427301 Municipality of Grande Synthe

CONSEIL D'ETAT
6th and 5th Chambers combined
Session of 9 November 2020
Reading of 19 November 2020

OPINION
Stéphane Hoynck, Consultant Judge (*Rapporteur Public*)

This is the first time you have been asked to rule on a climate change dispute.

One general finding is not disputed by the parties, namely the IPCC's observation that global warming needs to be limited to 1.5°C and a maximum of 2°C above pre-industrial levels by 2100. If this target is not met, the potential impact of climate changes would be too rapid for humanity to adapt. The disastrous consequences would affect both biodiversity and sea levels, food security and human health. Neither do the parties dispute the fact that the current global warming is human-induced and that specific human action is needed to curb it. This anthropogenic warming is caused by greenhouse gas (GHG) emissions, in particular carbon dioxide. GHG emissions must therefore be reduced in order to curb global warming.

A key scientific point is that today's carbon dioxide emissions will produce a greenhouse effect for approximately 100 years, as this is the time it takes carbon dioxide to break down in the atmosphere. When considering this 2100 target, we therefore need to look at the aggregate effect of emissions over the 100-year period preceding that date and not a snapshot of the carbon dioxide emissions in 80 years' time. The maximum temperature reached is therefore determined by the net global anthropogenic emissions until carbon neutrality can be achieved. This is why it is necessary to take decisive action now, in an attempt to limit global warming.

It is this very specific relationship to time that is pivotal for the application, involving the idea that a climate emergency does in fact exist today, as the action or inaction decided now and in the near future will determine the future of the planet and its habitability for mankind in the second half of the 21st century and beyond.

The heart of the matter is therefore the timetable and the level of limitation of GHG emissions that must be reached in order to attempt to limit global warming and the associated major risks.

However, before turning to that matter, I first wish to discuss the applicants and their legal standing, challenged by the respondents.

1. Legal standing

The application was filed by the municipality of Grande Synthe and by Mr Carême, who held the office of mayor of that municipality when the application was filed.

1.1 The Minister has pointed out that the applications filed by the municipality of Grande Synthe relate to the legislation on the prevention of climate change and that climate change is not expected to have a major impact on its territory. This line of defence appears questionable both in its premises and in its assessment of the situation in this case.

Your assessment of legal standing is often summarised using the words of Mr Théry in his opinion in the Damasio case (sectional judgment, 28 May 1971): "*in order to establish legal standing to file an application for judicial review, the applicant must show that the decision in question adversely affects the applicant's interests, requiring a sufficient special, certain and direct interest*".

The Minister's application to strike out the case seems to be based on the lack of a special, direct interest.

Traditionally, the special interest aspect was intended to prevent the judicial review mechanism from becoming a mechanism open to all. As stated by Presiding Judge Chesnot in his opinion in the Gicquel case (sectional judgment, 10 February 1950), this interest "*must fall within the range of the ever-growing groups of persons with legal standing determined by the courts without, however, reaching the dimension of the national community*".

However, your approach does not appear to necessarily mean, as a matter of principle, that an interest which is common to the whole of the national community cannot be an interest which an applicant can validly rely on in support of an application. In your decision in the *Société Eky* case issued on 12 February 1960, you impliedly upheld the legal standing of a company to challenge the regulatory provisions of the French Criminal Code (*code pénal*), which apply to all natural persons. In his opinion in that case, Presiding Judge Kahn showed that a line of reasoning denying legal standing for decisions binding on all would lead to absurdity, using the example of the French Highway Code (*code de la route*): "*This would mean that we would be forced to rule that the provisions of the said code governing the driving of vehicles could be challenged by any person who can prove that he owns a car or holds a driving licence, but that the provisions governing pedestrians could not be challenged"*.

This court has never adopted the rationale that has prevailed in the EU courts since the *Plaumann* judgment (ECJ, 15 July 1963 in Case 25/62), requiring individuals to show, in order to establish their legal standing to challenge regulatory decisions of the Union, that the decision affects them *"by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed"*. It is this reasoning that recently led the European General Court to dismiss for a lack of legal standing and in a simple order without going to the substance of the case (order, 8 May 2019, T-330/18) an application by 11 families and several associations wishing to challenge the EU's climate policy.

This would appear to be where the requirement for a special interest and the requirement for a direct interest are combined. There are situations where the effects of a decision concern a very wide range of potential applicants. This is not a valid requirement for holding that it cannot be challenged by anyone at all. As was stated by Mr Théry in his opinion referred to above, the decision to require legal standing rather than allowing an application that is open to all is designed to prevent *"citizens who are only affected in a very secondary and indirect way from retroactively undermining situations accepted by those who were directly affected. Between the problems caused by illegal decisions and the problems caused by invalidating decisions, this court is forced to make difficult compromises in terms of legal standing*".

Thus, for an issue as important as climate change, if an examination of the situation in all parts of the territory was to show that they are all affected in a direct, certain manner, it would not be consistent with this court's previous decisions to infer that no territory could file an application for judicial review.

Nevertheless, if we had to examine the situation of Grande Synthe in this scheme, it is clear that it would be classified as a territory that is sufficiently affected by climate change to give it standing to file such an application: the municipality is located on the North Sea coast and is partly built below sea level, in the polder of the Aa river. This polder runs from Sangatte to Dunkirk on the coast and inland as far as Saint-Omer. It requires water evacuation and drainage works, the management of which is entrusted to a local public service company (*établissement public*) called *Institution Interdépartementale des Wateringues*.

