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Standing for Climate Change Litigation: A Tort Law Approach and the Way Forward

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Climate change litigation is a polycentric issue, implying multiple parties at a wide scale. It is at odd with the rules of civil law, designed to individualise a connection between two parties, and shaped within a bilateral framework. Proximity between the parties is the hallmark of standing to examine the justiciability of a case. In climate change litigation, this bilateral scope is inherently problematic, and applying the rules of standing gives rise to recurrent legal contention. This difficulty has justified a theoretical analysis structured around a dialectical appreciation of standing, i.e., strictly versus broadly interpretated. Yet, the progression of admissible cases indicates a timely opportunity to enquire upon the contemporary relevance of this standpoint. This paper analyses, through a sample of exemplifying cases, the nature of the evolution of standing. It shows that it has not been allowed through a relaxing interpretation of the degree of proximity between the parties. It has rather been driven by the recognition of additional forms of proximity, recognised by the law, at both procedural and substantial levels. This paper seeks to move beyond the dialectical analysis, by clarifying the nature of these legal shifts.

Keywords: *Standing; Climate change litigation; Human rights; Civil liability; Proximity.*

Introduction

Standing examines the capacity of a party to bring a case to the court. It identifies genuine stakes involving personal interests or impairments of rights[1]. This rationale is similar in both civil and common law countries. For example, in the United States, it is regulated in the Constitution under article III[2]. Three cumulative requirements; injury-in-fact, fairly traceable to the defendants, and redressable in court, were interpretated as 'irreducible'[3] requirements by the jurisprudence[4]. The concreteness of the injury between two identifiable parties is also a touchstone of standing in civil law countries. For example, under the French law[5], claimants must demonstrate that the damage is existent, personal, and that

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[1]Kelleher (2022) at 1.
[2]U.S. Const. art. III, §§ 1–2.
[3]Cook (2022) at 15.
[4]*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) at 560-561.
[5]Civil procedural code of France (2024).

the dispute can be redressable[6]. At interstate level, the same logic is applied. At European level for instance, the *Plaumann case*[7] constructed a test evaluating how the claimants were individually concerned by the claim, 'by reason of certain attributes that are peculiar to them'[8]. The particularisation of the injury with the claimants is a consistent characteristic, designed to draw a line of 'correlativity in the plaintiff-defendant relationship (which) entails that each party's normative situation is relevant only in relation to that of the other'[9]. Standing, 'at root framed by the idea of particularised injury'[10], examines if the proximity between the parties legitimates (or on the contrary precludes) a judicial action to proceed.

Climate change litigation pursues different objectives according to the types of cases. First, cases seeking adaptation ask for adjusting human activities 'to attenuate harms from a changing climate'[11]. Typically, they ask that the court compels adaptation measures onto the defendant through judicial decisions. In adaptation cases, the main legal contentious point arising with standing, is that the damage has not materialised yet, despite established causality between the potential forthcoming injury, and the defendants' actions. This objective, preventive in nature, confronts itself with an intrinsic characteristic of standing, which is that to be redressable, harm must be existent. Second, cases seeking mitigation ask the defendant to exercise 'due diligence with the aim of limiting or reducing emissions, including by taking necessary and appropriate measures'[12]. Mitigation cases raise a similar difficulty as adaptation, being also preventive in essence. Third, loss and damage cases address 'harm caused by human-induced climate change itself'[13]. By contrast with the two previous configurations, they concern actual harm and are redressable. However, claimants face the challenge of linking the harm to the defendants' particular actions, making 'redressability for climate-related injuries […] the central difficulty in determining standing'[14], by struggling to establish legal causation.

The main problem between the applicability of the rules of standing and climate change litigation is that the latter is the result of an aggregation of multifactorial and cumulative causes. Its wide magnitude challenges the very nature of standing which is both contrived around, and designed for, the particularisation of the connection between two parties, potentially engaged in a legal relationship[15]. This contradiction engendered inconsistent case law, and numerous cases being struck out for their lack of standing [16]. Yet, the trajectory of the jurisprudence points at a diminution of cases struck out for being denied standing. This paper takes this opportunity to identify the legal strategies

[6]Ibid at art. 31.
[7]*Plaumann & Co v Commission, European Court of Justice* (1963) Case 25/62.
[8]Ibid at 100.
[9]Sangiuliano (2013) at 3.
[10]Kellman (2016) at 2.
[11]Lusk (2017) at 6.
[12]Mayer (2023) at 2.
[13]Doelle,& Seck (2020) at 2.
[14]Ruggiero (2022) at 1.
[15]Kellman (2016) at 2.
[16]Ruggiero (2022) at 1.

employed to achieve this result. It will show that it is being done through a two-tiered legal construction. First, at a procedural level, legislation is increasingly conferring a legitimacy to act to specific entities. Associations for instance can be endowed with the protection of collective interests, whereby the eligibility of their claims for wide scaled harm (and prevention thereof) is legally provided ex ante. Second, at a substantial level, with the addition of the human rights more inclusive regime, in the interpretation of the legitimacy to sue, which is increasingly connecting parties outside a bilateral scope.

The study suggests severing from the dialectical analysis shaped by the opposition between the strict as opposed to the broad application of standing in climate change litigation. It aims at showing that the progression is less the result of a broad interpretation of the connections between the parties, than the result of an *adjunction* of types of connections recognised by the law in practice. By giving a legal recognition to additional types of proximity through new 'liability routes'[17], the paper shows that the nature of the legal shift which is increasingly opening the courtrooms to climate change claimants, is a shift in the nature, more than in degree, of the forms of proximity recognised to grant standing.

Methodology

This paper is doctrinal research. It follows a deductive method, and its results are drawn from the examination of relevant jurisprudence. To draw consistency and avoid exceptional legal interpretations, the paper looks at the different types of climate change disputes (adaptation, mitigation and loss and damage) against private parties. Finally, for each case, the paper focusses only on the legal construction employed to grant or deny standing. The research is also limited to some countries where the jurisprudence related to climate change litigation is established.

