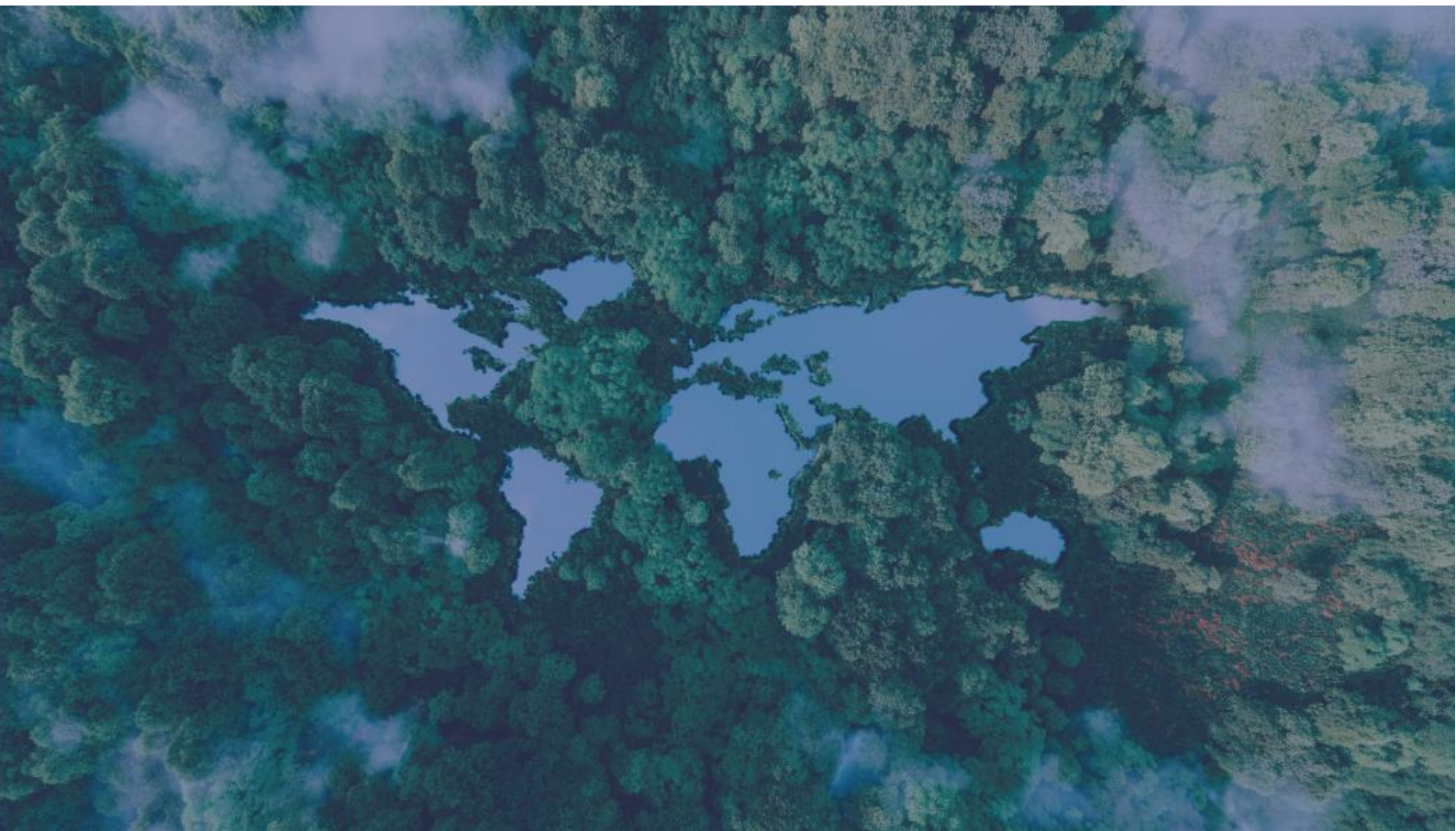




**British Institute of
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Comparative Law**

Global Perspectives on Corporate Climate Legal Tactics: France National Report

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Executive Summary

This report presents the various climate actions brought against companies before the French courts. In France, as in many other countries, the number of climate lawsuits brought against major French corporations whose activities emit greenhouse gases is growing all the time. For the moment, three types of activity are targeted: fossil fuel production, food and banking. With the exception of two administrative lawsuits, these are civil actions. Most actions are brought before a judiciary judge, more precisely the Paris Court of Justice (*Tribunal judiciaire de Paris*), with the aim of stopping activities that emit greenhouse gases. To date, if we disregard the legal actions brought before non-judicial bodies, we can count eight legal actions. However, none of them has yet resulted in a conviction. While most of the lawsuits are only at the summons stage or are still pending, some have been declared inadmissible, preventing the judge from ruling on the merits of the case.

This report explains the main causes of these various legal actions, the difficulties encountered by plaintiffs and the arguments that could be advanced if a judge were to rule in their favor.

Nota bene: A methodological clarification is in order: the actions are presented with regard either to judgments already rendered, or to certain published summonses. Some summonses have not been made public. The summonses that have been made public therefore highlight the arguments of the plaintiffs in the action, in particular the environmental protection associations.

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Introduction

To date, there have been 8 climate disputes against companies. Only one case, which was rendered by an administrative summary judge in 2022 (France Nature Environnement & Guyane Nature Environnement v. Prefect of Guyane and EDF - "The Larivot power plant case" - July 27th 2021 and February 10th 2022), has been finally decided. Among the seven other cases, three are still at the writ summons stage (Envol Vert et. al., v. Casino, writ of summons, March 2nd, 2021; Comissão Pastoral da Terra and Association Notre Affaire à Tous v. BNP Paribas, writ of summons, Feb. 27th 2023; Notre Affaire à Tous, Les amis de la Terre France, Oxfam France v. BNP Paribas, writ of summons February 23rd 2023). Obviously, they have not yet given rise to any judicial decision. Concerning the four other cases, even though they have led to a judgment, they haven't yet resulted in final decisions and are still pending. While one was handed down by an administrative judge in 2021 (Friends of the Earth et al. v. Prefect of Bouches-du-Rhône and Total - the "La Mède refinery case" - April 1st 2021), a second was rendered by a summary judiciary judge in 2023 (Les Amis de la Terre France, L'association NAPE & L'association AFIEGO v. TotalEnergies, Oct. 29th 2019 - L'association Survie, L'association Civic Response to Environment and Development, l'association Navigator of Development association v. TotalEnergies) and the two others by a trial judiciary judge in 2023 (Notre Affaire à Tous and others v. Total, January, writ of summons 28th 2020, Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France, writ of summons March 2nd 2022).

The three cases brought before the judiciary judge of Paris (all three concerning TotalEnergies) did not enable the court to rule on the merits of the case: while the action based on a legal argument relating to greenwashing had, so far, only led to an admissibility judgment (Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France), the other two actions based in particular on the statutory duty of vigilance were declared inadmissible in 2023 (Les Amis de la Terre France, L'association NAPE & L'association AFIEGO v. TotalEnergies, October 29th 2019 - L'association Survie, L'association Civic Response to Environment and Development, l'association Navigator of Development association v. TotalEnergies; Notre Affaire à Tous and others v. Total, January 28th 2020). Both of these cases are at appeal. They are still pending.

Nevertheless, as the French report shows, even though to date there has been no case in France of a company being convicted for its contribution to global warming, it is possible to highlight the most relevant causes of action (1), the difficulties relating to procedure and evidence (2) and the remedies requested by plaintiffs (3).

1. Causes of Action

In the climate field, the vast majority of legal actions are based on corporate duty of care, a legal tool under private law recognised in the French Commercial Code (articles L. 225-102-5 of the Commercial Code) (B). Often accompanied by constitutional law (G), tort law (C) and contract law (E), this basis has not yet enabled plaintiffs to obtain a conviction against a company due to difficulties linked to the admissibility of the action. Admittedly, an action based on consumer law, to punish unfair and deceptive practices, has been declared admissible. However, as the report shows below (3. Remedies), unlike other grounds, including the environmental law provisions invoked before the administrative judge (A), the control of deceptive unfair practices does not make it possible to obtain measures to reduce greenhouse gas emissions.

A. Climate Change Law / Environmental Law Statutory Provisions

Under French law, one way of contesting a polluting activity is to request the cancellation of an operating permit, by means of a legal review known as "*recours pour excès de pouvoir*". Since the operating permit is issued by a state authority (the prefect or directly by the competent minister, depending on the activity), the "*recours pour excès de pouvoir*" must be brought before the administrative court, which has sole jurisdiction to verify the legality of an operating permit. The judge must then assess whether the authorisation was issued in compliance with certain environmental protection rules (mainly found in the French Environment Code), such as those governing impact studies, participation and information.

The rulings presented below show that some environmental protection associations are using the "*recours pour excès de pouvoir*" to try to obtain the annulment of an authorization to perform an activity that is harmful to the climate.

While the case of *Amis de la Terre et al. v. Préfet des Bouches-du-Rhône and Total* (a decision in which the plaintiff was vindicated, but which is currently being appealed) calls into question compliance with the rules governing climate impact studies, the case of *France Nature Environnement & Guyane Nature Environnement v. Préfet de Guyane and EDF* (a decision in which the plaintiff was vindicated, but which is currently being appealed) calls into question compliance with the rules governing climate impact studies. *Préfet de Guyane and EDF* (decision dismissed) raises the question of whether the environmental authorization granted to a power plant operator must comply with the national policy objective of reducing emissions set out in article L. 100-4 of the Energy Code.

In addition to these two rulings, although we can expect to see further decisions in the future based on the illegality of operating permits, the room for manoeuvre remains limited, as only certain grounds can be invoked to challenge operating permits. In addition to non-compliance with the impact study, these include failure to carry out an

inquiry, failure to obtain the opinion of a competent body, or failure to respect certain protected interests referred to in article L. 711-1 of the Environmental Code. For the time being, however, the two decisions described above show that while failure to comply with the rules governing impact studies may be successful, this is not the case when it comes to taking into account national targets for reducing greenhouse gas emissions.

Friends of the Earth et al. v. Prefect of Bouches-du-Rhône and Total – “La Mède refinery case” – April 1st, 2021

On April 1, 2021, the Administrative Tribunal of Marseille partially invalidated Total's permit to operate a biorefinery granted by the Prefect of Bouches-du-Rhône on the ground that the environmental impact statement undertaken by Total was incomplete. More specifically, it found that the lack of information in relation to the impacts of the biorefinery on the climate hindered the provision of public information and influenced the Prefect's decision.

First, the tribunal recalls the relevant provisions of the French environmental code, which required the assessment of the foreseeable atmospheric emissions of the proposed facility on air and climate quality. Given the very high quantities of palm oil and its derivatives (known as *palm fatty acid distillates*) needed to produce biofuel and mentioned in the permit, the tribunal found the impact foreseeable. Second, building upon the current state of scientific knowledge both endorsed at the national and European level, the tribunal underlines the risk of palm oil production as related to its “indirect land use change” (ILUC), which, because it may lead to the extension of agricultural land into areas with high carbon stock, may ultimately result in additional GHG emissions (at § 46). More specifically, in order to substantiate the assertion that palm oil production generates ILUC, which in turn has adverse impact on GHG emissions, the Tribunal quotes an EU Commission report (COM(2019) 142 final) and the related directives (UE) 2015/1513 of September 9th 2015 and 2018/2001 of December 11th 2018, as well as the appendix of the delegated regulation of (UE) 2019/807 March 13th 2019 (at § 47). As far as France is concerned, it quotes the French Budget Act n° 2018-1317 of December 28th 2018 for fiscal year 2019, which excludes products based on palm oil from a tax discount list reserved for biofuels and confirmed by the decision of the Constitutional Council n° 2019-808 of October 11th 2019. Third, the Tribunal asserts, based on the aforesaid, that Total's environmental impact statement of the biorefinery of La Mède should have contained an assessment of the direct and indirect effects on climate “which shall not be construed in a strict local manner as reduced to the immediate perimeter of the facility” (at § 50).

The Tribunal then applies this standard to Total's environmental impact statement. The Tribunal notes that the assessment of the effects on climate, which Total characterises as “positive”, only considers the conversion of the facility from its previous designation

as a crude oil refinery to its new designation as a biorefinery and the related decrease in GHG emissions it allows in the immediate vicinity of the site. By doing so, Total's environmental impact statement fails to consider that the functioning of the facility primarily relied on palm oil and its derivatives, and that the impact on climate resulting from the very production of this oil, no matter where it is produced, has worse adverse effects than other compounds likely to serve the production of biofuels on the site and can generate more GHG emissions than fossil fuel production. The tribunal consequently concludes that the plaintiffs have properly established the incompleteness of Total's environmental impact statement as related to the facility's impact on climate (at § 52).

It should be noted that the Tribunal rejects the plaintiffs' argument that the environmental impact statement should have assessed the effects of Total's supply plan of pure plant oil necessary to produce biofuels. For the administrative judge, logging aimed at producing vegetal oil, on the one hand, and the production of biofuels, on the other hand, pursue two distinct objectives, fall within distinct legislations and are subject to distinct procedures. Fulfilling the conditions of logging operations to produce vegetal oil is not part of what the Prefect reviews when granting a biorefinery permit. If the relevant statutory provisions require an assessment of the direct and indirect effects of a given project, they do not mandate an appraisal of the global impacts of distinct activities. The tribunal, therefore, makes a sharp distinction between the effects of the functioning of the biorefinery itself and the effects of the supply of vegetal oil from logging activities in Asia, whose location is incidentally likely to change over time (at § 39-40). The Tribunal decision has been appealed, and a hearing is planned for September 2023. In the meantime, in another case bearing some resemblances, the Council of State decided on the scope of environmental impact assessments (direct and indirect environmental effects of a given project). The Council of State overturned the Court of Appeals' decision and held that the environmental impact assessment should cover the wood supply chain of the biomass power plant operator because of its indirect effects on the local forestry resources (see Council of State, n° 450135, *FNE et al. v. Prefect of Bouches-du-Rhône, La Gardanne*, March 27th 2023).

Reference: TA Marseille, April 1st, 2021, N° 1805238

<http://marseille.tribunal-administratif.fr/A-savoir/Communiqués-Selection-de-decisions/Jugement-du-tribunal-administratif-n-1805238-sur-la-requete-des-associations-Les-amis-de-la-terre-France-et-autres-contre-la-decision-prefectorale-autorisant-la-societe-Total-raffinage-France-a-poursuivre-l-exploitation-de-la-raffinerie-de-La-Mede>

France Nature Environnement & Guyane Nature Environnement v. Prefect of Guyane and EDF – “The Larivot power plant case” - July 27th 2021 and February 10th 2022

On July 27th 2021, the interim relief judge of the administrative tribunal of Cayenne granted a request filed by two NGOs to suspend an environmental authorisation issued to EDF by the Prefect of Guyane on October 22nd 2020, related to its operation of an oil-fired thermal power plant in Guyane. The judge suspended the authorisation on the ground that serious doubts existed in relation to its legality with respect to (i) the objectives set out in article L. 100-4 of the energy code of reducing greenhouse gas (GHG) emissions by 40 % between 1990 and 2030, and to (ii) art. L. 121-40 of the urban planning code relating to the limited extension of urban development in areas close to the shoreline.

The interim relief judge’s decision was appealed by EDF before the Council of State, which granted relief to the power company on February 10th 2022. The Council of State reversed the decision on the two aforementioned grounds. Only the climate motive will be analysed here. The question asked to the Court was whether an environmental authorisation granted to a power plant operator had to comply with the national policy objective of emissions reduction spelled out in article L. 100-4 of the energy code.

The Council of State ruled that the interim relief judge erred in considering that a serious doubt existed regarding the legality of the environmental authorisation’s compliance with article L. 100-4 of the energy code. In particular, it found that there was no requirement for environmental authorisations granted to power plants to emit GHGs under article L. 181-2, 2° of the environmental code (which refers to article L. 229-6 transposing the EU 2003/87 directive scheme for GHG emission allowance trading within the Community) to be in conformity with article L. 100-4 of the energy code. For the High Court, unlike authorizations “to operate” pursuant to article L. 311-5 of the energy code and granted by the Ministry of Energy (which is responsible for the *national* energy policy) as well as environmental authorisations which stand for licenses to operate under article L. 181-2, 10°, environmental authorisations “to emit” are not bound to consider the national policy objective of emissions reduction spelt out in article L. 100-4 of the energy code. Formally, the Council of State applied the principle of independence of legislation, which holds that the lawfulness of a permit granted pursuant to one legislation (here environmental) cannot be reviewed under the rules belonging to another legislation (here energy). But the decision can also be explained by the fact that environmental authorisations granted to fossil fuel power plants “to emit” are governed by the EU mandatory emissions trading scheme and that this regional market approach is inconsistent with setting an identical emission reduction target to each individual power plant. Although the Council of State overrules the interim relief judge decision, it leaves the door open for challenging the legality of authorisations to operate fossil fuel power plants with respect to the climate objectives.

