunal wishes to address another issue concerning the Request's scope. Some participants, referring to the mention of sea level rise in the Request, invited the Tribunal to deal with the issue of the relationship between sea level rise and existing maritime claims or entitlements. On the other hand, other participants expressed the view that, while acknowledging the importance of this issue, the present proceedings should focus instead on environmental issues. The Commission, in particular, explained that questions relating to consequences of sea level rise upon maritime zones, entitlements and boundaries are not before the Tribunal in the present case.

150. The Request mentions sea level rise in both questions. The preamble of the COSIS Agreement states, *inter alia*, that the Parties to the Agreement affirm that

maritime zones, as established and notified to the Secretary-General of the United Nations in accordance with the Convention, and the rights and entitlements that flow from them, “shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise”. However, neither the Request nor the decision that approved it refers to this provision or otherwise addresses the issue of base points, baselines, claims, rights or entitlements to maritime zones established under the Convention, or maritime boundaries, and the corresponding obligations in the context of “physical changes connected to climate change-related sea-level rise”. Instead, the Request employs sea level rise to form part of the context within which the Tribunal should consider the specific obligations concerning the protection and preservation of the marine environment, a matter on which the Request clearly concentrates. The Tribunal is of the view that if the Commission had intended to solicit an opinion on the consequences of sea level rise for base points, baselines, claims, rights or entitlements to the maritime zones established under the Convention, or maritime boundaries, and the corresponding obligations, it would have expressly formulated the Request accordingly.

B. Relationship between the questions

151. Before examining the two questions in the Request, the Tribunal wishes to address the relationship between them. Several participants in the proceedings expressed the view that the obligation to protect and preserve the marine environment reflected in the second question is more comprehensive than the obligation to prevent, reduce and control pollution of the marine environment reflected in the first question; therefore, the second question is broader than the first question. In this regard, some participants proposed that the Tribunal address Question (b) prior to Question (a).

152. The Tribunal considers that the obligation addressed in the second question is broader in scope than the obligation addressed in the first question. The obligation to protect and preserve the marine environment encompasses the obligation to prevent, reduce and control marine pollution. In addition, it extends to the protection of the marine environment from any negative impacts. As the arbitral tribunal in the *Chagos Marine Protected Area* case stated, “[w]hile the control of pollution is

certainly an important aspect of environmental protection, it is by no means the only one" (*Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland, Award of 18 March 2015, RIAA, Vol. XXXI*, p. 359, at pp. 499-500, para. 320; see also *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, *Advisory Opinion*, *2 April 2015, ITLOS Reports 2015*, p. 4, at p. 37, para. 120; *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999,* p. 280, at p. 295, para. 70; *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China, Award of 12 July 2016*, *RIAA, Vol. XXXIII*, p. 153, at pp. 521-522, para. 945). Thus, implementing the obligation to prevent, reduce and control pollution of the marine environment does not exhaust the implementation of the obligation to protect and preserve it. Given this relationship between the two obligations addressed in the questions before the Tribunal, it is plain that the second question is more comprehensive than the first question. The Tribunal will follow the order of the questions as they were posed in the Request and in its response to the second question will deal with the obligations not addressed in the first question.

VII. Question (a)

153. The Tribunal will now turn to the first question posed by the Commission. The question reads:

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the 'UNCLOS'), including under Part XII:
>
> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?

A. Clarification of terms and expressions

154. The first question posed to the Tribunal by the Commission concerns the specific obligations of States Parties to the Convention to prevent, reduce and

control marine pollution in relation to the deleterious effects that result or are likely to result from climate change and ocean acidification, which are caused by anthropogenic GHG emissions into the atmosphere. Before responding to the question, the Tribunal wishes to clarify certain terms and expressions employed therein to determine the precise meaning of the question.

155. The Tribunal first notes that the question asks the Tribunal to identify specific obligations of “State Parties to UNCLOS”. The term “State Parties” refers to States and international organizations which have become Parties to the Convention in accordance with article 1, paragraph 2, subparagraphs 1 and 2, of the Convention. Currently, 168 States and one international organization are Parties to the Convention.

156. The next point the Tribunal wishes to clarify is the meaning of “specific obligations” to prevent, reduce and control pollution of the marine environment. The term “specific obligations” may denote concrete or particularized obligations, in contrast to general obligations. It may also mean obligations specific to pollution of the marine environment in relation to the deleterious effects arising from climate change and ocean acidification. In responding to the question, the Tribunal will bear in mind both aspects of the term “specific”.

157. The terms “climate change”, “greenhouse gas emissions”, and “ocean acidification” do not appear in the Convention. The Tribunal understands that those terms are used in Question (a) as they are defined in relevant legal instruments relating to climate change or in authoritative scientific works such as in the IPCC reports. For the purpose of responding to Question (a), the Tribunal accepts those definitions and usage, which have already been explained in paragraphs 52, 54, 60 and 68 above.

158. Question (a) points to the specific obligations under the Convention to prevent, reduce and control marine pollution “in relation to” the deleterious effects that result or are likely to result from climate change and ocean acidification, which are caused by anthropogenic GHG emissions. The Tribunal observes that the question is formulated on the premise that these obligations necessarily apply to

climate change and ocean acidification. However, in the Tribunal's view, the validity of this premise cannot be presumed and needs to be examined. Therefore, the Tribunal will first address whether the obligations under the Convention apply to climate change and ocean acidification. If they do, the Tribunal will then examine how those obligations should be interpreted and applied in relation to the deleterious effects caused by anthropogenic GHG emissions.

B. Whether anthropogenic GHG emissions fall within the definition of marine pollution under the Convention

159. In responding to Question (a), the first issue that should be addressed is whether anthropogenic GHG emissions into the atmosphere fall under the definition of "pollution of the marine environment" under article 1, paragraph 1, subparagraph 4, of the Convention.

160. A large majority of the participants in the proceedings recognized that anthropogenic GHG emissions meet the definition of "pollution of the marine environment" under article 1, paragraph 1, subparagraph 4, of the Convention. On the other hand, some participants argued that GHG emissions should not be considered "pollution of the marine environment" and that to include them within the ambit of "pollution of the marine environment" would be tantamount to the Tribunal exercising legislative functions.

161. Article 1, paragraph 1, subparagraph 4, of the Convention reads:

> For the purposes of this Convention … "pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

This definition does not provide a list of pollutants or forms of pollution of the marine environment. Instead, it sets out three criteria to determine what constitutes such pollution: (1) there must be a substance or energy; (2) this substance or energy must be introduced by humans, directly or indirectly, into the marine environment; and

(3) such introduction must result or be likely to result in deleterious effects. These criteria are cumulative; all of them must be satisfied to meet the definition. The definition is general in that it encompasses whatever satisfies these criteria.

162. The Tribunal will now examine whether anthropogenic GHG emissions satisfy the criteria set out above.

163. The terms “substance” and “energy” have a broad meaning. The Tribunal is of the view that, in the context of the present case, the term “substance” refers to any particular kind of matter with uniform properties or a kind of matter of a definite chemical composition. As to the term “energy”, the Tribunal notes that one of the forms of energy is thermal energy or heat. It further notes that the ILC, in its commentary to the definition of “atmospheric pollution” – and specifically to the “introduction of energy” – in the 2021 Draft guidelines on the protection of the atmosphere, explains that this reference to energy is understood to include heat (ILC Draft guidelines on the protection of the atmosphere, Commentary to Guideline 1, subpara. (b)).

164. The term “gas”, in the context of the present case, refers to a substance in a form like air that is neither solid nor liquid. It is clear from the ordinary meaning of the word “gas” and from the UNFCCC and IPCC definitions of the term “greenhouse gases” (see paras. 54 and 68 above) that they are substances. Consequently, the first criterion of the Convention’s definition of “pollution of the marine environment” is satisfied.

165. The Tribunal will now address the second criterion. The first question concerns, in the context of pollution of the marine environment, not GHGs as such but “anthropogenic emissions” thereof. In view of the definitions of the term “emissions” in the UNFCCC (see para. 68 above) and of the terms “anthropogenic” and “anthropogenic emissions” by the IPCC (see para. 54 above), it is clear that anthropogenic GHG emissions are produced “by man”, within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention.

166. The term “marine environment” appears in many provisions of the Convention. However, the Convention does not give a definition of it. The term “marine” means belonging to, existing or found in, or produced by, the sea; belonging to, or situated at, the sea-side, bounded by the sea. The term “environment” denotes the area surrounding a place or thing; the surroundings or physical context and conditions in which an organism lives, develops, or a thing exists; the external conditions in general affecting the life, existence, or properties of an organism or object. The ICJ has recognized that the environment “represents the living space, the quality of life and the very health of human beings, including generations unborn” (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 241, para. 29). Thus, it may be assumed that the term “marine environment” in article 1, paragraph 1, subparagraph 4, of the Convention combines both spatial and material components. This is supported, in particular, by the context in which the term is used in the Convention, in light of its object and purpose, by the relevant subsequent practice of the States Parties to the Convention regarding its interpretation, and by the corresponding international jurisprudence.

167. According to its fourth preambular paragraph, one of the main goals of the Convention is to establish a legal order for the seas and oceans that will promote the protection and preservation of the marine environment. Here, the marine environment is referred to in a general sense. The Tribunal notes that most of the provisions of Part XII and, in particular, articles 192 and 194, use the term “marine environment” generally, without specifying to which maritime zone it relates.

168. Article 1, paragraph 1, subparagraph 4, of the Convention refers to “the marine environment, including estuaries”. Articles 145, paragraph (a), and 211, paragraph 1, refer to “the marine environment, including the coastline”. This indicates that the marine environment under the Convention encompasses certain spaces beyond maritime zones established thereunder.

169. Under article 194, paragraph 5, of the Convention, the measures taken in accordance with Part XII, i.e., protection and preservation of the marine environment, “shall include those necessary to protect and preserve rare or fragile ecosystems as

well as the habitat of depleted, threatened or endangered species and other forms of marine life." The term "ecosystem" is not defined in the Convention, but article 2 of the Convention on Biological Diversity (hereinafter "the CBD"), which was adopted on 5 June 1992 and entered into force on 29 December 1993, defines ecosystem to mean "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit." The IPCC defines "ecosystem" as a "functional unit consisting of living organisms, their non-living environment and the interactions within and between them" (2019 Report, Annex I, Glossary, p. 684). In this regard, the Tribunal recalls that in the *Southern Bluefin Tuna* cases and in the *SRFC Advisory Opinion*, it held that living resources of the sea and marine life are part of the marine environment (*Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, at p. 295, para. 70; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4, at p. 61, para. 216; see also *Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland, Award of 18 March 2015, RIAA, Vol. XXXI*, p. 359, at p. 580, para. 538).

170. The Tribunal notes that the term "marine environment" is defined in the regulations relating to prospecting and exploration of mineral resources in the Area adopted by the Authority. These regulations all provide the same definition of the term "marine environment", stating that it

> includes the physical, chemical, geological and biological components, conditions and factors which interact and determine the productivity, state, condition and quality of the marine ecosystem, the waters of the seas and oceans and the airspace above those waters, as well as the seabed and ocean floor and subsoil thereof.
> (Regulations on prospecting and exploration for polymetallic sulphides in the Area, regulation 1, para. 3(c); Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, regulation 1, paragraph 3(d); Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, regulation 1, paragraph 3(c).)

This definition of the marine environment has spatial and material dimensions. In clarifying the term "marine environment", the Tribunal has taken these regulations

into account as representing the practice of the States Parties to the Convention and of the Authority in this respect.

171. The Tribunal also notes that the participants in the present proceedings who addressed the meaning of the term “marine environment” expressed the view that it should be understood broadly.

172. The ordinary meaning of the word “introduction” relevant in the present context is the action of introducing, bringing in or inserting. The ordinary relevant meaning of the word “directly” indicates the absence of an intervening medium or agent; that is to say, through a direct process or mode. The ordinary relevant meaning of the word “indirectly” suggests indirect action or through indirect means, connection, agency or instrumentality, or an intervening person or thing. Given these ordinary meanings of “direct” and “indirect”, the introduction of the anthropogenic GHGs into the marine environment may take place either immediately, through a direct mode or in stages. According to the science (see para. 60 above), because of its solubility and chemical reactivity, carbon dioxide from human activities, which has the largest share and growth in gross GHG emissions (2023 Synthesis Report, p. 4), is taken up by the ocean much more effectively than other emitted gases. Carbon dioxide then dissolves in sea water and mixes into the deep ocean (see, e.g., Climate Change 2001, The Scientific Basis, pp. 187, 197-199). Thus, GHGs, as substances, are directly introduced by humans into the marine environment. Furthermore, according to the science (see para. 54 above), GHGs trap heat within the atmosphere and the ocean then stores this heat. In this way, and considering that heat is a form of energy, humans indirectly introduce energy into the marine environment through anthropogenic GHG emissions.

173. In light of the above, the Tribunal concludes that anthropogenic GHG emissions satisfy the second criterion of the “pollution of the marine environment” definition.

174. To fall within the definition of marine pollution, the introduction of substances or energy must result or be likely to result “in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine

activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities". The Tribunal notes that the "deleterious effects" illustrated in article 1, paragraph 1, subparagraph 4, of the Convention are not exhaustive, as implied by the words "such ... as" and, in any case, are not limited to the marine environment. This is clear, considering, for instance, that effects on human health, marine activities or amenities are mentioned. The definition also points to actual ("results") or potential ("likely to result") deleterious effects. The Tribunal further notes that the definition neither qualifies the "likelihood" of the deleterious effects nor specifies the level of "harm" that can be considered a deleterious effect.

175. The introduction of excess heat (energy) into the marine environment due to the accumulation of GHGs in the atmosphere results in ocean warming. Being itself a component of climate change, ocean warming, according to the IPCC findings made with high confidence, "accounted for 91% of the heating in the climate system" (WGI 2021 Report, p. 11). Anthropogenic GHG emissions thereby cause climate change, which includes ocean warming and sea level rise. The introduction of anthropogenic GHGs into the marine environment also causes ocean acidification (see para. 60 above). In turn, climate change, including ocean warming and sea level rise, and ocean acidification, interacting with other climatic and non-climatic factors, produce multiple deleterious effects on the marine environment and beyond. These effects of climate change and ocean acidification are observed and explained by the science and are widely acknowledged by States (see paras. 51 to 61 above). In particular, adverse effects of climate change are recognized by international climate treaties.

176. The UNFCCC has already acknowledged that human activities have been substantially increasing the atmospheric concentrations of GHGs, that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind, and that climate change has adverse effects (UNFCCC, first and second preambular paragraphs). This has been further recognized in the Kyoto Protocol and the Paris Agreement.

177. The UNFCCC defines the adverse effects of climate change as

> changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.
> (UNFCCC, Article 1, para. 1)

178. The adverse effects of climate change and ocean acidification satisfy the criterion relating to “deleterious effects” provided in article 1, paragraph 1, subparagraph 4, of the Convention. Thus, through the introduction of carbon dioxide and heat (energy) into the marine environment, anthropogenic GHG emissions cause climate change and ocean acidification, which results in the deleterious effects illustrated in the definition of pollution of the marine environment.

179. In light of the above, the Tribunal concludes that anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention.

C. Part XII of the Convention and marine pollution

180. Having found that anthropogenic GHG emissions into the atmosphere constitute “pollution of the marine environment” within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention, the Tribunal will now turn to the specific obligations of States Parties to the Convention to prevent, reduce and control such pollution.

181. In this regard, the Tribunal will first identify the provisions of the Convention relevant to its response to Question (a). It will then interpret those provisions to the extent necessary to respond to the question and examine how they should be applied in relation to anthropogenic GHG emissions causing pollution of the marine environment. The Tribunal will conclude by setting out the specific obligations of States Parties to prevent, reduce and control pollution of the marine environment arising from climate change and ocean acidification.

182. The provisions of the Convention which are relevant to answering Question (a) are those dealing with the obligations to prevent, reduce and control pollution of the marine environment. These provisions are mostly found in Part XII of the Convention. Before identifying and analysing them, the Tribunal finds it appropriate to give an overview of the system for the protection and preservation of the marine environment set out in Part XII of the Convention, in particular the marine pollution regime.

183. As stated in the fourth preambular paragraph of the Convention, the protection and preservation of the marine environment is one of the goals to be achieved by the Convention. To that end, the Convention, in particular Part XII, sets out fundamental principles to provide direction and guidance to States in their endeavour to protect and preserve the marine environment, and imposes upon States various obligations in this regard.

184. Article 192 of the Convention, the first article of Part XII, provides that "States have the obligation to protect and preserve the marine environment." While article 192 imposes upon States a legal obligation, this provision is, at the same time, a statement of principle upon which the legal order for the protection and preservation of the marine environment under the Convention is based.

185. Article 193 of the Convention provides that

> States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

186. These two articles together reflect, in the context of the protection and preservation of the marine environment, a principle of international environmental law, which has its origin in the Stockholm Declaration on the Human Environment adopted on 16 June 1972 (hereinafter "the Stockholm Declaration"). Principle 21 of the Stockholm Declaration reads:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do

> not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

This principle was further developed in Principle 2 of the Rio Declaration on Environment and Development adopted on 14 June 1992 (hereinafter "the Rio Declaration"), which refers to the sovereign right of States to exploit their own resources pursuant to their own environmental and "developmental" policies.

187. It should be noted that, while article 193 of the Convention recognizes the sovereign right of States to exploit their natural resources pursuant to their environmental policies, it further provides that States must exercise such right "in accordance with their duty to protect and preserve the marine environment." This article thus places a constraint upon States' exercise of their sovereign right. This shows the importance the Convention attaches to the protection and preservation of the marine environment.

188. The approach of the Convention to the protection and preservation of the marine environment is manifest in the subsequent provisions of Part XII. Those provisions impose upon States, among other obligations, those to prevent, reduce and control pollution of the marine environment. While the obligation to protect and preserve the marine environment is much broader in scope than the obligation to prevent, reduce and control marine pollution, the latter obligation constitutes the main component of the former obligation under the Convention.

189. Many provisions of Part XII of the Convention are directly or indirectly concerned with the prevention, reduction and control of pollution of the marine environment. They are structured in such a way as to provide for what may be called the regime for regulating marine pollution. The key provision in this regard is article 194 of the Convention, which requires States, *inter alia*, to take all necessary measures to prevent, reduce and control pollution of the marine environment from "any source". Thus, this article lays down an obligation common to all sources of pollution with which States must comply.

190. This obligation under article 194 of the Convention is complemented and elaborated upon by provisions in section 5 of Part XII (articles 207 to 212), which address the obligations of States with respect to specific sources of pollution. Those provisions are essentially concerned with the adoption of national legislation and the establishment of international rules and standards to regulate marine pollution. Section 6 of Part XII (articles 213 to 222), which corresponds to source-specific obligations under section 5, addresses the obligations of States to enforce national legislation and to implement international rules and standards.

191. In addition, there are other provisions in Part XII relevant to the prevention, reduction and control of pollution of the marine environment. They include provisions in section 2 on global and regional cooperation, section 3 on technical assistance and section 4 on monitoring and environmental assessment.

192. For the purpose of the present Advisory Opinion, the Tribunal will first consider the obligations of States under article 194 of the Convention and how they should be interpreted and applied in relation to marine pollution arising from anthropogenic GHG emissions. It will then proceed to examine the obligations of States with respect to the specific sources of pollution provided for in sections 5 and 6 of Part XII. The Tribunal will subsequently consider other relevant obligations under sections 2, 3 and 4 of Part XII.

D. Obligations applicable to any source of pollution under article 194 of the Convention

193. Article 194 of the Convention is the primary provision in the marine pollution regime set out in Part XII. This article provides for obligations to prevent, reduce and control marine pollution applicable to any source. Most of the participants in the proceedings took the view that article 194 of the Convention is a key provision in responding to Question (a).

194. Article 194 of the Convention reads:

Measures to prevent, reduce and control pollution of the marine environment

1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent:

(a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping;

(b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;

(c) pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;

(d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.

4. In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.

5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the

> habitat of depleted, threatened or endangered species and other forms of marine life.

195. This article provides for three main obligations of States: first, the obligation under paragraph 1 to take necessary measures to prevent, reduce and control marine pollution; second, the obligation under paragraph 2 to take necessary measures to ensure that certain situations relating to pollution do not occur; and third, the obligation under paragraph 5 to take necessary measures to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

196. Although the third obligation is included in article 194 of the Convention addressing measures to prevent, reduce and control marine pollution, it is clear that the measures envisaged under paragraph 5 are not circumscribed to merely those concerning pollution. For that reason, this paragraph refers to the measures taken in accordance with “this Part” rather than “this article”. The Tribunal considers that the third obligation can be more adequately addressed in the context of its reply to Question (b) as to the specific obligations to protect and preserve the marine environment. In its response to Question (a), the Tribunal will accordingly confine itself to the two obligations under paragraphs 1 and 2.

1. Obligation under article 194, paragraph 1, of the Convention

197. Article 194, paragraph 1, of the Convention imposes upon States an obligation to take all necessary measures to prevent, reduce and control marine pollution from any source, regardless of the specific sources of such pollution. This obligation is applicable to any kind of pollution. As anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment, it follows that article 194, paragraph 1, applies to such pollution. Most of the participants in the present proceedings expressed the same view.

(a) Scope and content of the obligation

Objective

198. The aim of the obligation to take all necessary measures under article 194, paragraph 1, of the Convention is to "prevent, reduce and control" pollution of the marine environment from any source. As the objective of prevention refers to preventing pollution from occurring at all, it necessarily applies to pollution that has not yet occurred, namely, future or potential pollution. On the other hand, the objective of reducing and controlling pollution presupposes the existence of pollution. Thus, the objective of preventing, reducing and controlling pollution means preventing future or potential pollution and reducing and controlling existing pollution. The compound objective to prevent, reduce and control marine pollution should be understood in the context of the comprehensive nature of the obligation under article 194, paragraph 1, to prevent, reduce and control any kind of pollution from any source. It is also a reflection of the reality that prevention of pollution from all sources at all times is, in practice, not possible.

199. In relation to anthropogenic GHG emissions, the objective of preventing, reducing and controlling marine pollution should be appreciated on the basis of the scientific assessment that, even if anthropogenic GHG emissions were to cease, the deleterious effects on the marine environment would nevertheless continue owing to the extent of GHGs already accumulated in the atmosphere. The obligation under article 194, paragraph 1, of the Convention requires States to take all necessary measures with a view to reducing and controlling existing marine pollution from such emissions and eventually preventing such pollution from occurring at all. Therefore, this obligation does not entail the immediate cessation of marine pollution from anthropogenic GHG emissions.

200. The Tribunal notes in this regard Article 4, paragraph 1, of the Paris Agreement, which provides that

> [i]n order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country

> Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century.

The Tribunal considers that the aim set out in the above provision is consistent with the objective of the obligation under article 194, paragraph 1, of the Convention.

Modalities

201. All measures necessary to prevent, reduce and control marine pollution shall be taken individually or jointly as appropriate. The phrase “as appropriate” in this context implies that there is no priority between an individual action and a joint action. Either action can be taken if it is appropriate. The appropriateness of an individual or joint action depends on the particular circumstances in which measures are taken. The reference to the word “jointly” indicates the importance of cooperation in addressing pollution of the marine environment. This point is also underscored by requiring States to “endeavour to harmonize their policies” in taking necessary measures as set forth in the final part of article 194, paragraph 1, of the Convention.

202. In relation to marine pollution from anthropogenic GHG emissions, given the global and transboundary nature of such pollution, joint actions should be actively pursued. It was contended in this regard that it is only through joint action that global levels of GHG emissions in the atmosphere and the consequent pollution of the marine environment can be prevented, reduced and controlled. While the importance of joint actions in regulating marine pollution from anthropogenic GHG emissions is undisputed, it does not follow that the obligation under article 194, paragraph 1, of the Convention is discharged exclusively through participation in the global efforts to address the problems of climate change. States are required to take all necessary measures, including individual actions as appropriate.

Necessary measures

203. Article 194, paragraph 1, of the Convention requires States to take “all measures … that are necessary” to prevent, reduce and control pollution of the

marine environment. The word “necessary” ordinarily means “indispensable”, “requisite” or “essential”. In the context of this provision, “necessary” should be understood broadly. Such understanding is consistent with the expansive scope of the obligation under article 194, paragraph 1, implied by words such as “all” measures or “any” source. It is further supported by the inclusive definition of “pollution of the marine environment” set forth in article 1, paragraph 1, subparagraph 4, of the Convention. Accordingly, necessary measures include not only measures which are indispensable to prevent, reduce and control marine pollution but also other measures which make it possible to achieve that objective.

204. However, such measures must be “consistent with [the] Convention”, as stated in article 194, paragraph 1, of the Convention. It is clear that measures to prevent, reduce and control marine pollution must be consistent with the Convention, in which rights and duties of the coastal State or flag State in various maritime zones are set out. In addition, necessary measures must not deny or unjustifiably interfere with the rights of States recognized by the Convention, such as navigational rights. This point is underscored by article 194, paragraph 4, which provides that

> [i]n taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.

205. Article 194, paragraph 1, of the Convention does not provide for any specific criteria as to what constitutes necessary measures. However, paragraph 3 of this article gives some indication about the kinds of measures that States must take with respect to specific sources of pollution. Among such measures, there are those designed to minimize, to the fullest possible extent, the release of toxic, harmful or noxious substances, especially those which are persistent. In the context of climate change, those measures are commonly known as “mitigation measures”. Central to such measures is the reduction of anthropogenic GHG emissions into the atmosphere.

206. While article 194, paragraph 1, of the Convention leaves it to each State to determine what measures are necessary to prevent, reduce and control marine

pollution, this does not mean that such measures are whatever measures States deem necessary to that end. Rather, necessary measures should be determined objectively. Many participants in the proceedings emphasized the importance of objectively determining those measures.

207. In the Tribunal's view, there are various factors States should consider in their objective assessment of necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions. It is evident that the science is particularly relevant in this regard. International rules and standards relating to climate change are another relevant factor. There are other factors that may be considered, such as available means and capabilities of the State concerned.

208. With regard to climate change and ocean acidification, the best available science is found in the works of the IPCC which reflect the scientific consensus. As noted in paragraph 51 above, most of the participants expressed the view that the IPCC reports are authoritative assessments of the scientific knowledge on climate change and referred to them in their pleadings in the present proceedings. In this regard, the Tribunal considers that the assessments of the IPCC relating to climate-related risks and climate change mitigation deserve particular consideration.

209. In the 2018 Report, the IPCC concludes that there is a high risk of a much worse outcome if temperature increases exceed 1.5°C above pre-industrial levels (2018 Report, Summary for Policymakers, p. 10). It points out significant differences in impacts when global temperature increases are maintained within 1.5°C as compared to 2°C. It states with high confidence that limiting global warming to 1.5°C compared to 2°C

> is projected to reduce increases in ocean temperature as well as associated increases in ocean acidity and decreases in ocean oxygen levels … Consequently, limiting global warming to 1.5°C is projected to reduce risks to marine biodiversity, fisheries, and ecosystems, and their functions and services to humans.
> (*ibid*., p. 8)

As to ocean acidification, the IPCC states with high confidence that

> [t]he level of ocean acidification due to increasing CO_2 concentrations associated with global warming of 1.5°C is projected to amplify the adverse effects of warming, and even further at 2°C, impacting the growth, development, calcification, survival, and thus abundance of a broad range of species, for example, from algae to fish.
> (*ibid*., p. 9)

210. As to emission pathways, the IPCC states in the 2018 Report that "[l]imiting warming to 1.5°C implies reaching net zero CO_2 emissions globally around 2050 and concurrent deep reductions in emissions of non-CO_2 forcers, particularly methane (*high confidence*)" (2018 Report, p. 95). It also states in the 2023 Synthesis Report that

> [d]eep, rapid, and sustained GHG emissions reductions, reaching net zero CO_2 emissions and including strong emissions reductions of other GHGs, in particular CH_4, are necessary to limit warming to 1.5°C … or less than 2°C … by the end of century (*high confidence*).
> (2023 Synthesis Report, p. 68)

211. The Tribunal notes that while most of the participants in the proceedings agree that States should refer to the science in determining necessary measures, there is disagreement among them as to its exact role. In this regard, it was contended that best available scientific standards require States, at a minimum, to take all measures objectively necessary to limit average global temperature rise to no more than 1.5°C above pre-industrial levels, without overshoot, taking into account any current emission gaps. It was also contended that States are required to reach global peaking of GHG emissions as soon as possible and undertake rapid reduction thereafter in accordance with the best available science. However, other participants took the view that while the best available science is a relevant factor for States to consider in assessing necessary measures under article 194, paragraph 1, of the Convention, it is not the only relevant factor to be considered. It was argued in this regard that the view that necessary measures must be aimed at limiting average temperature rise to 1.5°C above pre-industrial levels would be to elevate scientific information to the status of a legal obligation under the Convention, without accounting for the other factors. According to this view, some of those factors may point in different directions from others, and a State must weigh them in any particular circumstance.

212. The Tribunal considers that in the determination of necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, the science undoubtedly plays a crucial role, as it is key to understanding the causes, effects and dynamics of such pollution and thus to providing the effective response. However, this does not mean that the science alone should determine the content of necessary measures. In the Tribunal's view, as indicated above, there are other relevant factors that should be considered and weighed together with the best available science.

213. The Tribunal wishes to add at this juncture that in determining necessary measures, scientific certainty is not required. In the absence of such certainty, States must apply the precautionary approach in regulating marine pollution from anthropogenic GHGs. While the precautionary approach is not explicitly referred to in the Convention, such approach is implicit in the very notion of pollution of the marine environment, which encompasses potential deleterious effects. In this regard, the Tribunal recalls the observation of the Seabed Disputes Chamber in *Responsibilities and Obligations of States with Respect to Activities in the Area* (hereinafter "the *Area Advisory Opinion*") that

> the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law.
> (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 47, para. 135)

For marine pollution arising from anthropogenic GHG emissions, the precautionary approach is all the more necessary given the serious and irreversible damage that may be caused to the marine environment by such pollution, as is assessed by the best available science.

214. Relevant international rules and standards are another reference point for assessing necessary measures. In the context of climate change, such international rules and standards are found in various climate-related treaties and instruments.

The UNFCCC and the Paris Agreement stand out in this regard as primary treaties addressing climate change. Annex VI to MARPOL, which was amended in 2011 and 2021 with a view to reducing GHG emissions from ships, is also relevant. Volumes III and IV of Annex 16 to the Chicago Convention can be referred to in taking necessary measures to prevent, reduce and control GHG emissions from aircraft. The Montreal Protocol, including the Kigali Amendment, is also of relevance.

215. Most of the participants in the proceedings referred to the UNFCCC and the Paris Agreement as being relevant to the assessment of necessary measures. In this regard, the Tribunal considers the global temperature goal and the timeline for emission pathways set forth in the Paris Agreement particularly relevant. They are based upon the best available science stated above.

216. Article 2, paragraph 1, of the Paris Agreement, as stated above (see para. 72), provides that the Agreement aims to strengthen the global response to the threat of climate change, including by

> [h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.

The dual temperature goal stipulated in the Paris Agreement has been further strengthened by the successive decisions of the Parties to the Paris Agreement. In 2022, for example, the COP adopted the Sharm el-Sheikh Implementation Plan, in which it "[*r*]*eiterates* that the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2 °C and *resolves* to pursue further efforts to limit the temperature increase to 1.5 °C" (Decision 1/CP.27 of 20 November 2022, para. 7; see also Decision FCCC/PA/CMA/2023/L.17 of 13 December 2023, para. 4).

217. Article 4, paragraph 1, of the Paris Agreement sets timelines for emission pathways to achieve the long-term temperature goal set out in Article 2. According to this provision,

> Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century.

218. Article 4, paragraph 2, of the Paris Agreement requires each Party to "prepare, communicate and maintain successive nationally determined contributions that it intends to achieve." Parties then "shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions." In addition, each Party's successive nationally determined contribution "will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

219. Most of the participants in the proceedings took the view that the international rules and standards set out in the UNFCCC and the Paris Agreement are relevant in determining necessary measures under article 194, paragraph 1, of the Convention. The Tribunal notes, however, that there is a divergence of views among participants as to the relationship between the obligations under the Convention, on the one hand, and the obligations and commitments contained in the Paris Agreement, on the other. This dissent concerns, *inter alia*, the role to be accorded to international rules and standards under the Paris Agreement in the determination of necessary measures under article 194, paragraph 1, of the Convention.

220. It was contended in this regard that compliance with the UNFCCC and the Paris Agreement satisfies the specific obligation under article 194 of the Convention to take measures to prevent, reduce and control pollution of the marine environment arising from anthropogenic GHG emissions. It was also argued that Part XII of the Convention should not be interpreted as imposing obligations with respect to such emissions that are inconsistent with, or that go beyond, those agreed by the international community in the specific context of the UNFCCC and the Paris Agreement. According to this view, the UNFCCC and the Paris Agreement are *lex specialis* in respect of the obligations of States Parties under the more general provisions of the Convention. In the same vein, several participants took the view

that, as concerns obligations regarding the effect of climate change, the Convention does not by itself impose more stringent commitments than those laid down in the UNFCCC and the Paris Agreement.

221. Other participants disagreed with those views. It was contended that the question of what measures are necessary to prevent, reduce and control pollution of the marine environment is not to be interpreted solely or primarily by reference to the separate and independent commitments under the specialized treaties on climate change. It was also contended that the Paris Agreement should be considered as a minimum standard for compliance with Part XII of the Convention as concerns the deleterious effects of climate change. Similarly, many participants expressed the view that the Paris Agreement does not exhaust States' obligations to protect and preserve the marine environment from the adverse impacts of climate change. It was stated in this regard that while any true obligations under those specialized treaties are to be taken into account, this in no way precludes the Tribunal from going beyond the Paris Agreement. Many participants also took the view that it is not necessary to apply the principle of *lex specialis,* as no conflict exists between the rules concerned.

222. In the view of the Tribunal, the UNFCCC and the Paris Agreement, as the primary legal instruments addressing the global problem of climate change, are relevant in interpreting and applying the Convention with respect to marine pollution from anthropogenic GHG emissions. In particular, the temperature goal and the timeline for emission pathways set out in the Paris Agreement inform the content of necessary measures to be taken under article 194, paragraph 1, of the Convention. However, the Paris Agreement does not require the Parties to reduce GHG emissions to any specific level according to a mandatory timeline but leaves each Party to determine its own national contributions in this regard.

223. The Tribunal does not consider that the obligation under article 194, paragraph 1, of the Convention would be satisfied simply by complying with the obligations and commitments under the Paris Agreement. The Convention and the Paris Agreement are separate agreements, with separate sets of obligations. While the Paris Agreement complements the Convention in relation to the obligation to

regulate marine pollution from anthropogenic GHG emissions, the former does not supersede the latter. Article 194, paragraph 1, imposes upon States a legal obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions. If a State fails to comply with this obligation, international responsibility would be engaged for that State.

224. The Tribunal also does not consider that the Paris Agreement modifies or limits the obligation under the Convention. In the Tribunal's view, the Paris Agreement is not *lex specialis* to the Convention and thus, in the present context, *lex specialis derogat legi generali* has no place in the interpretation of the Convention. Furthermore, as stated above, the protection and preservation of the marine environment is one of the goals to be achieved by the Convention. Even if the Paris Agreement had an element of *lex specialis* to the Convention, it nonetheless should be applied in such a way as not to frustrate the very goal of the Convention.

Available means and capabilities

225. The Tribunal will now consider other factors relevant to the determination of necessary measures to prevent, reduce and control marine pollution. Article 194, paragraph 1, of the Convention provides that States shall take necessary measures, using for this purpose "the best practicable means at their disposal" and "in accordance with their capabilities". Thus, the scope and content of necessary measures may vary depending on the means available to States and their capabilities, such as their scientific, technical, economic and financial capabilities.

226. The reference to "the best practicable means at their disposal" and "in accordance with their capabilities" injects a certain degree of flexibility in implementing the obligation under article 194, paragraph 1, of the Convention. In particular, it seeks to accommodate the needs and interests of States with limited means and capabilities, and to lessen the excessive burden that the implementation of this obligation may entail for those States. However, the reference to available means and capabilities should not be used as an excuse to unduly postpone, or

even be exempt from, the implementation of the obligation to take all necessary measures under article 194, paragraph 1.

227. In the context of marine pollution from anthropogenic GHG emissions, States with greater means and capabilities must do more to reduce such emissions than States with less means and capabilities. The Tribunal notes in this regard that both the UNFCCC and the Paris Agreement recognize the principle of common but differentiated responsibilities and respective capabilities as a key principle in their implementation. Article 3 of the UNFCCC refers to this principle as one of the principles to guide the Parties in their actions to achieve the objective of that Convention and to implement its provisions. Article 2, paragraph 2, of the Paris Agreement also states that "[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

228. Article 4, paragraph 4, of the Paris Agreement, in particular, stipulates the differentiated responsibilities between developed country Parties and developing country Parties with respect to GHG mitigation efforts as follows:

> Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.

229. The Tribunal considers that while the obligation under article 194, paragraph 1, of the Convention does not refer to the principle of common but differentiated responsibilities and respective capabilities as such, it contains some elements common to this principle. Thus, the scope of the measures under this provision, in particular those measures to reduce anthropogenic GHG emissions causing marine pollution, may differ between developed States and developing States. At the same time, it is not only for developed States to take action, even if they should "continue taking the lead". All States must make mitigation efforts.

Obligation to harmonize policies

230. Article 194, paragraph 1, of the Convention imposes an obligation upon States to endeavour to harmonize their policies in taking necessary measures to prevent, reduce and control marine pollution. The word “endeavour” indicates that States must make every effort to harmonize their policy but are not required to achieve such harmonization. Given the nature of marine pollution, it is not difficult to see the need for, and the benefit of, harmonization of policies. Lack of harmonization may make the anti-pollution policy of each State less effective. This is particularly true for marine pollution arising from anthropogenic GHG emissions, in light of its diffused causes and global effects.

Duty not to transfer or transform, and use of technologies

231. Article 195 of the Convention requires States, in taking measures to prevent, reduce and control pollution of the marine environment, not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another. In this context, some participants raised the issue of marine geoengineering. Marine geoengineering would be contrary to article 195 if it has the consequence of transforming one type of pollution into another. It may further be subject to article 196 of the Convention which requires States, *inter alia*, to take all measures necessary to prevent, reduce and control marine pollution resulting from the use of technologies under their jurisdiction or control. The Tribunal is aware that marine geoengineering has been the subject of discussions and regulations in various fora, including the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters 1972 and its 1996 Protocol, and the CBD.

(b) Nature of the obligation

232. The Tribunal will now turn to the question of the nature of the obligation under article 194, paragraph 1, of the Convention. This obligation requires States to take all measures that are necessary to prevent, reduce and control pollution of the marine environment. As stated above, the prevention, reduction and control of marine

pollution is the objective or result States must seek to achieve by taking necessary measures.

233. In the view of the Tribunal, what is required of States under this provision is not to guarantee the prevention, reduction and control of marine pollution at all times but to make their best efforts to achieve such result. In the words of the Seabed Disputes Chamber in the *Area Advisory Opinion*, this is "an obligation of conduct", and not "an obligation of result". As such, it is an obligation "to deploy adequate means, to exercise best possible efforts, to do the utmost" to obtain the intended result (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 41, para. 110). It is thus the conduct of a State, not the result which would be entailed by the conduct, that will determine whether the State has complied with its obligation under article 194, paragraph 1, of the Convention.

234. Since article 194, paragraph 1, of the Convention provides for an obligation of conduct, it requires States to act with "due diligence" in taking necessary measures to prevent, reduce and control marine pollution. As the Seabed Disputes Chamber has stated, "[t]he notions of obligations 'of due diligence' and obligations 'of conduct' are connected" (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 41, para. 111).

235. The obligation of due diligence requires a State to put in place a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulate the activities in question, and to exercise adequate vigilance to make such a system function efficiently, with a view to achieving the intended objective. The Tribunal notes in this regard that the ICJ, in *Pulp Mills on the River Uruguay,* described an obligation to act with due diligence as follows:

> It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators.

(*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 14, at p. 79, para. 197)

236. This obligation of due diligence is particularly relevant in a situation in which the activities in question are mostly carried out by private persons or entities. The obligation to regulate marine pollution from anthropogenic GHG emissions is a primary example in this respect. In that situation, it would not be reasonable to hold a State, which has acted with due diligence, responsible simply because such pollution has occurred.

237. Most of the participants in these proceedings expressed the view that the obligation under article 194, paragraph 1, of the Convention is an obligation of conduct and not an obligation of result. They also stated that it is an obligation of due diligence. However, it was contended that while the obligation under article 194, paragraph 1, is an obligation for States to adopt a certain conduct, it does also mean that States Parties have a positive obligation of result, which is to adopt and implement all measures necessary to prevent, reduce and control marine pollution. It was further contended that the provisions of Part XII of the Convention, and in particular articles 192 and 194, entail but also go beyond due diligence obligations. It was also suggested that the obligation under article 194, paragraph 1, is divided into the obligation of result with respect to governmental activities, such as taking all necessary measures, and the obligation of due diligence with respect to activities of non-State actors. In response, it was argued that while the wording of article 194 assumes that necessary measures must be taken, this in itself does not lead to the conclusion that this is an obligation of result.

238. The Tribunal observes that the obligation under article 194, paragraph 1, of the Convention, and, in fact, obligations under some other provisions of Part XII, including article 194, paragraph 2, are formulated in such a way as to prescribe not only the required conduct of States but also the intended objective or result of such conduct. Whether this obligation is that of conduct or of result depends on whether States are required to achieve the intended objective or result, i.e., prevention, reduction and control of marine pollution. This, in turn, depends essentially upon the text of the relevant provision and the overall circumstances envisaged by it. As

stated above (see paras. 232 to 236), the Tribunal considers that what is required under article 194, paragraph 1, is not to achieve the prevention, reduction and control of marine pollution but to take all necessary measures to that end.

239. In the words of the Seabed Disputes Chamber in the *Area Advisory Opinion*, due diligence is a "variable concept" (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 43, para. 117). It is difficult to describe due diligence in general terms, as the standard of due diligence varies depending on the particular circumstances to which an obligation of due diligence applies. There are several factors to be considered in this regard. They include scientific and technological information, relevant international rules and standards, the risk of harm and the urgency involved. The standard of due diligence may change over time, given that those factors constantly evolve. In general, as the Seabed Disputes Chamber stated, "[t]he standard of due diligence has to be more severe for the riskier activities" (*ibid*.). The notion of risk in this regard should be appreciated in terms of both the probability or foreseeability of the occurrence of harm and its severity or magnitude.

240. In the context of marine pollution from anthropogenic GHG emissions, many participants in the proceedings expressed the view that the standard of due diligence should be set high. Some participants contended that due diligence cannot be interpreted as a simple best effort standard; a due diligence standard for marine pollution caused by GHG emissions should be substantially higher than best efforts, which has traditionally characterized pure conduct obligations; and the level of diligence must be set at its most severe in the case of climate change.

241. Best available science informs that anthropogenic GHG emissions pose a high risk in terms of foreseeability and severity of harm to the marine environment. As noted above (see para. 62), the IPCC, in its 2023 Synthesis Report, concludes that "[r]isks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming (*very high confidence*)" (2023 Synthesis Report, p. 14). There is also broad agreement within the scientific community that if global temperature increases exceed 1.5°C, severe consequences for the marine environment would ensue. In light of such information,

the Tribunal considers that the standard of due diligence States must exercise in relation to marine pollution from anthropogenic GHG emissions needs to be stringent. However, its implementation may vary according to States' capabilities and available resources. Such implementation requires a State with greater capabilities and sufficient resources to do more than a State not so well placed. Nonetheless, implementing the obligation of due diligence requires even the latter State to do whatever it can in accordance with its capabilities and available resources to prevent, reduce and control marine pollution from anthropogenic GHG emissions.

242. The obligation of due diligence is also closely linked with the precautionary approach. As the Seabed Disputes Chamber stated in the *Area Advisory Opinion*, the precautionary approach is "an integral part of the general obligation of due diligence" (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 46, para. 131). Therefore, States would not meet their obligation of due diligence under article 194, paragraph 1, of the Convention if they disregarded or did not adequately account for the risks involved in the activities under their jurisdiction or control. This is so, even if scientific evidence as to the probability and severity of harm to the marine environment of such activities were insufficient. Accordingly, States must apply the precautionary approach in their exercise of due diligence to prevent, reduce and control marine pollution from anthropogenic GHG emissions.

(c) Conclusion

243. To conclude, under article 194, paragraph 1, of the Convention, States Parties to the Convention have the specific obligations to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions and to endeavour to harmonize their policies in this connection. Such measures should be determined objectively, taking into account, *inter alia*, the best available science and relevant international rules and standards contained in climate change treaties such as the UNFCCC and the Paris Agreement, in particular the global temperature goal of limiting the temperature increase to 1.5°C above pre-industrial levels and the timeline for emission pathways to achieve that goal. The scope and content of necessary measures may vary in accordance with the means available to

States Parties and their capabilities. The necessary measures include, in particular, those to reduce GHG emissions. The obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions is one of due diligence. The standard of due diligence under article 194, paragraph 1, of the Convention is stringent, given the high risks of serious and irreversible harm to the marine environment from such emissions. However, the implementation of the obligation of due diligence may vary according to States' capabilities and available resources.

2. Obligation under article 194, paragraph 2, of the Convention

244. The Tribunal will now proceed to consider the obligation under article 194, paragraph 2, of the Convention in relation to anthropogenic GHG emissions. This provision sets out the obligation of States in the situation of transboundary pollution. It imposes upon States a particular obligation applicable to the transboundary setting in addition to the obligation to prevent, reduce and control marine pollution under article 194, paragraph 1.

245. Article 194, paragraph 2, of the Convention requires States to take all measures necessary to ensure that the following two situations do not occur: first, activities under their jurisdiction or control do not cause damage by pollution to other States and their environment; and second, pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights.

246. The obligation stipulated in article 194, paragraph 2, of the Convention bears a close resemblance to the well-established principle of harm prevention. First developed through arbitral and judicial decisions, this principle was incorporated in Principle 21 of the Stockholm Declaration, which states that "States have … the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." This principle was reaffirmed in Principle 2 of the Rio Declaration. The Tribunal notes in this regard that the ICJ stated in the *Legality of the Threat or Use of Nuclear Weapons*:

> The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.
> (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 226, at p. 242, para. 29; see also *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, decision of 24 May 2005, RIAA, Vol. XXVII*, p. 35, at pp.66-67, para. 59)

(a) Scope and content of the obligation

247. The phrase "activities under their jurisdiction or control" refers to activities carried out by both public and private actors. In addition, there should be a link of jurisdiction or control between such activities and a State. The concept of "jurisdiction or control" of a State in this context is a broad one, encompassing not only its territory but also areas in which the State can, in accordance with international law, exercise its competence or authority. Such areas include, for example, a State's exclusive economic zone and continental shelf. Activities carried out on board ships or aircraft which are registered in a State may also be considered activities under the jurisdiction of that State.

248. The Tribunal notes that while "damage" is mentioned in the first situation of transboundary pollution involving two or more States, there is no such reference in the second situation. Given that the notion of pollution involves both actual and potential deleterious effects on the marine environment, the obligation in the former situation should be understood as requiring the prevention of actual damage by pollution, whereas the obligation in the latter situation extends not only to damage that actually occurred but also to damage that is likely to occur. In this sense, article 194, paragraph 2, of the Convention imposes a more stringent obligation by requiring States to prevent the "spread" of pollution than the principle laid down in the Stockholm Declaration and the Rio Declaration which refers to "damage" to the environment of other States and of areas beyond the limits of national jurisdiction.

249. Article 194, paragraph 2, of the Convention, unlike paragraph 1, does not refer to the means to be employed by States in taking necessary measures or to

capabilities. The absence of such reference could be understood to imply that the scope and content of necessary measures to be taken by States under article 194, paragraph 2, are not differentiated in accordance with the availability of means and capabilities. The transboundary context of the obligation under paragraph 2 could lend some support to such understanding. However, in the view of the Tribunal, despite the lack of the above reference, the scope and content of necessary measures under article 194, paragraph 2, may differ among States in accordance with the availability of means and capabilities. As will be seen below, this obligation is an obligation of due diligence, and its implementation may vary in relation to several factors, including the capabilities of each State.

250. In the context of anthropogenic GHG emissions causing marine pollution, article 194, paragraph 2, of the Convention requires States to take all necessary measures to ensure that GHG emissions under their jurisdiction or control do not cause damage to other States and their environment, and that pollution arising from such emissions under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights. Many participants in the proceedings took the view that article 194, paragraph 2, is relevant with respect to marine pollution caused by anthropogenic GHG emissions. It was submitted in this regard that, in order to fulfil the obligation under article 194, paragraph 2, States must be at least as diligent as necessary to limit average global temperature rise to no more than 1.5°C. The Tribunal has stated above that the temperature goal of 1.5°C is one of the relevant factors to consider in determining necessary measures under article 194, paragraph 1, but that it is not the only such factor. In the Tribunal's view, this finding applies equally to the obligation under article 194, paragraph 2.

251. On the other hand, it was contended that GHG emissions are not activities of the kind to which article 194, paragraph 2, of the Convention is directed. According to this view, given that GHG emissions from the territory of one State will contribute to the volume of emissions in the atmosphere for decades to come, this provision cannot sensibly be interpreted as requiring States to ensure that such emissions do not spread to the territory of another State or on to the high seas. It was further contended that even if article 194, paragraph 2, covers GHG emissions, the measures necessary to ensure that such emissions do not cause damage to the

environment of other States, and that pollution does not spread beyond national jurisdiction, go no further than the measures necessary to prevent, reduce or control pollution pursuant to article 194, paragraph 1.

252. The Tribunal has concluded above that anthropogenic GHG emissions into the atmosphere fall under the definition of pollution of the marine environment within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention. It follows that the obligations under article 194 thus apply to marine pollution from such emissions. In the Tribunal's view, there appears to be no convincing reason to exclude the application of article 194, paragraph 2, to such pollution. It is acknowledged that, given the diffused and cumulative causes and global effects of climate change, it would be difficult to specify how anthropogenic GHG emissions from activities under the jurisdiction or control of one State cause damage to other States. However, this difficulty has more to do with establishing the causation between such emissions of one State and damage caused to other States and their environment. This should be distinguished from the applicability of an obligation under article 194, paragraph 2, to marine pollution from anthropogenic GHG emissions.

253. The Tribunal is also not convinced by the argument that the obligation under article 194, paragraph 2, of the Convention can be satisfied by meeting the obligation under paragraph 1. Such a view would have the consequence of depriving the obligation under paragraph 2 of any effect with respect to marine pollution from anthropogenic GHG emissions. The Tribunal considers that article 194, paragraph 2, imposes upon States a particular obligation in the context of transboundary pollution.

(b) Nature of the obligation

254. The obligation under article 194, paragraph 2, of the Convention requires States to take all measures necessary to ensure that activities under their jurisdiction do not cause damage by pollution to other States and their environment and that pollution arising from their activities does not spread beyond the limits of their national jurisdiction. The Tribunal considers that this obligation is an obligation of due diligence for the same reason stated in the context of the obligation under

article 194, paragraph 1. The Tribunal recalls that the Seabed Disputes Chamber in the *Area Advisory Opinion* referred to article 194, paragraph 2, as an example of such obligation (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 42, para. 113).

255. It was argued that the obligation under article 194, paragraph 2, of the Convention is an explicit and broad obligation of States to adopt all measures necessary to ensure that certain events will not occur, whereas the obligation the Seabed Disputes Chamber considered in the *Area Advisory Opinion* was the responsibility to ensure compliance as set out in article 139 of the Convention. According to this argument, the obligation under article 194, paragraph 2, therefore, goes beyond acting merely with due diligence and encompasses an obligation of result. The Tribunal has already expressed its view on this argument in relation to the obligation under article 194, paragraph 1, of the Convention. That finding is equally valid for the obligation under article 194, paragraph 2.

256. As stated above, the standard of due diligence is variable, depending upon relevant factors, including risks of harm involved in activities. With respect to transboundary pollution affecting the environment of other States, the standard of due diligence can be even more stringent.

257. In this regard, the Tribunal wishes to emphasize that an obligation of due diligence should not be understood as an obligation which depends largely on the discretion of a State or necessarily requires a lesser degree of effort to achieve the intended result. The content of an obligation of due diligence should be determined objectively under the circumstances, taking into account relevant factors. In many instances, an obligation of due diligence can be highly demanding. Therefore, it would not be correct to assume that the obligation under article 194, paragraph 2, of the Convention, as an obligation of due diligence, would be less conducive to the prevention, reduction and control of marine pollution from anthropogenic GHG emissions.

(c) Conclusion

258. To conclude, article 194, paragraph 2, of the Convention imposes upon States Parties a particular obligation applicable to the transboundary setting in addition to the obligation to prevent, reduce and control marine pollution from anthropogenic GHG emissions. Under this provision, States Parties have the specific obligation to take all measures necessary to ensure that anthropogenic GHG emissions under their jurisdiction or control do not cause damage to other States and their environment, and that pollution from such emissions under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights. It is an obligation of due diligence. The standard of due diligence under article 194, paragraph 2, can be even more stringent than that under article 194, paragraph 1, because of the nature of transboundary pollution.

E. Obligations applicable to specific sources of pollution

259. Having addressed the obligations of States common to the prevention, reduction and control of pollution from any source, the Tribunal will now proceed to examining obligations relating to pollution from specific sources. The relevant provisions in this regard are found in sections 5 and 6 of Part XII of the Convention.

260. Section 5 of Part XII of the Convention addresses the obligations to adopt national laws and regulations and establish international rules and standards to prevent, reduce and control marine pollution from six different sources: pollution from land-based sources (article 207), pollution from seabed activities subject to national jurisdiction (article 208), pollution from activities in the Area (article 209), pollution by dumping (article 201), pollution from vessels (article 211), and pollution from or through the atmosphere (article 212). In particular, this section addresses the relationship between national legislation and international rules and standards, and how States should refer to international rules and standards in adopting their national laws and regulations. Depending on the specific sources of pollution, different formulations of reference to international rules and standards are introduced in section 5.

261. Section 6 of Part XII of the Convention addresses the obligation to enforce national laws and regulations and implement international rules and standards. This section follows the source-specific approach of the previous section. The provisions of section 6, as an enforcement sequel to national legislation and international rules and standards adopted in accordance with section 5, need to be read together with the corresponding provisions of that section.

262. The initial issue the Tribunal should consider is how to characterize pollution of the marine environment from anthropogenic GHG emissions in terms of specific sources of pollution. This is necessary because the scope and content of the obligations of States under section 5 of Part XII vary depending on the specific source of pollution. Most participants in the proceedings took the view that marine pollution from anthropogenic GHG emissions can be considered either pollution from land-based sources or pollution from or through the atmosphere. They also expressed the view that marine pollution from such emissions from vessels can be considered either pollution from vessels or pollution from or through the atmosphere. The Tribunal notes in this regard that Question (a) asks it to identify the specific obligations of States Parties to prevent, reduce and control marine pollution in relation to deleterious effects caused by “anthropogenic GHG emissions into the atmosphere”.

263. According to the information submitted to the Tribunal, most anthropogenic GHG emissions into the atmosphere causing marine pollution originate from land-based sources. In addition, such emissions originate from vessels or aircraft. There are also some GHG emissions from other sources, including from certain seabed activities such as venting and flaring.

264. While there are multiple sources of GHG emissions into the atmosphere, the Tribunal considers that the types of pollution most relevant to the present proceedings are confined to marine pollution caused by anthropogenic GHG emissions into the atmosphere from land-based sources, vessels and aircraft. The relevant provisions under the Convention addressing such pollution are found in articles 207 (pollution from land-based sources), 211 (pollution from vessels) and 212 (pollution from or through the atmosphere). The corresponding provisions for

enforcement are articles 213 (enforcement with respect to pollution from land-based sources), 217 (enforcement by flag States) and 222 (enforcement with respect to pollution from or through the atmosphere).

1. Obligations to adopt national legislation and establish international rules and standards

265. At the outset, the Tribunal wishes to reiterate that articles 207, 211 and 212 of the Convention complement and elaborate the obligations common to all sources of pollution set out in article 194. The interpretation of these articles, therefore, should be consistent with that of article 194. The Tribunal notes that the findings it made in interpreting and applying article 194 in relation to marine pollution from anthropogenic GHG emissions are equally applicable with respect to articles 207, 211 and 212.

(a) Obligations under article 207 of the Convention

266. The Tribunal will now consider the obligations under article 207 of the Convention, which reads:

> *Pollution from land-based sources*
>
> 1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures.
>
> 2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.
>
> 3. States shall endeavour to harmonize their policies in this connection at the appropriate regional level.
>
> 4. States, acting especially through competent international organizations or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources, taking into account characteristic regional features, the economic capacity of developing States and their need for economic development. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.

> 5. Laws, regulations, measures, rules, standards and recommended practices and procedures referred to in paragraphs 1, 2 and 4 shall include those designed to minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances, especially those which are persistent, into the marine environment.

267. Article 207 of the Convention imposes upon States three main obligations: first, the obligation to adopt national legislation; second, the obligation to take other necessary measures; and third, the obligation to endeavour to establish international rules, standards and practices and procedures. Those obligations are mostly concerned with establishing the legal framework, both national and international, necessary to prevent, reduce and control marine pollution from land-based sources.

268. In addition to the above three obligations, article 207 of the Convention provides for obligations to endeavour to harmonize policies and to take certain specific measures. Article 207, paragraph 3, requires States to endeavour to harmonize their policies at the appropriate regional level. This obligation is consistent with the obligation to endeavour to harmonize policies under article 194, paragraph 1. Article 207, paragraph 5, which requires States to take measures to minimize the release of toxic, harmful or noxious substances, reiterates what is prescribed in article 194, paragraph 3, subparagraph (a).

269. Article 207, paragraph 1, of the Convention requires States to adopt laws and regulations to prevent, reduce and control marine pollution from land-based sources. Such laws and regulations are a formal means to give effect to necessary measures States must take under article 194 of the Convention. For marine pollution from anthropogenic GHG emissions, central to those laws and regulations is the reduction of such emissions.

270. In adopting laws and regulations, States are required to take into account “internationally agreed rules, standards and recommended practices and procedures”. There is no definition of this phrase in the Convention. Those rules, standards and practices and procedures encompass a broad range of norms, both binding and non-binding in nature. In the context of climate change, they include those contained in climate change treaties such as the UNFCCC and the Paris

Agreement. Accordingly, States Parties to the Convention have an obligation to take into account those norms in adopting their laws and regulations to prevent, reduce and control marine pollution from GHG emissions.

271. The phrase “taking into account” should be understood to mean that States are not required to adopt such rules, standards and practices and procedures in their national laws and regulations. However, States must, in good faith, give due consideration to them. In any case, States must comply with internationally agreed rules and standards, which are binding upon them.

272. Article 207, paragraph 2, of the Convention requires States to take other measures as may be necessary to prevent, reduce and control such pollution. Those measures can be wide-ranging, from the establishment of administrative procedures for the regulation of pollution to the monitoring of risks and effects of marine pollution and assessment of the potential effects of planned activities on the marine environment. In the context of marine pollution from anthropogenic GHG emissions, the Tribunal’s findings with respect to the obligation to take necessary measures under article 194 equally apply to the obligation under this paragraph.

273. Article 207, paragraph 4, of the Convention imposes upon States an obligation to endeavour to establish global and regional rules, standards and recommended practices and procedures to regulate pollution from land-based sources. Thus, States are required to make every effort in good faith to establish such rules, standards and practices and procedures, but are not required to succeed in establishing them. In this respect, States should act through competent international organizations or diplomatic conference. The efforts of States must be on a continuing basis. In the context of marine pollution from anthropogenic GHG emissions, this obligation means that States, which are parties to relevant international agreements such as the UNFCCC and the Paris Agreement, are required to participate in the process under those agreements with a view to “strengthen[ing] the global response to the threat of climate change”, as stated in Article 2, paragraph 1, of the Paris Agreement.

(b) Obligations under article 212 of the Convention

274. The Tribunal will now consider the obligations under article 212 of the Convention, which reads:

> *Pollution from or through the atmosphere*
>
> 1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere, applicable to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry, taking into account internationally agreed rules, standards and recommended practices and procedures and the safety of air navigation.
>
> 2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.
>
> 3. States, acting especially through competent international organizations or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control such pollution.

275. Article 212 of the Convention imposes upon States three obligations: first, the obligation to adopt national legislation to prevent, reduce and control marine pollution from or through the atmosphere; second, the obligation to take other necessary measures; and third, the obligation to endeavour to establish international rules, standards and practices and procedures.

276. There is no substantial difference between the obligations under article 212 of the Convention and those under article 207 in terms of their scope. While article 212 does not explicitly provide for the obligations to endeavour to harmonize policies and to take measures to minimize the release of toxic, harmful or noxious substances into the marine environment, as article 207 does, such obligations apply with respect to pollution from or through the atmosphere under article 212. The obligation to endeavour to harmonize policies is an obligation common to all sources of pollution, including pollution from or through the atmosphere, under article 194, paragraph 1. The obligation to minimize the release of toxic, harmful or noxious substances applies to pollution from or through the atmosphere under article 194, paragraph 3, subparagraph (a).

277. The content of the obligations under article 212 of the Convention is similar to that of the obligations under article 207. Thus, the findings the Tribunal made above with respect to the obligations under article 207 apply *mutatis mutandis* to those under article 212. In this regard, "internationally agreed rules and standards and recommended practices and procedures" relevant to pollution from or through the atmosphere include not only those contained in climate change treaties but also those in instruments such as Volume IV of Annex 16 to the Chicago Convention establishing a carbon offsetting and reduction scheme for international aviation. The Tribunal also notes that the IMO adopted amendments to Annex VI to MARPOL in 2011 and 2021 with a view to reducing GHG emissions from ships. As stated above, the IMO also recently adopted the 2023 IMO GHG Strategy to enhance its contribution to global efforts in this regard (see para. 80 above).