Literature Review

The literature addressing the problem of standing in climate change litigation is inscribed within a broader academic debate pointing at an inadaptation of civil law for the adjudication of climate change legal disputes[18]. The debate is underpinned by the idea that there is a detrimental strict interpretation of standing. More specifically, it is criticised of being limited to 'those with a sufficient interest'[19], suggesting that applying the classical proximity rules in the context climate change[20] is detrimental to claims in which the parties can less easily prove a sufficient interest to the dispute. Following Kelleher for example, the intergenerational and transboundary scales of climate change mean that proximity,

[17]Omuko-Jung (2021) at 17.
[18]Setzer & Higham (2023) at 33.
[19]Wilde (2003) at 2.
[20]Kellman (2016) at 7.

'which require the identification of an individually affected litigant, can be a major barrier in systemic mitigation climate cases'[21]. He further elaborates that the courts find 'it difficult to discern whose interests or rights should be considered'[22] when asked to allow proceedings between two specific parties. This complexity led to the impossibility for courts to distinguish between parties with a genuine stake in the claim from others. It led some authors to criticise 'the lack of adequately broad-standing provisions available'[23] to entitle claimants with a legal action. When applied to challenge climate litigation, it is for some authors impossible to meet the 'closed-class standard'[24] which is at the backdrop of standing. This predominant critical perspective in the literature[25] revolves around a twofold focus, the repeating critics first, and the recurrent responses second.

The inherent incompatibility [26] of standing with climate change litigation raises pleas for a flexible interpretation of the rules on proximity[27]. A liberal interpretation would overcome what has been seen as a long-lasting struggle in environmental claims [28], leading early authors to describe it as 'standing in the way'[29]. Up until recently, as suggested by Ruggiero, the non-justiciable feature of climate change under current standing rules [30] indicates a lack of legal innovation and a regrettable narrowness[31], which would justify to rather adopt a generous approach [32]. Also seen as the 'black hole of climate litigation'[33], standing remains entrenched in the irreducible 'special interest'[34] inflexible criterion. It rallies critics revolving around the lack of 'imaginative forces of the law and imagination of the judicial discourse' [35]. It also raises voices in favour of the 'imaginative expansion [36] of the law of standing, less strictly applied to 'streamlining climate change cases by assuming injury in fact and causation for a specific class of climate change injuries (that) will enable courts to focus on solutions'[37]. A critical rhetoric that features the inapplicability of the standing requirements in their traditional application, and which has prompted polymorphic answers.

The various propositions propounded to loosen the traditional standing requirements revolve around the general suggestion of a reform of standing. They

[21]Kelleher (2021) at 2.
[22]Ibid at 3.
[23]Robertson (2009) at 3.
[24]Brown (2022) at 10.
[25]Ibid at 7.
[26]Curry (2019) at 35.
[27]Kellman (2016) at 2.
[28]Farber (2008) at 6.
[29]Daniel (2012) at 1.
[30]Ruggiero (2022) at 3
[31]See in this respect the public source at https://blogdroiteuropeen.com/2024/04/04/possibility-of-extending-legal-standing-under-article-263-4-tfeu-in-the-matter-of-climate-litigation-by-yumiko-nakanishi
[32]Ghinelli (2023) at 1.
[33]Nagle (2010) at 38.
[34]Robertson (2009) at 3.
[35]Ciuffoletti (2020) at 15.
[36]Farber (2008) at 8.
[37]Curry (2019) at 35.

follow the idea that standing requirements are *reducible*, if 'special solicitude' [38] would be conferred due to the particular importance of the object of the claim, i.e., climate change. For instance, there could be special standing[39] based on specific procedural rights[40] to improve access to justice. It would allow claimants without special damage, that is 'not different from those suffered by the public at large'[41] to be redressed. This would bring about a broadened access to courts and address the hurdle of the limited access for individuals[42], through extending standing to persons, 'based on their statutory mission and activities, (for them to) have legal standing'[43]. Statutory legal standing could also allow claims based on increased risk[44]. It would absorb, in the legal concept of 'particular interest'[45] and its corollary, the requirement of a narrow linkage[46], the notion of 'incurred risks'[47], which would become acceptable to grant standing without the materialisation of the damage. Another argument in support of loosening the proximity criteria is based on a science focused analysis[48], which likewise, would allow to grant standing for preventive purpose, if scientific-evidenced risk of harm is established by latest science.

These suggested solutions reflect an overarching purposive approach[49]. They are orientated towards the object of the dispute (climate change) and are dissociated from the individual situation of the parties, as summarised as follow: 'the link (with) climate change is not only a matter of enabling lawsuits by setting up complaints procedures but implies the *overall goal* (emphasis added) of greenhouse gas reduction'[50]. A purpose-sensitive approach (by contrasts with the subjective perspective, orientated towards the degree of connection between the parties and the object of the claim) is also at the basis of the proposition to grant standing to things via human guardianship[51]. Likewise, it could surpass the required particularised connection from the injury to an individual. Linking damages to specific places[52] could, according to some, also extend the geographical understanding of proximity beyond traditional concept of connections, physically limited to neighbourhood[53]. Extending standing requirements are finally proposed on a temporal scale, by challenging the 'intergenerational buck passing' of the

[38]Abate (2008) at 13.
[39]Bradford (2011) at 1.
[40]Abate (2008) at 7.
[41]Alatise (2022) at 3.
[42]Engel (2011) p 20.
[43]van Loon (2020) at 2.
[44]Craig (2009) at 4.
[45]See Ruggiero (2022) at 4
[46]Brown (2022) at 1.
[47]Abate (2008) at 1.
[48]Johns (2015) at 16.
[49]Kelleher (2021) at 2.
[50]Akhtar (2020) at 13.
[51]Ciuffoletti (2020) at 7.
[52]Medici-Colombo & Ricarte (2023) at 7.
[53]Farber (2008) at 43.

current generation who benefits from passing on the costs and harms of their behaviour to future ones due to the time lag effect of climate change'[54].