In the present case, the authorisation to operate was granted by the Ministry of Energy on June 13th 2017, but was not challenged in court by the claimants. Had the two NGOs contested such authorization, the discussion, on the merits, would have probably focused on the scope of the confrontation to the "trajectory review". Indeed, article L. 311-15 of the energy code requires power plant authorizations to "take into account (...) the impact of the plant on the objectives of the fight against the worsening of the greenhouse effect". While the text only requires the authorization to "take into account" such objectives, it also states that the authorization shall be compatible with the pluriannual energy program (PPE) which is governed by article L. 141-1 and remands to the quantified targets set by article L. 100-4. Unsurprisingly, future litigations will be about the scope of this "take into account" v. "compatibility" review.

Reference: TA Guyane, July 27th 2021, N° 2100957 & CE, February 10th 2022, N° 455465

<https://www.actu-environnement.com/media/pdf/news-40045-TA-cayenne-Larivot-troisieme-jugement.pdf>

B. Human Rights Law

French law includes several texts recognising human rights at the constitutional level. Alongside the 1789 Declaration of the Rights of Man and the Citizen, there is the 2005 Charter of the Environment. This Charter is critical, as it recognises rights but also sets out duties in the environmental field. According to Article 1 of the Charter, "Everyone has the right to live in a balanced environment respectful of health", under Article 2, "Everyone has the duty to take part in preserving and improving the environment" and, according to Article 3, "Every person must, under the conditions defined by law, prevent the damage it is likely to cause to the environment or, failing that, limit its consequences". In 2011, the French Constitutional Council also recognised the obligation of vigilance, under which "all persons are bound by an obligation of environmental vigilance with regard to environmental damage that may result from their activity" (Decision no. 2011-116 QPC, April 8, 2011, M. Michel Z. et autres, JO, April 9, 2011, p. 6361). Finally, France is a member of the European Convention on Human Rights, and French courts apply its provisions directly.

For the time being, there are no legal actions based directly and only on non-compliance with human rights and duties in environmental matters. While the duty to prevent damage to the environment set out in Article 3 of the French Constitutional Charter for the Environment helped justify the French government's conviction in the "*Affaire du siècle*" case in 2021 (<http://paris.tribunal-administratif.fr/Actualites-du-Tribunal/Espace-presse/L-Affaire-du-Siecle-la-reparation-du-prejudice-ecologique-bien-que-tardive-est-complete>), no legal action has yet been successful or brought against a company on this only basis.

It should be noted, however, that two legal actions presented below are based more indirectly on Article 1 and Article 2 of the French Charter of the Environment and on the constitutional duty of vigilance recognised by the French Constitutional Council. These are *Notre Affaire à Tous et autres v. Total* (writ of summons dated January 28, 2020, Tribunal de Grande Instance de Paris, July 5, 2023, judgment of inadmissibility, decision under appeal, in progress) and *Notre Affaire à Tous, Les amis de la Terre France, Oxfam France v. BNP Paribas* (writ of summons dated February 23, 2023, in progress). One case is also based on the constitutional duty of vigilance (*Envol Vert et al., v. Casino* (writ of summons, March 2nd, 2021) – pending). In these cases, the constitutional duties to prevent environmental damage and the constitutional duty of vigilance are considered constitutional norms reinforcing the invocability of another legal basis: the legal duty of vigilance provided for in articles L. 225-102-4 and L. 225-102-5 of the French Commercial Code (https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000043978824#:~:text=%2DQuand%27une%20society%20is%20under%20reinte%2C%20to%20them%20respect).

Admittedly, this legal duty of care is linked in this report to the constitutional rights of the individual and can, therefore, be seen as a concrete expression of the constitutional duties of prevention and duty of care. However, it should be stressed that it could also be linked to two other causes: "Climate change law/environmental law provisions (A)" and "Tort law (B)". Indeed, not only does the duty of care recognised in the French Commercial Code partly fall under the legal provisions of environmental law, but it can also be seen as a specific application of the more general duty of care deriving from tort law.

Below, we present five climate actions based on the duty of care provided by the French Commercial Code.

More specifically, the plaintiffs rely on article L. 225-102-4 of the French Commercial Code. According to this provision created by the law of March 27, 2017 (Law no. 2017-399. relating to the duty of care of parent companies and ordering companies):

"I.- Any company that employs, at the close of two consecutive financial years, at least five thousand employees within its company and in its direct or indirect subsidiaries whose registered office is fixed on French territory, or at least ten thousand employees within its company and in its direct or indirect subsidiaries whose registered office is fixed on French territory or abroad, establishes and effectively implements a vigilance plan.

Subsidiaries or controlled companies that exceed the thresholds mentioned in the first paragraph are deemed to meet the obligations laid down in the present article if the company that controls them, within the meaning of article L. 233-3, draws up and implements a due diligence plan relating to the activity of the company and all the subsidiaries or companies it controls. This plan includes reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, personal health and safety, and the

environment, resulting from the activities of the company and those of the companies it controls within the meaning of II of Article L. 233-16, directly or indirectly, as well as from the activities of subcontractors or suppliers with whom it has an established business relationship, when these activities are linked to this relationship.

The plan is designed to be drawn up in association with the company's stakeholders, where appropriate within the framework of multi-stakeholder sectoral or regional initiatives. It includes the following measures:

- 1° Risk mapping to identify, analyse and prioritise risks;
- 2° Procedures for regularly assessing the situation of subsidiaries, subcontractors or suppliers with whom we have an established business relationship with regard to risk mapping;
- 4° A system for alerting and collecting reports on the existence or occurrence of risks, drawn up in consultation with the company's representative trade unions;
- 5° A system for monitoring the measures implemented and evaluating their effectiveness. The vigilance plan and the report on its effective implementation are made public and included in the management report referred to in the second paragraph of Article L. 225-100 (1).

A Conseil d'Etat decree may supplement the vigilance measures provided for in paragraphs 1 to 5 of this article. It may specify the procedures for drawing up and implementing the due diligence plan, where applicable, within the framework of multiparty sectoral or regional initiatives.

II - Where a company given formal notice to comply with the obligations set out in I fails to do so within three months of the notice being given, the competent court may, at the request of any person with an interest in the matter, order the company to comply with these obligations, subject to a fine where appropriate.

The president of the court, ruling in summary proceedings, may be seized for the same purpose".

From this detailed provision, it should be noted that under French law, since 2017, certain large companies have been required to draw up and implement a due diligence plan, including reasonable vigilance measures. These make it possible to identify and prevent human rights, health, safety and environmental risks arising from their activity or that of their subsidiaries and other subcontractors. The advantages of this provision are twofold: on the one hand, the duty makes it possible to require a parent company to adopt measures to prevent environmental damage created by the activity of a foreign subsidiary; on the other, its application is guaranteed by a legal action which enables plaintiffs to apply to the judge to require the companies concerned to comply with the legal requirements.

The five decisions presented follow the same reasoning: 1) The company's activity is a greenhouse gas emitter 2) The company must identify this risk and provide for measures to reduce greenhouse gas emissions 3) The plan adopted is imperfect 4) The judge must therefore force the company to revise its plan and provide for more appropriate measures to reduce greenhouse gas emissions.

Among these five actions, two are directed against a fossil fuel company (TotalEnergies) and criticise its oil explorations; two are directed against a bank (BNP Paribas) and criticise the financing it grants to activities that emit greenhouse gases; another against a major food retailer concerning the import of beef.

Envol Vert et al., v. Casino (writ of summons, March 2nd, 2021) – pending

The French supermarket chain Casino is sued for its involvement in the cattle industry in Brazil and Colombia, which plaintiffs, an international coalition of NGOs, allege caused environmental and human rights harm. The alleged harms include human rights violations including indigenous people's rights, health and safety violations and environmental damages resulting from illegal deforestation which include biodiversity loss and climate change through the destruction of carbon sinks. The entities at the origin of the harm are the beef suppliers of Casino's subsidiaries in Brazil (GPA) and Columbia (Grupo Exitó).

Plaintiffs allege that Casino breached its duty of vigilance described in art. L. 225-102-4 I. of the commercial code by failing to adopt and implement a proper vigilance plan. They contend that the judiciary was given by statute the power to scrutinize the effectiveness of the plan. And in accordance with art. L. 225-102-4 II., they seek a court order enjoining Casino to publish and implement a plan comprising a set of measures which they say will satisfy the requirements of art. L. 225-102-4 I.

It must be noted that plaintiffs also contend that Casino breached the general environmental obligation to act with vigilance enshrined by the Constitutional council in 2011 and strengthened by the reference made by art. L. 225-102-5 to article 1240 of the civil code (see below: cause of action: tort law and civil environmental liability).

The alleged harms and their significance are substantiated by a series of reports published by NGOs and investigative journalists documenting the consequences of Casino's subsidiaries' suppliers' practice of acquiring beef from farms that raise their cattle on lands illegally grabbed or illegally deforested.

The alleged breach of Casino's duty of vigilance relates to the inadequacy of its vigilance plans.

Plaintiffs contend:

- That relevant international soft law rules establish, in certain circumstances that plaintiffs purport are met, a heightened standard of corporate due diligence for responsible agricultural supply chains (see OECD-FAO guidance for responsible agricultural supply chains).
- That despite proves of aggravating adverse impacts that Casino has been aware of, its vigilance plans have remained loose, vague and identical over the years.
- That its plans are inadequate and there is no monitoring of the efficiency of the measures taken. To substantiate this claim, plaintiffs identify four breaches:

- Identification of adverse impacts is decontextualized (neither connected to a particular product or activity of the group nor to a particular region where its subsidiaries operate) and lacks prioritization. In addition, it is not updated although adverse impacts are worsening.
- Assessment of suppliers and measures aimed at preventing and limiting harms are incomplete and deficient.
 - Relevant international soft law rules (UN/OECD guiding principles + OECD-FAO guidance + the recital of the March 27th 2017 Act + NGOs recommendations for implementing the statute) establish that assessment of suppliers should cover the entire supply chain.
 - GPA's indirect suppliers are not assessed, and the description of how direct suppliers are assessed is vague.
 - Measures aimed at preventing and limiting adverse impacts are not appropriate: According to plaintiffs, the fact that illegal deforestation is documented by samples of beef sold by subsidiaries of Casino, despite defendant's assertion that 100 % of its suppliers have subscribed to its geotracking system "safe trace", shows that its policy is inefficient.
- The objectives and measures adopted in the plan are not monitored.
- The complaint procedure is inefficient (the fact that no "duty of vigilance" complaints was ever received despite widespread and severe violations demonstrates the inadequacy of the mechanism).

Reference: <https://climatecasechart.com/non-us-case/envol-vert-et-al-v-casino/>

Comissão Pastoral da Terra et Association Notre Affaire à Tous v. BNP Paribas, writ of summons, Feb. 27th 2023 – pending

In October 2022, Brazilian NGO Comissão Pastoral da Terra and French environmental NGO Notre Affaire à Tous, sent a notice of intent to sue BNP Paribas for its financing of companies which participate in the deforestation of the Amazon in Brazil, such as Marfrig, one of the world's largest producers of beef. Suppliers to Marfrig have engaged in severe deforestation of the Amazon, land-grabbing protected indigenous territories, and forced labour in cattle farms. Considering the answer by BNP Paribas as largely insufficient and non-satisfactory, the NGOs decided to bring suit before the Judicial Court of Paris (*Tribunal judiciaire de Paris*) on February 27th 2023. In their writ of summons, the associations accuse the French bank of financing the production and export of beef by the Brazilian company Marfrig for at least ten years.

First, concerning the climate (we leave aside here the infringement of workers' rights and the aspects related to slavery), the summons recalls the important consequences on climate change of the deforestation in the Brazilian Amazon caused by the clearing and the transformation of forests into pastures for cattle. The plaintiffs rely on a large body of private and public expertise to highlight the climate change impacts of Brazil's beef industry, particularly those operations in the legal Amazon that include breeding and fattening farms. Some of these farms are direct or indirect suppliers to Marfrig, one of the three major slaughter companies dominating the beef industry in Brazil. Cattle farming is a source of global warming for three reasons. First, because it involves the

deforestation of large areas. Cattle ranching is a major source of deforestation as forests are burned to make way for grazing areas. Agriculture and land use change account for 73% of the country's greenhouse gas emissions. In the process of deforestation, the use of fire to clear the land after the trees are cut down releases large amounts of CO₂ into the atmosphere. In addition, trees naturally absorb carbon dioxide (CO₂) for the process of photosynthesis; their destruction thus decreases the greenhouse gas reduction capacity of the planet. Second, because it involves the release of methane gas. Carbon dioxide and methane are the main pollutants contributing to global warming. According to the Intergovernmental Panel on Climate Change (IPCC), methane is the second most important contributor to warming and is responsible for about 0.5°C of global warming. Methane emissions from cattle farming have two sources: digestive gases from cows and the management of manure used to grow soybeans for cattle feed. Finally, because the commitments made by the actors of the beef industry in Brazil are ineffective or inefficient. The summons notes that: agreements have been reached with prosecutors to fight deforestation; commitments have been made under pressure from certain NGOs (Greenpeace); Marfrig has committed to achieving a "zero deforestation" objective by 2025 for its activities in the Amazon, and by 2030 for the Cerrado. It is also noted that instruments of control and traceability of the supply chain exist, such as the environmental rural cadastre, the animal transfer guide, and the SISBOV (voluntary certification system created and coordinated by the Ministry of Agriculture).

Secondly, the assignment recalls Marfrig's role in Brazil's beef industry. Marfrig Global Foods SA (MARFRIG) is a company incorporated under Brazilian law, with headquarters in São Paulo. It is listed on the São Paulo Stock Exchange. Its main activity is the processing and distribution of meat. Marfrig's market share in the Brazilian cattle sector is about 7.5%, and 72% of its revenues in Brazil come from exports. In the legal Amazon, Marfrig has three large production units. In 2020, as an extension of an agreement with Greenpeace in 2009, Marfrig launched the "Green Plan+" program (Plano Verde+), under which it committed to invest 500 million Brazilian real (\$94 million) to ensure that 100% of its production chain is sustainable and deforestation-free by 2030. However, the associations rely on a large number of expert reports, including the Ethics Council of the Norwegian Global Government Pension Fund and the Inter-American Development Bank, to demonstrate that the company has not complied with the 2009 agreement and that its activity continues to rely on deforestation practices.

Thirdly, the summons recalls the importance of the role played by BNP Paribas in the financing of this activity that contributes to climate change. The defendant, BNP Paribas, is said to be the leading French bank financing beef production companies in Brazil, with a total of 456 million euros invested in soy, beef and palm oil over the past ten years, including 117 million between January 2021 and September 2022. In particular,

it participated between 2019 and 2021, along with other international banks and through a U.S. subsidiary, in the Marfrig bond issue allowing this company to be financed for a total amount of three billion dollars. The financing is composed as follows: \$500 million transition bonds issued in 2019 and maturing in 2029, \$1 billion bonds issued in 2019 and maturing in 2026, \$1.5 billion bonds issued in 2021 and maturing in 2031. Yet, BNP Paribas is public about its climate commitments and how it cares about the impact of the cattle industry in Brazil. In 2018, it signed the Cerrado Manifesto, which aims to prevent deforestation in the Brazilian tropical savannah. It also adopted within its Sectoral Policy on Agriculture, in February 2021, specific measures on the beef and soy sector in the Amazon to fight deforestation.

To conclude, the plaintiffs believe that the financing granted by BNP Paribas to Marfrig constitutes, in several respects, a breach of the statutory duty of vigilance provided for by Article L. 225-102-4 of the French Commercial Code.

It is true that BNP Paribas produced a due diligence plan in 2022: although it is short and not very detailed, it does include some information. It specifies that BNP's activities carry risks for human rights and the environment. To limit the risks, the company excludes certain companies from its business relationships. With regard to its agricultural sector policy, the group specifies that it encourages its clients producing or buying beef or soy in the Amazon and Cerrado regions of Brazil to become "zero deforestation" companies and to demonstrate their progress in a transparent manner. BNP Paribas adds that it will only provide financial products or services to companies with a "zero deforestation" strategy in their production and supply chains by 2025 at the latest. The subpoena also states that BNP Paribas had committed in 2017 to eliminate deforestation from its portfolio by 2020 via the Soft Commodities Compact (SCC) Zero Net Deforestation initiative, which stems from the Consumer Goods Forum and the Banking Environment Initiative. In 2018, the BNP Paribas Group signed the Cerrado Manifesto aimed at preventing deforestation in the Brazilian tropical savannah. In addition, the Group is committed to respecting the main international standards that have been established by the United Nations Organization (UN) and the Organization for Economic Cooperation and Development (OECD) and have inspired French lawmakers. The company intends to exert a positive influence on its commercial partners.

However, the plaintiffs believe that the obligations resulting from the French law are disregarded for several reasons.