(c) Obligations under article 211 of the Convention

278. The Tribunal will now consider the obligations relating to marine pollution from vessels. Those obligations are found in article 211 of the Convention. In the context of marine pollution from anthropogenic GHG emissions, the most relevant provision is article 211, paragraph 2. The Tribunal will confine itself to that provision, which reads:

> States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.

279. Article 211, paragraph 2, of the Convention imposes upon States the obligation to adopt laws and regulations to prevent, reduce and control marine pollution from vessels flying their flag or of their registry. Thus, the obligation under this provision is incumbent on the flag State. Such laws and regulations must at least have the same effect as that of generally accepted international rules and standards. This provision, therefore, provides for the minimum threshold national legislation must meet. States may adopt more stringent laws and regulations than generally accepted international rules and standards. This requirement stands in contrast with

the requirement to “take into account” internationally agreed rules and standards under articles 207 and 212.

280. The term “generally accepted international rules and standards” is not defined in the Convention. Such rules and standards may refer to those contained in international legal instruments that are accepted by a sufficiently large number of States. They must be established through the competent international organization or general diplomatic conference. The term “the competent international organization” in this context is understood to refer to the IMO. The reference to “the competent international organization or general diplomatic conference” is distinct from the reference to “competent international organizations or diplomatic conference” made in articles 207 and 212 of the Convention. Thus, only those rules and standards that satisfy the above requirements would qualify as “generally accepted international rules and standards”. In the context of marine pollution from GHG emissions from vessels, the Tribunal notes in this regard that the IMO adopted amendments to Annex VI to MARPOL in 2011 and 2021 with a view to reducing GHG emissions from ships.

2. Obligation of enforcement

281. The Tribunal now turns to the obligation of enforcement under articles 213, 217 and 222 of the Convention. The scope and content of the obligations with respect to land-based pollution under article 213 and with respect to pollution from or through the atmosphere under article 222 are similar. For the purpose of the present Advisory Opinion, the Tribunal will, therefore, address those obligations together. It will then deal with the obligation of enforcement with respect to pollution from vessels under article 217.

(a) Obligations under articles 213 and 222 of the Convention

282. Article 213 of the Convention reads:

> *Enforcement with respect to pollution from land-based sources*
>
> States shall enforce their laws and regulations adopted in accordance with article 207 and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment from land-based sources.

Article 222 of the Convention reads:

> *Enforcement with respect to pollution from or through the atmosphere*
>
> States shall enforce, within the air space under their sovereignty or with regard to vessels flying their flag or vessels or aircraft of their registry, their laws and regulations adopted in accordance with article 212, paragraph 1, and with other provisions of this Convention and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment from or through the atmosphere, in conformity with all relevant international rules and standards concerning the safety of air navigation.

283. The above two articles address, respectively, the enforcement of national legislation and the implementation of applicable international rules and standards with respect to pollution from land-based sources and pollution from or through the atmosphere. States have two obligations in this regard: first, the obligation to enforce their laws and regulations; and second, the obligation to adopt laws and regulations and take other measures necessary to implement applicable international rules and standards.

284. The first obligation requires States to enforce their laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources or from or through the atmosphere. The word “enforce” is a broad term, encompassing the variety of ways and means to ensure compliance with laws and regulations within the framework of the national legal system. Such ways and means

may include, for example, monitoring and inspection, administrative guidance, investigation and prosecution for breaches of laws, and judicial or quasi-judicial proceedings. The Tribunal notes in this regard that article 235, paragraph 2, of the Convention provides for the obligation of States to "ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction." Section 7 of Part XII of the Convention provides for various safeguards relating to the institution of proceedings and the exercise of powers of enforcement.

285. The second obligation requires States to adopt laws and regulations and take other measures necessary to implement applicable international rules and standards. The term "applicable international rules and standards" should be understood to refer to those rules and standards which are binding upon the State concerned either as treaty or customary international law. Accordingly, they are to be distinguished from "internationally agreed rules, standards and recommended practices and procedures", which States must "[take] into account" in adopting national laws and regulations under articles 207 or 212 of the Convention. Such rules, standards and practices and procedures do not have to be binding upon the States. Applicable international rules and standards must be established through competent international organizations or diplomatic conference. Such rules and standards must be implemented in accordance with the legal system of each State.

286. In the context of marine pollution from anthropogenic GHG emissions, articles 213 and 222 of the Convention should be interpreted as imposing an obligation to adopt laws and regulations and to take measures necessary to implement, among others, rules and standards set out in climate change treaties and other relevant instruments. If a State Party to the Convention, which is bound by those rules and standards, fails to take such measures, its international responsibility would be engaged for breach of the obligations under article 213 or 222 of the Convention.

(b) Obligations under article 217 of the Convention

287. Article 217 of the Convention provides for enforcement by States with respect to marine pollution from vessels flying their flag or of their registry. The Convention, in particular articles 218 and 220, also provides for enforcement by port States and coastal States. However, in the context of marine pollution from anthropogenic GHG emissions, the most relevant provision is article 217, paragraph 1, and the Tribunal will confine itself to this provision for the purpose of the present proceedings. Article 217, paragraph 1, reads:

> States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organization or general diplomatic conference, and with their laws and regulations adopted in accordance with this Convention for the prevention, reduction and control of pollution of the marine environment from vessels and shall accordingly adopt laws and regulations and take other measures necessary for their implementation. Flag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.

288. Article 217, paragraph 1, of the Convention imposes upon States the obligation to ensure that vessels flying their flag or of their registry comply with applicable international rules and standards and their laws and regulations. To this end, it requires States to adopt laws and regulations and take other measures necessary to implement such international rules and standards as well as their national laws and regulations.

289. “[A]pplicable international rules and standards” refer to those rules and standards that are binding upon the States concerned. Such rules and standards must be established through the competent international organization or general diplomatic conference. The findings made by the Tribunal in this regard in relation to article 211 of the Convention equally apply to the present paragraph. The national “laws and regulations” to be implemented must be adopted in accordance with the Convention, in particular article 211, paragraph 2.

290. The means of implementation include laws and regulations, and other necessary measures. Such measures may be wide-ranging and include administrative and judicial measures.

291. In the context of marine pollution from anthropogenic GHG emissions from vessels, applicable international rules and standards may be found, *inter alia*, in Annex VI to MARPOL, as amended in 2011 and 2021.

F. Other obligations

292. The Tribunal will now proceed to examine other obligations relevant to its response to Question (a). Such obligations may be found in Part XII of the Convention, section 2 on global and regional cooperation, section 3 on technical assistance, and section 4 on monitoring and environmental assessment.

293. At the outset, the Tribunal points out that its findings in this regard apply not only in response to Question (a) but also in response to Question (b).

1. Global and regional cooperation

294. The Tribunal first wishes to turn to the specific obligations of cooperation under Part XII, section 2, of the Convention.

295. The Tribunal notes that almost all of the participants in the present proceedings shared the view that countering the effects of anthropogenic GHG emissions on the marine environment necessarily requires international cooperation. In this context, reference was made to the existence of a duty to cooperate under general international law, which informs Part XII of the Convention, and it was argued that this duty is central to the examination of the Request. It was also contended that pollution of the marine environment from such emissions calls for a regulatory response which must be supported by international coordination informed by internationally agreed standards. In this regard, references were made to cooperation efforts conducted under the auspices of the UNFCCC and the Paris Agreement. Almost all of the participants expressed the view that article 197 of the

Convention sets out the key obligation of cooperation and that this obligation is further elaborated upon in articles 198, 199, 200 and 201 of the Convention.

296. The Tribunal recalls its finding in the *MOX Plant Case* that "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law" (*MOX Plant (Ireland* v. *United Kingdom)*, *Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 110, para. 82; see also *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, at p. 25, para. 92; *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, *Advisory Opinion, 2 April 2005, ITLOS Reports 2015*, p. 4, at p. 43, para. 140; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment*, *I.C.J. Reports 2010,* p. 14, at p. 49, para. 77).

297. In the Tribunal's view, the duty to cooperate is reflected in and permeates the entirety of Part XII of the Convention. This duty is given concrete form in a wide range of specific obligations of States Parties, which are central to countering marine pollution from anthropogenic GHG emissions at the global level. In this respect, the Tribunal notes the finding of the IPCC that

> [c]limate change has the characteristics of a collective action problem at the global scale, because most GHGs accumulate over time and mix globally, and emissions by any agent (e.g., individual, community, company, country) affect other agents. Effective mitigation will not be achieved if individual agents advance their own interests independently. Collective responses, including international cooperation, are therefore required to effectively mitigate GHG emissions and address other climate change issues.
> (2014 Synthesis Report, Summary for Policymakers, p. 17)

298. Most multilateral climate change treaties, including the UNFCCC and the Paris Agreement, contemplate and variously give substance to the duty to cooperate on the assumption, as indicated in the preamble of the UNFCCC, that "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response".

299. In relation to marine pollution from anthropogenic GHG emissions, the Tribunal notes that the duty to cooperate is an integral part of the general obligations under articles 194 and 192 of the Convention given that the global effects of these emissions necessarily require States' collective action (see paras. 201 and 202 above). Furthermore, specific obligations to cooperate are provided for in Part XII, section 2, in particular in articles 197, 200 and 201. The Tribunal considers that these specific obligations complement the general obligations established in articles 194 and 192 by setting out the means for complying with the latter obligations.

(a) Obligation to cooperate under article 197 of the Convention

300. The core obligation of cooperation is enshrined in article 197 of the Convention, which reads as follows:

> *Cooperation on a global or regional basis*
>
> States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

301. According to article 197 of the Convention, cooperation is expressly aimed at developing a common regulatory framework "for the protection and preservation of the marine environment". Article 197 must be read in conjunction with article 194, paragraph 1, which refers to "all measures" that States shall take, individually or *jointly* as appropriate, in order "to prevent, reduce and control pollution of the marine environment from any source". It follows that cooperation in the formulation and elaboration of international rules, standards and recommended practices and procedures under article 197 is among the joint measures contemplated in article 194, paragraph 1.

302. The obligation to cooperate under article 197 is aimed at the formulation and elaboration of rules, standards and practices and procedures for the protection and preservation of the marine environment, and is characterized by a large degree of

flexibility. Such rules, standards and practices and procedures may be binding or non-binding. States are free to choose whether to cooperate through competent international organizations or otherwise. The possibility of having recourse to various forms of cooperation is particularly useful in the prevention, reduction and control of marine pollution from anthropogenic GHG emissions.

303. The Tribunal observes that most of the participants in the proceedings emphasized the importance of global cooperation through international organizations. In addition, some of the participants referred to regional cooperation insofar as marine pollution from anthropogenic GHG emissions has a particular impact on certain regions.

304. The Tribunal considers that the expression “competent international organizations” used in article 197 of the Convention refers, in the context of the present case, to all international organizations with competence to address, directly or indirectly, the protection and preservation of the marine environment from anthropogenic GHG emissions.

305. Article 197 of the Convention provides for the possibility of having recourse to regional cooperation agreements and plans as a means to combat marine pollution “as appropriate” and “taking into account characteristic regional features”. Given the impacts of pollution from anthropogenic GHG emissions, cooperation on a global scale is typically the most appropriate means to that end. Nevertheless, some effects of marine pollution from such emissions may be particularly harmful for the marine environment of certain geographical areas because of their special characteristics. In such situations, the obligation to cooperate on a global scale may be supported by regional cooperation under article 197 and article 123 on cooperation of States bordering enclosed or semi-enclosed seas.

306. The Tribunal will now turn to the nature of the obligation under article 197 of the Convention. It notes that most of the participants in the present proceedings were of the view that the obligation of cooperation enshrined in article 197 is an obligation of conduct, and that compliance therewith should be assessed by reference to the efforts that States make to coordinate their actions. It was also

generally contended that such obligation is of an ongoing nature, that cooperation must be meaningful, and that States must participate in good faith in cooperative efforts.

307. In the view of the Tribunal, this provision does not oblige States to achieve a normative outcome but to participate meaningfully in the formulation and elaboration of rules, standards and recommended practices and procedures for the protection and preservation of the marine environment.

308. The Tribunal wishes to recall that, in the *SRFC Advisory Opinion*, it stated that

> the obligation to "seek to agree …" under article 63, paragraph 1, and the obligation to cooperate under article 64, paragraph 1, of the Convention are "due diligence" obligations which require the States concerned to consult with one another in good faith, pursuant to article 300 of the Convention. The consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.
> (*Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion of 2 April 2015, ITLOS Reports 2015*, p. 4, at pp. 59-60, para. 210; see also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment*, *I.C.J. Reports 2010,* p. 14, at p. 49, para. 77)

The same reasoning applies to the obligation to cooperate under article 197 of the Convention.

309. Thus, the Tribunal considers that the obligation to cooperate under article 197 of the Convention, either on a global or regional basis, is an obligation of conduct which requires States to act with "due diligence". States are required to fulfil this obligation in good faith.

310. In the Tribunal's view, compliance with the obligation of cooperation is to be assessed by reference to the efforts made by States to formulate and elaborate international rules, standards and recommended practices and procedures. The results achieved by States through cooperation may, however, be relevant in assessing States' compliance with the obligation to cooperate.

311. The obligation of cooperation set out in article 197 of the Convention is of a continuing nature. It requires States to make an ongoing effort to formulate and elaborate rules, standards and recommended practices and procedures. The adoption of a particular treaty, such as the UNFCCC or the Paris Agreement, does not discharge a State from its obligation to cooperate, as the obligation requires an ongoing effort on the part of States in the development of new or revised regulatory instruments, in particular in light of the evolution of scientific knowledge.

(b) Obligation to cooperate under articles 200 and 201 of the Convention

312. The Tribunal notes that article 197 does not exhaust the obligation to cooperate under section 2 of Part XII of the Convention. States are also required to cooperate to promote studies, undertake research programmes, and encourage the exchange of information and data (article 200), and to establish appropriate scientific criteria for regulations (article 201).

313. Article 200 of the Convention reads:

> *Studies, research programmes and exchange of information and data*
>
> States shall cooperate, directly or through competent international organizations, for the purpose of promoting studies, undertaking programmes of scientific research and encouraging the exchange of information and data acquired about pollution of the marine environment. They shall endeavour to participate actively in regional and global programmes to acquire knowledge for the assessment of the nature and extent of pollution, exposure to it, and its pathways, risks and remedies.

Article 201 of the Convention reads:

> *Scientific criteria for regulations*
>
> In the light of the information and data acquired pursuant to article 200, States shall cooperate, directly or through competent international organizations, in establishing appropriate scientific criteria for the formulation and elaboration of rules, standards and recommended practices and procedures for the prevention, reduction and control of pollution of the marine environment.

The obligations under articles 200 and 201 provide the basis for the formulation and elaboration of international rules, standards and recommended practices and

procedures pursuant to article 197. The development of an effective common regulatory framework presupposes the existence of adequate information on the state of the marine environment based on updated scientific criteria and methods.

314. The Tribunal is of the view that articles 200 and 201 of the Convention apply in the context of marine pollution from anthropogenic GHG emissions.

315. Article 200 of the Convention is aimed at ensuring that pollution of the marine environment is properly acknowledged. In particular, this article is important for the development of an adequate common regulatory framework to protect and preserve the marine environment, as provided for under article 197. States are required to cooperate, directly or through competent international organizations, either globally or regionally, *inter alia*, in encouraging the exchange of information and data, primarily on the causes and effects of pollution. Cooperation also involves the search for possible and effective remedies in response to threats to the marine environment.

316. Article 201 of the Convention serves to link article 197 with article 200. Cooperation between States in the formulation and elaboration of rules, standards and recommended practices and procedures must be based on appropriate scientific criteria, developed through coordinated studies, research programmes and exchange of information and data. In particular, cooperation in the formulation and elaboration of a common regulatory framework would be ineffective if it did not rest on a solid scientific basis.

317. The Tribunal recalls that a close relationship between regulatory measures for the protection and preservation of the marine environment, on the one hand, and scientific findings and criteria, on the other, was previously highlighted by the Seabed Disputes Chamber in its *Area Advisory Opinion*. The Chamber held that measures adopted to prevent pollution of the marine environment may need to change over time to become stricter “in light ... of new scientific or technological knowledge” (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 43, para. 117).

318. In the context of anthropogenic GHG emissions, the obligation under article 201 of the Convention requires States to participate in those fora for cooperation aimed at establishing appropriate scientific criteria for the formulation of rules and standards for the prevention, reduction and control of marine pollution from such emissions. An example of such cooperation is the Subsidiary Body for Scientific and Technological Advice (SBSTA) under the UNFCCC, which, *inter alia,* assists the COP and the Meeting of the Parties to the Paris Agreement by providing information and advice on scientific and technological matters.

319. The obligation under article 201 of the Convention requires States to make, in good faith, continuous efforts. Such efforts may be made directly or through competent international organizations, at the global or regional level. Cooperation can be pursued through various international organizations, including those without a specific law of the sea mandate, if the extent and nature of the effects of anthropogenic GHG emissions so require.

320. The participation of States in relevant international organizations and fora in undertaking scientific research programmes, encouraging the exchange of information and data as well as developing scientific criteria for regulating marine pollution from anthropogenic GHG emissions is particularly important in light of the global scale of such emissions.

(c) Conclusion

321. To conclude, the Tribunal finds that articles 197, 200 and 201, read together with articles 194 and 192 of the Convention, impose specific obligations on States Parties to cooperate, directly or through competent international organizations, continuously, meaningfully and in good faith in order to prevent, reduce and control marine pollution from anthropogenic GHG emissions. In this regard, first, States Parties are required to cooperate in formulating and elaborating rules, standards and recommended practices and procedures, consistent with the Convention and based on available scientific knowledge, to counter marine pollution from such emissions. Second, States Parties are required to cooperate to promote studies, undertake scientific research, and encourage the exchange of information and data on marine

pollution from anthropogenic GHG emissions, its pathways, risks and remedies, including mitigation and adaptation measures. Third, States Parties are required to establish appropriate scientific criteria on the basis of which rules, standards and recommended practices and procedures are to be formulated and elaborated to counter marine pollution from such emissions.

2. Technical assistance

322. The Tribunal now turns to the specific obligations contained in Part XII, section 3, of the Convention, namely, article 202 on scientific and technical assistance to developing States and article 203 on preferential treatment for developing States.

323. Article 202 reads:

> *Scientific and technical assistance to developing States*
>
> States shall, directly or through competent international organizations:
>
> (a) promote programmes of scientific, educational, technical and other assistance to developing States for the protection and preservation of the marine environment and the prevention, reduction and control of marine pollution. Such assistance shall include, *inter alia*:
>
> (i) training of their scientific and technical personnel;
> (ii) facilitating their participation in relevant international programmes;
> (iii) supplying them with necessary equipment and facilities;
> (iv) enhancing their capacity to manufacture such equipment;
> (v) advice on and developing facilities for research, monitoring, educational and other programmes;
>
> (b) provide appropriate assistance, especially to developing States, for the minimization of the effects of major incidents which may cause serious pollution of the marine environment;
>
> (c) provide appropriate assistance, especially to developing States, concerning the preparation of environmental assessments.

324. Article 203 of the Convention reads:

> *Preferential treatment for developing States*
>
> Developing States shall, for the purposes of prevention, reduction and control of pollution of the marine environment or minimization of its effects, be granted preference by international organizations in:
>
> (a) the allocation of appropriate funds and technical assistance; and
>
> (b) the utilization of their specialized services.

325. The Tribunal notes that most of the participants in the present proceedings were of the view that assistance to developing States is indispensable in combating pollution of the marine environment from anthropogenic GHG emissions. Such assistance seeks to alleviate the difficulties of developing States in addressing this issue and to enhance their capacity to do so. However, divergent views were expressed on the relationship between the obligation of assistance in the Convention and the principle of common but differentiated responsibilities and respective capabilities contemplated in the UNFCCC. It was contended that obligations of assistance under the Convention are a means of implementing the principle of common but differentiated responsibilities and respective capabilities in the context of the law of the sea. It was also argued that this principle, although not expressly mentioned in the Convention, must be considered, as the Convention and the climate change treaty regime are mutually supportive. It was further maintained that this principle should not be used as a pretext to escape the responsibility that weighs on all States, both individually and collectively, to counter marine pollution from anthropogenic GHG emissions. Other participants took the view that articles 202 and 203 should be interpreted only in the context of the Convention.

326. The Tribunal notes that articles 202 and 203 of the Convention do not refer to the principle of common but differentiated responsibilities and respective capabilities. However, the obligation of assistance to developing States under these articles has some elements underlying this principle in that States with lesser capabilities need assistance from States that are better placed in order to meet their environmental responsibilities.

327. In the view of the Tribunal, scientific, technical, educational and other assistance to developing States that are particularly vulnerable to the adverse effects of climate change is a means of addressing an inequitable situation. Although they contribute less to anthropogenic GHG emissions, such States suffer more severely from their effects on the marine environment. In this regard, the Tribunal notes the relevance of the UNFCCC and the Paris Agreement, which expressly recognize and take into account the specific needs and special circumstances of developing countries, "especially those that are particularly vulnerable to the adverse effects of climate change."

328. The Tribunal notes the fifth preambular paragraph of the Convention which states that the achievement of its goals "will contribute to the realization of a just and equitable international economic order which takes into account … the special interests and needs of developing countries". In the same vein, the General Assembly, in its annual resolution on oceans and the law of the sea, has recognized that

> the realization of the benefits of the Convention could be enhanced by international cooperation, technical assistance and advanced scientific knowledge, as well as by funding and capacity-building, and reiterating the essential need for cooperation, in accordance with States' capabilities, including through capacity-building and transfer and development of marine technology, inter alia, in relation to … the protection and preservation of the marine environment.
> (General Assembly Resolution 78/69, 5 December 2023, p. 4)

329. The Tribunal observes that articles 202 and 203 of the Convention identify a wide range of assistance mechanisms to permit developing States to appropriately address marine pollution from anthropogenic GHG emissions. These mechanisms coexist with those indicated by the UNFCCC (e.g., in Article 4, para. 3; Article 5, para. (b); Article 6, para. (a)(iv)) and the Paris Agreement (e.g., in Articles 9, 10 and 11) for supporting capacity-building, technical development and transfer, and the financial capabilities of developing States.

330. The main recipients of the assistance under article 202 of the Convention are developing States. In the context of marine pollution from anthropogenic GHG emissions, they should be those developing and least developed States that are

most directly and severely affected by the effects of such emissions on the marine environment. The above assistance is confined to that aimed at the protection and preservation of the marine environment and the prevention, reduction and control of marine pollution.

331. The obligation of assistance under article 202 of the Convention includes three categories of measures, the content of which is outlined broadly, allowing for an element of discretion on the part of States.

332. The first category of assistance measures, envisaged in article 202, subparagraph (a), of the Convention, includes the promotion of programmes of scientific, educational, technical and other assistance to developing States. The provision identifies some of the measures for promoting assistance. The purpose of this provision is, in the short and medium term, to provide the adequate scientific and technological knowledge to developing States by facilitating and supporting their participation in relevant international research and capacity-building programmes; and, in the long term, to develop capacities for research, production and management of scientific knowledge and technologies in these States to enable them to set up their own programmes to counter marine pollution from anthropogenic GHG emissions.

333. The Tribunal notes that the wide range of assistance measures provided for in article 202, subparagraph (a), of the Convention is not exhaustive. This is deduced from the expression “include, *inter alia*”, contained in the provision. It may also be noted that there are other provisions of the Convention which deal with assistance to developing States in the fields of science, technology and education (e.g., in Part XIII, section 2, and in Part XIV).

334. The second category of assistance measures, envisaged in article 202, subparagraph (b), of the Convention, concerns the provision of appropriate assistance, especially to developing States, in order to minimize the effects of major incidents which may cause serious marine pollution. This category appears to be of lesser relevance in the context of addressing marine pollution from anthropogenic GHG emissions.

335. The third category of measures, envisaged in article 202, subparagraph (c), of the Convention, is to provide appropriate assistance, especially to developing States, concerning the preparation of environmental assessments. The modalities of assistance are left to the discretion of States.

336. The Tribunal is of the view that “other assistance” referred to in article 202, subparagraph (a), of the Convention may include financial assistance aimed at providing developing States with assistance to promote the programmes and undertake the activities indicated in article 202 of the Convention. It is evident that scientific, educational and technical assistance entails financial implications. As indicated in paragraph 330 above, the financial assistance to developing States is confined to the protection and preservation of the marine environment and the prevention, reduction and control of marine pollution.

337. Article 203 of the Convention shifts the focus from the duty of assistance incumbent on States to the right to preferential treatment enjoyed by developing States within international organizations with respect to the allocation of appropriate funds and technical assistance and the use of their specialized services to prevent, reduce, control and minimize the effects of marine pollution.

338. The Tribunal notes that article 203 of the Convention implies the obligation of States to take, through the international organizations of which they are members, the measures necessary to put into effect preferential treatment for developing States as envisaged in this provision. In the context of marine pollution from anthropogenic GHG emissions, preferential treatment for developing States, in particular those vulnerable to the adverse effects of climate change (see para. 69 above), shall be granted for the purposes of prevention, reduction and control of marine pollution from such emissions or minimization of its effects.

339. To conclude, the Tribunal is of the view that articles 202 and 203 of the Convention set out specific obligations to assist developing States, in particular vulnerable developing States, in their efforts to address marine pollution from anthropogenic GHG emissions. Article 202 provides for the obligation of appropriate

assistance, directly or through competent international organizations, in terms of capacity-building, scientific expertise, technology transfer and other matters. Article 203 reinforces the support to developing States, in particular those vulnerable to the adverse effects of climate change, by granting them preferential treatment in funding, technical assistance and pertinent specialized services from international organizations.

3. Monitoring and environmental assessment

340. The Tribunal will now turn to the specific obligations of States stipulated in Part XII, section 4, of the Convention. Article 204 addresses the monitoring of the risks or effects of pollution; article 205, the publication of reports; and article 206, the assessment of potential effects of activities.

341. Article 204 reads:

> *Monitoring the risks or effects of pollution*
>
> 1. States shall, consistent with the rights of other States, endeavour, as far as practicable, directly or through the competent international organizations, to observe, measure, evaluate and analyse, by recognized scientific methods, the risks or effects of pollution of the marine environment.
>
> 2. In particular, States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.

342. Article 205 reads:

> *Publication of reports*
>
> States shall publish reports of the results obtained pursuant to article 204 or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States.

343. Article 206 reads:

> *Assessment of potential effects of activities*
>
> When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or

> significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.

344. The Tribunal notes that many participants in the present proceedings took the view that section 4 of Part XII of the Convention contains obligations which are highly relevant to the questions posed in the Request. It was contended that this section is concerned with obtaining and disseminating knowledge, and that it plays a critical role in ensuring the compliance of States with their obligations under article 192 and, in particular, article 194. It was further contended that monitoring and assessment conducted by a State pursuant to articles 204 and 206, and any reports made available to States pursuant to article 205, may be relevant in assessing what measures are necessary to prevent, reduce and control pollution of the marine environment from anthropogenic GHG emissions.

345. The Tribunal observes at the outset that the obligations envisaged in section 4 are procedural in nature. As held by the arbitral tribunal in the *Chagos Marine Protected Area Arbitration*, procedural obligations, such as the requirement to conduct an environmental impact assessment, "may, indeed, be of equal or even greater importance than the substantive standards existing in international law" (*Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland*, *Award of 18 March 2015, RIAA, Vol. XXXI*, p. 359, at p. 500, para. 322). Compliance with these procedural obligations is a relevant factor in meeting the general obligations under articles 194 and 192 of the Convention.

(a) Obligation under article 204 of the Convention

346. Under article 204 of the Convention, States shall endeavour to monitor the risks or effects of pollution of the marine environment (paragraph 1) and shall keep under surveillance the effects deriving from any activity in which they are involved, with a view to determining whether this activity is likely to pollute the marine environment (paragraph 2). Both obligations are continuing in nature, in that monitoring and surveillance must be ongoing. The extent of the monitoring obligation

is conditioned by the fact that States, consistent with the rights of other States, are obliged to make every effort, as far as practicable, taking into account their capabilities.

347. Article 204, paragraph 1, of the Convention aims to enhance knowledge of the harmful consequences of marine pollution as a whole. It provides for two phases of monitoring. First, the risks and effects of pollution of the marine environment are to be observed and measured. Second, the data collected are to be evaluated and analysed. In both phases, States are called upon to use “recognized scientific methods”. The standard of “recognized” scientific methods is exacting.

348. With respect to the means through which to fulfil the monitoring obligation, the provision gives discretion to the State concerned. States shall comply with this obligation by acting directly or through the competent international organizations, whether global or regional. In this respect, the Tribunal observes that the adverse effects caused to the marine environment by anthropogenic GHG emissions have been, for many years, the subject of monitoring by international scientific bodies and mechanisms.

349. Article 204, paragraph 2, of the Convention provides for the obligation to keep under surveillance the effects of activities that States have permitted, or in which they are engaged. This obligation is stricter than that under article 204, paragraph 1. The obligation applies irrespective of the place where the activities are conducted or the nationality of the individuals or entities carrying out the activities.

(b) Obligation under article 205 of the Convention

350. Under article 205 of the Convention, States are required to publish reports of the results of their monitoring activities or to provide such reports to the competent international organizations to make them available to all States.

351. The Tribunal notes that the obligation to publish such reports or to provide them to the competent international organizations complements the duty of monitoring set out in article 204 of the Convention. The obligation to circulate reports

is based on the assumption that one of the most effective means for the protection and preservation of the marine environment consists in sharing information and scientific results on risks to the marine environment. In the context of climate change, article 205 requires States to ensure transparency by disseminating the results of their monitoring activities with respect to the negative impacts caused to the marine environment by anthropogenic GHG emissions.

(c) Obligation under article 206 of the Convention

352. The obligation to conduct environmental impact assessments, contemplated in article 206 of the Convention, requires States to assess the potentially harmful effects of a planned activity prior to its execution and to disseminate the obtained results thereafter.

353. The Tribunal notes that most of the participants in the present proceedings were of the view that there is an obligation to conduct an environmental impact assessment under the Convention and customary international law. Most participants also shared the view that the due diligence standard is closely connected to this obligation. It was generally argued that the scope of article 206 of the Convention is wide and that the discretion of States in triggering the obligation therein is limited by various elements, including the precautionary approach. In this regard, it was contended that an environmental impact assessment may also concern the cumulative effects of a planned activity on the marine environment. Furthermore, it was argued that, although article 206 establishes the duty to carry out an environmental impact assessment, the means to assess the adverse effects of activities related to GHG emissions on the marine environment, and the implementation of such a duty, need further study. Finally, while the view was expressed that the form and content of impact assessments are a matter for domestic rather than international law, several participants referred to other international instruments for guidance on this issue.

354. The Tribunal is of the view that the obligation to conduct environmental impact assessments is crucial to ensure that activities do not harm the marine environment and is an essential part of a comprehensive environmental management system

(see *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China, Award of 12 July 2016, RIAA, Vol. XXXIII*, p. 153, at p. 523, para. 948).

355. As the Seabed Disputes Chamber noted, this obligation also forms part of customary international law (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at pp. 50-51, paras. 145 and 147; see also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 83, para. 204).

356. The obligation to conduct an environmental impact assessment pursuant to article 206 of the Convention encompasses the duty of vigilance and prevention. As noted by the ICJ, this duty would not be considered to have been fulfilled if an environmental impact assessment was not undertaken of activities at risk of affecting the environment (see *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 83, para. 204). Article 206 therefore constitutes a "particular application" of the obligation enunciated in article 194, paragraph 2 (*The South China Sea Arbitration*, *Award of 12 July 2016, RIAA, Vol. XXXIII*, p. 153, at p. 523, para. 948).

357. In the Tribunal's view, although article 206 of the Convention does not specify the scope and content of an environmental impact assessment, it indicates some of the components that are relevant in addressing the Request.

358. The obligation to conduct an environmental impact assessment concerns "planned activities". This broad term implies that such assessment is to be conducted prior to the implementation of a project (see *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at pp. 83-84, para. 205; *Certain Activities Carried out by Nicaragua in the Border Area, (Costa Rica* v. *Nicaragua*), *Judgment, I.C.J. Reports 2015*, p. 665, at pp. 706-707, para. 104, p. 720, para. 153, and pp. 722-733, para. 161). The activities under assessment comprise both those planned by private entities and those planned by States.

359. Article 206 of the Convention establishes certain requirements to trigger the obligation to conduct an environmental impact assessment. These requirements are the “jurisdiction or control” of the State over the planned activities and the “reasonable grounds for believing” that these activities “may cause substantial pollution of or significant and harmful changes to the marine environment”.

360. As stated above, the concept of “jurisdiction or control” is a broad one. The duty under article 206 of the Convention applies to any planned activity under the jurisdiction or control of the State concerned (see para. 247 above). Land-based activities as well as those at sea are included.

361. Concerning the requirement of “reasonable grounds for believing”, the arbitral tribunal in the *South China Sea Arbitration* observed that the “terms ‘reasonable’ and ‘as far as practicable’ contain an element of discretion for the State concerned” (*The South China Sea Arbitration between the Republic of the Philippines and the People’s Republic of China, Award of 12 July 2016*, *RIAA, Vol. XXXIII*, p. 153, at p. 523, para. 948). However, the discretion of such a State is limited by the fact that it is required to determine whether an activity under its jurisdiction or control “may cause substantial pollution of or significant and harmful changes to the marine environment”. It is a matter of objective determination based on facts and scientific knowledge. Such pollution and changes need not be actual but can also be potential. Therefore, the Tribunal considers that the precautionary approach may restrict the margin of discretion on the part of the State concerned.

362. The expression “substantial pollution of or significant and harmful changes to the marine environment” is not further elaborated upon in article 206 of the Convention. In the Tribunal’s view, the use of the word “or” suggests that article 206 contemplates two alternative thresholds for subjecting a planned activity to an environmental impact assessment: one threshold for “substantial pollution” and another for “significant and harmful changes”. However, the issue of possible alternative thresholds to trigger the obligation to conduct an environmental impact assessment has little relevance in the case of anthropogenic GHG emissions in light of their impact on the marine environment.

363. Article 206 of the Convention does not specify the content of an environmental impact assessment or the procedure to be followed except for the reference to the communication of States' reports under article 205. Such content and procedure are to be determined by each State in its legislation. In this regard, it is worth recalling that the ICJ in *Pulp Mills on the River Uruguay* held that

> it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.
> (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 83, para. 205)

364. In this context, a certain degree of flexibility is indicated by the expression "as far as practicable", which addresses, in particular, the different capabilities of States, especially developing States, in conducting environmental impact assessments.

365. Concerning the content of an environmental impact assessment, the Tribunal considers that the broad wording of article 206 of the Convention does not preclude such assessment from embracing not only the specific effects of the planned activities concerned but also the cumulative impacts of these and other activities on the environment. In the context of pollution of the marine environment from anthropogenic GHG emissions, planned activities may not be environmentally significant if taken in isolation, whereas they may produce significant effects if evaluated in interaction with other activities. Moreover, the broad wording of article 206 does not preclude the assessment from including the socio-economic impacts of the activities concerned.

366. The Tribunal notes that the BBNJ Agreement contains, *inter alia*, detailed provisions on environmental impact assessments relating to their thresholds and factors, the processes for conducting them and the reports of such assessments.

(d) Conclusion

367. In light of the foregoing, the Tribunal is of the view that articles 204, 205 and 206 of the Convention impose specific obligations on States Parties to monitor the risks or effects of pollution, to publish reports and to conduct environmental impact assessments as a means to address marine pollution from anthropogenic GHG emissions. Under article 204, paragraph 1, States Parties are required to endeavour to observe, measure, evaluate and analyse the risks or effects of pollution of the marine environment from anthropogenic GHG emissions. Under article 204, paragraph 2, States Parties have the specific obligation to keep under continuing surveillance the effects of activities they have permitted, or in which they are engaged, in order to determine whether such activities are likely to pollute the marine environment through anthropogenic GHG emissions. Article 205 requires States Parties to publish the results obtained from monitoring the risks or effects of pollution from anthropogenic GHG emissions or to communicate them to the competent international organizations for their dissemination. Article 206 sets out the obligation to conduct environmental impact assessments. Any planned activity, either public or private, which may cause substantial pollution to the marine environment or significant and harmful changes thereto through anthropogenic GHG emissions, including cumulative effects, shall be subjected to an environmental impact assessment. Such assessment shall be conducted by the State Party under whose jurisdiction or control the planned activity will be undertaken with a view to mitigating and adapting to the adverse effects of those emissions on the marine environment. The result of such assessment shall be reported in accordance with article 205 of the Convention.

VIII. Question (b)

368. The Tribunal will now turn to the second question posed by the Commission. The question reads:

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (‘UNCLOS’), including under Part XII: …

> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

369. In its written submission, the Commission described Question (b) as "independent, but complementary to the first", encompassing the general obligation "to protect and preserve the marine environment in regulating the activities that cause climate change impacts, including ocean warming and sea level rise, and ocean acidification." In more precise terms, the Commission stated that "[t]his question concerns the meaning and scope of article 192". Other participants in the proceedings generally agreed with these observations.

370. The Tribunal has already drawn attention to the fact that Question (b) is broader in scope than Question (a) (see paras. 151 and 152 above). Question (b) is formulated in terms that invoke article 192 of the Convention, which provides that "States have the obligation to protect and preserve the marine environment." The obligation is comprehensive in nature and encompasses obligations contained in other provisions of the Convention, including article 194, which set out more specific obligations. The views of the Tribunal on Question (a) are fully applicable to Question (b).

371. The Tribunal notes that in addressing the definition of "pollution of the marine environment", it clarified the term "marine environment" (see paras. 166 to 171 above). This clarification applies to article 192 and other relevant provisions of the Convention that are considered below.

372. The Tribunal confines its observations herein to the specific obligations to protect and preserve the marine environment in relation to climate change impacts and ocean acidification that were not previously identified in its response to Question (a).

A. Clarification of terms and expressions

373. Certain terms employed in the Request are common to the first and second questions as formulated by the Commission. The Tribunal has already clarified some

terms in determining the precise meaning of Question (a), including the references made to “specific obligations”, “climate change” and “ocean acidification”.

374. As previously explained, the Tribunal accepts the definitions and usage of such terms as “climate change” and “ocean acidification” as they are defined in climate change treaties or widely used in authoritative scientific works such as the IPCC reports, which have already been explained in paragraphs 52, 60 and 68 above.

375. Question (b) concerns “climate change impacts”. The Tribunal observes that the word “impacts” is neutral. However, as formulated in the question submitted to the Tribunal, and in the arguments presented in the proceedings, the word is used in relation to circumstances in which drivers of climate change cause deleterious effects to the marine environment. The Tribunal is of the view that Question (b) concerns the negative impacts of climate change and ocean acidification on the marine environment.

376. As regards the term “specific obligations”, the Tribunal has already drawn attention to the fact that the term may denote concrete or particularized obligations in contrast to general obligations. It may also mean obligations specific to the protection and preservation of the marine environment in relation to climate change impacts and ocean acidification. In responding to Question (b), the Tribunal will bear in mind both aspects of the term “specific”.

B. Relevant provisions of the Convention

377. The Tribunal will now proceed to address the specific obligations of States Parties under the Convention to protect and preserve the marine environment in relation to climate change impacts and ocean acidification that go beyond the prevention, reduction and control of marine pollution as addressed in Question (a).

378. In this regard, the Tribunal will first identify the provisions of the Convention relevant to its response to Question (b). It will then interpret those provisions to the extent necessary to respond to the question, and examine how they should be

applied in protecting and preserving the marine environment in relation to climate change impacts and ocean acidification. Subsequently, the Tribunal will set out the specific obligations of States Parties under the Convention to protect and preserve the marine environment against climate change impacts and ocean acidification.

379. The provisions of the Convention which are relevant to answering Question (b) are found in Part XII, as well as other parts of the Convention. The Tribunal has already presented an overview of the system for the protection and preservation of the marine environment set out in Part XII (see paras. 182 to 191 above). The primary provision in this regard is article 192 of the Convention which provides for the general obligation.

380. The relationship between articles 192 and 193 of the Convention is also addressed in the overview of Part XII (see paras. 184 to 187 above). In the overview, it is noted that article 193 places a constraint upon States' exercise of their sovereign right to exploit their natural resources, which has to be exercised in accordance with their duty to protect and preserve the marine environment.

381. In addressing article 194 of the Convention on measures to regulate marine pollution in relation to the first question, the Tribunal observed that measures envisaged under paragraph 5 of that article cover more than those to regulate pollution, and for that reason, this paragraph refers to the measures taken in accordance with "this Part" rather than "this article". Paragraph 5 of article 194 is particularly relevant to the Tribunal's response to the second question concerning specific obligations to protect and preserve the marine environment.

382. The provisions of Part XII of the Convention that are not aimed exclusively at addressing marine pollution include article 196 on the use of technologies or introduction of alien or new species. Other provisions concerning the protection and preservation of the marine environment are found, in particular, in Part V, including articles 61, 63 and 64, and in Part VII, including articles 117, 118 and 119. These provisions are pertinent in addressing climate change impacts and ocean acidification.

383. The Tribunal's response to the first question addressed the provisions of Part XII of the Convention in section 2 on global and regional cooperation, section 3 on technical assistance, and section 4 on monitoring and environmental assessment. These provisions are also relevant to the Tribunal's consideration of the second question. The Tribunal will elaborate, as necessary, on the significance of these provisions in responding to the second question.

C. Obligations to protect and preserve the marine environment in relation to climate change impacts and ocean acidification

1. Obligation under article 192 of the Convention

(a) Scope of the obligation

384. A vast majority of participants argued that article 192 of the Convention must be interpreted so as to cover all contemporary threats to the marine environment, including those that have emerged following the adoption of the Convention. It was further contended that the mere fact that climate change and ocean acidification constitute a specific and considerable threat to the marine environment is already sufficient in and of itself to give rise to a specific obligation with regard to its protection and preservation in the context of article 192. Some participants, however, argued that Part XII of the Convention does not establish any specific obligations to protect and preserve the marine environment in relation to the impacts of climate change; rather, such obligations are found under specific international instruments, although the Convention may play a subsidiary role in protecting and preserving the marine environment from the adverse effects of climate change.

385. The Tribunal is of the view that the obligation contained in article 192 of the Convention has a broad scope, encompassing any type of harm or threat to the marine environment. The obligation under this provision has two distinct elements. The first element is the obligation to protect the marine environment. It is linked to the duty to prevent, or at least mitigate, environmental harm (see para. 246 above). The second element is the obligation to preserve the marine environment, which

entails maintaining ecosystem health and the natural balance of the marine environment.

386. Where the marine environment has been degraded, the Tribunal is of the view that the term “preservation” may include restoring marine habitats and ecosystems. The term “restoration” is not used in article 192 of the Convention but flows from the obligation to preserve the marine environment where the process of reversing degraded ecosystems is necessary in order to regain ecological balance.

387. The two distinct elements of article 192 of the Convention have been expressed in the following terms:

> This “general obligation” extends both to “protection” of the marine environment from future damage and “preservation” in the sense of maintaining or improving its present condition. Article 192 thus entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment.
> (*The South China Sea Arbitration between the Republic of the Philippines and the People’s Republic of China, Award of 12 July 2016*, *RIAA, Vol. XXXIII*, p. 153, at p. 519, para. 941)

388. Article 192 of the Convention does not specify the relevant harms and threats to which it applies. The open-ended nature of the obligation means that it can be invoked to combat any form of degradation of the marine environment, including climate change impacts, such as ocean warming and sea level rise, and ocean acidification. Article 192 does not specify how the marine environment must be protected and preserved against present and future harms. Other provisions of the Convention and external rules inform the content of article 192 and shape the types of measures that may be implemented to protect and preserve the marine environment. In this regard, the Tribunal has addressed the relevance of international instruments on climate change, including the UNFCCC and the Paris Agreement, to the questions before it (see paras. 67 to 82 above). Other agreements, such as the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter “the Fish Stocks Agreement” or “FSA”), which was adopted

on 4 August 1995 and entered into force on 11 December 2001, and the CBD, may also provide relevant guidance, as indicated further below.

(b) Measures

389. Some participants argued that, in the context of climate change and ocean acidification, the specific obligations under article 192 of the Convention fall into three categories: to mitigate climate change; to implement resilience and adaptation measures; and to protect marine ecosystems that sequester carbon dioxide, thereby preventing further harm to the marine environment. In this regard, many participants noted the relevance of the UNFCCC and the Paris Agreement, and the subsequent relevant decisions taken by the governing bodies of these treaties, in interpreting the provisions of Part XII of the Convention.

390. The Tribunal has drawn attention to the role of the ocean in storing heat trapped in the atmosphere caused by increasing concentrations of GHGs and storage of excess carbon dioxide (see paras. 54 and 55 above). The ocean is the world's largest sink. Coastal "blue carbon" ecosystems, such as mangroves, tidal marshes, and seagrass meadows, are also important sinks and can contribute to ecosystem-based adaptation (see para. 56 above). The obligation to protect and preserve the marine environment is therefore of dual significance in that it promotes the conservation and resilience of living marine resources, while also mitigating anthropogenic GHG emissions by enhancing carbon sequestration through measures to restore the marine environment (see also Article 4, paragraph 1(d), of the UNFCCC and Article 5, paragraph 1, of the Paris Agreement).

391. The obligation to take mitigation measures to reduce anthropogenic GHG emissions has been addressed in the response to Question (a). Article 192 of the Convention also requires States to implement measures to protect and preserve the marine environment in relation to climate change impacts and ocean acidification that include resilience and adaptation actions as described in the climate change treaties.

392. The Convention does not use the term “adaptation measures”. As defined by the IPCC, adaptation is “the process of adjustment to actual or expected *climate* and its effects, in order to moderate harm or exploit beneficial opportunities. In *natural systems*, … human intervention may facilitate adjustment to expected *climate* and its effects” (WGII 2022 Report, Annex II, p. 2898). The ultimate objective of the UNFCCC, as stated in its Article 2, includes the “stabilization of greenhouse gas concentrations in the atmosphere … within a timeframe sufficient to allow ecosystems to adapt naturally to climate change”. Other provisions of the UNFCCC address measures to facilitate adequate adaptation to climate change. This is further developed in the Paris Agreement.

393. Article 2 of the Paris Agreement, in enhancing the implementation of the UNFCCC, including its objective, aims to strengthen the global response to the threat of climate change by, *inter alia*, “[i]ncreasing the ability to adapt to the adverse impacts of climate change and foster climate resilience”. The Paris Agreement establishes the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change in paragraph 1 of Article 7. Paragraphs 5 and 6 of Article 7 of the Paris Agreement address elements of adaptation strategies and read as follows:

> 5. Parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate.
>
> 6. Parties recognize the importance of support for and international cooperation on adaptation efforts and the importance of taking into account the needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change.

394. The Tribunal is of the view that these provisions are compatible with the obligations of the Convention and exemplify how science and other relevant considerations are taken into account by States in implementing adaptation measures. The Tribunal notes that measures of adaptation and resilience-building frequently require significant resources. In this respect, the Tribunal has already

addressed the obligations under Part XII of the Convention on the provision of technical assistance to developing States (see paras. 322 to 339 above).

(c) Nature of the obligation

395. A vast majority of participants in the proceedings stated that article 192 of the Convention reflects an obligation to act with due diligence. Some noted that the principle of prevention is an integral part of the duty of due diligence, which is an obligation of conduct rather than of result. Other participants indicated that they deliberately avoided the binary characterization of obligations of conduct and of result because, in the context of the Convention and international law generally, these labels are largely unhelpful, as many obligations straddle both categories.

396. The Tribunal considers that the obligation to take measures necessary to protect and preserve the marine environment requires States to ensure that non-State actors under their jurisdiction or control comply with such measures. The obligation of the State, in this instance, is one of due diligence.

397. The Tribunal has already addressed the character of a due diligence obligation in responding to Question (a). The content of the due diligence obligation depends on the nature of the specific treaty obligation so qualified and may vary over time. The standard of this obligation is determined by, among other factors, an assessment of the risk and level of harm combined.

398. The impacts of climate change and ocean acidification on the marine environment are described in the IPCC reports as severe. The WGII 2022 Report states that “global sea level rise, as well as warming, ocean acidification and deoxygenation at depth, are irreversible for centuries or longer (*very high confidence*)” (WGII 2022 Report, p. 453). The 2023 Synthesis Report further states that “[t]he likelihood and impacts of abrupt and/or irreversible changes in the climate system, including changes triggered when tipping points are reached, increase with further global warming (*high confidence*)” (2023 Synthesis Report, p. 18). In its Judgment in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the ICJ observed that “in the field of environmental protection, vigilance and prevention are required on

account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 78, para. 140). In such circumstances, the standard of the due diligence obligation is stringent.

399. The Tribunal holds the view that, given the risks posed to the marine environment, States, in fulfilment of their obligations under article 192 of the Convention, are required to take measures as far-reaching and efficacious as possible to prevent or reduce the deleterious effects of climate change and ocean acidification on the marine environment. The standard of due diligence under article 192 is, as stated above, stringent given the high risks of serious and irreversible harm to the marine environment by climate change impacts and ocean acidification.

(d) Conclusion

400. To conclude, article 192 of the Convention imposes a general obligation on States Parties to protect and preserve the marine environment. It applies to all maritime areas and can be invoked to combat any form of degradation of the marine environment, including climate change impacts, such as ocean warming and sea level rise, and ocean acidification. Where the marine environment has been degraded, this may require restoring marine habitats and ecosystems. This obligation is one of due diligence. The standard of due diligence is stringent, given the high risks of serious and irreversible harm to the marine environment from climate change impacts and ocean acidification.

2. Obligation under article 194, paragraph 5, of the Convention

401. Many participants in the proceedings noted that article 194, paragraph 5, of the Convention gives a specific form to the general obligation enshrined in article 192 in the context of fragile ecosystems, which are particularly threatened by global warming and ocean acidification. Some participants drew attention to the fact that article 194, paragraph 5, refers to Part XII and invokes the phrase "protect and

preserve" contained in article 192. Some also suggested that article 194, paragraph 5, is reinforced by the call in the preamble of the Paris Agreement to protect the ecological integrity of the ocean.

402. The Tribunal observes that the obligation under article 192 of the Convention includes the specific obligation to take measures "necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life", as expressly provided for in article 194, paragraph 5. This paragraph does not provide specific criteria for determining what measures are "necessary". As stated above (see para. 203), the word "necessary" is to be interpreted in accordance with its ordinary meaning and should be understood broadly. The measures necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life are those which make it possible to achieve that objective.

403. The obligation stated in article 194, paragraph 5, of the Convention requires States to take both measures necessary to protect "rare or fragile ecosystems" and those necessary to protect the "habitat of depleted, threatened or endangered species and other forms of marine life." The Tribunal observes that the Convention does not define either expression. In clarifying the term "marine environment" in relation to article 1, paragraph 1, subparagraph 4, of the Convention, the Tribunal addressed the definition of the term "ecosystem" (see para. 169 above). The Tribunal notes that characteristics of an ecosystem, such as the uniqueness or rarity, and vulnerability, fragility, sensitivity, or slow recovery, may change over time. Consequently, the process of identifying "rare or fragile ecosystems" requires a case-by-case review. Article 234 of the Convention, concerning ice-covered areas, provides an example of fragile ecosystems where special measures may be required to protect and preserve the marine environment.

404. With regard to the phrase "the habitat of depleted, threatened or endangered species and other forms of marine life", the Tribunal notes that Article 2 of the CBD provides a generally accepted definition of the term "[h]abitat" as "the place or type of site where an organism or population naturally occurs." It is not necessary for such

place or site to form part of a rare or fragile ecosystem. The concern is with the conservation of depleted, threatened or endangered species and other forms of marine life and the preservation of their natural environment. The Convention does not identify a list of “depleted, threatened or endangered species”. The Tribunal notes that the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter “CITES”), which was adopted on 3 March 1973 and entered into force on 1 July 1975, classifies species threatened with extinction and those likely to become endangered in the absence of trade regulations. CITES is an agreement to which there is near-universal adherence. The Tribunal considers that the classification of species in the appendices to CITES provides guidance in interpreting the term “depleted, threatened or endangered species” in article 194, paragraph 5 (see *The South China Sea Arbitration between the Republic of the Philippines and the People’s Republic of China, Award of 12 July 2016*, *RIAA, Vol. XXXIII*, p. 153, at p. 526, para. 956).

405. The Tribunal notes that the obligation imposed by article 194, paragraph 5, of the Convention may call for specific measures, such as the enactment and enforcement of laws and regulations or the undertaking of monitoring and assessment (see paras. 340 to 367 above). These measures are context-specific and call for objectively reasonable approaches to be taken on the basis of the best available science. Their implementation depends on the relevant domestic legal system and allows for the exercise of discretion. However, States do not have absolute discretion with respect to the action that is required. As stated by the Seabed Disputes Chamber in the *Area Advisory Opinion*, a “State must take into account, objectively, the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole. It must act in good faith, especially when its action is likely to affect prejudicially the interests of mankind as a whole” (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 71, para. 230). Although the Seabed Disputes Chamber addressed the specific obligations of sponsoring States under article 4, paragraph 4, of Annex III to the Convention, the Tribunal finds that the views it expressed are also applicable to measures taken to protect and preserve the marine environment in relation to the impacts of climate change and ocean acidification.

406. To conclude, article 194, paragraph 5, of the Convention, read together with article 192, imposes specific obligations on States Parties to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life from climate change impacts and ocean acidification.

3. Obligations under other provisions of the Convention

407. The Tribunal will now identify specific obligations under article 192, read with other provisions of the Convention, that require States to take conservation measures, including adaptation and resilience-building, to protect and preserve the marine environment in response to climate change impacts and ocean acidification.

408. Some participants in the proceedings argued that article 192 provides an umbrella obligation that encapsulates several more specific obligations found in different parts of the Convention as well as in the Fish Stocks Agreement. In addition to the Convention, the Fish Stocks Agreement was cited as providing a relevant framework for cooperation on the protection and preservation of the marine environment in relation to climate change impacts and ocean acidification.

409. The Tribunal notes that climate change and ocean acidification affect virtually all forms of marine life, including fish and corals that build structures providing the habitat for large numbers of species. As the Tribunal stated in the *Southern Bluefin Tuna* cases, “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment” (*Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, at p. 295, para. 70). The Tribunal observes that the conservation of living resources and marine life, which falls within the general obligation to protect and preserve the marine environment, requires measures that may vary over time depending on the activities involved and the threats to the marine environment.

410. The impacts of climate change and ocean acidification include shifts in fish distribution and decreases in fisheries that affect the “income, livelihoods, and food security of marine resource-dependent communities”, as well as impacts on marine ecosystems which will put “key cultural dimensions of lives and livelihoods at risk” (see para. 66 above). For conservation measures to be effective, such impacts must be taken into account.

411. The specific obligations of the Convention on the conservation of living resources of the sea are stipulated, *inter alia*, in Parts V and VII, in particular article 61, on the conservation of living resources in the exclusive economic zone, and articles 117 and 119, on the conservation of living resources of the high seas.

(a) Obligations under articles 61, 117 and 119 of the Convention

412. Article 61 of the Convention provides for the obligations concerning the conservation of the living resources in the exclusive economic zone and general principles on what such conservation requires. Article 61, paragraphs 2, 3, and 4, reads as follows:

> 2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end.
>
> 3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.
>
> 4. In taking such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

413. Article 61 of the Convention identifies both the purpose of conservation and management measures and the factors to be taken into account in taking such measures. States retain discretion in determining the particular measures to achieve the stated objectives. As stated by the ICJ, in commenting on articles 61 and 62 of the Convention, in the *Fisheries Jurisdiction Case (Spain* v. *Canada*),

> [a]ccording to international law, in order for a measure to be characterized as a "conservation and management measure", it is sufficient that its purpose is to conserve and manage living resources and that, to this end, it satisfies various technical requirements.
> (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, at p. 461, para. 70)

414. The purpose of conservation and management measures under article 61 of the Convention is to ensure that the maintenance of the living resources in the exclusive economic zone is not endangered by overexploitation. To that end, such measures must be informed by the best available science, including internationally coordinated scientific assessments of the magnitude, timing, and potential environmental and socio-economic impacts of climate change and ocean acidification, and realistic response strategies. States are required, in designing such measures, to take into account relevant environmental and economic factors, including the impact of climate change and ocean acidification on marine ecosystems, environmental stressors, stock migration, and the implications for vulnerable communities and specially affected developing States. Consideration should be given to fishing patterns and the effects on associated and dependent species, and the different rates at which different parts of the food web are responding to climate change and ocean acidification, leading to population-level changes, with a view to ensuring their populations are maintained or restored at levels above which their reproduction may become seriously threatened.

415. The general obligation expressed in article 192 of the Convention, to protect and preserve the marine environment, encompasses obligations stated in article 117. According to article 117, all States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas. This

obligation is not limited to flag States but applies to all States with respect to their nationals engaged in activities on the high seas.

416. Article 119 of the Convention provides for the obligation to conserve the living resources in the high seas. This obligation substantially replicates that of article 61 of the Convention, as the conservation duty of all States in the high seas and of the coastal State in the exclusive economic zone is fundamentally the same. Paragraph 1 of article 119 reads:

> In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall:
>
> > (a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;
> >
> > (b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

417. Articles 61 and 119 of the Convention establish a consistent framework that promotes the compatibility of measures established for the high seas and those adopted for areas under national jurisdiction in order to ensure the conservation of stocks in their entirety. In the *SRFC Advisory Opinion*, the Tribunal observed that "fisheries conservation and management measures, to be effective, should concern the whole stock unit over its entire area of distribution or migration routes" (*Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion of 2 April 2015, ITLOS Reports 2015*, p. 4, at p. 60, para. 214). To that end, the Tribunal emphasized that "States may, directly or through relevant subregional or regional organizations, seek the cooperation of non-Member States sharing the same stocks along their migrating routes with a view to ensuring conservation and sustainable management of these stocks in the whole of their geographical distribution or migrating area" (*ibid.*, at p. 61, para. 215). The views

expressed in the *SRFC Advisory Opinion* are relevant to the conservation and management measures relating to climate-driven shifts in the distribution of stocks.

418. To conclude, articles 61 and 119 of the Convention impose specific obligations on States Parties to take measures necessary to conserve living marine resources threatened by climate change impacts and ocean acidification. Under article 61, States Parties must ensure that the maintenance of the living resources in the exclusive economic zone is not endangered by overexploitation. Conservation and management measures must be informed by the best available science. States Parties are required to take into account relevant environmental and economic factors, including the impact of climate change and ocean acidification. This entails the application of the precautionary approach and an ecosystem approach. The obligation imposed on States Parties under article 119 of the Convention substantially replicates that of article 61, as the conservation duty of all States in the high seas and of the coastal State in the exclusive economic zone is fundamentally the same.

(b) Obligations under articles 63, 64 and 118 of the Convention

419. The importance of the obligation on cooperation in addressing climate change impacts and ocean acidification has already been dealt with by the Tribunal above (see paras. 294 to 321). The obligation to cooperate in conserving living marine resources is found not only in articles 61, 117 and 119 but also in other provisions of the Convention, in particular, articles 63, 64 and 118.

420. Article 63 of the Convention reads:

> *Stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it*
>
> 1. Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.

> 2. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

421. In the case of highly migratory species, article 64, paragraph 1, of the Convention provides:

> The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.

422. As noted above, in the *SRFC Advisory Opinion*, the Tribunal clarified the obligations imposed on States by articles 63 and 64 of the Convention in the following terms:

> The Tribunal observes that the obligation to "seek to agree ..." under article 63, paragraph 1, and the obligation to cooperate under article 64, paragraph 1, of the Convention are "due diligence" obligations which require the States concerned to consult with one another in good faith, pursuant to article 300 of the Convention. The consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.
> (*Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015,* p. 4, at pp. 59-60, para. 210)

423. The Tribunal is of the view that the above clarifications provided in the *SRFC Advisory Opinion* are relevant in the context of climate change impacts and ocean acidification. The obligation to "seek to agree …" under article 63, paragraph 1, and the obligation to cooperate under article 64, paragraph 1, of the Convention require States, *inter alia*, to consult with one another in good faith with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks, taking into account the impacts of climate change and ocean acidification on living marine resources.

424. Article 118 of the Convention reads:

> *Cooperation of States in the conservation and management of living resources*
>
> States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.

According to this provision, States Parties have the specific obligation to cooperate in taking measures necessary for the conservation of living marine resources in the high seas that are threatened by climate change impacts and ocean acidification.

425. The Fish Stocks Agreement establishes an enhanced framework for the conservation and management of straddling and highly migratory fish stocks that is relevant to climate-driven shifts in the distribution of fish stocks. Article 5 of the Fish Stocks Agreement establishes general principles for the conservation and management of such stocks, including the precautionary approach (in accordance with article 6), an ecosystem approach and the protection of biodiversity. Article 7 of the Fish Stocks Agreement requires States, *inter alia*, to consult on necessary conservation measures, without prejudice to the sovereign rights of coastal States for the purpose of exploring and exploiting, conserving and managing the living marine resources within areas under national jurisdiction, and the right of all States for their nationals to engage in fishing on the high seas.

426. The Tribunal is of the view that articles 5 and 7 of the Fish Stocks Agreement may provide guidance in responding to distributional changes and range shifts of stocks due to climate change and ocean acidification, and inform the relevant provisions of Parts V and VII of the Convention.

427. According to the WGII 2022 Report, “[b]y altering physiological responses, projected changes in ocean warming … will modify growth, migration, distribution, competition, survival and reproduction (*very high confidence*)” of marine life (WGII

2022 Report, p. 400). The Report further states that the "[c]limate-driven movement of fish stocks is causing commercial, small-scale, artisanal and recreational fishing activities to shift poleward and diversify harvests (*high confidence*)" (WGII 2022 Report, pp. 381-382). The Tribunal observes that many uncertainties remain about the extent to which the impacts of climate change and ocean acidification may be manifested in particular regions. It notes that article 192 of the Convention requires States to anticipate risk, depending on the circumstances.

428. To conclude, articles 63, 64, and 118 of the Convention impose specific obligations on States Parties to cooperate, directly or through appropriate international organizations, in implementing conservation and management measures with regard to straddling and highly migratory species and other living resources of the high seas. This obligation requires States Parties, *inter alia*, to consult with one another in good faith with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks, taking into account the impacts of climate change and ocean acidification on living marine resources. Articles 5 and 7 of the Fish Stocks Agreement may provide guidance in responding to distributional changes and range shifts of stocks as a result of climate change and ocean acidification.