The fact that the flooding risk affecting the municipality is managed by an inter-departmental public service company and not by the applicant municipality itself, is not, in my view, sufficient alone to justify a lack of legal standing. It does, however, raise a specific legal standing question, pertaining to the capacity of municipalities. Other than the resolutions that the Municipal Council may adopt, which must, in principle, have a local interest (Article L. 2121-29 of the French Local Authorities Code (*code général des collectivités territoriales*)) that you refuse to review (Conseil d'Etat, *Sarl Enlem*, 29 December 1997, No. 157623), you frequently encounter situations in the litigation section where a local authority, often in order to take a political stand, takes a decision that does not necessarily fall within its authority, mainly relating to law and order, health or the environment.

Your review of legal standing is clearly not the same as your review of the powers of local authorities with regard to the local interest or co-existence of policing powers, for example.

In previous cases when you have decided on the legal standing of local authorities, you were mainly asked to rule on disputes concerning decisions with a local impact. For example, this court held, in a judgment issued by this Court on 20 January 1950, *Ville de Tignes*, p. 46, that a municipality had legal standing to take action against a declaration to obtain land for public works under which part of its territory would disappear under an artificial lake, as it affected "*its private assets and its life as a legal person*".

Environmental litigation has not been left behindon that regard, with the added specificity that you have been asked in several cases to rule on the legal standing of foreign authorities: you ruled that the City of Amsterdam had legal standing to challenge prefectural orders relating to the discharge of polluting substances into the Rhine (Conseil d'Etat, 18 April 1986, *Société les Mines de Potasse d'Alsace*, No. 53934). But you also ruled that the City of Geneva, among others, did not have legal standing to take action against a decision authorising the creation of basic nuclear facilities that would not have any impact in its territory. (Conseil d'Etat, 24 March 2014, No. 358882, *République et Canton de Genève et la Ville de Genève*)

It is clear, particularly in environmental cases as the effects of environmental decisions often transcend administrative and national borders, that the fact that the challenged measure is not confined to the municipality is not a sufficient ground to find that an authority lacks legal standing. The correct requirement, inferred from the case law of this court, is that an authority will only have legal standing to apply for a judicial review of an administrative decision if it

has an "impact in its territory" in the words of Presiding Judge Bonichot[1]. In some of the cases judged, this is interpreted as requiring the decision to have an impact on its own situation or the interests for which it is responsible[2].

In the case in point, and maybe precisely because it is a legal entity whose action goes hand in hand with its territory, it would appear that the potential impact of global warming on this territory means that the municipality should be held to have legal standing: there is no need to draw up a precise list of the public policies implemented locally that could be disrupted by climate change, in terms of town planning, housing and social matters for example. Moreover, although the dramatic effects of climate change, if no action is taken to limit them, will not be felt for several decades, they appear to be sufficiently certain for a local authority, which is required to plan ahead.

1.2 The other applicant is Mr Carême, who was the mayor of the municipality when the application was filed. That status is not sufficient to give him legal standing, no more than the fact that his current home is located in an area that will probably experience yearly flooding by 2040: there is nothing to indicate where he will establish his home in the years to come, especially in 20 years or more, meaning that the effect on his interests is too uncertain in this respect. The application filed by him should be dismissed for a lack of legal standing.

1.3 Another point to be considered is the applications to be joined to these proceedings. Two of them have been filed by local authorities, the Cities of Paris and Grenoble. Even though the dangers caused by the potential for climate change in their territory are not the same as those facing a coastal area such as Grande-Synthe, they should be held to have legal standing for the same reasons.

1.4 Finally, four associations have also applied to be joined to these proceedings in support of the application for judicial review. The main aim of these associations is to protect the environment and, moreover, they issued legal proceedings before the Paris Administrative Tribunal seeking damages from the State for the Government's alleged climate inaction, only a few weeks after the filing of the application we are discussing today. Their application should be held to be admissible, as there is nothing to refute this in their articles of association.

2. Merit of the case

It is clear that the submissions seeking the annulment of the refusal to adopt legislative measures should be dismissed, as the administrative courts have no jurisdiction to hear this type of claim[3]. The plea alleging that the implied refusal to adopt any regulatory measure making the climate a mandatory priority is invalid due to an incorrect assessment of the facts should also be dismissed, as it lacks sufficient explanations to enable the merits of the plea to be considered.

We can now focus on the heart of the matter.

[1] opinion on Conseil d'Etat, 19 March 1993, *Commune de Saint-Egrève*, No. 119147

[2] Conseil d'Etat, 22 May 2012, *SNC MSE Le Haut des Epinettes*, No. 326367, see also, for example, 17 June 1987, *Ville de Boulogne-Billancourt*, 39073, a case relating to the traffic generated by a project, in this case an extension of the Roland-Garros stadium; Conseil d'Etat, 23 May 2007, *Département des Landes et al.*, No. 288378s, relating to a national road plan

[3] for a recent application, see Conseil d'Etat, 26 November 2012, *Krikorian et al.*, No. 350492

Two distinct lines of reasoning emerge from the statements of case filed by the applicant and the parties joined in support of the application. **One of them is clear:** the court is asked to take into account France's GHG reduction commitments as they were agreed by the governement, both for the past period and for the future period, and to review the plausibility of achieving those commitments, given the action already taken and the resources implemented to achieve them. **The other line of reasoning is less clear**: it uses different legal instruments and examples of foreign court cases to ask the court to rule that France must go further than its commitments. We will examine the scope of these supra-legislative provisions in a moment, but it should be noted that virtually no concrete evidence has been produced to justify the claim that France is **required to go over and above its commitments** and that this is not merely an **option** available to it.

Without going into the details of international commitments in response to climate change at this stage, it is important to note that under the Paris Agreement, the signatory States agree to adopt nationally determined contributions (NDC) to reduce GHGs.