Generally, expanding the rules of standing entails a distancing from the human centred standpoint[55], along with a process of redefinition of its fundamental pillars, such as the redefinition of injury. For example, propositions to extend injury 'even absent a showing of direct human injury'[56] is recurrent in the literature within a general attempt at redefining 'injury in fact'[57]. Overall, a set of propositions designed to depart from the traditional understandings of proximity[58], which are considered being the major barriers for standing to adapt to climate change litigation, for their lack of flexibility.

Review of Standing in Adaptation Disputes

Massachusetts v EPA (2007)[59]

A group of environmental organisations, joined by the State of Massachusetts petitioned the Environmental Protection Agency (EPA) to regulate greenhouse gas emissions. They claim that both scientific evidence of the emergency to address climate change, and dispositions of the Clean Air Act[60] impose such a legal duty[61]. They argued that greenhouse gas fit within the category of air pollutant that the Clean Air Act requires that the EPA regulates. In response, the EPA denied the request to respond to the petition and said that the Clean Air Act does not authorise it to issue mandatory regulations to address climate change. They also responded that the petitioners had not yet suffered harm[62], and that granting standing to them could give rise to policy concern, overlapping the statutory competence given to the legislative to regulate emissions[63]. The EPA's response was two-fold. First, it contended against widening its prerogatives, without formal and statutory mandate to do so. Second, it contested having a duty to hear the petition based on the lack of connection between potential harm resulting from increased emissions and omission to act, i.e., to regulate emissions.

The court decided to grant standing to the state, it recognised its legal procedural right to bring a claim, vested by congress, to protect their interests[64]. As a sovereign entity, it is legally entitled to assess what are its interests at stake within its territory and needs only to show that 'procedural step was connected to the substantive result'[65], as established through consistent case law[66]. It would

[54]Johnston (2016) at 7.
[55]Benzoni (2008) at 5.
[56]Gorelick (2021) at 20.
[57]Hodas (2000) at 11.
[58]See Ruggiero (2022) at 25.
[59]*Massachusetts v. EPA*, 549 U.S. 497 (2007).
[60]The Clean Air Act (CAA) (42 U.S.C. 7401 et seq.).
[61]See *Massachusetts v. EPA*, 549 U.S. 497 (2007) at 1.
[62]Ibid at 17.
[63]Ibid at 16.
[64]Ibid at 20.
[65]Ibid at 21.

then suffice to demonstrate that there was a sufficient connection between the regulation of greenhouse gas emissions and interests of the state. This connection is being done through the interpretation of air pollutant, which were understood as including greenhouse gas emissions[67]. The court ordered that the EPA replied to the petition and that it 'ground(s) its reasons for action or inaction in the statute'[68].

Standing was granted because the claimants had a vested procedural interest to act. The court did not have to proceed to a broad interpretation of the rules of standing, as a sovereign entity, the state had 'its stake in the outcome of this case […] sufficiently concrete to warrant the exercise of federal judicial power[69]. *Massachusetts* is the result of the recognition of a preexisting statutory interest to act, which then only needed to be factually connected with the alleged harm. It is not the fruit of a broad interpretation of the rules on standing. As stated in the dissenting opinion, the sovereignty of the state was not substitute for Article III injury […] and raised 'an additional hurdle for a state litigant: the articulation of a quasi-sovereign interest *apart* (emphasis added) from the interests of particular private parties'[70]. The common analysis of Massachusetts as showcasing the possibility of extension of the rules of standing[71] need to be relativised. The legal tool utilised was an exception constructed by law. It is 'an implicit concession that petitioners cannot establish standing on traditional terms'[72], and that *Massachusetts* needs to be understood in that context.

Wash. Envil. Councul of Bellon v. Washington Environmental Council (2011)[73]

The 'limited relief'[74] of *Massachusetts* is at the backdrop of the case *Bellon* to which this research now turns. In *Wash. Envil. Councul of Bellon* (hereinafter *Bellon*) two environmental non-profit groups filed a lawsuit alleging that the Washington State Department of Ecology was in violation of the Clean Air Act because they failed to implement mandatory provisions in the state's plan relating to the control of greenhouse gas from oil refineries. The court of Appeal of the Ninth Circuit[75] denied standing to the non-profit organisations because the plaintiffs failed in demonstrating that the emissions were significant to the contribution of global emissions[76]. The court argued that the 'litigants fail to invoke a statute procedural provision and instead seek substantive relief in the form of an injunction requiring the government to promulgate regulations'[77]. In addition, the plaintiff did not manage to prove causation, so that compliance with

[66]*Massachusetts v. EPA*, 549 U.S. 497 (2007).
[67]Ibid at 30.
[68]Ibid at 38.
[69]Ibid at 22.
[70]See *Massachusetts v. EPA*, 549 U.S. 497 (2007) at 42.
[71]Martin (2018) at 4.
[72]See *Massachusetts v. EPA*, 549 U.S. 497 (2007) at 44.
[73]*Wash. Envtl. Council v. Bellon* 741 F.3d 1075 (9th Cir. 2014).
[74]Ibid at 9.
[75]Ibid at 5.
[76]Ibid at 7.
[77]Ibid at 9.

new standards would reduce greenhouse emissions and alleviate the alleged injuries [78].

Bellon shows a continuity in the fidelity observed by the courts to the irreducible standing requirements set out in by the jurisprudence[79]. The plaintiffs did not have a statutory entitlement to bring a claim which could have justified an exception to the traditional application of the particular interest rule. Consequently, contrary to what was pleaded by them, *Massachusetts* was irrelevant to the solution because the legal status of the claimants in *Massachusetts* was not applicable in *Bellon*. In addition, they did not have a special interest in the claim since they were not directly concerned by the injury and could not demonstrate a clear causation link between the omission to act from the defendant, and the alleged harm. Standing was denied because the court could not find any acceptable form of proximity, neither through statutory disposition, nor through factual examination.