First, BNP Paribas' commitments to prevent damage caused by deforestation are not clear. On the one hand, while BNP Paribas has repeatedly committed to eliminating deforestation-creating activities from its portfolio, in reality, the instruments used to meet this commitment only work on a voluntary basis with suppliers and only aim at "zero

net deforestation". This objective does not prevent deforestation if trees are replanted in parallel. On the other hand, the commitments made by BNP Paribas are ambiguous. While the 2022 Compliance Plan states that it will only provide services to companies with a strategy to achieve zero deforestation in their production and supply chains by 2025 at the latest, other documents refer to a "zero deforestation" strategy by 2025 at the latest. It is unclear whether 2025 is the date of adoption of the strategy or the end of deforestation.

Secondly, regarding the identification of risks, BNP Paribas' due diligence plan is incomplete. It indicates the risk of deforestation linked to the beef industry in Brazil. But it does not specify the risks linked to this industry: the invasion of indigenous lands, slavery-like practices and, as far as climate change is concerned, methane emissions.

Third, the vigilance plan does not include measures sufficiently tailored to mitigate the specified risks. The planned measures are inadequate because they do not effectively address deforestation, slavery practices, and abuses of indigenous lands. Applicants criticize weaknesses in supply chain traceability. The traceability requirement to which the group commits is akin to greenwashing. If the defendant wants to eliminate deforestation from its portfolio by 2025, it should require full traceability of the beef and soy subsidiaries' value chains today. The plaintiffs also criticize the lack of monitoring of customer commitments and activity. They criticize the lack of monitoring and the absence of contract suspensions with companies involved in the violations. Finally, the plaintiffs criticize the fact that third parties do not benefit from a warning mechanism. While alerts issued by employees are mentioned, there is no provision for third parties.

The reasoning that we can retain is therefore as follows:

Under French law (Article L. 225-102-4-I of the French Commercial Code), BNP Paribas must establish and effectively implement a due diligence plan that includes certain reasonable measures to prevent human rights, safety and environmental violations (statutory duty of vigilance). It must therefore include measures to identify risks relating to cattle production activities and prevent the resulting damage, as this activity contributes to climate change. It is true that the BNP Paribas Group has adopted a due diligence plan and has made commitments not to finance activities involving deforestation. However, BNP Paribas provides financial support to certain large cattle production companies in Brazil, such as Marfrig, one of the leading groups in this sector, while failing : specifying the exact date by which beef suppliers must stop all deforestation; indicating all the risks associated with deforestation activity (lack of precision regarding the consequences of methane); providing for more appropriate preventive measures that require a more effective supplier traceability system, a warning

system extended to third parties to the company or a system of sanctions and control of suppliers.

All of these shortcomings constitute a failure to comply with the obligation to adopt and implement a vigilance plan in an effective manner. They explain why, on the basis of Article L. 225-102-4-II of the French Commercial Code, the judge must find that the statutory duty of vigilance has been disregarded and order BNP Paribas to put an end to it by modifying its plan and adopting certain measures.

Reference: <https://climatecasechart.com/non-us-case/comissão-pastoral-da-terra-and-notre-affaire-a-tous-v-bnp-paribas/>

Notre Affaire à Tous, Les amis de la Terre France, Oxfam France v. BNP Paribas, writ of summons February 23rd 2023, pending

This second action against BNP Paribas is also based on non-compliance with the statutory duty of vigilance. The summons points out that the BNP Paribas group has made a major contribution to the worsening of global warming through its financing and investment activities in support of the development of fossil fuels, which are the primary source of greenhouse gas emissions. It is true that BNP has presented a corporate social responsibility plan in accordance with Article L. 225-102-4 of the French Commercial Code. But it is not sufficient, and contravenes the obligations set out in the law. As a result, on October 26, 2022, in accordance with the provisions of article L.225-102-4 II of the French Commercial Code, the associations Oxfam France, Notre Affaire à Tous and Les Amis de la Terre France gave BNP Paribas formal notice to comply with its obligations under article L.225-102-4 I of the French Commercial Code by publishing a new due diligence plan in line with legal requirements, within three months of receipt of the formal notice letter.

To recall, it should be noted that, in addition to invoking non-compliance with the statutory duty of vigilance, the plaintiffs rely on the general obligation of vigilance stemming from Article 1 of the Charter of the Environment (2005), which states that "Everyone has the right to live in an environment that is balanced and respectful of health", and on Article 2, which says "Everyone has the duty to take part in preserving and improving the environment". For the plaintiffs, it is in fact on the basis of these two articles that the Constitutional Council has upheld the existence of a duty of vigilance in environmental matters, in the following terms: "respect for the rights and duties set out in general terms by these articles is binding not only on public authorities and administrative authorities within their respective spheres of competence, but also on all persons; it follows from these provisions that everyone is bound by a duty of vigilance with regard to any damage to the environment that might result from his or her activity". And for this reason, according to the plaintiffs, the statutory duty of vigilance is therefore seen as a specific application of a more general obligation of constitutional value.

We may also note that, in the writ, the plaintiffs put forward other articles of the Charter of the Environment, namely: article 3 (duty of prevention), article 5 (precautionary principle). They also cite article L. 110-1 of the French Environment Code, which recognises the principles of environmental law at the legislative level.

The plaintiffs deduce that "In view of the foreseeability of worsening global warming, the risks involved and the significant damage associated with it, everyone is fully obliged to reduce their impact on global warming in due proportion to their means". And above all: "In addition to this general obligation of environmental vigilance with constitutional foundations, there are special obligations of a legislative nature, including the provisions of the Commercial Code stemming from Law no. 2017- 399 of March 27, 2017 on the duty of vigilance of parent companies and ordering companies".

In concrete terms, to assess whether BNP Paribas has breached its legal duty of care, the summons invites the judge to consider the guidelines set out in soft law instruments, such as the United Nations principles and the OECD guidelines for multinational enterprises. In both cases, it is clear from these texts that banking and investment activities fall within the scope of the legal obligation of vigilance. It is in this context, and because greenhouse gas emissions represent a risk of serious damage to the atmosphere, the environment and human health and safety, that BNP Paribas must demonstrate its vigilance. To do so, the company must stop investing in and supporting fossil fuels. However, according to the plaintiffs, the vigilance plan does exist but does not comply with the requirements of the law: it does not show that BNP Paribas is adopting reasonable vigilance measures compatible with the objective of not exceeding 1.5°C global warming. On the contrary, BNP Paribas continues to invest in new fossil fuel projects, thereby contributing to further global warming. For the plaintiffs, the vigilance plan is incomplete and disparate. With regard to the climate risks resulting from the Group's activities, they also point out that the risk mapping is incomplete and imprecise. Finally, the complainants note shortcomings in the assessment procedures for subsidiaries and subcontractors, and the inadequacy of prevention and mitigation actions. According to the complainants, BNP Paribas is therefore in non-compliance with the main items required by law.

Reference: <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/>

Notre Affaire à Tous and others v. Total, January 28th 2020 writ of summons, Judiciary Tribunal of Paris, July 5th 2023, inadmissibility judgment, decision appealed, pending

The French NGOs Notre Affaire à Tous, Sherpa, Zea, and Les Eco Maires, along with more than a dozen French local governments took legal action against the French oil company and carbon major TotalEnergies on January 28, 2020. The plaintiffs argue that the French Oil Company has violated several obligations by French Law: among

them, the statutory duty of vigilance recognised in Article L. 225-102-4.-I of the French Commercial Code (Act 27 Mars 2017 sur le devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, n° 2017-399) (see also the duty of environmental vigilance recognised by the French constitutional Council through its interpretation of the French Environmental Charter (2005); the obligation to prevent ecological damage based on the Article 1252 of the French civil Code created by the Biodiversity Act (2016) which inserted a system of environmental liability in the civil Code, see Torts Law above C/).

The lawsuit filed by Notre Affaire à Tous and Sherpa, Zea, and Les Eco Maires and ten French municipalities is the first lawsuit filed against the French company TotalEnergies concerning climate change and based on the statutory duty of vigilance. The Legal action was brought before a judicial judge on 2020. On July 5th 2023, the *Tribunal judiciaire* of Paris declared the legal action inadmissible for formal reasons. But the decision will be examined by an appeal Court in March 2024.

The arguments presented by the plaintiffs are based on the breach of the statutory duty of vigilance and are the following:

First, after recalling the international climate regime and the French laws organising the fight against global warming, the summons presents the company TotalEnergies, its oil exploration and gas and renewable energy production activities as well as oil marketing, and specifies its role in climate change. According to the plaintiffs, the attribution of GHG emissions to companies was the subject of recent works, specifically from the American researcher Richard Heede, published on April 7th 2014. These works provide data showing how 90 companies (83 companies in the petroleum sector and 7 companies in the business of concrete production) in the world contributed to the climate crisis (Evidence n°6). According to this report, direct and indirect emissions generated by TOTAL's activities represent 0.82% of the global GHG emissions for the period 1751-2010. TotalEnergie is ranked 19th in the history of companies that have most contributed to global warming in the world. It is the only French company. The 458 million tons generated by TOTAL's activities thus amount to slightly more than 1% of the global GHG emissions.

Second, the plaintiffs recall the importance of provisions recognized by the Constitutional Charter of the Environment (March 1, 2005). Article 1 of the French Charter for the Environment asserts that "Everyone has the right to live in a balanced environment which shows due respect for health." and Article 2 of the Charter provides that "Everyone has the duty to participate in preserving and enhancing the environment". The plaintiffs recall that, considering these two articles, the Constitutional Council deduced the existence of an environmental duty of vigilance. The judge decided in 2011 that it follows from these provisions that every person is under an obligation to exercise care that no damage to the environment results from his actions" (Decision n° 2011-116 QPC" Michel z.").

This solution was reaffirmed in Decision n° 2017-672 QPC of November 10, 2017 "Association Between Seine and Bretonne and others".

For the plaintiffs, this general vigilance duty compels TotalEnergies to take appropriate measures to prevent damages caused to climate.

Moreover, for the plaintiffs, TotalEnergies has violated the statutory duty of vigilance recognized by the French Commercial Code.

After recalling that TotalEnergies is concerned by this statutory duty, the plaintiffs explain why the company doesn't comply with the provision. Two arguments are suggested: the plan had no mention of global warming risks that would result from a raise in global GHG emissions flowing from TOTAL Group's activities; and it did not provide for any adapted action in relation to risk mitigation and prevention of severe damage that result from global warming. Concerning the identification of the risks, it should be noted that (for the plaintiffs) TotalEnergies does not indicate that it is the cause of about 1% of worldwide GHG emissions, or that it is listed among the big *Carbon Majors* that must take urgent measures to limit climate change in order to respect the objectives of the Paris Agreement. In particular, TOTAL S.A. does not specify its major contribution to worldwide GHG emissions. In other words, we can deduce from the risk identification TOTAL S.A.'s desire to dilute its liability in climate matters and to deny its significant contribution to global warming. Moreover, TOTAL S.A. does not analyse risks resulting from climate change as are now demonstrated by the most recent scientific works summarised by the IPCC and in regard to emission reduction trajectories. Concerning also the inadequacy and insufficiency of measures to reduce risk or prevent serious damage, the plaintiffs observe that the plan of vigilance states the intention of Total to: reduce routine flaring in operating facilities by 80% between 2010 and 2020 with the objective of its elimination by 2030; improve the energy efficiency of operating facilities by 1% per year on average between 2010 and 2020; sustainably reduce the degree of methane emissions of operating facilities in the Exploration-Production sector to less than 0.20% of commercial gas produced by 2025; reduce GHG emissions (scopes 1 & 2) in oil & gas operating facilities from 46 Mt CO₂e in 2015 to 40 Mt CO₂e in 2025.

For the plaintiffs, these measures are not enough to prevent damage, and they are clearly not adapted to prevent the risk of serious damage from global warming and are absolutely ludicrous regarding TOTAL's significant contribution to climate change. The plaintiffs point to shortcomings in each measure: improving energy efficiency, growing its investments in natural gas, expanding its low-carbon electricity business, promoting sustainable biofuels, investing in CO₂ capture and storage, and carbon sink technologies. All these levers would be insufficient to prevent the risks and mitigate the serious damage resulting from a warming beyond 1.5°C.

We can add that the plaintiffs also criticize the targets that the company has set. On the one hand, they do not go beyond 2030 and do not mention a date by which the group must have reduced its emissions to achieve carbon neutrality. On the other hand, they

do not include indirect emissions, such as those of Scope 3, from the use of products and services.

To conclude, in summary, in light of the inaccuracies in the identification of the risks associated with TotalEnergies' business and the inadequacy of the measures to prevent the resulting harm specified in its due diligence plan, the plaintiffs believe that the defendant has failed to comply with its statutory duty to establish and implement a due diligence plan that includes reasonable measures of vigilance. The plan is allegedly incomplete and contains measures that are inappropriate to the need to reduce its greenhouse gas emissions so as not to exceed global warming of more than 1.5°C by 2030.

Reference: Tribunal Judiciaire of Paris, July, 5th, 2023:
https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230706_NA_order-2.pdf

Les Amis de la Terre France, L'association NAPE & L'association AFIEGO v. TotalEnergies, October 29th 2019 – L'association Survie, L'association Civic Response to Environment and Development, l'association Navigator of Development association v. TotalEnergies, Oct. 29th 2019 writ of summons, inadmissibility judgment February 28th 2023, decision appealed, pending

This dispute pits French and Ugandan associations against the company TotalEnergies. It is important for two reasons: first, because it is the first judgment relating to the statutory duty of vigilance; second, because the case is transnational. Damage invoked is caused by TotalEnergies subsidiaries in Tanzania and Uganda.

The case was filed in 2019 and led to a judgment on February 28, 2023 rendered by the Paris Court ("juge des référés", interim relief judge of the Tribunal judiciaire de Paris). At the origin of this dispute, there is the mega oil development project led by subsidiaries of TotalEnergies in Uganda and Tanzania, called Eacop and Tilenga. These projects, which consist of drilling and operating 400 wells, many of which are located in a national park (Murchison Falls), and the construction of the world's largest heated oil pipeline (1,500 km) to reach the sea due to Uganda's landlocked status, have been the subject of considerable criticism. Expropriation of the owners of their land, deprivation of their right to enjoy and cultivate it, risks of environmental damage in case of accidents, especially because of the high seismic potential of the region and the passage of the pipeline very close to Lake Albert, the main freshwater resource of the region, risks of damage to biodiversity because of the exploitation of wells in the enclosure of a national park which has one of the richest ecosystems in the world, carbon footprint estimated at 33 million tons of CO₂ per year.

These risks led six associations (Friends of the Earth, Survie and four Ugandan NGOs) to summon TotalEnergies on October 29, 2019.

More specifically, the action is based on the disregard of the statutory duty of vigilance provided for in Article L. 225-102-4 of the French Commercial Code (Act of March 27, 2017 on the statutory duty of vigilance of parent companies and ordering companies).

In this case, on March 20, 2019, the company TotalEnergies EP published a universal registration document for the year ended 2018, which included a due diligence plan for the year 2018. However, in a letter dated June 24, 2019, the six associations denounced this due diligence plan and gave formal notice to TotalEnergies EP “to comply with its due diligence obligations with regard to both the inadequacies of its plan and its effective implementation and publication”. In a letter of reply dated September 24, 2019, TotalEnergies EP defended its plan, arguing that it contained all the elements necessary to adequately inform its recipients, that the risks of serious harm to people and the environment had been correctly identified in the plan, and that adequate measures had been deployed to prevent or mitigate them, without the need for these measures, which are specific to each project, to be detailed in this document, specifying that they were accessible to the public through the impact studies available online. On October 29, 2019, criticizing the 2019 vigilance plan, the associations then summoned the company TotalEnergies before the president of the Nanterre judicial court ruling in summary proceedings, with the aim of enjoining, this company, to carry out its obligations in terms of vigilance, that is to say, to comply with its legal obligations and to suspend the project.

After several rulings on the objection of lack of jurisdiction raised by TotalEnergie, the Paris Court of First Instance rendered two rulings of inadmissibility of the claims on February 28, 2023. The reason is purely formal: failure to comply with the formal notice requirement relating to the compliance plan criticized by the associations, i.e., the 2021 plan challenged at the time of the proceedings and not the 2019 plan.

It should be remembered that the vigilance plan is not fixed: it can be modified under the impulse of the critics and throughout the evolution of the activity of the company. Moreover, as it must be made public and included in the Management Report presented annually to the General Meeting of Shareholders (art. L. 225-102-4-I para. 5), it is intended to be amended annually. It is therefore highly likely that, after the summons, and throughout the proceedings, the plaintiff will be required to specify its grievances and claims based on the latest plan in force. The question is then to know whether the latter should be the subject of a new formal notice.

However, in finding that, because the claims and grievances formulated in the first and only formal notice of 2019 that led to the summons were “substantially different” from those formulated on the day of the debates, which were aimed at the 2021 plan, the associations should have notified their grievances and claims to the defendant by a new formal notice concerning the latter plan prior to the referral of the case to the interim relief judge. The judge confirmed this was the case.