Thus, for France, as the Paris Agreement is a mixed agreement between the EU and the Member States, its national contribution by the interim deadline of 2030 is determined in an EU regulation. It is my opinion, as I will explain a little later, that this obligation can be reviewed by this court to check that it is effectively implemented.

But if it were to be argued that France is required to go further than that, which does not appear to be the argument submitted to you, this would mean that in practice, the EU rules determining France's contribution would not comply with other rules. Such a conflict, which would require an application to the CJEU for a preliminary ruling on the validity of the EU regulation **if its application had to be excluded**, has not been argued.

2.1 I will first set out my views on the invocability of the various rules of the Constitution.

The application relies, first of all, on the **French Constitution and the French Charter for the Environment attached to it**. Reference is made to Article 1 of the Charter, which proclaims the right of everyone to "*live in a balanced environment which shows due respect for health"* and Article 3, which provides that*: "Each person shall, in the conditions provided for by law, foresee and avoid the occurrence of any damage which he or she may cause to the environment or, failing that, limit the consequence of such damage".*

With regard to Article 3 and as has been decided by this court in a decision issued on 12 July 2013 (*Fédération Nationale de la Pêche en France*, No. 344522), there is no room for an autonomous regulatory power, as the intervention of the law is required. With regard to Article 1, such intervention is not provided for in the Charter, but this court has ruled in a decision issued on 26 February 2014 (*Ass. Ban Abestos France et al.*, No. 351514) that the administrative authorities are responsible for ensuring compliance with the principle set out in that article when they clarify the arrangements for implementing a law setting out a framework for protecting the population from environmental health risks and that the role of the administrative courts is to review, in light of the arguments pleaded before them, whether the measures adopted to implement the law, to the extent that they are not merely limited to taking the necessary action, are not in turn in breach of that principle.

In the case in point, the law has intervened to impose a set of rules limiting GHG emissions, as will be further discussed later. It is not argued that this legislative framework is itself in breach

of the constitutional principles of the Charter that are relied on. In light of this, it is clear that the pleas are ineffective, as is the plea alleging a breach of Article 6 of the Charter (Conseil d'Etat, 10 June 2015, *CCI de Rouen*, No. 371554).

Lastly, an alleged breach of Article 5 of the Constitution has been claimed, which provides that the President of the Republic is "*the guardian (...) of territorial integrity*". To my knowledge, the Constitutional Council has never been asked to rule on this concept of territorial integrity, but it is my view, as has also been decided by this court (Conseil d'Etat, 12 July 2017, Mr Durbano, No. 395313), that this concept refers to changes to the legal substance of a territory, in the event of a transfer or exchange for example, and does not cover a potential risk of coastal erosion.

2.2 The second rule asserted is the **European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)** and, more specifically, Articles 2 and 8 of the Convention. The application relies significantly on a court decision issued in the Netherlands pursuant to an application filed by an association called Urgenda, which had a strong impact even beyond the legal community.

The judgment issued by the Civil Chamber of the Supreme Court of the Netherlands on 20 December 2019 in that case upheld the approach taken by the Hague Court of Appeal on 9 October 2018. To uphold the need for the Netherlands State to take action, the court found that each country must play its part in the efforts to limit global warming, **without being able to argue** that national emissions are relatively limited and that a reduction in its own emissions would only have a very limited impact on a global scale. It inferred that each country is responsible for reducing GHGs in proportion to its share of responsibility and the ruling based this obligation on Articles 2 and 8 of the ECHR, due to the serious risk of critical climate change, which would endanger the lives and well-being of many residents of the Netherlands.

According to the Supreme Court, which based its decision on the 2007 IPCC report, developed countries would have to reduce their emissions by 25-40% by 2020 and by 80-95% by 2050 below 1990 levels to limit the risk of global warming to 2°C. It noted that until 2011, the Netherlands targeted a 30% reduction by 2020. However, that target had been reduced under EU rules to 20%, but would then be accelerated to a target of 49% in 2030 and 95% in 2050.

It appears that the Supreme Court in the Netherlands was affected by the shift in the goals of the Government of the Netherlands and the fact that it **was unable** to explain the extent to which the proposed acceleration of emission reductions between 2020 and 2030 to offset the loosening of the rules before 2020 would be feasible and sufficiently effective to meet the 2030 and 2050 targets (see paragraphs 7.4.1 to 7.4.6 of the judgment).

I am not suggesting that you should use this solution based on the ECHR. From a principle-based perspective, firstly, the use of a combination of Articles 2 and 8 of the Convention appears questionable. Article 2 enshrines the right to life, which constitutes an absolute right that cannot be restricted based on other requirements under the Convention, meaning that there are hardly any circumstances in which a State can deprive someone of that right. This is obviously not the case for Article 8, as it enshrines the right to a normal family life.

It does not appear that the European Court of Human Rights has decided any cases relating to the right to life enshrined in Article 2 using any assumptions that are similar or comparable to the reasoning adopted by the Supreme Court in the Netherlands. The main environmental issues referred to the European Court of Human Rights in Strasbourg relate to the policing of industrial activities affecting the environment, in particular in a Grand Chamber case (*Öneryıldız v. Turkey*, ECHR, Grand Chamber, 30 November 2004, No. 48939/99) relating to an accidental methane explosion in a rubbish tip near a shanty town, killing several people. In that case, the European Court of Human Rights ruled that States have a duty to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life, which applies in the particular context of dangerous activities.

However, it is clear that it would be difficult to require a State, other than for activities that are proven to present an immediate threat to human life, to adopt coercive, drastic measures whenever an activity is not inherently a zero-risk activity.