Friends of the Earth et al. v. Total (2020 [80]

Under the French law of duty of vigilance[81], French registered companies which count more than five thousand employees must elaborate and publish a vigilance plan, destined to identify and prevent human rights and environmental risks derived from their activities, and the activities of their economic partners, both in France and at transnational level. Some environmental associations based in France and in Uganda filed a claim against TOTAL Energie SE for its non-compliance with the vigilance plan. They argued that the plan related to the projects of pipelines' construction and oil mine exploitation in Uganda is in breach of the law, first in its content, by being insufficient and incomplete, and second in its form, through ineffective publication[82]. The company responded that the associations had no interest to act[83]; under some dispositions of the French code of civil procedural[84] an action can only be brought to court by any person with a 'sufficient link'[85] to the injury. Total contested the proximity between the associations and the object of the claim.

The French court recognised to the associations an interest to act and granted standing. It identified a link based on the scope of actions of the associations, and the object of the claim. The reasoning was that the associations had a stake in the company because they had been working in cooperation with the company in the elaboration of the plan, in accordance with the requirements of law on duty of vigilance [86]. There was in this instance no need to expand the interpretation of

[78]Ibid at 7.
[79]See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) at 560-561.
[80]*Friends of the Earth et al. v. Total*, 10 December 2020, Court of Appeal of Versailles.
[81]Loi on the duty of vigilance for French companies, n. 2017-399 27 March 2017.
[82]See *Friends of the Earth et al. v. Tota* at 6.
[83]See *Friends of the Earth et al. v. Total*, Court of Appeal of Versailles at 8.
[84]Articles 325 and 330 of the French civil procedural code.
[85]Ibid.
[86]See *Friends of the Earth et al. v. Total*, 10 December 2020, Court of Appeal of Versailles at 12.

interest to act to research a connection with the alleged wrong. This interest was pre-existent, through the law itself, and independent of the personally distinguishable link between the alleged harm and the claimants[87]. The dispute was concerned with the prevention of harm (harm had not yet materialised) and the claim was allowed to move forward through a legal recognition, at the pre dispute stage, of the capacity of the claimants, (the 'raison d'être' of the claimants being precisely to prevent the materialisation of the risks resulting from the companies' activities).

Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) (2020) [88]

In Australia, the mining company Waratah Coal Pty Ltd applied to the Land Court to recommend the approbation of a mining lease to develop a thermal coal mine. The environmental association Youth Verdict asked the court not to recommend that the competent institutions approve the lease. They argued that the granting of the application would be in breach of s 58(1) of the Human Rights Act 2019 which set out that it is unlawful for a public entity to 'act or make a decision in a way that is not compatible with human rights'[89]. In response, the defendants replied that the claim should be struck out on the basis that only individuals have standing in relation to the Human Rights Act 2019[90]. Furthermore, article 9(4) (b) of the Human Right Act does not include a court or tribunal within the definition of a public body, except when acting in an administrative capacity. The outcome was then dependant on the status of the court, i.e., whether it could be considered as a public body, and on the legal nature of the decision of the land court in recommending the grant, i.e., whether it could be defined as an administrative decision.

The court recognised that in the circumstances of the case the court was acting in an administrative capacity which made it fall within the definition of public body. It ensued that it had obligations to abide by section 58 of the Human Rights Act, which obliges public body to act in a compatible way with the respect of human rights (procedural obligations) in the process[91], and to redress any violations of human rights (substantial rights) under article 59 of the Act[92]. Thus, by being merely 'engaged'[93], the plaintiffs' human rights did provide the legal basis to grant the claim, and standing was granted to them. In this instance, the court did not resort to an extension of the traditional proximity requirements. It recognised as *legally valid* the proximity between the potential breach of the plaintiffs' human right, and the activity in question. Instead of establishing a connection between the plaintiffs, as persons, to the alleged harm (which they could have interpretated broadly or strictly), the court established a connection

[87]Ibid at 11.
[88]*Waratah Coal Pty Ltd. v Youth Verdict Ltd. & Others* (No 6) [2022] QLC 21.
[89]Human Rights Act Queensland 2019, art 58.
[90]Human Rights Act Queensland 2019, art 64.
[91]See above Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) [2022] QLC 21.at para 1330.
[92]Human Rights Act Queensland, art 59.
[93]*Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 6) [2022] QLC 21. at para 1294.

between the rights represented by these persons, and the activities that are likely to breach them. By applying a type of connectivity that is objectivised, the court can circumvent the individualisation of the harm and adjudicate outside the bilateral framework of standing, at a preventive stage.

Review of Standing in Mitigation Disputes

Sierra Club v. U.S. Defense Energy Support Center (2010)[94]

In the United States of America, the Defence Logistics Agency is an agency of the Department of Defence (DoD) which is responsible for providing, storing, and distributing fuel for federal agencies. They concluded contractual agreements for purchasing alternative fuel derived from Canadian oil sands recovered crude. The environmental associations Sierra Club and Southern Alliance for Clean Energy brought an action seeking declaratory judgment and injunctive relief for the alleged violations of federal law [95] arising from purchasing these contracts. They alleged both procedural violations for failing to carry out an environmental assessment, and violations of substantive law [96] which compels contracts on alternative fuel to show that the lifecycle greenhouse gas emissions would be less or equal to conventional petroleum sources. They argued that these violations will increase general risks 'of harm to their health, recreational, economic, and aesthetic interests as a result of the defendants' conduct (including for) their respective members'[97]. The defendants responded that the plaintiffs lacked standing since they suffered no personal injury, which is an 'irreducible constitutional minimum of standing'[98]. They failed in evidencing that they personally suffered an injury-in-fact, that was caused by the defendant's conduct and that can be redressed by a legal decision.