It should then be noted that the judge, in summary proceedings, was unable to rule on the failure to comply with the statutory duty of vigilance. As the absence of a formal notice leads to the action's inadmissibility, it is impossible for the judge to verify whether or not TotalEnergies has complied with the requirements set out in article L. 225-102-4 of the French Commercial Code.

Reference: Tribunal judiciaire de Paris, juge des référés, February 28, 2023, two decisions:

https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230228_NA_decision-1.pdf

https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230228_NA_decision.pdf

C. Tort Law

French law does not recognize torts Law. In French law, tort law is a matter of civil liability. Civil liability law consists of common law and special law regimes. We must also recall that in French Law, to obtain compensation, the victim must demonstrate the event giving rise to the damage, the damage and the causal link.

Since 1804, when the Civil Code came into force, there has been a general rule of civil liability. Article 1240 of the Civil Code states: "Any act of man, which causes damage to another, obliges the person by whose fault it occurred to repair it". This provision creates a system of fault-based liability and is related also to the article 1241: "Everyone is responsible for the damage he has caused, not only through his own actions, but also through his negligence or imprudence". Both provisions are the legal bases of the French duty of care. It is important not to confuse duty of care under the French Commercial Code with duty of care under tort law. The former is a duty imposed on a company, namely to draw up and implement a due diligence plan. The latter is a norm comprising a general standard of behaviour that may evolve over time.

It is important to understand that to facilitate compensation for damage, the legislator has also created special civil liability regimes. This is the case in environmental matters. The law of August 8, 2016 (Biodiversity law: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000033016237>) created a compensation scheme for ecological damage. Its provisions have been incorporated into the Civil Code in articles 1246 to 1252 (https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000033019109).

With regard to climate actions brought against companies, it should be noted that some cases are for a part (never invoked alone) based on the general common law provisions (1240/1241 of the Civil Code) and/or the special provisions for compensation for ecological damage (in particular 1246, 1248 and 1252 of the Civil Code). One of them is also based on the "Quasi-Contracts" theory. Indeed, in the French Civil Code,

Article 1300 provides that “Quasi-contracts” are purely voluntary facts from which there results a commitment on the part of the person who benefits from them without having a right to do so, and sometimes a commitment on the part of their author towards others. The quasi-contracts governed by the present subtitle are business management, undue payment and unjust enrichment”. If a company undertakes to develop a low-carbon emissions policy, this can be considered a voluntary act which, in the event of non-compliance with the resulting commitment, triggers the application of civil liability law.

The following cases (already mentioned) show these different liability law grounds. But we can expect in the future that other legal bases will be invoked, such as: (more often and as the main basis) the general provision of civil liability (provisions 1240 and 1241 Civil Code); liability for defective products; and above all, provision L. 225-102-5 of Commercial Code, relating to the statutory duty of vigilance which says: “Under the conditions set out in Articles 1240 and 1241 of the French Civil Code, any breach of the obligations defined in Article L. 225-102-4 of the present Code shall engage the liability of the party responsible for the breach, and oblige the latter to compensate for any loss that could have been avoided by the fulfilment of these obligations”.

Notre Affaire à Tous, Les Amis de la Terre France, Oxfam v. BNP Paribas, writ of summons, February 23rd 2023, pending

In the above-mentioned case, in addition to the statutory duty of vigilance basis, the plaintiffs invoke the ecological damage compensation regime inserted into the Civil Code since 2016 (Biodiversity Act). This regime contains a preventive action. According to Article 1252 of the Civil Code, "Independently of compensation for ecological damage, the judge, seized of a request to this effect by a person mentioned in Article 1248, may prescribe reasonable measures to prevent or stop the damage." Because they have standing, the associations are asking for "reasonable measures to prevent" the worsening of this ecological damage and related ecological damage.

The summons show that the plaintiffs find their inspiration in administrative case law. Indeed, it was on the basis of this preventive action that the administrative judge ordered the French state to halt its greenhouse gas emissions after finding that they had caused damage to the atmosphere (Paris Administrative Court, February 3, 2021, and October 14, 2021).

The plaintiffs in the action point out that BNP's activities significantly aggravate ecological damage. BNP's activities contribute to direct and indirect emissions, and banking and financial activities enable the development of New Fossil Projects whose induced emissions will exceed the Global Carbon Budget enabling global warming to be limited to 1.5°C.

On this point, it should be noted that the plaintiffs also rely on the theory of quasi-contract. In the words of the summons: "Failing to consider that the voluntary

"commitment" to achieve carbon neutrality adopted by BNP Paribas is a unilateral commitment of will, it will be appropriate to consider that the company is bound by a quasi-contract. Consequently, breach of this quasi-contract may give rise to an action for extra-contractual liability. Indeed, in the French Civil Code, Article 1300 provides that "Quasi-contracts are purely voluntary facts from which there results a commitment on the part of the person who benefits from them without having a right to do so, and sometimes a commitment on the part of their author towards others. The quasi-contracts governed by the present subtitle are business management, undue payment and unjust enrichment".

The plaintiffs in the action point out that some authors admit that commitments arising from CSR (Corporate Social Responsibility) policies are quasi-contracts. More specifically, it must be admitted that BNP Paribas is bound by a quasi-contract towards its stakeholders, which include the associations that are parties to the action, obliging it to achieve carbon neutrality by 2050. Since BNP Paribas is in breach of its obligation to achieve carbon neutrality by 2050, it should also be held liable in tort under articles 1240 et seq. of the French Civil Code. And at the end of this same quasi-contractual liability action, BNP Paribas should also be required to prevent ecological damage (article 1252).

Reference: <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/>

Notre Affaire à Tous and others v. Total, January 28th 2020 writ of summons, Judiciary Tribunal of Paris, July 6th 2023, inadmissibility judgment, decision appealed, pending

The legal action taken against TotalEnergies (see above) in the case "Notre affaire à Tous and others against Total" brought before the Paris Court (*Tribunal judiciaire de Paris*) is also based on Environmental Civil Liability. More precisely, since 2016 (8 August 2016, Biodiversity Act, n° 2016-1087), the legislator created a new civil liability regime integrated in the French Civil Code. The regime is located from article 1246 to article 1252. Besides the compensation, this regime also has a prevention objective.

More precisely, Article 1252 of the Civil Code provides that:

"Independent from repairing the ecological damage and having received a request to this effect by a person mentioned in Article 1248, the judge may prescribe reasonable steps to prevent or stop the damage from occurring."

This provision may constitute the legal basis for action with a purely preventive purpose, apart from any action for repairing ecological damage.

The plaintiffs observe two elements: TOTAL S.A.'s vigilance plan actions are notoriously insufficient and will not prevent the risk of global warming above 1.5°C. And furthermore, despite the objective of reducing the carbon intensity of its products by 15% by 2030, the TOTAL group's global emissions will not decrease if the objective is

set on carbon intensity, even if the growth rate of hydrocarbon products sold is little more than 1% per year on average.

The plaintiffs conclude that TOTAL S.A.'s "ambition" to reduce the carbon intensity of its products by 15% is notoriously insufficient to achieve carbon neutrality by 2050 and reduce its emissions on a trajectory in line with the Paris Agreement.

For this reason, they invoke article 1252 to prevent serious ecological damage from occurring as a result of warming beyond the 1.5°C threshold, and ask the Court to order TOTAL S.A. to take measures to reduce its emissions in a trajectory in line with the Paris Agreement.

As said before, the action was dismissed on July 6, 2023. It was declared inadmissible. But, we have to see what the Appeal Court will judge in March 2024.

Reference: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230706_NA_order-2.pdf

Envol Vert et. al., v. Casino (writ of summons, March 2nd, 2021), pending

Beside the statutory duty of vigilance of art. L 225-102-4 and 5, plaintiffs' claim is also grounded in general civil liability.

Plaintiffs recall the constitutional foundations of a general environmental obligation to act with vigilance which exists without any specific statute, and which falls under the rules of civil liability law. Plaintiffs also recall that art. L. 225-102-5 of the commercial code, codifying article 2 of the March 27 2017 Duty of Vigilance Act, provides that when the statutory duty of vigilance described in article 1 (L. 225-102-4) is violated, general rules of civil liability comprised in art. 1240 and subsequent of the French civil code apply.

Then, plaintiffs contend that the three civil liability conditions necessary to hold Casino liable are met. Indeed, concerning the wrongdoing, plaintiffs first contend that – notwithstanding the enactment of the Duty of Vigilance Act – the *Cour de cassation* has already approved the principle that not acting with vigilance, in a context where the defendant is aware of a risk, is a delict. According to the Court, acting with vigilance means adopting all measures which would limit or suppress the risk. The more severe the risk is, the more demanding the requirement to act with vigilance also is. Plaintiffs further contend that this obligation to act with vigilance is grounded in art. 1241 of the French civil code, which the 2017 governmental project to reform civil liability confirms. Prior caselaw has enshrined the existence of an obligation of prevention after a risk materialized. Legal scholars say such preventive obligation is part of the general duty of prudence and care/diligence (art. 1241) and is premised on the breach of a non-contractual safety obligation and on the breach of the requirement to act with vigilance (not adopting the measures that would have limited or suppressed the harm). In fact, plaintiffs contend that Casino's demonstrated breach of its statutory duty to adopt,

publish and effectively implement a vigilance plan (see above) satisfies the wrongdoing requirement for civil liability. They also contend that not conforming with its own internal policies characterizes the wrongdoing condition for civil liability. Damage and violations within Casino's supply chains are documented by the various aforementioned NGOs and investigative journalists' reports (see above). And finally, it is important to note that, concerning the proof of causal link, it is established by the demonstration of the breach of the duty of vigilance which is aimed at preventing and suppressing the damages resulting from the cattle rearing practices which GPA's suppliers purchase and by the documented harms. According to plaintiffs, the very existence of the duty of vigilance supports the idea that a group's preventive actions have an impact on downstream harms. In civil liability, a causal link may be established by judicial findings of precise and concordant presumptions (art. 1382 of the French Napoleon civil code became 1240). The simple knowledge by Casino that cattle raising practices in its supply chain may cause the harm satisfies such presumption.

Reference: <https://climatecasechart.com/non-us-case/envol-vert-et-al-v-casino/>

D. Company and Financial Laws

There are no cases based on corporate and financial law, and academics have not yet addressed these issues.

E. Consumer Protection Laws

Consumer law provisions are set out in the French Consumer Code and are designed to protect consumers. One provision in particular is used in the climate sector. This is article L. 121-1 of the French Consumer Code:

“Unfair commercial practices are prohibited.

A commercial practice is unfair when it is contrary to the requirements of professional diligence and alters or is likely to alter in a substantial manner the economic behavior of a consumer who is normally informed and reasonably observant and circumspect, with regard to a good or service.

The unfairness of a commercial practice aimed at a particular category of consumers or a group of consumers who are vulnerable by reason of mental or physical infirmity, age or credulity is assessed in the light of the average capacity for discernment of the category or group.

In particular, unfair commercial practices include misleading commercial practices as defined in articles L. 121-2 to L. 121-4 and aggressive commercial practices as defined in articles L. 121-6 and L. 121-7”.

The case mentioned below is based on this provision.

Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France, writ of summons March 2nd 2022, pending

On March 2, 2022, 3 NGOs brought a claim against TotalEnergies (mother company) and subsidiary TotalEnergies Electricité et Gaz de France before the Paris judicial tribunal arguing that the company's advertising campaign launched in 2021 accompanying its 'rebrand' to TotalEnergies misled French consumers, because (i) Total's claims to be aiming for 'net zero' by 2050 and to becoming a "major player in the energy transition" are false and (ii) the advertising claims promoting the environmental virtues and transition role of gas and biofuels are misleading.

The action is brought under articles L. 121-1 et seq. of the French Consumer Code which prohibits misleading and deceptive commercial practices (which implement 2005/29/EU Unfair Commercial Practices Directive), article 1240 of the French Civil Code, and under article L. 142-2 of the Environment Code which governs standing to sue.

The claimants are requesting from the tribunal an injunction to stop the prohibited practices, the publication of the decision, the compensation of the moral damages suffered by the organizations and the repayment of legal fees.

Various motions to dismiss were filed by Total. A court hearing was thus held on March 14, 2023 to discuss issues related to the admissibility of the claim, including whether the claimants have standing to sue. In a decision handed down on May 16, 2023, the Paris judicial court accepted the standing of the associations Greenpeace France, Les Amis de la Terre France and Notre Affaire à Tous.

On the merits, plaintiffs will have to establish that TotalEnergies' campaign on aiming for 'net zero' by 2050, where the company pretends to be a major player in the energy transition and puts forward the environmental virtues and transition role of gas and biofuels, are to be considered as deceptive commercial practices. Based on relevant French and EU legislation and caselaw, this requires proving 1) that environmental claims are commercial practices; 2) That Total's environmental claims are of a commercial nature; 3) That they are misleading; and 4) that they have altered the economic behavior of consumers.

Reference: <https://climatecasechart.com/non-us-case/greenpeace-france-and-others-v-totalenergies-se-and-totalenergies-electricite-et-gaz-france/>

F. Fraud Laws

There are no climate cases based on Fraud Laws and the scholars haven't yet researched any avenues concerning this specific cause.

G. Contractual Obligations

In French law, contract law, along with tort law, forms part of the law of obligations. The general provisions (applicable to all contractual relationships) are set out in the French Civil Code. Generally speaking, under French law, a contract is a binding agreement between parties. If a contract is the result of a meeting of minds between two or more persons (article 1101 of the French Civil Code: "A contract is an agreement of wills between two or more persons intended to create, modify, transmit or extinguish obligations"), a commitment by a single person may be qualified as a unilateral legal act, and in this case be subject to the rules of contract law (article 1100-1 of the French Civil Code: "Legal acts are expressions of will intended to produce legal effects. They may be conventional or unilateral". "They obey, as a matter of course, for their validity and effects, the rules governing contracts"). This commitment is then binding, and the judge can impose its respect (article 1103 of the Civil Code: "Legally formed contracts take the place of law for those who have made them". Non-compliance may also lead the judge to impose a civil penalty on the author of the commitment: contractual liability, i.e., payment of damages.

Contract law is a useful tool in climatic disputes. It makes it possible to qualify a voluntary commitment as a unilateral undertaking, and to ask the judge to impose compliance, or to claim damages in the event of non-compliance. Companies committed to reducing their greenhouse gas emissions or adopting behavior conducive to the fight against global warming are particularly targeted.

The case study below shows that some litigants also rely on contract law to ask the judge to condemn a company that does not respect the commitments it has made.

We can also imagine another use for contract law in the future. In French law, according to article 1196 of the Civil Code, "Contracts bind not only to what is expressed in them, but also to any consequences that equity, usage or the law may give them". This provision may lead the judge to "graft" obligations onto the contracting parties. In the future, on this legal basis, the question is whether a judge will dare to impose an obligation to adopt conduct appropriate to the fight against global warming in certain contracts entered into by companies, in particular those enabling them to conduct their business. In addition, the duty of care recognized in the French Commercial Code (article L. 225-102-4) could have a role to play in contract law. Certain environmental protection associations could ask the courts to require the companies concerned to include contractual clauses favorable to the reduction of greenhouse gas emissions in contracts enabling them to carry out their activities.

But for the moment, only one legal action is based on contract law, and it concerns the qualification of a unilateral commitment. This is the following case.

Notre Affaire à Tous, Les amis de la Terre France, Oxfam France v. BNP Paribas, writ of summons February 23rd 2023, pending

The summons recalls that BNP Paribas has entered into various commitments through voluntary instruments. Specifically: BNP Paribas joined the Net-Zero Banking Alliance in April 2021; BNP Paribas Cardif also joined the Net-Zero Asset Owner Alliance in September 2021; and BNP Paribas Asset Management joined the Net-Zero Asset Managers Initiative in November 2021.

Under French law, since the reform of contract law carried out by Ordinance no. 2016-131 of February 10, 2016, unilateral commitments of will are a source of obligation which, if disregarded, can lead to the forced execution of the commitment. Indeed, according to Article 1100-1 of the Civil Code as it results from Ordinance no. 2016-131 of February 10, 2016:

"Legal acts are expressions of will intended to produce legal effects. They may be conventional or unilateral.

Their validity and effects are subject to the rules governing contracts".

In spite of the subscriptions and its own commitment to carbon neutrality by 2050, the BNP Paribas Group is not effectively implementing the required measures. The defendant is therefore in breach of its obligation to respect its unilateral commitment and must be condemned on the basis of contractual sanctions, namely the injunction to force performance of the commitment, which lies in the immediate cessation of all new financing in fossil fuels and all new investments.

Reference: <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/>

H. Planning and Permitting Laws

This cause is studied in section dedicated to climate and environmental Law (A).

I. Other Causes of Action

There are no other causes invoked in climate change litigation against companies.