With regard to Article 8, the European Court of Human Rights has held that the protection of the environment must be taken into account by States when acting within their margin of appreciation in order to ensure that an appropriate balance is struck between, on the one hand, the right of the individuals affected by the relevant legislation to have their privacy and home respected and, on the other, the competing interests of others and society as a whole. It ruled in this way, for example, in a case concerning alleged failings in the plan designed to limit aircraft noise at Heathrow and the disturbance caused to local residents (ECHR, Hatton and others *v.* United Kingdom, Grand Chamber, 8 July 2003, No. 36022/97).

Many decisions of the European Court of Human Rights[4] have recorded that it is the existence of an adverse effect on an individual's private or family sphere, and not simply general damage to the environment, that determines whether, in the circumstances of a case, environmental damage has led to a violation of one of the rights guaranteed under Article 8(1).

In commentary in a Dutch human rights journal[5] relating to the judgment issued by the Court of Appeal in the Urgenda case, an academic noted that the case involved an application of Convention rights to a situation that was **more abstract** than in the cases decided by the European Court of Human Rights, and that it involved imposing positive obligations that were **more precise** than usual. She used an example that could be of concern to the Dutch public: if studies showed that wearing a helmet reduces the risk of death for cyclists, could a court make helmets mandatory using the Urgenda reasoning based on a right to life? Of course, that example is different as everyone is free to protect themselves by wearing a helmet, as long as they are aware of the risk, whereas individuals cannot take effective action to counter climate inaction by a State.

However, I share the view that these convention-based rules were not enacted to restrict the margin of appreciation of States by imposing judge-made standards of conduct. This is all the more true when, as is the case here, the State has responded to the issue at stake.

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[4] E.g. Kyrtatos *v.* Greece, No. 41666/98, § 52, ECHR 2003-VI; Fadaïeva *v.* Russia (ECHR, 9 June 2005, No. 55723/00); Di Sarno and others *v.* Italy of 10 January 2012 §§ 80 No. 30765/08; 24 January 2019, Cordella *v.* Italy, Nos. 54414/13 and 54264/15

[5] Leijten I. Human rights v. Insufficient climate action: The Urgenda case. Netherlands Quarterly of Human Rights. 2019; 37(2):112-118.

It should also be noted that, although the Urgenda case created quite a stir, other decisions issued this year in cases before other national courts did not go that far, with the courts holding that pleas based on the same provisions of the ECHR were invalid when applied to the action taken to counter global warming. In one case concerning the granting of deep-sea fossil fuel mining permits, the Oslo Court of Appeal, in a decision[6] issued on 22 January 2020, held that the decision does not create a "real and immediate" risk of human casualties for the inhabitants of Norway as a whole and does not have a "direct and immediate connection" to the alleged violations of the protection of the right to private and family life. However, the decision did not rule out, in keeping with the cases decided by the European Court of Human Rights, a potential consideration of the situation of inhabitants of specific areas particularly exposed to the direct consequences of such an authorisation. It should also be borne in mind that this judgment is currently being challenged before the Norwegian Supreme Court.

In a case[7] of 5 May 2020 on the climate inaction of the Swiss Confederation, the Swiss Supreme Court held that the rights of the applicants *"along with the rights of the rest of the population,"* had not been sufficiently affected by the alleged failings to establish a breach of Articles 2 and 8 of the ECHR.

Lastly, in a judgment[8] issued on 31 July 2020, the Supreme Court of Ireland did in fact quash the Government's national mitigation plan on the ground that it was not clear how the plan would achieve the target set for 2050, but it only did so after ruling that the rights of the applicant, an association, under the convention were not liable to be infringed[9].

2.3 A violation of two **specific EU directives** is also alleged.

Firstly, Directive 2009/28/EC of 23 April 2009, which "*sets mandatory national targets for the overall share of energy from renewable sources in gross final consumption of energy and for the share of energy from renewable sources in transport."*

It is alleged that France's renewable energy development trajectory is not in line with the 23% target to be achieved by the end of 2020. However, and even though the directive has been transposed into domestic law, you have not been asked to rule on an alleged **breach** by France of this directive, as this is not the role of this court but that of the Commission and, where necessary, the ECJ. You have only been asked, in the submissions, to order France to take all useful measures to reduce the GHG emissions curve. Even though these two subjects are related, the issue at stake here does not involve the enforcement of a specific obligation to develop energy from renewable sources, as was the case in the "*Amis de la terre*" air quality litigation in 2017 and 2020. It is unclear how an alleged breach of the objectives of the Directive

[6] Case: Greenpeace Nordic Association and Nature and Youth *v.* Ministry of Petroleum and Energy

[7] case: Verein KlimaSeniorinnen Schweiz *v.* Bundesrat 1C_37/2019

[8] case: Friends of the Irish Environment, Appeal No: 205/19

[9] It does not appear that this type of reasoning has been argued before this court, even though the individual application procedure before the ECHR under Article 34 of the Convention is not available to public-law entities (cf., for example, ECHR, 23 November 1999, Section de commune d'Antilly *v.* France, No. 45129/98). The applicable principle in judicial review cases, with the limits that I will discuss shortly, is that legal standing is assessed with respect to the submissions and not the pleas. For example, the court has ruled that a local authority may rely on the provisions of Article 1 of Protocol No. 1 to the Convention relating to the peaceful enjoyment of property (cf. 3 September 2008, Min. *v.* Aéroport de Bâle-Mulhouse, No. 304375, mentioned in the Tables of the Lebon Law Reports, to be compared to 23 May 2007, *Département des Landes*, No. 288378, mentioned in the Tables of the Lebon Law Reports on another point).

could automatically result in an obligation to take action to reduce GHGs, as the development of energy from renewable sources is not the only means to achieve a reduction in GHGs.