The court concluded that they could not demonstrate that they would be personally affected by the particular pipeline transmission of the refining of Canadian oil sands. Causality between environmental disruptions and increase of emissions is uncontested, but on general terms, whereas the specific link between the purchase of oil sand crude and the claimant's injury is still too tenuous under traditional injury requirements (injury in fact- causation- redressability) to allow the action between the two specific parties[99]. This case emphasises on the importance of the subjective relationship of the plaintiff, with the alleged harm. In this respect, the District Court recalled that standing rule 'serves to avoid the adjudication of abstract questions of wide public significance pervasively shared

[94]*Sierra Club v. U.S. Defense Energy Support Center*, 2010, No. 1:11-cv-00041-CMH -TRJ.
[95]Ibid at 2.
[96]Ibid.
[97]Ibid at 3.
[98]Ibid at 4 see *Lujan*, 504 U.S. at 560.
[99]See *Sierra Club v. U.S. Defense Energy Support Center*, 2010, No. 1:11-cv-00041-CMH -TRJ.
[99]Ibid at 2.

and most appropriately addressed in the representative branches'[100]. Even faced with an undisputed causality link between an activity (emissions) and a harm (environmental disruptions), the court decided within the bilateral framework between the parties, where one is likely to be personally responsible for the other's situation. Proximity, as this case shows, remains the court's flagship in standing assessment, when courts must deduce it from the factual background of the case alone.

Milieudefensie v Shell (2021)[101]

The environmental group Milieudefensie (along with other associations and individual citizens) brought an action against the Royal Dutch Shell PLC oil company alleging that its contributions to climate change violate its duty of care under national land international law[102] to contribute to the prevention of climate change adverse impacts. Concretely, the plaintiffs sought a ruling from the court that Shell reduce its emissions through its activities. Under the Dutch Civil Code[103], associations are legally entitled to institute legal proceedings for the protection of public interest if they can demonstrate similar interests as those implicating Dutch citizens.

The legal treatment of standing was then relatively straightforward since the law provided for the answer a priori. The court admitted the claim based on the statutory interest to act of the association but made an interesting distinction on two points. First, it distinguished between the claim's admissibility for the associations (assimilated as a class action), from the claim's admissibility of the individuals[104]. The rationale is that the interests of the individuals are protected by the class action, barring their legitimacy to have a separate claim, unless they can prove a separate injury directly connected to the defendant's actions. Second, it differentiated between associations serving the interests of Dutch residents, and associations protecting the interests of the world population, and denied standing to the latter for their lack of concern with the Dutch residents[105]. Standing was therefore granted to the Dutch association which class action[106] (orientated towards the protection of collective interests) was already authorised by law. This case testifies once more that a valid legitimacy to act is here provided ex ante by statutes, and not by virtue of an extension of the rules of standing. By providing the court with a proximity created by the legislation, the court overcomes the

[100]Ibid at 8.
[101]*Milieudefensie and Others v. Royal Dutch Shell PLC and Others*, 26 May 2021, The Hague District Court, case number C/09/571932.
[102]Book 6 Section 162 Dutch Civil Code.
[103]Book 3 Section 305a Dutch Civil Code.
[104]See *Milieudefensie and Others v. Royal Dutch Shell PLC and Others*, 26 May 2021, The Hague District Court, case number C/09/571932at para 4-2-7.
[105]Ibid at para 4-2-5.
[106]Ibid at para 4-2-7.

recurrent barriers to establish proximity through the factual background of the case[107].

Smith v Fonterra, Court of appeal (2020)[108]

Mr Smith is a representative of an indigenous Māori community in New Zealand, and he is also the climate change spokesperson for the Iwi Chairs Forum, an entity created to facilitate dialogue between the Māori communities[109]. He issued proceedings in the High Court against seven New Zealand companies involved, in brief, in an industry which releases greenhouse gases into the atmosphere. He sought the court to compel them to achieve an objective to net-zero emissions[110]. He pointed that the respondents know about the harmful impacts of their activities and must act. The defendants replied that M. Smith had no cause of action and that they operate legally 'within all relevant statutory requirement and regulatory requirements'[111].

This court denied standing to M. Smith. First, under the 'damage rule'[112] a person who suffered from public nuisance has a claim only if he can prove that his injury was 'over and above the harm suffered by the general public'[113]. Even if ready to 'adopt the most liberal formulation of the special damage rule'[114], the plaintiff did not manage to prove that he suffers personally more than the members of the community he represents. Furthermore, the claim was doomed to fail because causation was not satisfied, judges needed a direct connection between the respondents' activities and the pleaded harm [115]. In the context, comparison with collective tort, where the group of tortfeasors *is* the singularised entity (even if identified as a group) held accountable, and its members are jointly liable, does not apply. As restated, in a situation involving multiple tortfeasors, 'where damages are awarded, each defendant is held liable only to the extent of their contribution and if there is no satisfactory basis on which to apportion responsibility the liability is divided equally'[116]. The court made this crucial distinction with the scale of climate change for which, consequently, there could *not* be a 'natural and rational extension'[117] of the rules, which could only be loosened if it 'involved a finite number of known contributors to the harm'[118].

[107]See *Milieudefensie and Others v. Royal Dutch Shell PLC and Others*, 26 May 2021, The Hague District Court, case number C/09/571932 at para 4-2-2.
[108]*Smith v Fonterra* CA128/2020 [2021] NZCA 552.
[109]The Iwi Chair Forum is an entity founded in 2005 which facilitates dialogue and cooperation between the Iwi leaders (Māori's leaders).
[110]See *Smith v Fonterra* CA128/2020 [2021] NZCA 552 at para 20.
[111]Ibid at para 9.
[112]Ibid at para 45.
[113]Ibid at para 82.
[114]Ibid.
[115]Ibid at para 90.
[116]Ibid.
[117]Ibid.
[118]Ibid.

Even from a 'collective approach to causation'[119], however justifiable in some contexts to avoid defendants to hide behind the 'collective harmful actions of others to obscure their own contribution'[120], here, 'the class of possible contributors is virtually limitless'[121] and therefore poses what the court of appeal called 'an insuperable problem'[122]. The court concluded that it would open the floodgates with 'limitless class of potential plaintiffs as well as a limitless class of potential defendants'[123]. A very recent Supreme Court decision[124] reversed the decision of the court of appeal and allowed the claim to proceed. We will now look at this case to close the study on mitigation disputes.