2. Procedures and Evidence

As in all other legal systems, French law contains important procedural and evidentiary requirements which can be a source of difficulty for plaintiffs. These include the need to demonstrate an interest in bringing an action, to act before the competent judge and to bear the burden of proof. The cases already mentioned show that plaintiffs are faced with two difficulties: the first concerns the need, with regard to the duty of vigilance provided for in the French Commercial Code, to comply with a requirement relating to formal notice prior to summons. The second concerns the need to demonstrate an interest in acting on the basis of the ecological damage compensation scheme provided for in the Civil Code. In the future, difficulties may also arise with regard to the judge's powers and proof.

A. Actors Involved

Legal action is taken by environmental protection associations and/or legal entities under public law, such as cities and regions, against transnational companies in the energy, banking and food distribution sectors.

i. Claimants

France Nature Environnement & Guyane Nature Environnement v. Prefect of Guyane and EDF – “The Larivot power plant case” - July 27th 2021 and February 10th 2022

The action before the interim relief administrative tribunal of Cayenne is brought by two NGOs against the Prefect of Guyane. The action before the Council of State to reverse the interim relief judge's decision is brought by EDF Production Electrique Insulaire and the Ministry of Ecology.

Comissão Pastoral da Terra et Association Notre Affaire à Tous v. BNP Paribas, writ of summons, February 27th 2023, pending

The action is brought by two NGO's: Notre Affaire à Tous, a French NGO and Comissão Pastoral da Terra, a Brazilian NGO. The legal action is taken against BNP Paribas, one of the most important financial group who found the beef industry.

Notre Affaire à Tous, Les amis de la Terre France, Oxfam France v. BNP Paribas, writ of summons February 23rd 2023, pending

The legal action against BNP Paribas is being taken by three environmental and human rights associations: Notre Affaire à Tous, Oxfam et Les amis de la Terre France.

Notre Affaire à Tous and others v. Total, January 28th 2020 writ of summons, Judiciary Tribunal of Paris, July 5th 2023, inadmissibility judgment, decision appealed, pending

The defendant is TotalEnergie, the most important oil Company in France, a public limited company under French law created in France on 28 March 1924 under the denomination "French petroleum company" (*Compagnie française des pétroles - CFP*). The group started its activities in the Middle East in 1924 and later developed its presence globally. According to the Reference document of 2018 by Total ("RD 2018" thereafter), the activities of the group are divided into four sectors: exploration production sector; gas, renewables, and power sector; refining and chemistry sector; marketing and services sector.

The plaintiffs are 19. Among them, there are some NGOs, such as Notre Affaire à Tous and France Nature Environnement (environmental NGO), Sherpa (NGO defending the environment and human rights) and Eco Maire (NGO grouping majors for the protection of environment), and 14 municipalities and regions. In France, NGOs and such legal person has a standing. They can bring their legal action before the judge for defending collective interests and asking compensation or prevention of ecological damage (art. 1248 Civil Code)

Les Amis de la Terre France, L'association NAPE & L'association AFIEGO v. TotalEnergies, October 29th 2019 – L'association Survie, L'association Civic Response to Environment and Development, l'association Navigator of Development association v. TotalEnergies, writ of summons, October 29th 2019, judgment of inadmissibilité, February 28th 2023, Judiciary Tribunal of Paris

The action is brought by six NGOs (3 French NGOs and 3 Tanzanian and Ugandan NGOs).

The defendant is TotalEnergies. The activities involved are the activities led by one of its subsidiaries in Uganda: TOTAL E&P Uganda B.V. (hereinafter, "TEPU") which is engaged in the exploration and production of oil. In defense, TotalEnergies argued before the Paris Court of Justice, which has been recognized as having jurisdiction to rule on due diligence matters (Act of December 22nd, 2021 on confidence in the judiciary, which affirmed the exclusive jurisdiction of the Paris Court of Justice for cases relating to Act No. 2017-399 of March 27, 2017 on due diligence), that the six environmental protection associations' claim was inadmissible. The company argued that the associations should have served notice on TotalEnergies to comply with its legal obligations in this area by referring to the 2021 compliance plan discussed at the hearing, not the 2019 plan.

Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France

The action is brought by Greenpeace France, Friends of the Earth France and Notre Affaire à Tous with the support of Client Earth (voluntary intervention declared inadmissible in a decision rendered by the Tribunal of Paris, on May 16, 2023). The action is brought against TotalEnergies SE (parent company) and TotalEnergies Electricité et Gaz France (subsidiary).

Friends of the Earth et al. v. Prefect of Bouches-du-Rhône and Total – “The La Mède refinery case” – April 1st, 2021

The action is brought by six French environmental NGOs against a decision by the Prefect of the Bouches du Rhône authorizing Total Raffinage France to continue operating a refinery platform in La Mède.

Envol Vert et. al., v. Casino (writ of summons, March 2nd, 2021), pending

The action is brought by 11 NGOs (French, Brazilian, Colombian and US). The legal action is taken against Casino, Guichard-Perrachon S.A (The Casino group) headquartered in Saint-Etienne, France.

ii. Defendants

Transnational companies in the energy, banking and food distribution sectors (see above).

iii. Third-party intervenors

In France, legal action is brought by plaintiffs who have an interest in the case. But in addition to the parties, it is possible for third parties to join the legal action. They are called "voluntary interveners". They are subject to the same conditions of admissibility as the parties, and must have standing. The judge may also call in *amicus curiae*. He may appoint them freely and listen to them at the hearing to help him better understand the legal issues involved. These are not third-party intervenors. They are considered to be experts in a particular discipline. The judge is never bound by what they explain. In the aforementioned climate lawsuits against companies, there are two situations: voluntary intervention and recourse to *amicus curiae*.

France Nature Environnement & Guyane Nature Environnement v. Prefect of Guyane and EDF – “The Larivot power plant case” – July 27th 2021 and February 10th 2022

Before the Council of State, the Energy Regulation Commission is found to be a proper intervenor. Its intervention is justified by its statutory mission and the importance of the power project at stake.

Notre affaire à tous and others v. TotalEnergie, January 28th 2020, pending

In this case, it should be noted that on July 21, 2022, the City of New York intervened in support of the Plaintiffs in the current litigation through an “*intervention volontaire accessoire*”. The City of New York has based its intervention on the significant interest it has in engaging – locally and globally – in efforts to mitigate climate change, also because of the severe damages and risks this phenomenon causes to the City. Nevertheless, the Judiciary Tribunal of Paris has rejected this voluntary intervention (July 6, 2023).

Les Amis de la Terre France, L’association NAPE & L’association AFIEGO v. TotalEnergies, oct. 29th 2019 – L’association Survie, L’association Civic Response to Environment and Development, l’association Navigator of Development association v. TotalEnergies, writ of summons, oct. 29th 2019, judgment of inadmissibilité, February 28th 2023, Judiciary Tribunal of Paris

On October 27, 2022, the summary proceedings panel of the Paris Judicial Court heard three academics (Professors Marie-Anne Frison-Roche, Jean-Baptiste Racine and Bruno Deffains), intervening as *amicii curiae*, to shed light on the concept of “duty of vigilance”, as provided for by the March 2017 law. These *amicii curiae*’s interventions have not been transcribed in writing.

B. Elements of the Procedural Framework

i. Standing

It should be remembered that in the French system, the standing requirements are more flexible than in other countries. In principle, plaintiffs must demonstrate a personal interest in bringing an action (article 31 Civil Procedure Code: “*The action is open to all those who have a legitimate interest in the success or rejection of a claim, subject to cases in which the law attributes the right to act only to persons it qualifies to raise or combat a claim, or to defend a specific interest., the legislator has provided for certain derogations*”). But the legislator also grants certain legal entities, in particular associations, the right to act to defend certain interests other than their personal interests.

In most French climatic lawsuits, plaintiffs make use of the provisions granting them a right to act. However, the judge must always ensure that the conditions laid down by the law authorizing associations or other legal entities (e.g. local authorities) are met. In this respect, two provisions that can be seen in various court cases should be kept in mind:

- Concerning the compensation suffered by Ngo’s (moral damage), Art. L. 142-2 of the Environment Code: “The approved associations mentioned in article L. 141-2 may exercise the rights accorded to civil parties in respect of acts that are directly or indirectly prejudicial to the collective interests that they aim to defend, and that constitute an infringement of legislative

provisions relating to the protection of nature and the environment, the improvement of the quality of life, the protection of water, air, soil, sites and landscapes, town planning, maritime fishing or the fight against pollution, sites and landscapes, town planning, maritime fishing, pollution and nuisance control, nuclear safety and radiation protection, commercial practices and advertising that are misleading or likely to mislead when such practices and advertising include environmental information, as well as the texts adopted for their application”.

This right is also granted, under the same conditions, to associations which have been duly registered for at least five years on the date of the facts and which propose, through their articles of association, to safeguard all or part of the interests referred to in article L. 211-1, with regard to facts constituting an infringement of the provisions relating to water, or the interests referred to in article L. 511-1, with regard to facts constituting an infringement of the provisions relating to classified installations”.

- And specifically concerning the ecological damage: Art. 1248 of the Civil Code provides: "The action for compensation for ecological damage is open to any person with standing, such as the State, the French Biodiversity Office, local authorities and their groupings whose territory is concerned, as well as public establishments and associations approved or created for at least five years on the date the proceedings are instituted, whose purpose is the protection of nature and the defense of the environment”.

Some cases dismissed above show the difficulties to prove the standing.

France Nature Environnement & Guyane Nature Environnement v. Prefect of Guyane and EDF – “The Larivot power plant case” – July 27th 2021 and February 10th 2022

Because of their publicly accredited status and because the object of their action falls within the scope of their statutory object, the two NGOs have standing to challenge the environmental authorization granted by the Prefect pursuant to article L. 141-1 of the environmental code. However, had the NGOs challenged the operating permit granted by the Ministry of Energy according to article L. 311-5 of the Energy Code, they may have been found to lack standing. Caselaw is not fixed in that respect but this outcome may be inferred from the decision of Nantes Administrative Court of Appeal, 2018, Association Non aux éoliennes entre Noirmoutier et Yeu, Case 17NT00609.

Envol Vert et. al., v. Casino (writ of summons, March 2nd, 2021), pending

Given the broad language of article L. 225-102-4 II of the commercial code, which provides that “upon the request of all persons justifying standing to sue...” and given the object of the articles of incorporation of the four French NGOs and the six foreign NGOs, which specifically refer to the protection of the environment, plaintiffs contend these ten organisations have standing to bring the legal action.

For *France Nature Environnement*, plaintiffs contend that standing is justified by its publicly accredited status.

Les Amis de la Terre France, L'association NAPE & L'association AFIEGO v. TotalEnergies, October 29th 2019 – L'association Survie, L'association Civic Response to Environment and Development, l'association Navigator of Development association v. TotalEnergies, writ of summons, October 29th 2019, judgment of inadmissibilité, February 28th 2023, Judiciary Tribunal of Paris

In this case, it should be remembered that the plaintiffs in the action are not just French associations. There are two Tanzanian associations and one Ugandan association. According to the case law of the *Cour de cassation*, a foreign NGO could claim an interest in bringing an action before the French judge by application of French law and, therefore, of the requirements laid down by French law. (*Cour de cassation*, civ. 1 re, 9 mars 2022, n° 20-22.444). But in this case, the judge has not yet had the opportunity to rule. On February 28, 2023, the Paris judicial court (the interim relief judge) declared the action inadmissible for lack of formal notice, a formal condition required by the statutory duty of vigilance. Indeed, article L. 225-102-4-II Commercial Code says:

“II. - Where a company given formal notice to comply with the obligations set out in I fails to do so within three months of the notice being given, the competent court may, at the request of any person having an interest in the matter, order the company to comply, subject to a fine where appropriate”.

Here, the judge considers that the formal notice must relate to the plan criticised at the court hearing. If the plan has been modified, a new formal notice must be served before the summons is issued. The criticisms made at the hearing must be identical to those mentioned in the formal notice. With regard to the other plaintiff associations, it should be remembered that in the second "TotalEnergies" case (*Notre affaire à Tous*), the Paris Court at the First Instance ruled here again very strictly on the question of standing. On July 6, 2023, it dismissed certain plaintiffs' claims on the grounds of lack of approval on the summons date and the climate damage's global nature.

Comissão Pastoral da Terra et Association Notre Affaire à Tous v. BNP Paribas, writ of summons, February 27th 2023, pending

Here too, the question arises as to how the judge will assess the standing of foreign associations.

Notre Affaire à tous, Les Amis de la Terre France, Oxfam v. BNP Paribas, writ of summons, February 23rd 2023, pending

In this case, the judge will have to assess whether the conditions of the three associations' right to act have been met. In particular, he will check compliance with article 1248 of the French Civil Code. Under this provision: “*The action for compensation for ecological damage is open to any person with standing and an interest in bringing an action, such as the State, the French Biodiversity Office, local authorities and their groupings whose territory is concerned, as well as public establishments and associations approved or created for at least five years on the date*

the action is brought, whose purpose is the protection of nature and the defence of the environment".

With regard to the action to prevent ecological damage, it will be necessary to show that the associations were approved on the date of the writ of summons, and that their corporate purpose enables them to claim compensation for ecological damage.

With regard to the statutory duty of vigilance, it will also be necessary to demonstrate consistency between the corporate object and the purpose of the action (article L. 142-2 of the French Environment Code mentioned in the introduction of section 2). It should be remembered that the recent Total case (July 6, 2023) is not favourable to associations' actions and that the Paris court was strict.

Notre Affaire à Tous and others v. Total, January 28th 2020 writ of summons, Judiciary Tribunal of Paris, July 6th 2023, inadmissibility judgment, decision appealed, pending

In this case, the associations and communes asserted their standing. With regard to the action based on the statutory duty of vigilance (article L. 225-102-4 of the French Commercial Code), in its decision of July 6, 2023, the Paris court declared the action inadmissible due to the absence of a proper formal notice. Here again (in comparison with the judgement rendered by the Judiciary Tribunal of Paris on February 28, 2023, TotalEnergies Case concerning Uganda and Tanzania fossil exploration), the formal notice meets strict requirements and must concern the vigilance plan 39 authorizes at the trial.

However, with regard to the action based on prevention for ecological damage (provided for in the French Civil Code), the Paris Court ruled that certain plaintiffs did not meet the conditions for standing to sue.

According to article 1248 of the French Civil Code, "An action for compensation for ecological damage is open to any person with standing and a standing, such as the State, the French Biodiversity Office, local authorities and their groupings whose territory is concerned, as well as public establishments and associations approved or created for at least five years on the date the proceedings are instituted, whose purpose is the protection of nature and the defence of the environment". The association must therefore be "approved" to take legal action. However, the Paris court noted that the Notre Affaire à Tous (ONG) had not been accredited on the date of the summons. It also specified that the corporate purpose of the Eco-Maires association was to promote the local activities of communes. The purpose of the legal action brought against TotalEnergies is to force it to publish measures to prevent global warming, which is a worldwide phenomenon. He added, with regard to local authorities, that Article 1248 of the French Civil Code 39 authorizes them to act only when ecological damage concerns their territory. According to the judge, the ecological damage they claim concerns the whole world, not just their territory. We can add, finally, that the same reasoning has been followed for declaring inadmissible the voluntary intervention of

the City of Paris. The conditions for taking action have not been met. We will have to wait and see what the Court of Appeal says.

Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France, writ summons March 2nd 2022, pending

In this case, while the judge decided that the three French ONG have standing, he rejected the claim of the NGO Client Earth as “voluntary intervention” (May 16, 2023, Judiciary Tribunal of Paris).

ii. Justiciability

There is no justiciability requirement as there is in other countries. The doctrine of the political question does not exist. On the other hand, French law recognises the separation of executive, legislative and judicial powers. Above all, there is the principle of separation of judicial and administrative authorities. Judges refuse to prescribe measures that would contradict administrative authorisations. For example, he cannot impose the cessation of an activity if it has been authorised by the State. In this case, the plaintiff must bring his action before the administrative judge. It is up to this administrative judge to verify the operating authorisation's legality, not the judicial judge. It is, therefore, conceivable that, in the future, a judge might refuse to prescribe measures to reduce greenhouse gas emissions or prohibit an activity that emits them because his or her decision would contradict authorisations issued by the State. Today, there are no climate lawsuits that raise this issue.

iii. Jurisdiction

As mentioned above, disputes involving private individuals fall within the jurisdiction of the courts. In the case of the duty of vigilance, this is the Paris judicial court. For other claims, the action is brought before the court in the defendant's place of residence.

Notre Affaire à Tous and others v. Total, January 28th 2020 writ of summons, Judiciary Tribunal of Paris, July 6th 2023, inadmissibility judgment, decision appealed, pending

The summons for *Notre Affaire à Tous* dates back to January 28, 2020. But the case has still not been tried. TotalEnergies immediately raised a procedural issue: the competence of the judge. According to the defendant, the case should have been tried before a commercial court because the due diligence plan constitutes a commercial act between all persons, within the meaning of paragraphs 2° and 3° of article L. 721-3 of the Commercial Code. This objection to jurisdiction was presented in *limine litis* and with all reservations to the Pre-Trial Judge of the Nanterre Court.