(c) Obligation under article 196 of the Convention

429. The possibility of significant and harmful changes to the marine environment, as a consequence of the introduction of alien species to a particular part of the marine environment due to climate change and ocean acidification, invokes article 196 of the Convention. Article 196, paragraph 1, reads:

> States shall take all measures necessary to prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction or control, or the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto.

430. Some participants in the present proceedings expressed the view that in responding to Question (b), the Tribunal might have to determine whether other impacts of climate change which would not fall within the definition of pollution could

give rise to specific obligations to protect the marine environment from a future threat. It was suggested that this scenario might occur, for example, were certain invasive species to move in response to ocean warming or changes in ocean currents. Article 196, paragraph 1, of the Convention was identified as relevant in this regard.

431. The Tribunal notes that this provision contains two distinct obligations: the first, concerning the use of technologies, was addressed in the context of Question (a) (see para. 231 above); and the second, concerning the introduction of alien or new species, flows from the general obligation to protect and preserve the marine environment under article 192 of the Convention.

432. The second obligation under article 196, paragraph 1, of the Convention addresses a concern distinct from that of pollution of the marine environment *stricto sensu*, as defined in article 1, paragraph 1, subparagraph 4, of the Convention. The Tribunal notes that this provision is designed to address the disturbance of the ecological balance of the marine environment as a result of human activities which are not pollution, such as the introduction of alien or new living organisms. This is manifested in the proviso stated in paragraph 2 of article 196, which reads: “This article does not affect the application of this Convention regarding the prevention, reduction and control of pollution of the marine environment.” The obligation to take necessary measures concerning the introduction of alien or new species to a particular part of the marine environment, as provided for in article 196, paragraph 1, was not intended to be controlled by the definition of “pollution of the marine environment” as stated in article 1, paragraph 1, subparagraph 4, of the Convention.

433. Article 196 of the Convention may be invoked only where the introduction of alien or new species “may cause significant and harmful changes” to the marine environment. The Tribunal notes that this threshold is also applied in article 206, on the assessment of potential effects of activities, although it is not defined in the Convention. In this regard, the Tribunal observes that the ILC commentary on article 2, paragraph (a), of the Draft articles on Prevention of Transboundary Harm from Hazardous Activities, defining the “Risk of causing significant transboundary harm”, states:

> The term “significant” is not without ambiguity and a determination has to be made in each specific case. It involves more factual considerations than legal determination. It is to be understood that *“significant” is something more than “detectable” but need not be at the level of “serious” or “substantial”.* The harm must lead to a real detrimental effect [and] … [s]uch detrimental effects must be susceptible of being measured by factual and objective standards.
> (Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries 2001, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 148, at p. 152, para. (4))

434. The Tribunal notes that in establishing a threshold, article 196 of the Convention uses the word “may”, which implies the precautionary approach. It is sufficient that the introduction of non-indigenous species to a particular part of the marine environment due to climate change impacts and ocean acidification may have a real detrimental effect for article 196 to be engaged.

435. According to the WGII 2022 Report,

> [n]on-indigenous marine species are major agents of ocean and coastal biodiversity change, and climate and non-climate drivers interact to support their movement and success (*high confidence*) … . At times, non-indigenous species act invasively and outcompete indigenous species, causing regional biodiversity shifts and altering ecosystem function, as seen in the Mediterranean region (*high confidence*) … . Warming-related range expansions of non-indigenous species have directly or indirectly decreased commercially important fishery species and nursery habitat.
> (WGII 2022 Report, p. 456)

436. The Tribunal finds that the second clause of article 196, paragraph 1, of the Convention requires States to take appropriate adaptive measures to prevent, reduce and control pollution from the introduction of non-indigenous species as a result of climate change impacts and ocean acidification which may cause significant and harmful changes to the marine environment. This does not affect the application of the Convention regarding the prevention, reduction and control of pollution of the marine environment.

4. Area-based management tools

437. Some participants in the proceedings argued that rapidly implementing area-based management tools, including marine protected areas (hereinafter “MPAs”),

both within and beyond national jurisdiction, is one of the most effective ways to implement article 192 of the Convention in relation to climate change impacts and ocean acidification.

438. There is support in the WGII 2022 Report for the use of area-based management tools, including MPAs, as a realistic response strategy to climate change. It states:

> MPAs and other marine spatial-planning tools have great potential to address climate-change mitigation and adaptation in ocean and coastal ecosystems, if they are designed and implemented in a coordinated way that takes into account ecosystem vulnerability and responses to projected climate conditions, considers existing and future ecosystem uses and non-climate drivers, and supports effective governance (*high confidence*).
> (WGII 2022 Report, p. 483)

439. The Tribunal observes that the term "marine protected area" is not found in the Convention. It notes that Article 2 of the CBD defines "[p]rotected area" as a "geographically defined area which is designated or regulated and managed to achieve specific conservation objectives." State practice in support of implementing MPAs in areas beyond national jurisdiction is based on regional treaties and collaborative arrangements, as evidenced, for example, in the practice of Contracting Parties to the Convention for the Protection of the Marine Environment of the North-East Atlantic (hereinafter "the OSPAR Convention"), which was adopted on 22 September 1992 and entered into force on 25 March 1998. The OSPAR Convention recognizes

> that it may be desirable to adopt, on the regional level, more stringent measures with respect to the prevention and elimination of pollution of the marine environment or with respect to the protection of the marine environment against the adverse effects of human activities than are provided for in international conventions or agreements with a global scope.
> (Preamble, eleventh paragraph)

440. The Tribunal notes that Part XII of the Convention does not preclude States from adopting more rigorous measures to protect and preserve the marine environment than provided for therein. However, such measures must be consistent with the Convention and other rules of international law. The Tribunal notes that the recently adopted BBNJ Agreement expresses the need for a global framework under

the Convention to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction and provides for the use of area-based management tools, including MPAs.

IX. Operative clause

441. For these reasons,

THE TRIBUNAL,

(1) Unanimously

Decides **that it has jurisdiction to give the advisory opinion requested by the Commission.**

(2) Unanimously

Decides **to respond to the request for an advisory opinion submitted by the Commission**.

(3) Unanimously

Replies **to Question (a) as follows:**

(a) Anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention.

(b) Under article 194, paragraph 1, of the Convention, States Parties to the Convention have the specific obligations to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions and to endeavour to harmonize their policies in this connection. Such measures should be determined objectively, taking into account, *inter alia*, the best available science and

relevant international rules and standards contained in climate change treaties such as the UNFCCC and the Paris Agreement, in particular the global temperature goal of limiting the temperature increase to 1.5°C above pre-industrial levels and the timeline for emission pathways to achieve that goal. The scope and content of necessary measures may vary in accordance with the means available to States Parties and their capabilities. The necessary measures include, in particular, those to reduce GHG emissions.

(c) The obligation under article 194, paragraph 1, of the Convention to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions is one of due diligence. The standard of due diligence is stringent, given the high risks of serious and irreversible harm to the marine environment from such emissions. However, the implementation of the obligation of due diligence may vary according to States' capabilities and available resources.

(d) Under article 194, paragraph 2, of the Convention, States Parties have the specific obligation to take all measures necessary to ensure that anthropogenic GHG emissions under their jurisdiction or control do not cause damage by pollution to other States and their environment, and that pollution from such emissions under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights. This obligation applies to a transboundary setting and is a particular obligation in addition to the obligation under article 194, paragraph 1. It is also an obligation of due diligence. The standard of due diligence under article 194, paragraph 2, can be even more stringent than that under article 194, paragraph 1, because of the nature of transboundary pollution.

(e) In terms of specific sources of pollution, marine pollution from anthropogenic GHG emissions can be characterized as pollution from land-based sources, pollution from vessels, or pollution from or through the atmosphere.

(f) Under articles 207 and 212 of the Convention, States Parties have the specific obligation to adopt laws and regulations to prevent, reduce and control marine pollution from GHG emissions from land-based sources and from or through the atmosphere, respectively, taking into account internationally agreed rules,

standards and recommended practices and procedures contained, *inter alia*, in climate change treaties such as the UNFCCC and the Paris Agreement. To this effect, States Parties have the specific obligations to take other necessary measures and, acting especially through competent international organizations or diplomatic conference, to endeavour to establish global and regional rules, standards and recommended practices and procedures.

(g) Under article 211 of the Convention, States Parties have the specific obligation to adopt laws and regulations to prevent, reduce and control marine pollution from GHG emissions from vessels flying their flag or of their registry, which must at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.

(h) Under articles 213 and 222 of the Convention, States Parties have the specific obligation to enforce their national laws and regulations and to adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment from anthropogenic GHG emissions from land-based sources and from or through the atmosphere, respectively.

(i) Under article 217 of the Convention, States Parties have the specific obligation to ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards established through the competent international organization or general diplomatic conference and with their laws and regulations for the prevention, reduction and control of marine pollution from GHG emissions from vessels. To this end, they shall adopt laws and regulations and take other measures necessary for their implementation.

(j) Articles 197, 200 and 201, read together with articles 194 and 192 of the Convention, impose specific obligations on States Parties to cooperate, directly or through competent international organizations, continuously, meaningfully and in good faith, in order to prevent, reduce and control marine pollution from

anthropogenic GHG emissions. Under article 197, States Parties have the specific obligation to cooperate in formulating and elaborating rules, standards and recommended practices and procedures, consistent with the Convention and based on available scientific knowledge, to counter marine pollution from anthropogenic GHG emissions. Under article 200, States Parties have the specific obligations to cooperate to promote studies, undertake scientific research and encourage the exchange of information and data on marine pollution from anthropogenic GHG emissions, its pathways, risks and remedies, including mitigation and adaptation measures. Under article 201, States Parties have the specific obligation to establish appropriate scientific criteria on the basis of which rules, standards and recommended practices and procedures are to be formulated and elaborated to counter marine pollution from anthropogenic GHG emissions.

(k) Under article 202 of the Convention, States Parties have the specific obligation to assist developing States, in particular vulnerable developing States, in their efforts to address marine pollution from anthropogenic GHG emissions. This article provides for the obligation of appropriate assistance, directly or through competent international organizations, in terms of capacity-building, scientific expertise, technology transfer and other matters. Article 203 reinforces the support to developing States, in particular those vulnerable to the adverse effects of climate change, by granting them preferential treatment in funding, technical assistance and pertinent specialized services from international organizations.

(l) Articles 204, 205 and 206 of the Convention impose on States Parties specific obligations of monitoring, publishing the reports thereof and conducting environmental impact assessments as a means to address marine pollution from anthropogenic GHG emissions. Under article 204, paragraph 1, States Parties have the specific obligation to endeavour to observe, measure, evaluate and analyse the risks or effects of pollution of the marine environment from anthropogenic GHG emissions. Under article 204, paragraph 2, States Parties have the specific obligation to keep under continuing surveillance the effects of activities they have permitted, or in which they are engaged, in order to determine whether such activities are likely to pollute the marine environment through anthropogenic GHG emissions. Under article 205, States Parties have the specific obligation to publish

the results obtained from monitoring the risks or effects of pollution from such emissions or to communicate them to the competent international organizations for their dissemination. Under article 206, States Parties have the specific obligation to conduct environmental impact assessments. Any planned activity, either public or private, which may cause substantial pollution to the marine environment or significant and harmful changes thereto through anthropogenic GHG emissions, including cumulative effects, shall be subjected to an environmental impact assessment. Such assessment shall be conducted by the State Party under whose jurisdiction or control the planned activity will be undertaken with a view to mitigating and adapting to the adverse effects of such emissions on the marine environment. The result of such assessment shall be reported in accordance with article 205 of the Convention.

(4) Unanimously

***Replies* to Question (b) as follows:**

(a) The Tribunal's response to Question (a) is relevant to its response to Question (b). Subparagraphs (j), (k) and (l) of operative paragraph (3) are of particular relevance in this regard.

(b) The obligation under article 192 of the Convention to protect and preserve the marine environment has a broad scope, encompassing any type of harm or threat to the marine environment. Under this provision, States Parties have the specific obligation to protect and preserve the marine environment from climate change impacts and ocean acidification. Where the marine environment has been degraded, this obligation may call for measures to restore marine habitats and ecosystems. Article 192 of the Convention requires States Parties to anticipate risks relating to climate change impacts and ocean acidification, depending on the circumstances.

(c) This obligation is one of due diligence. The standard of due diligence is stringent, given the high risks of serious and irreversible harm to the marine environment from climate change impacts and ocean acidification.

(d) Under article 194, paragraph 5, of the Convention, States Parties have the specific obligation to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life from climate change impacts and ocean acidification.

(e) Under articles 61 and 119 of the Convention, States Parties have the specific obligations to take measures necessary to conserve the living marine resources threatened by climate change impacts and ocean acidification. In taking such measures, States Parties shall take into account, *inter alia*, the best available science and relevant environmental and economic factors. This obligation requires the application of the precautionary approach and an ecosystem approach.

(f) The obligation to seek to agree under article 63, paragraph 1, and the obligation to cooperate under article 64, paragraph 1, of the Convention, require States Parties, *inter alia*, to consult with one another in good faith with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks. The necessary measures on which consultations are required must take into account the impacts of climate change and ocean acidification on living marine resources. Under article 118 of the Convention, States Parties have the specific obligation to cooperate in taking measures necessary for the conservation of living marine resources in the high seas that are threatened by climate change impacts and ocean acidification.

(g) Under article 196 of the Convention, States Parties have the specific obligation to take appropriate measures to prevent, reduce and control pollution from the introduction of non-indigenous species due to the effects of climate change and ocean acidification which may cause significant and harmful changes to the marine environment. This obligation requires the application of the precautionary approach.

Done in English and French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this twenty-first day of May, two thousand and twenty-four, in three copies, one of which will be placed in the archives of the

Tribunal and the others transmitted to the Commission of Small Island States on Climate Change and International Law and to the United Nations.

(signed)
Albert J. HOFFMANN,
President

(signed)
Ximena HINRICHS OYARCE,
Registrar

Judge JESUS, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Advisory Opinion of the Tribunal.

(initialled) J.L.J.

Judge PAWLAK, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Advisory Opinion of the Tribunal.

(initialled) S.P.

Judge KULYK, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Advisory Opinion of the Tribunal.

(initialled) M.K.

Judge KITTICHAISAREE, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Advisory Opinion of the Tribunal.

(initialled) K.K.

Judge INFANTE CAFFI, availing herself of the right conferred on her by article 125, paragraph 2, of the Rules of the Tribunal, appends her declaration to the Advisory Opinion of the Tribunal.

(initialled) M.T.I.C.

TAB M

Global trends in climate change litigation: 2024 snapshot

Joana Setzer and Catherine Higham

Policy report

June 2024



LSE

Grantham Research Institute on Climate Change and the Environment

Columbia Law School

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Climate Change Laws of the world

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Summary

Key insights

- At least 230 new climate cases were filed in 2023. Many of these are seeking to hold governments and companies accountable for climate action. However, the number of cases expanded less rapidly last year than previously, which may suggest a consolidation and concentration of strategic litigation efforts in areas anticipated to have high impact.
- Climate cases have continued to spread to new countries, with cases filed for the first time in Panama and Portugal in 2023.
- 2023 was an important year for international climate change litigation, with major international courts and tribunals being asked to rule and advise on climate change. Just 5% of climate cases have been brought before international courts, but many of these cases have significant potential to influence domestic proceedings.
- There were significant successes in 'government framework' cases in 2023; these challenge the ambition or implementation of a government's overall climate policy response. The European Court of Human Rights' decision in April 2024 in the case of *KlimaSeniorinnen and ors. v. Switzerland* is likely to lead to the filing of further cases.
- Strategic climate cases continued to be filed against companies, with about 230 such cases now identified from 2015 to the present. Key trends in corporate climate litigation include:
  - The number of cases concerning 'climate-washing' has grown in recent years. 47 such cases were filed in 2023, bringing the recorded total to more than 140. These cases have met with significant success, with more than 70% of completed cases decided in favour of the claimants.
  - There were important developments in 'polluter pays' cases: more than 30 cases worldwide are currently seeking to hold companies accountable for climate-related harm allegedly caused by their contributions to greenhouse gas emissions.
  - Litigants continue to file new 'corporate framework' cases, which seek to ensure companies align their group-level policies and governance processes with climate goals. The New Zealand Supreme Court allowed one such case to proceed, although cases filed elsewhere have been dismissed. The landmark case of *Milieudefensie v. Shell* is under appeal.
  - In this year's analysis a new category of 'transition risk' cases was introduced, which includes cases filed against corporate directors and officers for their management of climate risks. Shareholders of Enea approved a decision to bring such a case against former directors for planned investments in a new coal power plant in Poland.
- Nearly 50 of the more than 230 cases filed in 2023 are not aligned with climate goals. Some cases challenge climate action; others do not challenge climate action *per se*, but are concerned with the way in which it is implemented. Key types of non-aligned climate litigation include:
  - ESG backlash cases, which challenge the incorporation of climate risk into financial decision-making.
  - Strategic litigation against public participation (SLAPP) suits against NGOs and shareholder activists that seek to deter them from pursuing climate agendas.
  - Just transition cases, which challenge the distributional impacts of climate policy or the processes by which policies were developed, normally on human rights grounds.
  - Green v. green cases, which concern potential trade-offs between climate and biodiversity or other environmental aims.

Focusing on the calendar year 2023, this report, the latest in an annual series on climate change litigation cases, provides a numerical analysis of how many cases have been filed, where and by whom, and a qualitative assessment of trends and themes in the types of cases filed. We present the topline findings and analytical points in this summary.

In places we refer separately to **'US cases'** and **'Global cases'**, the latter meaning any that have been brought to court outside the US, including before international and regional courts and tribunals.[1]

More than 230 new climate cases were filed in 2023, but the overall rate of growth may be slowing down

Our dataset, primarily drawn from the Sabin Center for Climate Change Law's Climate Litigation Databases, currently contains 2,666 climate litigation cases. Around 70% of these have been filed since 2015, the year the Paris Agreement was adopted. 233 of these cases were filed in 2023. The data suggests that the overall rate of increase in new cases may be slowing down.

Climate cases are spreading to more countries

The United States remains the country with the highest number of documented climate cases, with 1,745 cases in total, and 129 new cases filed in 2023. After the US, the countries with the highest number of recorded cases filed in 2023 were the UK with 24 cases, Brazil with 10 cases, and Germany with 7 cases. These three countries also have high aggregate numbers of recorded cases, with the UK currently at 139 cases, Brazil at 82 cases, and Germany at 60.

Climate cases were filed in 2023 for the first time in Panama and Portugal. Older cases filed in Hungary and Namibia were identified for the first time, bringing the total number of countries in which climate cases have been recorded to 55.

Cases in the Global South are increasing and gaining more attention

Currently, more than 200 climate cases from Global South countries are recorded in the databases, comprising around 8% of all cases. A landmark judgment by the Supreme Court of India in *M.K. Ranjitsinh and Others v. Union of India* established a new constitutional right to be free from the adverse effects of climate change.

2023 was a significant year for international climate litigation, particularly involving human rights

146 cases, equivalent to around 5% of all climate cases, have been filed before international and regional courts and tribunals over the years – which we describe as 'international litigation' – including 70 cases filed before the Court of Justice of the European Union and the European Ombudsman. Nine of these international and regional cases were filed in 2023.

Around 45% of international cases and complaints filed to date have been filed before international human rights courts, bodies and tribunals. These cases reflect a growing trend in the use of human rights arguments in climate cases. They include three cases brought before the European Court of Human Rights decided in April 2024 and the request for an advisory opinion from the Inter-American Court on Human Rights (filed in 2023).

Human rights arguments have also been made in submissions to the International Court of Justice, which is in the process of responding to a request for an advisory opinion on climate change issues (filed in 2023). In May 2024 the International Tribunal on the Law of the Sea issued its advisory opinion, finding that greenhouse gas emissions can be understood as a source of marine pollution, and that states have obligations to prevent such pollution, and to restore damaged ocean ecosystems.

Most climate litigation cases from recent years have been filed by NGOs or individuals

In 2023 the plaintiffs in more than 70% of all cases, both US and Global, included either individuals, non-governmental organisations (NGOs) or both. This trend reflects an effort by civil society actors to use the courts to raise concerns about climate action, and mirrors the rise in strategic climate litigation. However, there are further actors involved. In the US, government actors were among the plaintiffs in nearly 20% of the cases filed last year.

[1] This reflects the two separate databases maintained by the Sabin Center.

Companies and trade associations are filing cases in significant numbers

13% of all cases filed in 2023 were filed by companies and trade associations, and the vast majority of these were filed in the US. Most cases filed by companies challenge climate policy and regulation, but in some cases companies are supporting more stringent climate action or seeking to prevent 'climate-washing' (a form of greenwashing).

Cases continue to be filed against corporate actors

In 2023 around 70% of all cases involved government actors among the defendants and only 25% involved companies. However, considerable differences are emerging on this front between cases filed in and outside the US. In the US, governments were among the defendants in nearly 85% of cases, and just 15% involved companies as defendants. Governments were involved as defendants in fewer Global cases, at nearly 60%, and 40% included corporate actors among the defendants.

Companies from many sectors are now at risk of being taken to court over climate

Since the ratification of the Paris Agreement, around 230 strategic climate-aligned lawsuits have been initiated against companies and trade associations, with more than two-thirds of these cases emerging since 2020. Cases against companies have traditionally been focused on the fossil fuel sector but they are now being launched across other sectors, including airlines, the food and beverage industry, e-commerce and financial services.

Climate-aligned strategic cases use diverse case strategies

We have identified several strategies in climate-aligned strategic cases and provide an overview below of the number of cases employing each strategy and significant current or recent cases.

'Government framework' cases challenge the ambition or implementation of a government's overall climate policy responses:

- 15 new cases were filed in 2023 and 110 such cases have been filed since 2015.
- The European Court of Human Rights confirmed that government failure to act on climate change constitutes a violation of the European Convention on Human Rights in the case of *KlimaSeniorinnen and ors. v. Switzerland*.
- A landmark ruling from the US in the case of *Held v. Montana* has been described as the first big win for the US youth-led climate litigation movement.
- There is potential for an increase in litigation challenging the integrity of governments' net zero targets, i.e. over their clarity and substance.

'Integrating climate considerations' cases seek to integrate climate considerations into decisions on a given project or sectoral policy:

- 97 new cases were filed in 2023.
- Many cases concern the licensing or development of new fossil fuel production and fossil fuel electricity generation. In January 2024 the Oslo District Court ruled in the case of *Greenpeace Nordic and Nature and Youth v. Energy Ministry* that Scope 3 emissions must be considered in environmental impact assessments, to ensure protection of human rights.
- Such cases can cause projects to be delayed, abandoned or may simply result in proponents resubmitting an environmental impact assessment and receiving a further permit.

'Polluter pays' cases seek monetary damages from defendants based on an alleged contribution to harmful climate change impacts:

- 5 new cases were filed in 2023. 34 cases have been filed since 2015, mostly in the US.
- Many of the 'climate liability lawsuits' filed by subnational governments in the US against the so-called Carbon Majors moved a step closer to trial in 2023 when the US Supreme Court declined to hear arguments about whether the cases should proceed in state or federal court.
- In September 2023, California became the largest subnational government to file a climate suit, which it brought against five Carbon Major oil companies and the American Petroleum Institute, focusing on the need to hold oil companies accountable for what the state described as "decades of deception".
- The case of *Falys v. Total*, in which a Belgian farmer is suing French energy giant Total for climate damages, became the third polluter pays case filed in Europe.

'Corporate framework' cases seek to disincentivise companies from continuing with high-emitting activities by requiring changes to group-level policies and corporate governance:

- 3 new cases were filed in 2023, and 22 such cases have been recorded to date, all outside the US.
- These cases are usually linked directly to the Paris Agreement goal of limiting warming to 1.5°C, or to the related concept of net zero.
- In February 2024 the New Zealand Supreme Court overruled the Court of Appeal's previous decision to dismiss the case of *Smith v. Fonterra*. This is an important example of Paris-alignment corporate case involving a potential new duty to be heard by a common-law court.

'Failure to adapt' cases challenge a government or company for failure to address climate risks:

- 8 new cases were filed in 2023, and 64 such cases have been recorded since 2015.
- In 2023 Friends of the Earth supported two members of the public in filing a lawsuit against the UK government over its Third National Adaptation Programme.
- Increasingly, the physical and mental health impacts of climate change are becoming the focus of this type of litigation.

'Transition risk' cases concern the (mis)management of low-carbon transition risk by directors, officers and others tasked with ensuring the success of a business:

- 1 new case was filed in 2023 and just 17 such cases have been recorded since 2015.
- This is a new category of cases introduced this year to reflect an increase in litigation over the management of risk.
- In December 2023 the Polish energy company Enea indicated its intention to sue several of its former directors who had supported the company's investments in the cancelled Ostroleka C coal-fired power station project.

'Climate-washing' cases challenge inaccurate government or corporate narratives regarding contributions to the transition to a low-carbon future:

- 47 new cases were filed in 2023, and more than 140 such cases have been filed to date, making this one of the most rapidly expanding areas of climate litigation.
- Climate-washing cases have often centred on claims around the climate neutrality of products and services, with several recent claims relating to transport.
- Cases can also involve financial products and services. For example, in 2023 Australia's Federal Court ruled that Vanguard Investments Australia's claims about an ethical bond were false and misleading.

'Turning off the taps' cases challenge the flow of finance to projects and activities that are not aligned with climate action:

- 6 new cases were filed in 2023, and 33 such cases since 2015 have been recorded.
- In *Jubilee v. EFA and NAIF*, an Australian NGO is seeking to force government bodies to disclose impact assessments for investments that subsidise fossil fuels.
- Non-judicial proceedings include communications by UN experts on the responsibilities of the financial backers of Saudi Aramco under the UN Guiding Principles on Business and Human Rights, and a complaint with the American National Contact Point against insurance broker Marsh challenging the East African Crude Oil Pipeline planned by TotalEnergies in Uganda.

Direct judicial outcomes in climate-aligned strategic cases vary

We have assessed the 'success rate' of four key types of strategic cases:

- **Government framework**: Around 60% of these cases have at least one judicial decision. Of these, one-third have outcomes positive for climate action, while two-thirds have had outcomes that from the perspective of the claimants are anticipated to be negative for climate action. Some ongoing cases with decisions from appellate courts are having positive impacts on climate governance.
- **Polluter pays**: Early polluter pays cases filed in the US before 2015 were unsuccessful. However, the vast majority of the 33 cases filed since then remain open, their outcomes uncertain. The case of *Lliuya v. RWE* has advanced furthest through the evidentiary process and may be the first to receive a substantive decision on its merits.
- **Corporate framework**: The outcomes in these cases remain uncertain. Half of those decided so far have been successful and half unsuccessful. Success in the case of *Milieudefensie v. Shell*, in which Shell was ordered to increase the ambition of its emission reduction targets, and the recent Supreme Court decision in New Zealand allowing the case of *Smith v. Fonterra* to proceed to trial must be weighed against unsuccessful cases against car manufacturers in Germany dismissed by appellate courts.
- **Climate-washing**: Decided cases have mostly yielded positive outcomes. More than half of the nearly 140 climate-washing cases filed from 2016 to the present have reached official decisions and 54 of these 77 cases (i.e. 70%) have concluded in favour of the claimant.

Not all climate action is aligned with climate goals

Nearly 50 of the more than 230 recorded cases filed in 2023 include non-aligned arguments. The overwhelming majority of these were filed in the US. At times, actors involved in such cases appear to be intentionally seeking to use legal tactics to obstruct climate action. Such cases include:

- **ESG [environmental, social, governance] backlash cases,** in which tactics used by litigants in climate-aligned cases are turned against them. In 2023, there were significant cases alleging breaches of fiduciary duties related to the integration of climate risk into financial decisions and allegations concerning deceptive practices. Notable cases include *Spence v. American Airlines and State ex rel. Skrmetti v. BlackRock*.
- **Strategic litigation against public participation (SLAPP)** suits brought against activists and others who speak out about climate change and the environment. Examples include cases filed by Shell and Total against Greenpeace and other NGOs, and Exxon filing litigation against two shareholder activist organisations, Arjuna Capital and Follow This.

Not all non-aligned cases necessarily aim to obstruct climate action. We also see:

- **'Just transition' cases** challenging how climate action is designed, rather than opposing the need for such action. These cases are filed by individuals, communities or labour groups who consider climate action a threat to human rights. An example is the communication by a group of UN Special Rapporteurs to the French government concerning the development of 'mega-basin' projects which have impacts on small-scale farming and biodiversity.
- **'Green v. green' cases** involving apparent trade-offs between the need to protect biodiversity and projects or policies that are introduced on climate grounds. An example is the Indian Supreme Court case of *M.K. Ranjitsinh and Others v. Union of India*, and cases opposing offshore wind projects in the US claiming these constitute a threat to whale populations. There are signs that some of these cases may be used to prevent climate action.

Climate litigation beyond the courtroom

Climate litigation impacts extend beyond courtroom decisions, influencing policy, governance and public discourse. There are groups of key actors that both contribute to and experience these impacts:

- **Courts can have influence beyond their decisions**. Courts are playing a pivotal role in climate policy, publicising climate science through public hearings and their rulings.
- **Climate litigation has spurred legislative reforms**. Notable examples include changes to climate framework laws in Ireland and Germany following successful government framework cases. Litigation also appears to have influenced the proposed Climate Superfund Act in Vermont, which aims to hold fossil fuel companies financially accountable for climate damages. Other US states and legislators in the Philippines are considering similar laws.
- **Financial regulators are increasingly aware of and highlighting climate litigation risk**. Reports by the Network for Greening the Financial System highlight the need for better risk assessment methodologies. Central banks and financial regulators are being urged to adapt to these evolving risks.
- **The insurance sector is starting to respond to litigation risk**. Insurance and reinsurance companies face significant challenges from climate litigation, necessitating a re-evaluation of risk management strategies. Regulatory bodies are underscoring the importance of robust risk assessment models.
- **Climate litigation is impacting the broader legal profession**. Professional associations are guiding law firms to align with net zero targets and integrate climate risk into client advisories, acknowledging the ethical responsibilities of legal professionals. Legal and consulting firms also face growing risk from climate litigation.

Future trends in climate litigation

We anticipate the following future trends:

- **Post-disaster cases**: Legal disputes are emerging over recovery efforts following climate disasters, exemplified by a case in Puerto Rico challenging the reconstruction of fossil fuel-based infrastructure.
- **Ecocide and criminal law**: The concept of ecocide is gaining traction, with new legislation in Belgium and proposed EU directives addressing environmental crimes. These developments may influence future climate litigation.
- **Environmental and climate litigation synergies**: Climate litigation strategies are increasingly applied to environmental cases, such as plastic pollution. Rights-based environmental cases are also incorporating climate arguments, indicating a convergence of legal approaches.

Introduction

Over the past six years, the Grantham Research Institute, in partnership with the Sabin Center for Climate Change Law, has published annual snapshot reports in its *Global trends in climate change litigation* series. Each report provides a synthesis of the latest research and developments in the climate change litigation field.

Focusing on the calendar year 2023, this 2024 report provides:

- A numerical analysis of how many cases have been filed, where, and by whom.
- A qualitative assessment of trends and themes in the types of cases filed.

We also provide commentary on important cases filed or decided in the first five months of 2024.

In previous years most of the numerical analysis has focused on cases outside the US; this year we have expanded that approach to provide numerical analysis including subsets of both United States and 'Global' (non-US) climate cases (see Box A).

Box A. Data sources

The primary sources of data for this report are the Climate Change Litigation Databases maintained by the Sabin Center for Climate Change Law (see further the Appendix). The Sabin Center maintains two databases:

- **One contains all climate cases filed in the US** before state and federal courts, and selected cases before administrative entities. This database contains just under two-thirds of all identified climate cases around the world to date.
- **The other is a database of 'Global' cases**, which includes information on cases filed in all countries *other than the US* and in international and regional courts and tribunals.

Since 2021, coverage of many jurisdictions has improved thanks to the Sabin Center's convening of the Peer Review Network of Global Climate Litigation, a group of scholars and practitioners from around the world who track litigation within specified geographical areas and participate in ongoing information- and knowledge-sharing and dialogue about climate litigation.

While we provide quantitative data and analysis of climate cases around the world, the existing data is not comprehensive or exhaustive. Nonetheless, the databases offer a diverse and cross-cutting sample of cases covering a wide geographical scope and range of levels of government, types of actor and types of argument, enabling observations to be made about trends and innovations in cases and countries.

Defining climate change litigation

In this series we define climate change litigation as consisting of cases brought before judicial and quasi-judicial bodies that involve material issues of climate change science, policy or law. This is the definition that the Sabin Center uses in defining which cases to include in its Climate Change Litigation Databases, and which we take as the basis for the quantitative analysis. This definition involves a narrow approach to determining what is 'climate change-related', including only cases that explicitly engage with climate change matters. However, the Sabin Center takes a broader approach to determining what is 'litigation', including notable examples of investigations, communications by domestic and international bodies, complaints to regulators, requests for prosecution and enforcement actions. We explore how those proceedings are being used as a tool to advance a variety of climate change-related agendas in so-called 'strategic litigation'; i.e. those cases filed with the aim of influencing the broader debate around climate action.

We acknowledge that there are numerous court cases around the world in which neither climate change science nor law is explicitly mentioned but which will have a serious impact on the volume of greenhouse gas emissions or on a community's resilience to climate change (see Peel and Osofsky, 2020; Bouwer, 2018; Hilson, 2010). These deal with matters such as illegal deforestation and planning decisions. As a result, critical developments in cases outside the Global North have often been excluded from scholarship on climate litigation. Specifying climate risks to particular locations and regions could help identify new climate cases, especially in countries in the Global South (Field, 2024).[2] We acknowledge the critical importance of adopting a multiplicity of approaches to understanding legal responses to climate change. Our approach is by no means intended as the last word on the subject. Instead, we are seeking to provide an easy-to-understand snapshot of some key developments to enable readers to start to understand this rapidly evolving field.

Categorisation of cases to accurately illustrate their diversity

As the amount of climate litigation has grown over the years, so too has the diversity of cases, increasing the options for categorising and classifying cases. Within the different types of cases, we see significant variation in terms of the legal arguments made by the litigants. We also see differences in the levers for changing the system identified by those involved in 'strategic litigation'. For example, activist groups concerned about fossil fuels may choose to bring a challenge to the permitting process around a given fossil fuel project; alternatively, they might choose to target the policies of the banks providing financial support to those projects. Activists concerned with emissions associated with deforestation may use the same kind of tactics, even though their thematic focus differs. Different insights about trends in climate cases emerge depending on which elements of the issue we choose to focus on – 'how we choose to cut the cake', as it were (see e.g. United Nations Environment Programme [UNEP], 2023, for alternative approaches).

Our primary aim through this series is to provide readers with a comprehensive overview of the multifaceted dimensions of climate change litigation. We initially assess the objectives of each climate case as they appear from the complaint and any campaign materials provided by the claimants, examining whether the parties' requests for judicial relief are likely to align with climate action goals – either by fostering resilience to climate impacts or by reducing greenhouse gas emissions – or if, conversely, achieving success in these cases could potentially hinder climate objectives, such as by delaying or obstructing the implementation of certain climate policies. Historically, the labels 'pro-regulatory' and 'anti-regulatory' (Peel and Osofsky, 2015), or simply 'pro' and 'anti' climate (Hilson, 2010), have been applied to cases. However, as demonstrated in this report, the distinction is becoming increasingly nuanced. Consequently, we categorise cases as either 'climate-aligned' or 'non-climate-aligned', considering trends in each of these case types separately (Setzer and Higham, 2022, 2023).

[2] The distinction between the 'Global South' and 'Global North' is based on economic inequalities, but the 'Global South' is not a homogeneous group of countries: legal development and legal capacity vary by country. We use the list of G77 + China countries to determine if a country is in the Global South.

Box B. Definitions in a nutshell

Climate change litigation: cases before judicial and quasi-judicial bodies that involve material issues of climate change science, policy or law.

Strategic litigation: litigation where the plaintiff seeks to both win the individual case and to influence the public debate on climate action.

Climate-aligned litigation: cases that appear from the complaint and any campaign material to be requesting judicial relief that would align with climate action goals, fostering resilience to climate impacts or reducing greenhouse gas emissions. Determining if a case is climate-aligned is not always straightforward, given the variety of views about the best way to successfully achieve climate adaptation and mitigation.

Non-climate-aligned litigation: cases that appear from the complaint and any campaign material to be requesting judicial relief that would prevent or delay climate action. As with climate-aligned cases, it is not always straightforward to identify such cases, as some may not be challenging climate action *per se* but rather the manner in which it is being carried out.

Structure of the report

Part I provides an overview of overall case numbers, including an overview of cases by year of filing, an assessment of where cases are being filed, and an analysis of the key actors involved in climate litigation.

Part II takes a closer look at climate-aligned strategic cases, identifying key strategies used in these cases, and commenting on their direct judicial outcomes.

Part III explores developments in non-climate-aligned cases, focusing on case types filed in 2023, and explaining the nuance and variety among this group of cases.

Part IV explores the impacts of climate litigation beyond the courtroom, and also the actors involved in creating these impacts. Finally, it considers what possible future trends for climate litigation seem likely.

Note about references

We have hyperlinked our in-text citations wherever possible but also provide a full references list in a separate annex, available at:
http://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2024-snapshot

Part I. The global landscape of climate cases

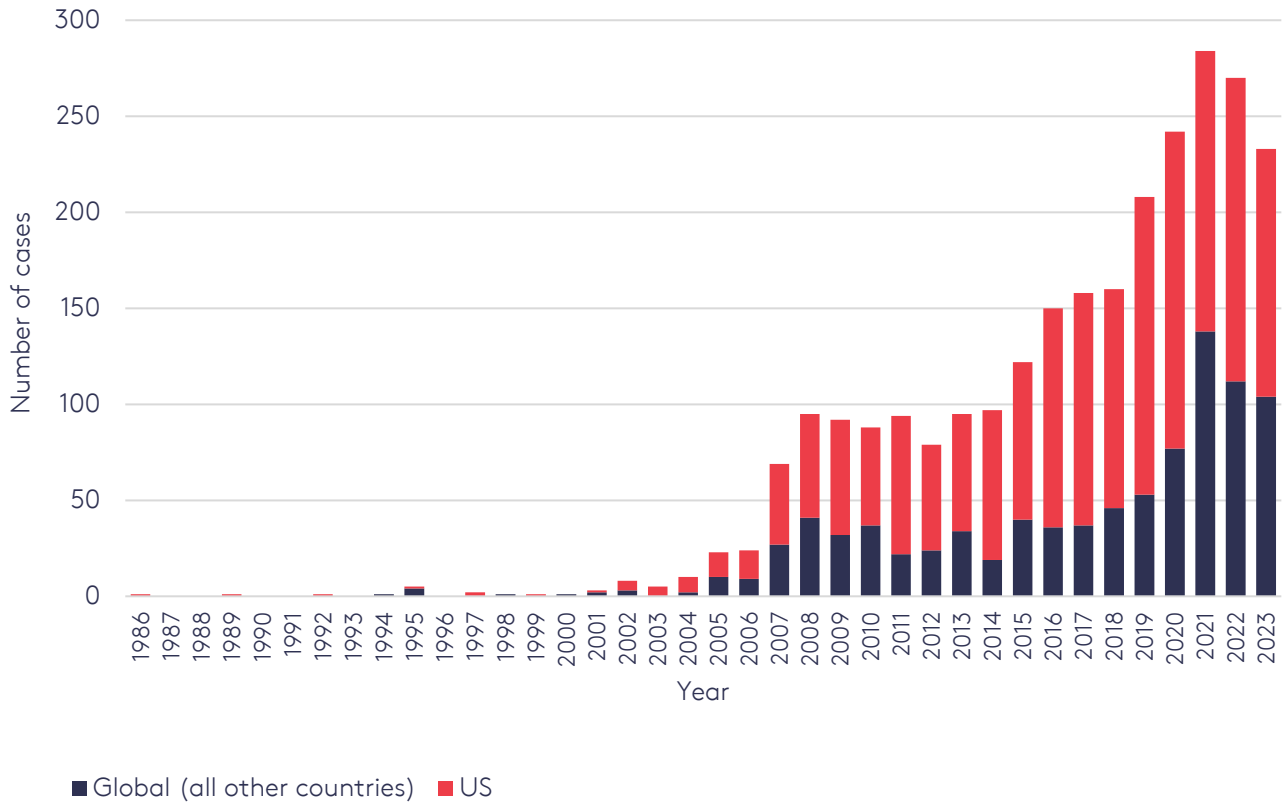
This section provides an update on key metrics regarding climate litigation. We start by discussing the overall number of cases and the pace of filing of new cases. We then provide a geographical breakdown of cases, focusing on jurisdictions where cases are frequently filed, considering cases in the Global South, and providing an overview of trends in international and regional cases. Finally, we provide an assessment of the actors involved in climate cases, discussing the growing focus on climate litigation against corporate actors.

We recognise that the growing field of climate litigation offers a complex landscape and that our primary focus on cases at the point of filing offers only a partial view. As more cases get decided, a comprehensive understanding would require further assessing decided cases, for instance analysing their types, different forms of resolution and the duration required for resolution in various jurisdictions.

Growth in climate cases

Our dataset currently contains 2,666 climate litigation cases.[3] Around 70% of these cases have been filed since 2015, the year the Paris Agreement was adopted. 233 of these cases were filed in 2023. As in previous years, more cases (129 of 233) were filed in the US in 2023 than in all other countries around the world. Figure 1.1 shows the number of cases within and outside the US from 1986 to 2023.

Figure 1.1. Number of climate litigation cases within and outside the US, 1986–2023



[3] This dataset contains 43 cases filed in 2024. However, our focus when discussing trends over time below is on cases filed up until the end of the calendar year 2023. This is a departure from previous years in which we have focused on a study period from May to May. The decision to change the temporal focus has been made in part to reflect changes to the data collection process as the field has grown that mean that cases often take longer to collect and process. For more information on the dataset used for this report see the Appendix.

Although hundreds of new climate cases continue to be filed, the data suggests that the rate of increase may be slowing down. The decreased filing rate in the US could be due to a year of unprecedented clean energy deployment or because of a reduction in the approval and construction of new fossil fuel infrastructure. The Sabin Center will further explore the shifts in the US landscape.

Outside the US, the possible slowdown might also be a result of delays in data collection. For example, when our last report was published in June 2023, 222 cases filed in 2022 had been identified, but this number has since increased to 270. This suggests that what currently appears to be a downward trend may become a more stable plateau as more data is collected.

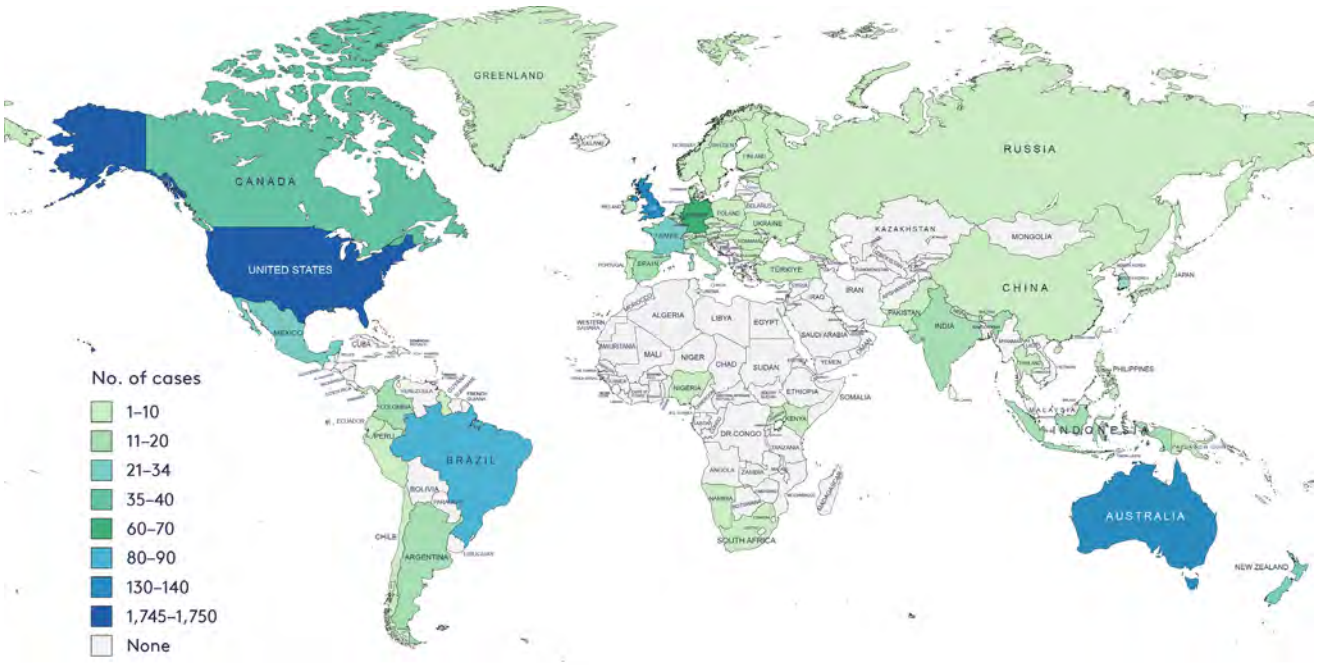
Other factors contributing to the apparent decline in new cases may include the diversification of case strategies, with more cases addressing climate issues only peripherally and thus not captured in existing databases. It is also possible that more resources might be being directed towards a smaller number of cases anticipated to have a more lasting or wide-ranging impact.

Climate cases spreading to more countries around the world

The United States remains the country with the highest number of documented climate cases, with 1,745 cases in total. Next is Australia, where 132 cases have been identified, but only 6 new cases filed in 2023 have been recorded there so far.

Climate cases have been identified in new jurisdictions since the last edition of this report. In 2023, cases were filed for the first time in Panama (*Callejas v. Law No 406 – unconstitutionality of mining concession*) and Portugal (*Associação Último Recurso et al. v. Portuguese State*). Older cases filed in Hungary and Namibia were also identified for the first time, bringing the total number of countries in which climate cases have been recorded to 55 (see Figure 1.2).

Figure 1.2. Number of cases to date in countries globally



The UK, Brazil and Germany were the countries with the most recorded cases in 2023

Outside the US, the countries with the highest number of recorded cases filed in 2023 were the UK with 24 cases, Brazil with 10 cases, and Germany with 7 cases. All three of these countries also have high aggregate numbers of recorded cases, with the UK currently at 139 cases, Brazil at 82 cases, and Germany at 60.

We observe the following important trends and developments in these countries:

- **The UK** has seen developments concentrated on its Climate Change Act. In addition to new framework cases, i.e. those challenging the government's overall approach to climate policy (discussed in Part II), there have been challenges to specific sectoral policies for their failure to contribute to achieving the national emissions reduction targets set out in the Act, including an unsuccessful challenge to the UK Food Strategy (*Global Feedback Ltd v. Secretary of State for Environment, Food and Rural Affairs*).
- **In Brazil** a study conducted by JUMA on 80 climate litigation cases filed up to March 2024 reveals distinct patterns (Moreira et al., forthcoming). The Public Prosecutor's Office filed 22 cases, civil society filed 21 cases, other public bodies (including the Federal Environmental Agency) filed 15 cases, and political parties filed 14 cases. The Public Prosecutor's Office, traditionally the main initiator of environmental and climate cases in the country, now finds itself on a par with civil society in terms of the quantity of litigation it has initiated. Predominantly, cases target government entities. Meanwhile, litigation against private companies is on the rise, with 31 cases recorded. Over half of the lawsuits in Brazil concern land use and forestry issues, with equal numbers filed against government bodies for their lack of action and against individuals and companies directly responsible for deforestation (see further Box 1.1). The Brazilian Amazon is the subject of 34 of these actions. Additionally, there is a growing trend in litigation concerning civil liability for environmental and climate-related damage, primarily associated with deforestation. This trend is exemplified by the recent case of *IBAMA v. Dirceu Kruger*, which challenges the court to establish causation and quantify damage, aiming to repair and restore the area of forest in question. Furthermore, 25 cases concern the exploration, production and use of fossil fuels. Of these, 12 broadly address Brazilian energy policy, while 13 question the permitting of specific projects.
- **In Germany** there has been a significant uptick in climate-related legal action, with the number of cases more than doubling since 2021, as noted in our 2023 report. This increase followed the Federal Constitutional Court's pivotal verdict in *Neubauer et al. v. Germany* (Setzer and Higham, 2023). Although many cases from this 'second generation' have not succeeded, the past year witnessed notable victories for climate activists, for example in *DUH and BUND v. Germany*. Initiated under the Federal Climate Protection Act, which sets sector-specific emissions targets, this lawsuit challenged the sufficiency of policy measures proposed by the building and transport sectors to meet these targets. The Court sided with the plaintiffs, deeming the proposed policy measures inadequate. The government may contest this ruling, potentially intensifying an ongoing political discussion about possibly revising the law to eliminate these sector-specific targets (Bonnemann, 2023; Averchenkova et al., 2024).

Box 1.1. Forests and deforestation: carbon sinks, their preservation and ownership are increasingly the subject of litigation

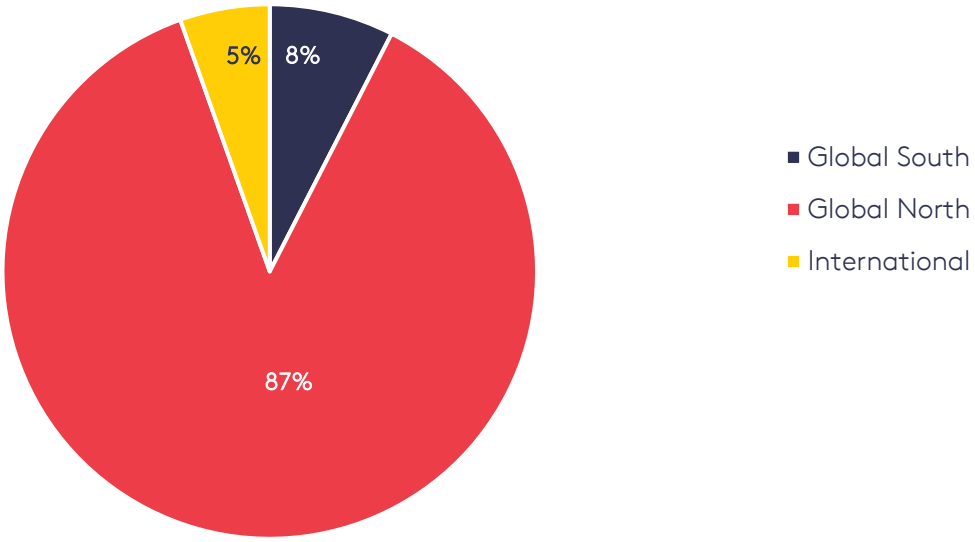
In their capacity as carbon sinks, forests are anticipated to play a vital role in any effort to balance emissions and removals of carbon dioxide in the atmosphere (i.e. achieve net zero). Cases that combine forest and climate change arguments have emerged as a significant area of legal action globally, with at least 81 recorded cases addressing deforestation and forest governance filed between 2009 and 2023. A working paper by Bisiaux et al. highlights the diverse approaches and outcomes of these cases. Brazil and the US are the most prominent locations for filings. Most cases are brought by NGOs and individuals aligned with climate objectives, but there are also a few non-aligned cases brought by companies. The legal basis for these cases varies, encompassing environmental law, air pollution regulations, human rights and private law. Litigation grounded in environmental law typically targets governments or companies, challenging project approvals. A few cases also involve deforestation in companies' value chains, including cases targeting European banks such as the 2023 case of *Comissão Pastoral da Terra and Notre Affaire à Tous v. BNP Paribas*.

Cases that combine climate, forest protection and human rights arguments increased during 2023. A notable example is the action taken by the Brazilian Public Prosecutor's Office of the State of Pará, which has initiated a series of lawsuits against various companies and a municipality for what is being termed 'forest carbon grabbing'. This term describes a scenario where the municipality issued a decree authorising the operations without previous consultation with affected communities, while companies are accused of illegally generating and selling carbon credits on the voluntary market. These activities are said to infringe upon the rights of traditional communities, highlighting the complex interplay between environmental conservation efforts and the protection of indigenous and local communities' rights.

Climate litigation in the Global South

While Brazil is the country from the Global South with the largest number of climate cases, a number of other countries in the Global South are developing unique judicial responses to climate challenges. Currently, more than 200 climate cases from these countries are recorded in the Global database, comprising around 8% of all cases (see Figure 1.3).

Figure 1.3. Percentage of cases in the Global database filed in courts in the Global North, courts in the Global South, and international and regional courts



Climate litigation in the Global South has garnered considerable attention and scholarly work in recent years. A growing body of literature, with many contributions from authors based in the Global South, is now available on this subject. Among recent publications is an edited volume on climate litigation in Africa that challenges the notion of African climate litigation falling behind its global counterparts. Its editors advocate taking a perspective that appreciates how activists and legal professionals in Africa have tailored their approaches to suit the unique and varied domestic contexts of the continent (Bouwer et al., 2024). Additionally, Lin and Peel (2024) have published the first comprehensive monograph on climate litigation in the Global South; they examine the legal strategies employed and the preliminary effects of such litigation originating from the Global South. Concurrently, the Global Network for Human Rights and the Environment maintains an extensive bibliography on climate litigation in the Global South, featuring hundreds of sources (Murcott et al., 2023).

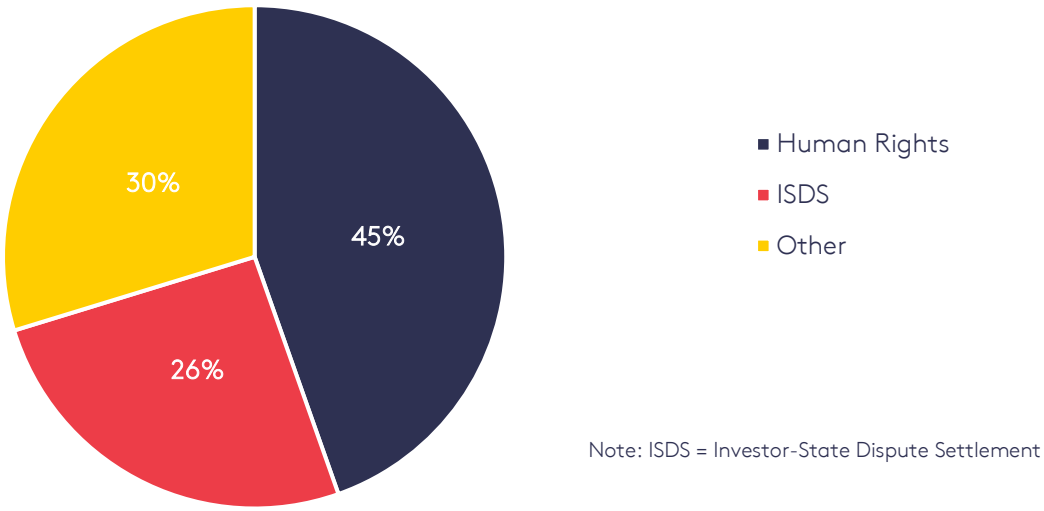
While research indicates a growing trend in utilising the courts as instruments in climate policy responses in some Global South countries, there may be a strategic avoidance of climate litigation in others. For instance, India's historically low number of climate cases has reflected a conscious decision to avoid an overly narrow focus on emissions, as this can overlook broader issues related to livelihoods, rights and ecological concerns (Ohdedar, 2021; Kumar and Naik, 2024). However, there may be a shift there following a landmark judgment by the Supreme Court of India in *v. Union of India*. This decision established a new constitutional right to be free from the adverse effects of climate change, drawing on Article 21 (the fundamental right to life and personal liberty) and Article 14 (the fundamental right to equality) of the Indian Constitution (Kumar and Naik, 2024).

International courts and tribunals are being asked to rule and advise on climate change

Around 5% of all cases have been filed before international or regional courts, tribunals and authorities. Half of these (70 out of 146) cases have been filed before the Courts of Justice of the European Union.[4] Nine of these international and regional cases were filed in 2023.

Outside the EU context, which has been discussed in earlier publications (see Higham et al., 2023), we see several key trends in international cases. Figure 1.4 shows the breakdown of international and regional human rights-focused cases, investor-state dispute settlement (ISDS) cases (an indicative number, as many arbitrations are conducted confidentially), and 'other' types of tribunal (including the International Court of Justice, the International Tribunal on the Law of the Sea and the UNFCCC's dispute resolution bodies).

Figure 1.4. Breakdown of international and regional cases by tribunal type, excluding cases in EU courts



Note: ISDS = Investor-State Dispute Settlement

[4] The Court of Justice of the European Union (CJEU) is the judicial branch of the EU, and it consists of two separate courts: the Court of Justice and the General Court. It does not include the European Court of Human Rights (ECtHR), which is the international court of the Council of Europe. The figure of 70 does, however, include one case filed before the European Ombudsman.

More international climate cases are filed before human rights tribunals than any other type of court

Firstly, around 45% of international cases and complaints recorded to date involve international human rights courts, bodies and tribunals.[5] These cases reflect a growing trend in the use of human rights arguments, and include three cases brought before the European Court of Human Rights decided in April 2024 (discussed in more detail in Part II). This figure also includes a request for an international advisory opinion from the Inter-American Court of Human Rights (IACtHR).

Human rights arguments are also being made in cases beyond specialist human rights tribunals

In 2023 two requests were submitted for advisory opinions on climate change issues from international tribunals, including the request to the Inter-American Court noted above and a request to the International Court of Justice (ICJ). An earlier request was made to the International Tribunal on the Law of the Sea (ITLOS), in 2022.

These three legal requests, aimed at combating climate change, differ significantly in scope and potential impact. Each court operates under unique jurisdictional capacities, with distinct procedures and functions. The ICJ has the broadest inquiry, seeking to define state obligations and the repercussions of climate-related harm, potentially influencing global reparations for damage caused by climate change. In contrast, the IACtHR focuses on human rights issues within the Americas, while ITLOS concentrates on preventing marine pollution and preserving the marine environment.

The volume of state and general public engagement with these proceedings seem to illustrate global concern and interest in clarifying state obligations regarding climate protection. ITLOS's advisory process attracted statements from 34 states and nine intergovernmental organisations (Tigre and Silverman-Roati, 2023). The IACtHR also observed record engagement, receiving more than 260 submissions from states, international organisations, NGOs and individuals. The ICJ received 91 written statements, the highest number ever filed in advisory proceedings before the Court, primarily from states but also including contributions from entities such as the World Health Organization (WHO).

On 21 May 2024, ITLOS issued a unanimous advisory opinion (see Box 1.2). Expected outcomes from the IACtHR and ICJ opinions are anticipated in late 2024 and early 2025, respectively.

The broader implications of these opinions remain unclear, and opinions on their impacts vary. Although advisory opinions are non-binding, they carry substantial legal and moral weight, potentially spurring governments towards more ambitious climate action and setting the stage for contentious litigation (Sthoeger, 2023). Some view these advisory opinions as a means to clarify the human rights obligations of states concerning climate, although the ITLOS opinion made only passing reference to human rights despite some of the submissions made including significant human rights arguments. The collective outcome across all cases may also generate a more specific articulation of states' climate commitments than currently exists (Hamilton, 2024). Others caution against potential lack of precision or overreach that might infringe on state sovereignty or complicate climate negotiations (Bodansky, 2023). Altogether, it is likely that these decisions will be used as building blocks for further litigation, both at the national level and before relevant regional or international courts.

[5] These include the communications by UN Special Rapporteurs mentioned above, along with complaints filed before the UN Human Rights Committee and the UN Committee on the Rights of the Child. They also include cases filed before regional human rights bodies including the European Court of Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, and the East African Court of Human Rights.

Box 1.2. First international court or tribunal answer to the question 'do countries have an obligation to protect the climate?'

The ITLOS request was designed with two primary objectives: to establish that the harmful effects on the oceans resulting from, or likely to result from, climate change due to anthropogenic greenhouse gas emissions into the atmosphere constitute 'marine pollution' under the 1982 United Nations Convention on the Law of the Sea (UNCLOS); and to clarify the specific legal obligations of states' parties under UNCLOS in addressing the impacts of climate change on the marine environment.

Key advancements can be observed from the ITLOS opinion. First, ITLOS clarified that all anthropogenic greenhouse gas emissions constitute marine pollution, which has potentially far-reaching consequences (Voigt, 2024). Under UNCLOS, states must now take all necessary measures to prevent, reduce and control emissions. Additionally, states are obligated to protect and preserve the marine environment against the impact of climate change, maintaining and restoring ecosystem health and the natural balance of the marine environment. ITLOS thus established UNCLOS as a legal basis for obligations to address climate change and its adverse effects, alongside the United Nations climate treaties such as the UNFCCC and the Paris Agreement. However, ITLOS stopped short of detailing what measures a state with progressively ambitious NDCs would need to take under Articles 194.1 and 194.2 of UNCLOS (Voigt, 2024).

Second, ITLOS clarified that obligations under UNCLOS and the Paris Agreement are separate but mutually reinforcing (Peel, 2024). States have a set of obligations to protect the climate deriving directly from UNCLOS (namely under Articles 194, 207 and 212) irrespective of the Paris Agreement outcomes (Rocha, 2024). These obligations include adopting a regulatory framework to reduce emissions, effectively enforcing that framework, conducting Environmental Impact Assessments, implementing international rules and standards at the domestic level, fulfilling the obligation of global and regional cooperation with other states, and providing scientific and technical assistance to vulnerable states.

Third, ITLOS elaborated on the doctrine of states' due diligence obligations, affirming that even if the primary obligation is difficult to define, it remains under some form of international judicial oversight (Rocha, 2024). The Tribunal confirmed that the standard of due diligence evolves over time as scientific knowledge advances and the risks associated with a particular activity become more foreseeable.

