

# 1. Introduction

**Elbert de Jong, Anneloes Kuiper, Marlou Overheul and Anne-Jetske Schaap<sup>1</sup>**

---

## 1. MULTI-LAYERED CORPORATE CLIMATE LAW

Corporate accountability and liability in the context of climate change are in the spotlight. This is first illustrated by developments in the context of climate change litigation against corporations, addressing their allegedly failing climate change policies. For instance, the IPCC explicitly acknowledges litigation as part of a broader system of climate change governance and as a potentially impactful mechanism to regulate corporate (and governmental) climate change policies.<sup>2</sup> The worldwide increase in climate change cases against corporate actors brought to court substantiates that the tide of climate change litigation against corporate actors is rising.<sup>3</sup> Second, at the national, regional, and international level, regulatory initiatives are undertaken to define, distribute, and enforce the responsibilities and liabilities of corporations in relation to climate change. In particular in the EU, general and sectoral legislation dealing with corporate responsibility for climate change and the environment in general,

---

<sup>1</sup> All authors are affiliated to the Utrecht Centre for Accountability and Liability Law (UCALL) of Utrecht University, The Netherlands. Elbert de Jong is Professor of Private Law. He is also the co-director of UCALL, and he is a deputy judge in the Court of Appeal of Arnhem-Leeuwarden. Dr Anneloes Kuiper is Assistant Professor of Private Law. Marlou Overheul is a PhD Candidate in Liability Law. Dr Anne-Jetske Schaap is Assistant Professor of Criminal Law.

<sup>2</sup> IPCC, *Climate Change 2022. Mitigation of Climate Change* (2022) Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, pp. 1376–1377. IPCC, *Climate Change 2023. Mitigation of Climate Change* (2023) Working group III for the 6th IPCC Assessment Report, p. 110.

<sup>3</sup> J. SETZER & C. HIGHAM, *Global Trends in Climate Change Litigation: 2024 Snapshot*, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science 2024.

have been adopted or are in preparation.<sup>4</sup> Combined, this regulatory package provides for a variety of responsibilities and enforcement mechanisms, including private law remedies, such as civil liability and contractual provisions. And, of course, the relevance of various soft law documents containing provisions on the responsibility of companies to respect the environment and human rights, also in the context of climate change,<sup>5</sup> have to be mentioned in this respect: it is becoming increasingly clear that these provisions are relevant to the formulation of corporate responsibilities in combating climate change.

## 2. TWO INTERRELATED CENTRAL QUESTIONS

The contributions to this volume interact with the abovementioned developments by, essentially, addressing two interrelated questions.

First, the question arises whether or not, and under which conditions, the current transnational legal framework governing corporate accountability and liability for climate change, as a whole and the separate areas of the law containing it, provides for an allocation of responsibilities and liabilities that purposefully contributes to dealing with climate change. An important implication of the above-mentioned developments is that a multi-layered system of corporate climate change laws has emerged,<sup>6</sup> and is expanding due to regulatory initiatives and litigation. Within this framework, the formulation and distribution of responsibilities take shape at different governance levels (global, supranational, national, and local), take place through several areas of the law (human rights law, soft law, European law, civil law, etc.), involve several standard-setting actors (courts, legislators, international regulatory bodies and corporations themselves), and are enforced through both private law and public law enforcement mechanisms. Consequently, new legal avenues for holding corporations accountable and sometimes even liable for their climate governance are being opened, thereby providing various actors

---

<sup>4</sup> E.g., Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L, 2024/1760, 5.7.2024 and Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (Text with EEA relevance). See also Chapter 7 for recent developments in the context of consumer law.

<sup>5</sup> See Chapters 3 and 4 in this volume.

<sup>6</sup> E.g., D.A. FARBER & M. PEETERS, 'The Emergence of Global Climate Law' in M. Faure (ed), *Elgar Encyclopedia of Environmental Law*, Edward Elgar, Cheltenham 2016, pp. 687–702.

(shareholders, NGOs, citizens, governments etc.) with legal tools to further develop and sharpen corporate responsibility for climate change and/or to effectively force companies to comply with their climate change obligations. Understanding the boundaries and possibilities of this multi-layered corporate climate law system could make a meaningful contribution to addressing the adverse impacts of climate change and holding corporations accountable to their obligations to do so.