The Plaintiffs opposed the objection raised by TotalEnergies and maintained that the Court had exclusive jurisdiction over their action, in particular on the grounds that their claims were not directly related to the management of TotalEnergies and that the

allegedly civil nature of the statutory duty of vigilance would have given the Court jurisdiction.

In an order dated February 11, 2021, the "*Juge de la mise en état*" rejected TotalEnergies' objection to jurisdiction and ordered it to pay a sum of 6,000 euros pursuant to the provisions of Article 700 of the French Code of Civil Procedure. The Judge considered that the dispute had an undeniable link with the management of TotalEnergies, which justified the jurisdiction of the Commercial Court, but that this jurisdiction was not exclusive. He also found that the Plaintiffs had an option to bring the matter before the Nanterre Court of Justice, and that the issues at stake in the dispute exceeded the jurisdiction of the consular judges. TotalEnergies has appealed the Order. In a decision dated November 18, 2021, the Versailles Court of Appeal upheld the dismissal of the Nanterre judicial court's objection to jurisdiction and ordered TotalEnergies to pay 12,000 euros pursuant to Article 700 of the French Code of Civil Procedure.

Since this decision of the judge, the law n° 2021-1729 of December 22, 2021 on confidence in the judicial institution published in the official journal n°0298 of December 23, 2021 has provided, in an article L. 211- 21 of the Code of Judicial Organisation, that:

"The Paris judicial court shall hear actions relating to the statutory duty of vigilance based on Articles L. 225-102-4 and L. 225-102-5 of the French Commercial Code".

Finally, on February 11, 2022, the "*juge de la mise en état*" of Paris (*Tribunal judiciaire de Paris*) noted the jurisdiction of the Paris Judicial Court to hear the dispute relating to the statutory duty of vigilance (Commercial Code) but also to the prevention of ecological damage (Civil Code).

Nevertheless, in its decision of July 6, 2023, the *Tribunal judiciaire* of Paris declared the legal action inadmissible for another formal reason already mentioned (standing).

Les Amis de la Terre France, L'association NAPE & L'association AFIEGO v. TotalEnergies, October 29th 2019 – L'association Survie, L'association Civic Response to Environment and Development, l'association Navigator of Development association v. TotalEnergies, writ of summons, October 29th 2019, judgment of inadmissibilité, February 28th 2023, Judiciary Tribunal of Paris

In a first step, the French courts were asked to rule on jurisdiction. By order of January 30, 2020, the Paris Court of First Instance upheld the objection of lack of subject matter jurisdiction raised by TotalEnergies EP in favour of the Commercial Court of Nanterre. In a December 10, 2020 ruling, the Versailles Court of Appeal confirmed the order. By judgment of December 15, 2021, the Commercial Chamber of the Court of Cassation partially quashed the contested decision, on the grounds that there was a right of option for non-traders between the judicial court and the commercial court for the action brought on the basis of Law No. 2017-399 of March 27, 2017 on the

statutory duty of vigilance of parent companies and ordering companies. The case was referred to the summary jurisdiction of the Nanterre court. However, Law n° 2021-1729 of December 22, 2021 for confidence in the judiciary, which came into force on the following December 24, gave exclusive jurisdiction to hear actions brought on the basis of Law n° 2017-399 of March 27, 2017 relating to the statutory duty of vigilance of parent companies and ordering companies, to the Paris judicial court. By order of April 21, 2022, the summary proceedings court of the Nanterre judicial court thus declared itself incompetent in favor of the summary proceedings court of the Paris judicial court.

On February 28, the Paris judicial court, recognised as having jurisdiction, rendered its first two judgments on the statutory duty of vigilance recognised by the Commercial Code. It concluded that the claim was inadmissible.

Above all, in this same case, the judge restricted the jurisdiction of the summary proceedings judge. While it is possible for him to take note of the absence of a plan or its obvious incompleteness with regard to the required headings, this is not a case about the "reasonable" nature of the measures. It is for this reason that, after noting that the defendant had indeed drawn up a due diligence plan and indicated in detail the various headings required by the provisions, that the documents in the file were highly complex and that "there is no regulation specifying the contours of the standard of a normally diligent company", the judge affirmed that the request must be "the subject of an in-depth examination of the elements of the case exceeding the powers of the judge in summary proceedings" ("juge des référés").

On this point, the solution is not at all surprising: the conditions required by articles 834 (proof of urgency and the absence of a serious challenge to the measures prescribed by the judge) or 835 (proof of imminent damage or of the violation of an unlawful manifestation in the event of a serious challenge) of the Code of Civil Procedure must be met. However, in the case of the breach of the statutory duty of vigilance, the absence of a serious dispute as well as the imminence of the resulting damage or its manifest illegality cannot be characterised with, as the judge reminds us, "the evidence required in summary proceedings".

iv. Group litigation

One provision could be interesting in climate change litigation against companies but it would be challenging to meet some required conditions. It is the French Environmental Group Provision.

Under article L. 142-3-1 of the Environmental Code:

"I. - Subject to the present article, Chapter I of Title V of Law no. 2016-1547 of November 18, 2016 on the modernisation of justice for the 21st century and Chapter X of Title VII of Book VII of the Code of Administrative Justice apply to the action brought on the basis of the present article.

II. - When several persons in a similar situation suffer prejudice resulting from damage in the fields mentioned in article L. 142-2 of the present code, caused by the same person, having as its common cause a breach of the same nature of its legal or contractual obligations, a group action may be brought before a civil or administrative court.

III. - This action may seek the cessation of the breach, compensation for personal injury or material damage resulting from the damage caused to the environment, or both.

IV. - Only the following may take such action

1° Associations, approved under conditions defined by decree by the Conseil d'Etat, whose statutory purpose includes the defence of victims of personal injury or the defence of the economic interests of their members;

2° Environmental protection associations approved under article L. 141-1.

v. Additional procedural conditions – formal notice ('mise en demeure')

As mentioned before, all legal actions grounded on the statutory duty of vigilance created by the March 27, 2017 Act must satisfy a formal notice condition sent by plaintiff to the defendant prior to addressing the subpoena. This procedural requirement has been interpreted by trial courts in a way that makes access to justice for plaintiffs almost impossible. The forthcoming legal battles will undoubtedly be on the proper interpretation given to this condition.

Envol Vert et. al., v. Casino (writ of summons, March 2nd, 2021), pending

Given the ordinance rendered by the *Tribunal Judiciaire de Paris (Juge de la mise en état)* on July 6, 2023 in the action opposing *Notre Affaire à Tous et. al. v. TotalEnergies* which held that each single plaintiff must have individually notified the defendant (*mise en demeure*) prior to addressing the subpoena, it is not sure that, beside *Envol Vert* who seems to be the only author of the formal notice, the other 10 NGOs will be admitted to sue.

Les Amis de la Terre France, L'association NAPE & L'association AFIEGO v. TotalEnergies, October 29th 2019 – L'association Survie, L'association Civic Response to Environment and Development, l'association Navigator of Development association v. TotalEnergies, writ of summons, October 29th 2019, judgment of inadmissibilité, February 28th 2023, Judiciary Tribunal of Paris

For the defendant, the argument of pure form is important in order to avoid a trial and to conclude that the action is inadmissible. Thus, in this case, the goal of *TotalEnergies* is to convince the judge that the absence of a formal notice relating to the due diligence plan discussed during the debates should justify the inadmissibility of the action. This would allow the company to avoid a trial and, more importantly, to delay the trial on the merits.

At this stage, we must recall that the judge at the Paris Court ruled in this direction. But, because the plaintiffs have appealed against the judgment, the argument could be

discussed before the Appeal Court of Paris. It raises technical questions (Article L. 225-102-4-II of the French Commercial Code does not formally require the reiteration of the formal notice relating to the plan initially criticized, and only the identity between the formal notice and the initial summons could have been required), in terms of the principles of the lawsuit (if the principle of immutability of the dispute implies in principle the impossibility of forming new claims during the proceedings, except in the case of incidental claims, in this case the plaintiffs considered that they had only specified their former claims), and even politically speaking. Indeed, if the solution implies that, after the amicable phase, the plaintiff is obliged to sue the defendant again under the new plan, the task could be complicated and could call into question the equality of arms.

Notre Affaire à Tous and others v. Total, January 28th 2020 writ of summons, Judiciary Tribunal of Paris, July 5th 2023, inadmissibility judgment, decision appealed, pending

On July 6, 2023, the Court of Paris (*Tribunal judiciaire de Paris*) declared the action brought by the plaintiffs (NGOs and communes) against TotalEnergies inadmissible. The decision was based on irregularities relating to the formal notice requirement. Firstly, the judge noted that some of the plaintiffs had not sent a formal notice to the defendant. Secondly, he noted that the formal notice sent on June 19, 2019 was imprecise. In his view, "To constitute a solemn warning and to serve as a basis for discussion before a case is brought before a court, the formal notice provided for in article L. 225-102-4 II of the French Commercial Code must be sufficiently precise". In addition, he notes that the summons contains requests that are not formulated in the formal notice. Following the same reasoning as in the case concerning the construction of an oil pipeline by TotalEnergies in Tanzania and Uganda (see above), the judge concluded that the formal notice, in this case, did not constitute sufficient interpellation and could not serve as a basis for useful negotiation prior to the issue of the summons. The action is deemed inadmissible. We must now wait for the decision of the appeal Court of Paris.

C. Defences

i. Formal Arguments.

Subpoena/formal notice

As with all statutory duty of vigilance cases, the lethal defense argument opposed by corporate defendants deals with the formal notice requirement prior to subpoena. More specifically, trial judges have considered that the contested elements of the corporate plan of vigilance which must be presented in the formal notice and, in their judgement, identically reproduced in the subpoena addressed to the defendant no sooner than 3 months later, must still exist on the day the court hearing is held (See above: Total Energies cases: Tribunal judiciaire de Paris, Feb. 28th 2023; Tribunal judiciaire de Paris, July 6th 2023). However, corporate plans of vigilance belong to the information

annually disclosed by corporations and a new plan is published every year replacing the prior one making plaintiffs' claim moot. While plaintiffs have sought to overcome this hurdle by fueling their first claim with criticisms of the new plan to sustain the viability of the initial contested elements, judges have held they were inadmissible because they did not satisfy the formal notice requirement targeting the new plan with a corresponding new subpoena. Appeals have been filed by plaintiffs and are currently pending.

Misappropriated legal action

We must also note a very interesting argument deployed by the defendant in one of the TotalEnergies Cases. It concerns the adage *specialia generalibus derogant*. In its decision rendered July 5th 2023, the Tribunal judiciaire of Paris observed that in this case, the claim under article 1252 of the French Civil Code (ecological Damage) is worded as follows in the writ of summons: "Order TOTAL SA to publish and implement, as part of its obligation to prevent ecological damage resulting from its activities, appropriate actions to reduce its direct and indirect emissions in line with the Paris Agreement, in order to limit global warming to well below 2°C, in particular:". For the judge, the expression "publish actions" means that TOTAL ENERGIES is asked to publish a plan to prevent ecological damage. There is then a confusion with the statutory duty of vigilance provided for in article L225-102-4 of the French Commercial Code. In addition, the judge notes that the measures which the plaintiffs on the merits are requesting to be "published" are similar to those which they are requesting to be mentioned in the new due diligence plan on the basis of article L225-102-4 of the French Commercial Code. Because there is no difference between the request they are making on the basis of article 1252 of the French Civil Code and the one they are basing on article L225-102-4 of the French Commercial Code, the two claims pursue the same objective. The judge asserts that "the request made on the basis of article 1252 of the Civil Code is in fact subject to the provisions of article L225-102-4 of the Commercial Code, which are special and derogate from the general provisions of the Civil Code" and it concludes : "It has clearly been made with a view to circumventing the formal notice requirement set out in paragraph II of article L225-102-4 of the French Commercial Code. It is therefore inadmissible". Again, the articulation between the provisions of the Civil Code and the provisions of the Commercial Code will be debate before the Appeal Court.

ii. Merits arguments

For the moment, the arguments on the merits have not really been deployed and examined. What judges will rule about non-compliance with consumer law, commercial law, contract law and tort law is still uncertain. The argument most often put forward by plaintiffs is non-compliance with the statutory duty of vigilance. The defendants will have to demonstrate that they comply with the requirements set out in article L. 225-102-4 of the French Commercial Code.

See for instance: Comissão Pastoral da Terra et Association Notre Affaire à Tous v. BNP Paribas, writ of summons, February 27th 2023, pending

The case against BNP Paribas has not yet been opened. In order to take legal action against BNP Paribas, the NGOs had to give the company formal notice to comply with the statutory duty of vigilance (article L. 225-102-4 of the French Commercial Code). BNP Paribas has issued an unpublished response. The summons provides information on the response, which is as follows:

"BNP Paribas' financing and investment policy therefore emphasizes value chain control and specifies that the group's entities will provide financial products or services only to companies active in this sector that will have a "zero deforestation" strategy in their production and supply chains by 2025 at the latest"; BNP Paribas "encourages its customers not to produce or purchase beef or soy from land cleared or converted in the Cerrado after January 1, 2020, in accordance with international standards";

"Specifically, in the case of companies (producers, meat packers and traders) producing or purchasing beef or soy in the Brazilian Amazon and Cerrado, financial products or services will only be provided to companies with a zero deforestation strategy in their production and supply chains by 2025 at the latest. Achieving zero deforestation requires many measures such as traceability, monitoring, reporting, engagement with suppliers and even exclusion, which has led us to give our clients time to implement all these measures by 2025."

For BNP Paribas, these elements specified in the Compliance Plan are sufficient to demonstrate that the Group is in compliance with Article L. 225-102-4 of the French Commercial Code (statutory duty of vigilance).

D. Relevant sources of evidence¹ procedures (and standards) related to causation

In French law, the rules applicable to civil and administrative procedures are largely identical. Their original sources are to be found in the French Civil Code. To understand how French law works in terms of evidence, it is necessary to take a closer look at the principles set out in articles 1353 and 1354 of the Civil Code:

On the one hand, generally speaking, according to the new article 1353 (former article 1315 renumbered on the occasion of the ordinance reforming contract law of February 10, 2016) of the Civil Code paragraph 1 then paragraph 2: "He who claims the performance of an obligation must prove it. Conversely, he who claims to be discharged must justify the payment or the fact which produced the extinction of his obligation". Formalising the adage "Actori incombit probatio", this provision stipulates that the burden of proof lies with the claimant. It sets up a "game of rackets": while the plaintiff

¹ See R Stuart-Smith et al, 'Filling the evidentiary gap in climate litigation' (2021) 11 Nat Clim Chang 651.

must initially provide proof of what he or she claims to obtain, once proof has been provided, it is up to the defendant to provide proof to the contrary. However, this chronological presentation should be treated with caution. It is accepted that none of the parties is passive in the proceedings: they each participate in establishing the facts of the dispute. Above all, the law of evidence also provides for a system of presumptions, either for reasons of high probability, legal certainty or social justice. A distinction is made between presumptions of fact and presumptions of law. Presumptions of fact are those which the magistrate draws from a known fact to establish an unknown fact. They are set out in Article 1382 of the French Civil Code: "Presumptions not established by law are left to the discretion of the judge, who must admit them only if they are serious, precise and concordant, and only in cases where the law admits proof by any means. "This means that the judge can be satisfied with a simple probability to admit a legal truth. The assessment of the facts is a matter of personal conviction. But presumptions must meet three criteria: they must be serious, precise and concordant".

The latter are those created by the legislator. Ultimately, they reverse the burden of proof. They are defined in the new article 1354 of the French Civil Code: "The presumption that the law attaches to certain acts or facts by considering them as certain exempts the person in whose favor it exists from having to prove it. It is said to be simple, when the law reserves proof to the contrary, and can then be rebutted by any means of proof; it is said to be mixed, when the law limits the means of rebutting it or the object on which it can be rebutted; it is said to be irrebuttable when it cannot be rebutted".

In climate trials, no presumption of legal proof is applicable, so the difficulty for plaintiffs remains that they have to prove the facts on which they rely. On the merits, however, the judge will remain free to rely on article 1382 of the Civil Code, in his or her sovereign discretion. He may consider that the presumption is sufficiently serious, precise and concordant to convince him of the alleged fact.

All the cases presented in this report show that claimants are obliged to prove facts based on scientific evidence. In general, the most common references are IPCC reports and other scientific reports highlighting greenhouse gas-emitting activities.