It is expected that the ITLOS opinion will inform other advisory opinions and impact on international legal understanding of climate-related obligations (Silverman-Roati and Bönnemann, 2024). However, this was quite a narrowly framed request, and questions regarding state responsibility and liability for acts and omissions that harm the climate system are yet to be answered. In particular, the legal consequences for injured and specially affected states, peoples and individuals are likely to be addressed by the ICJ, as the UN General Assembly's request for an advisory opinion explicitly asks for this clarification (Wewerinke-Singh and Viñuales, 2024).

Ultimately, the ITLOS advisory opinion could serve to strengthen states' duties to reduce greenhouse gas emissions and minimise the environmental harm resulting from climate change and will likely inform and impact international legal understanding of climate-related obligations.

International climate cases involving investment law and international trade

Another trend in international climate litigation that has garnered significant attention in recent years has been the growth of cases concerned with investment law – particularly investor-state dispute settlement processes – and international trade.

ISDS cases

Processes concerned with investment law provide opportunities for foreign investors to seek compensation in circumstances where a country unfairly prejudices their investments. Such proceedings are not judicial cases before courts, but arbitrations conducted before panels of arbitrators, and are often conducted under terms of confidentiality. Originally intended to provide confidence to investors looking to invest overseas, this system has been subject to criticism for the potential 'regulatory chill' it creates regarding environmental and public health policy (Tienharaa, 2017). One of the most controversial investment agreements from a climate change perspective is the Energy Charter Treaty, signed by more than 50 countries in Europe and Asia, which was designed to promote energy cooperation and provides significant protection for fossil fuel investments.

The Sabin Center Global databases currently list 19 ISDS cases, constituting about 30% of the international cases outside the EU, as shown in Figure 1.4. A larger group of approximately 70 'climate-related' claims were recently analysed by Fermeglia et al. (2024). Notably, arbitration requests by German energy companies RWE and Uniper against the Netherlands, regarding policies to prematurely close coal-fired power plants, were both discontinued in 2023 (Verbeek 2023; IISD, 2022). This development came in the aftermath of a ruling by the German Federal Court of Justice that cast doubt on the validity of arbitration claims between EU member states, and after the German government set conditions on Uniper as part of bailout agreements during the energy crisis triggered by Russia's invasion of Ukraine.

It is worth noticing that governments are increasingly recognising the challenges posed by the current interpretations of investment treaties to climate policy and are starting to devise strategies to mitigate these issues (OECD, 2023). In a significant move, 11 EU Member States and the UK have withdrawn from the Energy Charter Treaty, with the EU poised to follow suit. Despite this, a 'sunset clause' remains in effect, permitting investors to seek arbitration for another 10 years (CAN Europe, 2024).

Trade disputes

A less well-studied area of international climate litigation has been trade disputes before the World Trade Organization (WTO) Dispute Settlement Body. At least three climate-related trade disputes have been recorded before this body (Setzer and Higham, 2022), and in March 2024 one of these received an initial ruling from the panel appointed to review the case. Trade disputes often arise when a country introduces a policy measure that may result in unequal access to markets in contravention of WTO rules. We consider these to be 'climate related' when the policy measure in question is justified on the basis that it forms part of the countries' climate policy response. The case in question (DS-600) concerns complaints by Malaysia that the EU's ban on the use of palm oil as a biofuel (implemented under the recast Renewable Energy Directive [RED II]) violates WTO rules. The panel decision confirms that elements of the implementation of the RED II framework do breach WTO rules, and it appears that the EU is unlikely to dispute this, as "[t]he matters identified by the panel are, to a very large extent, required anyway to be adjusted under EU law" (Directorate-General for Trade, 2024).

Plaintiffs and defendants: key actors in climate litigation

Most climate cases are filed by NGOs and individuals, but governments also bring cases

As documented in previous reports, most climate litigation cases recorded in the databases in recent years have been filed by NGOs or individuals, or a combination of these actors and others. This holds true for 2023, when more than 70% of all cases, both US and Global, involved either individuals, NGOs or both among the plaintiffs. This trend reflects an effort by civil society actors, some of which may otherwise be excluded from climate change decision-making (Kotze et al., 2023), to use the courts to raise concerns about climate action, and mirrors the rise in strategic climate litigation.

However, in the US, nearly 20% of cases filed in 2023 involved government actors among the plaintiffs. These are often subnational governments challenging federal climate policy decisions (for example, some of the cases challenging SEC's rule mentioned in Box 3.1 were filed by state governments), and subnational governments filing suits against oil and gas companies, as discussed in Part II. Different actors have turned to the courts elsewhere too, such as political parties and public prosecutors in Brazil (as noted above).

Cases filed by companies are common in the US, but such cases are also filed elsewhere

A significant number of climate change cases are filed by companies and trade associations. Thirteen per cent of all cases filed in 2023 were filed by these actors, with the vast majority of these filed in the US. This replicates a pattern from previous years where companies have also been responsible for a significant proportion of US cases. Many but by no means all of these cases can be understood as non-climate-aligned cases, which are discussed further in Part III. However, there are interesting examples of cases filed by companies that are trying to advance climate-friendly agendas such as seeking priority for renewable energy, and examples of companies seeking to use climate litigation as a strategy to achieve a commercial advantage. For example, in 2024 the Spanish renewable energy company Iberdrola sued Repsol, a major fossil fuel company, alleging that Repsol was involved in climate-washing (see *Iberdrola and others v. Repsol*). A small number of significant cases have also been launched by companies or on their behalf against the companies' directors. Such cases are discussed further in Section II.



Climate activists protest outside ING's head office in Amsterdam in April 2023, demanding the bank to stop financing the climate crisis.
Photo: Milieudefensie/Muzi Ndiweni

More cases continue to be filed against corporate actors

Despite significant interest from the media and academic communities in corporate climate litigation, historically, the majority of climate cases have been filed against governments (Setzer and Higham, 2021). This remained true in 2023, with just over 70% of all cases filed in this year involving government actors among the defendants and only 26% involving companies. However, evidence of divergence between the US and Global cases is becoming apparent. In the US, governments were among the defendants in nearly 85% of cases, with just 15% of cases involving corporate defendants. For Global cases, governments were involved as defendants in nearly 60% of cases, and 40% involved corporate actors among the defendants.[6]

This increase in the proportion of Global cases targeting corporate actors is accompanied by significant engagement with the question of corporate climate responsibility from both scholars and activists, with many new publications and projects focused on this issue. Among the most ambitious new initiatives are:

- The Carbon Majors dataset, initially released by Richard Heede in 2013, was rereleased in 2024 as an online platform with annual database updates, under a collaboration with InfluenceMap. The platform encompasses emissions data from 1854 to 2022, revealing a concentrated source of CO_2 emissions from global fossil fuel and cement producers tied to a small number of corporate and state-producing entities. Drawing from this data, a report by Carbon Majors (2024) suggests that 70% of the emissions since the Industrial Revolution can be attributed to 78 such entities, with just 19 of them responsible for half of these emissions. Furthermore, the report highlights that since the Paris Agreement, 57 corporate and state entities have contributed 80% of these emissions. Litigants have made wide use of this evidence of the significant role that a relatively small group of high emitters continues to play in driving climate change, and they will likely continue to use it when bringing cases against these actors.
- A project run by the British Institute for International and Comparative Law, which created a Global Toolbox on Corporate Climate Litigation (BIICL, 2024) using national reports from 17 countries, identifies legal pathways, challenges and opportunities for corporate climate litigation around the world, exploring causes of action, procedures and evidence, and remedies.
- Publications, toolkits and manuals from litigators involved in successful climate cases, such as the Milieudefensie (Friends of the Earth Netherlands) report *Defending the Danger Line* (Cox and Riej, 2022), may potentially contribute to a further increase in the number of corporate cases being brought around the world. Milieudefensie published that report after it won a landmark judgment from the Hague District Court in 2021 requiring Shell to increase its emissions reduction ambition (see *Milieudefensie v. Shell*).

Companies from many sectors are now at risk of being taken to court over the climate

Our analysis reveals that between 2015 (the year the Paris Agreement was adopted) and 2023 around 230 strategic climate-aligned lawsuits have been initiated against companies and trade associations, with more than two-thirds of these cases emerging since 2020 (see Part II for discussion of strategic cases).

While cases against companies have traditionally focused on the fossil fuel sector (both producers and the combustion of fossil fuels in the energy sector), a notable development in recent years is the increased diversity of industries targeted. This trend continued into 2023, as illustrated in Figure 1.5. Legal challenges have been launched against businesses across various sectors, including airlines, the food and beverage industry, e-commerce, and financial services, in addition to the traditional focus on the fossil fuel sector.

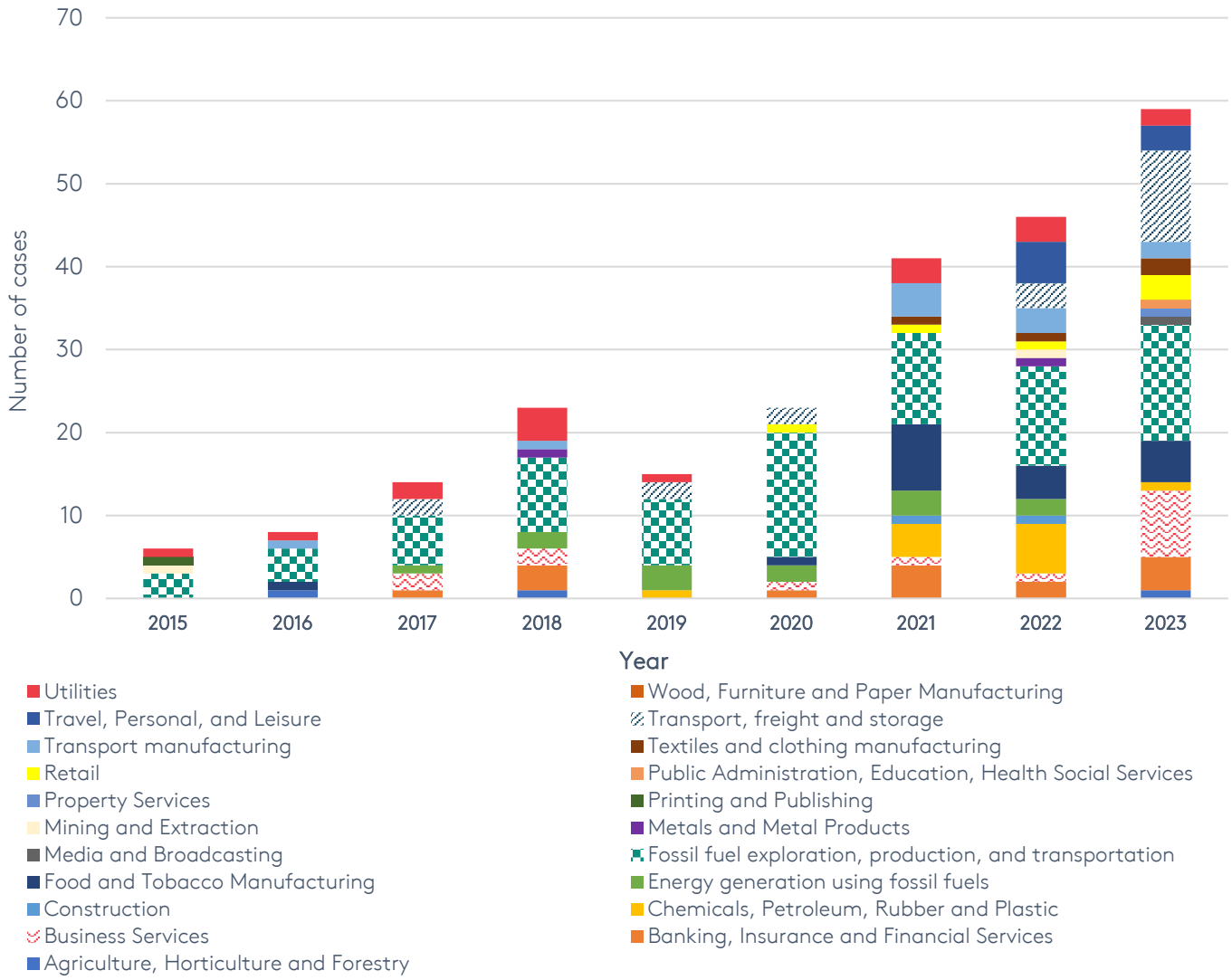
[6] There is some overlap between these two groups of cases as some involve both government and corporate actors as defendants.

Part of this shift targets the professional and financial services that enable the work of fossil fuel companies. A notable lawsuit by Multnomah County in the US against leading entities in the fossil fuel industry also implicated the consulting firm McKinsey as a defendant, accusing it of facilitating the industry's misinformation campaigns (*County of Multnomah v. Exxon Mobil Corp.*). Additionally, recent complaints have been lodged with regulatory bodies in the UK and the Netherlands against the *Financial Times* newspaper for its partnership with Saudi Aramco in creating content, alleging efforts to misrepresent the company's environmental impact.

Another aspect of this trend involves new sectors that are users of fossil fuels or depend on fossil fuel use. Examples from the past year include climate-washing claims against airline companies. The UK advertising regulator, the Advertising Standards Authority (ASA), banned adverts from Air France, Lufthansa and Etihad due to concerns that they misled customers about the environmental impact of air travel. In 2023, an Austrian court ruled that Austrian Airlines AG misled the public when it published ads offering CO_2-neutral flights using 100% sustainable aviation fuel between Vienna and Venice.

Litigation has also expanded to companies for harmful climate impacts caused by sources other than fossil fuel production and combustion, such as deforestation, agriculture and associated food and beverage supply chains. For instance, the case *People v. JBS USA Food Co.* involved the New York State Attorney General suing the beef producer for allegedly making unsubstantiated claims regarding its 'Net Zero by 2040' commitment. Recent research suggests that a wave of 'Methane Majors' cases may be on the horizon (Bray and Poston, 2024).

Figure 1.5. Number of companies targeted in strategic climate-aligned cases by sector, 2015–2023



Underpinning some of these corporate climate cases is a mutually reinforcing relationship with evolving standards regarding responsible corporate conduct in the context of climate change (see Rajavuori et al., 2023). The update to the OECD Guidelines for Multinational Enterprises, published in 2023, illustrates this idea of increased expectations for corporate climate due diligence. The updated Guidelines – which are expected to inform corporate conduct and the development of mandatory regulations in OECD countries and beyond – impose far more explicit obligations on multinational companies regarding climate change than the previous 2011 edition (Aristova et al., 2024). Some aspects of the 'soft law' standards contained in instruments like the OECD Guidelines are now in the process of being hardened into mandatory requirements, at least for the largest companies operating within the EU.[7]

Of particular importance in this discussion are the EU's new Deforestation Regulation (EUDR) and Corporate Sustainability Due Diligence Directive (CSDDD). The EUDR will impose due diligence obligations from 30 December 2024 requiring companies to undertake due diligence into the source of a range of commodities, including cattle, cocoa, coffee, palm oil, rubber, soya and wood, to ensure that they have not caused deforestation. The CSDDD was adopted by the European Parliament in April 2024 and Member States will have two years to amend their domestic legislation to comply with its requirements. The CSDDD requires large companies to conduct human rights and environmental due diligence. The directive aims to harmonise due diligence requirements across EU Member States and standardise responsible business conduct, building on previous national and EU-level regulations like France's Duty of Vigilance Act and Germany's Supply Chain Due Diligence Act.

While civil society groups have criticised the final text of the CSDDD, which now partially exempts financial institutions and applies to only one-third of companies that would have been captured in the original proposal (WWF, 2024), the law nonetheless has huge potential for impact, being the first piece of legislation across major economies to require companies to adopt and put into effect a transition plan to make their business model compatible with limiting global warming to 1.5°C under the Paris Agreement. Member States will have two years to amend their domestic legislation to comply with its requirements, which may create a period of some uncertainty for stakeholders. In the meantime, the law is likely to give rise to a new climate cases, as companies and civil society groups seek to clarify what new requirements entail in practice (Higham et al., 2023).

Direct judicial outcomes in climate cases

In the previous reports in this series, we have provided an assessment of the judicial outcomes of recorded Global cases. This analysis includes the preliminary outcomes in cases that have not yet reached a final verdict before an apex court, so is subject to change year on year as cases move through the courts.[8] Historically, more than 50% of such cases have had outcomes favourable to climate action. Looking at the current global data, about 57% of decided cases have favourable outcomes. However, *this figure does not include the outcomes in US climate cases, which make up most of the cases filed*. While older analyses of US cases indicate that they were more likely to result in outcomes that hinder climate action or "favour antiregulatory" positions (McCormick et al., 2018), there has been no similar complete survey of US cases to draw on for more recent years.

This year, taking both US and Global cases together for the first time, we conducted new analysis to understand distinct patterns in the success of some of the different case strategies discussed in Part II below. The results of this analysis are presented in boxes through the text.

[7] The OECD Guidelines themselves draw heavily on another soft law standard, the UN Guiding Principles on Business and Human Rights (see further Aristova et al., 2024).

[8] See the Appendix for more detail on our methodology.

Part II. Climate-aligned strategic cases

In this part of the report we discuss key developments in climate-aligned strategic cases, focusing on cases filed or decided in 2023. We provide an update on figures for different types of cases filed since 2015, using the same typology of case strategies used in previous years, followed by more in-depth update on trends observed in the different types of cases.

Diverse case strategies in climate-aligned strategic cases

A main aim of this report series is to provide an idea of the ways in which the law and the courts are being used to advance different climate action agendas. To that end we classify cases as either strategic, semi-strategic or non-strategic (see Box 2.1). We then classify climate-aligned strategic cases into categories based on the types of strategies employed in the case (Setzer and Higham, 2022).

Box 2.1. Identifying strategic and semi-strategic cases

Identifying a case as strategic is no simple task, particularly when we have imperfect information about the intentions of the parties. As discussed in our 2023 report, we consider the following factors when making a determination:

- **Identity of the plaintiffs**. In strategic litigation the plaintiffs are selected to communicate a carefully designed message (Peel and Markey-Towler, 2021). Most cases of strategic climate litigation are filed by NGOs and individual campaigners, but other plaintiffs include Members of Parliament, political parties, or government representatives. An NGO and its lawyers might work with communities to develop legal strategies around their concerns (Okoth and Odaga, 2021). The term 'movement lawyering' emphasises the importance of co-creating strategic litigation with affected communities at the centre (Cummings, 2017).
- **Identity of the defendants**. Strategic climate litigation has often targeted actors that make the largest direct contribution to the problem (e.g. governments that can legislate and the largest emitters of CO_2), and actors who mislead the public about their climate action or consideration of climate risks. Strategic litigation can also be brought against actors that are not so visible but are crucial for the functioning of the value chain for high emitting activities, such as the public authorities that grant the fossil fuel licences and permits, and the financial institutions that provide the necessary capital or insurance for high emitters to develop or pursue their core activities.
- **Aim of the litigation**. Strategic litigation aims to achieve broader societal impacts beyond the outcome of individual cases, looking at long-term policy and regulatory changes (Bouwer and Setzer, 2020). These cases often seek remedies that are broader than the interests of the individual litigants, to influence policy and regulatory frameworks (Peel and Markey-Towler, 2021). The goals and strategies of such litigation can vary significantly between jurisdictions in the Global South and more developed countries, often reflecting the political and legal landscapes shaped by national leaders (e.g. climate litigation during the Trump era in the US – see Gerrard and McTiernan, 2018; and during the Bolsonaro era in Brazil – see Tigre and Setzer, 2024).
- **If the case is one piece of a larger puzzle**. Strategic litigation is part of a broader advocacy strategy of one or several organisations (Eilstrup-Sangiovanni, 2019), and often complements efforts outside the courts. These efforts will be carried out by NGOs lobbying or pressurising legislators and policymakers, or sending letters to targeted companies or regulators, or by protesters taking to the streets. The climate litigation movement is also part of an emergent transnational climate litigation network that generates ideas and facilitates intellectual and financial resources to litigants (Iyengar, 2023). Media coverage and a sophisticated communications campaign are often another part of this larger puzzle.

Below we provide an update on the strategies identified in strategic and semi-strategic cases filed in 2023, which is summarised in Table 2.1, along with examples of important case developments. As there is significant overlap between strategies, and litigants may seek to use more than one strategy at once, the same case may be counted in several categories. A case is considered semi-strategic when it meets some of the criteria above, even where it may not meet all of them. This includes many 'site-specific' challenges to oil and gas projects or other potentially climate-damaging developments. The litigants in such cases are often local groups directly concerned with the impact on their local communities. However, the pleadings in such cases also often exhibit engagement with broader questions of climate policy. For example, in the case of *Frack Free Balcombe Residents Association v. Secretary of State for Levelling Up, Housing and Communities*, local community groups unsuccessfully objected to the approval of a permit allowing hydrocarbon exploration in an Area of Outstanding Natural Beauty (a specific designation under UK law) in West Sussex, South East England, on the basis of both the local impacts and the broader climate impacts.

By adopting this approach, we favour developments in novel and high-profile case types, cases that Bouwer (2018) referred to as the 'sexy' cases. However, it is important to note that in so doing we leave many important cases with significant potential consequences underexplored. Moreover, the typology of climate-aligned strategic cases described presents only one way of understanding the diverse kind of climate-aligned strategic cases filed in the past year and before. This typology also hides similarities that can be seen between cases employing different strategies.



Anti-fracking campaigners at a Cuadrilla drilling site in Balcombe, West Sussex, UK.
Photo: Sheila/Flickr.

Table 2.1. Types of climate-aligned case strategies and number of cases employing each strategy in 2023

Strategy and definition	Case numbers	Examples of cases illustrating recent developments
Government framework cases: cases that challenge the ambition or implementation of climate targets and policies affecting the whole of a country's economy and society.	15 new cases filed in 2023 *110 such cases have been filed around the world since 2015, and these are among the highest profile of all cases.*	*VZW Klimaatzaak v. Kingdom of Belgium and Others* *Comunidad aborigen de Santuario de Tres Pozos et al v. Jujuy Province* *KlimaSeniorinnen v. Switzerland (ECtHR)*
Integrating climate considerations cases: cases that seek to integrate climate considerations, standards, or principles into a given decision or sectoral policy, with the dual goal of stopping specific harmful policies and projects, and mainstreaming climate concerns in policymaking.	97 new cases filed in 2023 *By far the largest category of cases to date, cases employing this strategy are often overlooked in the literature on climate litigation.*[1]	*Healthy Gulf v. Haland* *IDLADS v. MINAM (Enforcement Action for Guarantee Fund)*
Polluter pays cases: cases seeking monetary damages from defendants based on an alleged contribution to harmful impacts of climate change.	5 new cases filed in 2023 *34 cases have been filed since 2015, most of them in the US.*	*Falys v. Total* *People v. Exxon Mobil Corp (California case)*
Corporate framework cases: cases that seek to disincentivise companies from continuing with high-emitting activities by requiring changes in group-level policies, corporate governance and decision-making extending through the companies' operations.	3 new cases filed in 2023 *22 such cases have been recorded to date, all of them outside the US.*	*Smith v. Fonterra* *Falys v. Total*

Strategy and definition	Case numbers	Examples of cases illustrating recent developments
Failure to adapt cases: cases that challenge a government or company for failure to take climate risk into account.	8 new cases filed in 2023 *64 such cases have been recorded since 2015.*	*Healthy Gulf v. Secretary, Louisiana Department of Natural Resources* *Comité Dialogo Ambiental v. Federal Emergency Management Agency*
Transition risk cases: cases that concern the (mis)management of transition risk by directors, officers and others tasked with ensuring the success of a business.[2]	1 new case filed in 2023 *Just 17 such cases have been recorded since 2015, but considerable growth is anticipated in this area, including growth in cases that are only semi-strategic or non-strategic in nature.*	*ClientEarth v. Shell Board of Directors* *Métamorphose v. TotalEnergies*
Climate-washing cases: cases that challenge inaccurate government or corporate narratives regarding contributions to the transition to a low-carbon future.	47 new cases filed in 2023 *More than 140 such cases have been filed to date, with numbers growing significantly in the last few years.*	*FossielVrij NL v. KLM* *ASA complaint on cruise operators by Opportunity Green*
Turning off the taps cases: cases that challenge the flow of finance to projects and activities that are not aligned with climate action.	6 new cases filed in 2023 *33 such cases filed since 2015 have been recorded to date.*	*Communications to Saudi Arabia, Japan, France, USA and the UK, and 13 financial institutions* *Jubilee v. EFA and NAIF*

Notes: 1. Due to time constraints it has not been possible to identify a complete list of 'integrating climate considerations cases' in the US and therefore we do not know the total number of all such cases filed since 2015 (see further the Appendix). However, we believe this to be the largest category of cases overall both in the US and elsewhere. 2. 'Transition risk cases' is a new category introduced since the 2023 report. It includes the vast majority of cases previously described as 'personal responsibility' cases, but excludes those cases concerned with the imposition of criminal responsibility on individuals with positions of power within governments or companies.

A. Government framework cases

Government framework cases are among the climate cases most frequently discussed by the media and academic literature. We define these as cases that challenge the ambition or implementation of climate targets and policies affecting the whole of a country's economy and society. They can be divided into two broad types: 'ambition cases', concerning the absence, inadequacy or design of a government's policy response to climate change; and 'implementation cases', concerning the enforcement of climate protection measures to meet existing targets or implement existing plans (Higham et al., 2022). Cases often raise issues concerning the validity or interpretation of climate change framework laws, frequently with reference to the Paris Agreement. By focusing on the framework within which climate action should happen, litigants seek to have an impact on a broad range of operational decisions.

Rights-based arguments

Often, government framework cases are grounded in human rights arguments that are in turn based on international and regional treaties, constitutional rights and human rights enshrined in statute. Rights-based climate cases bring the vulnerabilities of individuals and communities to climate change impacts into the spotlight (Peel and Osofsky, 2020; Savaresi and Setzer, 2022; Rodríguez-Garavito, 2022; Kumar and Naik, 2024).[9] The role of human rights has become more prominent with an intensification of adverse impacts of climate change (see also Box 2.7 in Part II E).

This year saw a major development in this line of cases, when the European Court of Human Rights (ECtHR) confirmed that government failure to act on climate change constitutes a violation of the European Convention on Human Rights in the case of *KlimaSeniorinnen and ors. v. Switzerland*. The decision was handed down in April 2024, alongside decisions in two other cases: *Carême v. France and Duarte Agostinho and Others v. Portugal and 32 Others* (see Box 2.2).

Other important developments in this category include *VZW Klimaatzaak v. Kingdom of Belgium and Others*, a case in which the Belgian Court of appeal ordered the federal government and the regional governments of Flanders and Brussels to reduce their greenhouse gas emissions by at least 55% compared with 1990 levels by 2030. After *Urgenda Foundation v. State of the Netherlands* and *Neubauer et al. v. Germany*, this is the third domestic case in which a court has confirmed that a government is required to achieve a minimum level of emissions reductions, a point now reaffirmed by the *KlimaSeniorinnen* decision.



Representatives from KlimaSeniorinnen outside the European Court of Human Rights in Strasbourg, France.
Photo: Miriam Künzle/Ex-Press/Greenpeace

[9] The Climate Law Accelerator CLX database at NYU Law reports 301 climate-related human rights cases brought before national, regional and international courts from 2005 to 2023, indicating a diverse global litigation landscape. The University of Zurich's CRRP climate rights database also compiles cases, and currently includes 116 filings.

Box 2.2. Landmark decision of the European Court of Human Rights on states' obligation to take action on climate

In April 2024, the European Court of Human Rights delivered three pivotal rulings that significantly advanced the field of rights-based climate litigation. Among these, the decision in *KlimaSeniorinnen and Others v. Switzerland* was successful and emerged as particularly important. Conversely, the cases of *Carême v. France and Duarte Agostinho and Others v. Portugal and 32 Others* were declared inadmissible by the ECtHR, due to issues including 'lack of victimhood' (see Torre-Schaub, 2024 for a more in-depth analysis of *Carême* on this basis), failure to exhaust domestic remedies and finding that climate mitigation cases of this kind cannot be brought by individuals located extra-territorially (see Heri, 2024 for a more in-depth analysis of *Duarte Agostinho* on this basis). These outcomes highlight the procedural and substantive challenges inherent in climate litigation.

The ruling in *KlimaSeniorinnen* affirmed that climate change poses a direct and substantial threat to human rights and cemented the obligation of states under Article 8 of the European Convention on Human Rights (ECHR) to undertake effective climate action. The ruling established that Switzerland had failed to meet its greenhouse gas emission reduction targets, highlighting significant deficiencies in its regulatory framework.

The *KlimaSeniorinnen* ruling not only aligns with but also builds upon previous domestic judicial precedents, such as the landmark *Urgenda Foundation v. State of the Netherlands* case decision issued by the Hague District Court and subsequently affirmed by the Dutch Supreme Court. The *Urgenda* judgment required the government of the Netherlands to increase its emissions reduction targets to better align with the scientific consensus of the time. The Swiss decision goes further in that it requires states to develop emissions reduction pathways "with a view to reaching net neutrality within, in principle, the next three decades". Notably, the court confirmed the concept of 'carbon budgets' as an essential tool for states, mandating that these budgets clearly quantify allowable emissions over set periods to meet climate goals effectively (Hilson, 2024). This part of the judgment stipulates that states must also establish robust intermediate greenhouse gas reduction targets and regularly update these targets based on the latest scientific evidence.

The *KlimaSeniorinnen* ruling does more than reaffirm the judiciary's role in climate governance: it signals a growing judicial consensus on the necessity for robust legal frameworks to support effective climate action. Yet, substantial challenges remain in ensuring effective and consistent application across jurisdictions. Some researchers argue that the Court has only established a "minimum standard" (Milanovic, 2024) and question if it will prompt signatories to the ECHR to significantly tighten their climate laws (Abel, 2024). Additionally, it is crucial to assess whether the regulatory framework envisioned by the Court will drive countries to fulfil their legislative climate commitments effectively (Higham et al., 2024).

This judgment will likely influence future climate litigation and continue to shape the global discourse on environmental responsibility and human rights. By setting a precedent for courts worldwide in interpreting the human rights obligations of states regarding climate action, the *KlimaSeniorinnen* decision could inform the advisory opinions regarding states' legal obligations in the context of climate change discussed above, thereby highlighting the interconnectedness of human rights and environmental protection on a global scale.

New government framework cases grounded on human rights were filed in 2023 in Romania and Portugal, illustrating the expanding geographical reach of such litigation. In *Comunidad aborigen de Santuario de Tres Pozos et al. v. Jujuy Province* an indigenous community in the Argentinian province of Jujuy submitted a challenge to the new provincial constitution arguing that it is inconsistent with national climate goals and fails to include protection for public participation, ecosystems and future generations.

Not all framework cases rely on human rights

Reliance on human rights arguments in such cases is not universal. In Australia, where rights-based legal actions are constrained in both availability and scope, litigators have adopted alternative strategies. In the last year there have been hearings in the case of *Pabai Pabai v. Commonwealth of Australia*, a case that is grounded in Australian tort law. Litigators in Australia have also sought to adapt human rights arguments to be more suited to their context, including employing human rights as a lens for statutory interpretation and as a basis to identify violations of planning or environmental legislation (Preston and Silbert, 2023). This nuanced approach reflects the way in which legal advocates are navigating different judicial landscapes to address the climate crisis, while still drawing on transnational developments.

There are also prominent examples of litigation challenging the poor implementation of net zero legislation. These include the case of *R (oao Friends of the Earth) v. Secretary of State for Business Energy and Industrial Strategy* (the 'Net Zero Case'), brought by environmental organisations Friends of the Earth, ClientEarth and the Good Law Project against the UK government, for what they consider an inadequate climate action plan. The case follows a 2022 High Court decision secured by the same organisations. The first decision demanded that the government amend its net zero strategy, a set of policy measures intended to help it meet both the requirements of the UK's sixth carbon budget and the net zero 2050 target, because there was insufficient evidence to show that the strategy was likely to achieve the required outcomes. Once a new strategy was produced by the government, the NGOs argued that the revised plan replicated many of the previous flaws and failed to meet the obligations of the Climate Change Act, which requires the government to cut greenhouse gas emissions to net zero by 2050. In May 2024 this challenge was upheld, and the government has once again been required to revise the strategy.

The case of *R (Packham) v. Secretary of State for Energy Security and Net Zero and Secretary of State for Transport* also contests the UK's "new approach to Net Zero" announced in September 2023, which saw a roll-back of previously announced policy measures without any reference to whether and how this would impact on the government's ability to deliver against existing commitments. Similar patterns involving multiple or ongoing challenges to the implementation of net zero laws can be identified across various countries in Europe (see Higham et al., 2022; Merner et al., 2023).

The potential for an increase in litigation challenging the integrity, i.e. the clarity and substance, of government net zero targets is also gaining prominence (Maxwell et al., 2024). A principal concern centres on the opacity and lack of detail regarding the dependence on carbon dioxide removal (CDR) technologies in strategies to achieve net zero emissions. The argument that an excessive reliance on prospective CDR technologies to meet Paris Agreement objectives might contravene international law is gaining traction (Stuart-Smith et al., 2023). Germany and Portugal have adopted CDR targets separate to their emissions reduction targets in their national laws to address this, but most countries have not taken this approach.

This evolving landscape of government framework litigation underscores the critical role of the legal system in holding governments accountable and ensuring that net zero commitments are translated into meaningful action aligned with global climate goals. It also shows how important it is to resolve uncertainties regarding when it is appropriate to rely on carbon removals, and the degree to which these can be used to offset emissions where emissions reductions could have been achieved.

Box 2.3. Outcomes of government framework cases

Despite notable successes like those discussed above, the outcomes of government framework cases are mixed. Of the 110 government framework cases filed since 2015, around 60% have at least one judicial decision (including in some instances decisions on whether the case should be permitted to proceed to trial). Around one-third have outcomes positive for climate action, while two-thirds have had outcomes that are anticipated to be negative for climate action, at least from the perspective of the claimants arguing that existing action was insufficient.[10]

For example, in February 2024 Rome's Court ruled it lacked jurisdiction in a case against the Italian government, which was accused of inadequate CO_2 emissions reduction efforts. The court highlighted the complexity of climate policy, deeming it beyond judicial purview and best handled by political entities, directing specific grievances about Italy's National Energy and Climate Plan to administrative courts. This divergence reflects a different approach to judicial balancing between enforcing human rights-related legal obligations and respecting the legislative domain in climate governance.

However, these figures do not show the full extent of the impact these cases have had on climate action. For example, the unsuccessful cases include 12 similar cases filed against German subnational governments in the wake of the landmark decision of the German Federal Constitutional Court in *Neubauer et al. v. Germany*. These cases were all dismissed in a single decision by the Federal Constitutional Court. Nevertheless, there is evidence to suggest that the original *Neubauer* decision, which led to the amendment of the German Federal Climate Protection Act (*Klimaschutzgesetz*), has had a significant influence on action by these subnational governments (Averchenkova et al., 2024).

Among the significant decisions issued in 2023 was a trial court ruling from the US in the case of *Held v. Montana*, described as the "first big win" for the US youth-led climate litigation movement (Bookman, 2023). The case, which was filed in 2020, challenged the validity of the so-called 'MEPA Limitation' – which actively prevented the consideration of the impacts of greenhouse gas emissions in environmental reviews – on the basis that it was incompatible with the protection of the right to a healthy environment enshrined in the state's constitution. This case started life as a framework case with the plaintiffs seeking a broad remedial order that would require the voiding of the MEPA Limitation but also a court order requiring the state authorities to develop a broader remedial plan to reduce emissions.

While the case was decided on relatively narrow grounds, the decision could offer a model of the type of scientific arguments and evidence that can be used to overcome hurdles around standing and causation that have previously posed major challenges for similar cases (Bookman, 2023). But it should be noted that this was only a first instance judgment and the Montana Supreme Court is yet to consider an appeal from the defendant government.

This analysis highlights the challenges of any approach to evaluating the success of litigation as a strategy that is based on the overall number of direct outcomes rather than the influence of particular significant cases and their interaction with other cases and potential cases.

[10] It is beyond the scope of this series of reports to assess whether the claimants' underlying claims were justified.

B. Integrating climate considerations into decisions

Cases that integrate climate considerations into decisions are by far the largest group of cases identified to date. We define these cases as seeking to integrate climate considerations, standards or principles into a given decision, with the dual goal of stopping specific harmful policies and projects and mainstreaming climate concerns into policymaking. Cases may challenge new policies developed without careful consideration of climate impacts, or decisions to roll back or reduce the level of ambition in existing climate policies. Cases may also focus on permits and licensing related to high emitting activities and individual projects.

Some of the policies challenged in such cases can be very far reaching. For example, in 2023 a group of four cases were filed in Peru by the Institute for the Legal Defense of the Environment and Sustainable Development Association of Peru (IDLADS), which challenged the Ministry of Environment's failure to enforce four separate provisions of the Climate Change Act, including provisions requiring the establishment of a fund to promote climate action and new regulations on forest carbon credits. If such challenges are successful, they could have real-world impacts similar to the challenges to the UK's net zero strategy discussed above.

One of the key questions currently facing policymakers is the degree to which expansion in fossil fuel exploration and supply, or the development of new fossil fuel energy generation facilities, is consistent with the global goal of achieving net zero. Many cases concern the licensing or development of new fossil fuel production and fossil fuel electricity generation, often based on the inadequacy of environmental impact assessments.

The success of such cases can be hard to gauge – in some instances cases can delay a proposed project for long enough that the project is abandoned; in others an initial 'successful outcome' may simply result in the project proponents resubmitting an environmental impact assessment and receiving a further permit. Nevertheless, over time this strategy has led to some significant developments (see Box 2.4). It should, however, be noted that this is not the only case strategy that is being used to target new fossil fuel production and fossil energy generation (see also the discussion of polluter pays cases and climate-washing cases below).



The KlimaSeniorinnen (Senior Women for Climate Protection) vote to take their case to Switzerland's federal supreme court. Photo: Greenpeace/Piero Good

Box 2.4. Litigation against new oil extraction in Norway: hitting the target – eventually

The early climate litigation case of *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy (People v. Arctic Oil)*, filed in 2016, contended that Norway's approval of new oil and gas exploration in the Barents Sea was illegal and in violation of Norway's Constitution Article 112, for neglecting the environmental impact of increased greenhouse gas emissions. The Norwegian Supreme Court, in 2020, did not overturn the decision but recognised the constitutional right to a healthy environment could lead to a review of government actions, including those affecting Norway from abroad.

In 2023 the same plaintiffs launched *Greenpeace Nordic and Nature and Youth v. Energy Ministry (The North Sea Fields Case)*, challenging the approval of three North Sea oil and gas fields for overlooking Scope 3 emissions – those that would result from the eventual burning of the oil by others – in their environmental assessments. In January 2024 the Oslo District Court ruled in favour, recognising the importance of including Scope 3 emissions in environmental impact assessments. Consequently, the state will have to redo its environmental assessment, taking into account the harm the new developments will cause to young people in Norway. This is likely the first example of litigation that has successfully addressed Scope 3 emissions in environmental assessments, a topic gaining traction in Europe.

Bouwer and Setzer (2020) call such litigation 'hit the target' cases, part of broader campaigns to influence decision-making. These cases exemplify how sustained litigation can effect change beyond a single lawsuit.

C. Polluter pays cases

Polluter pays cases are those seeking monetary damages from defendants based on an alleged contribution to harm caused by climate change. These cases seek either contributions to the cost of adaptation or compensation for loss and damage. They are often coupled with climate-washing arguments and/or corporate framework arguments.

Climate liability cases

The polluters pays cases that have received the most attention have been a series of 'climate liability lawsuits' filed by subnational governments in the US against the so-called Carbon Majors (see Center for Climate Integrity, 2024). Most of these suits, which seek to make fossil fuel companies responsible for the costs of climate change adaptation, make climate-washing arguments about the harm caused by the Carbon Majors' involvement in major disinformation campaigns. It is this alleged deceptive conduct by the defendants, rather than simply their manufacture of products, that forms the key legal basis for most of the claims.

Most of these cases moved a step closer to trial in 2023, when the US Supreme Court declined to hear arguments about whether the cases should proceed in state or federal court. Since then, the cases have been proceeding in state courts (Setzer and Higham, 2023). The defendant companies continue to argue that the cases should be dismissed, and the scope of the claims that are ultimately allowed to proceed may still be narrowed. For example, in January 2024 a court in Delaware limited the scope of a case brought by the state of Delaware to cover only greenhouse gas emissions from within the state. An initial decision by the Hawaii Supreme Court issued in October 2023 refusing to dismiss the plaintiffs' claims would have permitted a broader claim to proceed, but the defendant companies have now asked the US Supreme Court to review that decision.

Such appeals mean that it is likely to be many months if not years before any trial hearings take place. However, some of these cases are nonetheless starting to move into the 'discovery phase', which could see thousands of pages of internal documents released to the plaintiffs and the public and may in itself result in significant changes in political debate around the defendants, building on the momentum created by a Congressional report released in April 2024 that found that companies had engaged in "climate denial, disinformation, and doublespeak".

The date of the first trials remains uncertain but in the last year new plaintiffs have joined the cases. In September 2023 California became the largest subnational government to file a suit against five of the Carbon Majors (ExxonMobil, Chevron, BP, Shell and ConocoPhillips) and the American Petroleum Institute (API). As a state that has licensed the extraction and refining of billions of dollars' worth of oil in its history, California may face an uphill struggle in overcoming the typical arguments often made by the defendants in these cases that fossil fuel use is a broader "social issue" not confined to oil companies (Walker-Crawford, forthcoming). However, the state's strategy to overcome this appears to rely on focusing heavily on the need to hold the oil companies "accountable" for what the state's promotional materials describe as "decades of deception" (Governor's Office, State of California, 2023).

Two Tribal Governments, the Makah Indian Tribe and Shoalwater Bay Indian Tribe, also filed new suits against the same companies as California (the API is not included as a defendant), at the end of 2023. The tribes, which are both based in the Pacific Northwest, are specifically asking for costs associated with moving their communities to higher ground and creating defences against sea-level rise. The cases have been removed to federal court and a new jurisdictional battle is now underway. At least two other new suits have also been filed in 2024 so far, one by Chicago and one by Bucks County in Pennsylvania.[11]

Cases outside the US

The US is not the only country in which polluter pays cases have been filed. In 2023 a third polluter pays case was filed in a European court. In *Falys v. Total*, a Belgian farmer is suing French energy giant Total for climate damages. The claimant intends to donate any damages to an environmental charity. This is the first such case filed in Europe involving a claimant from the Global North, with the other two, *Lliluya v. RWE and Asmania v. Holcim,* both involving claimants from the Global South. A case filed in Ecuador also made arguments that a high emitting company should pay for local climate change adaptation costs, but this case was dismissed in 2021 (*Baihua Caiga et. al., v. PetroOriental S.A.*).

Other cases imposing damages or penalties based on emissions

It is worth noting that a second, distinct group of cases using the polluters pay principle exists in the database but is not counted in the figures discussed above. These cases do not centre on greenhouse gas emissions from companies but rather address illegal deforestation. However, they incorporate costs based on estimates of the greenhouse gas emissions created by the deforestation into the penalties. Such cases could have been successfully prosecuted even without explicitly mentioning 'climate change' or 'greenhouse gas emissions'. Although these are not claims seeking compensation specifically for the climate harm caused by the major carbon polluters, they can be seen as embodying the polluter pays principle, as they involve plaintiffs seeking payment for climate-related damages.

For instance, in *IBAMA v. Minerva Ribeiro de Barros e Genesisagro S/A*, Brazil's Federal Environment Agency (IBAMA) brought a lawsuit against a company accused of extensive illegal deforestation in the native Cerrado forest. IBAMA is requesting that the court compel the company to pay for the environmental damage caused, including damage from climate change. Similar cases have been filed by the Ministry of Environment in Indonesia (Wibisana and Cornelius, 2020). As these cases are filed by government agencies, the degree to which they fit the definition of 'strategic cases' is challenging to discern. Nonetheless, they are noteworthy because unlike the cases discussed above, they have already resulted in successful judgments holding companies financially responsible for specific contributions to emissions (Moreira et al., 2024).

[11] These cases are not included in the case counts in Table 2.1, which only covers cases up until the end of 2023.

Box 2.5. Outcomes of polluter pays cases

Early cases filed in the US before 2015 were unsuccessful (Ganguly et al., 2018) and the outcome of the second generation of climate liability suits discussed above remains uncertain. The polluter pays case that appears to be closest to a conclusion on the merits is the case of *Lliuya v. RWE*, a German tort law case filed in 2015 by a Peruvian farmer from Huaraz, Peru, against RWE, Germany's largest coal-burning power company. It addresses the liability for climate damage in Peru caused by a melting glacier. The case has reached the evidentiary stage, with the court even making a fact-finding visit to Peru, but no verdict has yet been issued. The question of whether courts will ultimately order climate damages in any polluter pays cases therefore remains open.

D. Corporate framework cases

Even as the polluter-pays-style cases await outcomes, new strategies have emerged that take a different approach to holding companies to account for emissions. Corporate framework cases seek to disincentivise companies from continuing with high-emitting activities by requiring changes in group-level policies, corporate governance and decision-making extending through the companies' operations. These cases focus on company-wide policies and strategies and frequently draw on human rights and environmental due diligence standards, arguing that companies are failing to comply with positive duties to avoid interference with the rights of others. Cases are usually linked directly to the Paris Agreement goal of limiting warming to 1.5°C, or to the concept of net zero, which is closely linked to this goal.

Litigants often combine corporate framework arguments with polluter pays arguments. This is true in the case of *Falys v. Total*, noted as a new polluter pays case in the section above. In addition to requesting damages, Falys is seeking an injunction to order Total to reduce emissions. Like the polluter pays cases, the outcome of these cases before the courts remains uncertain (see Box 2.6).

Box 2.6. Outcomes of corporate framework cases

While there are some encouraging initial judgments and opinions in cases against large companies, challenging their lack of alignment with the Paris Agreement, there are also several cases that have been dismissed and others that are still pending. Positively for climate action, in the landmark judgment issued in 2021 in the case of *Milieudefensie v. Shell* the Hague District Court in the Netherlands ordered Shell to make rapid emission reductions across its entire operations (including Scope 3 emissions). Following the submission of an appeal by Shell, oral hearings took place in April 2024; a judgment is expected to arrive between four and 12 months after the hearings.

In February 2024 the New Zealand Supreme Court became the highest appellate court to make a judgment in a Paris-alignment corporate case when it overruled the Court of Appeal's previous decision to dismiss the case of *Smith v. Fonterra*. The case, brought by Māori leader Mike Smith, argues that under New Zealand tort law, a number of high emitting companies, including dairy giant Fonterra, owe a novel climate-related duty of care that requires them to rapidly reduce emissions. The New Zealand Supreme Court held that there is at least a case to be made and remitted the case to the trial court. This will now be the first Paris-alignment corporate case involving a potential new duty to be heard by a common-law court.

While the decision is in no way indicative of the ultimate decision on the case's merits (Hook et al., 2021), it may suggest that courts are becoming increasingly willing to seriously engage with such cases. However, not only are cases with positive outcomes still subject to change as they proceed through the courts, but they must also be viewed in the context of several cases having had negative outcomes. Of the most significant of the latter, three cases filed in Germany filed in 2021, two against car manufacturers and another against a gas company, were dismissed soon after they were filed. At least two of these dismissals have been confirmed by appellate courts to date.

E. Failure to adapt cases

According to the classifications developed by the Sabin Center, of the more than 2,500 climate change cases worldwide, only 205 touch on the issue of adaptation, most of which have been brought in US and Australian courts.[12] One of the reasons for this relatively small number of cases is that climate litigation that touches on adaptation is difficult to define (Donger, 2022), and adaptation-related litigation may engage less explicitly with climate change than mitigation cases, thus falling outside the scope of the databases. While many climate cases require scientific evidence, adaptation cases also face additional requirements on this front, as they need to demonstrate not only the impacts of climate change to date, but also projections of future impacts in specific locations. A significant proportion of adaptation litigation also includes 'failure to adapt' cases, which can be been defined as cases that challenge a government or company for failing to take climate risks into account (see also UNEP, 2023).

Cases may allege either that a government or company has a responsibility to introduce adaptation measures, or that a government or company has failed to introduce adaptation measures that they should have introduced, causing reasonably foreseeable harm for which the plaintiff must be compensated.[13]

The most obvious type of 'failure to adapt' case consists of litigation seeking the enforcement of existing adaptation law or policy.

This type of litigation involves legal action aimed at enforcing already established adaptation laws or policies within various countries. The case of *Northwest Environmental Defense Center v. Federal Emergency Management Agency*, for example, challenged the implementation of a national flood insurance programme in Oregon, US, on the basis that it had "incentivised" developments in flood-prone areas that had put both people and ecosystems at risk; in essence, this therefore constitutes a 'failure to adapt' case.[14]

In another recent case, Friends of the Earth supported two members of the public in filing a lawsuit against the UK government over its Third National Adaptation Programme (NAP3). Kevin Jordan, facing coastal erosion risks to his home in Norfolk on the East coast, and Doug Paulley, who is vulnerable to extreme heat due to medical conditions, are seeking recognition from the court that NAP3 is not fit for purpose and must be improved. They argue that it lacks ambition and specificity, fails to assess climate change risks adequately, and overlooks the unequal impact on protected groups, thus failing to protect various human rights (see *R (Friends of the Earth Ltd, Mr Kevin Jordan and Mr Doug Paulley v. Secretary of State for Environment, Rood and Rural Affairs*). Recent research by the Grantham Research Institute highlights that while NAP3 recognises the risks to human health from extreme heat, it fails to offer actions of sufficient scale and urgency to significantly improve heat preparedness (Howarth et al., 2024). Increasingly, we are seeing the physical and mental health impacts of climate change becoming the focus of litigation – as both the scientific evidence and people's lived experience of those impacts develop (see Box 2.7).

A small handful of cases can be observed that seek to enhance the recognition and protection of climate-induced migrants before distinct international, regional and national jurisdictions. Serraglio et al. (2024) note that strategic rights-based litigation could enhance the visibility of these migrants, encouraging long-term legal developments. For instance, the Constitutional Court of Colombia recently addressed internal displacement caused by environmental and climate factors in *Bohorquez and Mendonza v. DPS et al.* The plaintiffs, displaced when the Bojabá River flooded,

[12] This classification does not include a series of cases filed in the US under the Endangered Species Act that concern whether or not individual species should be subject to endangerment findings given the impact of climate change on their habitats. Such cases are currently treated as a unique category in their own right but given the importance of scientific evidence regarding the physical impacts of climate change and the need to respond to these, they should be understood as closely related to other adaptation cases.

[13] This definition excludes several adaptation-relevant cases, including cases brought by companies or individuals who suffer loss as a result of adaptation measures by others (e.g. restrictions on water use prevent them from operating a business-as-usual scenario). It also excludes cases concerning who should pay the costs of future adaptation actions, which are instead included in the polluter pays category (e.g. damages cases brought by cities and states in the US, as discussed further below).

[14] We have classified this case as both a green v. green trade-off case and a climate-aligned case, as it challenges inadequate adaptation measures. Similar cases have been recorded in the US in previous years.

sought the same level of aid as those displaced by armed conflicts. The court ruled that the state must not only draft adaptation and development plans but also establish early warning systems, planned relocation mechanisms and an administrative registry to safeguard the rights and address the vulnerabilities of displaced persons.

These cases highlight the challenges in enforcing adaptation responsibilities and the potential for legal action to stimulate policy implementation and governance reform on difficult issues, despite political and financial constraints. They illustrate growing attempts to enforce national and international adaptation obligations, despite the challenges posed by the broad and sometimes vague provisions of international environmental law, such as those outlined in the Paris Agreement. Additionally, legal actions seeking migration status for individuals displaced by climate change highlight the intersection of adaptation and human rights, reflecting the complex landscape of adaptation litigation. There is clearly a need for a greater focus on adaptation litigation. This is especially important in the Global South, where the burden of climate impacts and adaptation is greatest.

Box 2.7. Health impacts of climate change becoming the focus of litigation

Questions concerning the physical and mental health impacts of climate change are increasingly being emphasised with varying importance in cases brought by elderly and youth plaintiffs against governments. This is distinct from litigation concerning health impacts associated with climate-harmful activities – for example, contributions of a coal-fired power plant to air pollution and therefore to respiratory illnesses.

Before it was escalated to the ECtHR, the Swiss Federal Supreme Court had dismissed the *KlimaSeniorinnen v. Federal Department of the Environment Transport, Energy and Communications (DETEC) and Others* case, partly because it found the heat stress-related claims by the plaintiffs to be insufficiently specific (Harvey, 2021). For the proceedings before the Grand Chamber, the applicant association gathered detailed submissions from its members on how climate change, particularly heatwaves, impacted their health and daily activities. Presented evidence showed that older women are disproportionately affected by heatwaves. The ECtHR recognised that Article 8 is applicable not only when actual damage to health or wellbeing occurs but also when there is a significant risk of such effects, provided there is a sufficiently close connection with the applicant's enjoyment of rights under Article 8 (paragraph 437).

Less often, but also increasingly, climate litigation cases have dealt with the mental health risks of climate change. In *Held v. Montana*, the Judicial District Court recognised that the plaintiffs' mental health injuries stemming from the effects of climate change on Montana's environment, including feelings such as loss, despair and anxiety. This represents the first time an American court found that climate anxiety is an injury that can be examined in a court of law (Tims, 2023). The decision also traces a well-defined causal pathway from Montana's authorisation of fossil fuel projects to the concrete injuries suffered by the plaintiffs. In the South African case '#CancelCoal litigation' (*Africa Climate Alliance v. Minister of Natural Resources and Energy*) the claimants have also introduced evidence about the impacts of climate change on their mental as well as physical health.

F. Transition risk cases

The question of how companies and financial institutions (and their directors and trustees) should or should not be managing the risks associated with climate change and the transition to net zero remains a highly contested topic. The question of how to manage transition risk has so far manifested most commonly in climate-washing claims (discussed below), some of which dig into the degree to which commitments to climate goals are actually being operationalised. However, this year, for the first time, we decided to isolate climate-aligned cases focused explicitly on this topic as cases involving a new strategy type (the 'transition risk'). While we had previously considered such cases as a sub-set of 'failure to adapt' cases – where the failure was to adapt to the new social and political dimensions of the climate transition rather than to the physical impacts associated with

global temperature rise – we have since concluded that transition risk litigation is drawing sufficient attention and interest that it requires discussion as a category in its own right.

These cases concern the (mis)management of transition risk by directors, officers and others tasked with ensuring the success of a business. Like the Paris-alignment corporate cases, they are concerned with the degree to which corporate policies align with climate goals, but unlike the previous category they are (at least *prima facie*) concerned more with the impacts on the company and its finances created by misalignment rather than on the external impacts on the climate and communities.

An example of a transition risk case filed in 2023 is *Métamorphose v. TotalEnergies*, in which shareholders in Total sued the company for, they argued, unlawfully distributing dividends based on incorrect accounting around stranded assets. The shareholders say the company has failed to adequately account for the depreciation of its assets due to the increasing cost of carbon, and that it has failed to consider the impacts of its Scope 3 emissions.

Interest in transition risk cases continues to grow, despite the fact that one of the seminal strategic cases in this category, *ClientEarth v. Shell Board of Directors*, was dismissed in very unfavourable terms (and with a punishing costs order) by the UK High Court last year (Setzer and Higham, 2023). In that case, ClientEarth brought a derivative claim against failure by the members of the Board to implement policies that would enable it to meet the goals of its own energy transition strategy (i.e. its net zero commitment). As Carnwath (2024) has written, the dismissal of the case without trial represents a "missed opportunity". The case, if it had proceeded, would have provided a valuable chance to examine the operation of the relevant provisions of the UK's Companies Act and a reference point for what exercising reasonable care, skill and diligence should look like in the face of a decision to align with the global objectives of the Paris Agreement, a critical question for the current era. However, while that opportunity for clarification in court may have been lost, the issues raised in the case are far from buried.

In the months following the proceedings in the ClientEarth case, there were several new developments that point to the ongoing evolution of the legal context around transition risk. The first is itself a new case. In December 2023 the Polish energy company Enea decided to sue several of its former directors who had supported the company's investments into the controversial and ultimately cancelled Ostroleka C coal fired power station project. The plans for a coal project were abandoned in the face of difficulties finding financing and eventually a gas project was substituted (S&P Global Platts, 2020).

An Enea resolution concerning the case states that the former directors had failed to exercise sufficient due diligence regarding the project, leading the company to lose more than US$160 million. The decision to file the lawsuit obtained the support of 87% of Enea's shareholders at the company's extraordinary general meeting.

The Ostroleka C case follows years of campaigning against the power station by civil society groups. These campaigns have included several previous examples of 'hit the target' litigation, filed and supported by ClientEarth among others, including litigation over a shareholder resolution questioning the financial viability of the project. This litigation, and the political controversy over the project, should have acted as a red flag to the directors that the project might end up as a 'stranded asset' but they chose to proceed with their investments regardless.

This is not the first 'backward-looking' case about whether a drop in company value can be attributed to poor management and communication of climate risks associated with new fossil fuel investments (the case of *Ramirez v. Exxon Mobil* in the US is an earlier example; see also Setzer and Higham, 2023 for further discussion and examples). Given the volume of civil society campaigns against new fossil fuel projects, and more than 30 'hit the target' cases focused on projects around Europe, the Enea case also seems unlikely to be the last. The question is how the Polish courts will treat this issue, and whether the outcomes in the case might inform a better understanding of prudent climate risk management in the broader European context. This line of cases is also likely to inform the development of new litigation outside the climate space, on the subject of biodiversity risk assessments and strategic decision-making (see Box 2.8).

Box 2.8. A legal duty to manage nature and biodiversity risks?

One of the consequences of the legal controversy surrounding prudent management in the face of climate risk has been a fresh focus on other types of environmental risk, particularly nature and biodiversity risks. In March 2024, a legal opinion, commissioned by the Commonwealth Climate and Law Initiative and Pollination, was published in the UK. The opinion argues that UK-based directors can and must consider nature-related risks arising from dependencies and impacts on nature in the course of their duties. The opinion contains considerable reference to the line of cases discussed above.

G. Climate-washing cases

Climate-washing cases, which challenge inaccurate government or corporate narratives regarding contributions to the transition to a low-carbon future (Benjamin et al., 2022), have been one of the major growth stories of the last few years. These cases might concern misleading claims asserting that products or services are more climate-friendly than they really are. Increasingly, these cases focus on claims regarding terms such as 'net zero', 'climate neutrality' and 'deforestation-free'. Some cases concern the degree to which misinformation campaigns seeking to discredit climate science, or failure to disclose known risks, have contributed to harm caused by climate change.

Climate-washing litigation continues to be a focal point in climate litigation. There has been a surge in such cases from a mere handful in 2017 to over 140 globally at present. This marks a critical shift in the battle against climate misinformation. Unlike other forms of litigation that primarily focus on companies, cases of this type can already be shown to have a significant success rate (see Box 2.9).



Supporters celebrating after Fossielvrij's win against KLM.
Photo: Hermen van de Waal/Fossielvrij NL

Box 2.9. Outcomes of climate-washing cases

Decided climate-washing cases have mostly yielded positive outcomes to date (see Velez Echeverri et al., 2024). More than half of the nearly 140 reviewed climate-washing cases from 2016 (the filing date of the earliest case identified) to the present have reached official decisions; 54 of these 77 cases (i.e. 70%) have concluded in favour of the claimant.

While many recorded climate-washing cases involve investigations by regulators and complaints before quasi-judicial bodies, there were important victories in courts in 2023 too. First, the District Court of Amsterdam decided on the case of *FossielVrij NL v. KLM*, deeming its sustainability advertising illegal. Although the Court upheld the claim, there are limits to the remedy. No injunction was issued against the company as the advertisements were no longer in use, and no award for damages as there is no evidence of consumers still making decisions based on the advertising campaign. Shortly after, Australia's Federal Court ruled that Vanguard Investments Australia's claims about an ethical bond were false and misleading.

However, the impact of successful climate-washing cases on the broader goal of achieving net zero emissions and enhancing climate governance warrants careful consideration. While the legal dismantling of false advertisements and claims is a positive step and is symbolically significant, its direct contribution to reducing carbon emissions or achieving substantive climate action goals remains uncertain.

Successful litigation serves as a deterrent against misleading practices and reinforces the importance of transparency and accountability. But it also highlights the need for systemic change in corporate behaviour, regulatory frameworks and public awareness to achieve meaningful progress towards global climate objectives.

Climate-washing cases have often centred on claims around the climate neutrality of particular products and services, with several claims relating to transport. In *ASA complaint on cruise operators by Opportunity Green*, the latter, an NGO, filed a complaint against a series of cruise ship operators over "the cruise industry's systemic misleading advertising of fossil LNG as a 'green' fuel". This case follows a series of cases against airlines focused on misleading advertising around sustainable aviation fuels and forest-based offsetting schemes, keeping transport firmly in the spotlight. For example, consumers in California sued Delta Airlines over its "carbon neutrality" claims, based in part on concerns about the additionality and impermanence of forest carbon credits (*Berrin v. Delta Air Lines Inc.*). Although several of the plaintiffs' arguments were dismissed in April 2024, an argument has been allowed to proceed that says the airline's conduct might violate California's Consumers Legal Remedies Act because the airline knew or ought to have known that the claims of its carbon credit suppliers were inaccurate. This case is part of a new trend of cases and investigations that challenge the integrity of climate change solutions, highlighting the potential for corruption in the development of such projects. This phenomenon is further discussed in a recent report published by the Grantham Research Institute and DLA Piper (Chan et al., 2023).

Several cases employ novel arguments and legal frameworks that could be influential in combating climate-washing from varied perspectives. Of particular note, two current climate-washing cases that focus on the Brazilian Amazon utilise climate-washing arguments, among others, in cases that fundamentally concern the rights of communities. The first, the case of *Amorema and Amoretgrap v. Sustainable Carbon and others*, filed in Brazil, accuses companies of trading carbon credits in the Amazon as 'social carbon credits' without ensuring actual benefits to communities. The claimants allege misuse of community names, images and cultural heritage, and accuse the entities of misrepresenting their socio-environmental responsibility, thereby inflicting material and moral damage on local communities.