Second, the question arises as to how emerging issues of corporate climate change accountability and liability can be captured in the existing rules and doctrines of various areas of law, and whether or not these doctrines and rules should be adapted to suffice. Answering this question requires clarification of the state of the law and the formulation of perspectives on what the different parts of this legal framework could, or even, should look like in the (near) future. While doing so, we are often entering (relatively) unexplored legal territory. In many areas of the law, corporate accountability and liability for climate change is a relatively new phenomenon. The legal state of the art is (far) from clear and will be developed in the near future. Consequently, there are still many unanswered questions about the sources, content, scope, nature, purpose, efficacy, and enforcement of corporate responsibilities and liabilities. Also, the traditional boundaries between different sources and fields of law are blurring, for instance, because private law instruments are used to achieve public goals of climate change governance. This raises the question of how these areas of law, and the obligations and liabilities they contain, substantively relate to each other, to what extent they make up a consistent framework, and whether and under which circumstances this framework can lead to a consistent allocation of responsibilities and liabilities. An overarching starting point for assessing the adequacy of the current legal framework governing corporate accountability and liability for climate change is provided in Chapter 2. This chapter shows how determining and distributing responsibility for greenhouse gas emissions from transnational production can be understood and analysed through a combination of private governance, regulation and private law doctrine. This approach provides a tool for identifying, apportioning and mitigating chain emissions, thus augmenting other, often state-centric perspectives on climate governance.

### 3. DUE DILIGENCE, HUMAN RIGHTS & INTERNATIONAL (SOFT) LAW

One area of law to which the above-mentioned questions apply is international and European due diligence and human rights law; it has the potential to create new narratives about corporate climate responsibility, thereby opening new pathways for the accountability and liability of corporations in the context

of climate change. Crucial in this context is the recently adopted European Corporate Sustainability and Due Diligence Directive (CSDDD), that contains legal obligations for corporations in the context of human rights and the environment, including a climate change transition plan obligation (see Article 22 CSDDD). Increasingly, there is an understanding that companies have legal obligations to protect human rights and that the effects of climate change, in combination with a failure to take adequate mitigation or adaptation measures might infringe on them, in particular the right to life and a healthy living environment.<sup>7</sup> In this respect, over the years, in particular, international soft law aimed at protecting the environment and human rights, such as the United Nations Guiding Principles on Business and Human Rights (UNGPs),<sup>8</sup> has acquired a crucial place in corporate climate law and governance.

The use of the tools that the CSDDD, soft law and human rights law offer for answering complex legal questions about corporate responsibility for climate change and ultimately contributing to a more effective approach to the climate crisis will, most likely, get an even more prominent place in corporate climate accountability and liability in the near future. In addition, legislative initiatives, such as the CSDDD are inspired by and partly build upon notions of corporate responsibility laid down in soft law instruments. Also, it is by no means inconceivable that soft law can become hard law, and thus ultimately be enforced through legal enforcement mechanisms. The use of soft law in determining corporate responsibilities in climate change litigation, although so far only successfully upheld in the climate case against Shell,<sup>9</sup> illustrates that soft law *can* become hard law. This application of soft law may create new litigation and liability risks for corporations, creating incentives for corporations to change their climate policies. Yet, to what extent this holds true for other jurisdictions than the Netherlands, remains to be seen.

The role of European due diligence, human rights and soft law in addressing issues of corporate climate change accountability and liability is of a recent nature, leaving much territory unexplored and raising unanswered questions

<sup>7</sup> See Chapters 3 and 4 of this volume.

<sup>8</sup> UN HUMAN RIGHTS COUNCIL, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations* (2011) 17th Session, UN Doc A/HRC/17/31, *Annex: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, Remedy' Framework*.

<sup>9</sup> District Court the Hague, 26 May 2021, ECLI:NL:RBDHA:2021:5337 (Milieudefensie/Shell). See on the use of soft law in the Dutch legal system and the *Shell* case: E.R. DE JONG & D. VAN MAURIK, 'Corporate Climate Change Litigation in the Netherlands, National Report: the Netherlands' (2024) *BIICL Project Global Perspectives on Corporate Climate Legal Tactics*, pp. 12–14.

about their limitations and potential. Therefore, it is first of all important to gain insight into the relevant developments in this field, as well as the potential these developments bring to fill accountability gaps in global corporate climate law and governance. Chapter 3 adheres to this by highlighting the gaps in global corporate governance and the role that human rights law might play in bridging these gaps. The chapter reflects on the ongoing UN negotiations on a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises. Specifically, it considers whether and how this proposed new treaty might address the multifaceted and complex questions associated with climate harms caused by corporate actors. Furthermore, it reflects on the law-making process concerning corporate due diligence in the EU and how the approach adopted in that context compares to that of UN treaty negotiations.