Envol Vert et. al., v. Casino (writ of summons, March 2nd, 2021), pending

In order to prove the breach of the statutory duty of vigilance provided for in Article L. 225-102-4 of the French Commercial Code as well as the general environmental obligation to act with vigilance governed by rules of civil liability, plaintiffs rely on numerous NGOs and investigation journalists reports. In particular:

- Envol Vert report "*Groupe Casino Eco Responsable de la déforestation*" of June 2020. The report is based on ground investigations held in Brazil in 2019 and 2020 with the collaboration of a group of journalists which are part of Reporter Brazil. It has allowed to establish the link between the Casino Group and farms involved in the deforestation of the Amazon Forest and/or indigenous land grabbing. More specifically, it has

identified with great precision individual farms that have sold beef to slaughterhouses operated by the suppliers of Casino's subsidiary (GPA). Some of these farms had been found guilty of illicit forest-cuts and land grabbing and prohibited by the Brazilian environmental authority (IBAMA) to sell beef and yet disregarded the sanctions.

- Amnesty International report « *From Forest to Farm Land* » of July 2020. The report corroborates the findings of Envol Vert report with an emphasis on the serious violations of indigenous people's rights.
- Reports of CCCA of 2020 and 2021 synthesized in the Memorandum CCCA (Center for Climate Crime Analysis/OSJI (Open Society Justice Initiative)). The reports corroborate Envol Vert findings. Their investigations particularly target one GPA suppliers, JBS, which operates various slaughterhouses. They document the connection between designated slaughterhouses and the registered properties of their direct cattle-farms suppliers. These suppliers are said to grow cattle on thousands of yards of deforested lands, some of which are located within protected forest zones or within indigenous reserves. They also document specific instances of beef-washing, the practice of transferring cattle raised on illegal deforested lands to legally registered properties. The reports finally document the involvement of JBS in what could be considered as forced labor as its slaughterhouses purchased beef grown on lands owned by farms pinned on a blacklist established by the government and based on regularly up-dated labor inspections.
- Reporter Brazil report (a group of investigation journalists) of February 2021 "steak in the supermarket and forest on the ground". The report documents the failure of distributors like the Casino Group to effectively control their supply chains despite their public commitments. They show that cattle growers can easily subvert the TAC agreement restrictions (an extrajudicial agreement concluded by Brazilian public authorities and corporate entities to protect individual and collective rights which includes not purchasing beef from cattle grown on illegally deforested lands or farms suspected of forced labor or beef wash). The report points to specific farms and lands.

Comissão Pastoral da Terra et Association Notre Affaire à Tous v. BNP Paribas, writ of summons, February 27th 2023, pending

In order to prove the disregard of the statutory duty of vigilance provided for in Article L. 225-102-4 of the French Commercial Code, the plaintiffs in the action rely on a large number of expert reports. These expert reports are used to attest to the following: the effects of the beef production industry on climate change, the harmful effects of Marfrig's activity, BNP Paribas' financing of Marfrig's activity, BNP Paribas' lack of control over the activities of beef producers such as Marfrig, who are responsible for deforestation. The expert reports cited are private or public. They come from NGO's, States, IPCC reports (Intergovernmental Panel on Climate Change (IPCC) findings indicating that methane is the second most important contributor to warming and is responsible for about 0.5°C of current global warming), scientists themselves, banks, the defendant. They are relayed by the media and journalists (written and oral press).

The writ is very documented and more precisely, we can retain:

- The organization Repórter Brasil details the case of five farms practicing deforestation or modern slavery.

- The investigation by the NGOs Disclose and Repórter Brasil published in November 2022 - in partnership with Sherpa, Harvest and the Center Climate Crime Analysis (CCCA) - shows that four French banks have financed large agribusinesses in the beef, soy and palm oil sectors linked to deforestation in Brazil for more than 743 million euros between 2013 and 2022.
- The official tool, named PRODES, set up in 1988 by Brazil allows to monitor deforestation on its territory thanks to satellite imagery.
- The Stockholm Resilience Center has published a study that shows that a significant part of the Amazon Forest could be downgraded by the end of the century from "tropical forest" to "savanna".
- According to Geoconfluences, a publication co-sponsored by the French Ministry of Education and the Ecole Normale Supérieure de Lyon, the launch of an action plan to control deforestation in 2004 has led to a drastic drop in the annual area deforested.
- Also cited are reports or studies by France TV Info, "Is the Amazon forest really the 'lung of the planet'?", August 24, 2019; Marion Daugeard and François-Michel Le Tourneau, "Le Brésil, de la déforestation à la reforestation?", Géoconfluences, October 2018. <http://geoconfluences.ens-lyon.fr/informations-scientifiques/dossiers-thematiques/changement-global/articles-scientists/bresil-deforestation-reforestation>.
- According to the NGO World Wildlife Fund (WWF), agricultural expansion in tropical areas is the primary direct cause of deforestation.
- According to data from the Brazilian federal state, 65% of deforested areas are occupied by pastureland.
- A recent article in Nature magazine warns that the Amazon has become a source of carbon dioxide (CO2) due to forest fires, deforestation and climate change⁴⁴. The article reports the results of a study by a team of Brazilian scientists who measured CO2 emissions in several areas of the Amazon affected differently by deforestation over a 9-year period from 2010 to 2018. According to this study, deforestation reduces the capacity of the Amazon forest to absorb CO2 from the atmosphere.
- Also cited: the Intergovernmental Science and Policy Platform on Biodiversity and Ecosystem Services (IPBES), Global assessment report on biodiversity and ecosystem services, May 4, 2019, p. 257. <https://zenodo.org/record/6417333#.Y9KJe4SZNPZ>
- Research by Scott Denning, "Southeast Amazonia is no longer a carbon sink," in Nature, vol. 595, 15 July 2021 (our translation), by Gatti, L.V., Basso, L.S., Miller, J.B. et al. "Amazonia as a carbon source linked to deforestation and climate change," Nature 595, 388-393 (2021).
- Articles by Alex Cuadros, "Has the Amazon Reached Its 'Tipping Point'?", The New York Times, January 4, 2023 (our translation). <https://www.nytimes.com/2023/01/04/magazine/amazon-tipping-point.html>.
- World Wildlife Fund (WWF) expert reports, "Understanding the impact of forests on climate," September 25, 2012. <https://www.wwf.fr/vous-informer/actualites/comprendre-limpact-de-la-foret-sur-le-climat>
- A study by the journal Global Environmental Change released in 2018⁵⁴ that highlights the role of forests in regulating local climate and shows how the ecosystem system is threatened

by deforestation, even though it is vital for avoiding heat-related illnesses, and for enabling adaptation to climate change.

- A study conducted for the Fourteenth Session of the United Nations Forum on Forests (2019) that also indicated that the net impact on climate also depends on what replaces the forest after deforestation.

- The InfoAmazonia news site, which reports that the cattle population in the legal Amazon has increased 20 times more than the average for the rest of the country.

- Research by physicist Paulo Artaxo, a professor at the Institute of Physics at the University of São Paulo (Brazil) and a member of the UN's Intergovernmental Panel on Climate Change (IPCC), which states, "The effects of reducing methane emissions on global warming could be observed in a shorter time frame. While carbon dioxide takes thousands of years to dissolve in the atmosphere, methane takes only 11 years.

- A report co-authored by the United Nations Environment Programme.

- The investigations of the association Repórter Brasil, which explains that several owners of large contiguous areas declare these properties separately to the environmental rural cadastre. Instead of a single farm, the parcel is converted - at least on paper.

- Investigations by the NGO Chain Reaction Research (CRR) that found the limitations of the Safe Trace system.

- The non-governmental organization Chain Reaction Research, which investigated a tiny sample of Marfrig's direct and indirect suppliers.

- The report "Beef, Banks and the Brazilian Amazon" (2020) produced by the non-governmental organization Global Witness, which criticized Marfrig for not respecting the agreement signed in 2009 with Greenpeace (see above) while maintaining a "green" communication.

- Global Witness' investigation that shows that between 2017 and 2019, Marfrig sourced from 89 farms with 3,300 hectares of deforested land, 39 of which were during the period covered by the agreement with Greenpeace.

- Documents from the NGO Greenpeace from 2020 showing that nearly 30% of the Pantanal ecoregion in the Brazilian states of Mato Grosso and Mato Grosso do Sul has burned down following two years of drought. In the majority of cases, cattle ranchers were suspected of deliberately setting fires to install cattle farms.

- Greenpeace also found in 2020 that Marfrig and other cattle slaughter companies continue to source from indirect deforestation farms.

- The report by the NGO Center for Climate Crime Analysis (CCCA), a Dutch non-profit organization of prosecutors, legal practitioners, megadata scientists and anthropologists, aims to support and scale up climate forensic action around the world at the national and international levels. CCCA released a report in September 2022 identifying massive deforestation between July 2008 and June 2020 within the supply chain of two slaughterhouses in Marfrig.

- Documents from the Central Bank of Norway and its Norwegian Government Pension Fund Ethics Board, which conducted its own study of Marfrig's supply chain and concluded that between 2016 and 2019, all of Marfrig's slaughterhouses had sourced from suppliers embargoed by IBAMA.

- Documents from Repórter Brasil, "The relationship between the French financial system and deforestation in Brazil".
- Press releases from BNP Paribas "BNP Paribas defines a restrictive policy to fight deforestation in the Amazon and Cerrado", 15 February 2021.
- Its document Politique sectorielle Agriculture, February 2021, pp. 16-17.
- its BNP Paribas 2022 Corporate Responsibility Plan, Universal Registration Document and 2021 Annual Financial Report, p. 644.
- In its Sustainability 2020 report, BNP Paribas stated that it "participates in an ongoing collaborative effort as a focused investor in leading Brazilian meat slaughter companies JBS, Marfrig and Minerva. BNP Paribas reportedly "played a leading role in a joint meeting with the three companies to discuss their respective efforts to fully trace their supply chains, and then sent letters to their attention in the summer of 2020 requesting formal commitments with timelines for full traceability."
- The 2021 press release: BNP Paribas company acknowledged that beef production in Brazil accelerates deforestation in the Amazon and the Cerrado.
- The program broadcast on the France 2 channel on January 26, 2023 at 9:10 pm. France Info, "Cash Investigation" investigated BNP's green funds, January 25, 2023.

Les Amis de la Terre France, L'association NAPE & L'association AFIEGO v. TotalEnergies, October 29th 2019 – L'association Survie, L'association Civic Response to Environment and Development, l'association Navigator of Development association v. TotalEnergies, writ of summons, October 29th 2019, judgment of inadmissibilité, February 28th 2023, Judiciary Tribunal of Paris

The "assignation" (writ) is not published. However, on the Sabin Center's database of climate litigation, a very important expert opinion is posted online. It is a private report prepared by the association Friends of the Earth (France) and the association Survie (http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2019/20191023_NA_na-1.pdf). This report details the risks and violations of the environment and human rights caused by the activities of TotalEnergies' subsidiaries in Uganda and Tanzania. Above all, this case is known also because it is the first time that an interim relief judge. The Paris judicial court brought three *amicus curiae* into the courtroom. Among them were two law professors (Marie Anne Frison-Roche and Jean-Baptiste Racine) and a management professor (Bruno Deffain). He wanted them to clarify the meaning and scope of the duty of vigilance. These professors were heard at the hearing on December 7, 2022. The two judgments rendered on February 28, 2023 by the Paris Judicial Court declared the action inadmissible. The reasoning clearly reflects the thinking of one of the *amicus curiae* (Professor Marie-Anne Frison-Roche). She linked the duty of vigilance to a duty of compliance, justifying giving priority to resolving the dispute through negotiation, outside the courtroom. Unfortunately, the opinions of the three *amici* have not been published. On this point, it should be noted that there are no rules governing the calling in of an *amici* under

French law. In this case, we have no idea how or why the judge called on these three professors. In addition, the plaintiffs also called in professors and submitted their consultations to the judge.

Notre Affaire à Tous and others v. Total, January 28th 2020 writ of summons, Judiciary Tribunal of Paris, July 5th 2023, inadmissibility judgment, decision appealed, pending

A large number of international and national, public and private, collective and individual expert opinions support the reasoning of the plaintiffs in *Notre Affaire à Tous and others v. TotalEnergies*.

These include :

- The work of the IPCC, which helps determine the causes and consequences of anthropogenic greenhouse gas emissions. More precisely, we can observe the importance of the following documents: The IPCC Special Report 1.5°C, 2018, chapter 2 of the full report. The IPCC's work shows that the warming of the climate resulting from anthropogenic activities generates risks of serious harm to the environment, human rights, and human health and safety that will be aggravated and amplified under the assumption of warming above 1.5°C.; The Summary for Policymakers (SFP) of the IPCC Special Report "on the consequences of global warming of 1.5°C above pre-industrial levels and associated global greenhouse gas emission trajectories in the context of strengthening the global response to climate change, sustainable development, and poverty alleviation" published on October 8, 2018.
- The work of the International Energy Agency (IEA), whose SDS and NPS scenarios are highlighted by TOTAL within its vigilance plan, and which notes that advances in carbon capture technology suffer from considerable delays compared to the deployment anticipated by the SD scenario.
- The work of J. Stiglitz, winner of the Nobel Prize in Economics, who exclusively advocates immediate GHG reduction as a mitigation measure³⁴ because of the high costs associated with negative emission technologies³.
- The work of A. Karsenty: Karsenty, A., "Total and the Forests," September 2, 2019, available online at URL: <https://www.telos-eu.com/en/economy/total-and-the-forests.html>.
- The Climate Action Network's report on corporate climate responsibility (May 2016) defines scope 3 emissions as being "indirectly produced by the activities" of the legal entity: "Other indirect emissions (or SCOPE 3).
- The work of American researcher Richard Heede published on April 7, 2014, which measures how 90 companies (83 companies in the oil sector and 7 cement production companies) around the world have contributed to the climate crisis. According to this report, the direct and indirect emissions generated by TOTAL's activities represent 0.82% of global greenhouse gas emissions during the period 1751-2010²(Exhibit #6, p. 26).
- The work of the NGO Carbon Disclosure Project published in 2017 in partnership with R. Heede leading to a second study according to which 100 companies are responsible for 71% of global GHG emissions during the period 1988-2015.

We can add that a private expertise has been submitted to the judge. It is the expert Report of Dr. Yann Robiou du Pont (https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220208_NA_na.pdf). Its title is: "Consultation on Total Energies alignment with the objective of limiting global warming to 1.5°C.

Notre Affaire à Tous, Les Amis de la Terre France, Oxfam v. BNP Paribas, writ of summons, February 23rd 2023, pending

In this case, the evidence is very varied. There are the scientific aspects to demonstrate that the expected standard is not to exceed a 1.5 degree rise in temperature. There are also expert reports demonstrating that it is no longer possible to continue financing and investing in fossil fuels, and that these activities must be stopped.

A few examples could be retain: 1) The IPCC Reports, which demonstrate that there is a well-established scientific consensus that global warming in excess of 1.5°C poses a threat to biodiversity and the functioning of human societies. 2) A quote from Antonio Guterres during his speech at the World Economic Forum on January 18, 2023. 3) The recommendations of the High-Level Panel of Experts mandated by the UN Secretary-General, the universal reference standard for limiting global warming to 1.5°C. 4) A reference to the fact that on February 6, 2023, UN Secretary-General Antonio Guterres called on all players in the fossil fuel industry and their financial backers to immediately implement the measures recommended by the UN-HLEG.

Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France, pending

The commercial practices at stake are found on the group's website for private individuals ("the commercial site"), on an *ad hoc* web page entitled "energy reinvents itself" created specifically to accompany its advertising campaign, on its social networks, on Total' sports sponsorship of cycling and rugby, on billboards in cities and service stations and on TV and newspaper advertisements.

To substantiate their claim of deceptive practices:

- As of Total's overall ambition to be carbon neutral and a major player in transition, plaintiffs say common principles define minimum requirements of professional diligence to meet net zero targets for oil & gas companies. This professional diligence standard is derived from scientific benchmarks and guidelines:
 - Related to what it means to be carbon neutral for companies (the scope of GHG emissions reduction measurement and target dates) → The "Net Zero" benchmark of the Science Based Targets Initiative ("SBTi"), the "Net Zero Initiative" benchmark of the French climate economics specialist Carbone 4, the AMF's Climate and Sustainable Finance Commission report, the "Assessing low carbon transition" ("ACT") methodology promoted by ADEME, and the international campaign coordinated by the UN "Target Zero" (or "Race to Net Zero").

- Related to the role of the oil & gas sector in relation to that objective → UNEP Production Gap Reports, and IEA reference scenario known as NZE described in its report "Net Zero by 2050.

Then, plaintiffs confront this professional diligence standard to Total's emissions reduction strategy and to its investment plan in oil and gas presented to shareholders. To assert a contradiction between the common standard of diligence and Total's claims, plaintiffs scrutinize the Group Climate Report, "Towards Carbon Neutrality", 2020, the Universal Registration Document for 2020, and two documents presented to the shareholders "Strategy and Outlook, 'From Net Zero ambition to Total strategy'", of September 2020 and "Strategy and Outlook, 'Building a sustainable multi-energy company'" of September 2021. To support their findings of contradiction, plaintiffs also rely on a report from Greenpeace France and Reclaim Finance, "Total fait du sale: La Finance complice?", February 2021, on the Net Zero Company Benchmark assessment for TotalEnergies made by Climate+100, and an assessment report of the Total Group from the World Benchmarking Alliance.