The same arguments can be used to dismiss the similar line of reasoning argued for Directive 2012/27/EU of 25 October 2012 on energy efficiency targets.

2.4 The last convention relied on to justify an obligation to act imposed on the State is the **Paris Agreement**, adopted on 12 December 2015 and ratified on 5 October 2016 by France and the EU.

The background to the Paris Agreement is relevant here. It was signed as part of the United Nations Framework Convention on Climate Change (UNFCCC), adopted at the Rio Earth Summit in 1992.

The first agreement adopted under this framework convention was the Kyoto Protocol in 1997, which set obligations to reduce GHGs, specifically for developed countries. The Kyoto Protocol came into force in 2005, but it was never ratified by the USA and Canada withdrew from the agreement in 2011.

With a view to achieving a universal application of GHG reduction commitments, it was decided not to set obligations in the Paris Agreement but to commit the State parties to submitting nationally determined contributions, which could be revised to make them more ambitious. As has been summarised by a legal commentator "*This 'bottom-up' dynamic, very respectful of the will of the Parties, has been criticised for its lack of ambition, but has been praised for its ability to deliver a universal agreement*"[10].

This is specifically the meaning of Article 4 of the agreement, which is at the centre of the debate before this court.

There is well-established case law on the invocability of non-EU international conventions. In a judgment issued on 11 April 2012 (GISTI, No. 322326), this court upheld the solution it had adopted in a previous judgment issued on 23 April 1997 (Conseil d'Etat, GISTI 23 Apr. 1997, No. 163043), ruling that the direct effect of the provision is the condition for its invocability in support of an application for judicial review.

The conditions of this direct effect were specified, which appear to correspond to **two alternative criteria** (even though the court appears to have ruled, in other decisions, that certain provisions lacked both criteria): **the first one** is that the exclusive purpose of the provision must not be to govern relations between States (such as, for example, the obligation[11] to inform a State whenever the extradition of one of its nationals to a third State is planned or the obligation[12] for the host State to avoid any interference with the exercise of consular protection). The **second one** is that it must not require any additional decision to have full effect against individuals. This court has also ruled that the lack of such effects cannot be inferred solely from the fact that the provision provides that the State parties are the subjects of the obligation defined in the provision.

[10] *Les circulations entre l'Accord de Paris et les contentieux climatiques nationaux: quel contrôle de l'action climatique des pouvoirs publics d'un point de vue global?* Anne-Sophie Tabau - *Revue juridique de l'environnement* 2017/HS17 (special issue), pages 229 to 244

[11] Conseil d'Etat, 8 March 1985, *Garcia Henriquez*, No. 64106

[12] Conseil d'Etat, 29 January 1993, *Bouilliez*, No. 111946

Article 4 of the Paris Agreement, and also its Article 2 which is relied on in other respects, appear to quite clearly fall within the second type of case: their very construction requires the State parties to define the content of their obligation.

As you are aware, legal writers have not been particularly supportive of your two GISTI decisions and their theoretical bases are difficult to justify. R. Abraham and then G. Dumortier have each unsuccessfully attempted to convince you in their opinions that the invocability of international conventions cannot **systematically** depend on their direct effect, at least in cases where an individual right is not at issue, where the self-executing nature of the international rule is a logical condition for its invocability.

For applications for judicial review, as shaped by this court, where legal standing does not require an infringed right, as is the case in Germanic law systems or for the ECJ for example, the GISTI decisions introduce a subjective condition for the effectiveness of pleas, which is quite unusual for this court. Another way of looking at the uniqueness of these decisions, which stand out from your usual approach, is to consider that by ruling that certain international rules only become effective following their translation into domestic law, you appear to introduce a form of dualism into the monist system of the Fifth Republic, that is not provided for in Article 55 of the Constitution.

Legal writers appear to believe that these decisions are marked by a type of expediency[13] in order to prevent a potential risk to legal certainty, which is not the worst justification. This has been summed up nicely by our colleague Marie Gautier[14]: "*when trying to reconcile the international order with the domestic order, [it is] a matter of opening up the floodgates to allow international rules to penetrate the domestic order in a measured and, above all, a controlled manner*".

In any event, it is not my role today to suggest that you should change your assessment of the invocability of conventions, because, as was the case for the two previous GISTI decisions, it does not appear that a ruling based on considerations of ineffectiveness, arising from your well-established case law, would be any different here from a ruling based on the merits, which would involve a departure from previous decisions. Indeed, it is only if France had failed to submit its NDCs that a ruling upholding invocability despite the absence of a direct effect would create a different outcome in a dispute relating to government inaction, as the Agreement requires action, and that action takes the form of an additional decision. And yet, once again, both the EU and France have submitted a national contribution under the Paris Agreement. It is my view that it is this commitment that should be examined to decide whether the inaction alleged by the applicant and the joined parties should be subject to your review.

3. This brings us to the second set of arguments, asking the court to ensure that the commitments made **are respected**.

3.1 Firstly, two pieces of EU legislation are emphasised, concerning the trajectories to be adopted by Member States to reduce their GHG emissions.

[13] See, in particular, Thierry-Xavier Girardot, AJDA 2014, p. 125 *Un arrêt plus grand qu'il n'y paraît*; A. Bretonneau and X. Domino, AJDA 2012, p. 936 *Les aléas de l'effet direct*

[14] RFDA, May-June 2012, p. 561

The first of these is 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 greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020. This decision was taken within the framework of the Kyoto Protocol, which is also a mixed agreement signed by both the EU and its Member States.