Smith v Fonterra, Supreme Court (2024)[125]

As a preliminary remark, the Supreme Court asserted its theoretical viewpoint regarding the purpose of striking out an action. It recalled that it is not decisive upon the success of a claim, suggesting that it should not be resorted to as an opportunity to bar the claim from proceedings, if there are some preconceived prejudices concerning its chances of success[126]. On the contrary, granting standing must allow the possibility of a dispute[127]. It should only be denied whenever the facts are obviously linked to a controversy, providing no basis for any such dispute. The court of appeal deemed that the facts of the case were decisively bound to fail because there was no clear individualised connection between M. Smith's alleged harm and the defendants' activities. By opposition, the Supreme Court allowed standing and stated: 'for present purposes it is sufficient to observe that rights pleaded by Mr Smith […] fall *tenably* (emphasis added) within (or bear sufficient relation to) the particular rights […]'[128]. The major difference through this formulation, is that the court of appeal reasoned from the claimant's particular situation (in concreto), whereas the Supreme Court reasoned from the perspective of general risks of rights' violation (in abstracto)[129].

The approach in the abstract allowed the judge to construe a relationship of proximity between the risks of infringement of the human rights mentioned above and the defendants' activities. By being dissociated from the individual situation of the claimant, and by being instead attached to their rights *per se*, proximity could be recognised, and the special damage rule[130] was applied between those rights and the claimants, as their holders. Further supported by the idea of a distinct interest, proper to the Māori population[131], proximity was established

[119]See *Smith v Fonterra* CA128/2020 [2021] NZCA 552 at para 105.
[120]Ibid.
[121]See *Smith v Fonterra* CA128/2020 [2021] NZCA 552 at para 112.
[122]Ibid at para 113.
[123]See *Smith v Fonterra* CA128/2020 [2021] NZCA 552 at para 116.
[124]*Smith v Fonterra* SC 149/2021 [2024] NZSC 5.
[125]Ibid.
[126]Ibid at para 74.
[127]Ibid at para 143.
[128]Ibid at para 145.
[129]Ibid at para 130.
[130]Ibid at para 150.
[131]Ibid at para 152.

through a method of depersonalisation of the link between harm and activities (an objectivisation of proximity).

Review of Standing in Loss and Damage Disputes

Native Village of Kivalina v. ExxonMobil Corp (2008)[132]

The plaintiffs, natives of village of Kivalina, alleged that as a result of climate change, the Arctic Sea ice has diminished and that it could not protect the Kivalina coast from extreme weather events. It resulted in erosion and destruction which will require the relocation of Kivalina's residents. They sought compensatory damages from twenty-four oil, energy and utility companies, based on their alleged contribution to the excessive emission of carbon dioxide and other greenhouse gases which are causing climate change. The defendants asserted that Kivalina's allegations raised inherently nonjusticiable issues, more appropriately addressed by political competences[133]. According to them, Kivalina lacked standing to raise its claims because Kivalina alleged no facts showing that its injuries are 'fairly traceable to the actions of the Energy Producers'[134]. In response, plaintiffs conceded that they are unable to trace their alleged injuries to any particular defendant, but that they need not do so. For purposes of establishing standing, they need only allege that Defendants 'contributed'[135] to their injuries.

Allowing standing to the plaintiffs was impossible for two main reasons that are interlinked. First, the resolution of the claim would require determining what would have been an acceptable limit on the level of greenhouse gases emitted by the energy producers[136], and that was already legislated in federal statutes. And so, 'when federal statutes directly answer the federal question, federal common law does not provide a remedy because legislative action has displaced the common law'[137]. There was no 'gap for federal common law to fill'[138] if the object of the claim has already an answer through statutes. Second, the court could not link the activities of the defendants with the harm. The application of collective liability is applicable when there are several tortfeasors, it is not relevant in the instance due to the impossibility to single out a group of polluters as being particularly causative of the harm[139]. The scale of the collective nature of emissions, rather than its collective nature itself [140], rendered invalid the argument that the defendants could be jointly liable for the weather events which caused the injury.

[132]*Native Village of Kivalina v. ExxonMobil Corporation et al.,* United States Court of Appeal for the Ninth Circuit et al No. 4:08-cv-01138.
[133]Ibid at 9.
[134]Ibid.
[135]Ibid.
[136]See *Native Village of Kivalina v. ExxonMobil Corporation et al*., United States Court of Appeal for the Ninth Circuit et al No. 4:08-cv-01138 at 12.
[137]Ibid.
[138]Ibid.
[139]See *Native Village of Kivalina v. ExxonMobil Corporation et al.,* United States Court of Appeal for the Ninth Circuit et al No. 4:08-cv-01138 at 23.
[140]Ibid. at 34.

Here again, the impossibility to link the two parties in a particular relationship motivated the court to deny standing[141].

RWE v Lliuya (2015) [142]

RWE is a German electricity producer which built a dam in Peru. Luciano Lliuya is a local farmer and had to face costs to set up flood protection around his farm. He alleged that RWE was a contributor to the emissions responsible for climate change causing excessive floods and the lake's growth, which obliged him to take preventive and costly measures to protect his property. He asked the court to order RWE to reimburse him for a portion of the costs resulting from setting up flood protection.

At first instance[143], the District Court found no connectivity between the harm and the activity: the 'principle of 'conditio sine qua non' was not satisfied: 'Co-causation only exists if the hypothetical omission of merely one of the causes would already undo the damage'[144]. In this context of the climate change, 'the chain of causation is incomparably more complex, multipolar, and therefore more unclear […] it is impossible to identify anything resembling a linear chain of causation from one particular source of emission to one particular damage'[145]. There was no exclusive connectivity between the defendant's activity and the injury, even considering the size and scale of the latter, so that joint liability for mere contribution to harm was too tenuous and therefore not applicable in this instance. On appeal[146] the court took the opposite view, and the claim was admissible based in the defendant's contribution to the harm[147], through its active participation. The legal reasoning was based on domestic German law which requires that even if the defendant act lawfully[148], it must repair the damage to property due to its activities[149].