- As of Total's claims related to fossil gas and biofuels, plaintiffs recall the properties of fossil gas in relation to GHG over its life cycle. They rely on IPCC report "AR5" and Energy Literacy, "IEA releases 2020 edition of Key World Energy Statistics", 28/08/2020.

Then, plaintiffs confront such properties to Total's claim that 1/ gas emits lower CO2 eq. than other fossil energy sources, and 2/ offers other virtuous assets. To contest these assertions, plaintiffs rely on a 2021 report from Climate Analytics "Why gas is the new coal", an article published in Science "Global assessment of oil and gas methane ultra-emitters", 2022, IISD, Summary of the Step Off the Gas Report, 2021, ADEME, "Cost of Renewable and Recoverable Energy in France", 2020, an IEA website page "Global natural gas demand per sector, 2007-2025" and an IEA Report, "Net Zero by 2050, A roadmap for the global energy sector", October 2021.

- As of Total's claims related to agrofuels, plaintiffs contend that Total's claims related to the benefits of agrofuels are over simplistic and scientifically undemonstrated. Plaintiffs also quote EU Commission delegated regulation 2019/807 of March 13th 2019 which points out the adverse effects of biofuels notably made of palm oil on indirect land use change (ILUC) and deforestation, a press article from Le Monde, the French budget act n° 2018-1317 of December 28th 2018 and the decision of the Constitutional Council n° 2019-808 of October 11th 2019 and an information report N°2609 issued by the information mission on agrofuels of the National Assembly of 22 January 2020.

E. Limitation Periods

Firstly, it should be noted that in French law, the principle applicable to the law of civil liability is that set out in Article 2224 of the Civil Code: "Personal or movable actions are prescribed by five years from the day when the holder of a right knew or should have known the facts enabling him to exercise it". On the other hand, as an exception to the rule governing compensation for ecological damage, the limitation period is longer. According to Article 2226-1 of the French Civil Code, "A liability claim for compensation for ecological damage redressable under Chapter III of Subtitle II of Title III of the present Book shall be time-barred ten years from the date on which the holder

of the claim knew or should have known of the occurrence of the ecological damage".
To date, there has been no legal action involving the statute of limitations.

3. Remedies

In France, a distinction must be made between administrative and judicial courts. The administrative judge can annul an administrative act. In the case of climate change, for example, environmental protection associations turn to the administrative judge to overturn an authorisation to operate an activity that emits greenhouse gases. As for the judicial judge, he can impose criminal and civil sanctions, such as the cancellation of a contract, an injunction to perform an obligation, an obligation to pay damages, or an injunction to take measures to put an end to an unlawful act. Concerning the civil liability law, most of the time, the plaintiffs ask some damages for the compensation of a moral or material damage. It is also possible to request some preventive measures. This is the case when the origin of the damage is still present and, to stop the damage, it is necessary to attack its origin.

In the case of the climate litigation studied, we can find only one case (*Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France*) where claimants are seeking damages for harm suffered by victims (not individuals, only environmental protection associations). The aim here is to obtain compensation. However, in all other climate change litigation against French companies, the aim of the plaintiffs is to ask the judge to prescribe measures that directly or indirectly reduce greenhouse gas emissions.

Two legal provisions enable preventive measures to be taken: the duty of vigilance (article L. 225-102-4-II of the French Commercial Code: "*Where a company given formal notice to comply with the obligations set out in I fails to do so within three months of the notice being given, the competent court may, at the request of any person having an interest in the matter, order the company to comply, subject to a fine where appropriate*".) and the preventive action provided for in the ecological damage compensation scheme (article 1252 of the French Civil Code: "*Independently of compensation for ecological damage, the judge, on receipt of a request to this effect from a person referred to in article 1248, may prescribe reasonable measures to prevent or halt the damage*").

On this point, it should be noted that the requests are sometimes very specific. For example, when requesting compliance with the statutory duty of care (Commercial Code), applicants specify what they want to see written into the plan. In French law, this type of remedy is called "*la cessation de l'illicite*" (cessation of the unlawful [conduct]). This involves complying with the law, i.e. setting up a due diligence plan containing reasonable measures to prevent environmental damage, in particular by reducing greenhouse gas emissions.

We must also note that some legal grounds do not allow preventive measures to be obtained directly, as in the case of unfair and deceptive practices.

Envol Vert et. al., v. Casino (writ of summons, March 2nd, 2021), pending

In this case, the goal is to obtain preventive remedies by the cessation of the unlawful. Plaintiffs ask the Court to enjoin Casino to respect its obligations pursuant to article L. 225-102-4, namely, to adopt, publish and effectively a new plan of vigilance containing at least:

- A cartography presenting, analysing and prioritizing the serious potential adverse impacts resulting from its subsidiaries' beef supply chains in Latin America, and notably in Brazil and Colombia, which shall be regularly updated.
- Proper measures of evaluation of suppliers and actions aimed at preventing and mitigating serious violations and harms. Such measures shall exclude of beef supply coming from illegally deforested and converted lands and from farms relying on forced labor and involved in violations of indigenous people's rights. In particular, such measures shall apply to its entire beef supply chain (fresh and frozen beef, marketed under its own brand or under national brands as well as transformed food). In addition, such measures shall apply to its subsidiaries' direct and indirect suppliers no matter their rank in the supply chain. They shall guarantee the traceability of the beef from its origin.
- Include specific and proper measures to guarantee the absence of beef washing.
- Require supermarkets owned by Casino to purchase beef from suppliers who abide by the aforementioned measures and who operate a control system to ensure compliance.
- Plan additional controls of its supply chains, particularly in zones considered at risk.
- Adopt and implement corrective measures when violations have been established including ending commercial relations with suppliers in breach.
- Waiting for the above measures to be effectively put in place, implement a moratorium in its subsidiaries in Brazil and Colombia.
- Monitor the fulfillment of the objectives of the above measures based on publicly disclosed and stakeholders-built indicators of means and indicators of result.
- A proper notification mechanism easily accessible to victims.

France Nature Environnement & Guyane Nature Environnement v. Prefect of Guyane and EDF – “The Larivot power plant case” – July 27th 2021 and February 10th 2022

Plaintiffs asked for the suspension of the environmental authorisation (because the legal action is bought before an administrative judge).

Friends of the Earth et al. v. Prefect of Bouches-du-Rhône and Total – “The La Mède refinery case” – April 1st, 2021

Here again, because the legal action is bought before an administrative judge, plaintiffs asked for the suspension of the authorization to operate the refinery pursuant to article L. 512-18 of the environmental code.

Comissão Pastoral da Terra et Association Notre Affaire à Tous v. BNP Paribas, writ of summons, Feb. 27th 2023, pending

Here again, the goal is to obtain preventive remedies. About this BNP case, the plaintiffs ask the Court to order BNP Paribas, on the basis of Article L. 225-102- 4 II of the French Commercial Code, to comply with its obligations in terms of due diligence by adopting a new due diligence plan, subject to a fine of 10,000 (ten thousand) euros per day of delay from the date of the judgment. If the goal is at the end to obtain preventive measures, more precisely, the bank is requested: 1) to group together all the elements relating to the law on the statutory duty of vigilance within its due diligence plan in order to provide simple, clear, detailed and complete information on its implementation of this law, to put an end to the ambiguity on its commitments in environmental matters within its due diligence plan and in terms of public communication, which contributes to the discourse of greenwashing; 2) To identify the risks of invasion of indigenous territories, practices akin to slavery, and the risk of methane emissions, particularly from cattle breeding and in Brazil 3) To adopt appropriate risk mitigation and prevention measures accordingly but also measures to assess the situation of suppliers and appropriate risk mitigation and prevention actions to ensure that the supply chains of its customers do not contribute to deforestation, do not use practices similar to slavery, and do not infringe on the rights of indigenous populations.

The various measures for preventing infringement and identifying risks are described in the subpoena. For example, the plaintiffs require BNP Paribas: to require customers of Brazilian beef producers to use the theoretical animal productivity index as a tool to detect cattle laundering, indicate in its plan how BNP Paribas concretely uses its influence in its business relationships to promote the protection of human rights and the environment, and preventatively monitor any contracts. The plan should also specify whether BNP Paribas will refuse new financing or terminate its business relationships definitively in the event of non-compliance with the Agriculture sector policy. The vigilance plan must also provide for the implementation of a warning mechanism accessible to third parties and a specific system for monitoring measures.

Notre Affaire à Tous and others v. Total, January 28th 2020 writ of summons, Judiciary Tribunal of Paris, July 5th 2023, inadmissibility judgment, decision appealed, pending

The remedies asked by the plaintiffs are not to obtain some compensation but some prevention measures. Two legal bases can allow preventive remedies: the statutory duty of vigilance and the ecological damage regime.

More precisely, on the basis of article L. 225-102-4 II of the French Code of Commerce, they ask the judge to impose adherence to the obligations provided in article L. 225-102-4 I of the French Code of Commerce and to render its vigilance plan compliant. For that, the judge should ask TotalEnergies to publish a new vigilance plan respecting the obligations under the duty of vigilance resulting from risks related to climate change

and including as a minimum measures concerning the identification of risks and the way to prevent damages caused by TotalEnergies' activities. The plaintiffs also ask the judge to require the identification of risks related to an overage of the global carbon budget compatible with limiting global warming to 1.5°C above pre-industrial levels, and to analyse the risks resulting from its own activities according to the Group TOTAL's growth and production assumptions by 2050. The plaintiffs also hope that Total will be required to establish a complete and exhaustive mapping of the risks resulting from its activities and, in particular, GHG emissions by each activity sector and project including their primary energy mix.

Concerning the actions taken for preventing the risk, the plaintiffs observe the efforts made by several companies in various sectors. They therefore ask the judge to require TotalEnergie to prevent and mitigate risks to global warming in order to achieve carbon neutrality by 2050 across all direct and indirect emissions resulting from its activities. In this way, they hope that the Court will agree to order TOTAL to include the following measures in its vigilance plan, which TOTAL will publish and execute: 1) To conform to a reduction trajectory of direct and indirect GHG emissions (scope 1, 2 and 3) compatible with limiting warming to 1.5°C with no overshoot to reach carbon neutrality by 2050; 2) To set intermediate objectives to reduce the carbon intensity of its products in line with this trajectory; 3) To reduce gas production by 25% by 2030 and 74% by 2050 (from 2010 levels); 4) To reduce oil production by 37% by 2030 and by 87% by 2050 (from 2010 levels); 5) To immediately cease research and exploitation of new hydrocarbon deposits.

And finally, because the legal action is also based on the Ecological Damage Regime and in particular the article 1252 of the Civil Code ("Independently of compensation for ecological damage, the judge, on receipt of a request to this effect from a person referred to in article 1248, may prescribe reasonable measures to prevent or halt the damage"), the plaintiffs ask the judge more directly (and not only by writing again that vigilance plan), to impose to TotalEnergies: 1) To conform with a direct and indirect emissions reduction trajectory compatible with the Paris Agreement objective; 2) To decrease net emissions by at least 40% by 2040 (from 2019 levels) with a 1.8% annual reduction; 3) To decrease its hydrocarbon production by 35% by 2040 (from 2019 levels) with a 1.7% annual reduction; 4) To decrease its net emissions by at least 40% by 2040 (from 2019 levels) with a 1.8% annual reduction; 5) To end the exploration and the solicitation of new hydrocarbon exploration permits; 6) To implement a gradual cessation, by 2040, of research and exploitation of hydrocarbon deposits by committing to leave 80% of known reserves in the subsoil in accordance with the objective defined by Law n° 2017-1839 of December 30, 2017 known as "Hulot";

Les Amis de la Terre France, L'association NAPE & L'association AFIEGO v. TotalEnergies, October 29th 2019 – L'association Survie, L'association Civic Response to Environment and Development, l'association Navigator of Development association v. TotalEnergies, writ of summons, October 29th 2019, judgment of inadmissibilité, February 28th 2023, Judiciary Tribunal of Paris

The six NGOs ask the interim relief judge, as a matter of urgency, to require Total not to pay damages, but to comply with its statutory duty of vigilance obligations and to halt its oil project in Uganda and Tanzania.

Specifically, the defendant should, first, establish and publish in its due diligence plan and to include in it all the due diligence measures provided for in 2° to 5° of Article L. 225-104 I that are appropriate to prevent the risks identified in the risk mapping and to prevent serious violations of human rights and fundamental freedoms, the health and safety of individuals and the environment resulting from the activities of Total Exploration & Production Uganda B. V and Total East Africa Midstream B. V, wholly-owned subsidiaries of TOTAL SA, and their subcontractors, notably Atacama Consulting Ltd and Newplan Ltd in the conduct of the Tilenga and EACOP projects, including

The plaintiffs also ask the judge to require TotalEnergie: to establish a risk mapping; a regular assessment procedure; to provide for appropriate actions to mitigate or prevent identified risks; to adopt an alert and reporting mechanism relating to the existence or realisation of identified risks; to create a system for monitoring the measures implemented and assessing their effectiveness resulting from the activities of Total Exploration & Production Uganda B.V., V and Total East Africa.

Finally, it is also required to effectively implement its due diligence plan by ordering compliance with the principles set out in its reference document.

Notre Affaire à Tous, Les Amis de la Terre France, Oxfam v. BNP Paribas, February 23rd 2023

Once again, these are preventive remedies. The aim is to reduce greenhouse gas emissions by halting investment in fossil fuel activities.

In this case, the plaintiffs are asking the judges to order the defendant to stop financing fossil fuel activities and investing in fossil fuels. This general injunction takes the form of three injunctions based on the different grounds invoked: imposing the implementation of vigilance measures in the statutory duty of vigilance plan (article L. 225-102-4 of the French Commercial Code), imposing measures to prevent damage to the atmosphere by stopping harmful financing and investment activities (regime relating to ecological damage under the French Civil Code), and ensuring compliance with BNP Paribas' carbon neutrality commitments by stopping its financing and investment activities in fossil fuels.

Concerning the statutory duty of vigilance (Commercial Code), the plaintiffs requested that BNP Paribas publish a new due diligence plan which, without prejudice to other

measures that may be identified in light of the worsening climate emergency, scientific data and changes in its activities, should include some measures specified in the summons, such as: To determine: “Appropriate measures to prevent serious damage and mitigate risks, in line with a 1.5°C trajectory compatible with the Paris Agreement's objective of limiting global warming to 1.5°C, and consistent with BNP Paribas' commitment to finance a carbon-neutral world by 2050”.

Concerning the ecological damage, the plaintiffs ask the defendant for an immediate suspension of all new Financing to any company developing New Fossil Projects and an immediate halt to all new investments in any company developing New Fossil Projects. They ask the judge to impose the adoption and effective implementation of a shareholder engagement and voting policy to lead Invested companies to renounce the development of New Fossil Projects and to adopt, detail and publicly implement measures compatible with limiting global warming to 1.5°C with no or minimal overshoot, as well as preserving the corresponding Precautionary Carbon Budget, in line with the latest state of knowledge and taking into account in this respect the recommendations of the UN-HLEG 2022 report. In the absence of results in line with the aforementioned objectives following its effective commitment actions, within a reasonable period of no more than two years from the communication of its requests, the divestment of the companies concerned.

They ask also that the judge impose the adoption, publication and effective implementation of all measures compatible with a 1.5°C trajectory with no or minimal overshoot and with the corresponding Precautionary Carbon Budget, in line with the latest state of knowledge and taking into account, in this respect, the recommendations of the UN-HLEG 2022 report. This implies in particular:

The question is whether the judge will agree to provide this remedy when it could be considered similar to that sought by the plaintiffs in the statutory duty of vigilance action. On this point, the Paris Court of First Instance was very severe in the Total case (judgment of July 5, 2023, cited above).

Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France

For this case, it is necessary to distinguish between the two remedies: non-pecuniary damage and pecuniary damages.

With respect to non-pecuniary damages:

Plaintiffs seek a court order enjoining the defendants to immediately cease their misleading commercial practices. This involves ordering the defendant to modify, under penalty, the presentation, marketing and advertising materials of the TotalEnergies group and its products in order to remove some specific allegations (see the summons).

In addition, and to prevent new communication campaigns containing modified claims that are still misleading, plaintiffs ask the Court to impose mandatory information when

environmental claims relating to the defendants' climate commitments are used in the context of a commercial practice. Plaintiffs suggest model informative messages.

Lastly, to educate consumers, plaintiffs seek the publication of the operative part of the judgment

With respect to pecuniary damages

Plaintiffs also seek compensatory damages for moral prejudice. They argue that the misleading commercial practices of the defendant undermine the protection of the environment, which is at the heart of the plaintiff associations' activities. More specifically, they contend that these practices constitute an obstacle to the realisation of their social purpose, and therefore cause them personal moral prejudice distinct from the prejudice to the collective interests they defend. The moral damage is estimated to 10 000€ for each three NGOs.

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