This decision sets Member States' greenhouse gas emission limits for 2020 compared to 2005 emission levels. For France, a reduction of at least 14% is imposed for 2020. It also provides, in Article 3.2, that subject to allowances traded between Member States which are not at issue here, and the rules governing a carry-over to the next year that are not argued by the government in its pleadings, "*each Member State shall annually limit its greenhouse gas emissions in a linear manner, in order to ensure that its emissions do not exceed its limit in 2020*".

The data published by CITEPA, the State operator that produces an annual inventory of France's greenhouse gas emissions into the air on behalf of the Ministry for an Ecological, Social Transition, shows the following changes (taken from the SECTEN national inventory report dated June 2020):

"*In France, national GHG emissions (...) were at an average level of 554 Mt CO2e between 1990 and 2005. After a **drop** between 2005 and 2014, emissions slightly **increased** ... between 2014 and 2017, primarily caused by the energy, transport and heating industries. Since 2018, emissions have again **dropped** (-4% in 2018, -1% in 2019) and this trend is expected to continue in 2020 given the COVID-19 crisis. Emissions in 2018 (445 Mt CO2e) and 2019 (441 Mt CO2e) were **at their lowest recorded levels since 1990**.*"

The applicants rely on the slight increase between 2014 and 2017, allegedly proving a failure to comply with the linear reduction required under the 2009 decision.

However, it is not disputed that the level of GHG emissions in France has been on a significant downward trend since 1991, but that for the 2013-2020 period covered by the 2009 Decision, the reduction was not linear as, instead, the level stagnated in 2016 and even rose slightly in 2017. However, even though this lack of linearity could constitute a breach of EU obligations, this is once again not the issue submitted to you. It appears likely that by the end of 2020, France will be close to its -14% target. In litigation seeking measures to ensure compliance with obligations, which is essentially forward-looking, a lack of linearity in the past cannot influence the court, if the interim losses have since been made up.

3.2 The second piece of EU legislation that has been relied on, setting a trajectory, is Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement.

This new Regulation therefore covers a ten-year period from 2021 to 2030, following on from the period covered by the 2009 Decision, which is now governed by the Paris Agreement, replacing the approach adopted under the 1997 Kyoto Protocol, which will cease to be used after 2020.

It may appear difficult, at first sight, to ask you to check compliance with EU obligations, not only for a **future** deadline but even more so for a period that has not even **started** yet.

However, the approach under the 2018 Regulation is quite similar to that of the 2009 Decision: each Member State must limit its GHG emissions by 2030 to a level calculated in relation to its emissions in 2005, with the percentage reduction for France set at -37% for 2030. The reduction must be linear until 2030 (based on the average GHGs for the 2016 to 2018 period), although flexibilities are available.

There is therefore a fairly large degree of continuity between the 2009 Decision and the 2018 Regulation: France must reduce its GHG emissions by at least 14% by 2020 and achieve a reduction of at least 37% by 2030, compared to its 2005 GHG emissions. They are binding targets and not merely programmatic targets, as the 2018 Regulation provides for corrective action in the event of insufficient progress by a Member State (Article 8) and compliance checks (Article 9).

3.3 In addition to this continuum of EU legislation, the national legislator has also taken action to lay down legal obligations limiting GHGs, with reference to the Paris Agreement, under Article L. 100-4 of the French Energy Code (*code de l'énergie*), in the version introduced by French Energy and Climate Act No. 2019-1147 of 8 November 2019.

"*In order to address an ecological and climatic emergency*", this article sets the 13 targets of the national energy policy. It is the first of these targets that is of direct interest to us: *"1° To reduce greenhouse gas emissions by 40% between 1990 and 2030 and to achieve carbon neutrality by 2050 by dividing greenhouse gas emissions by a factor of more than six between 1990 and 2050*".

It is clear that this target set by the legislator follows the logic of the Paris Agreement and the EU legislation and potentially goes even further.

However, it could be argued that this legislative target has no normative effect, as it forms part of a programmatic law (*loi de programmation*) within the meaning of Article 34 of the Constitution.

Continuing on from its case law on the former programming laws, the Constitutional Council (CC) has in fact ruled that programmatic laws, constituting a new category of laws arising from the Constitutional Act of 23 July 2008, and which "determine the objectives of State action", do not in principle have any normative effect, meaning most claims based on their unconstitutionality are not effective against them. You have followed this approach by holding that there can be no application for a preliminary ruling on the issue of the constitutionality of provisions of a law adopted on the basis of the ante-penultimate paragraph of Article 34 of the Constitution, as they have no normative effect and cannot therefore be treated as applicable to the dispute, within the meaning and for the application of Article 23-5 of French Order No. 58-1067 of 23 November 1958[15].

With regard to Article L. 100-4 of the French Energy Code, in its previous version introduced by the 2015 Energy Transition for Green Growth Act, the Constitutional Council has ruled

[15] Conseil d'Etat, 18 July 2011, *Fédération nationale des chasseurs* and *Fédération départementale des chasseurs de la Meuse*, No. 340512.

(Decision No. 2015-718 DC of 13 August 2015) that this provision setting the quantitative targets assigned to the energy policy was in fact a programmatic law.

However, in that 2015 version, not only were the GHG reduction targets less ambitious than in the version in force today but also it was limited to the determination of quantified targets and provided that the trajectory of this reduction would be specified in the carbon budgets referred to in Article L. 222-1 A of the French Environment Code (*code de l'environnement*).

The 2019 version of Article L. 100-4 has been supplemented as follows "*For the application of this section 1°, carbon neutrality means a balance, within the national territory, between anthropogenic emissions by sources and anthropogenic removals by sinks of greenhouse gases, as mentioned in Article 4 of the Paris Agreement ratified on 5 October 2016. Accounting for these emissions and removals shall be carried out in the same way as for the national greenhouse gas inventories reported to the European Commission under the United Nations Framework Convention on Climate Change, ...*;".