The second, the case of *Comissão Pastoral da Terra and Notre Affaire à Tous v. BNP Paribas*, filed in France, criticises bank BNP Paribas's due diligence processes for failing to prevent human rights violations, specifically in its financial dealings with Marfrig, a major beef producer implicated in land-grabbing and deforestation in the Amazon.[15]

These cases shed light on the nuanced and context-specific impacts of climate-washing, which not only mislead the public about companies' environmental practices but can also conceal grave human rights abuses. The differing legal approaches and jurisdictions involved highlight the diverse legal strategies that need to be accounted for in our understanding of climate-washing litigation.

H. Turning off the taps cases

Cases that challenge the flow of finance to projects and activities that are not aligned with climate action have continued to increase in number and diversity. Turning off the taps cases may be filed against public or private financial institutions, or a combination of the two. Their common goal is to amplify the importance of climate risk in financial decision-making, increasing the cost of capital for high-emitting activities to the point where such activities become economically unviable, even if they remain legally permissible.

One of the significant cases of 2023 is *Jubilee v. EFA and NAIF*, in which an Australian NGO filed a claim in Australia's federal court seeking to force government bodies that subsidise fossil fuel use to disclose full impact assessments of those investments. Similar disclosure claims have been successful in the past, sometimes leading to negotiated outcomes with the defendants. In the absence of such a negotiated outcome, it is possible that the claim may be followed by more substantive challenges to the agencies' policies. It should be noted that substantive challenges to effective government subsidies of fossil fuels and taxation regimes favourable to fossil fuels have been dismissed in the past. One example is *R (oao Cox & Others) v. Oil and Gas Authority & Others ('Paid to Pollute case')* in the UK, and another is an Austrian case, *In Re Tax Benefits for Aviation*, challenging a taxation regime that the claimants alleged favoured airline travel over train travel, which was also dismissed in 2023.

In 2023 a group of UN experts issued communications to several governments about the responsibilities of the financial backers of the oil company Saudi Aramco under the UN Guiding Principles on Business and Human Rights (UNGPs).[16] The communications are a response to a 2021 legal complaint made by ClientEarth that accused Aramco of committing climate-related violation of international human rights law and implicating its financial supporters for enabling its detrimental environmental impact. The UN experts expressed concerns over Aramco's potential to undermine the Paris Agreement and the human rights threat posed by climate change, also suggesting that the financial institutions supporting Aramco's expansion might be violating international human rights norms and standards. ClientEarth has now sent follow-up communications directly to the financial institutions in question.

In another non-judicial example of a case aimed at stemming the flow of finance to fossil fuel companies, the East African Crude Oil Pipeline (EACOP) planned by TotalEnergies in Uganda has been put under pressure by Inclusive Development International and 10 Ugandan and Tanzanian organisations filing a complaint with the American National Contact Point (NCP) against insurance broker Marsh. They accuse Marsh of violating the OECD guidelines with regard to respect for human rights and the environment. This is just one of several cases targeting the EACOP, with other cases filed directly against Total in France and a case filed by the East African Court of Justice, illustrating the way in which litigators often find multiple avenues to challenge the same contentious activities. Interestingly, in November 2023 the Court of first instance of the East African Court of Justice dismissed the case challenging the pipeline on the basis that it should have been filed earlier. The applicants have said they intend to appeal the decision.

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[15] This case also includes turning off the taps and corporate framework arguments.

[16] The communications concern the following financial businesses: JP Morgan, Citi, HSBC, SMBC, Crédit Agricole, Morgan Stanley, BNP Paribas, Goldman Sachs, Mizuho, Société Générale and EIG Global Energy Partners. The communications and the original complaints also concern the obligations of Saudi Aramco itself.

Part III. Developments in cases not aligned with climate goals

The majority of the climate cases captured in the databases – and the majority that make headlines around the world – are cases that seek to hold governments and companies accountable for inadequate action and ambition in tackling the climate crisis. However, it is crucial to recognise that not all cases are aligned with climate goals. Courts may also be used as a venue for advancing agendas that seek to delay or derail climate action, as this section discusses.

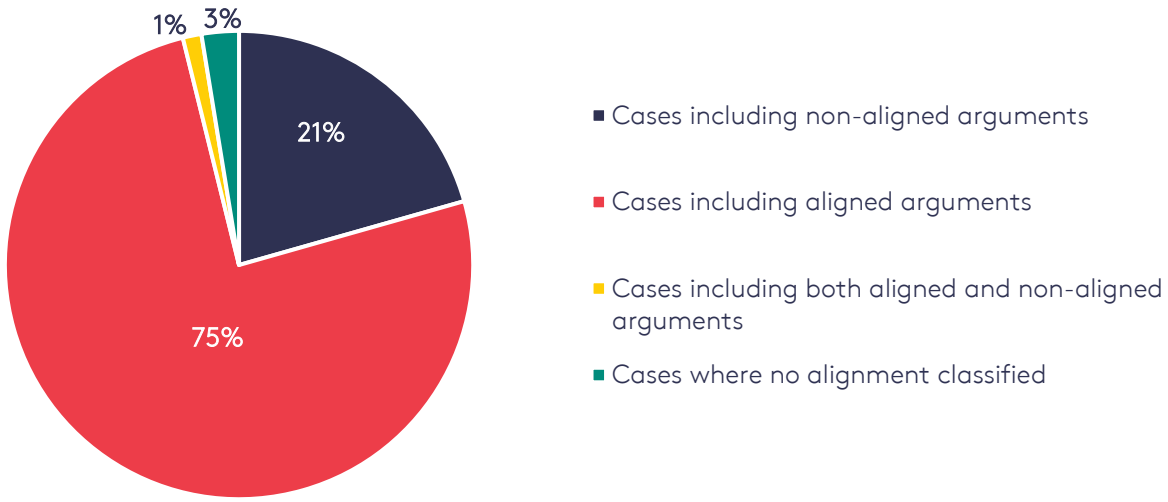
At times, actors involved in such cases appear to be intentionally seeking to use legal tactics to obstruct climate action; this is a well-documented phenomenon in the case of some industry groups (Nosek, 2020; Mijatović, 2023; Dutta, 2020). These cases can be understood as a form of 'strategic' litigation and have often been referred to as 'anti-climate' litigation (Hilson, 2010) or increasingly as 'backlash' litigation (UNEP, 2023). In this section we elaborate on the two most prominent types appearing among cases filed in 2023, identified as 'ESG backlash cases' and 'strategic litigation against public participation' (see below for definitions).

However, a climate-related case not directly aimed at advancing climate goals is not necessarily 'anti-climate' in motivation, and indeed may not be a strategic case at all. Instead, some cases challenge how climate action is designed, rather than opposing the need for such action. Many of these cases can be understood as 'just transition litigation' (Savaresi and Werewinke-Singh, 2024), cases filed by individuals, communities or labour groups seeking to challenge climate action or policies because they consider them a threat to their individual circumstances, directly risking their livelihood.

A related trend is emerging in the form of cases involving apparent trade-offs between the need to protect biodiversity and projects or policies that are introduced on climate grounds. We label these 'green v. green trade-off' cases. While many such cases raise legitimate concerns, there is also a risk that both these types of cases may be encouraged or instrumentalised by those seeking to delay climate action. Drawing the line between the various types of non-climate-aligned cases is therefore a challenging exercise, particularly in the absence of detailed information about the motivations of various parties.

Nearly 50 (21%) of the more than 230 recorded cases filed in 2023 included non-aligned arguments (see Figure 3.1). The overwhelming majority of these were filed in the US.

Figure 3.1. Cases involving aligned and non-aligned arguments filed in 2023



Note: In some cases, multiple claimants file different challenges to the same regulation, some arguing that it does not address climate enough and others arguing that it goes too far. Such cases may be bundled together into one case that therefore involves both climate-aligned and non-climate-aligned arguments (e.g. *Center for Biological Diversity v. EPA*, which involved challenges to new EPA fuel standards for road vehicles from both environmental and industry groups). Similarly, cases may make just transition arguments and also climate-aligned arguments.

A. ESG backlash cases

A major trend in non-climate-aligned cases in the US in recent years has been the rise of so-called backlash litigation, which sees tactics used by litigants in climate-aligned cases turned against them. Litigation, particularly around transformative social issues such as climate policy, often provokes a backlash, a phenomenon well-documented across various fields of socio-legal scholarship. Historical analyses on racial equality (Klarman, 2004) and on LGBT rights (Keck, 2009) illustrate that legal decisions can spark significant opposition, which sometimes strengthens the movements they intend to counteract. Paradoxically, this type of backlash can lead to increased mobilisation and support for the causes at the heart of the litigation (see Setzer et al., 2024). This understanding of backlash within the socio-legal context emphasises the importance of fostering greater public participation in policymaking and combatting misinformation. By engaging the public more directly and clarifying the facts around contentious policies, it may be possible to mitigate the negative effects of backlash (Almeida et al., 2023).

One of the key focuses for US backlash litigation has been the phenomenon of ESG (environmental, social, governance) investing. In 2023 there were significant cases alleging breaches of fiduciary duties related to the integration of climate risk into financial decisions. One notable case is *Spence v. American Airlines, Inc.*, where the plaintiff accused American Airlines of breaching fiduciary duties under the Employee Retirement Income Security Act (ERISA) by prioritising ESG goals over financial returns. In February 2024 a Texas federal court allowed this lawsuit to continue, denying the airline's motion to dismiss. Another case, *Wong v. New York City Employees' Retirement System*, involves plaintiffs alleging that fund managers compromised their fiduciary duties by integrating climate change considerations into their investment decisions, seeking damages for losses attributed to such policies.

Another approach is observed in *State ex rel. Skrmetti v. BlackRock, Inc.*, where Tennessee Attorney General Jonathan Skrmetti filed a consumer protection lawsuit against the asset manager BlackRock. Unlike the broader claims of fiduciary breaches and antitrust violations, Skrmetti's lawsuit specifically targets alleged consumer confusion over BlackRock's simultaneous pursuit of maximising investment returns and minimising environmental impact. This use of consumer protection law raises parallels with cases brought by cities and states against the Carbon Majors and may be adopted by other state governments that oppose ESG investment practices. In March 2024, for example, Mississippi issued a legal order against BlackRock aimed at stopping alleged "fraudulent action" by the company and imposing a multimillion-dollar administrative penalty over its ESG investment policies. This approach seems to pivot from direct legal confrontations over the obligations of financial actors to allegations of consumer protection violations, highlighting the evolving nature of legal strategies in the face of politically sensitive investment practices.

This ESG backlash litigation in the US contrasts with cases elsewhere in the world, such as the UK case of *McGaughey v. USS* which brought a derivative action against the directors of a pension fund for failing to consider climate risks, and the 2023 case in South Korea of *SFOC et al. v. Minister of Health and Welfare*, filed by environmental NGOs against the National Pension Service, which seeks to compel the disclosure of a coal divestment plan announced by the service in 2021. These cases demonstrate what is already becoming a significant divergence between the US and other jurisdictions regarding the management of climate risks (see also Gordon, 2023). It is also notable that although there have been climate-aligned transition risk cases in the US in the past, no new cases filed in 2023 have yet been included in the databases.[17]

This divergence between the US and other jurisdictions extends to regulatory approaches. While the EU and other regions are introducing laws aimed at channelling investments into greener initiatives, the US faces significant hurdles to introducing such regulations, as illustrated by legal challenges such as those against the U.S. Securities and Exchange Commission's new rule on climate-risk reporting (see Box 3.1).

[17] We are aware of a whistle-blower complaint filed to the Securities and Exchange Commission by the NGO Mighty Earth against the meat processing company JBS accusing it of deceiving investors by making unsubstantiated sustainability commitments.

Box 3.1. The new SEC rule on climate-related disclosures and its challengers

In March 2024 the Securities and Exchange Commission (SEC) in the US introduced significant updates to its disclosure regulations, requiring both US and international companies to report extensive climate-related information. The updates mandate disclosures on material climate-related risks, governance and risk management processes, Scope 1 and Scope 2 greenhouse gas emissions (if material), and any voluntary climate goals and transition plans. The detailed rules span nearly 900 pages and were approved after considerable public debate and more than 24,000 comment submissions.

The aim was to enhance transparency regarding the climate-related impacts of corporate activities but the new rules faced immediate legal challenges from diverse stakeholders including environmental groups, oil companies, the U.S. Chamber of Commerce and state attorneys general. Nine cases were filed within 10 days of the rules' adoption and were consolidated in the Eighth Circuit Court of Appeals. In April 2024 the SEC suspended the implementation of the rules pending completion of the judicial review but stated that it remains committed to defending their legality. The agency argues that the rules are within its statutory authority and are essential for providing investors with critical information on climate-related risks.

This ongoing litigation underscores the deep divisions regarding the role of regulatory bodies in integrating climate considerations into financial reporting and is one venue for broader debate in the US over climate policy and regulation.

B. Strategic litigation against public participation (SLAPP) cases

SLAPP suits are lawsuits brought against activists and others who speak out about matters of public interest and they often relate to climate change and the environment. In general, the objective of SLAPPs is not to obtain redress but to intimidate and silence the target of the SLAPP while exhausting their resources (Manko, 2022). SLAPPs are frequently an abuse of the legal process that involves expensive and meritless litigation by wealthy companies against more resource-constrained civil society groups, and in the context of climate change can be used to harass an opponent and prevent climate activism and public participation, putting at risk the possibility of a just transition (Kaminski, 2022).

There were several SLAPP cases filed in 2023, including by Shell in the UK and Total in France against Greenpeace and other NGOs (the French case has since been dismissed). In both countries the NGO had been involved in or supportive of litigation against the companies, although the SLAPP suit against Shell appears to be focused on a protest staged by Greenpeace activists rather than on issues to do with the litigation. Requests for mediation, which appear to be a precursor to another SLAPP case, were also filed by Eni against activist groups bringing litigation against the company in Italy.

In January 2024 Exxon also took the unusual step of filing litigation against two shareholder activist organisations, Arjuna Capital and Follow This, which had sought to file a shareholder resolution urging Exxon to adopt a more rapid emissions reduction trajectory. Despite relatively low support for the resolution, Exxon opted to bypass the U.S. Securities and Exchange Commission's no-action process for shareholder resolutions and instead file a lawsuit in Texas to prevent the proposal from going to a vote.

Given the availability of alternatives, the relatively low levels of support for the resolution among shareholders, and the fact that the resolution was actually withdrawn after the complaint was first filed, it is reasonable to consider Exxon's decision to litigate as intended to deter the defendants and other shareholders from similar interventions in future, and this is thus another example of litigation that shares many of the hallmarks of a SLAPP suit.

SLAPPs have been brought in "every major region in the world", according to the Business and Human Rights Resource Centre (2021).

Although relatively few such cases are recorded in the databases, it is clear that SLAPPs are one of several legal tactics used by the fossil fuel industry to try to deter its opponents (Nosek, 2020). Focusing on the US, EarthRights International (2022) reported that it had identified 152 cases in the past 10 years in which the fossil fuel industry had allegedly used SLAPPs to try to silence critics. The cases filed against Greenpeace and others in the past year share many similarities with these earlier cases, which have already contributed to proposals for anti-SLAPP legislation within the EU.

C. Just transition cases

The term 'just transition case' describes a suit brought on behalf of groups or individuals who are negatively affected and structurally disadvantaged by the transition to a low-carbon future. Often, such cases rely on human rights grounds. Scholarly understanding of the phenomenon of just transition litigation is still developing, having first been identified by Savaresi and Setzer in 2022 and further elaborated in a multi-authored working paper (Savaresi and Werewinke-Singh, 2024). The majority of cases identified to date have focused on issues related to climate change mitigation measures, and most of the analysis of these cases on those where the central issue is climate mitigation measures such as renewable energy projects or mining for critical minerals (Savaresi and Werewinke-Singh, 2024; Tigre et al., 2023). For example, in *Regional Government of Atacama v. Ministry of Mining*, the regional government of Atacama sued the Chilean government for a decision to issue a call to increase lithium production in the region without public consultation. Lithium is a key component of many of the technologies required for a low-carbon transition.

In 2023 several new just transition cases were filed, including cases focused on climate change adaptation measures. These include a communication by a group of UN Special Rapporteurs to the French government concerning the development of 'mega-basin' projects (which store water for use in large-scale agriculture and thus can be considered climate change adaptation measures but have impacts on small-scale farming and biodiversity). An earlier communication issued by a group of UN Special Rapporteurs to Pakistan in 2022 (*Communication to Pakistan concerning the ongoing forced evictions and home demolitions along Karachi's waterways [nullahs]*) was also recently added to the database. The communication raised concerns over the execution of Pakistan's strategy of demolishing buildings along waterways in Karachi, an adaptation measure aimed at reducing the devastation caused by flooding related to climate change. The plaintiffs raised a perceived failure to consult the people whose homes and livelihoods were being destroyed and failure to provide adequate compensation and redress to those affected, despite a domestic court order requiring respect for human rights when carrying out demolitions.

D. Green v. green cases

Another important type of non-climate-aligned case that has emerged in recent years is what can be understood as green v. green litigation; i.e. cases in which there is a trade-off between climate and biodiversity or other environmental aims. Common focuses of these cases are challenges to climate mitigation-related projects such as renewable energy projects on the basis that they may have negative impacts on biodiversity. The Indian Supreme Court case of *M.K. Ranjitsinh* mentioned in Part I of the report is a good example of such a case: it originated in concerns about the impact of overhead power cables on the Great Indian Bustard before eventually becoming a case about the need to balance climate action with other conservation measures when the government argued that the power transmission lines were a crucial part of India's climate change response.

Like 'just transition' cases, these cases cannot be understood as straightforwardly anti-climate action: they challenge the way in which actions to address the climate crisis are being designed rather than the need for such actions in the first place.

Our review of 2023 cases revealed at least four such cases filed in the US, such as the case of *Save Long Beach Island v. U.S. Department of Commerce*, in which an environmental group challenged the authorisation for an offshore wind project arguing that it would impact North Atlantic and humpback whales.

The complainants argued that the project's climate change mitigation benefits would be small and offset by the negative impact on the whale population, which has "immense carbon sequestration capacity". The project at issue in this case is just one of nearly 300 contested renewable energy projects across the US, which are opposed by many local groups and governments on a variety of grounds (Eisenson, 2023). The means by which such projects are contested takes many different forms, including comments at public hearings and letter writing campaigns, and not every contested project results in litigation.

Opposition to many offshore wind projects has been organised by an 'anti-offshore wind network' of groups operating across multiple US states on the East Coast, according to a recent report by the Brown Climate and Development Lab (Slevin et al., 2023). The report states that the network, which often employs misinformation, includes a complex array of participants, from grassroots organisations motivated by conservation concerns to organisations and individuals whose past involvement with climate change denial is well-documented (ibid.). Understanding this movement and its motivations is crucial to understanding the emergence of green v. green cases – particularly since information from the National Oceanic and Atmospheric Administration (NOAA, part of the US Department of Commerce) suggests that there is no rigorous scientific research behind the claims that offshore wind projects constitute a significant threat to whale populations (NOAA, 2024).



The Indian Supreme Court case of *M.K. Ranjitsinh* sought to protect the endangered Great Indian Bustard from overhead power lines. Photo: Inside Indian Jungles/Flickr

Part IV. Impacts and future trends

The diverse impacts of climate litigation include both *direct impacts* resulting from a court order or change in the law (the outcome of the case, as discussed in Part I and throughout Part II), and *indirect impacts*. Indirect impacts occur beyond the courtroom, may be fairly distant from the original litigation in time and space, and may be present even while the litigation is ongoing or when the litigation is unsuccessful before the judge.[18] In this section we discuss the way in which different actors are engaging with climate litigation to generate impacts beyond the courtroom, before moving on to a discussion of possible future trends in climate litigation. We note that future climate cases, which build on and learn from the existing body of cases, can also be understood as among the indirect impacts of litigation.

Impacts beyond the courtroom

Courts as influential actors in climate policy and governance

The role of courts in climate litigation often raises a discussion around the dynamic between judicial authority and the principle of separation of powers. Traditionally, courts have been conservative, focusing mainly on ensuring government compliance with statutory mandates rather than dictating specific policy outcomes (Nedevska, 2021). However, it is also possible to observe that courts, together with the burgeoning international climate litigation movement, are increasingly influential in evolving earth system-oriented approaches to global climate law and governance (Kotze et al., 2023). This influence extends beyond merely impacting the legislative and executive branches, reshaping power dynamics at local, national and international levels among government bodies and civil society. Courts play a crucial role in establishing accountability, redefining power relations, addressing vulnerabilities and injustices, broadening the scope and effectiveness of international climate law, and incorporating the latest climate science to resolve legal disputes.

The recent European Court of Human Rights rulings, particularly in the *KlimaSeniorinnen* case, exemplify a balanced approach to power distribution. The Court underscored that Articles 2 and 8 of the European Convention on Human Rights require states to achieve climate neutrality by 2050, allowing states considerable discretion in how they meet this obligation. The court gave states a narrow margin of appreciation in terms of what they must achieve, setting out minimum standards for regulatory frameworks on climate change based on science and international practice, but it gave a wide margin of appreciation for the policy measures to be used to achieve the emissions reductions required. These rulings emphasise the necessity for states to develop and execute emission reduction strategies informed by the best available science and principles of intergenerational equity, with responsibilities spanning all government branches. Nonetheless, the Court also delineated the limits of judicial interference in areas traditionally reserved for political decision-making. Although it was met with some criticism (see Blattner, 2024 for a summary), including in the dissent of judge Eicke, the Court achieved a nuanced stance that affirms that while courts should not prescribe specific climate policies, they must ensure that government actions are consistent with established climate goals and broader obligations for climate neutrality. This strategic positioning underscores the essential role of courts in climate litigation, balancing respect for democratic processes with the protection of fundamental rights affected by climate policies. The ECtHR's decisions thus highlight the judiciary's critical oversight role in holding governments accountable to both their international and domestic climate commitments.

However, courts' influence in climate policy and governance is not restricted to their rulings. Decisions to hold public hearings and facilitate public engagement in climate cases further demonstrate courts' proactive engagement in these pivotal issues (see Box 4.1). There is evidence that climate litigation – including these unusual measures by judges – does have an influence on dominant narratives around climate change and climate governance in many different contexts (Averchenkova et al., 2024; Peel et al., 2022).

[18] See Setzer and Higham, 2023; Peel and Osofsky, 2015; Peel et al., 2022; Setzer and Higham, 2022; Bouwer and Setzer, 2020.

Box 4.1. Public hearings as a platform for dialogue and fostering public understanding of climate change

An increasingly common feature of climate litigation cases is the willingness of the courts to take unusual measures to facilitate public engagement with hearings and evidence. Public hearings play many different roles in climate cases (Medici-Colombo and Ricarte, 2024). Hearings facilitate the introduction of complex scientific evidence, enabling judges to better understand technical aspects and resolve any doubts directly. They also provide a platform for civil education, fostering evidence-based debates and enriching discussions within the courtroom.

The last decade has seen numerous examples of courts and tribunals actively promoting public engagement with climate science through the course of proceedings, ranging from the efforts of actors like the Philippines Commission on Human Rights in its National Inquiry on Climate Change to a US District Court hearing a case brought by San Francisco and Oakland against five major oil companies in 2017. That trend has continued in recent months, with unusual public hearings in four constitutional cases in South Korea held in April 2024, and the Inter-American Court of Human Rights holding exceptional hearings in Barbados in April 2024 and in Brazil in May 2024, rather than hearing arguments concerning the request for an advisory opinion from its usual location in Costa Rica.

While holding public hearings is one way for courts and climate litigation to influence public debate on climate change, it is not always straightforward to understand the impacts of climate cases once the hearings are over and the judgment is delivered. Even when litigation achieves courtroom success, its effectiveness in driving substantive policy change can be limited and it requires long-term evaluation (Setzer et al., 2024). Ashgar Leghari's reflections on his landmark climate litigation case in Pakistan, decided in 2015, illustrate this complexity (Kaminski, 2024). The legal victory in this case initially catalysed the creation of a national climate framework and the court sought to ensure ongoing action by imposing the novel remedy of convening a committee of officials overseen by the court to monitor the government's progress on implementing the judgment. However, momentum dwindled after key judicial figures, such as Justice Syed Mansoor Ali Shah, moved on to other roles and were no longer involved in implementing the case's outcomes. A standing committee on climate change set up to replace the original committee in 2017 has yet to meet. Over time, Leghari has come to view litigation as just one component of a broader strategy needed for environmental advocacy. He emphasises that while legal action is vital, it must be part of a multifaceted approach that includes significant policy shifts and investments in climate adaptation and resilience to achieve comprehensive and lasting change. This perspective underscores the complex interplay between legal victories and their practical impacts on climate policy.

Legislators are introducing legislation related to issues raised in climate litigation

Previous work has considered the interaction between climate litigation and the development of legislation, particularly in the context of human rights (see Rajavuori et al., 2023). Evidence also suggests that government framework cases, for example, have led both directly and indirectly to reforms to climate framework laws in Ireland and Germany (Averchenkova et al., 2024). In 2023 it seems that the idea that polluters should be made to pay their fair share of the costs of dealing with damage caused by climate change also gained traction in different fora, including in legislatures.

Despite the creation of a Fund for responding to loss and damage, announced at the COP28 UN climate conference in December 2023, the question of who pays for loss and damage due to climate change, and of the costs of climate change adaptation, remains politically charged.

In the context of climate litigation, loss and damage is typically associated with transnational litigation – the idea that countries or companies in the Global North should be held liable for the damage that climate change, to which they have contributed the most, is causing in the Global South (Wewerinke-Singh and Salili, 2020; Bouwer, 2020; Toussaint, 2020; Kodiveri at al., 2023).

However, the US climate liability cases discussed above also increasingly concern questions about loss and damage – even if they are not always framed as such. In a case filed by Multnomah County, Oregon, for example, the plaintiffs are arguing that a set of named companies should pay US$50 million in actual damages sustained after the 2021 heat dome in the US, and a further US$1.5 billion in future damages.

Such cases may already be contributing to shifts in the political conversation, at least in some parts of the US. For example, Vermont's legislature has given final approval to the Climate Superfund Act (S.259), a bill that has garnered widespread support in both the House of Representatives and the Senate. If enacted, this groundbreaking legislation would impose strict liability on major oil and gas companies for carbon pollution, similar to the federal Superfund program's approach to hazardous waste. Vermont's bill proposes a one-time fee on fossil fuel companies responsible for over 1 billion metric tons of greenhouse gas emissions in the past 30 years. The responsibility for identifying the liable companies, determining the amount each owes, and calculating Vermont's costs related to climate recovery and adaptation falls to the state's Agency of Natural Resources and the state treasurer. Legal scholars have expressed their readiness to defend the bill's legality and constitutionality if it is challenged, as seems likely. Similar legislation in New York passed the Senate but stalled in the Assembly, while Massachusetts, Maryland, and California have also introduced comparable bills targeting climate costs recovery from the oil and gas industry (see Lockman and Shumway, 2024 for an analysis of differences).

The idea behind such legislation is not entirely new. A bill containing similar concepts was proposed in the Philippines in late 2023 (see Bradeen et al., 2023), and scholars and activists were discussing the idea of "climate compensation acts" nearly a decade ago (Gage and Wewerinke-Singh, 2015). Nonetheless, the fact that such a bill has now reached this late stage of the legislative process is remarkable. It also raises pressing questions about equity. Why should US states be able to make US companies liable for paying for the costs of climate-related losses while communities in the Global South would have a far more challenging time trying to enforce any legislation that sought to do the same? As Lyster (2015) has argued, the solution may lie in a Global "Fossil Fuel-Funded Climate Disaster Response Fund", an idea that may gain increasing currency in international negotiations as the challenges of leaving such question to litigation become more evident.[19]

Financial regulators advancing new understanding of climate litigation and financial risk

It is not just the courts and lawmakers that are contributing to the phenomenon of climate litigation creating impacts outside the courtroom. Many actors in the world of finance have also started to engage with climate litigation to understand its impact on both individual companies and the wider economy. For example, the Network for Greening the Financial System (NGFS) has been at the forefront of these efforts through its publication of two pivotal reports on climate-related litigation. Its first report underscores the urgent need for a more nuanced understanding of the risks these lawsuits pose (NGFS, 2023a). The subsequent report examines the micro-prudential supervision of financial risks associated with this increase in climate-related litigation (NGFS, 2023b). Together, these documents emphasise the need for central banks and supervisory authorities to enhance their capacity for assessing and mitigating the financial sector's vulnerability to such legal challenges.

Adding a notable voice to the discussion, Frank Elderson, an Executive Board member of the European Central Bank and former Chair of the NGFS, addressed the issue in a speech he delivered in September 2023 titled 'Come hell or high water'. Elderson highlighted the dire consequences that climate and environment-related litigation could have on the banking sector, stressing the importance of preparedness and adaptation in the face of these evolving risks.

[19] The new EU Commissioner on Climate Action, Wopke Hoekstra, has indicated that a fossil fuel levy to pay for loss and damage is something he is willing to discuss with international partners (see https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754186/IPOL_BRI(2023)754186_EN.pdf).



ClientEarth's legal team outside the courtroom at the Royal Courts of Justice, London, for their transition risk case against Shell. See section F in Part II for more details on this case.
Photo: ClientEarth

However, current methodologies for assessing climate risk still fall short in accurately representing the scale and distribution of climate-related financial risks (Wetzer et al., 2024). Organisations including the International Sustainability Standards Board and the NGFS still tend to amalgamate legal risk in this context with 'transition risk', even though others have argued that it should be considered a distinct category of risks (Carney, 2015). This perspective is increasingly challenged by the growing body of evidence that demonstrates climate litigation is not a peripheral concern but a central risk that necessitates comprehensive evaluation and action. As legal action over climate issues gains momentum, central banks and financial regulators are being compelled to reconsider their strategies for risk assessment and management, marking a significant shift in how the financial sector responds to the challenges posed by climate change.

(Re-)Insurers re-evaluating risk management strategies in the face of litigation risk

Climate litigation presents a growing challenge for the insurance and reinsurance sectors, introducing multiple dimensions of risk, including operational, investment and direct legal challenges (Golnaraghi et al., 2021; Doering et al., 2023; Brook at al., 2023). Firms within these sectors are increasingly confronted with potential financial losses stemming from climate-related lawsuits, either through direct suits tied to their corporate activities and those of their clients, or through regulatory actions. The escalating focus of regulators, shareholders and investors on the risks associated with climate litigation underscores the importance for insurers and reinsurers to assess and understand their framework but also necessitate a forward-looking strategy to mitigate potential exposures.

Analysis of the impact of climate litigation on the insurance market has become more robust and detailed, reflecting the sector's growing understanding of this trend. The Bank of England's climate stress-test in 2021 revealed a general struggle among insurers to accurately gauge their susceptibility to climate litigation risks. Further emphasising this concern, Canada's federal insurance regulator in 2023 highlighted the importance of preparing for climate-related claims under liability policies, cautioning that insurers, along with their directors and officers, could face liabilities for neglecting these risks. This evolving regulatory landscape points to a critical need for insurers to re-evaluate their risk management strategies.

The potential for climate litigation to impact various policy lines – including commercial general liability, directors and officers (D&O) policies, and environmental liability, among others – signals a broad spectrum of risk. A survey conducted with insurance industry practitioners concluded that climate change is one of the most urgent risks facing the insurance industry, particularly because of the cost and pricing challenges it presents as an underwriting risk, and the threat it poses to insurance companies' own operations (CSFI, 2023). The development of modelling tools, as outlined by Lockman (2023), aims to equip insurers and reinsurers with the means to better understand and prepare for the way litigation may amplify these risks.

Litigation risk is just one of the many climate-related risks that insurers need to grapple with now and in the coming years. Currently, the lack of significant financial losses from court cases to date may be hindering the levels of engagement with the phenomenon by the industry, but this is unlikely to persist indefinitely.

Legal associations and lawyers are grappling with their role

Legal associations such as the UK Law Society are issuing targeted guidance to help legal organisations align their operations with net zero targets and are advising solicitors on how to integrate the physical and legal risks of climate change into their client advisories.

Lawyers also have substantial ethical agency. According to Vaughan (2023), legal professionals' ethical responsibilities not only permit but at times necessitate an active and ethically responsible approach towards mitigating environmental harm. The risk of litigation for consulting, advisory and legal services is also increasing. These sectors may confront legal challenges for not adequately considering 'advised emissions', i.e. the emissions associated with the guidance they provide to their clients.

Future trends

One of the documented outcomes of successful – and even unsuccessful – climate cases to date has been the filing of further climate cases, often involving processes of significant international exchange between lawyers and courts in different jurisdictions (Affolder and Dzah, 2024; Ganguly et al., 2018). Here, we examine three additional areas where the seeds of existing cases in a small handful of jurisdictions may start to inform future trends at the global level.

Post-disaster cases – the rights and wrongs of recovery?

As the number of climate-related disasters increases year on year, so too does the need to make good decisions about how to respond to such disasters. Given differing political viewpoints on what shape a 'good' recovery might take, this looks set to become a site of significant contestation in the courts. An early example of a 'post-disaster' case is the case of *Comité Dialogo Ambiental v. Federal Emergency Management Agency*, filed in the US in 2023 challenging the Federal Emergency Management Agency's handling of the disaster recovery effort following hurricanes in Puerto Rico. The plaintiffs argue that in their planning for the recovery the defendants had failed to consider reasonable alternatives to reconstructing Puerto Rico's existing fossil fuel-based power infrastructure, and that this reconstruction limits resilience and 'locks in' years of future reliance on climate-damaging power supplies.

The case has some parallels with a communication issued by a group of UN Special Rapporteurs to Colombia in 2022 that raised concerns about human rights violations associated with failures in Colombia's response to the humanitarian and environmental crisis suffered by the Afro-descendant Raizal people of the islands of Vieja Providencia and Santa Catalina, after category 4 and 5 hurricanes Eta and Iota. Among the concerns raised was the fact that the housing built after the hurricanes was insufficiently resilient to future climate-related disasters. The communication followed an earlier judgment issued by the Colombian Constitutional Court.

Climate litigation using the 'ecocide' concept and other forms of criminal law is likely to grow

New ecocide legislation is being adopted in several countries. For example, the new Belgian Criminal Code approved in February 2024 made Belgium the first country in the EU to recognise ecocide as an international crime, alongside war crimes, genocide, crimes against humanity and crimes of aggression. The new Belgian law also recognises that businesses' actions are ultimately carried out by individuals, directors and other executives, who may be punished with imprisonment of up to 20 years; countries liable for ecocide might have to pay a fine of up to €1.6 million. Meanwhile, proposals to adopt related concepts such as a "crime of environmental destruction" into international law continue to gain momentum (IUCN, 2024).

Also in February 2024, the European Parliament adopted a new EU directive containing an extended list of environmental crimes. Environmental crimes committed by individuals and company representatives may be punishable with imprisonment depending on how long-lasting, severe or reversible the damage is. In addition, natural persons who commit such crimes may be required to restore the environment (if the damage is reversible) or to compensate for the damage. They might also face fines proportionate to the gravity of the conduct, and other ancillary sanctions may be imposed.

While it is not always obvious how these developments around ecocide apply in the climate context, we can already see the ways in which debates about the role of criminal law in environmental protection are appearing in the context of climate litigation. Several efforts have been made to involve the International Criminal Court in climate issues, including most recently in a letter issued by the World Council of Churches to the Assembly of State Parties to the International Criminal Court arguing that the Rome Statute, the foundational treaty establishing the court, should be amended to include crimes relating to climate disinformation promoted by corporate actors (see also *The Planet v. Bolsonaro and NZ Students for Climate Solutions and UK Youth Climate Coalition v. Board of BP*). Such efforts may not prove fruitful, but it is likely that the convergence between the debates on ecocide and on climate responsibility may become increasingly close to one another in future years.

Environmental litigation and climate litigation will reinforce each other in new cases

Strategies in climate cases are increasingly likely to be transferred to and integrated into other types of environmental cases, such as cases involving plastic pollution. Plastic litigation is evolving as awareness grows of the full lifecycle of plastic. These legal actions often address the environmental harm caused by plastic production, use and disposal, highlighting the significant carbon footprint associated with the lifecycle of plastics, from fossil fuel extraction to product manufacturing and waste management. As plastics are primarily derived from petrochemicals, litigation in this area intersects with climate change by challenging the expansion of plastic production facilities, alleging violations of environmental laws, or seeking to hold companies accountable for plastic-related pollution, including greenhouse gas emissions.

Additionally, there is an increasing emphasis on the concept of extended producer responsibility, pushing for laws and policies that require producers to be responsible for the entire lifecycle of their products, including disposal and recycling, to mitigate environmental and climate impacts. For example, 175 states agreed to develop a legally binding agreement on plastic pollution by 2024, prompting a major step towards reducing emissions from plastic production, use and disposal (UNEP/EA.5/Res.14, of 2 March, 2022). As public and legal scrutiny of plastics' environmental impact intensifies, plastic litigation might become part of broader climate litigation efforts.

At the same time, rights-based environmental cases are likely to continue leveraging climate arguments, and vice-versa. In March 2024 for the first time the Inter-American Court of Human Rights held a state responsible for violating the right to a healthy environment and the impact this has on the guarantee of other rights (*La Oroya v. Peru*).

The case was brought against Peru for human rights violations due to pollution from a metallurgical complex affecting 80 residents in La Oroya. Although climate change was not central to the dispute, the Court acknowledged that "States have an enhanced duty of protection towards children against health risks caused by the emission of polluting gases that contribute to climate change." In the judgment, the Court ordered the State of Peru to adopt comprehensive reparation measures for the damage caused to the population of La Oroya.

We anticipate that other important developments in environmental cases will also inspire developments in climate cases (see Box 4.2).

Box 4.2. From environmental group claims to climate group claims?

There is building momentum for group litigation against multinationals in English courts, especially concerning environmental disasters. The UK Court of Appeal listed the trial of *Municipio de Mariana v. BHP*, concerning the collapse of the Fundão dam in Brazil in 2015, to take place in October 2024. The case will be the largest opt-in group action to be brought before the English courts with an excess of 700,000 plaintiffs seeking up to £36 billion to compensate for alleged damage to their homes and livelihoods.

This litigation follows the precedents set by the Supreme Court in the *Vedanta* and *Okpabi* cases, enabling foreign litigants to sue England-domiciled parent companies for overseas environmental damage.

The outcome of this appeal could redefine the landscape of environmental damage redress, potentially encouraging more group litigation against multinational companies in English courts. The eagerly awaited decision may reach beyond the plaintiffs of the Fundão disaster to set a broader precedent for future ESG and climate litigation, particularly against major emitters, highlighting the English courts' role in the global fight against environmental damage.

Conclusion

The field of climate litigation continues to grow and diversify but the number of new cases filed each year may be stabilising. The slowdown could be due to a shift towards fewer, more strategic cases – but it may be temporary. We are yet to see many cases employing corporate framework strategies and polluter pays strategies achieve final resolution. If these cases succeed in key jurisdictions, it is likely that they will inspire similar cases. Additionally, new case strategies may evolve rapidly, as has been the case with climate-washing cases.

Despite the apparent stabilisation in new case filings, significant divergence within climate litigation persists. The US remains distinct in several ways, not only in the number of cases filed, but also in trends within cases, such as a higher prevalence of non-climate-aligned strategies and relatively fewer cases against companies, though the absolute number of corporate cases in the US remains significant. Another distinctive feature of the US is the way in which recent cases focused on climate-related financial risk have largely been non-climate-aligned, challenging the consideration of such risks, which is out of step with trends elsewhere in the world. This divergence might indicate future changes in the broader field, as US litigation often sets precedents for strategies adopted globally. Trends such as the growth in ESG backlash litigation might spread to other jurisdictions. However, it is possible that the main drivers for this type of litigation, which include the polarisation in the politics of subnational governments – might be unique to US circumstances.

Overall, whether climate litigation is advancing or hindering climate action remains difficult to determine. Some types of cases, such as government framework cases, have already had lasting impacts on domestic climate governance. However, the long-term implications of other case types, such as climate-washing cases, remain unclear, despite the relatively high levels of 'successful' cases in courtroom terms. Both types of cases can and must be understood as part of the wider constellation of climate cases. This broader phenomenon continues to drive shifts in thinking and behaviour among many stakeholder groups, ranging from the courts and the legal profession to legislators and regulators, financiers and insurers. Understanding the nuance and scope of these changes remains an urgent challenge.

Appendix: Methodological notes

Data collection

Information about the cases discussed in this report was primarily derived from the Sabin Center databases. Data was downloaded from the US database on 4 April 2024 and from the Global database on 10 May 2024. Both databases have been updated since then. More detail on the data collection methodology can be found on the About page of the Sabin Center's climate case charts.

In the course of drafting the report and updating case classifications we sometimes identified updates to cases and new cases not yet included in the databases. Information about these updates has been provided to the Sabin Center and will be added to the databases in due course.

At the time of release of our 2023 report, the Sabin Center's Global Climate Litigation Database contained more than 750 cases. Since then, more than 170 new cases have been added to the Global dataset. Many of the cases added were filed in years prior to 2023. Readers should, therefore, bear in mind that the figures presented in this report are likely to be an underestimate of cases from around the world as previously overlooked cases continue to be identified.

At the time of our data download for the 2024 report, the Sabin Center's US Climate Litigation Database contained over 1,745 case bundles. In some instances, a case bundle may contain information about more than one complaint when these are filed on the same subject matter and have been consolidated before a court. For example, the case of *Western States Trucking Association Inc. v. EPA* involves six separate challenges to the Environmental Protection Agency's (EPA) decision to grant a waiver of Clean Air Act pre-emption, allowing the California's Air Resources Board to introduce new emissions standards for heavy-duty vehicles. These challenges are filed by a range of plaintiffs including trade associations, states and campaign groups. A similar case involving multiple complaints which have since been consolidated is the case of *Center for Biological Diversity v. EPA*, which involves nine separate challenges to new EPA rules on renewable fuel standards, some filed by environmental associations and others by companies, and trade associations or industry bodies. This case is counted once in the overall case count but is also counted in both the climate-aligned and non-climate-aligned categories.

Approach to case classification

When classifying cases for these reports we primarily base our findings on the Sabin Center's case summaries. In cases where it is challenging to make a determination about a case based on the information available in the summaries, we also review the full case documents in the databases and/or media reports. Some classifications will be assigned based on review by one member of the research team. However, where there is uncertainty about a classification, this case is reviewed and discussed in detail by the authors before a final determination is made.

Classification of strategies

Many of the classifications in Part II of this report – for example, determination of whether to classify a case as strategic – are based on informed, subjective assessments. Case assessments may also be made on imperfect or incomplete information, particularly about the parties' intentions. For example, we may define a case as strategic based on the evidence of the plaintiffs' behaviour (e.g. issuing press releases about the case) and the claimant type (e.g. a case filed by an NGO or community group with a mission and purpose to protect the environment is likely to form part of a broader advocacy strategy on the part of the NGO). This does not mean that the plaintiffs themselves would necessarily describe the case as 'strategic'.

Classifying a case as 'strategic' or 'non-strategic' also does not imply a judgement of one being better or more impactful than the other. Cases brought to achieve a relief that will apply to an isolated situation without the intention of influencing the broader debate (i.e. non-strategic) can be as (or more) important as cases that actively seek the realisation of broader changes in society (i.e. strategic litigation).

Courts will not always have regard for the broader intentions of the parties when determining a case, meaning that cases brought with little or no strategic intent may nonetheless provide opportunities for courts to issue far-reaching judgments on novel legal issues. In some cases, the strategic nature of the case may have positive impacts on the way the court determines the issues, and in others, as in the case of *ClientEarth v. Shell*, it may be weighed against the plaintiffs by the courts (see Setzer and Higham, 2022).

Given that our identification of different strategy types in this report is sometimes based on only partial data, it is possible that some cases may employ additional strategies which we have not identified here. Similarly, we have confined our review to primary and secondary strategies, but determining which strategy takes precedence is a subjective question and our assessment may differ from the deeper understanding afforded to the parties by their access to more privileged information. Nonetheless, we feel that the classification of cases by strategy can offer a more detailed understanding of the body of climate litigation, particularly given that differences in legal cultures may require different litigants to employ a variety of legal grounds to achieve the same ends.

Where data on the strategies employed in cases filed in 2023 is compared to data from previous years, the figures for earlier cases are based on a comprehensive review of the global dataset. However, since the US dataset is considerably larger and US cases have not been evaluated in depth in previous reports, we have adopted an alternative approach to providing historical comparison data for the US. This approach has varied between case categories:

- For government framework cases, the comparison data is derived from the dataset used for a previous report on this subset of cases, which included US cases (Higham et al., 2022). This dataset has been updated based on a thorough review of more recent cases.
- For corporate framework, transition risk, climate-washing and polluter pays cases, comparison data has been derived from a review of a dataset of corporate cases filed since 2015 developed by the authors.
- For the turning off the taps and failure to adapt cases, which involve both cases against corporate actors and cases against government actors, a dataset of historical comparison cases was developed for this report using the case categorisation on climatecasechart.com and search and filter options on the database.
    - To identify failure to adapt cases filed between 2015 and 2023, we first developed a dataset including all cases with the word 'adaptation' in any part of their classification on the Sabin Center's website. This dataset included 94 cases. Each case was then reviewed to determine whether it fell within the definition of failure to adapt.
    - For turning off the taps cases, historical comparison cases were identified by searching key terms such as 'public finance', 'bank' and 'export finance'. We also conducted a manual review of all cases in the Securities and Financial Regulation Archives on climatecasechart.com. Few cases seeking to force financial decision-makers to incorporate climate in decision-making were identified in the data from 2015–2023, although several cases challenging the relevance of climate to such decision-making were identified. A series of cases involving import-export finance institutions was also identified, but these all predated 2015.
- Due to the sheer volume of data, we have been unable to quantify the number of 'integrating climate considerations' cases in the US for this year's report. However, we believe this number to be very large.

Classification of outcomes

When reviewing our classification of outcomes, readers should note that we classify outcomes at several different stages within a given case. The first stage at which a case may be classified as having a given outcome (as opposed to being classed as 'open') is when there is a positive ruling on a procedural issue such as standing or justiciability, even if the case has not proceeded to trial. This is particularly likely to happen in a case where the issues presented are of a novel nature, or where the case runs counter to a procedural decision taken in a similar case.

The second stage is when there is an initial ruling on the case from a court of first instance, and the third stage is when the outcomes of any appeals become known. This means that the status of a case may change from 'favourable' or 'unfavourable' throughout the course of the proceedings as different judgments are issued.

In some instances, cases that may have been classified as having negative outcomes for the parties may nonetheless advance an issue of fact or law that may have positive impacts on subsequent litigation. For example, in the case of *Sacchi et al. v. Argentina*, the case has been classified as having an unfavourable outcome because it was dismissed by the Committee on the Rights of the Child. However, it could be argued that the case has in fact had positive outcomes because it has helped to clarify several issues of international law. This reflects the overall limitations of imposing a quantitative assessment of outcomes on complex legal cases.

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JUSTICIABILITY, ACCESS TO JUSTICE AND THE DEVELOPMENT OF CONSTITUTIONAL LAW IN CANADA

Gerard J Kennedy[*] *and Lorne Sossin*[**]

ABSTRACT

Concentrating on Canadian experience, specifically litigation under the *Canadian Charter of Rights and Freedoms* (the '*Charter*'), this article seeks to reconcile the access to justice benefits of summary procedures with the government litigant's duty to act in the public interest (or as a 'model litigant') and uphold the rule of law. Though acknowledging the benefits that can result from the use of summary procedures to end litigation, the authors observe that compliance with strict requirements in procedural law are frequently dispensed with in the *Charter* context. In fact, summary procedures can have a devastating effect on the development of *Charter* rights. The authors ultimately posit that the government should have a duty of restraint in using summary procedures to end public law litigation, and courts should be reluctant to permit the government to preclude such litigation aimed at advancing the evolution of the *Charter* from reaching hearings on the merits.

I INTRODUCTION

This edition of this journal addresses the 'boundaries of judicial review'. Traditionally, this concerns the concept of justiciability.[1] If a case raises a question that a court is institutionally incapable of answering, or that is not susceptible to the judicial process, litigation is foreclosed by the courts as part of their gatekeeping function. In this paper, we look at justiciability from a different angle, one which can functionally determine whether litigation can proceed—the boundaries of the use of summary procedures to end public law litigation (including judicial review).

Just as there is no right without a remedy, so it means little to say a matter is justiciable if a party is effectively precluded from advancing it to a decision on the merits. Using Canada as a case study, and concentrating on litigation under the *Canadian Charter of Rights and Freedoms*,[2] we explore the relationship between procedural justice and justiciability. We seek to reconcile the access to justice benefits that can result from

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1 See, eg, Lorne M Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Carswell, 2nd ed, 2012).

2 *Canada Act 1982* (UK) c 11, sch B pt I ('*Charter*').

summary procedures with the government litigant's duty to act in the public interest (or as a 'model litigant') and uphold the rule of law.

The Supreme Court of Canada has acknowledged that access to justice is one of the least admirable aspects of Canada's justice system, and a serious threat to the rule of law.[3] Courts in Canada and specifically Ontario have encouraged the creative and novel uses of civil procedure to summarily end proceedings in order to improve access to justice.[4] But summary procedures are not without their disadvantages, such as risking advantaging heavily resourced parties[5] and denying parties their 'day in court'.[6] These concerns are heightened when a government litigant considers using the summary procedure to end a litigation. Government litigants are not only exceptionally well-resourced, but they also have a public interest mandate, particularly in *Charter* matters.[7] Moreover, the use of summary procedures to end *Charter* litigation can have devastating effects.

In Part II of this paper, we briefly explain principles of constitutional litigation in Canada and how they differ in important ways from those in Australia. We then explore the relationship between justiciability and access to justice, and provide a brief overview the crisis of access to justice facing the courts in Canada. We also explore civil rules reform (particularly with respect to summary procedures to end civil actions) as one strategy adopted by Canadian jurisdictions to address this crisis. In Part III, we explain why greater flexibility regarding procedural matters in *Charter* cases may be justified. In Part IV, we note the negative consequences that can arise from the use of procedural tactics in *Charter* matters, especially when employed against poorly resourced parties. In Part V, based on the foregoing, we explain why we view it as appropriate to recognise a duty of constraint on government lawyers employing summary procedures to end *Charter* litigation, and why courts should be reluctant to allow the government to end such litigation through summary procedures. This will not require much nuancing of established principles of and rules within procedural law. Indeed, the rule of law—one of the principles that supports the expanded use of summary procedures to end litigation in a purely private context—may point in precisely the opposite direction in the public law, and specifically *Charter*, context.

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3 See, eg, *Hryniak v Mauldin* [2014] 1 SCR 87, 92 [1] (Karakatsanis J) ('*Hryniak*').

4 Ibid.

5 See, eg, Michelle Flaherty, 'Best Practices in Active Adjudication' (2015) 28 *Canadian Journal of Administrative Law and Practice* 291, 297–8. The pitfalls facing self-represented litigants are explained thoroughly by Julie Macfarlane in Julie MacFarlane, 'The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants' (Final Report, Treasurer's Advisory Group on Access to Justice, May 2013) < http://www.lsuc.on.ca.ezproxy.library.yorku.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self-represented_project.pdf>.

6 Vasuda Sinha, Lorne Sossin and Jenna Meguid, 'Charter Litigation, Social and Economic Rights & Civil Procedure' (2017) 26 *Journal of Law and Social Policy* 43; Jonathan Lisus, '*Hryniak*: Requiem for the vanishing trial, or brave new world?' (2014) 33(1) *The Advocates' Journal* 6.

7 Adam M Dodek, 'Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law' (2010) 33(1) *Dalhousie Law Journal* 1.

II CANADIAN CONSTITUTIONAL LITIGATION, JUSTICIABILITY, ACCESS TO JUSTICE AND PROCEDURAL LAW

A Justiciability in Canadian Law

As in Australia,[8] judicial review is constitutionally guaranteed in Canada to uphold the rule of law.[9] As Justice Ivan Rand famously wrote in 1959's *Roncarelli v Duplessis*, 'there is no such thing as absolute and untrammelled "discretion"' in exercising public powers.[10] Despite these general principles in Canadian law, the doctrine of justiciability demarcates the scope of judicial review. Consistent with Rayner Thwaites's conceptualisation, justiciability may extend further to administrative schemes directed at making the actions they cover non-justiciable.[11]

In the Canadian context, where a matter raises no legal dispute, or is otherwise inappropriate to adjudicate (whether because the dispute has been allocated to another body such as Parliament to resolve or because the matter is not yet ripe or already moot), a judge generally will decline to hear the matter as it is non-justiciable. Though an important doctrine that recognises the limits of judicial power, justiciability can also be seen as the effective limits of the rule of law in a society. Parties to disputes held to lie outside of the province of the courts to adjudicate are left without recourse to assure the rule of law is respected.[12]

Non-justiciable matters *per se* are relatively rare in Canadian law, related to matters such as exercises of Crown prerogative, including advice that the Prime Minister gives to the Queen or her representatives concerning the bestowing of honours.[13] As we return to below, some kinds of claims for social and economic rights may also be non-justiciable.[14] This is very different than in Australia, where many 'margin cases' concern migration.[15] Unlike Australia,[16] advisory opinions are permissible in Canadian law.[17] Public interest standing can be granted to ensure that judicial review of government

8 Explained in Matthew Groves, 'Judicial Review and Human Rights' (2018) 25 *Australian Journal of Administrative Law* (forthcoming), citing *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103].

9 Described in a series of cases beginning with *Crévier v A-G (Quebec)* [1981] 2 SCR 220 (Laskin CJ). The constitutional requirement for judicial review is also noted by Abella J in *Wilson v Atomic Energy of Canada Ltd* [2016] 1 SCR 770, 794-5 [31].

10 [1959] SCR 121, 140.

11 Rayner Thwaites, 'The Changing Landscape of Non-Justiciability' [2016] 1 *New Zealand Law Review* 31, 59.

12 For further discussion of this point, see Lorne Sossin, 'The Unfinished Project of *Roncarelli*: Justiciability, Discretion and the Limits of the Rule of Law' (2010) 55(3) *McGill Law Journal* 661.

13 See, eg, *Black v Chrétien* (2001) 54 OR (3d) 215 (CA).

14 *Tanudjaja v A-G (Canada)* (2014) 123 OR (3d) 161 ('*Tanudjaja*').

15 See, eg, Groves, above n 8, citing Stephen Gageler, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92.

16 See, eg, Matthew Groves, 'Judicial Review of Administrative Action in the High Court of Australia' (2008) 33(2) *Queen's Law Journal* 327, 347–8; *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

17 See, eg, *Reference re Secession of Quebec* [1998] 2 SCR 217.

action is not illusory,[18] and Canadian courts will even entertain 'moot' matters where the live dispute between the parties is over, but there is a public interest in resolving a point of law.[19] This makes the Canadian experience very different than Australian concerns about the defining the 'matter' in a judicial review proceeding.[20]

What is less clear is the status of those matters which in theory can be adjudicated, but where practical barriers lead to them effectively being outside the province of the courts. Traditionally, such areas are examined through the lens of access to justice—the matrix of personal, situational, and institutional and systemic factors which make certain matters and certain litigants less likely to be heard in court. The relationship between justiciability and access to justice remains both under-theorised and under-scrutinised. This article is an attempt to address this lacuna.

Our argument is that access to justice may be considered as a dimension of justiciability (and vice versa). This perspective does not necessarily entail seeing *every* question of how courts are accessed as a matter of justiciability. The tort of negligence is justiciable even if we know the cost of competent legal representation may put the enforcement of tort rights out of reach for many middle and low-income community members. By the same token, disputes about the tenets of religious faiths may be non-justiciable even where parties have the patience and resources to see through the litigation process. Access to justice and justiciability remain distinct spheres which shape the justice system. Rather, we argue there is an overlapping sphere where justiciability and access to justice interact and reinforce one another. In this article, we suggest litigation under the Canadian *Charter* represents one such overlapping sphere.

Justiciability construed in this broader way, as including where relevant an access to justice dimension, cannot be defined simply as the matters which a court will adjudicate, but also the matters which effectively can be brought to court. In this sense, justiciability should include an analysis of courts, but also an analysis of the rules governing the litigation process, as well as an analysis of the parties who come to court, and the barriers they may face.

B Conceptualizing Access to Justice

Precisely what the phrase 'access to justice' encompasses varies according to the circumstances. Access to justice often is expressed as access to lawyers and courts. Under this view, services such as *pro bono* legal services and legal aid provide a means for individuals to access formal dispute resolution mechanisms like courts where they would otherwise be unable to do so. Another example would be the waiver of court hearing fees for individuals without the financial means to pay, thus helping all persons access the courts.[21] Another broader conception, however, is that access to justice is not 'just about access to the courts but also about access to markets and regulatory regimes that would lessen the need for access to the courts'.[22] This broader approach to access to

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18 *A-G (Canada) v Downtown Eastside Sex Workers United Against Violence Society* [2012] 2 SCR 524 ('*Downtown Eastside*').

19 *Borowski v A-G (Canada)* [1989] 1 SCR 342 ('*Borowski*').

20 See, eg, Groves, above n 16, 347–8; *Re McBain; ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 458-62 [242]–[252] (Hayne J).

21 *Trial Lawyers Association of British Columbia v A-G (British Columbia)* [2014] 3 SCR 31 ('*Trial Lawyers Association*').

22 Kent Roach and Lorne Sossin, 'Access to Justice and Beyond' (2010) 60(2) *University of Toronto Law Journal* 373, 374.

justice embraces the adoption of innovations in the traditional justice system, such as small claims courts, class actions, and online dispute resolution.[23] They allow a greater number of individuals to seek legal remedies.[24] Access to justice in this sense is not only about enabling individuals to access means of legal remedies (as with the first two conceptions), but also about breaking down the barriers that often prevent people from ensuring their legal rights are respected.

At its most holistic, understanding these barriers will include normative questions about what values constitute 'justice' and ensuring that the substantive law encompasses such values.[25] But at the very least, it means that civil litigation should have three characteristics: minimal financial costs, timeliness, and simplicity.[26] Strong arguments can be made that such an understanding of access to justice is too narrow.[27] Nonetheless, these virtues are unquestionably *part* of a proper understanding of access to justice.[28]

Based on these values, Ontario amended its *Rules of Civil Procedure* effective January 1, 2010 (the '2010 Amendments').[29] The 2010 Amendments were the beginning of an effort to amend the *Rules* to promote the resolution of lawsuits in a manner that minimises delay and expense.[30] In its seminal 2014 decision *Hryniak v Mauldin*, the Supreme Court held that the 2010 Amendments should be interpreted generously to achieve access to justice. This is consistent with enshrining of the value of proportionality in the *Rules*.[31]

Amending civil procedure is surely not a catch-all solution to access to justice problems. Indeed, an excessive emphasis on civil procedure can even be an impediment to more holistic understandings of access to justice.[32] But once civil procedure is guiding an action through the court system, it is useful and appropriate to assess whether that civil procedure is leading to resolution of that action promptly and with minimal

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23 Civil Resolution Tribunal <https://civilresolutionbc.ca/>; Shannon Salter, 'ODR and Justice System Integration: B.C.'s Civil Resolution Tribunal' (2017) 34(1) *Windsor Yearbook of Access to Justice* 112.

24 Roach and Sossin, above n 22, 376.

25 See, eg, Trevor C.W. Farrow, 'What is Access to Justice?' (2014) 51(3) *Osgoode Hall Law Journal* 957, 970–2.

26 Ibid, 978-9; Roderick A Macdonald, 'Access to Justice in Canada Today: Scope, Scale and Ambitions' in Julia Bass, W A Bogart and Frederick H Zemans (eds), *Access to Justice for a New Century – The Way Forward* (Irwin Law, 2005) 68–73. Underlying all of these, as well as an important principle in its own right, is proportionality: *Hryniak* [2014] 1 SCR 87, [29]–[33]; Trevor Farrow, 'Proportionality: A Cultural Revolution' (2012) 1 *Journal of Civil Litigation and Practice* 151.

27 See, eg, Trevor C.W. Farrow, 'A New Wave of Access to Justice Reform' in Adam Dodek and Alice Woolley (eds), *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (UBC Press, 2016) 164, 166–7; Andrew Pilliar, 'Exploring a Law Firm Business Model to Improve Access to Justice' (2015) 32(1) *Windsor Yearbook of Access to Justice* 1.

28 Farrow, above n 27, 166-7.

29 *Rules of Civil Procedure*, RRO 1990, Reg 194 ('*Rules*').

30 See, eg, O Reg 43/14; O Reg 438/08.

31 *Rules*, RRO 1990, Reg 194, r 1.04(1.1) as inserted by O Reg, 438/08, s 2. See Farrow, above n 26.

32 Farrow, above n 27, 167.

financial expense. This work is complementary, rather than an alternative, to analyses of broader issues affecting access to justice.[33]

There are three aspects of Ontario's procedural law that have arguably changed in recent years, with the goal of contributing to prompt, summary resolutions of civil claims on their merits: 1) summary judgment; 2) motions to strike; and 3) dismissals *sua sponte*. We discuss each in turn.

1 *Summary Judgment*

Hryniak concerned likely the most notable of the 2010 Amendments—the expanded power of courts to grant 'summary judgment'. This allows a court to dispose of all or part of a case on a motion, with affidavit evidence, and without a full trial.[34] Any party may bring a summary judgment motion to resolve an action promptly. Despite historic reluctance to grant 'summary judgment', the Supreme Court of Canada ruled in *Hryniak* that summary judgment powers are to be interpreted broadly to promote access to justice.[35] *Hryniak* was generally praised,[36] but its effects are only beginning to be analyzed. Shantona Chaudhary[37] and Brooke MacKenzie[38] have argued that *Hryniak*'s expansion of summary judgment powers has a strong theoretical foundation and has had positive empirical effects.