The court of appeal has managed to identify a connection through the contribution of RWE's activities and the injury by resorting to a statistical approach. What was the main obstacle faced by the argument of the multiple defendants has been overcome by a precise calculation of contribution. This has allowed the court to ground his decision and allowed to single out the contribute share of RWE in the farmer's claim: 'RWE has caused 0.47% of global post-Industrial Revolution carbon emissions, so Lliuya is suing for that proportion of

[141]Ibid. at 35.
[142]*Luciano Lliuya v. RWE AG*, 27 September 2021, Higher Regional Court Hamm (English translation).
[143]*Luciano Lliuya v. RWE* AG, 15 December 2016, District Court Essen (English translation).
[144]Ibid at 6.
[145]See *Luciano Lliuya v. RWE AG*, 27 September 2021, Higher Regional Court Hamm (English translation). *Luciano Lliuya v. RWE AG*, 15 December 2016, District Court Essen (English translation) at 7.
[146]See *Luciano Lliuya v. RWE AG*, 27 September 2021, Higher Regional Court Hamm (English translation).
[147]Ibid at 2.
[148]Ibid.
[149]Section 14(2) of the BlmSchG and (§) section 906(2)(2) of the BGB.

the costs of flood prevention'[150]. In this case, it is a mathematical quantification of contributory negligence that has allowed the connection to be established between the company and the claimant, for the claim to proceed.

Amis de la Terre and Sherpa v. Perenco (2019)[151]

The French Association les Amis de la terre and Sherpa filed a claim against the French hydrocarbon producer Perenco for environmental damages due to the activities in Democratic Republic of Congo. It based the request on article 145 of the civil procedural code [152] on the receivability on instructions measures sought to obtain some evidence, in order to prevent further damages to occur. The question of standing was dependant on the resolution of the conflict of laws that was raised in the case. On appeal[153], the court has denied standing. It concluded that the applicable law was the Congolese law, under which the association had no interest to act. The plaintiffs argued that there was a mistake on the application of the conflict of law. Under articles 3 of the civil code[154], 31[155] and 145[156] of the procedural civil code, interest to act for an association which seeks to prevent damages resulting from overseas activities carried out by a French company, is submitted to the lex for, the law of the country of origin of the damage, i.e., the French law. Under this interpretation, the two associations had a legally recognised interest to act and were admissible in seeking interim instructions measures.

The high court decided in favour of the associations. The French law was applicable, and the association were granted standing by virtue of the object of their mission, as environmental associations. Even if the generating factor was located outside France, that did not preclude the application of the French law since the damages were the results of decision taken in France. The court of appeal, after having recognised the legal capacity to act conferred to the association, established a direct proximity between the decisional centre and the damages. Here again, a connection of a new legal nature is established for the claim to be heard. A connection that results from a direct proximity between a damage and its origins.

[150]See *Luciano Lliuya v. RWE AG*, 27 September 2021, Higher Regional Court Hamm (English translation) at 4.
[151]*Amis de la Terre and Sherpa v. Perenco*, 9 March 2022, Cour de Cassation Pourvoi n°20-22. 144.
[152]French civil procedural code, art 145.
[153]Court of appeal of Paris, 17 September 2020 (n19/20669).
[154]Art 3 French civil code.
[155]Art 31 French procedural code.
[156]Art 145 French procedural code.

The Farmer Case (2024)[157]*: A Prospection*

This research closes the case study with a very recent claim that has not yet been decided. A Belgian farmer purports that its activity suffers from the effects of climate change (extreme weather events, heatwaves, and droughts) which led to major losses, extra workload, constant stress and impossibility to work normally. He is suing the company Total Energies in reparation for the damages he has suffered through financial contribution. He is also seeking judges to oblige the company to move away from fossil fuels to prevent future damage.

The legal basis for this legal action is grounded in the general civil liability rules. The burden of the proof is on the Belgian farmer to prove cumulatively, an illegality or a fault on the part of the company, a damage suffered by the farmer and a causal link between the alleged fault and the damage[158]. Based on how similar cases have been adjudicated previously, this research could speculate how the courts will decide. If scientific developments provide the court with a statistical contribution, the court could potentially link the damages with Total Energies' activities which increase his chances as an individual. Since the claim is supported by environmental associations with environmental protection purposes, the case could succeed in obtaining that the court grants standing.

Discussion

Generally, the cases illustrate that a lack of proximity between the defendants' actions and the damage remains a fatal flaw. We saw that the courts have always endeavoured to connect the two parties in a legal relationship likely to grant the claim and that, absent this connection, locus standi was denied systematically. Connectivity remains the touchstone of standing in climate change litigation, analysed within a bilateral framework designed to link a claimant with a defendant. Allowing standing when harm is multifactorial and multidimensional rendered more difficult the identification of this connectivity. Yet, it was not done through a loose interpretation of standing. Instead of broadening the existing requirements, by extending special damage or injury traceable to the defendants for example, courts have sometimes created, and sometimes identified, additional types of connections. By doing so, they have not transformed the traditional application of standing for the purpose of the complexity of climate change, they have created and applied new types of legal relationships, likely to be admissible in law. The transformations operated are therefore not ones of degree, but in nature. A process resulting from of a two-fold legal innovation, procedural first, and substantial second, explained in the last following two sections.

[157]*Hugues Falys, FIAN, Greenpeace, Ligue des droits humains v. TotalEnergies*, filed on 13th March with the Commercial Court of Tournai, Belgium.
[158]Art 1382 of the Belgian civil code.

The Procedural Shift

First, standing has been transformed through the reinforcement, by the legislative of legally recognised procedural entitlements to sue. Environmental associations, by virtue of their mission, focussing on the protection of collective interests, are not only legitimated, but also required, to take legal actions, both at preventive and corrective levels. Their representative mission, established by statutory provision, legitimises a connection ex ante, with alleged or foreseeable harm. By virtue of their mission, legal actions are pre validated by law to bring claims to courts, and granting standing becomes in turn the application of this law (under the condition that causation is established). With this procedural reinforcement, the interest of the association *being* the protection of collective interests, a specific connectivity is tailored through the interests of the association and adapted to the complexity of the climate change harm.