The addition of an express reference to the Paris Agreement could appear to be purely technical, as a simple framework for defining the concept of carbon neutrality. It was introduced following an amendment by the rapporteur for the bill in the Senate, Mr Gremillet, and the amendment states that it was designed to explain and "introduce certainty for the concept of 'carbon neutrality'". The legislator's desire to enshrine in law the aim of achieving carbon neutrality by 2050 is not technical, it is central. During the first reading in the National Assembly, the Senior Minister, Minister of Ecology, stated in a press release on 27 June 2019 that "The adoption of carbon neutrality is a concrete translation of the implementation of the Paris Agreement, making France one of the first countries to enshrine it in law".

The objectives of Article L. 100-4 can be found, in particular, in the carbon budget of Article L. 222-1A of the French Environment Code, which sets a ceiling on GHG emissions for each 3-year period from 2015 onwards, and in the national low-carbon strategy under Article L. 222-1B, which defines the procedure to be followed to ensure that the greenhouse gas emission mitigation policy is implemented in economically sustainable conditions in the medium and long term in order to achieve the objectives defined by law. The aim is to allocate the carbon budget among the major industries, with the annual emission tranches being indicative, which can be read *a contrario* as meaning that the three-year targets are binding. Article L. 222-1B(II) shows that these quantitative targets are more than simple guidelines for the public authorities, as it provides that "*the level of financial support for public projects shall systematically include, among other criteria, the contribution to the reduction of greenhouse gas emissions*".

The legislator has also provided that the State, local authorities and their respective public service companies must take into account the low-carbon strategy in their planning and programming documents that have a significant impact on greenhouse gas emissions. Moreover, Articles D. 222-1-A and B of the French Environment Code show that the data used in the carbon budgets is that notified to the Commission and under the United Nations Framework Convention on Climate Change.

On a related issue, you have ruled (*Greenpeace France*, 11 April 2018, No. 404959) that the multiannual energy programmes, provided for in Article L. 141-1 of the French Energy Code, establishing the priorities for action by the public authorities in order to achieve, in particular, the objectives of Article L. 100-4, could be subject to judicial review.

It would therefore appear difficult to argue that the targets set out in Article L. 100-4 of the French Energy Code, reducing GHGs by 40% between 1990 and 2030 and achieving carbon neutrality by 2050, are now purely programmatic objectives with no normative effect. The need to set France on the path to achieving carbon neutrality by 2050 with a review in 2030 is the rationale behind the Paris Agreement and the legislation adopted at EU level, and is reflected in the law.

A provision which, in the past and in an earlier version, was treated as part of a programmatic law, needs therefore to be considered as producing obligations for the State now. But as was noted in your 2013 annual report on soft law (p. 65), norms increasingly position themselves on "a graduated normative scale". The report further points out (p. 73) that some provisions have "shifted from soft law to hard law", for example the 1946 Preamble to the Constitution and the Declaration of the Rights of the Man and of the Citizen. In this case, the 2019 version of Article L. 100-4 appears to have climbed several rungs up the normative scale, particularly in light of the Paris Agreement.

However, an important point should not be overlooked. In his analysis called "*le Conseil d'Etat et l'interprétation de la loi"* (the Conseil d'Etat and the interpretation of the law) (RFDA 2002.877), Presiding Judge Genevois drew a distinction between traditional methods based on the primacy given to the will of the legislator and the growing role in interpretation of the requirements inherent to the hierarchy of norms.

With respect to Article L. 100-4, the approach that I suggest you should adopt is clearly more in line with the traditional method than the method resulting, in particular, from a review of the compliance with conventions, which, as explained by Presiding Judge Frydman in his opinion on the Nicolo judgment, "removes from the applicable legislation anything in breach" of treaty provisions.

It is not a question, in this case, of adopting an interpretation of the law **conforming** to the requirements of treaty-based law[16], as, under your Gisti decisions, there is no **requirement** of the Paris Agreement that could be invoked before you. It is merely a question of **interpreting** the provisions of the applicable law in line with the **will**[17] of the legislator to implement the Paris Agreement.

3.4 I am therefore of the opinion that the law and EU regulation from 2018 provide for a course of action that is binding on the government. This course of action is mainly in the future, with two major deadlines, in 2030 and 2050. Does this mean that we have to wait for these deadlines to occur before we can check whether the corresponding targets have been met, and only then, if necessary, order the government to act?

[16] See, classically again, your judgment of 22 December 1989, Min du budget *v.* Cercle militaire mixte de la caserne Mortier,

[17] As part of the circulation that appears undoubtedly to be at work in these climate change disputes, one decision, which is again a very recent decision, is noteworthy, issued by the London Court of Appeal on 27 February 2020 (R. (on the application of Plan B Earth) and Secretary of State for Transport [2020] EWCA Civ 214), concerning the Heathrow Airport extension project, in which the court notes (pt. 226-230) that it is not a question of giving effect to the Paris Agreement when it has not yet been incorporated into domestic law, but of giving the proper interpretation to a statutory provision deliberately and precisely enacted by Parliament, requiring the Minister to take the Paris Agreement into account in his decisions and explain how he did so.

A British economist, referring to the contradiction between long-term demands and short-term pressures on climate policy, has referred to the **tragedy of the horizon**[18]. If you were to rule that the applicants have to wait until 2030 to check whether the targets have been achieved, and only then consider an order to take the necessary action if they have not been met, this would mean that you would contribute in your own manner to this tragedy of the horizon. The idea that one should not wait until an absolute obligation has been breached before considering action to correct it, when tools exist to prevent the breach, is not too different from the previous cases you have decided, focusing on the effectiveness of administrative action.