Summary judgment remains available in constitutional law cases and is sought by the Crown or other public bodies as defendants in instances such as there being no evidence to support a claim[39] or a binding release having been signed.[40] One Ontario judge, when dismissing a motion to strike a *Charter* claim, recently suggested that a summary judgment motion would have been more appropriate.[41]

2 *The Motion to Strike*

The motion to strike (in Ontario, Rule 21 of the *Rules*) allows a Court to dispose of a case because it does not disclose a cause of action. This could be because the action is frivolous, vexatious, or an abuse of the Court's process.[42] It could also be the result of the plaintiff's claim failing to disclose a cause of action because she pleads facts that, even if accepted as true, would not entitle her to the relief she is seeking; in this sense, an action that fails to plead a cause of action is an abuse of process.[43] Importantly, the record is said to be less significant in motions to strike because the premise of such a motion is that all the facts must be considered as proven. This approach makes sense in the context of common law contexts such as tort and contract breaches. For example, if

33 Ibid 166.
34 *Rules*, RRO 1990, Reg 194, r 20, as analysed in *Hryniak* [2014] 1 SCR 87.
35 *Hryniak* [2014] 1 SCR 87, 93 [5].
36 See, eg, Shantona Chaudhary, 'Hryniak v. Mauldin: The Supreme Court issues a clarion call for civil justice reform' (2014) 33 *The Advocates' Journal* 3.
37 Ibid.
38 Brooke MacKenzie, 'Effecting a Culture Shift: An Empirical Review of Ontario's Summary Judgment Reforms' (2017) 54 *Osgoode Hall Law Journal* 1275.
39 See, eg, *Kasheke v A-G (Canada)* (2017) 277 ACWS (3d) 75 (NSSC); *Farley v Ottawa (City) Police Services Board* (2017) 282 ACWS (3d) 690 (ONCA), as examples where this occurred.
40 See, eg, *Sturgeon Lake Indian Band v A-G (Canada)* (2016) 269 ACWS (3d) 201 (ABQB).
41 *Smith v Ontario* (2016) 368 CRR (2d) 322, [172] (Matheson J) (ONSC).
42 *Rules*, RRO 1990, Reg 194, r 21.01(3)(d).
43 Stephen Pitel and Matthew Lerner, 'Resolving Questions of Law: A Modern Approach to Rule 21' (2013) 43 *Advocates' Quarterly* 344, 348.

the issue is whether tort law recognises a right to damages for 'nervous shock,' it would be unnecessary and arguably unfair to put the parties to the task of establishing a factual basis for nervous shock if this category of tortious harm is not recognised in the first place. In this sense, Rule 21 may be understood as an underutilised tool for facilitating access to justice and developing the common law in a principled and proportionate matter.[44] Rule 21 per se was not amended in 2010, though the value of proportionality should apply to how it is interpreted, just as it applies to all elements of Ontario procedural law.[45] *Hryniak*'s call for a 'culture shift' in how civil litigation is conducted is also arguably relevant to the interpretation of this rule.[46]

As we discuss below, however, the same logic which animates civil justice disputes may not adhere in the context of the *Charter*.

3 *Dismissals* Sua Sponte

Ontario's *Rules* were once again amended in 2014 to allow a court to very summarily—either on its own initiative or at the request of counsel—dismiss a claim that is 'on its face' frivolous, vexatious, or an abuse of process.[47] This rule is 'not for close calls'[48]—given the 'on its face' requirement, defendants are not generally permitted to explain *why* the action should be dismissed.[49] But this new rule does allow a Court to deal with vexatious litigants who, were a formal motion brought seeking to dismiss their claim, would merely treat the motion as a fresh opportunity to conduct the proceedings in a vexatious manner.[50] Arguably, whatever the proper approach to procedural constraint under the *Charter*, it should not permit frivolous and vexatious matters to tie up judicial resources.[51]

III THE NEED FOR GREATER FLEXIBILITY IN *CHARTER* CASES

These three procedural mechanisms may be used to prevent claims from going to trial. In many cases, they allow for parties to avoid the cost and delay associated with trials and ensure only those matters which need the judicial and institutional resources of a trial receive them. Applications under the *Charter*, however, raise different concerns. The *Charter*, which came into effect in 1982 following the patriation of Canada's Constitution from the United Kingdom, recognises a series of fundamental freedoms and rights which operate against the state.

All applicants who raise *Charter* challenges, by definition, engage the Crown as a party, and will be at a disadvantage against the Crown in terms of resources and patience. People grow old and die but the Crown does not. People can run out of money but the Crown cannot (in theory, at least, it can obtain additional funds through taxation which no private party can match). This imbalance risks disturbing equal access to

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44 Gerard J Kennedy and Mary Angela Rowe, '*Tanudjaja v. Canada (Attorney General)*: Distinguishing Injusticiability and Deference on Motions to Strike' (2015) 44 *Advocates' Quarterly* 391. See also ibid.

45 Farrow, above n 26.

46 Already discussed in Pitel and Lerner, above n 43; Kennedy and Rowe, above n 44.

47 *Rules*, RRO 1990, Reg 194, r 2.1.

48 *Raji v Ladner* (2015) 248 ACWS (3d) 828, [9] (ONSC) ('*Raji*'); approved by the Court of Appeal in *Scaduto v Law Society of Upper Canada* (2015) 343 OAC 87, [9].

49 *Raji* (2015) 248 ACWS (3d) 828, [12].

50 Ibid [8].

51 See, eg, *Asghar v Ontario* [2015] ONSC 4071 (23 June 2015).

courts, and to law, which has been recognised by scholars in Canada and Australia as a practical threat to the rule of law as one's ability to live under the law will be affected by her economic status.[52] The Supreme Court of Canada recognised this concern in *Trial Lawyers Association*, where it held that mandatory court service fees were unconstitutional.[53] Thus, when it comes to the justiciability of *Charter* rights, we must be concerned both with the doctrinal scope of the *Charter* (as interpreted by the Courts) and with the litigation tactics and procedural avenues open to the parties, and in particular open to the Crown to deter or derail litigation seeking to assert, apply or expand *Charter* rights and freedoms. In this sense, we argue justiciability needs to be understood through the lens of the lived experience of those who seek judicial remedies.

Notwithstanding the access to justice benefits of summary procedures generally in civil litigation, there are three main arguments to support the proposition that it is inconsistent with the public interest for procedural mechanisms to be used as barriers in *Charter* and public standing litigation: 1) the Attorney General has special ethical duties to the public interest and rule of law; 2) the government itself provides financial support for *Charter* challenges and therefore should not actively seek to prevent *Charter* litigation from being decided on its merits; and 3) the Supreme Court of Canada has aimed to promote public standing litigation by adopting flexible standards for public interest standing and interim costs, and this same approach should inform the exercise of Crown discretion in relation to procedural challenges.

Procedural mechanisms, such as motions to strike, must be understood as having the capacity to undermine the development of *Charter* rights. In other words, in setting out the boundaries of judicial review, justiciability extends beyond the subject area limits of the judicial process to practical realities in that process as well. Understanding justiciability in this way, in our view, also leads to a rationale for principled constraints to be recognised on the Crown's discretion to raise procedural challenges at least to *Charter* test cases (if not to a broader set of public interest litigation), where doing so in effect would bar such cases from ever reaching a hearing on the merits.

A Legal Ethics and Crown Discretion in *Charter* Cases

The Attorney General occupies a unique role in that they are both the government's lawyer and the protector of the rule of law and public interest.[54] In other words, the Attorney General has a duty to ensure that government action is in keeping with the values of the Constitution and the greater public good. As such, it seems appropriate that the Attorney General would have a subsidiary duty to refrain from adopting a litigation strategy in which procedural mechanisms are used as barriers to public interest standing cases.

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52 Paul Vayda, 'Chipping away at Cost Barriers: A Comment on the Supreme Court of Canada's *Trial Lawyers* Decision' (2015) 36 *Windsor Review of Legal and Social Issues* 207; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 594–6, specifically concerning access to representation.

53 [2014] 3 SCR 31.

54 See Kent Roach, 'Not Just the Government's Lawyer' (2008) 31 *Queen's Law Journal* 598; Allan Hutchinson, '"In the Public Interest": The Responsibilities and Rights of Government Lawyers' (2008) 46 *Osgoode Hall Law Journal* 105; Debra McAllister, 'The Attorney General's Role as Guardian of the Public Interest in Charter Litigation' (2002) 21 *Windsor Yearbook of Access to Justice* 47.

The importance of this understanding of special Crown ethical duties in relation to civil litigation flows from the fact that, if it were not to exist, the Attorney General would be able to represent the protection of the rule of law and public interest while simultaneously having the license to undermine them. It also flows, by analogy, from the fact that in specific legal settings (criminal and family law, for example) the Crown is said not to act as a 'zealous advocate' but rather as a 'neutral' officer of the Court.[55] In *Boucher v The Queen*,[56] the Supreme Court characterised the role of the Crown prosecutor in these terms:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.[57]

While similar constraints do not apply to the Crown in its role as a litigant in civil matters (pursuing damages for breach of contract, for example), in all these settings, Crown counsel remain 'guardians of the public interest'.[58] The position of the Crown in civil matters involving the *Charter* (or other constitutional provisions) would appear to be a hybrid. The reasons for the constraints in criminal and family matters may not apply, but the model of the Crown as a zealous advocate also seems at odds with the mix of public interest, accountability, and rule of law imperatives operating in *Charter* settings.

This duty of the Crown to act in the public interest in Canada is arguably analogous to the Australian duty of the government to be a 'model litigant'. The Commonwealth is only to pursue litigation if it is convinced it is the best course, and based on reasonable grounds.[59] On a practical level, the Commonwealth's obligations include the duty to pay legitimate claims, not cause undue delay, avoid relying on 'technical' arguments, and not take advantage of a claimant who lacks the resources to litigate a legitimate claim.[60]

The Crown's duty to act in the public interest (or be a model litigant) is particularly relevant and important when the government is dealing with vulnerable parties, where the government has a higher standard of conduct. Adam Dodek has pointed to *parens patriae*, child protection, expropriation, charities, and dealings with Indigenous peoples (Honour of the Crown) as instances of this higher standard.[61] As public standing cases will involve vulnerable parties, it is arguable that the Crown should adopt strategies that seek to prevent unfairness towards such parties (discussed further below).

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55 The *Rules of Professional Conduct* of the Law Society of Upper Canada <https://www.lsuc.on.ca/list.aspx?id=671> set out the following:

> 5.1–3 When acting as a prosecutor, a lawyer shall act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

56 [1955] SCR 16.

57 Ibid 23-4.

58 For discussion, see *New Brunswick v Rothmans Inc* (2009) 352 NBR (2d) 226, [33].

59 Attorney-General of Australia, *Legal Services Directions 2017*, 29 March 2017, s 4.2 ('*LSD 2017*').

60 Ibid app B.

61 Dodek, above n 7, 26.

B Public Funding

The federal government has historically (and will now again)[62] provided 'financial assistance for important court cases that advance language and equality rights guaranteed under Canada's Constitution'.[63] In fact, the modernised Court Challenges Program (CCP) has expanded its scope of rights and will now accept challenges to 'fundamental freedoms, democratic rights and rights with respect to life, liberty and security of the person'.[64]

As such, it is clear that the government has an interest in ensuring that the rights of Canadians are respected and that those with legitimate claims are afforded the support they need to have their position heard. In light of this commitment, it would seem inconsistent and hypocritical for the Attorney General to make use of procedural mechanisms, such as summary judgment and motions to strike, in order to undermine cases brought forward with government funding. Further, due to the fact that all cases funded by the CCP have undergone a screening by a panel of experts and have been selected on their merits, any attempts to dismiss the case on procedural grounds should be seen as acts of hindrance, just as Commonwealth lawyers have a duty not to cause unnecessary delay.[65]

C Flexibility in *Charter* Procedures — Guidance from the Supreme Court

Recognizing that litigation can have public importance beyond the narrow dispute between the parties, Canadian courts, particularly the Supreme Court, have been especially flexible in the application of civil procedure in *Charter* litigation. This is strikingly apparent in the progressive and flexible approach to public interest standing, mootness, and interim cost awards, justified on access to justice grounds. Throughout all of these examples, it is apparent that when a poorly resourced party is up against the government, flexibility is necessary. A paramount consideration should be that matters should not be beyond the scope of judicial review due to procedural hurdles.

For instance, in *British Columbia v Okanagan Indian Band* and *Little Sisters Book and Art Emporium v Canada*, the Court established the test for awarding interim costs in public interest litigation. The test does indeed have a high threshold — the claimant must show: 1) that the litigation would be unable to proceed without the costs; 2) the claim is *prima facie* meritorious; and 3) that the issues transcend the interests of the litigant, are of public importance, and have not been previously resolved.[66] However, the very existence of such a mechanism to support important public interest cases suggests a strong interest on behalf of the courts to ensure the advancement of constitutional rights.

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62 Court Challenges Program of Canada, *Reinstatement News* (February 2017) <www.ccppcj.ca/en/news.php>.

63 Court Challenges Program of Canada, *About CCP* (February 2017) <www.ccppcj.ca/en/about.php>.

64 Court Challenges Program of Canada, above n 62.

65 *LSD 2017* sch B s 2(a).

66 *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 SCR 371, 399-400 [40] (LeBel J); *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)* [2007] 1 SCR 38, 47-64 [2]–[44] (Bastarache and Lebel JJ).

In any event, costs awards ought not to act as a 'chilling effect' on citizens seeking to ensure that their government behaves constitutionally.[67] The discretionary nature of costs awards and the unique nature of *Charter* litigation means that even the losing party can be awarded its costs in public interest litigation[68] and/or the winning party can be awarded *all* of its costs.[69]

Further, in *Downtown Eastside*, the Court revised the requirements for public interest standing, adopting a 'purposive and flexible approach to applying the three factors' developed in its earlier trilogy of *Thorson*,[70] *McNeil*,[71] and *Borowski*:[72] 1) whether there is a serious justiciable issue raised; 2) whether the plaintiff has a real stake or a genuine interest in it; and 3) whether, in all circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.[73] In particular, the Court in *Downtown Eastside* reformed the way in which the third element of the test was to be applied, moving from it as a 'strict requirement' to one that should also be considered purposively and flexibly.[74] While, much like interim cost awards, the Court has established a high standard for public interest standing, the adoption of a flexible approach that is premised on a 'cumulative weighing' of the factors is a sign that the Court has an interest in allowing meritorious claims to succeed.

Finally, the Court has frequently heard 'moot' appeals even when the dispute between the parties has ceased. While it normally a waste of judicial resources to hear a moot appeal, it can be a very prudent use of judicial resources to decide *Charter* matters likely to re-arise in litigation. The clarification in the law can be a 'stitch in time to save nine'. Moreover, there are frequently parties willing to defend or challenge the constitutionality of particular government action even after a particular dispute concerning the constitutional matter is moot. As such, courts will decide 'moot matters' in the constitutional law realm if resolution of a legal issue is in the public interest.[75] By example, in *M v H*, the Supreme Court determined the constitutionality of a family law statute even when the affected parties had reached a settlement. Though there was no more dispute between M and H, the Court of Appeal's declaring the statute unconstitutional affected thousands of other families so certainty was warranted.[76] This is not a *carte blanche* for courts to decide moot issues—for example, the Supreme Court refused to hear an equality-focussed challenge to the constitutionality of abortion statutes after the statutes had been declared unconstitutional on procedural fairness

67 See, eg, the decision of Justice Sharpe in *Edwards v Law Society of Upper Canada* (1998) 156 DLR (4th) 348. He gives a similar overview from an academic perspective in Justice Robert J Sharpe, 'Access to *Charter* Justice' (2013) 63 *Supreme Court Law Review* 3.

68 See eg, *B(R) v Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315, 327 [26] (Deschamps J); *Conseil scolaire francophone de la Colombie-Britannique v British Columbia* [2013] 2 SCR 774, 802 [64] (Wagner J); Sharpe, above n 67.

69 *Carter v A-G (Canada)* [2015] 1 SCR 331, 393-5 [138]–[143].

70 *Thorson v A-G (Canada)* [1975] 1 SCR 138.

71 *Nova Scotia Board of Censors v McNeil* [1978] 2 SCR 662.

72 *Minister of Justice (Canada) v Borowski* [1981] 2 SCR 575.

73 *Downtown Eastside* [2012] 2 SCR 524, 546-53 [37]–[51] (Cromwell J).

74 Ibid 550 [45]. See Matt Malone, 'Standing in the Way: Comparing Constraints on Access to Justice After the Liberalization of Public Interest Standing in Canada and Israel' (2017) 46 *Advocates' Quarterly* 451.

75 See, eg, *Borowski* [1989] 1 SCR 342, 361 (Sopinka J).

76 *M v H* [1999] 2 SCR 3, 44-5 [44] (Cory and Iacobucci JJ).

grounds and while the government was contemplating a replacement.[77] But there is no question that the doctrine of mootness is relaxed in *Charter* litigation, given that public and private litigation differ in important ways.

Overall, it seems clear that the Court, through its evolution of mechanisms to support public interest litigation, has an interest in the advancement of *Charter* rights for Canadians. As such, it would seem inconsistent with this general promotion of public interest cases for the Attorney General to adopt litigation strategies that seek to prevent claimants from advancing their claims.

IV THE IMPACT OF PROCEDURAL TACTICS ON *CHARTER* LITIGATION

A Procedural Mechanisms Can Undermine the Development of *Charter* Rights

As should be evident from the above, we agree that procedural mechanisms, such as motions to strike, are important tools in the civil litigation process, including applications under the *Charter*. They are designed to allow parties to avoid the expense and anxiety of non-justiciable, unmeritorious or inappropriate litigation, and/or abuses of the justice system, as well as the public resources and legitimacy which go into that system.[78]

It is important to understand, however, that these mechanisms are powerful and, when used improperly, they have the capacity to impede the understanding of *Charter* rights. As a potential example, in *Tanudjaja v Canada*, a 'challenge to both Ontario's and Canada's housing-related law and policy under sections 7 and 15 of the *Charter*,'[79] a motion to strike was upheld by the Ontario Court of Appeal. The claimants alleged that various actions and inactions of the provincial and federal governments had led to their dire housing circumstances and, as such, violated their rights of security of the person and equality. The claimants amassed a very substantial evidentiary record, but once the majority of the Court of Appeal upheld the motion judge's dismissal of the case on the grounds that the claim was non-justiciable,[80] the merits of the *Charter* claim, and the evidence underlying it, received no judicial consideration.

Cases like *Tanudjaja* demonstrate the potentially devastating effect of the Crown's procedural discretion (coupled with the Court's own jurisprudence on justiciability and related doctrines). The dismissal of the claim on justiciability grounds at the outset prevented the admissibility of an evidentiary record on the issue and, possibly, set a precedent that such general issues as a right to housing are not within the realm of the courts. While the majority of the Court of Appeal in *Tanudjaja* expressed reservations on the generality of the applicant's claim (leaving open, for example, that specific public housing schemes or legislation could be subject to a *Charter* analysis), the chilling effect may be real, as such judgments may subsequently be cited for broad propositions about the Court's approach to *Charter* rights.[81] The fact that anyone alleging that the *Charter*

77 *Borowski* [1989] 1 SCR 342.
78 Sinha, Sossin and Meguid, above n 6.
79 Ibid 1.
80 *Tanudjaja* (2014) 123 OR (3d) 161.
81 See the press coverage of *Tanudjaja*, eg, Laurie Monsebraaten, 'Housing for All Not a Right: Court of Appeal Rules in Rejecting *Charter* Challenge', *Toronto Star* (online), 1 December 2014

includes a right to housing will, almost by definition, be a poorly resourced person, decreases the likelihood that claims such as this will be litigated. Though such a claim may not be tenable in Australian courts, the Commonwealth has a similar duty to not take advantage of a poorly resourced party.[82]

In the end, while it is open to debate as to whether or not such issues are wholly political and non-justiciable, there is no denying that the unseen evidentiary record was crucial to the claimants' arguments in *Tanudjaja*. Whether or not the motion to strike in this case could have been sustained,[83] the motion completely undermined the claim by preventing the claimants from being able to make use of the very materials that would allow them to convince the court. Further, even if the record had failed to convince the court, its very presence could have been helpful in determining the scope of the *Charter* rights at issue, and providing guidance in subsequent cases.[84] In her dissenting opinion, Justice Feldman noted how clarity in the law in this area could help further parties.[85] Instead, the decision may result in a chilling effect for prospective litigants.

B When Procedural Mechanisms are Not Successful in Undermining Public Interest Claims, There Can be Significant Advancements in *Charter* Rights

The advancement of *Charter* rights will often require a trial and the use of an evidentiary record. This is often due to their complexity and the need to establish causal connections between the actions of government and the harms experienced by the claimants. As such, the use of motions to strike carry a particular potential to thwart the development of *Charter* case law.

However, when these motions are dismissed by the courts in order to allow meritorious claims to advance, there can be positive consequences for the scope of *Charter* rights. For instance, in *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police*, Justice Henry dismissed the defendant's motion to strike out the claims of negligence and violations of sections 7, 15, and 28 of the *Charter*.[86] In *Jane Doe*, the Court clarified that novelty alone should never be a ground for striking a claim as disclosing no cause of action. As a result, unlike in *Tanudjaja*, the claimants were enabled to put forward an evidentiary record at trial and establish the grounds for their position. In the end, the court found in favour of the claimant, holding that the police failed to provide the claimant with information vital to the security of her person, and that they neglected to do so based on a 'stereotypical discriminatory belief that as a woman she and others like her would become hysterical and panic and scare off an attacker'.[87] As

<https://www.thestar.com/news/gta/2014/12/01/housing_for_all_not_a_right_court_of_appeal_rules_in_rejecting_charter_challenge.html>.

82 *LSD 2017* app B.

83 Cf Sinha, Sossin and Meguid, above n 6; Kennedy and Rowe, above n 44.

84 Sinha, Sossin and Meguid, above n 6. Kennedy does not disagree with this proposition though questions whether the value was worth the cost in *Tanudjaja* itself. Kennedy believes the matter was justiciable but, unlike Sossin, he believes that the underlying claim was clearly implausible and the pleading manifestly failed to disclose a cause of action: Kennedy and Rowe, above n 44.

85 *Tanudjaja* (2014) 123 OR (3d) 161, [67]–[68].

86 (1989) 58 DLR (4th) 396 (Supreme Court of Ontario — High Court of Justice).

87 *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998) 39 OR (3d) 487 (Court of Justice (General Division)).

such, the case helped to expand the scope of sections 7 and 15 as well as the obligations of the police under the *Charter*.

C The Purpose and Value of Public Interest Standing and its Connections to Justiciability

Public interest standing was not developed in order to create a narrow exemption to standing law. Rather, the aim of public interest standing has been to facilitate the judicial review of the validity of government action where to refuse standing might provide the Crown with constitutional immunity.[88] We argue a similar framework should apply more broadly to procedural discretion—at least in the context of *Charter* test cases aimed at recognizing novel rights or notably new approaches to existing rights. To properly develop *Charter* jurisprudence, these kind of constitutional arguments need to reach the Court on their merits.[89] This may require a pragmatic consideration of the (lack of) resources held by parties likely to allege a particular *Charter* violation.

Consider the challenge brought by the Canadian Bar Association in British Columbia asserting that the *Charter* guaranteed a right to legal aid in civil cases (earlier case law had established such a right in criminal law contexts—and had enlarged this right to some civil areas which were analogous to those criminal law settings).[90] The British Columbia Supreme Court held that the applicants had not raised a specific constitutional breach as a result of a statute or executive action, but rather the failure of British Columbia to establish and fund a civil legal aid scheme:

> However, in the case at bar, there is no challenge to legislation or to administrative action said to be *ultra vires*. Instead, there is a challenge attacking a failure to legislate or a failure to have a scheme in place that meets appropriate constitutional criteria as contended by the CBA. This is a significant distinction. Instead of considering a specific statute or a specific administrative act or expenditure for constitutional compliance, this case would ultimately require the court to define a constitutionally valid civil legal aid scheme and order its provision by the defendants.
>
> The plaintiff correctly submits that the principles governing public interest standing must be applied in a 'liberal and generous manner'. In *Canadian Council of Churches*, Cory J. stated that 'the post-*Charter* era calls for a liberal and purposive approach to standing'. However, he also emphasised that the approach must remain balanced (at 250). In my view, the balanced approach will not be served by removing the requirement that the 'serious issue' must relate to invalidity of legislation, or to a public act undertaken without or in excess of statutory authority.
>
> In the case at bar, there is no challenge to a specific governmental decision, act, or statute. The case cannot be characterised as raising an issue with respect to the limits of statutory, administrative, or executive authority. The challenge is to the funding, content, administration, operation, and effect of an entire public program that invokes various federal and provincial statutes, ministries, agencies, and non-governmental entities and actors.[91]

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88 Lorne Sossin, 'The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?' (2007) 40(2) *UBC Law Review* 727, 734.

89 Ibid 731.

90 See *New Brunswick (Minister of Health and Community Services) v G(J)* [1999] 3 SCR 46.

91 *Canadian Bar Assn v British Columbia* (2006) 59 BCLR (4th) 38, [45]–[47] (BCSC), affd (2008) 76 BCLR (4th) 48 (BCCA), leave to appeal to the Supreme Court of Canada denied [2008] SCCA No 185.

The CBA never had the opportunity to demonstrate that the *Charter* includes a right to civil legal aid as it was denied standing. As this case demonstrates, procedural steps within test case litigation can create, in effect, the actual boundaries of judicial review. Justiciability needs to be seen not only through doctrinal boundaries of subject-area jurisdiction, but also as limits on judicial review as a result of the capacity and resources of those bringing test cases. This approach leads to new principles which can (and, we argue, should) be brought to bear on the procedural discretion of the Crown. As we elaborate in the final section, in light of the Crown's status in *Charter* cases, there should be limits on its discretion to seek procedural remedies that do not apply to other parties.[92]

V TOWARDS A NEW APPROACH

In our view, it is appropriate to recognise that the difference in the resources, position and ethical framework of the Crown in relation to *Charter* cases ought to lead to a concomitant difference in approach to procedural justice. The Crown is under no obligation to accede to every *Charter* claim, and indeed, Crown lawyers are under a duty to advance the best arguments available to the Crown in relation to such claims. Those arguments may sometimes include procedural motions—particularly where the Crown believes judicial resources are not well spent on the matter (including, for example, because it appears to be vexatious or frivolous). Where the Crown seeks to deny an argument on the merits to a *Charter* matter because it raises a novel argument or extends an existing *Charter* right beyond its current scope, caution is warranted in our view. We would frame the duty on the Crown as ensuring the development of *Charter* rights is not obstructed.

While a detailed elaboration of this Crown duty of constraint should be developed in consultation with some of the stakeholders involved (Crown lawyers themselves, representatives of the applicant *Charter* bar, legal regulators, client groups, and so forth), we believe a point of departure should include three threshold questions:

1. Is the *Charter* challenge brought in good faith, with plausible arguments?
2. Would the potential procedural remedy sought by the Crown make it less likely that the applicant's or a similar challenge could be pursued due to the applicant's or others' limited time, resources and capacity?
3. Would the potential procedural remedy sought by the Crown thwart the opportunity of the Court to develop *Charter* rights, including the boundaries of or limits to those rights?

Where the answer to all three of these threshold questions, or even the first one as well as one of the other two, is affirmative, we believe the Crown should exercise its discretion not to proceed with the procedural challenge, or at a minimum, to have the procedural challenge considered concurrent to the merits of the challenge so a Court would have all the evidence and argument before it in advance of deciding on the procedural challenge. In some cases, this may mean greater Crown resources will have to go into defending an action. But this is consistent with the Crown's duty to act in the public interest and as a model litigant.[93]

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92 Sossin, above n 88, 741.
93 Dodek, above n 7; *LSD 2017* sch B.

On this basis, a *Charter* claim like *Tanudjaja* could very well have been permitted to proceed. The claim was certainly brought in good faith, and its arguments around a declaratory remedy on governments to develop a plan to address the right to housing struck many observers (including the dissenting judge on the Ontario Court of Appeal) as plausible. The limited budgets of participating organizations and transient nature of applicants who lacked housing would meet the second prong of the threshold. And, in the end, the development of the *Charter* around social and economic rights generally, and the right to housing specifically, has been thwarted (at least for now).[94] The CBA *Charter* claim seeking a right to civil legal aid, however, may be seen differently. While its claim was brought in good faith and certainly met the plausibility standard, it is less clear that the Canadian Bar Association falls into the same category in terms of limited time, resources and capacity. This standard must of course turn on the circumstances of particular cases, but as a general proposition, a large and well-funded organization of professionals with a long-term policy goal around the *Charter* may well not attract the special duties of constraint on the Crown developed above.

We would not limit the application of this framework of justiciability and access to justice to *Charter* cases alone—by analogy, a similar approach might be relevant in other constitutional settings—particularly involving the rights of Indigenous peoples under s 35(1) of the *Constitution Act 1982*, human rights cases against the Crown, and in other administrative law settings where similar dynamics are in play.

We should add that different considerations arise where it is the applicants seeking to use a procedural mechanism to short-cut a consideration of the evidence and argument in a *Charter* case. In other words, the rationale for the Crown duty does not apply equally in the context of *Charter* claimants. The asymmetry in resources and public interest duties results in an asymmetry in procedural considerations as well. This dynamic was illustrated by the 2015 decision in *Allen v Alberta*.[95] In *Allen*, the Alberta Court of Appeal found that the appellant's attempt to adjudicate the constitutionality of s 26(2) of the *Alberta Health Care Insurance Act*[96] through summary judgment was inappropriate. Rather, the court held that the trial judge was correct to refrain from applying the precedent of *Chaoulli*[97] as the issues in the case were complex, nuanced, factually sensitive, and raised genuine issues requiring a trial.[98] The court did note, however, that 'there are undoubtedly cases where the binding authority is so clearly on point and definitive that a full trial is not required'.[99] In order to determine whether or not this is the case, a number of factors must be considered, including: '(a) the scope, (b) the pedigree, (c) the clarity of the precedent, and (d) the precise constitutional provision that is engaged'.[100]

As such, the case appears to establish a multi-step test for determining whether or not summary judgment can be used to determine the constitutionality of legislation or

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94 There is of course a school of thought that such matters should not be subject to judicial review but given open-ended statements of the Supreme Court of Canada in *Gosselin v A-G (Québec)* [2002] 4 SCR 429, that appears uncertain.

95 *Allen v Alberta* (2015) 389 DLR (4th) 422 (ABCA) ('*Allen*').

96 RSA 2000, c A-20.

97 *Chaoulli v A-G (Québec)* [2005] 1 SCR 791.

98 *Allen* (2015) 389 DLR (4th) 422, [54].

99 Ibid [27].

100 Ibid.

government action. At the core of the test is whether or not a full evidentiary record is necessary; the less clear-cut the issues and the precedent's commentary on the issues (this test necessitates precedent), the more likely it will be that a full evidentiary record will be necessary. The test is important as it seems to establish quite a high bar for using summary judgment on issues of constitutionality. While this may well be relevant as a general proposition, our approach would see an even higher threshold applied where such motions are brought by the Crown.

VI CONCLUSION

We have pursued two arguments in this brief article — one far-reaching and one modest. The first and far-reaching argument is that the principles of justiciability should not be understood in the abstract, but rooted in the lived experience of litigants. Thus, a matter that in principle could be subject of adjudication, but which in practice never would be because of the procedural tactics available to the Crown in a particular jurisdiction, should in our view be considered as part of the justiciability analysis. The resources parties actually possess must also be considered relevant and a matter should not, in practice, become beyond the scope of judicial review due to procedural obstacles. Justiciability, in this sense, is a multi-dimensional set of boundaries, closely related to access to justice concerns more generally, not a one-dimensional inquiry into the subject-matter of a dispute.

The second and more modest argument is that a duty of restraint in raising procedural hurdles should be among the factors that informs Crown discretion in *Charter* litigation.[101] This is a logical corollary to the justiciability concerns inherent to *Charter* litigation.

It is often said that Canadian constitutional law is best understood as a living tree. While we believe this metaphor remains apt, trees often need to be tended in order to thrive. This is particularly true when the tree is young, and before its roots are deep enough so that it can survive harsh weather. In Canada, the *Charter* is only 35 years old and its roots may not be deep enough to weather a storm that could be anything from a constitutional crisis to legislative malaise. Our prime gardeners are our courts. When someone calls for the gardener's help, the gardener should not be reluctant to come.

101 See, eg, Matthew A Hennigar, 'Conceptualizing Attorney General Conduct in *Charter* Litigation: From Independence to Central Agency' (2008) 51(2) *Canadian Public Administration* 193.

TAB O



Multilateral Treaties

[Signatories and Ratifications] [text in Spanish]

ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS "PROTOCOL OF SAN SALVADOR"

Preamble

The States Parties to the American Convention on Human Rights "Pact San José, Costa Rica,"

Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Recognizing that the essential rights of man are not derived from one's being a national of a certain State, but are based upon attributes of the human person, for which reason they merit international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States;

Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified;

Recognizing the benefits that stem from the promotion and development of cooperation among States and international relations;

Recalling that, in accordance with the Universal Declaration of Human Rights and the American Convention on Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights;

Bearing in mind that, although fundamental economic, social and cultural rights have been recognized in earlier international instruments of both world and regional scope, it is essential that those rights be reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the right of its peoples to development, self-determination, and the free disposal of their wealth and natural resources; and

Considering that the American Convention on Human Rights provides that draft additional protocols to that Convention may be submitted for consideration to the States Parties, meeting together on the occasion of the General Assembly of the Organization of American States, for the purpose of gradually incorporating other rights and freedoms into the protective system thereof, Have agreed upon the following Additional Protocol to the American Convention on Human Rights "Protocol of San Salvador:"

Article 1

Obligation to Adopt Measures

The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.

Article 2

Obligation to Enact Domestic Legislation

If the exercise of the rights set forth in this Protocol is not already guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Protocol, such legislative or other measures as may be necessary for making those rights a reality.

Article 3

Obligation of nondiscrimination

The State Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.

Article 4

Inadmissibility of Restrictions

A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree.

Article 5

Scope of Restrictions and Limitations

The State Parties may establish restrictions and limitations on the enjoyment and exercise of the rights established herein by means of laws promulgated for the purpose of preserving the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights.

Article 6

Right to Work

1. Everyone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity.

2. The State Parties undertake to adopt measures that will make the right to work fully effective, especially with regard to the achievement of full employment, vocational guidance, and the development of technical and vocational training projects, in particular those directed to the disabled. The States Parties also undertake to

implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work.

Article 7

Just, Equitable, and Satisfactory Conditions of Work

The States Parties to this Protocol recognize that the right to work to which the foregoing article refers presupposes that everyone shall enjoy that right under just, equitable, and satisfactory conditions, which the States Parties undertake to guarantee in their internal legislation, particularly with respect to:

a. Remuneration which guarantees, as a minimum, to all workers dignified and decent living conditions for them and their families and fair and equal wages for equal work, without distinction;

b. The right of every worker to follow his vocation and to devote himself to the activity that best fulfills his expectations and to change employment in accordance with the pertinent national regulations;

c. The right of every worker to promotion or upward mobility in his employment, for which purpose account shall be taken of his qualifications, competence, integrity and seniority;

d. Stability of employment, subject to the nature of each industry and occupation and the causes for just separation. In cases of unjustified dismissal, the worker shall have the right to indemnity or to reinstatement on the job or any other benefits provided by domestic legislation;

e. Safety and hygiene at work;

f. The prohibition of night work or unhealthy or dangerous working conditions and, in general, of all work which jeopardizes health, safety, or morals, for persons under 18 years of age. As regards minors under the age of 16, the work day shall be subordinated to the provisions regarding compulsory education and in no case shall work constitute an impediment to school attendance or a limitation on benefiting from education received;

g. A reasonable limitation of working hours, both daily and weekly. The days shall be shorter in the case of dangerous or unhealthy work or of night work;

h. Rest, leisure and paid vacations as well as remuneration for national holidays.

Article 8

Trade Union Rights

1. The States Parties shall ensure:

a. The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The

States Parties shall also permit trade unions, federations and confederations to function freely;

b. The right to strike.

2. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law.

3. No one may be compelled to belong to a trade union.

Article 9

Right to Social Security

1. Everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence. In the event of the death of a beneficiary, social security benefits shall be applied to his dependents.

2. In the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave before and after childbirth.

Article 10

Right to Health

1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.

2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right:

a. Primary health care, that is, essential health care made available to all individuals and families in the community;

b. Extension of the benefits of health services to all individuals subject to the State's jurisdiction;

c. Universal immunization against the principal infectious diseases;

d. Prevention and treatment of endemic, occupational and other diseases;

e. Education of the population on the prevention and treatment of health problems, and

f. Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.

Article 11

Right to a Healthy Environment

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.

2. The States Parties shall promote the protection, preservation, and improvement of the environment.

Article 12

Right to Food

1. Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development.

2. In order to promote the exercise of this right and eradicate malnutrition, the States Parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to promote greater international cooperation in support of the relevant national policies.

Article 13

Right to Education

1. Everyone has the right to education.

2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.

3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:

a. Primary education should be compulsory and accessible to all without cost;

b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;

c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;

d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;

e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.

4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above.

5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties.

Article 14

Right to the Benefits of Culture

1. The States Parties to this Protocol recognize the right of everyone:

a. To take part in the cultural and artistic life of the community;

b. To enjoy the benefits of scientific and technological progress;

c. To benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to this Protocol to ensure the full exercise of this right shall include those necessary for the conservation, development and dissemination of science, culture and art.

3. The States Parties to this Protocol undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to this Protocol recognize the benefits to be derived from the encouragement and development of international cooperation and relations in the fields of science, arts and culture, and accordingly agree to foster greater international cooperation in these fields.

Article 15

Right to the Formation and the Protection of Families

1. The family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions.

2. Everyone has the right to form a family, which shall be exercised in accordance with the provisions of the pertinent domestic legislation.

3. The States Parties hereby undertake to accord adequate protection to the family unit and in particular:

a. To provide special care and assistance to mothers during a reasonable period before and after childbirth;

b. To guarantee adequate nutrition for children at the nursing stage and during school attendance years;

c. To adopt special measures for the protection of adolescents in order to ensure the full development of their physical, intellectual and moral capacities;

d. To undertake special programs of family training so as to help create a stable and positive environment in which children will receive and develop the values of understanding, solidarity, respect and responsibility.

Article 16

Rights of Children

Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.

Article 17

Protection of the Elderly

Everyone has the right to special protection in old age. With this in view the States Parties agree to take progressively the necessary steps to make this right a reality and, particularly, to:

a. Provide suitable facilities, as well as food and specialized medical care, for elderly individuals who lack them and are unable to provide them for themselves;

b. Undertake work programs specifically designed to give the elderly the opportunity to engage in a productive activity suited to their abilities and consistent with their vocations or desires;

c. Foster the establishment of social organizations aimed at improving the quality of life for the elderly.

Article 18

Protection of the Handicapped

Everyone affected by a diminution of his physical or mental capacities is entitled to receive special attention designed to help him achieve the greatest possible development of his personality. The States Parties agree to adopt such measures as may be necessary for this purpose and, especially, to:

a. Undertake programs specifically aimed at providing the handicapped with the resources and environment needed for attaining this goal, including work programs consistent with their possibilities and freely accepted by them or their legal representatives, as the case may be;

b. Provide special training to the families of the handicapped in order to help them solve the problems of coexistence and convert them into active agents in the physical, mental and emotional development of the latter;

c. Include the consideration of solutions to specific requirements arising from needs of this group as a priority component of their urban development plans;

d. Encourage the establishment of social groups in which the handicapped can be helped to enjoy a fuller life.

Article 19

Means of Protection

1. Pursuant to the provisions of this article and the corresponding rules to be formulated for this purpose by the General Assembly of the Organization of American States, the States Parties to this Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol.

2. All reports shall be submitted to the Secretary General of the OAS, who shall transmit them to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture so that they may examine them in accordance with the provisions of this article. The Secretary General shall send a copy of such reports to the Inter-American Commission on Human Rights.

3. The Secretary General of the Organization of American States shall also transmit to the specialized organizations of the inter-American system of which the States Parties to the present Protocol are members, copies or pertinent portions of the reports submitted, insofar as they relate to matters within the purview of those organizations, as established by their constituent instruments.

4. The specialized organizations of the inter-American system may submit reports to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture relative to compliance with the provisions of the present Protocol in their fields of activity.

5. The annual reports submitted to the General Assembly by the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture shall contain a summary of the information received from the States Parties to the present Protocol and the specialized organizations concerning the progressive measures adopted in order to ensure respect for the rights acknowledged in the Protocol itself and the general recommendations they consider to be appropriate in this respect.

6. Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

7. Without prejudice to the provisions of the preceding paragraph, the Inter-American Commission on Human Rights may formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social and cultural rights established in the present Protocol in all or some of the States Parties, which it may include in its Annual Report to the General Assembly or in a special report, whichever it considers more appropriate.

8. The Councils and the Inter-American Commission on Human Rights, in discharging the functions conferred upon them in this article, shall take into account the progressive nature of the observance of the rights subject to

protection by this Protocol.

Article 20

Reservations

The States Parties may, at the time of approval, signature, ratification or accession, make reservations to one or more specific provisions of this Protocol, provided that such reservations are not incompatible with the object and purpose of the Protocol.

Article 21

Signature, Ratification or Accession

Entry into Effect

1. This Protocol shall remain open to signature and ratification or accession by any State Party to the American Convention on Human Rights.

2. Ratification of or accession to this Protocol shall be effected by depositing an instrument of ratification or accession with the General Secretariat of the Organization of American States.

3. The Protocol shall enter into effect when eleven States have deposited their respective instruments of ratification or accession.

4. The Secretary General shall notify all the member states of the Organization of American States of the entry of the Protocol into effect.

Article 22

Inclusion of other Rights and Expansion of those Recognized

1. Any State Party and the Inter-American Commission on Human Rights may submit for the consideration of the States Parties meeting on the occasion of the General Assembly proposed amendments to include the recognition of other rights or freedoms or to extend or expand rights or freedoms recognized in this Protocol.

2. Such amendments shall enter into effect for the States that ratify them on the date of deposit of the instrument of ratification corresponding to the number representing two thirds of the States Parties to this Protocol. For all other States Parties they shall enter into effect on the date on which they deposit their respective instrument of ratification.

[Signatories and Ratifications]

TAB P

FILED

AUG 14 2023

ANGIE SPARKS, Clerk of District Court
By H Coleman Deputy Clerk

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiff, v. STATE OF MONTANA, et al., Defendant.	Cause No. CDV-2020-307 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

PROCEDURAL HISTORY

On March 13, 2020, sixteen Montana youth (collectively Plaintiffs or Youth Plaintiffs) filed a Complaint for Declaratory and Injunctive Relief (Doc. 1) against the State of Montana, the Governor, Montana Department of Environmental Quality, Montana Department of Natural Resources and Conservation, Montana Department of Transportation, and Montana Public Service Commission (collectively Defendants or State). Plaintiffs' Complaint challenged the constitutionality of the State's fossil fuel-based state energy system, which they allege causes and contributes to climate change in violation

of their constitutional rights guaranteed under Article II, Section 3; Article II, Section 4; Article II, Section 15; Article II, Section 17; Article IX, Section 1; Article IX, Section 3 of the Montana Constitution; and the Public Trust Doctrine. (Doc. 1 ¶¶ 3-4).

Specifically, the Complaint challenged the constitutionality of fossil fuel-based provisions of Montana's State Energy Policy Act, Mont. Code Ann. § 90-4-1001(1)(c)-(g); a provision of the Montana Environmental Policy Act (MEPA), Mont. Code Ann. § 75-1-201(2)(a) (MEPA Limitation), which forbids the State and its agents from considering the impacts of greenhouse gas (GHG) emissions or climate change in their environmental reviews; and the aggregate acts the State has taken to implement and perpetuate a fossil fuel-based energy system pursuant to these two statutory provisions. (Doc. 1 ¶¶ 4, 105, 108, 118).

Youth Plaintiffs asked the Court for a declaration of law concerning their constitutional rights; a declaration of law that the fossil fuel-based provisions of Montana's State Energy Policy, Mont. Code Ann. § 90-4-1001(1)(c)-(g), are unconstitutional; a declaration of law that the MEPA Limitation is unconstitutional; and a declaration of law that Defendants' past and ongoing affirmative aggregate actions to implement a fossil fuel-based energy system—carried out in furtherance of the State Energy Policy and perpetuated through the MEPA Limitation—are unconstitutional. (Doc. 1, Requests for Relief # 1-5). The Complaint further requested injunctive relief to enjoin Defendants from subjecting Plaintiffs to the fossil fuel-based State Energy Policy, Mont. Code Ann. § 90-4-1001(1)(c)-(g), the MEPA Limitation, and aggregate acts; order Defendants to prepare a statewide GHG accounting; order

Defendants to develop a remedial plan to reduce statewide GHG emissions; retain jurisdiction until Defendants have fully complied with the Court's orders; and, if necessary, appoint a special master to review the remedial plan for efficacy. (Doc. 1, Requests for Relief # 6-9). Plaintiffs also requested an order awarding Youth Plaintiffs their reasonable attorneys' fees and costs, and any such further or alternative relief as the Court deems just and equitable. (Doc. 1, Requests for Relief # 10-11).

On April 24, 2020, Defendants filed a motion to dismiss pursuant to Mont. R. Civ. P. 12(b)(1), 12(b)(6), and 12(h)(3). (Doc. 11). After briefing and oral argument, the Court issued an Order on Motion to Dismiss on August 4, 2021, (Doc. 46), partially granting and partially denying Defendants' motion to dismiss.

The Court found that Plaintiffs' requests for the Court to order Defendants to develop a remedial plan, to retain jurisdiction over the matter until Defendants complied with the remedial plan, and, if necessary, appoint a special master to assist the Court in reviewing the remedial plan exceeded the Court's authority under the political question doctrine. (Doc. 46 at 21). Nevertheless, the Court held that prudential standing considerations did not merit dismissal because the Court "may grant declaratory relief regardless of injunctive relief. The court possesses the authority to grant declaratory or injunctive relief, or both." (Doc. 46 at 22).

Finally, the Court declined to dismiss Plaintiffs' challenge to MEPA for want of administrative exhaustion, finding that "Youth Plaintiffs properly brought this action in district court rather than through the administrative review process." (Doc. 46 at 24). The Order granted Defendants'

motion with respect to Plaintiffs' Requests for Relief # 6, 7, 8, and 9, and denied Defendants' motion with respect to Plaintiffs' Requests for Relief # 1, 2, 3, 4, and 5.

Defendants filed their Answer on September 17, 2021, (Doc. 53), denying virtually all allegations in the Complaint and raising several affirmative defenses.

Pursuant to the December 27, 2021, Scheduling Order (Doc. 61), the parties engaged in discovery throughout 2022.

On May 6, 2022, Defendants filed a Motion for Clarification of Order on State's Motion to Dismiss pursuant to Rule 60(a), Mont. R. Civ. P. (Doc. 84), seeking clarification on whether Plaintiffs' Request for Relief # 5 had been dismissed by the August 04, 2021, Order on Motion to Dismiss. Plaintiffs filed a Response in Opposition on May 20, 2022. (Doc. 102).

On June 10, 2022, Defendants filed a Petition for Writ of Supervisory Control (OP 22-0315), requesting the Montana Supreme Court exercise supervisory control and "dismiss Request for Relief 5 from this case." On June 14, 2022, the Supreme Court denied the Petition. (OP 22-0315).

On June 15, 2022, the Court issued an Order Partially Granting Defendants' Motion to Modify Scheduling Order and Setting Scheduling Conference. (Doc. 145) (Modified Scheduling Order). The Modified Scheduling Order governed the timeline thereafter. Pursuant to the Modified Scheduling Order, the parties engaged in discovery through January 9, 2023 — including disclosing expert witnesses (Docs. 222, 227), rebuttal expert witnesses (Docs. 240, 242), and conducting dozens of depositions.

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On June 30, 2022, the Court issued an Order on Defendants' Rule 60(a) Motion for Clarification (Doc. 158), clarifying that "requests for injunctive relief contained in the complaint were dismissed, except for Request for Relief 5." (Doc. 158 at 3).

On July 19, 2022, Defendants filed a Motion for Independent Medical Examination, or, in the Alternative, Motion to Strike Opinions and Testimony of Plaintiffs' Expert Dr. Lise Van Susteren Pursuant to Rule 35(a), Mont. R. Civ. P. (Doc. 163), alleging that Plaintiffs' allegations of mental health impacts as a result of climate change had placed their mental health at issue. (Doc. 163 at 2). On October 14, 2022, the Court issued an Order denying Defendants' motion (Doc. 225), ruling that IMEs were unwarranted because "Plaintiffs have not placed their mental health at the center of this case, nor is it really and genuinely in controversy," (Doc. 225 at 6), and because "Defendants have not established good cause for the requested examinations." (Doc. 225 at 7).

On July 20, 2022, Defendants filed a Second Motion for Clarification of Order on State's Motion to Dismiss pursuant to Rule 60(a), Mont. R. Civ. P. (Doc. 167). Defendants' second motion for clarification sought clarification from the Court as to why Plaintiffs' Requests for Relief # 1, 2, 3, 4, and 5 "don't violate the political question doctrine." (Doc. 167 at 3). On September 22, 2022, the Court issued an Order (Doc. 217), denying Defendants' Second Rule 60(a) Motion for Clarification of Order on State's Motion to Dismiss.

On September 30, 2022, pursuant to the Modified Scheduling Order, Plaintiffs disclosed their expert witnesses and expert disclosures. (Doc. 222). On October 31, 2022, Defendants disclosed their expert witnesses and

expert disclosures. (Doc. 227). On November 30, 2022, the parties exchanged rebuttal expert disclosures. (Docs. 239, 242).

Discovery closed on January 9, 2023. Between the parties, discovery included the completion of thirty-six depositions, the exchange of twenty-two expert reports, the exchange of over 50,000 pages of documents, and responses to dozens of interrogatories.

On February 1, 2023, Plaintiffs and Defendants file motions *in limine*. Plaintiffs filed seven motions *in limine* (Docs. 260, 262, 264, 266, 268, 270, 272) and Defendants filed seven motions *in limine* (Docs. 284, 286, 288).

On February 1, 2023, Defendants filed a Motion for Summary Judgment pursuant to Mont. R. Civ. P. 56. (Doc. 290). On February 14, 2023, Plaintiffs filed a response brief opposing summary judgment. (Doc. 299). Plaintiffs filed sixteen declarations from Plaintiffs, experts, and counsel in support of their response brief. (Docs. 300-315). On February 28, 2023, Defendants filed a reply. (Doc. 332).

On March 16, 2023, Governor Greg Gianforte signed House Bill 170 into law, repealing the Montana State Energy Policy, Mont. Code Ann. § 90-4-1001.

On March 31, 2023, Defendants filed a Motion to Partially Dismiss for Mootness pursuant to Mont. R. Civ. P. 12(b)(1), 12(b)(6), and 12(h)(3). (Doc. 339). Defendants moved to dismiss Plaintiffs' claims premised on the Montana State Energy Policy Act, Mont. Code Ann. § 90-4-1001, on the ground that the repeal of Mont. Code Ann. § 90-4-1001 (HB 170) mooted claims concerning the statute.

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On April 14, 2023, Plaintiffs filed a Response Brief in Opposition to Defendants' Motion to Partially Dismiss for Mootness. (Doc. 354). Plaintiffs filed nine declarations from experts in support of their response. (Docs. 355-363).

On April 26, 2023, unable to reach agreement on a joint proposed Pre-Trial Order, the parties submitted separate proposed pre-trial orders. (Docs. 366, 367). On April 27, 2023, a Final Pre-Trial Conference was held with the Court.

In response to Judge Moses' April 6, 2023, Order on Summary Judgment in *MEIC, et al. v. DEQ, et al.*, Yellowstone County Cause No. DV-56-2021-1307, the Montana Legislature adopted House Bill 971, an amendment to clarify the MEPA Limitation. On May 10, 2023, Governor Greg Gianforte signed into law HB 971, which clarified Mont. Code Ann. § 75-1-201(2)(a). The clarifications in HB 971 explicitly prohibit Montana's agencies from considering "an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders" in their MEPA reviews.

On May 12, 2023, the Court heard oral argument on Defendants' Motions for Summary Judgment, Motion to Partially Dismiss for Mootness, and Motion to Stay Proceedings.

On May 18, 2023, Defendants filed a Motion to Dismiss MEPA Claims based on the enactment of HB 971. (Doc. 376). On June 1, 2023, Plaintiffs filed a response brief opposing Defendant's motion to dismiss the claims. (Doc. 382). Defendants filed a reply and request for oral argument on June 9, 2023. (Doc. 385).

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On May 19, 2023, Governor Gianforte signed into law Senate Bill 557, amending several provisions of MEPA, Mont. Code Ann. § 75-1-201.

On May 23, 2023, the Court issued an Order on Defendants' Motions to Partially Dismiss for Mootness and For Summary Judgment. (Doc. 379). As to Defendants' Motion to Partially Dismiss for Mootness (Doc. 343), the Court granted Defendants' motion and dismissed without prejudice Plaintiffs' claims involving the State Energy Policy and Defendants' aggregate acts taken pursuant to and in furtherance of the State Energy Policy on redressability and prudential standing grounds. (Doc. 379 at 3-4). The Court denied Defendants' motion for summary judgment and allowed Plaintiffs' MEPA claims to proceed to trial. (Doc. 379 at 20-26).

On June 1, 2023, the Court issued an order on the remaining motions *in limine*. (Doc. 381). The Court granted Plaintiffs' motion # 2; granted in part and denied in part Plaintiffs' motions # 3 and 5; and denied Plaintiffs' motions # 4, 6, and 7. The Court granted Defendants' motions # 1, 4, 5, 6, 7; and denied Defendants' motions # 2 and 3.

On June 2, 2023, Defendants filed an Emergency Petition for Writ of Supervisory Control with the Montana Supreme Court (OP 23-0311), requesting again that the Supreme Court exercise supervisory control and reverse this Court's denial of the State's motion for summary judgment. The State also asked the Supreme Court to stay the trial set to begin June 12, 2023.

On June 6, 2023, the Montana Supreme Court denied the Emergency Petition for Writ of Supervisory Control. (OP 23-0311). The Supreme Court observed that Defendants had "not demonstrated that HB 971's

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amendments alter the allegations the Plaintiffs make in the Complaint" concerning the MEPA provision. (OP 23-0311 at 3).

On June 7, 2023, this Court entered the Final Pre-Trial Order governing this proceeding. (Doc. 384). In addition to "supersed[ing] the pleadings as to the remaining issues and govern[ing] the course of the trial of this case," (Doc. 384 at 38), the Court's Final Pre-Trial Order denied Defendants' Motion to Dismiss MEPA Claims (Doc. 376). (Doc. 384 at 38).

Trial began June 12, 2023, and ended on June 20, 2023.

On June 19, 2023, while trial was proceeding, Defendants filed a Bench Memorandum on the Constitutional and Procedural Limits of the Montana Environmental Policy Act. (Doc. 396). On June 25, 2023, Plaintiffs filed a response (Doc. 402). This briefing discussed in detail SB 557.

FINDINGS OF FACT[1]

The Findings of Fact and Conclusions of Law are based on the evidence and arguments presented at trial. The Court heard live testimony from twenty-seven witnesses. Plaintiffs presented testimony from twenty-four witnesses and Defendants presented testimony from three witnesses. The Court admitted one hundred sixty-eight of Plaintiffs' exhibits and four of Defendants' exhibits.

I. PARTIES

A. Plaintiffs

1. Plaintiffs are youth citizens of Montana. When the Complaint was filed in March 2020, Plaintiffs were from two to eighteen years old. They are now between five and twenty-two years old.

[1] Citations to the trial transcript, exhibits, and demonstrative slides are in brackets and identified by witness using their initials. For example, "SR-14", refers to Steven Running demonstrative slide 14.

2. Plaintiffs are Rikki Held, Lander Busse, Sariel Sandoval, Kian Tanner, Georgianna Fischer, Kathryn Grace Gibson-Snyder, Olivia Vesovich, Claire Vlases, Taleah Hernández, Badge B., by and through his guardian Sara Busse, Eva L., by and through her guardian Mark Lighthiser, Mica K., by and through his guardian Rachel Kantor, Jeffrey K., by and through his guardian Laura King; Nathaniel K., by and through his guardian Laura King, Ruby D., by and through her guardian Shane Doyle, and Lilian D., by and through her guardian Shane Doyle.

3. Rikki Held is from Broadus, Montana, was eighteen years old when this case was filed, and is currently twenty-two years old.

4. Lander Busse is from Kalispell, Montana, was fifteen years old when this case was filed, and is currently eighteen years old.

5. Sariel Sandoval is from Ronan, Montana, and lives on the Flathead Indian Reservation. She was seventeen years old when this case was filed and is currently twenty years old.

6. Kian Tanner is from Bigfork, Montana, was fourteen years old when this case was filed, and is currently eighteen years old.

7. Georgianna Fischer is from Bozeman, Montana, was seventeen years old when this case was filed, and is currently twenty-one years old.

8. Kathryn Grace Gibson-Snyder is from Missoula, Montana, was sixteen years old when this case was filed, and is currently nineteen years old.

9. Olivia Vesovich is from Missoula, Montana, was sixteen years old when this case was filed, and is currently twenty years old.

10. Claire Vlases is from Bozeman, Montana, was seventeen years old when this case was filed, and is currently twenty years old.

11. Taleah Hernández is from Polson, Montana, was sixteen years old when this case was filed, and is currently nineteen years old.

12. Badge B. is from Kalispell, Montana, was twelve years old when this case was filed, and is currently fifteen years old.

13. Eva L. is from Livingston, Montana, was fourteen years old when this case was filed, and is currently seventeen years old.

14. Mica K. is from Missoula, Montana, was eleven years old when this case was filed, and is currently fifteen years old.

15. Jeffrey K. is from Montana City, Montana, was six years old when this case was filed, and is currently nine years old.

16. Nathaniel K. is from Montana City, Montana, was two years old when this case was filed, and is currently five years old.

17. Ruby D. is from Bozeman, Montana, was twelve years old when this case was filed, and is currently fifteen years old.

18. Lilian D. is from Bozeman, Montana, was nine years old when this case was filed, and is currently twelve years old.

B. Defendants

19. Defendants are the State of Montana, Governor Greg Gianforte, Montana Department of Environmental Quality, Montana Department of Natural Resources and Conservation, Montana Department of Transportation, and Montana Public Service Commission.

20. The State of Montana is a governmental entity.

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21. Greg Gianforte is the current Governor of Montana. He is sued in his official capacity.

22. As Governor, Governor Gianforte is charged with seeing that the State's laws are faithfully executed, including the Constitution. Mont. Const. Art. VI, Sec. 4.

23. Governor Gianforte has supervisory authority over the principal departments of the executive branch.

24. Governor Gianforte holds cabinet meetings, communicates with other state officers, oversees budget expenditures, and has authority to issue executive orders. [Def. Answer, Doc. 11 ¶ 84].

25. Defendant Montana Department of Environmental Quality (DEQ) is a department of the State of Montana.

26. DEQ is the primary administrator of Montana's environmental regulatory, environmental cleanup, environmental monitoring, pollution prevention, and energy conservation laws. [Def. Answer, Doc. 11 ¶ 88].

27. DEQ is mandated to ensure that projects and activities for which it issues permits, licenses, authorizations, or other approvals comply with Montana's environmental laws and rules (including MEPA) to maintain and improve Montana's natural environment. [Agreed Facts, Final PTO, Doc. 384 at 2; Def. Answer, Doc. 11 ¶ 88].

28. DEQ is mandated to comply with the Montana Constitution and state law. [CD 1308:6-12].

29. DEQ issues air quality permits for applications that demonstrate compliance with all applicable requirements of the Federal and/or Montana Clean Air Act and their implementing rules, including but not limited to

coal and natural gas-powered energy plants, coal mining operations, and oil and gas refineries. [Agreed Facts, Final PTO, Doc. 384 at 2; Def. Answer, Doc. 11 ¶ 90].

30. DEQ prepares environmental review documents under MEPA, including for projects related to fossil fuels, such as natural resource extraction and power generating facilities. [CD 1313:21-1315:13].

31. DEQ has authority to certify certain pipelines that meet the definition provided in the Major Facility Siting Act, § 75-20-104(9)(b), MCA, and that comply with the requirements of the Major Facility Siting Act. [Agreed Facts, Final PTO, Doc. 384 at 2; Def. Answer, Doc. 11 ¶ 91].

32. DEQ permits coal mining for applications which meet the requirements set forth in Titles 82 (Minerals, Oil, and Gas) and 75 (Environmental Protection). DEQ has issued permits for surface coal mining in Montana on state, private, and federal land. [Agreed Facts, Final PTO, Doc. 384 at 2; Def. Answer, Doc. 11 ¶ 92].

33. Pursuant to its statutory authority, DEQ has discretion to deny and revoke permits. [SN 1392:24-1393:6].

34. Since 2011, pursuant to the MEPA Limitation, DEQ has not analyzed in its environmental review documents the cumulative impacts of the permits it issues on GHG emissions or climate change. [AH 846:1-3, 818:11-819:10].

35. Defendant Montana Department of Natural Resources and Conservation (DNRC) is a department of the State of Montana.

36. DNRC prepares environmental review documents under MEPA. [Shawn Thomas Perpetuation Deposition, 42:1-16].

37. DNRC manages the resources of the state trust lands through the State Board of Land Commissioners (Land Board). [Agreed Facts, Final PTO, Doc. 384 at 2; Def. Answer, Doc. 11 ¶ 95].

38. DNRC regulates, permits, and authorizes activities that result in GHG emissions in Montana. [Agreed Facts, Final PTO, Doc. 384 at 2].

39. DNRC issues leases, permits, and licenses for uses of lands under its jurisdiction, including licenses for exploration and leases for production and extraction of oil and gas in Montana and permits for drilling. [Agreed Facts, Final PTO, Doc. 384 at 2].

40. DNRC has exercised its authority to grant easements for the operational rights-of-way for interstate pipelines, with the approval of the Land Board, and issues land use licenses for the construction of rights-of-way and other activities on state lands and waterways for the construction and operation of interstate pipelines, which are used to transport fossil fuels. [Agreed Facts, Final PTO, Doc. 384 at 2; Def. Answer, Doc. 11 ¶ 95].

41. DNRC, through its Forestry Division, is responsible for planning and implementing forestry and fire management programs, as well as authorizing and permitting commercial timber sales on trust lands. [Agreed Facts, Final PTO, Doc. 384 at 3; Def. Answer, Doc. 11 ¶ 97].

42. Defendant Montana Department of Transportation (MDT) is a department of the State of Montana.

43. MDT is responsible for state planning in the transportation sector and is charged with collecting and enforcing fuel taxes. [Agreed Facts, Final PTO, Doc. 384 at 3].