In *Kivalina*[159], the claimants were not legally entitled to act, and the lack of procedural special rights was implicitly fatal to allow the claim[160]. Similarly, in the judgement on appeal in *Fonterra*[161], the special damage rule was applicable (and standing was denied) because the claimant was an individual with no distinctive harm[162]. By opposition special solicitude was given to the claimant in *Massachusetts*[163] thanks to pre-existing vested procedural rights conferred to the state[164]. The case *Perenco*[165] was also a prominent example of the potential offered by this procedural legal route. It was crucial for the claimants to demonstrate that the applicable law in the conflict was the law of the state which recognised the right to bring legal actions to associations. *Friends of the Earth v Total*[166] and *Milieudefensie*[167] were also recent demonstrations of the strength of the legal capacity of associations, to a point where interests of the claimants as individuals 'are already served by the class actions'[168]. Individual interests become additional and encapsulated within the general interest[169] represented by these associations to which the law confer a specific legitimacy to sue for climate change harm. They are coexistent, rather than extension, to traditional standing. They transform the understanding of proximity through procedural endowments, and buttress the transformations resulting from the substantial changes, that this research now explains.

[159]See *Native Village of Kivalina v. ExxonMobil Corporation et al*., United States Court of Appeal for the Ninth Circuit et al No. 4:08-cv-01138.
[160]Ibid at 10.
[161]See *Smith v Fonterra* CA128/2020 [2021] NZCA 552.
[162]Ibid at para 103.
[163]See Massachusetts v. EPA, 549 U.S. 497 (2007).
[164]See Massachusetts v. EPA, 549 U.S. 497 (2007) at 21.
[165]See *Amis de la Terre and Sherpa v. Perenco*, 9 March 2022, Cour de Cassation Pourvoi n°20-22.144
[166]See Friends of the Earth et al. v. Total, 10 December 2020, Court of Appeal of Versailles
[167]See *Milieudefensie and Others v. Royal Dutch Shell PLC and Others*, 26 May 2021, The Hague District Court, case number C/09/571932.
[168]Ibid at para 4-2-7.
[169]Ibid.

The Substantial Shift

Second, standing requirements are being transformed from a substantial perspective. The analyse of the cases reveals that the complexity of the nature of climate change often blurs the clarity of the causality link between the defendants' activities and the harm. An additional legal venue has increasingly permeated civil liability to increase claimants' chances to be granted access to courts. Human rights are transforming the appreciation of the requirements of standing, notably the special damage rule since it provides with a wider ground of actions.

As stated in general terms in *Fonterra* [170], the 'development of the common law of torts is an act done by the judicial branch of government […], within the meaning of s 3(a) of the New Zealand Bill of Rights Act'[171]. More specifically, in *Watarah*[172], claimants argued a breach of human rights[173] and, by linking the harm to the collective scope of rights protected by the human rights legislation, they provided the judge with a connection between legally protected rights and harm, thus overcoming the impossibility to particularise the link at an individual level. Similarly, in *RWE*[174], human right to property has overcome the obstacle resulting from the difficulty to single out the company [175] as responsible for the damage. In *Milieudefensie*, human rights were underpinning the interpretation of the unwritten duty of care'[176] which gave a wider legal basis, surpassing the need for a personal connection. In the case *Total*[177], the law duty of vigilance requires compliance with human rights[178] and likewise, gives rise to an additional type of proximity, resulting from human rights breach. Finally, in *Perenco*[179] human rights' violation was also central to the claim and its admissibility, for the same reasons[180]. The proximity between the breach of human rights and the harm becomes coexistent with the proximity between the individuals and harm. Rather than an extension of traditional standing requirement of proximity, the human rights regime supplements with a legally recognised relationship, to allow climate change claims to reach the dispute stage.

[170]See *Smith v Fonterra* SC 149/2021 [2024] NZSC 5.
[171]Ibid para 142.
[172]*Waratah Coal Pty Ltd. v. Youth Verdict Ltd. & others* (No. 6) [2022] QLC 21.
[173]Ibid at para 1288.
[174]See *Luciano Lliuya v. RWE AG, 27 September 2021,* Higher Regional Court Hamm (English translation).
[175]Ibid at 2.
[176]See *Milieudefensie and Others v. Royal Dutch Shell PLC and Others*, 26 May 2021, The Hague District Court, case number C/09/571932.
[177]See *Friends of the Earth et al. v. Total*, 10 December 2020, Court of Appeal of Versailles.
[178]See Law on the duty of vigilance for French companies, n. 2017-399 27 March 2017 article 1.
[179]See *Amis de la Terre and Sherpa v. Perenco*, 9 March 2022, Cour de Cassation Pourvoi n°20-22.144.
[180]Ibid at 4.

Conclusion

We have shown that the dialectical opposition between the traditional versus the liberalised application of the rules on standing is losing relevance. Recognizing that standing rules are a potential hurdle for climate litigation, we took another perspective on the cases studied, by questioning the nature of the transformations. Overall, the cases revealed that the rules on proximity remained tailored to assess connectivity between two parties. From this standpoint, we looked at how then cases have been allowed. They have been allowed first, by virtue of the statutory legitimacy to act of collective entity, which has provided the courts with a pre-existent legal entitlement to bring the claim. Second, they have been facilitated by the human rights regime which has been incorporated to the civil trials, adding a collective scope to the claims. These two-fold transformations provided for novel conception of proximity but did not widen the existing requirements. Instead, standing is still construed within a vertical framework, which allowed for a depersonalisation of its appreciation, more than a broader interpretation of the existing requirements. Despite the rightful eagerness to 'promote justice'[181] in cases of such complex backgrounds, this research also sheds light on the 'uneasy compromise between notions of loss-distribution on the one hand and individualised justice on the other'[182]. 'Fears of an oppressive multiplicity of actions'[183] was so far at the basis of the reluctance of the courts to extend standing. The research hopefully showed that courts regain the necessary confidence when given some workable legal framework.

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[181]See Cook (2022) at 25.
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