For example, in a sectional decision (*TF1*, 10 July 1995, No. 141726) you validated the CSA's practice of giving formal notice during the course of a year to a TV channel to comply with its annual audio-visual broadcasting obligations, in order to ensure that those obligations would be met, without having to wait until the breach has actually occurred to attempt to remedy it, which would be unlikely to work.

The increasing insistence in your case law on the useful effect of your decisions takes a particularly serious turn here, as in climate matters, any delay in taking action could be irreversible and it may not be possible to make up for lost time.

4 Ladies and gentlemen, an examination of this case, the importance of which need not be stressed any further, may give the impression that we are facing a series of **doors** as in Bluebeard's castle[19], that a certain number of hunches, or even taboos, or inadmissibility applications in defence, could incite you not to **open**.

I believe that several of them should, however, be opened whether it is a question of the municipality's legal standing, the mandatory nature of the GHG reduction commitments or the need to ensure a review by the court of France's trajectory now, without waiting for the 2030 or 2050 deadlines, to ensure that it plays its part in the global effort that is essential to guarantee that our planet will remain habitable.

If you agree to open those doors, what should be the outcome in this case?

The debate before this court does not appear sufficient to identify what is hiding behind those doors for two reasons. **Firstly,** the debate has so far focused mainly on the legal right to open them rather than on what may be found behind them. **Secondly** there is a question of principle that needs to be decided: this dispute concerning a refusal to take all useful measures to reduce GHG emissions in France appears, naturally enough, to be connected to the line of decisions established in your ruling by the Combined Court in the *Association des Américains Accidentels* case[20], which provides that when examining an application for judicial review, the court must assess the legality of the regulatory instrument whose repeal for the future has been requested, in light of the rules applicable on the date of its decision. You justified this principle, with regard to a refusal to repeal a regulatory instrument, by the useful effect of its annulment under the judicial review procedure, which lies in the obligation, that the court may order of its own motion, to repeal it in order to put an end to the unlawful conduct.

[18] Mark Carney, speech given to Lloyd's of London on 29 September 2015

[19] In his version of the opera by B. Bartók, or the essay by G. Steiner....

[20] Conseil d'Etat, 19 July 2019, *Association des Américains Accidentels*, No. 424216

As you are aware, in the 2017 *Amis de la Terre* case[21] concerning a refusal to take measures to achieve the air quality required under EU law, this court annulled the refusal in question for 16 administrative zones, in light of the situation on the date of that refusal, but an order to take action was issued in respect of 12 zones only, after finding that the relevant levels continued to be exceeded in those zones only on the date of your decision. Your decision in the *Association des Américains Accidentels* case should automatically mean that there is no need to proceed in two stages, that you can avoid checking the legality of the refusal on the date of the refusal, as you would do when you judge that there no more case to answer, and concentrate instead on its legality on the date of your decision, and the useful effect of the annulment is even more obvious here, all the more so since the municipality has asked the court for an order to take action.

However, since the date of the disputed refusal, many events have taken place, including measures that could have an impact - positive or negative - on compliance with the 2030 deadline, but it is not possible to decide this based on the evidence submitted to you. For example, the adoption of a new three-year carbon budget last April or the announcement of a governmental recovery plan that includes, in particular, measures for energy efficiency renovation work in buildings, measures that are, in principle, identified by the High Council on Climate (HCC) as particularly useful in the short term to mitigate emissions. The HCC has also analysed[22] the progress made so far, noting that we "need to pick up the pace and get back on track" given the rate of GHG reductions observed in recent years, which it considers insufficient to meet future deadlines.

Moreover, national contributions are not fixed, as can be seen from the European Green Deal announced by the EU, which includes a 2030 climate target plan, in which the Commission proposes to raise the EU's ambition on reducing the EU's greenhouse gas emissions to at least 55% below 1990 levels by 2030 (current target is 40%). If this results in changes to national obligations, it is my opinion that this point should be taken into account.

Unlike in the air pollution case, where the deadlines for the State's obligations had expired several years before you ruled on the case and where you needed to check whether the obligations were still not being met, the case in point requires you to take a stand on a trajectory that is essentially for the future and a more in-depth adversarial debate would appear necessary between the parties on this point to check whether the planned trajectory is consistent with the reduction target.

Confronted with a global problem, with States having a significant role to play in its resolution, the national courts are particularly solicited. By adopting this proposed review of the trajectory to curb global warming, you will introduce a **requirement**, with a specific line of reasoning based on reviewing government action within its power to enforce the law, that is ultimately close to those that other European national courts have adopted or may adopt by asking their governments to prove that their action against global warming is sufficient and effective.

[21] Conseil d'Etat, 12 July 2017, *Les amis de la Terre*, No. 394254prononcer un non-lieu

[22] Annual Report for 2020

For those reasons, I submit that the court should:

- dismiss the submissions to the extent that they challenge the implied refusal to take legislative action, on the ground that the court does not have jurisdiction to hear this issue;

- dismiss the submissions filed by Mr Carême as he lacks legal standing;

- allow the joinders;

- dismiss the submissions seeking an annulment under the judicial review procedure of the implied refusals to take any regulatory action to make climate a mandatory priority and to implement measures for an immediate adaptation to climate change;

- before ruling on the remainder of the submissions, order an additional investigation measure requiring the parties to produce, within three months, all evidence to allow the court to check, in view of the increase introduced in French Decree No. 2020-457 of 21 April 2020, whether the trajectory now planned is consistent with the target of reducing France's greenhouse gas emissions set in Article L. 100-4 of the French Energy Code and in Annex I to Regulation (EU) 2018/842 of 30 May 2018.