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44. Defendant Montana Public Service Commission (PSC) is a governmental entity.

45. PSC regulates, supervises, and controls public utilities, common carriers, railroads, and pipelines. [Agreed Facts, Final PTO, Doc. 384 at 3].

46. PSC sets standard-offer contracts for qualifying facilities and utility rates. [Agreed Facts, Final PTO, Doc. 384 at 3].

47. PSC is responsible for the safety of interstate pipelines, including crude oil or petroleum products that operate within or through Montana. [Agreed Facts, Final PTO, Doc. 384 at 3].

48. Defendants' performance of their respective governmental functions has resulted in the extraction, transportation, and consumption of fossil fuels. [Agreed Facts, Final PTO, Doc. 384 at 3].

49. The extraction, transportation, and consumption of fossil fuels results in GHG emissions. [Agreed Facts, Final PTO, Doc. 384 at 3].

50. Defendants authorize the operation of coal-fired powerplants in Montana. [Def. Answer, Doc. 11 ¶ 118].

51. The drilling for and production of oil in Montana is authorized by Defendants. [Def. Answer, Doc. 11 ¶¶ 90, 96].

52. Montana has an abundance of energy sources, including fossil fuels yet to be extracted. [PE 944:24-946:4; PE-37].

53. The Montana Legislature enacted Mont. Code Ann. § 90-4-1001 (repealed) and the MEPA Limitation as amended. [Def. Answer, Doc. 11 ¶ 82].

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54. Montana's State Energy Policy was codified at Mont. Code Ann. § 90-4-1001. [Def. Answer, Doc. 11 ¶ 112].

55. Mont. Code Ann. § 90-4-1001 was enacted by the Montana Legislature in 1993 and amended in 2011. [Def. Answer, Doc. 11 ¶ 115].

56. The Montana Legislature repealed Mont. Code Ann. § 90-4-1001 in 2023. The Governor signed the repeal, HB 170, into law on March 16, 2023.

57. The provisions of MEPA governing environmental reviews are codified at Mont. Code Ann. § 75-1-201.

58. In 2011, the Montana Legislature amended MEPA to limit the scope of environmental reviews—enacting the MEPA Limitation, which prohibited Montana's agencies from considering in their MEPA reviews "actual or potential impacts beyond Montana's borders . . . [or] actual or potential impacts that are regional, national, or global in nature."

59. The Montana Legislature adopted amendments to clarify the MEPA Limitation in 2023. The Governor signed the clarifying legislation, HB 971, into law on May 10, 2023.

60. The MEPA limitation now provides that Montana's agencies are prohibited from considering "an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders." Mont. Code Ann. § 75-1-201(2)(a) (enacted by HB 971, 68th Legislature (2023)).

61. The 2023 Montana Legislature amended various provisions of MEPA that pertain to legal challenges to MEPA environmental reviews.

62. SB 557 was introduced on March 27, 2023, passed by the Legislature, and signed into law by the Governor on May 19, 2023.

63. SB 557 enacted a new provision, Mont. Code Ann. § 75-1-201(6)(a)(ii), which eliminates the preventative, equitable remedies for MEPA litigants who raise GHG or climate change issues. The new subsection provides in part:

> [a]n action alleging noncompliance or inadequate compliance with a requirement of parts 1 through 3, including a challenge to an agency's decision that an environmental review is not required or a claim that the environmental review is inadequate based in whole or in part upon greenhouse gas emissions and impacts to the climate in Montana or beyond Montana's borders, cannot vacate, void, or delay a lease, permit, license, certificate, authorization, or other entitlement or authority unless the review is required by a federal agency or the United States congress amends the federal Clean Air Act to include carbon dioxide as a regulated pollutant.

Mont. Code Ann. § 75-1-201(6)(a)(ii) (enacted by SB 557, 68th Legislature (2023)).

64. Defendants cited Mont. Code Ann. § 75-1-201(6)(a)(ii) and SB 557 as foreclosing redressability in this case in their June 19, 2023, Bench Memorandum on the Constitutional and Procedural Limits of the Montana Environmental Policy Act. (Doc. 396).

II. CLIMATE SCIENCE AND PROJECTIONS.

A. Climate Science

65. Dr. Steven Running is a University Regents Professor Emeritus of Global Ecology in the College of Forestry and Conservation at the University of Montana. [SR-2]. Dr. Running currently co-chairs the standing Committee for Earth Science and Application from Space of the National Academy of Science. In 2007, Dr. Running shared the honor of the Nobel Peace Prize as a chapter Lead Author for the 4th Assessment Report of the

Intergovernmental Panel on Climate Change (IPCC). [P193]. Dr. Running provided expert testimony in the general areas of the climate system, including the energy balance and imbalance, the physics of GHG emissions that are driving climate change, the global carbon cycle, the global hydrologic cycle, how they control this energy imbalance, and then how human caused fossil fuel development is harming Montana's ecosystems and hydrology. Dr. Running is a well-qualified expert, and the Court found his testimony informative and credible.

66. Dr. Cathy Whitlock is Regents Professor Emerita of Earth Sciences and a Fellow of the Montana Institute on Ecosystems at Montana State University (MSU). Dr. Whitlock was lead author of the 2017 Montana Climate Assessment, and in 2020 co-authored a state-level Montana Climate Solutions Plan and a 2021 special report of the Montana Climate Assessment entitled Climate Change and Human Health in Montana. Dr. Whitlock was also co-lead author of the 2021 Greater Yellowstone Climate Assessment. Dr. Whitlock provided expert testimony explaining how human-caused fossil fuel development and the resulting release of CO_2 into the atmosphere are harming Montana's ecosystems, water supplies, communities, and the Plaintiffs themselves. Dr. Whitlock also discussed recent trends and future projections in temperature, precipitation, snow accumulation and snowmelt, and stream runoff in Montana and explained how they affect terrestrial ecosystems, communities, and the livelihoods of people that depend on these ecosystem services. Dr. Whitlock's testimony

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primarily focused on the effect GHG emissions in Montana. Dr. Whitlock is a well-qualified expert, and the Court found her testimony informative and credible.

67. There is overwhelming scientific consensus that Earth is warming as a direct result of human GHG emissions, primarily from the burning of fossil fuels. [SR 102:10-103:9, 125:11-22, 141:18-20; CW 257:14-25; P6, P13, P23, P34, P223, P143; SR-22].

68. Fossil fuels include coal, crude oil or its derivatives (such as gasoline or jet fuel), and natural gas. [PE 901:24-902:8].

69. While several GHGs are emitted from the burning of fossil fuels, carbon dioxide (CO_2) is the GHG most responsible for trapping excess heat within Earth's atmosphere. [SR 114:20-116:10].

70. Science is unequivocal that dangerous impacts to the climate are occurring due to human activities, primarily from the extraction and burning of fossil fuels. [SR 103:5-9; P6, P23, P34, P223, P143; SR-46, SR-47].

71. A substantial portion of every ton of CO_2 emitted by human activities persists in the atmosphere for as long as hundreds of years or millennia. As a result, CO_2 steadily accumulates in the atmosphere. [SR 166:2-10, 168:2-10; CW 279:14-20, 314:20-315:8, 318:2-5].

72. The cumulative effect of GHG emissions causes the impacts to the climate being experienced today. [SR 168:2-16]. Human activity and the burning of fossil fuels have accelerated the accumulation of CO_2 to the point that 42% of the total accumulation of CO_2 emissions has happened in the last thirty years. [SR 141:16-142:2; SR-42].

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73. It has long been understood that certain GHGs, including CO_2 and methane (CH_4), trap heat in the atmosphere, causing the Earth to warm. [SR 107:16-25]. An American, Eunice Newton Foote, was one of the first scientists to research and write about the ability of atmospheric carbon dioxide to affect solar heating in the 1850s. [SR 108:22-109:3; SR-14].

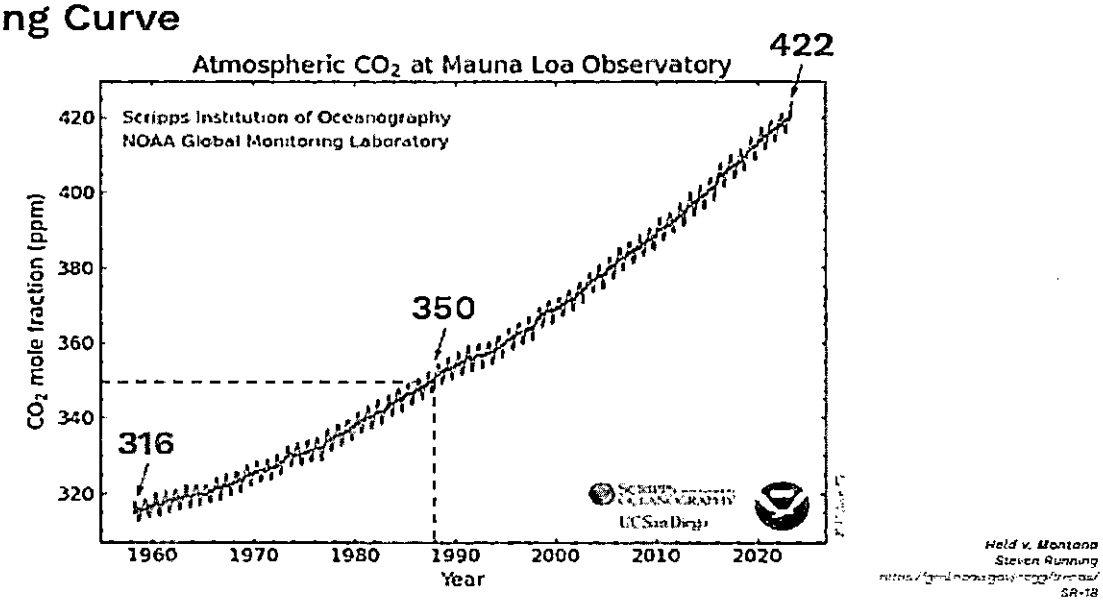
74. In 1896, Svante Arrhenius, a Swedish chemist, wrote that the practice of burning fossil fuels emitting CO_2 could one day warm the planet. [SR 108:1-8]. Arrhenius, and other early climate scientists, understood that the more CO_2 that was added to the atmosphere, the more the surface of the Earth would warm. [SR 108:8-13]. At the time of Arrhenius's work, atmospheric CO_2 levels were approximately 295 parts per million (ppm). Pre-industrial levels were approximately 280 ppm. [SR 109:22-25; SR-14].

75. In 1958, Dr. David Keeling began the modern monitoring of atmospheric CO_2 at Mauna Loa, Hawaii, a remote location not near any local CO_2 sources. [SR 111:12-21]. Keeling's data, now replicated at dozens of stations worldwide, proved that CO_2 has continued to rise every year from 1958 to the present from an initial concentration of 315-316 ppm in 1958, to an annual mean level of around 424 ppm today. [SR 112:22-113:4, 113:16-114:8]. The curve showing a long-term increase in CO_2 concentrations has become known as the "Keeling Curve." [SR 110:22-111:11, 113:20].

76. Between 1960 and 2000, CO_2 levels rose at about 2 ppm per year, but since approximately 2000, CO_2 levels are rising at about 3 ppm per year, primarily from fossil fuel emissions. [SR 117:14-20, 118:1-12, 121:9-11; SR-21].

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Keeling Curve



77. CO_2 levels have fluctuated throughout history, but the rate of increase in atmospheric CO_2 is 100 times faster than in natural CO_2 fluctuations and cycles, and it is happening in a very short timeframe that is unprecedented in the geologic record. [SR 119:20-121:11; SR-19].

78. The continuous rise in atmospheric CO_2 has caused global, national, and Montana air temperatures to rise, as measured by meteorological stations. Total global temperature rise over the last 120 years is on average 2.2°F, or about 1.2°C. [SR 132:19-22; SR-38; CW 262:4-21; CW-18, CW-19, CW-20].

79. Montana is heating faster than the global average because higher latitudes are heating more quickly. [CW 263:20-264:7].

80. Montana is warming, and the rate of warming is increasing. [CW 266:15-16].

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81. The Earth has warmed by 1.3 to 2.2°F in only the last thirty-five years, as atmospheric CO_2 concentrations have risen from 350 ppm to over 420 ppm today. [SR 130:14-18; SR-35, SR-64]. It previously took 140 years for the Earth to warm by 0.9°F. [SR-35]. The Earth is heating more quickly now. 2020 was the second warmest year on record, and land areas were record warm. The ten warmest years on record have occurred since 2005, and since 1981, a new global temperature record has been set every three years. Since 1980, the Earth has not experienced a single year with below long-term average temperatures. [SE 131:20-132:10; SR-37].

82. The Earth's energy imbalance (the difference in energy from sun arriving at the Earth and the amount radiated back to space) is what climate scientists describe as the most critical metric for determining the amount of global heating and climate change we have already experienced and will experience as long as the Earth's energy imbalance exists. [SR 122:1-15, 129:17-20; SR-34]. Scientists measure and calculate how much extra energy, or heat, is being retained in Earth's systems, like oceans, ice, air, and land surface, compared to what Earth's natural balance would be if more heat escaped our atmosphere. [SR 122:1-15, 129:21-130:4].

83. The Earth's energy imbalance is currently significant and is due to accumulation of energy within Earth's oceans, ice, land, and air, with the energy measured in joules and the rate of additional energy measured in watts per square meter. [SR 124:14-125:18]. A watt is the addition of one joule of energy in one second, which is then averaged by the area of the Earth to yield watts per square meter. From 1971 to 2018, the Earth gained about 360 zeta joules of heat (a zeta is a unit with 21 zeros; a trillion has 12 zeros). [SR-29]. Adding this much

energy over forty-eight years yields an energy imbalance of about 0.5 W m^{-2}. However, the rate of energy addition has continued to increase due to increasing GHG emissions and the Earth's energy imbalance for 2010 to 2018 is about 0.9 W m^{-2}. [SR 122:14-24; SR-29; P79].

84. 358 zeta joules are enough energy to bring Flathead Lake to boil 40,000 times over. [SR 125:3-6; SR-30].

85. As long as there is an energy imbalance, the Earth will continue to heat, ice will continue to melt, and weather patterns will become more extreme. [SR 127:7-22, 131:9-15, 137:6-9, 149:2-14]. If more GHGs are added to the atmosphere and more incoming energy received from the sun is trapped as thermal energy, the Earth's climate system will continue to heat up. [SR 125:7-22].

86. The scientific consensus is that CO_2 from fossil fuel pollution is the primary driver of Earth's energy imbalance. [SR 117:21-118:12; 125:11-22]. Due to the buildup of CO_2 from about 280 ppm to 419 ppm in the last 140 years (and to a lesser extent other GHGs), more solar energy is now retained on Earth and less energy is released back to space. [SR 130:8-14; P20, P22, P79; SR-14].

87. The buildup of CO_2 and the current Earth energy imbalance is due to anthropogenic changes in the environment, not natural variability. [SR 103:5-9, 121:7-11].

88. Approximately 89% of annual anthropogenic CO_2 emissions, or 35 gigatons of CO_2, is attributable to burning fossil fuels. [SR 115:9-17; SR-20]. Approximately 11% of annual anthropogenic CO_2 is from land use change, which includes wildfires, agricultural burning, and deforestation.

[SR 115:18-22, 116:7-15; SR-20]. This means that fossil fuel use is around 10 times as large as other sources of emissions due to human management. [SR 115:15-21]. In terms of the CO_2 humans emit each year, approximately 48% of these emissions end up in the atmosphere, 29% are absorbed in back up in the biosphere, and 26% are absorbed by the oceans. [SR 115:7-117:10; SR-20].

89. Until atmospheric GHG concentrations are reduced, extreme weather events and other climactic events such as droughts and heatwaves will occur more frequently and in greater magnitude, and Plaintiffs will be unable to live clean and healthy lives in Montana. [SR 128:22-129:5, 131:5-15, 149:2-150:7; SR-45; LVS-44].

90. There is scientific certainty that if fossil fuel emissions continue, the Earth will continue to warm. [SR 106:15-18, 168:20-24; SR-46, SR-47].

91. Each additional ton of GHGs emitted into the atmosphere exacerbates impacts to the climate. [SR 106:15-18, 188:3-6; CW 279:14-20, 314:20-315:8, 318:2; P143].

92. Every ton of fossil fuel emissions contributes to global warming and impacts to the climate and thus increases the exposure of Youth Plaintiffs to harms now and additional harms in the future. [SR 168:17-169:7; CW 279:14-20, 314:20-315:8, 318:2-5; PE-40].

B. Climate Change Projections.

93. Computer models used by scientists are an important tool for predicting climate change and are reasonably relied upon by members of the scientific community. [SR 90:23-91:9].

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94. Projections indicate atmospheric CO_2 and other GHGs will increase the severity of all impacts to the climate for the foreseeable future, absent drastic reduction in fossil fuel use and the resulting GHG emissions. [SR 106:1-18, 169:22-170:10, 170:16-22; CW 269:14-18; SR-46, SR-47].

95. There is a strong scientific consensus that as GHG emissions continue to increase, impacts to the climate will become more severe. [SR 106:15-18, 137:3-9; SR-43].

96. The yearly days in Montana with extreme heat, meaning temperatures over 90 degrees, is expected to increase by 11 – 30 days by midcentury, and by as much as two months by the end of the century. [CW 273:6-20; CW-24, CW-28]. At the same time, the number of days above freezing will increase by weeks to months in the future. [CW 273:6-20, 275:21-276:7; CW-27; P222].

97. Projections indicate a high-emission scenario results in 9.8°F of warming in Montana by 2100, relative to temperatures in 1971-2000. An intermediate emission scenario projects an increase of 5.6°F in Montana by 2100, relative to temperatures in 1971-2000. [CW 270:1-271:9; CW-23; P222].

98. According to the Intergovernmental Panel on Climate Change (IPCC), "Climate change is a threat to human well-being and planetary health (*very high confidence*). [SR-48]. There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*) . . .. The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*)." [SR 149:15-150:7; P143; SR-48, SR-63; LB-43].

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99. According to the IPCC, "[i]n the near term, every region of the world is projected to face further increases in climate hazards (*medium to high confidence*, depending on region and hazard), increasing multiple risks to ecosystems and humans (*very high confidence*). Hazards and associated risks expected in the near-term include an increase in heat-related human mortality and morbidity (*high confidence*), food-borne, water-borne, and vector-borne diseases (*high confidence*)." [SR-46, SR-47; LB-42].

III. CLIMATE CHANGE HARMS CHILDREN AND SPECIFICALLY THE YOUTH PLAINTIFFS.

100. Dr. Lori Byron obtained a Doctor of Medicine degree in 1984. She has been a board-certified pediatrician since 1988. Dr. Byron earned a M.S. in Energy Policy and Climate from Johns Hopkins in 2020. From 1988-2015, Dr. Byron worked with the Indian Health Service in Crow Agency, Montana, providing primary care, emergency care, and public health services to Crow Indian children. Dr. Byron now works as a pediatric hospitalist at SCL Health in Billings, Montana. Dr. Byron has decades of experience caring for children who have suffered Adverse Childhood Events (ACEs). Over the past decade, Dr. Lori Byron and her husband, Dr. Rob Byron, have made presentations on climate change and health locally, nationally, and internationally. Dr. Lori Byron finished a six-year term on the Executive Committee of the Council on Environmental Health and Climate Change with the American Academy of Pediatrics and a six-year term on the Children's Health protection Advisory Committee with the Environmental Protection Agency (EPA). Dr. Byron was an author on the 2021 report "Climate Change and Human

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Health in Montana: A Special Report of the Montana Climate Assessment," as well as other climate and health publications.

101. Dr. Byron provided expert testimony that climate change and the air pollution associated with it are negatively affecting children in Montana, including Youth Plaintiffs, with a strong likelihood that those impacts will worsen in the absence of aggressive actions to mitigate climate change. Dr. Byron outlined ways in which climate change is already creating conditions that are harming the health and well-being of the Youth Plaintiffs. Dr. Byron testified that reducing fossil fuel production and use, and mitigating climate change now, will benefit the health of the Youth Plaintiffs now and for the rest of their lives. Dr. Byron is a well-qualified expert, and the Court found her testimony informative and credible.

102. Dr. Lise Van Susteren is a board certified general and forensics clinical psychiatrist, in practice for thirty years. She is a Clinical Associate Professor of Psychiatry and Behavioral Sciences at George Washington University in Washington, D.C. In 2009, Dr. Van Susteren co-convened one of the first conferences on the psychological effects of climate change. In 2013, Dr. Van Susteren worked with Dr. James Hansen and other experts on a paper, Assessing "Dangerous Climate Change": Required Reductions of Carbon Emissions to Protect Young People, Future Generations and Nature. (Hansen et al., 2013). In May 2018, Dr. Van Susteren received the Distinguished Fellow award of the American Psychiatric Association, its highest membership honor. Dr. Van Susteren has helped develop youth climate anxiety assessment tools, conducted research and reviewed data in assessing the mental health of young people faced with climate change. Dr. Van Susteren provided

expert testimony on the physiological harms caused by climate change to Montana's youth, including the Youth Plaintiffs, the psychological harms caused by the MEPA Limitation, and the availability of remedies to alleviate Plaintiffs' psychological injuries. Dr. Van Susteren is a qualified expert, and the Court found her testimony credible.

103. Michael Durglo, Jr., is a member of the Confederated Salish and Kootenai Tribes (CSKT). He has a Bachelor of Science degree in Environmental Science from Salish Kootenai College. Mr. Durglo has worked in different capacities for the CSKT for over three decades. In his current role as Head of the Tribal Preservation Department and Chairman of the Climate Change Advisory Committee (CCAC), Mr. Durglo has worked extensively with tribal elders and youth on climate related issues. He has been involved with the Institute for Tribal Environmental Professionals' Climate Change Adaptation Planning Workshop, and he served as the co-chair of the National Tribal Science Council and the chair of the EPA Region 8 Tribal Operations Committee, consisting of EPA tribal environmental directors in Montana, Wyoming, Colorado, Utah, and North and South Dakota. He has taught workshops and seminars on climate adaptation planning throughout North America. Mr. Durglo is a qualified expert and the Court found him informative and credible.

104. Children are uniquely vulnerable to the consequences of climate change, which harms their physical and psychological health and safety, interferes with family and cultural foundations and integrity, and causes economic deprivations. [LB 473:12-24, 474:12-477:12; LVS 1177:5-8, 1202:6-24, 1215:13-24, 1217:2-1222:11; MDJ 597:9-18, 600:23-604:14, 609:23-610:10; LB-9, LB-15, LB-16; LVS-11, LVS-25].

105. Children are at a critical development stage in life, as their capacities evolve, and their physiological and psychological maturity develops more rapidly than at any other time in life. [LB 474:12-477:12, 485:10-486:1; LVS 1177:10-21, 1213:7-23, 1215:13-24].

106. The brains and lungs of children and youth are not fully developed until around age 25. [LB 474:18-25; LVS 1213:7-16].

107. All children, even those without pre-existing conditions or illness, are a population sensitive to climate change because their bodies and minds are still developing. [LB 473:12-24, 474:12-477:12; LVS 1177:2-1178:12, 1213:7-23; LB-9; LVS-11].

108. The physical and psychological harms are both acute and chronic and accrue from impacts to the climate such as heat waves, droughts, wildfires, air pollution, extreme weather events, the loss of wildlife, watching glaciers melt, and the loss of familial and cultural practices and traditions. [LB 498:12-25, 524:11-22; LVS 1178:13-1179:6, 1196:6-11, 1200:7-1201:25, 1202:6-24, 1204:21-1205:19, 1206:19-1209:12, 1218:2-16, 1219:25-1220:11, 1221:19-21; MDJ 595:18-596:2, 597:6-18, 600:23-604:14, 606:11-607:2, 608:1-13, 609:23-610:10].

109. Climate change can cause increased stress and distress which can impact physical health. [LB 526:8-16; LVS 1188:16-24; LVS-15]. Dr. Van Susteren observed that Youth Plaintiffs testified to specific personal consequences. For example:

a. Grace feels fearful due to the glaciers disappearing from a state she loves.

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b. Sariel has suffered significant distress due to the impacts of climate change on culturally important plants, and snow for creation stories. Her cultural connection to the land increases this impact.

c. Mica has experienced a sense of loss from having to stay inside due to wildfire smoke.

d. Olivia expressed despair due to climate change.

e. Claire has been impacted by fear and loss from glaciers melting, and anxiety over whether it is a safe world in which to have children.

110. Heat waves are associated with significant psychological stress. Increased heat and temperature negatively affect cognition and are linked to increased incidence of aggression and exacerbation of pre-existing mental health disorders. [LVS 1197:1-1198:7, 1200:7-12; LVS-29].

111. Children have a higher risk of becoming ill or dying due to extreme heat. [LB-15, LB-16].

112. Drought is associated with anxiety, depression, and chronic despair. [LVS 1200:24-1201:25].

113. Wildfires, including those witnessed by Badge, are traumatic. Being surrounded by wildfires can make the world feel unsafe and the inability to breathe clean air creates anxiety. [LVS 1202:6-24, 1204:21-1205:19].

114. The threat of loss can be enough to cause mental health harms, especially when there are no signs the future will be any different. [LVS 1203:15-1204:6].

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115. As climate disruption transforms communities, some Plaintiffs are experiencing feelings that they are losing a place that is important to them.

116. The IPCC has found, with *very high confidence*, that climate change has "detrimental impacts" on mental health and the harms to mental health are expected to get worse. [LVS 1185:12-1186:3, 1192:23-1194:9, 1195:6-13; P127; LVS-23, LVS-24].

117. The 2021 report, Climate Change and Human Health in Montana, found that "[t]he mental health impacts of climate change are profound and varied." [LVS-27]. Extreme weather events, prolonged heat and smoke, and environmental change can all impact mental health and increase feelings of disconnectedness and despair. [LVS 1196:6-11; P31; LVS-28].

118. Exposure to extreme heat can cause heat rash, muscle cramps, heatstroke, damage to liver and kidney, worsening allergies, worsening asthma, and neurodevelopmental effects. [LB 485:2-9; P31; LB-13, LB-14].

119. The psychological harms caused by the impacts of climate change can result in a lifetime of hardships for children. [LVS 1194:4-9, 1210:2-1211:2, 1213:24-1215:4; P127; LVS-12].

120. The physiological features of children make them disproportionately vulnerable to the impacts of climate change and air pollution. [LB 474:14-25, 475:4-10; LVS 1213:7-23; LB-9, LB-10; LVS-11].

121. Children have a higher basal metabolic rate, which makes it harder for them to dissipate heat from their bodies. [LB 475:14-21].

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122. Children breathe in more air per unit of time than adults and consume more food and water proportional to their body weight, making children more susceptible to polluted or contaminated air, water, or food. [LB 476:21-477:12].

123. Typical child behavior and physiology—which involves spending more time recreating outdoors and more difficulty self-regulating body temperature—render children more susceptible to excess heat, poor air quality, and other climate change impacts. [LB 476:21-477:12, 481:9-19].

124. Childhood exposure to climate disruptions and air pollution can result in impaired physical and cognitive development with lifelong consequences. Air pollution can trigger or worsen juvenile idiopathic arthritis, leukemia, and asthma in children. [LB 482:9-21, 502:4-22; LB-25; LVS 1205:20-1206:8, 1207:18-1208:3].

125. The air quality where Plaintiffs live has been negatively impacted by smoke from wildfires contributed to by climate change.

126. Allergies are increasingly prevalent among children and anthropogenic climate change is extending the allergy season and exacerbating allergy symptoms. An increase in these symptoms can affect children's physical and psychological health by interfering with sleep, play, school attendance, and performance. [LB 484:25-485:9, 508:2-16; LVS-30].

127. Climate change is contributing to an increase in the severity and frequency of asthma in children. Six million children in the U.S. ages 0-17 have asthma, which translates to approximately one in every twelve children. [LB 485:7-8, 503:1-14, 505:4-25; LB-26, LB-30].

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128. Children who have pre-existing respiratory conditions, including asthma, are especially vulnerable to climate impacts, including increasing air pollution and rising temperatures. Wildfire smoke has harmed the health of Plaintiffs Olivia, Jeffrey, and Nate, all who have pre-existing health conditions, and other Plaintiffs, including Badge and Eva. [LB 505:12-506:20, 508:23-509:1; LB-28].

129. Plaintiffs Olivia and Grace are distressed by feeling forced to consider foregoing a family because they fear the world that their children would grow up in. [LB 497:4-21; LVS 1214:21-1215:1, 1221:19-1222:5; GGS 208:3-22].

130. Plaintiffs Rikki, Kian, Claire, and Taleah, face economic deprivations, including barriers to keeping family wealth and property intact and decreased future economic opportunities.

131. Extreme heat threatens the health of competitive athletes, including Kian, Georgi, Claire, and Grace. [LB 490:6-491:15; LB-18].

132. For indigenous youth, like Ruby, Lilian, and Sariel, extreme weather harms their ability to participate in cultural practices and access traditional food sources, which is particularly harmful to indigenous youth with their place-based cultures and traditions. [LB 491:23-493:9; MDJ 579:19-580:9].

133. Because of their unique vulnerabilities, their stages of development as youth, and their average longevity on the planet in the future, Plaintiffs face lifelong hardships resulting from climate change. [LB 474:14-25, 475:4-10; LVS 1177:2-1178:12, 1189:1-6,1194:4-9, 1210:2-1211:2, 1213:7-23, 1215:13-24].

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134. Youth are more vulnerable to the mental health impacts of climate change because younger people are more likely to be affected by the cumulative toll of stress and have more adverse childhood experiences (ACEs). ACEs increase the likelihood of cumulative trauma that leads to mental and physical illness, as well as an increased risk of early death. [LB 521:14-16, 5236-15; LVS 1210:2-1211:2; LB-33; LVS-31].

135. ACEs can cause prolonged fear, anxiety, and stress, cognitive impairments, and unhealthy risk behaviors. ACEs can also cause long-term health impacts including increased risk of obesity, diabetes, heart disease, depression, strokes, chronic obstructive pulmonary disease, and broken bones. [LB 516:3-20, 519:16-520:4, 522:17-523:2; LB-34].

136. Children born in 2020 will experience a two to sevenfold increase in extreme events, particularly heatwaves, compared with people born in 1960. [LB 495:1-11, 497:1-3; P45; LB-20].

137. According to the IPCC, "Climate change is a threat to human well-being and planetary health (*very high confidence*)." The IPCC stated, "Without urgent, effective, and equitable mitigation and adaptation actions, climate change increasingly threatens ecosystems, biodiversity, and the livelihoods, health and wellbeing of current and future generations (*high confidence*)." [LB 530:11-533:9; LB-43, LB-44; P143; SR-61].

138. The unrefuted testimony at trial established that climate change is a critical threat to public health. [LB 536:10-537:14].

139. Actions taken by the State to prevent further contributions to climate change will have significant health benefits to Plaintiffs. [LB 534:25-535:9].

IV. CLIMATE CHANGE IS ALREADY ADVERSELY AFFECTING MONTANA'S NATURAL ENVIRONMENT.

140. Anthropogenic climate change is impacting, degrading, and depleting Montana's environment and natural resources, including through increasing temperatures, changing precipitation patterns, increasing droughts and aridification, increasing extreme weather events, increasing severity and intensity of wildfires, and increasing glacial melt and loss. [JS 655:2-658:10, 659:6-660:11; *see generally* SR, CW, DF; CW-56; DF-20].

141. Climate change impacts result in hardship to every sector of Montana's economy, including recreation, agriculture, and tourism. For example, private water supplies will be harmed. [SR 144:13-145:17; CW-52].

142. Montana has already warmed significantly more than the global average. [CW 263:12-17, 263:20-264:7; CW-18, CW-19].

143. All parts of Montana have seen a long-term trend of increasing mean annual temperatures since 1950. Winter and spring have warmed the most [CW 267:18-268:20; CW-21; P6].

144. There is a scientific consensus that rising temperatures in Montana are due to rising GHG concentrations, primarily CO_2. [SR 103:5-9, 117:25-118:12; CW 269:18-25].

145. Montana's snowpack has been decreasing and is likely to continue decreasing with warmer temperatures, as a long-term trend caused by impacts to the climate. [CW 283:11-19; CW-33, CW-35, CW-55; DF 421:12-23].

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146. Montana's April 1, Snow Water Equivalent, which is an important metric for how much water will be available during the dry summer months in Montana, has been declining since the 1930s. [CW 284:23-286:15; CW-34].

147. The decline in snowpack is directly attributed to elevated temperatures due to high levels of GHG emissions. [CW 283:11-19, 288:3-10].

148. Warming temperatures in Montana are resulting in more precipitation falling as rain instead of snow, particularly in western Montana. This results in reduced snowpack and shorter snowpack runoff duration in the spring and summer. Warming temperatures and rapid snowmelt and rain-on-snow events have been a major cause of spring flooding in Montana. [CW 291:17-292:20].

149. Extreme spring flooding events are consistent with climate change, including more spring precipitation, which can cause flash flooding when rain falls on snow. [SR 144:24-145:8; SR-44]. Spring flooding is expected to increase in frequency with increased climate change. [CW 291:15-292:20].

150. The 2018 Shields River flooding and the 2022 Yellowstone River flooding event are examples of rain on snow and heavy precipitation events that will be more frequent with climate change. [CW 291:15-292:20].

151. Dr. Dan Fagre holds a Ph.D. from the University of California, Davis. He joined the National Park Service as a research scientist in 1989 and, in 1991, he became the Climate Change Research Coordinator at Glacier National Park as part of the nationwide United States Global Change Research Program. His position was transferred to the United States Geological Survey (USGS), where he served until his retirement in 2020, after which he has

continued as Scientist Emeritus. At Glacier National Park, Dr. Fagre helped develop a national climate change research program within the National Park Service, coordinating with other scientists at national parks from Florida to Alaska. He built a research program centered on Glacier Park as a representative mountain ecosystem, engaging faculty and scientists from Montana universities and across the U.S. [P190]. Dr. Fagre is a well-qualified expert, and his testimony was informative and credible.

152. Glacier National Park is a major driver of the regional economy and a source of fresh water for countless communities. [Def. Answer, Doc. 54 ¶ 159; DF 404:10-406:10, 407:1-3, 408:11-25, 426:2-17; DF-13].

153. The glaciers in Glacier National Park were an early focus of the U.S. Geological Survey climate change research because they are excellent indicators of impacts to the climate. Located above the rest of the mountain ecosystem, glaciers respond only to climatic forces that affect summer temperatures that melt ice and snow and winter snow accumulation (i.e., snowpack). [DF 394:15-396:1, 396:25-397:17].

154. Of the approximately 146 glaciers present in Glacier National Park in 1850, only twenty-six glaciers larger than twenty-five acres remained in 2015. 82% of Glacier Park's glaciers are gone and there has been a 70% loss of area of all glaciers. [DF 418:1-8, 422:25-424:4; DF-17, DF-20].

155. Since 1900, glaciers in Glacier Park lost 66% of their area, making Montana the largest region for glacier loss in the U.S. lower forty-eight. Agassiz Glacier, Grinnell Glacier, Jackson Glacier, Sperry Glacier, and

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Thunderbird Glacier have all experienced significant retreat. [DF 409:9-23, 410:23-415:5, 412:13-21, 415:12-416:20; P61-P64; DF-8, DF-15, DF-16, DF-18, DF-20, DF-21].

156. The scientific consensus is that the retreat of Glacier Park's glaciers over the past century is due to human GHG emissions (mainly CO_2 from fossil fuel burning). [DF 409:24-410:19, 416:21-417:15, 422:8-19, 424:5-11, 428:13-24].

157. The current ice retreat of Glacier Park's glaciers is in response to modern, human-caused warming of the region. [DF 428:13-24].

158. Computer models project the loss of Glacier Park's glaciers if fossil fuel emissions continue to rise. [DF 425:9-23].

159. The loss of Glacier National Park's glaciers will affect the water sources of many communities, stream and river hydrology, local economies, and the recreational opportunities of several Plaintiffs because they will be denied access to natural resources enjoyed by previous generations of Montanans. [DF 404:10-406:10, 407:1-3, 408:11-25, 426:2-17; DF-13].

160. If GHG emissions are reduced glaciers would slow their melting, eventually stabilize, and then begin to grow again. [DF 428:1-12].

161. Climate change results in water levels in Montana's rivers and lakes that are routinely well below normal levels in summer and fall months and water temperatures that are well above historical levels. [JS 686:18-687:4, 690:7-17, 692:22-25, 693:2-7; JS-25].

162. Dr. Jack Stanford received his Ph.D. in Freshwater Ecology at the University of Utah. [JS-2]. He is Professor Emeritus at the Flathead Lake Biological Station (FLBS) of the University of Montana. He was the Director and

Bierman Professor of Ecology at the University of Montana (1980-2016). His primary area of research is aquatic ecosystem processes, including influences of human activities. He has published over 220 scientific papers and books on aquatic ecosystem processes, including influences of human activities. [P194]. Dr. Stanford is a well-qualified expert, and his testimony was informative and credible.

163. Montana is part of the northern Rocky Mountain region. The northern Rocky Mountains are a headwaters region, including for the Missouri River system to the East and the Columbia River System to the West, where most of the water originates as snow. [Def. Answer, Doc. 54 ¶ 157].

164. Montana is a key "water tower" of the Continent. Water that drains from the Rocky Mountains feeds three of the great rivers of North America: the Columbia, the Saskatchewan, and the Missouri-Mississippi. Snow at high elevations provides eighty-five percent of the fresh water that people use in Montana. [DF 405:22-406:10, 407:16-409:1; DF-13; JS 656:21-657:7].

165. The accumulation of winter snowpack in the mountains naturally acts as a reservoir for the hotter, drier months, gradually melting with onset of spring, and in summer providing continuous flow downstream, which is critical in the period of less precipitation and warmer temperatures. [SR 152:2-18]. Some accumulations are held in mountain glaciers which add meltwaters to the flow paths. [DF 407:16-409:1; DF-13].

166. Precipitation also is retained in lakes and wetlands where a large share of runoff penetrates into the ground, feeding aquifers that store water or augment river and stream flows. [JS 655:20-24, 657:13-17, 660:12-661:7; JS-4].

167. Montana's river and lake ecosystems are interconnected with each other and with aquatic and terrestrial ecosystems beyond Montana's borders. [JS 646:2-647:2]. The interconnectivity of Montana's river and lake ecosystems includes being connected with groundwater and atmospheric waters. [JS 661:8-12; JS-4, JS-8, JS-9; P82].

168. The rivers of Montana are interlinked and their flows and the quantity of materials (e.g., sediments) that they naturally transport are now, without functioning glaciers, increasingly dependent on seasonal rain and Snow. These river networks transport and deliver the water and materials that sustain the natural and cultural (human) elements of Montana's ecosystems. [JS 661:8-664:18, 646:2-647:2; JS-4; DF-19].

169. Montana's water resources are critically important to Youth Plaintiffs and all Montana citizens and to many people beyond the State's borders. Montanans must have a dependable supply of clean freshwater. [JS 659:6-19; JS-25].

170. Anthropogenic climate change is disrupting the natural range of variation in the flow paths of Montana's river systems. Compared to the 1960s, the summer streamflow in Montana's rivers has decreased by approximately 20% and stream temperatures have increased between 1-2°C. [JS 666:15-667:20; JS-10, JS-25].

171. As a result of anthropogenic climate change:

a. Surface temperatures in Flathead Lake are too warm for bull and cutthroat trout to sustain their historic populations. [JS 687:5-14].

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b. The Flathead River is experiencing low streamflow and a decline in cutthroat trout populations due to warm temperatures and low water. Bull trout populations have also declined in Flathead Lake. [JS 687:5-14].

c. The Missouri River is experiencing discharge declines, and increase in stream temperatures, fishing restrictions, and algae blooms. [JS 687:15-688:25].

d. The Clark Fork River is experiencing low streamflow and discharge declines. [CW 292:21-293:18; CW-42].

e. The Yellowstone River is experiencing discharge declines, low streamflow, increasing temperatures, fish die offs due to diseases, record-setting floods, a decline in brown trout populations, and algae blooms. [JS 676:4-25, 689:9-690:1].

f. The Powder River is experiencing low streamflow and a decline in water quality. [JS 690:7-17].

g. The Madison River is experiencing increased temperatures, declining discharge, fishing closures, a decline in brown trout populations, algae blooms, fish die offs and river closures. [JS 692:2-10].

h. The Blackfoot River is experiencing declining discharge, increased temperatures, and river closures. [JS 692:22-25].

i. The Smith River is experiencing record low flows in June, increased temperatures, and fishing restrictions. [JS 693:2-7].

j. The Shields River is experiencing low flows and river closures. [JS 693:9-10].

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k. The Bitterroot River has experienced increased temperatures, a reduction in bull trout habitat, algae blooms, and fishing closures. [JS 693:12-22].

172. One impact of anthropogenic climate change to Montana's aquatic ecosystems is that runoff (spring spate) from snowmelt is days to weeks earlier. Loss of snowpack also accelerates warming and water loss owing to reduced reflection than would occur if the snowpack was sustained. [JS 670:20-671:2].

173. Low water levels and abnormally warm water temperatures create harmful conditions for fish and other aquatic organisms. [JS 671:3-17].

174. Access to boating and fishing on certain rivers and lakes in Montana has been limited, and in some instance completely foreclosed, because of low river flows or high-water temperatures. These changes limit the ability of some Plaintiffs to fish and access the State's rivers and lakes for sport or recreation. [SR 152:25-153:9, 153:10-13; JS 679:7-15].

175. Wildfires resulting from climate change have caused nitrogen levels in Montana's lakes to increase. This has caused nutrient imbalances that threaten the plant and animal life in the lakes. [JS 683:1-684:4].

176. If GHG emissions continue to rise, impacts to the climate will further harm Montana's wildlife and fisheries, and the ability of Plaintiffs to hunt and fish. [JS 679:7-15; 687:8-14].

177. The western United States, including Montana, has experienced a trend of increased drought and heat stress from climate change,

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which has killed trees and altered ecosystem dynamics, and this trend toward hotter and drier summers will continue in the future. [SR 106:1-18, 146:18-21, 156:2-17; CW 258:24-259:8, 283:3-10; CW-44].

178. Droughts in Montana are more expansive and longer term which negatively affects stream systems: aquifer systems become depleted due to reduced infiltration of streamflow and rainfall. Where aquifers contribute significantly to base flow maintenance in Montana streams, the outcome is even more extreme and with sustained drying. [JS 677:7-678:1].

179. Anthropogenic climate change is producing a shift from snow to rain earlier in the year, and flooding from intense but extreme, short-duration flooding is more commonly occurring today than in the past (especially in the spring). That ultimately means less water is retained in the drainage network. [JS 676:12-25].

180. Increases in the frequency, duration, and/or severity of drought and heat stress associated with climate change are fundamentally altering the composition, structure, and biogeography of forests in Montana. [SR 106: 1-14]. There is already evidence of accelerating forest mortality in western forests, and this acceleration is clearly tied to increasing temperatures and plant water stress. [SR 156:2-17, 163:9-164:2].

181. Montana's forests are being drastically altered due to the combination of drought, pest infestations, and wildfires. [SR 156:12-157:15].

182. Climate scientists have long known that increasing temperatures intensify drought conditions, and the combination of drier and hotter weather leads to larger, more frequent, and severe wildfires. [SR 106:1-14, 157:2-158:6].

183. The wildfire season in Montana is two months longer than it was in 1980s. [SR 159:7-13]. The lengthening of the fire season is largely due to declining mountain snowpack, earlier spring snowmelt, decreased summer precipitation, and warmer summer temperatures leading to deficits in soil and fuel moisture—which are all due to increasing GHG emissions. [SR 106:1-14, 156:24-157:13, 159:18-160:6, 160:22-24; SR-54; CW 305:3-24; CW-47].

184. The extent of area burned in the U.S. each year has increased since the 1980s. According to National Interagency Fire Center data, of the ten years with the largest acreage burned, all have occurred since 2004, including the peak year of 2021. This period coincides with many of the warmest years on record nationwide. [SR 158:4-11; SR-52].

185. Wildfires in Montana are expected to become significantly worse in the coming years without immediate steps to reduce GHG emissions. [SR 106:1-24; CW 306:11-307:11; CW-49].

186. The effects of anthropogenic climate change, including rising temperatures, changing precipitation patterns, and drought conditions, create challenges and uncertainty for farmers. [CW 312:2-313:15].

187. Climate change affects wildlife, and some species will be more sensitive to impacts to the climate than others. Species may adapt, move, or go extinct. For example, the American pika and Snowshoe hares are considered highly sensitive to climate change due in large part to their dependence on subalpine habitat and snow cover, which is also projected to decline. [SR-59; P72; DF 406:11-15]. Dependence on climate-sensitive habitats like seasonal

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streams, wetlands and vernal pools, seeps and springs, alpine and subalpine snowfield areas, grasslands and balds, is a large driver of species sensitivity. [SR 164:5-16, 165:6-166:6].

188. Rising temperatures will increase the number of freeze-free days in Montana and increase in the number of days above 90°F. [CW 273:6-20, 275:18-276:7; P6; CW-24, CW-27].

189. There will be increasing seasonal variation in Montana's precipitation, with more precipitation falling in the spring and fall and less in the winter and summer. The change in precipitation timing and a decrease in precipitation during the summer months, combined with increasing summer temperatures, will contribute to increasing risk of summer drought conditions in parts of Montana and more precipitation falling as rain as opposed to snow. [CW 281:4-21; CW-30, CW-35; P6, P34].

190. Increasing temperature will offset small increases in precipitation by increasing rates of evaporation and transpiration and will make late-summer and fall droughts highly likely and increasingly severe. [CW 283: 3-10].

191. The current decline in Montana snowpack and snow accumulation is projected to continue. The loss of snowpack and snow accumulation is primarily driven by increasing temperatures, which are caused by anthropogenic GHG emissions. [CW 283:11-19, 284:23-285:21, 286:9-15, 287:15-288:10, 290:20-291:9; CW-35].

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192. Spring runoff in Montana is projected to increase through the 21st century because of warmer temperatures and earlier snowmelt. Increased January-April runoff will lead to increasingly low streamflow in July-September. [CW 293:8-18].

193. The science is clear that there are catastrophic harms to the natural environment of Montana and Plaintiffs and future generations of the State due to anthropogenic climate change. [SR 105:9-21, 149:15-150:7]. The degradation to Montana's environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG emissions and climate change. [SR 105:22-106:18, 137:10-15, 168:17-169:7, 169:19-21; CW 318:2-5, 316:17-317-14; DF 428:6-12; JS 712:8-12].

V. CLIMATE CHANGE IS ALREADY HARMING PLAINTIFFS.

194. The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation.

195. Plaintiff Rikki Held lives on her family's ranch twenty miles outside of Broadus, Montana. Broadus is a ranching community in Southeastern Montana, with a population of approximately 450 people in the town and approximately 2000 in Powder River County.

a. Rikki has experienced climate change-related harms to herself and her family ranch, including harms from flooding, severe storms, wildfires, and drought.

b. The Powder River runs through Rikki's ranch. The ranch includes five pivot fields and pine-covered hills. Rikki and her family have raised cattle on the ranch, grew crops to feed cattle, and owned horses.

c. Rikki started riding horses and herding livestock when she was four. Rikki grew up involved in ranching activities, working with livestock, haying, and fixing fences.

d. Rikki's grandparents are from Broadus and her dad grew up in Broadus.

e. Rikki and her family run a motel that rents rooms to travelers. Rikki often works for the family motel business. The primary source of Rikki's family's income is the ranch (currently leased) and motel business. Loss of this income affects Rikki personally.

f. Impacts to the climate are already harming Rikki's home, family, community, income, and way of life.

g. Rikki was often required to work outside on the ranch regardless of the temperatures or air quality. Rikki's physical well-being has been harmed by wildfires and wildfire smoke, as well as extreme heat.

h. In 2012, the Ash Creek fire burned seventy miles of power poles, causing the loss of electricity on Rikki's ranch for a month. Electricity is required to access water for both cattle and Rikki's house on the ranch, so the loss of electricity harmed both cattle and Rikki.

i. Climate change has impacted the snowpack on the ranch in recent years, with snow typically not lasting through the winter. Reduced winter snowpack means less natural water available for cattle. As a result, the cattle must rely on water tanks, which are far apart and expensive to install. With less water, there is also less grass available for the cattle to eat.

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j. With less water and grasses, cattle travel further for water and food, and lose weight. This means the cattle are not as valuable and the ranch profits and income declined.

k. Wildfires have closed roads around Broadus limiting the number of people that can reach Rikki's family motel business, causing lost income for Rikki and her family.

l. Climate change has caused increased variability in water levels in the Powder River. Rikki's family relies on the river to water their livestock. Increasingly, the river levels are extremely low while at other times the river floods.

m. In 2017, the Powder River flooded and eroded the riverbank on Rikki's ranch, undercutting a fifty-year-old fence. Since then, continued flooding has eroded about fifty feet of riverbank, with floodwaters that nearly reach Rikki's home.

n. Rikki experiences stress and despair from how climate change impacts her well-being, the well-being of her family, and the well-being of other Montanans. Montana is Rikki's home and seeing how climate change is impacting Montana and her family ranch is a heavy emotional burden for Rikki.

o. Rikki faces economic harm, including barriers to keeping family wealth and property intact and decreased future economic opportunities.

196. Plaintiffs Lander Busse and Badge B. are brothers, living in Kalispell, Montana.

a. Lander and Badge enjoy hunting and fishing.

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b. Lander and Badge hunt with their parents and grandparents. Hunting is an important family activity.

c. Lander and Badge's ability to hunt and fish is inhibited due to climate change consequences, including extreme heat and wildfires.

d. Climate change has adversely impacted Lander and Badge's ability to fish by rendering certain waterways impassible by raft due to low instream levels or too-warm water temperatures, which harm fish and decrease their populations.

e. Lander and Badge have had their ability to fish limited or foreclosed due to fishery closures as a result of climate change-induced conditions in Montana's rivers. Lander and Badge have also had their access to rivers limited for other recreational activities.

f. The extreme temperatures and smoke have at times made hunting unbearable and impossible for Lander and Badge. Smoky conditions have also impacted their fishing activities.

g. Due to climate change, the wildfire smoke in Kalispell, and in other parts of Montana where Badge recreates, makes it difficult for Badge to breathe and triggers a cough, which negatively impacts his health and well-being.

h. In 2018, a wildfire near the Busse's home forced their family to prepare to evacuate. Preparing to evacuate was a traumatic experience for Lander and Badge. Badge is worried that wildfires will continue to threaten his home.

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i. Lander has seasonal pollen allergies, which are worsening due to the increased pollen count and a changing climate.

j. Lander is an accomplished musician and theater performer and often performs outdoors. Climate change and wildfires have hampered his ability to perform music and theater at a high level and have negatively impacted his physical well-being.

k. Badge is named after the Badger-Two Medicine, an area where he frequently recreates and fishes. Wildfires in the Badger-Two Medicine have destroyed trees and have degraded areas important to Badge and where he enjoys visiting and recreating, which has had a powerful emotional impact on Badge. Badge experiences a sense of loss and distress knowing that the area is being damaged and degraded due to climate change. Badge feels as if a part of him were lost in the Badger Two-Medicine fire.

l. Badge is passionate about skiing and has skied for as long as he can remember. Climate change is reducing Badge's ability to participate in this important recreational activity.

m. Badge is anxious when he thinks about the future that he, and his potential children, will inherit.

n. Lander and Badge care deeply about protecting Montana's environment, which is an integral part of their family traditions, culture, and identity. Witnessing the current impacts of climate change in Montana is traumatic for both Lander and Badge.

o. Lander and Badge are experiencing the loss of ties to the land in Montana.

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197. Plaintiff Sariel Sandoval is a member of the Confederated Salish and Kootenai Tribes and is from Ronan, Montana.

a. Sariel and her family have a deep connection to the natural world, and have a unique connection to the land, the natural environment, and the seasons. Climate change is harming Sariel's culture and tribal practices. Sariel went to a Salish language immersion school called Nkwusm in Arlee. At school, Sariel was taught her native language and learned about the Salish culture.

b. Sariel was excited to receive her Salish name, which means "Person Who Brings the Cedar." Cedar has important cultural significance because it provides a connection through the land to the Creator.

c. Sariel feels a strong sense of connection to her community. She believes that carrying on her community's traditions is important because it is their way of life and reflects their connection to the land.

d. Gathering and using sweet grass and bear root is important to Sariel culturally and spiritually.

e. Sariel is concerned about how climate change affects the seasons because her culture is very ingrained with the land and the seasons. It also affects plants and foods her tribe needs to survive, and she is concerned that these changes will change the community itself. Because of earlier-than-normal snowmelt and the consequent drying of mountain streams as a result of climate change, plants used in Salish and Kootenai medicines are becoming scarcer and more difficult for tribe members to gather.

f. Coyote Stories are a culturally important type of Creation Story that can only be told when there is snow on the ground. Sariel is

concerned because the snow is not staying on the ground as long, and she does not know what will happen to the stories when there is no more snow.

g. Climate change impacts Sariel's ability to partake in cultural and spiritual activities and traditions, which are central to her individual dignity. Climate change has disrupted tribal spiritual practices and longstanding rhythms of tribal life by changing the timing of natural events like bird migrations.

h. Sariel worked at Blue Bay Campground the summer after she graduated high school. Sariel lost a few weeks of work and income due to the nearby Finley Point fire (also known as the Boulder 2700 Fire) in 2021. The fire also led to the road being shut down, homes being lost, and people being evacuated.

i. Sariel is often unable to see the mountains near her home due to wildfire smoke.

j. Berry picking is a staple cultural activity for Sariel and her family. Some huckleberry bushes are not producing fruit because of drought and Sariel must travel higher up into the mountains to find healthy huckleberries.

k. Climate change has a profound emotional impact on Sariel, who experiences stress and despair about the impacts her community is facing due to climate change.

l. Sariel was greatly distressed when she learned that Montana was almost at the point of no return with respect to climate change.

198. Plaintiff Kian Tanner lives on his family's property in Bigfork, Montana.

a. Kian's property has been degraded by wildfire smoke.

b. Kian is a passionate fly fisher and has fished with his dad since he was about four years old. Kian hopes he will be able to preserve this tradition and fish for the next fifty years or more.

c. The warmer water temperatures, lower oxygen levels, and declining instream flows due to climate disruption are harming Montana's rivers and fish. These climate impacts have decreased fishing opportunities for Kian as he has had to cancel fishing trips due to wildfires. Not being able to fish is devastating for Kian.

d. Kian lives near and enjoys visiting and recreating in Glacier National Park, which is a very special place for Kian. He is distressed he will never be able to see the natural glaciers as they have historically existed, and as other generations experienced them.

e. Kian enjoys downhill and cross-country skiing, which is an activity he does with his mom, who taught him to ski. Kian cross-county skis on his family's property. Impacts to the climate have reduced his opportunities to downhill and cross-country ski.

f. Increased smoke in the summer has harmed Kian's ability to play soccer, fish, and otherwise recreate outside, activities which are crucial for his emotional health and foundational to his family. Kian's soccer practices have been cancelled due to heat and wildfire smoke.

g. The smoke often forces Kian to seek refuge indoors, which makes him feel very claustrophobic.

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h. Kian's fears about impacts to the climate take an emotional toll on him and he feels a heavy burden to carry the mantel of the generation that must address climate change.

199. Plaintiff Georgianna Fischer (Georgi) is from Bozeman, Montana.

a. Georgi's family has lived in Montana for generations. Goergi's great grandmother, Mary "Polly" Wisner Renne, is someone that Georgi admires because of her work to protect Montana's environment. Renne was a key figure in establishing protections for the Lee Metcalf Wilderness Area.

b. Georgi is a competitive Nordic skier. She has competed on the national level, including Junior National Championships, U.S. National Championships, and the 2021 NCAA competition. She trains eleven months of the year, six days a week. Georgi's ability to compete and participate in Nordic skiing has been directly impacted by climate disruption. Declining winter snowpack has inhibited Georgi's ability to complete necessary and appropriate training and hinders her ability to continue to compete at a high level, which adversely impacts her health and mental well-being.

c. In recent years there has not been enough snow to groom trails or create tracks in the snow to Nordic ski race until January, although historically tracks were created in November.

d. Georgi's summer Nordic skiing training has been impacted by wildfires and wildfire smoke. Practices have been cancelled or curtailed due to smoke and the smoke prevents Georgi from training at a high intensity. Georgi is increasingly worried about the long-term effects that the exposure to heavy wildfire smoke while training has on her health and respiratory

system. Extreme heat also harms Georgi and her ability to recreate and train outdoors. The heat has caused her to feel dizzy, nauseous, generally unwell, and has caused persistent nosebleeds that led Georgi to seek medical attention.

e. Georgi enjoys paddleboarding, rafting, backpacking, hiking, and other outdoor activities. Georgi's recreation on Montana's rivers has been impaired due to low water levels and stream flows. Georgi and her family have had to cancel river rafting trips, including one on the Smith River, due to low stream flow.

f. Georgi experiences feelings of despair and hopelessness because of the declining winter snowpack and what that trend entails for her snow-based sport.

200. Kathryn Gibson-Snyder (Grace) is from Missoula, Montana.

a. Grace's recreation on Montana's rivers and streams has been affected due to both low water levels and flooding conditions. Because of climate change, Grace's access to the Clark Fork River for recreational activities has been increasingly impaired, limiting her ability to enjoy activities important to her health and family.

b. Grace enjoys many outdoor activities, including long-distance biking, hiking, soccer, and kayaking.

c. Grace has been harmed by wildfire smoke and extreme heat; which have adversely impacted her ability to play competitive soccer. Smoke and heat have led to fewer soccer practices and the cancellation of games. Wildfires have impacted Grace's ability to go outside, enjoy outdoor activities, and have placed her safety, health, and well-being at risk.

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d. One of Grace's environmental community education events was cancelled due to wildfire smoke.

e. Grace has had hiking activities impacted by wildfire smoke.

f. Grace experiences psychological harms, is distressed from day-to-day climate conditions, and is anxious about climate change. It is devastating for Grace to think that Montana's special landscapes, like Glacier National Park's glaciers, will not exist as they have in the past, or at all, when she is older.

g. Even though Grace would like to raise children in Montana, she questions whether she can morally bring children into the world, because of her knowledge and fear of the world that her children would grow up in if climate change is not ameliorated.

201. Plaintiff Olivia Vesovich is from Missoula, Montana.

a. Olivia has exercise-induced asthma and is therefore particularly vulnerable to smoke-filled air. In smoky conditions, Olivia feels she is suffocating if she spends more than thirty minutes outdoors. During smoky conditions, Olivia is forced to stay inside and reduce or eliminate the outdoor activities she enjoys. Olivia has been forced to spend recent summers away from Montana due to the smoke-filled air and her asthma.

b. Olivia suffers from spring pollen allergies, which force her to stay indoors and prevent her from engaging in the recreational activities she enjoys. Olivia's spring allergies cause her eyes to swell shut and can cause eye pain for weeks at a time. Olivia's allergies have become progressively worse in recent years.

c. Olivia is affected emotionally and psychologically by climate change, and experiences bouts of depression when she thinks about the dire projections of the future. Olivia would like to have children of her own, but she questions whether this is an option in a world devastated by the effects of climate change.

d. Olivia experiences psychological harms and is distressed from day-to-day climate conditions and is anxious about climate change. There are days when Olivia feels paralyzed by the impacts and threats of climate change and she fears that it is too late to address climate change.

e. For Olivia, climate anxiety is like an elephant sitting on her chest and it feels like a crushing weight. This climate anxiety makes it hard for her to breathe.

202. Plaintiff Claire Vlases is from Bozeman, Montana.

a. Claire works as a ski instructor at Big Sky Resort, and her ability to earn money is harmed by climate disruption, which is decreasing Montana's winter snowpack and the number of days Claire can work. Claire has been sent home from her job as a ski instructor without working her scheduled shift, and without pay, because of insufficient snow. Claire relies on her income as a ski instructor, so the lost income is a financial hardship for her.

b. Claire regularly visits Glacier National Park where she loves to hike. Seeing the loss of glaciers in Glacier National Park is terrifying for Claire and reduces her enjoyment of the park. Claire's ability to enjoy hiking in Glacier National Park has also been diminished due to increasing wildfire smoke, which obstructs the beautiful views and is harmful to her health.

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c. Claire has been harmed by the reduced snowpack in Montana and the related impacts to winter sports and tourism.

d. Claire's ability to run cross-country has been harmed by extreme heat and wildfire smoke. Claire has had cross-country practices cancelled due to dangerously smoky air quality conditions. The heat and smoke make it difficult for Claire to train and compete.

e. Claire's family has water rights to Bozeman Creek. Claire and her family use the water for drinking, plumbing, watering their garden, and all other water needs at their home.

f. Claire's water security is threatened by Montana's melting glaciers, declining snowpack, and increasing summer drought conditions, which lead to water scarcity and low water levels in Bozeman Creek.

g. As an individual born with a disability, Claire relies on the outdoors for recreational therapy to replace the physical therapy her insurance stopped providing when she was ten years old. The outdoors helped Claire to grow strong and she continues to rely on activities like skiing, biking, hiking, and running to maintain her physical health. Claire depends on a clean and healthful environment for her physical and mental health and well-being.

h. Climate change impacts harm Claire's mental health, causing her to feel stress, anxiety, and a sense of helplessness about the future.

203. Plaintiff Taleah Hernández is from Polson, Montana, and lives on the Flathead Indian Reservation.

a. Taleah has been forced to remain inside for extended periods of time during the summer because of poor air quality caused by excessive wildfire smoke. Wildfires have caused Taleah to lose electricity at her

home and forced her to prepare to evacuate her home. The Boulder 2700 fire in 2021, forced Taleah to cut down trees around her property for fire safety.

b. Taleah works outdoors with horses and other animals. Dangerous air quality conditions created by wildfire smoke have caused Taleah to miss days of work, lose pay, and lose opportunities to ride horses.

c. Wildfires and wildfire smoke have prevented Taleah from participating in outdoor recreation activities, including hiking and paddleboarding on Flathead Lake.

d. Changes in weather and climate patterns, including warming winter temperatures, have reduced the number of opportunities Taleah has to ice skate on Flathead Lake in the winter.

e. Wildfires and wildfire smoke have caused Taleah physical and emotional distress.

204. Plaintiff Eva L. is from Livingston, Montana.

a. Eva enjoys many outdoor activities, including backpacking, climbing, and cycling, which are central to her family life.

b. Eva has been harmed by wildfire smoke in Montana on numerous occasions, and Eva has suffered eye, nose, and throat irritation and headaches because of the smoky air.

c. Eva and her family had a family trip to Glacier National Park negatively impacted by excessive wildfire smoke, which posed risks to Eva's health and safety.

d. Eva has been harmed by the impacts of extreme flooding. In 2018, flooding along the Shields River damaged a bridge and rendered impassable for more than a year the primary route from Eva's home to

the town of Livingston. A temporary bridge was also washed away due to extreme flooding. Eva's family eventually decided to relocate because of this hardship. Being cut off from town was very stressful for Eva and her family.

e. Eva moved to Livingston and now lives near the Yellowstone River. Eva feels a strong connection to the river. In 2022, there was major flooding along the Yellowstone River, including in Livingston. [CW-41; JS-11]. Eva helped fill sandbags to hold back the flood waters. [P108, P109]. A park near Eva's home was underwater. [P110]. Eva saw her community and close friends lose property due to flooding.

f. The 2022 flooding in Livingston caused Eva acute emotional distress, panic, and dread. Parks and other public places she often visits were significantly damaged, preventing her enjoyment of them.

g. Eva's access to the Yellowstone River in summer 2016 was significantly curtailed, as a 180-mile portion of the river was closed for several weeks due to a parasite growth in cutthroat and rainbow trout perpetuated by abnormally high air temperatures and historically low river flows.

h. Eva has experienced forced relocation and the loss of ties to the land.

i. Eva has had her ability to access Montana's rivers for other recreational activities limited due to river conditions.

j. Wildfire smoke has impacted Eva's ability to hike and spend time outdoors with her family.

k. Eva is anxious about how she, her family and community can adapt to the devastation of public resources and infrastructure as the impacts of climate change worsen. Eva is increasingly anxious about the

climate change impacts she and her family are experiencing. She is distressed that climate change will worsen if action is not immediately taken.

205. Plaintiff Mica K. is from Missoula, Montana.

a. Rising temperatures and wildfires resulting from climate change make it difficult for Mica to recreate outdoors and participate in activities he loves, and which are important to his health and well-being.

b. Mica has been forced to spend extended periods of time indoors and has lost school recess time because of wildfire smoke. In 2019, a forest fire started approximately one mile from Mica's home, and Mica is anxious that, as climate change worsens, he may lose his family home.

c. Wildfire smoke has impacted Mica's training as a long-distance runner. Mica is an avid runner, running his first half-marathon when he was nine. He runs regularly with his dad. Running is a way for Mica to be in nature and relieve stress. Running in smoke makes Mica feel sick, so he cannot run as much due to increasingly smoky summers in Missoula. Smoke has limited Mica's ability to train and compete in sports.

d. Mica gets frustrated when he is required to stay indoors during the summer because of wildfire smoke.

e. Mica's family now avoids camping and other outdoor activities in August and September due to wildfire smoke and its negative effect on Mica's health.

f. Mica was recently diagnosed with exercise-induced asthma, which puts him at greater risk for respiratory hardship when the air is smoky.

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g. Mica's favorite animal is the pika. Mica understands the pika is uniquely vulnerable to climate impacts, and its survival is in jeopardy due to climate change.

h. Mica's outdoor recreation activities such as enjoying the views of glaciers in Glacier National Park are disrupted by climate change. Seeing the glaciers recede in Glacier National Park is depressing for Mica.

i. Climate change causes Mica to feel anxious, stressed, and depressed, and makes it hard for him to sleep at times.

206. Plaintiffs Jeffrey K. and Nathaniel K. are brothers who grew up in Montana City, Montana.

a. Jeffrey K. has pulmonary sequestration and is uniquely susceptible to respiratory complications, such as infections. Nathaniel K. also has respiratory issues. Both Jeffrey and Nate are therefore especially vulnerable to poor air quality, such as smoke-filled air caused by wildfires. [LB 487:21-488:11, 505:4-25].

b. The increasing length and severity of the wildfire season harms Jeffrey's and Nathaniel's health, especially given their young age and pre-existing respiratory health conditions. It has forced their family to make changes in daily activities. [LB 487:21-488:11, 505:4-25].

207. Plaintiffs Ruby D. and Lilian D. are from Bozeman, Montana. Shane Doyle is their father and he testified on their behalf.

a. Ruby and Lilian are members of the Crow Nation. Ruby and Lilian regularly travel to the Crow Reservation to visit family members and engage in traditional cultural activities.

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b. Ruby's Crow name is Biachəgata, which means "Pretty Woman." Lilian's Crow name is Malesch, which means "Loved by Many."

c. Abnormal and extreme weather conditions caused by climate change have impacted Ruby's and Lilian's ability to engage and otherwise partake in cultural practices that are central to their spirituality and individual dignity.

d. Ruby and Lilian visit their family on the Crow Reservation several times a year. Ruby and Lilian attend Crow Fair on the Crow Reservation every year. Crow Fair takes place each August and is a large gathering to celebrate cultural activities and events. Many people, including Ruby and Lilian, stay in teepees. Attending Crow Fair is a highlight for Ruby and Lilian. Ruby and Lilian love dancing at Crow Fair, and enjoy the parades, the rodeo, and doing family events.

e. In recent years, increasing temperatures at Crow Fair have made it hard to wear traditional regalia and participate in cultural activities because it is dangerously hot, sometimes over 100 degrees.

f. Wildfire smoke has also made it difficult for Ruby and Lilian to enjoy the Crow Fair.

g. It is a huge disappointment to Ruby and Lilian when they are unable to dance or participate in other events at the Crow Fair due to heat or smoke.

h. Crow Fair used to coincide with when chokecherries were ripe, which was important because many meals eaten at Crow Fair involved

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chokecherries. In recent years chokecherry harvest has become much harder to predict, and drought has meant there are less chokecherries available for the festival.

i. Ruby and Lilian pick chokecherries with their family as part of the Crow tradition. They enjoy participating in the process of picking the berries, processing them into syrup, and eating them. But due to drought and heat, fewer chokecherries are available and some stands that usually have berries had none. Increased wildfire frequency has impacted the ability of Ruby and Lilian to participate in these traditional cultural practices.

j. Ruby was diagnosed with asthma when she was eight years old and had an acute form of pneumonia. As a result, Ruby stays inside when it is smoky, and Lilian often stays inside too. This is a disappointment for Ruby and Lilian.

k. During the Bridger fire, which burned near Bozeman in 2020, Ruby and Lilian were worried to see a fire so close to their home and it brought up concerns about whether they were safe.

l. Climate disruption has impacted Ruby and Lilian's outdoor recreation activities, such as rafting, swimming, and floating. Drought has created low river conditions that have impacted Ruby and Lilian's ability to enjoy recreating on the river because it has such low flow.

m. Ruby and Lilian believe that protecting Montana's environment and natural resources is important because in their culture taking care of the Earth is their responsibility.

208. The testimony of the Youth Plaintiffs and their guardian was credible and was undisputed.

VI. DEFENDANTS' ACTIONS CONTRIBUTE TO CLIMATE CHANGE AND HARM PLAINTIFFS.

209. Anne Hedges received a B.S. in environmental policy analysis and planning from the University of California at Davis in 1988 and a Master of Environmental Law, *magna cum laude,* from Vermont Law School in 1993. She is Co-Director and Director of Policy and Legislative Affairs at the Montana Environmental Information Center (MEIC). She directs MEIC's program work, including its legislative, regulatory, policy, and legal activities. She has worked at MEIC since 1993, and her work is focused on pollution-related policy issues in Montana, with a primary emphasis on impacts to air, water, landscapes, and climate from fossil fuels. Ms. Hedges is a well-qualified expert, and the Court found her testimony informative and credible.

210. Peter Erickson received a bachelor's degree in Geology in 1998 at Carleton College, Minnesota, as well as coursework in intermediate microeconomics and macroeconomics at the University of Washington. Mr. Erickson has worked as an environmental and climate policy and technical analyst in greenhouse gas emission accounting, most recently with the Stockholm Environment Institute, an international research institution providing, in part, technical analysis to government and NGOs on the details of climate policy and emissions accounting. Mr. Erickson has served on both national and international committees devoted to GHG emissions accounting: one convened by the International Council of Local Environmental Initiatives (ICLEI) to create a U.S. Community-scale GHG Emissions Accounting and Reporting Standard, and one convened by the Greenhouse Gas Protocol to create the Greenhouse Gas Mitigation Goals Standard. [P192]. Mr. Erickson testified about Montana's fossil

fuel consumption, extraction, and infrastructure, focusing on three categories: (1) extraction of fossil fuels; (2) processing and transportation of fossil fuels; and (3) consumption of fossil fuels by end users. For each of these categories, Mr. Erickson quantified the amount of coal, oil, and gas and translated that in units of carbon dioxide (CO_2) emissions released from the fuels once they are combusted. Mr. Erickson added up all the coal, oil, and gas to determine the emissions associated with the extraction, consumption, and transportation of those fuels. In his opinion, emissions from Montana's fossil fuel consumption, extraction, and infrastructure are globally significant quantities. Mr. Erickson is a well-qualified expert, and the Court found his testimony informative and credible.

211. Defendants offered the testimony of Dr. Terry Anderson as an expert economist. Purporting to be based on data from the Energy Information Agency (EIA), Dr. Anderson provided extremely limited testimony in response to three questions: (1) the total greenhouse gas emissions for the world; (2) the 2020 greenhouse gas consumption emissions for the state of Montana; and (3) the 2022 greenhouse gas consumption emissions for the state of Montana. Dr. Anderson's testimony was not well-supported, contained errors, and was not given weight by the Court.

212. Defendants permit three types of fossil fuel-related activities: (1) extraction of fossil fuels; (2) processing and transportation of fossil fuels; and (3) consumption of fossil fuels by end users. [PE 914:12-915:3; PE-9].

213. Fossil fuel consumption includes any combustion, or burning, of these fuels, primarily for energy. Fossil fuel extraction is mining, pumping, drilling, or otherwise taking fossil fuels out of the ground for purposes of making fuels. Fossil fuel processing and transportation are activities that occur

between that initial extraction and combustion by the end user, such as refining, or moving the fuels in bulk from one place to another. [PE 914:14-21; PE-11].

214. It is possible to calculate the amount of CO_2 and GHG emissions that results from fossil fuel extraction, processing and transportation, and consumption activities that are authorized by Defendants. [PE 915:13-21; P311; PE-10].

215. Data indicates that in 2019, the total annual fossil fuels extracted in Montana led to about 70 million tons of CO_2 being released into the atmosphere once the fuels were combusted, which is higher than many other countries, including Brazil, Japan, Mexico, Spain, or the United Kingdom. [PE 922:23-923:3, 928:18-929:11, 950:13-14; PE-17].

216. Data indicates that in 2019, total annual fossil fuels consumed in Montana led to about 32 million tons of CO_2 being released into the Atmosphere.

217. In 2019, total annual fossil fuels transported and processed in and through Montana led to at least 80 million tons of CO_2 being released into the atmosphere once those fuels were combusted. [PE 923:19-924:4, 950:14-15]. That is equivalent to all the GHG emissions from Columbia, which has 50 times the population of Montana. [PE 930:11-23; PE-17, PE-20].

218. Accounting for overlap among fossil fuels extracted, consumed, processed, and transported in Montana, the total CO_2 emissions due to Montana's fossil fuel-based economy is about 166 million tons CO_2. [PE 924:5-18, 950:16-18; PE-18]. This is a conservative estimate and does not include all the GHG emissions, including methane, for which Montana is responsible. [PE 928:5-9; PE-17].

219. The 166 million tons CO_2 due to Montana's fossil fuel-based economy is equivalent to the emissions from Argentina (with forty-seven million residents), the Netherlands (with eighteen million residents), or Pakistan (with 248 million residents). [PE 931:22-932:9; PE-22].

220. In terms of per capita emissions, Montana's consumption of fossil fuels is disproportionately large and only five states have greater per capita emissions. [PE 930:19-23, 938:23-25; PE-25].

221. The cumulative CO_2 emissions from all fossil fuels extracted in Montana since 1960 is 3.7 billion metric tons of CO_2. [PE 941:9-19; PE-26].

222. Montana is a major emitter of GHG emissions in the world in absolute terms, in per person terms, and historically. [PE 930:19-23].

223. Montana has six coal mines that Defendants authorize: Spring Creek Mine, Rosebud Mine, Decker Mine, Absaloka, Bull Mountain, and Savage Mine. [PE 942:16-943:5]. Montana also has the largest estimated recoverable coal reserves in the U.S., and Montana is a substantial exporter of coal. [AH 791:1-25; AH-7-AH-13; PE 946:1-3].

224. Montana's annual coal production is 34 million short tons of coal. [PE 946:5-22]. Montana's coal reserves, as of 2019, are 707 million short tons. [PE 945:21-25; PE-37].

225. Montana is a substantial producer of oil and gas in the U.S. Defendants authorize the drilling and production of oil and gas in Montana. [PE 932:18-933:5, 949:7-15].

226. Montana has approximately 4,000 oil producing wells with an annual oil production of twenty-three million barrels. As of 2019, Montana's oil reserves were 298 million barrels. [PE 946:23-947:8; PE-36, PE-37].

227. Montana has approximately 5,000 gas producing wells with an annual oil production of forty-three billion cubic feet. As of 2019, Montana's gas reserves were 613 billion cubic feet. [PE 947:14-19; PE-36, PE-37].

228. Between 1960 and 2019 the fastest growing category of fossil fuel consumption in Montana has been gas. [PE 942:11-12].

229. Montana is home to four state-authorized oil refineries. [PE 948:22-24, 949:10-15]. Montana's refineries process crude oil largely from Canada and Wyoming and distribute the refined product by railroad and pipeline throughout Montana and to nearby states. [PE 948:17-949:23; PE-38].

230. Montana's land contains a significant quantity of fossil fuels yet to be extracted. [Def. Answer, Doc. 54 ¶ 139; PE 945:21-946:4, 947:16-19, 945:1-25].

231. Montana's GHG emissions have grown significantly since the passage of the 1972 Montana Constitution. [AH 940:15-941:2; PE-27, PE-28].

232. Defendants continue to approve permits and licenses for new fossil fuel activities. [AH 862:1-5; SN 1354:12-16].

233. Defendants have authorized fossil fuel extraction, transportation, and combustion resulting in high levels of GHG emissions that contribute to climate change. [AH 831:22-832:1, 846:25-847:11, 845:14-846:3; AH-50-AH-61; PE 932:18-933:5].

234. In taking action to authorize fossil fuel extraction, since 2011 Defendants have not considered or disclosed GHG or climate change impacts in their environmental reviews because they were statutorily precluded from doing so. [AH 836:2-13, 845:14-846:3; AH-50-AH-61].

235. DEQ issues air quality permits to facilities that emit GHG emissions. [AH 788:13-23; Def. Answer, Doc. 11 ¶ 90].

236. DEQ has authorized fossil fuel extraction, transportation, and combustion, which generate GHG emissions, contribute to climate change, and harm Plaintiffs. [AH 845:14-846:24; AH-50-AH-61].

237. What happens in Montana has a real impact on fossil fuel energy systems, CO_2 emissions, and global warming. [PE 976:8-24; PE-40].

VII. THE MEPA LIMITATION AND ITS IMPLEMENTATION.

238. The 2011 MEPA Limitation provided in pertinent part:

> (2)(a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include a review of actual or potential impacts beyond Montana's borders. It may not include actual or potential impacts that are regional, national, or global in nature.

239. While this case has been pending, Judge Moses held in *MEIC v. DEQ*:

> Here, the plain language of MCA 75-1-201(2)(a) precludes agency MEPA review of environmental impacts that are 'beyond Montana's borders,' but it does not absolve DEQ of its MEPA obligation to evaluate a project's environmental impacts within Montana. DEQ misinterprets the statute. They must take a hard look at the greenhouse gas effects of this project as it relates to the impacts within the Montana borders.

Order on Summary Judgment at 29:3-9, *MEIC v. DEQ*, No. DV-56-2021-1307 (Thirteenth Dist. Ct., April 6, 2023).

240. Eight days after Judge Moses' ruling, on April 14, 2023, HB 971 was introduced in the Montana Legislature. HB 971 was passed, sent to enrolling

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on May 1 and signed by the Governor on May 10, 2023. HB 971 clarifies the MEPA Limitation to say:

> (2)(a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders.
> (b) An environmental review conducted pursuant to subsection (1) may include an evaluation if:
> (i) conducted jointly by a state agency and a federal agency to the extent the review is required by the federal agency; or
> (ii) the United States congress amends the federal Clean Air Act to include carbon dioxide emissions as a regulated pollutant.

Mont. Code Ann. § 75-1-201(2)(a) (enacted May 10, 2023) (new language underlined).

241. On May 19, 2023, various provisions of MEPA that pertain to legal challenges to MEPA environmental reviews were amended when the Governor signed SB 557 into law. SB 557 created Mont. Code Ann. § 75-1-201(6)(a)(ii), which states:

> (ii) An action alleging noncompliance or inadequate compliance with a requirement of parts 1 through 3, including a challenge to an agency's decision that an environmental review is not required or a claim that the environmental review was inadequate based in whole or in part upon greenhouse gas emissions and impacts to the climate in Montana or beyond Montana's borders, cannot vacate, void, or delay a lease, permit, license, certificate, authorization, or other entitlement or authority unless the review is required by a federal agency or the United States congress amends the federal Clean Air Act to include carbon dioxide as a regulated pollutant.

Mont. Code Ann. § 75-1-201(6)(a)(ii) (enacted by SB 557, 68th Legislature (2023)) (signed May 19, 2023).

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242. Other components of SB 557 limit who can challenge an agency's final decision, the scope of the challenge, and require challengers to pay a fee to compile and submit a certified record to the reviewing court. [AH 825:4-826:18; AH-45].

243. Both the 2011 and 2023 versions of the MEPA Limitation allowed Projects to be permitted without consideration of their impacts that increase emissions of greenhouse gases. [AH 851:9-852:23; AH-51-AH-60].

244. The State has known of the dangerous impacts of GHG emissions and climate change for at least the last thirty years. [CW 256:6-15; AH 802:13-18; AH-25, AH-26; P17, P19].

245. State government and scientists have known about the international scientific consensus of the dangers posed by climate change since at least the 1990s when the IPCC started issuing climate assessment reports. The State also had access to the congressionally mandated national climate assessments undertaken in 2000, 2009, 2014, and 2017. [SR 139:12-140:1; AH 797:5-798:6, 802:13-18; CW 256:9-24; AH-32, AH-33, AH-34; P28, P262, P263].

246. In 2007, Defendants DNRC, DEQ, and the Office of the Governor were made aware of the issues concerning the impacts of climate change in Montana, including rising temperatures, accelerating warming, and reduced snowpack, and the need for Montana to reduce its GHG emissions, as a result of the 2007 Montana Climate Change Action Plan and the 2007 Montana Greenhouse Gas Inventory and Reference Case Projections 1990-2020. [CW 243:14-244:3, 256:19-24; CW-12, CW-13, CW-14; AH 806:17-807:20; AH-35, AH-36, AH-37; P2, P18].

247. In 2017, Defendants DNRC, DEQ, and the Office of the Governor were again informed by the 2017 Montana Climate Assessment of the issues concerning the impacts of climate change in Montana. [CW 243:14-244:3; AH 832:12-24; AH-49; P6].

248. In 2019, when then Governor Steve Bullock promulgated Executive Order No. 8-2019 creating the Montana Climate Solutions Council, Defendants knew that "climate change poses a serious threat to Montana's natural resources, public health, communities, and economy," and "Montanans understand that climate change is occurring and are concerned about the impacts it will have on current and future generations." [AH 832:25-833:6; AH-49; P10].

249. In August 2020, when the Montana Climate Solutions Council released its final report, the Montana Climate Solutions Plan (Climate Solutions Plan), the State knew how climate change was already harming Montana and its residents, through rising temperatures, early snowmelt, earlier spring runoff, flooding, changes in water availability and stream temperatures, increase in forest mortality due to insects, and increasing wildfires. [CW 244: 7-22; AH 833:7-835:10; AH-49; P36].

250. The Climate Solutions Plan included thirty-seven recommendations and strategies to reduce Montana's GHG emissions. [AH 833:7-835:10; AH-49; P36]. Defendants have not implemented the recommendations. [AH 835:8-10].

251. In 2021, the report Climate Change and Human Health in Montana was distributed to State officials. [CW 245:2-246-1].

252. Prior to 2011, Defendants were quantifying and disclosing GHG emissions and climate impacts from fossil fuel projects, including, for

example, the Silver Bow Generation Project, the Roundup Power Project (Bull Mountain), and the Highwood Generating Station. [AH 808:10-19, 808:20-809:18, 809:19-810:24, 811:8-24, 813:6-23; AH-38, AH-39, AH-40; P231, P224, P232, P225, P226, P229, P237].

253. Since 2011, because of the MEPA Limitation, Defendants have been statutorily prevented from considering climate change impacts and GHG emissions when conducting environmental reviews. [AH 814:6-21, 816:17-817:14, 818:11-819:10; SN 1361:6-9; AH-42].

254. The MEPA Limitation explicitly prohibits state agencies from considering the impacts of climate change and GHG emissions in environmental reviews under MEPA. [AH 814:22-815:9, 816:17-817:14, 818:11-819:10; SN 1361:6-9; AH-42].

255. Pursuant to the MEPA Limitation, the State has ignored GHG emissions and climate impacts when authorizing fossil fuels activities. [AH 814:22-815:9, 816:17-817:14, 818:11-819:10; AH-51-AH-60].

256. The MEPA Limitation constrains Defendants from making fully informed decisions through their environmental analysis about the scope and scale of the impacts to the environment and Montana's children and youth when conducting environmental reviews. Mont. Code Ann. § 75-1-201(6)(a)(ii) attempts to constrain the authority of courts when reviewing agency permitting decisions and MEPA analyses.

257. If the MEPA Limitation is declared unconstitutional, state agencies will be capable of considering GHG emissions and the impacts of projects on climate change. [AH 807:23-808:19, 821:16-25; SN 1437:4-8; P231, P224, P232, P225, P226, P229, P237].

258. Montana's river and lake ecosystems are interconnected with each other, as well as aquatic and terrestrial ecosystems beyond Montana's borders. Because of this interconnectivity to ecosystems both within and beyond Montana's borders, any prohibition on the consideration of either impacts within Montana or regional impacts of climate change, is not scientifically supported. [JS 642:23-15, 646:2-647:2].

259. Defendants' application of the MEPA Limitation during environmental review of fossil fuel and GHG-emitting projects, prevents the availability of vital information that would allow Defendants to comply with the Montana Constitution and prevent the infringement of Plaintiffs' rights. [AH 810:13-24, 816:9-16, 820:16-821:11, 822:1-823:10; AH-51-AH-60].

260. The State authorizes energy projects and facilities within Montana that emit substantial levels of GHG pollution, including, but not limited to, projects that burn and promote the use of fossil fuels, but pursuant to the MEPA Limitation, Defendants do not consider climate change and GHG emissions and measure those individual and cumulative emissions against the standards the Montana Constitution imposes on the State to protect people's rights, before authorizing energy projects and facilities. [AH 818:25-819:10, 824:8-825:3; AH-51-AH-60].

261. The State issues permits, licenses, and leases that result in GHG emissions without considering how the additional GHG emissions will contribute to climate change or be consistent with the standards the Montana Constitution imposes on the State to protect people's rights. [AH 832:2-11, 841:23-844:9, 843:1-844:5, 844:19-846:3; AH-51-AH-60].

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262. The State authorizes four private coal power plants to operate in the State, which generate 30% of Montana's energy production, without considering how the additional GHG emissions will contribute to climate change or be consistent with the standards the Montana Constitution imposes on the State to protect people's rights. [AH 792:1-21].

263. The State continues to permit surface coal mining and reclamation in Montana, which results in substantial GHG emissions, without considering how the additional GHG emissions will contribute to climate change or be consistent with the standards the Montana Constitution imposes on the State to protect people's rights. [AH 836:16-846:3; PE 934:14-15].

264. The State authorizes, through licenses and leases, the exploration for and extraction of oil and gas in Montana, without considering how the additional GHG emissions will contribute to climate change or be consistent with the standards the Montana Constitution imposes on the State to protect people's rights. [AH 793:6-18, 845:20-846:9].

265. Defendants have and continue to authorize projects, activities, and plans that cause emissions of GHG pollution into the atmosphere, all while ignoring the impacts of climate change and GHG emissions due to the MEPA Limitation. [AH 836:16-846:3; AH-51-AH-60; PE 932:18-933:5]. For example:

a. Defendants authorize and certify energy projects and facilities within the State of Montana that emit substantial levels of GHG pollution, including, but not limited to, projects that burn and promote the use of fossil fuels. [AH 836:16-846:3; PE 932:18-933:5].

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b. DEQ approved the AM4 expansion of Rosebud Strip Mine in December 2015, a 12.1-million-ton coal mine expansion. Pursuant to the MEPA Limitation, DEQ refused to analyze how that decision would aggravate climate impacts. [AH 836:16-837:12; P259, P260, P277; AH-51].

c. DEQ issued a MSUMRA permit to Bull Mountain Mine in January 2016, authorizing Bull Mountain Mine to produce 176 million tons of coal per year. DEQ refused, pursuant to the MEPA Limitation, to analyze how the decision would aggravate climate impacts. [AH 837:14-838:16; P243, P264; AH-52].

d. Between 2002 and 2014, DEQ issued twelve different permits for Signal Peak Energy to operate the Bull Mountain Mine. Since 2011, pursuant to the MEPA Limitation, DEQ refused, in its environmental assessments to consider how those GHG emissions would contribute to climate change or adversely impact Montana's environment and natural resources. [P245, P247, P256].

e. DEQ approved the TR3 expansion of Decker Mine in 2018, allowing for strip-mining of twenty-three million tons of coal. DEQ refused, pursuant to the MEPA Limitation, to analyze how that decision would aggravate climate impacts. [P236, P238, P250, P252, P257-258].

f. In 2020, DEQ approved revision to Spring Creek Mine, the largest coal mine in the State, allowing for recovery of additional seventy-two million tons of coal. In August 2019, DEQ refused, pursuant to the MEPA Limitation, to analyze impacts on the social cost of carbon and economic impacts from climate change in its EIS. [AH 841:23-842:20; P227, P248, P253, P255; AH-56].

g. DEQ authorized the operation of Colstrip Steam Electric Station—which produced 13.2 million metric tons of carbon dioxide equivalent (CO_2e), 38,015 metric tons methane, and 65,919 metric tons nitrous oxide in 2018. CO_2e is a metric measure used to compare the emissions from various greenhouse gases based upon their global warming potential (GWP). [P281, P285, P286].

h. In 2019, when DEQ issued its Record of Decision approving Western Energy's permit application to expand coal mining at Rosebud Coal Mine Area F, where "[t]he proposed mine permit application would add 6,746 acres and approximately 70.8 million tons of recoverable coal reserves to the Rosebud Mine, extending the operational life of the mine by eight years (at the current rate of production)." DEQ, pursuant to the MEPA Limitation, did not consider how those GHG emissions would contribute to climate change or adversely impact Montana's environment and natural resources. [AH 830:25-840:16; SN 1322:21-1323:2; P254, P277, P297; AH-54].

i. DEQ issued the air quality permit to NorthWestern Energy for the Laurel Generating Station (now named the Yellowstone County Generating Station), a proposed gas-fired power plant. Pursuant to the MEPA Limitation, DEQ, in its environmental assessment, did not consider how the GHG emissions would contribute to climate change or adversely impact Montana's environment and natural resources. [AH 831:9-21, 844:19-845:13; P294; AH-57].

j. In May 2022, DEQ issued its Final EIS for Rosebud Mine Area B AM5, in Colstrip. Pursuant to the MEPA Limitation, the environmental assessment did not consider how GHG emissions would

contribute to climate change or adversely impact Montana's environment and natural resources. [AH 840:20-841:22; P228; AH-55].

k. DEQ continues to issue permits for fossil fuel energy projects, including oil and gas pipelines and associated compressor stations, coal mines and coal facilities, oil and gas facilities, oil and gas leases, oil and gas drilling, petroleum refineries, industrial facilities that burn fossil fuels, and fossil fuel power plants. Pursuant to the MEPA Limitation, DEQ does not consider how a proposed project would contribute to climate change or adversely impact Montana's environment and natural resources. [AH 845:14-846:24; PE 949:7-15, 954:2-9; P138, P224, P232, P239, P240, P241, P242, P246, P249, P251, P264, P276, P277, P278, P279, P280, P281, P282, P285-301; AH-58, AH-59, AH-60].

l. DNRC issues permits for fossil fuel projects, including coal mines and oil and gas extraction. DNRC does not consider how GHG emissions from projects will contribute to climate change or adversely impact Montana's environment and natural resources or violate the Constitution, because of the MEPA Limitation. [P217-217; P233, P234, P235, P265-P275, P283, P284].

266. Montana's annual, historical, and cumulative GHG emissions are increased by Defendants' actions to permit and approve fossil fuel activities with no environmental review of their impact on GHG levels in the atmosphere and climate change. [PE 932:18-933:5].

267. Defendants' actions cause emissions of substantial levels of GHG pollution into the atmosphere within Montana and outside its borders, contributing to climate change. [SR 164:18-166:16; PE 932:18-933:5].

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268. The State's actions exacerbate anthropogenic climate change and cause further harms to Montana's environment and its citizens, especially its youth. [AH 845:14-846:2; P150].

VIII. THE MEPA LIMITATION PREVENTS FULL REVIEW OF THE TECHNOLOGICALLY AND ECONOMICALLY AVAILABLE ALTERNATIVES TO FOSSIL FUEL ENERGY IN MONTANA.

269. Dr. Mark Jacobson obtained a M.S. in Environmental Engineering, from Stanford University. Dr. Jacobson also obtained both a M.S. and later a Ph.D. in Atmospheric Sciences from UCLA. In 1994, Dr. Jacobson became an Assistant Professor in the Department of Civil & Environmental Engineering at Stanford. Since 2007, he has been a full professor in that Department. Dr. Jacobson was a co-founder and is Director of Stanford's Atmosphere/Energy Program, as well as a Senior Fellow at Stanford's Precourt Institute for Energy, and Stanford's Woods Institute for the Environment. Since 2008, Dr. Jacobson has been Director and Co-founder of The Solutions Project, an organization that utilizes the combined efforts of individuals in the fields of science, business, and culture to accelerate the transition to 100% renewable energy use in the United States. Starting in 1999, Dr. Jacobson began examining clean, renewable energy solutions. In 2015, this research culminated in the development of roadmaps to transition the all-sector energy infrastructures of each of the fifty United States to 100% clean, renewable energy by 2050, which Dr. Jacobson updated in 2022. Dr. Jacobson has published six textbooks of two editions each and over 175 peer-reviewed journal articles. Dr. Jacobson's career has focused on understanding air pollution and global warming problems and developing large-scale clean, renewable energy solutions to those problems. In

this case, Dr Jacobson summarized his research related to Montana and the feasibility of transitioning Montana swiftly from fossil fuels to clean and renewable energy in all sectors by mid-century, where all energy sectors include electricity, transportation, heating/cooling, and industry. Dr. Jacobson is a well-qualified expert, and his testimony was informative and credible.

270. The MEPA Limitation causes the State to ignore renewable energy alternatives to fossil fuels. [MJ 1030:7-1032:24, 1035:9-23, 1069:18-1071:8, 1066:6-17, 1067:10-20; MJ-15, MJ-62, MJ-63; AH 823:15-825:3; P312].

271. Non-fossil fuel-based energy systems across all sectors, including electricity, transportation, heating/cooling, and industry, are currently economically feasible and technologically available to employ in Montana. Experts have already prepared a roadmap for the transition of Montana's all-purpose energy systems (for electricity, transportation, heating/cooling, and industry) to a 100% renewable portfolio by 2050, which, in addition to direct climate benefits, will create jobs, reduce air pollution, and save lives and costs associated with air pollution. [MJ 1030:7-1032:24, 1035:9-23, 1069:18-1071:8, 1066:6-17, 1067:10-20; P312; MJ-15, MJ-62, MJ-63].

272. It is technically and economically feasible for Montana to replace 80% of existing fossil fuel energy by 2030 and 100% by no later than 2050, but as early as 2035. [MJ 1072:4-23, 1100:9-1101:4; P312; MJ-62, MJ-63]. A number of countries around the world with populations far larger than Montana's relied on >95% wind, water, and sunlight (WWS) to power their electricity sectors in 2021. [MJ-44].

273. To replace fossil fuel energy, Montana would need to electrify all energy sectors with existing or near-existing appliances and

machines, and then generate the electricity for all sectors with 100% WWS, namely onshore wind, utility-scale photovoltaics (PV), rooftop PV, geothermal power, and hydroelectric power. [MJ 1043:9-1045:8, 1045:15-1047:10; P312; MJ-12, MJ-15, MJ-18, MJ-19, MJ-20, MJ-29].

274. All-purpose Montana energy in 2050 can be met, for example, in one scenario, with 4.5 gigawatts (GW) of onshore wind, 3 GW of rooftop PV, 2.9 GW of utility-scale PV, 0.17 GW of geothermal electricity, and 2.7 GW of hydropower (which already exists). [MJ 1057:2-1058:15; MJ-29].

275. Converting from fossil fuel energy to renewable energy would eliminate another $21 billion in climate costs in 2050 to Montana and the world. Most noticeable to those in Montana, converting to wind, water, and solar energy would reduce annual total energy costs for Montanans from $9.1 to $2.8 billion per year, or by $6.3 billion per year (69.6% savings). [MJ-39]. The total energy, health, plus climate cost savings, therefore, will be a combined $29 billion per year (decreasing from $32 to $2.8 billion per year), or by 91%. [MJ 1061:20-1063:24; MJ-15, MJ-39, MJ-40, MJ-41, MJ-42].

276. Wind, water, and solar are the cheapest and most efficient form of energy. Cost per unit of energy in a 100% WWS system in Montana would be about 15% lower than a business-as-usual case by 2050, even when including increased costs for energy storage. New wind and solar are the lowest cost new forms of electric power in the United States, on the order of about half the cost of natural gas and even cheaper compared to coal. [MJ 1045:9-1047:10, 1062:8-1063:24; MJ-20].

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277. According to a 2018 Montana DEQ report, Understanding Energy in Montana, Montana has significant solar energy potential, comparable to many other U.S. cities. [MJ 1086:21-1087:4; P9; MJ-50].

278. The new footprint over land required to implement a 100% renewable energy system in Montana would be only about 0.06% of Montana's land. Utility scale solar would occupy 0.01% of Montana's land (fourteen square miles), while new wind turbines, including the land around those turbines, which could be used for agriculture, open space, or more solar panels, would occupy about 0.05% (seventy-one square miles) of Montana's land. In comparison, Montana's oil and gas wells and associated infrastructure already occupy about 304 square miles of land (0.21% of Montana land area). [MJ 1079:25-1082:3; MJ-46].

279. There is an abundant supply of renewable energy and four ways to store renewable energy: heat storage (in water), cold storage (as ice), electricity storage (pumped hydropower, batteries, hydrogen fuel cells), and hydrogen as a form of storage (for use in long distance transportation and steel production). [MJ 1057:2-15, 1058:5-15, 1072:24-1073:7, 1076:9-1077:22, 1079:22-1082:8; MJ-15, MJ-19, MJ-45, MJ-62].

280. Montana's energy needs in 2050 under a 100% WWS roadmap would decline significantly (over fifty percent) as compared to a business-as-usual energy system due to a mix of gains in energy efficiency in vehicles and appliances, and through eliminating the significant amounts of energy required to extract, transport, and refine fossil fuels. [MJ 1045:9-1047:10; MJ-15, MJ-19, MJ-20, MJ-21, MJ-22, MJ-23, MJ-24, MJ-25, MJ-26, MJ-27, MJ-28, MJ-55].

281. Transitioning to WWS will keep Montana's lights on while saving money, lives, and cleaning up the air and the environment, and ultimately using less of Montana's land resources. [MJ 1061:4-1062:12, 1066:6-17, 1066:18-1067:20, 1079:22-1082:8; MJ-15, MJ-20-MJ-30, MJ-39, MJ-41, MJ-42, MJ-46, MJ-56, MJ-57, MJ-58, MJ-62].

282. The current barriers to implementing renewable energy systems are not technical or economic, but social and political. Such barriers primarily result from government policies that slow down and inhibit the transition to renewables, and laws that allow utilization of fossil fuel development and preclude a faster transition to a clean, renewable energy system. [MJ 1042:15-1043:2, 1059:9-1061:3, 1100:9-1101:4, 1103:11-1104:24; MJ-15, MJ-19, MJ-20, MJ-33, MJ-35, MJ-36, MJ-38, MJ-62, MJ-63].

283. Montana has abundant renewable energy resources that can provide enough energy to power Montana's energy needs for all purposes in 2050. [MJ 1058:2-15; MJ-15, MJ-19, MJ-29, MJ-30, MJ-46, MJ-47, MJ-48, MJ-50, MJ-61, MJ-62].

IX. THE 1972 MONTANA CONSTITUTION.

284. Mae Nan Ellingson was a delegate to the 1972 Montana Constitutional Convention. Ms. Ellingson's testimony was informative and provided useful context, including on the compilation of the records of the Constitutional Convention proceedings on which Montana courts regularly rely. Ms. Ellingson was elected to the Constitutional Convention as a delegate from Missoula County.

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285. The first "delegate proposal" advanced during the Constitutional Convention was for a constitutional provision on environmental quality.

286. Article IX, Section 1 of the Constitution states that "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." This provision came about after long debate to strengthen the environmental article recommended by the Natural Resources Committee by including the words "clean" and "healthful."

287. As reflected in the Constitutional Convention Transcripts (March 1, 1972, Vol. V 1230), Ms. Ellingson suggested the "legislature shall provide adequate remedies to prevent" language of Article IX, Section 1 to assure greater protections of the current environment. She believed that if you are trying to protect the environment, you need the ability to sue or seek injunctive relief before the environmental damage is done--paying someone monetary damages after the harm is done does little good. This position was complemented by including the right to a clean and healthful environment in the Declaration of Rights in Article II, Sec. 3 of the Montana Constitution. The decision to include the right to a clean and healthful environment as one of the unalienable rights included in the Bill of Rights passed by a large majority.

288. During the Constitutional Convention, there were concerns among the delegates over the constitutional rights for people under the age of eighteen, and Article II, Section 15 in the Declaration of Rights was included to ensure that Montana's youth have the same fundamental rights as adults. This section was adopted with broad support.

289. Delegates to the 1972 Constitutional Convention intended to adopt the strongest preventative and anticipatory constitutional environmental provisions possible to protect Montana's air, water, and lands for present and future generations.

CONCLUSIONS OF LAW

1. To the extent that any of the foregoing Findings of Fact incorporate Conclusions of Law or the application of law to fact, they are incorporated herein as Conclusions of Law.

2. This Court has jurisdiction over the parties and subject matter in this case.

3. The Conclusions of Law are conformed to the evidence presented at trial by both parties. Mont. R. Civ. P. 15(b)(2). The Court will address the constitutionality of Mont. Code Ann. § 75-1-201(6)(a)(ii), which was enacted by SB 557 and addressed by both parties during trial and in trial briefing. *See, e.g.,* Docs. 390, 402.

I. PLAINTIFFS HAVE PROVEN STANDING.

A. Plaintiffs Have Proven Injury.

4. As described in the Findings of Fact, Youth Plaintiffs have experienced past and ongoing injuries resulting from the State's failure to consider GHGs and climate change, including injuries to their physical and mental health, homes and property, recreational, spiritual, and aesthetic interests, tribal and cultural traditions, economic security, and happiness.

5. Plaintiffs' mental health injuries directly resulting from State inaction or counterproductive action on climate change, on their own, do not establish a cognizable injury. *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83,

107 (1998). However, Plaintiffs' mental health injuries stemming from the effects of climate change on Montana's environment, feelings like loss, despair, and anxiety, are cognizable injuries.

6. Every additional ton of GHG emissions exacerbates Plaintiffs' injuries and risks locking in irreversible climate injuries.

7. Plaintiffs' injuries will grow increasingly severe and irreversible without science-based actions to address climate change.

8. Plaintiffs have proven that as children and youth, they are disproportionately harmed by fossil fuel pollution and climate impacts.

9. Plaintiffs have proven that they have suffered injuries that are concrete, particularized, and distinguishable from the public generally.

10. Plaintiffs suffer and will continue to suffer injuries due to the State's statutorily mandated disregard of climate change and GHG emissions in the MEPA Limitation, and due to SB 557's removal of MEPA's preventative equitable remedies with Mont. Code Ann. § 75-1-201(6)(a)(ii).

B. Plaintiffs Have Proven Causation at Trial.

11. The PSC is exempted from MEPA as a matter of law. Mont. Code Ann. § 75-1-201(3).[2]

12. There is a fairly traceable connection between the MEPA Limitation and the State's allowance of resulting fossil fuel GHG emissions, which contribute to and exacerbate Plaintiffs' injuries.

13. There is a fairly traceable connection between the State's disregard of GHG emissions and climate change, pursuant to the MEPA Limitation, GHG emissions over which the State has control, climate change impacts, and Plaintiffs' proven injuries. Unlike in *Bitterrooters Inc.*, the causal

[2] Hereinafter, when the Court refers to Defendants or the State, the PSC is excluded.

relationship between the permitted activities and the resulting environmental harms is reasonably close. *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl.* Quality, 2017 MT 222, ¶ 25, 401 P.3d 712. The State authorizes fossil fuel activities without analyzing GHGs or climate impacts, which result in GHG emissions in Montana and abroad that have caused and continue to exacerbate anthropogenic climate change.

14. The Defendants have the authority under the statutes by which they operate to protect Montana's environment and natural resources, protect the health and safety of Montana's youth, and alleviate and avoid climate impacts by limiting fossil fuel activities that occur in Montana when the MEPA analysis shows that those activities are resulting in degradation or other harms which violate the Montana Constitution.

15. Montana's contributions to GHG emissions can be measured incrementally and cumulatively both in terms of immediate local effects and by mixing in the atmosphere and contributing to global climate change and an already destabilized climate system.

16. Montana's GHG contributions are not *de minimis* but are nationally and globally significant. Montana's GHG emissions cause and contribute to climate change and Plaintiffs' injuries and reduce the opportunity to alleviate Plaintiffs' injuries.

C. Plaintiffs Have Proven Redressability at Trial.

17. The psychological satisfaction of prevailing in this lawsuit does not establish redressability. *Steel Co.* at 107.

18. Defendants can alleviate the harmful environmental effects of Montana's fossil fuel activities through the lawful exercise of their authority if

they are allowed to consider GHG emissions and climate change during MEPA review, which would provide the clear information needed to conform their decision-making to the best science and their constitutional duties and constraints, and give them the necessary information to deny permits for fossil fuel activities when inconsistent with protecting Plaintiffs' constitutional rights.

19. Montana's land contains a significant quantity of fossil fuels yet to be extracted. The State and its agents could consider GHG emissions and climate impacts and reject projects that would lead to unreasonable degradation of Montana's environment.

20. A reduction in Montana's GHG emissions that results from a declaration that Montana's MEPA Limitation is unconstitutional would provide partial redress of Plaintiffs' injuries because the amount of additional GHG emissions emitted into the climate system today and in the coming decade will impact the long-term severity of the heating and the severity of Plaintiffs' injuries.

21. It is possible to affect future degradation to Montana's environment and natural resources and injuries to these Plaintiffs.

22. Permitting statutes give the State and its agents discretion to deny permits for fossil fuel activities. *See, e.g.,* Mont. Code Ann. §§ 75-2-203 and -204 (discretion under Clean Air Act of Montana to prohibit facilities that cause air pollution); § 75-2-211(2)(a) (DEQ to provide rules governing suspension or revocation of air quality permits); § 75-2-218(2) (DEQ has discretion to deny air quality permits); § 75-2-217(1) (DEQ to provide rules governing suspension or revocation of operating permits); 75-20-301 (DEQ can only approve permits for Major Facility Siting Act facilities after considering

numerous discretionary factors, including environmental impacts and public health, welfare, and safety); § 77-3-301 (state lands "may" be leased for coal if "in the best interests of the state"); § 77-3-401 (state lands "may" be leased for oil and gas if consistent with the Constitution); § 82-4-102(3)(a) (stating purpose of surface and underground mining and reclamation laws to vest DEQ with rulemaking authority to "either approve or disapprove" new strip mines or new underground mines); § 82-4-227 (DEQ has wide discretion to refuse mining permits).

23. The State must either: 1) have discretion to deny permits for fossil fuel activities when the activities would result in GHG emissions that cause unconstitutional degradation and depletion of Montana's environment and natural resources, or infringement of the constitutional rights of Montana's children and youth; or 2) the permitting statutes themselves must be unconstitutional.

24. "[C]ourts should avoid constitutional issues whenever possible." *Park Cnty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶ 54, 477 P.3d 288 (citing *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 62, 165 P.3d 1079). Under the doctrine of constitutional avoidance, this Court clarifies that Defendants do have discretion to deny permits for fossil fuel activities that would result in unconstitutional levels of GHG emissions, unconstitutional degradation and depletion of Montana's environment and natural resources, or infringement of the constitutional rights of Montanans and Youth Plaintiffs.

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II. MONT. CODE ANN. § 75-1-201(6)(a)(ii) IS NOT A BARRIER TO REDRESSABILITY BECAUSE IT IS FACIALLY UNCONSTITUTIONAL UNDER *PARK COUNTY.*

25. Mont. Code Ann. § 75-1-201(6)(a)(ii) eliminates the preventative remedies available to MEPA litigants: vacatur and injunction. The State raised Mont. Code Ann. § 75-1-201(6)(a)(ii) during trial as a barrier to redressability in this case, bringing it before the Court and making the issue unavoidable.

26. The Legislature is obligated under Article IX, Sec. 1(3) to provide "adequate remedies for the protection of the environmental life support system from degradation" and "to prevent unreasonable depletion and degradation of natural resources." Mont. Const. Art. IX, Sec. 1(3).

27. "MEPA is an essential aspect of the State's efforts to meet its constitutional obligations, as are the equitable remedies without which MEPA is rendered meaningless." *Park Cnty.* ¶ 89.

28. In *Park Cnty*, a unanimous Court reasoned:

> Montanans' right to a clean and healthful environment is complemented by an affirmative duty upon their government to take active steps to realize this right. Article IX, § 1, Subsections 1 and 2 of the Montana Constitution command that the Legislature 'shall provide for the administration and enforcement' of measures to meet the State's obligation to 'maintain and improve' the environment. Critically, Subsection 3 explicitly directs the Legislature to 'provide adequate remedies to prevent unreasonable depletion and degradation of natural resources ...
>
> Without a mechanism to prevent a project from going forward until a MEPA violation has been addressed, MEPA's role in meeting the State's 'anticipatory and preventative' constitutional obligations is

> negated. Whatever interest might be served by a statute that instructs an agency to forecast and consider the environmental implications of a project that is already underway—perhaps analogous to a mandatory aircraft inspection after takeoff—the constitutional obligation to prevent certain environmental harms from arising is certainly not one of them.

Id. ¶¶ 63, 72.

29. Pursuant to the Court's decision in *Park Cnty.*, Mont. Code Ann. § 75-1-201(6)(a)(ii) is facially unconstitutional because it eliminates MEPA litigants' remedies that prevent irreversible degradation of the environment, and it fails to further a compelling state interest. *Park Cnty.* ¶¶ 63, 69-72.

III. ALL PLAINTIFFS' CONSTITUTIONAL CLAIMS ARE PREDICATED ON DEGRADATION OF MONTANA'S CLEAN AND HEALTHFUL ENVIRONMENT.

30. All of Plaintiffs' claims hinge on whether the MEPA Limitation and Mont. Code Ann. § 75-1-201(6)(a)(ii) violate Mont. Const. Art. II, Sec. 3 and Art. IX, Sec. 1.

a. The Public Trust Doctrine is already codified in the Montana Constitution in Art. IX, Sec. 3. *Galt v. State*, 225 Mont. 142, 144, 146, 731 P.2d 912, 913, 914 (1987) (citing *Mont. Coal. for Stream Access v. Curran*, 210 Mont. 38, 682 P.2d 163 (1984) and Mont. Const. Art. IX, Sec. 3(3)).

b. Except for Plaintiffs' mental health injuries resulting from government inaction on climate change, the alleged equal protection, dignity, liberty, and health and safety violations all stem from harm to Montana's environment.

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c. Plaintiffs' mental health injuries resulting from government inaction alone do not establish a cognizable, redressable injury.

d. It would be impossible for the Court to find that the MEPA Limitation and Mont. Code Ann. § 75-1-201(6)(a)(ii) do not violate Art. II, Sec. 3 and Art. IX, Sec. 1, and then find that the statutes violate the Public Trust Doctrine or the rights to equal protection, dignity, liberty, or health and safety.

IV. DETERMINING WHETHER THE CONSTITUTIONAL PROVISIONS AT ISSUE ARE SELF-EXECUTING IS UNECESSARY TO RESOLVE THIS CONTROVERSY.

31. It is possible to resolve this case without determining whether Art. II, Sec. 3 and Art. IX, Sec. 1 are self-executing.

32. A determination that a right is non-self-executing "does not end the inquiry. As here, (1) once the Legislature has acted, or 'executed,' a provision (2) that implicates individual constitutional rights, courts can determine whether that enactment fulfills the Legislature's constitutional responsibility." *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 17, 109 P.3d 257 (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

33.

> "Provisions that directly implicate rights guaranteed to individuals under our Constitution are in a category of their own. That is, although the provision may be non-self-executing, thus requiring initial legislative action, the courts, as final interpreters of the Constitution, have the final 'obligation to guard, enforce, and protect every right granted or secured by the Constitution . . ..'"

Brown v. Gianforte, 2021 MT 149, ¶ 23, 488 P.3d 548 (citing *Columbia Falls Elem. Sch. Dist.*, ¶ 18 (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884))).

34. Like in *Park Cnty.*, the question presented to the Court by this case "is straightforward: has the Legislature met its obligation to provide adequate remedies with which to prevent potential future environmental harms when it removes what appears to be the *only* available legal relief positioned to do so?" *Park Cnty.* ¶ 78. The MEPA Limitation, especially in conjunction with Mont. Code Ann. § 75-1-201(6)(a)(ii), removes the only preventative equitable relief available to the public and MEPA litigants concerned about GHGs and climate change, which are degrading Montana's environment.

V. THE MEPA LIMITATION IS SUBJECT TO STRICT SCRUTINY.

35. Any statute, policy, or rule which implicates a fundamental right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that the action is narrowly tailored to effectuate that interest. *Park Cnty.* ¶ 84.

36. The MEPA Limitation is subject to strict scrutiny because it implicates Plaintiffs' fundamental right to a clean and healthful environment.

VI. THE MEPA LIMITATION VIOLATES THE MONTANA CONSTITUTION.

A. MEPA Limitation violates Plaintiffs' Right to a Clean and Healthful Environment – Mont. Const. Art. II, Sec. 3, 15; Art. IX, Sec. 1.

37. Montana's Constitution provides: "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment...." Mont. Const. Art. II, Sec. 3. Consistent with the provision of these rights and responsibilities, the Montana Constitution further provides: "The

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state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Mont. Const. Art. IX, Sec. 1(1).

38. Article II, Sec. 3 and Article IX, Sec. 1 are to be read together, along with the Preamble to Montana's Constitution. *MEIC I*, ¶¶ 65, 77.

39. The right to a clean and healthful environment is a fundamental right protected by Mont. Const. Art. II, Sec. 3 and Art. IX, Sec. 1(1). *MEIC I*, ¶ 64.

40. Montana's children under age eighteen, have a fundamental right to a clean and healthful environment. Mont. Const. Art. II, Sec. 15. The right to a clean and healthful environment is intended to protect Montana's children and future generations.

41. During Montana's 1972 Constitutional Convention, delegates placed significant emphasis on protecting natural resources and improving Montana's environment. The Montana Supreme Court has recognized that "it was agreed by both sides of the debate that it was the convention's intention to adopt whatever the convention could agree was the stronger language." *MEIC I*, ¶ 75 (citing Convention Transcripts, Vol. IV at 1209, Mar. 1, 1972). The Montana Supreme Court has repeatedly found that the Framers intended the state constitution contain "the strongest environmental protection provision found in any state constitution." *Park Cnty.*, ¶ 61.

42. The Constitutional Framers "did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment." *MEIC I*, ¶ 77. As Delegate Foster noted: "[I]f we put in the Constitution that the only line of defense is a healthful

environment and that I have to show, in fact, that my health is being damaged in order to find some relief, then we've lost the battle." *MEIC I*, ¶ 74 (citing Convention Transcripts, Vol. V at 1243-44, Mar. 1, 1972).

43. The right to a clean and healthful environment language in Montana's Constitution is "forward-looking and preventative language" which "clearly indicates that Montanans have a right not only to reactive measures after a constitutionally-proscribed environmental harm has occurred, but to be free of its occurrence in the first place." *Park Cnty.*, ¶ 62.

44. The right to a clean and healthful environment requires enhancement of Montana's environment. According to the Constitutional Delegates, "*our intention was to permit no degradation* from the present environment and affirmatively require enhancement of what we have now." *MEIC I,* ¶ 69 (quoting Convention Transcripts, Vol. IV at 1205, Mar. 1, 1972) (emphasis in original).

45. Montanans' right to a clean and healthful environment is complemented by an affirmative duty upon their government to take active steps to realize this right. Article IX, Sec. 1(1) and (2) of the Montana Constitution command that the Legislature "shall provide for the administration and enforcement" of measures to meet the State's obligation to "maintain and improve" the environment. Critically, Subsection 3 explicitly directs the Legislature to "provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." Mont. Const. Art. IX, Sec. 1(3); *Park Cnty.*, ¶ 63.

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46. The obligations of the Legislature found in Article IX, Sec. 1 include providing "adequate remedies for the protection of the environmental life support system from degradation." Mont. Const. Art. IX, Sec. 1(3).

47. According to Delegate McNeil, "the term 'environmental life support system' is all-encompassing, including but not limited to air, water, and land; and whatever interpretation is afforded this phrase by the Legislature and courts, there is no question that it *cannot be degraded*." *MEIC I*, ¶ 67 (citing Convention Transcripts, Vol. IV at 1201, Mar. 1, 1972) (emphasis in original).

48. Montana's constitutional right to a clean and healthful environment prohibits environmental degradation that causes ill health or physical endangerment and unreasonable depletion or degradation of Montana' natural resources for this and future generations:

> Our conclusions in *MEIC I* are consistent with the constitutional text's unambiguous reliance on preventative measures to ensure that Montanans' inalienable right to a 'clean and healthful environment' is as evident in the air, water, and soil of Montana as in its law books. Article IX, Section 1, of the Montana Constitution describes the environmental rights of 'future generations,' while requiring 'protection' of the environmental life support system 'from degradation' and 'prevent[ion of] unreasonable depletion and degradation' of the state's natural resources. This forward-looking and preventative language clearly indicates that Montanans have a right not only to reactive measures after a constitutionally-proscribed environmental harm has occurred, but to be free of its occurrence in the first place.

Park Cnty., ¶ 62.

49. Based on the plain language of the implicated constitutional provisions, the intent of the Framers, and Montana Supreme Court precedent,

climate is included in the "clean and healthful environment" and "environmental life support system." Mont. Const. Art. II, Sec. 3; Art. IX, Sec. 1.

50. Montana's climate, environment, and natural resources are unconstitutionally degraded and depleted due to the current atmospheric concentration of GHGs and climate change.

51. The right to a clean and healthful environment allows plaintiffs to obtain equitable relief before harm occurs. According to the Supreme Court:

> When considering which remedies are 'adequate' in this context, we note that equitable relief, unlike monetary damages, can avert harms that would have otherwise arisen. It follows that equitable relief must play a role in the constitutional directive to ensure remedies that are adequate to prevent the potential degradation that could infringe upon the environmental rights of present and future generations. We are not alone in this conclusion. As Delegate Mae Nan Robinson pointed out during the 1972 Constitutional Convention: if you're really trying to protect the environment, you'd better have something whereby you can sue or seek injunctive relief before the environmental damage has been done; it does very little good to pay someone monetary damages because the air has been polluted or because the stream has been polluted if you can't change the condition of the environment once it has been destroyed.

Park Cnty. ¶ 64 (citing *MEIC I* ¶ 71).

52. "The essential purpose of MEPA is to aid in the agency decision-making process otherwise provided by law by informing the agency and the interested public of environmental impacts that will likely result from agency actions or decisions." *Bitterrooters Inc.* ¶ 18.

53. "MEPA is an essential aspect of the State's efforts to meet its constitutional obligations." *Park Cnty.*, ¶ 89; § 75-1-102, MCA.

54. The stated policy of MEPA makes clear that the State should use "all practicable means" "so that the state may: (a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; (b) ensure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings; (c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences . . .." § 75-1-103, MCA.

55. By enacting and enforcing the MEPA Limitation, the State is failing to meet their affirmative duty to protect Plaintiffs' right to a clean and healthful environment, and to protect Montana's natural resources from unreasonable depletion.

56. The MEPA Limitation categorically limits what the agencies, officials, and agencies tasked with protecting Montana's clean and healthful environment can consider. The MEPA Limitation conflicts with the very purpose of MEPA, which is to aid the State in meeting its constitutional obligation to prevent degradation by "informing the agency and the interested public of environmental impacts that will likely result" from State actions. *Bitterrooters Inc.* ¶ 18; § 75-1-102(1), MCA ("The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Environmental Policy Act . . . [to] provide for the adequate review of state actions in order to ensure that: (a) environmental attributes are fully considered . . ..").

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57. The plain language of the MEPA Limitation bars agencies from considering GHG emissions and climate impacts for any project or proposal, even to assess whether the project complies with the Montana Constitution.

58. The MEPA Limitation is unconstitutionally contributing to the depletion and degradation of Montana's environment and natural resources and contributing to Plaintiffs' injuries. The MEPA Limitation deprives Plaintiffs of their constitutionally guaranteed rights under Mont. Const. Art. II, Sec. 3, and Art. IX, Sec. 1.

59. By prohibiting consideration of climate change, GHG emissions, and how additional GHG emissions will contribute to climate change or be consistent with the Montana Constitution, the MEPA Limitation violates Plaintiffs' right to a clean and healthful environment and is facially unconstitutional.

B. The MEPA Limitation Does Not Pass Strict Scrutiny.

60. The MEPA Limitation infringes on fundamental rights and must pass strict scrutiny. *Mont. Cannabis Indus. Ass'n v. Montana*, 2012 MT 201, ¶ 16, 366 Mont. 224, 286 P.3d 1161 ("*Mont. Cannabis Indus Ass'n* (2012)"); *see also Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 52, 310 Mont. 123, 54 P.3d 1.

61. Under strict scrutiny, "the government must show that the law is narrowly tailored to serve a compelling government interest." *Mont. Cannabis Indus. Ass'n* (2012), ¶ 16.

62. The State failed to show that the MEPA Limitation serves a compelling governmental interest.

63. The State did not put forward any evidence of a compelling governmental interest for the MEPA Limitation.

64. Undisputed testimony established that Defendants could evaluate "greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders" when evaluating fossil fuel activities. Indeed, Defendants have performed such evaluations in the past.

65. Undisputed testimony established that clean renewable energy is technically feasible and economically beneficial in Montana.

66. Even if the State had established a compelling interest for the statute, the MEPA Limitation is not narrowly tailored to serve any interest.

67. The MEPA Limitation neither serves a compelling state interest nor is narrowly tailored and fails strict scrutiny.

ORDER

1. Based upon the foregoing Findings of Fact and Conclusions of Law the Court determines and declares that:

2. The Youth Plaintiffs have standing to bring the claims addressed herein.

3. Montana's GHG emissions have been proven to be fairly traceable to the MEPA Limitation.

4. Montana's GHG emissions and climate change have been proven to be a substantial factor in causing climate impacts to Montana's environment and harm and injury to the Youth Plaintiffs.

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5. This judgment will influence the State's conduct by invalidating statutes prohibiting analysis and remedies based on GHG emissions and climate impacts, alleviating Youth Plaintiffs' injuries and preventing further injury.

6. By prohibiting analysis of GHG emissions and corresponding impacts to the climate, as well as how additional GHG emissions will contribute to climate change or be consistent with the Montana Constitution, the MEPA Limitation violates Youth Plaintiffs' right to a clean and healthful environment and is unconstitutional on its face.

7. Plaintiffs have a fundamental constitutional right to a clean and healthful environment, which includes climate as part of the environmental life-support system.

8. The 2023 version of the MEPA Limitation, Mont. Code Ann. § 75-1-201(2)(a), enacted into law by HB 971, is hereby declared unconstitutional and is permanently enjoined.

9. Mont. Code Ann. § 75-1-201(6)(a)(ii), enacted into law by SB 557 from the 2023 legislative session, is hereby declared unconstitutional and is permanently enjoined because it removes the only preventative, equitable relief available to the public and MEPA litigants.

10. In addition to the findings, conclusions, and declarations set forth above, injunctive relief is appropriate, prohibiting Defendants from acting in accordance with the statutes declared unconstitutional.

11. Judgment is hereby found in favor of the Plaintiffs as prevailing parties.

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12. The Youth Plaintiffs requested an award of reasonable attorneys' fees and costs. (Doc. 1 at 104.). Pursuant to Rule 54 (d), Mont. R. Civ. P., Youth Plaintiffs shall submit their motion for fees and costs and documentation in support of their request for fees and costs, within fourteen days of the date of this Order. Defendants shall have fourteen days thereafter to respond, and shall have the opportunity to request a hearing pursuant to the provisions of Rule 43 (c), Mont. R. Civ. P. The Court reserves jurisdiction to issue its final judgment to include the issue of attorneys' fees and costs.

DATED this 14 day of August 2023.

Kathy Seeley
District Court Judge

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