A related, crucial issue is the integration of corporate climate change governance into emerging sources of hard law, such as private law. In that context, the question arises about the significance of soft law in (domestic) corporate climate change litigation. Although the ruling in the *Shell* case may set an important standard in this area, it is not yet certain to what extent soft law enjoys wider relevance in climate change litigation. It is also uncertain whether and how the use of soft law in the *Shell* case will be followed on appeal and, probably, cassation. The question also arises as to its relevance for other, but similar cases dealing with mitigation obligations. Against this background, Chapter 4 illustrates the potential role of both the UNGPs and the OECD Guidelines for Multinational Enterprises to establish responsibility for climate-related harms by multinational companies. It explores the evolving nature of climate-related responsibility for multinational companies by reference to these standards, and uses the first-instance ruling in the climate case against Royal Dutch Shell as an example of potential future pathways for climate litigation against corporations.

## 4. PRIVATE LAW

### 4.1 Introduction

Alongside the area of international (human rights) law, the potential of several sub-areas of private and corporate law in regulating issues of corporate climate accountability and liability is being explored, both in legal scholarship and in practice. Corporate climate change governance is linked to prevailing, and long standing, private law doctrines and foundational ideas about accountability and liability for the harmful consequences of corporate activities. Thus, corporate climate governance is no longer a peripheral phenomenon in private law, but increasingly penetrates the core of private law systems, rules, and

principles. To a great extent, this is because climate change adversely affects interests that are (traditionally) protected by private law and even belong to its core: climate change impacts adversely affect health, environmental, property, and financial interests. This makes issues of climate accountability and liability seemingly easier (note: not easy) to capture in private law doctrines and narratives, thereby opening private law avenues for addressing corporate accountability and liability for climate change. Lastly, several regulatory initiatives, particularly those of the European Union, include private law instruments to regulate corporate policy in the context of sustainability and climate change. Consequently, also in this context, the two interrelated questions discussed in section 2 arise. First, questions arise about the possible application of private law doctrines to corporate climate change governance: to what extent can issues of climate change adequately be captured in several private law doctrines? Second, questions arise about the efficacy of the use of private law instruments in regulating corporate climate change policies: to what extent can the use of private law indeed help to fight climate change?

## **4.2 Contract Law and Consumer Law**

Questions about the relationship between private law and climate change, for instance, arise in the domain of commercial contract law, whose potential to regulate and enforce responsibilities and liabilities in the context of climate change risks is being explored by setting requirements and boundaries on the substance of contractual provisions and sometimes even on contracting parties. In Chapter 5, the context of contracting in global value chains to tackle adverse social, environmental and human rights impacts is described. In that chapter, it is argued that the current framework does not offer an in-depth assessment of specific model clauses or model contracts striving to incorporate standards for climate change governance, thereby focusing on the Chancery Lane Project net-zero model contract clauses for supply chains. Through an analysis of several model clauses, the chapter identifies potential further research in the field, focusing on the role of contracts in creating enforceable mechanisms to address adverse social, environmental, and human rights impacts in global value chains.

Moreover, deviating from the foundational notion of freedom of contract, contract law is used as a mechanism to set climate policy standards for contracts with trading partners (in the chain). The idea behind this, as expressed for example in the CSDDD, is that companies can effectively influence the climate change policies and actions of business partners along the chain. The question, however, is to what extent this instrumental use of contractual provisions is an effective and appropriate tool to achieve this goal. Therefore, the ideas and assumptions behind the use of contract law as a regulatory instrument are crit-

ically examined in Chapter 6, which specifically questions the confidence the European legislator places in the CSDDD and the actual ability of companies to control activities in the supply chain through commercial contracts. Such doubts arise because these mechanisms do not remove all practical difficulties in contractual control of the supply chain. Based on recent empirical research and existing general conditions used by multinational companies, the chapter offers recommendations that can help corporations manage their supply chains contractually and thus contribute to the effectiveness of the CSDDD.

Related to the foregoing is the role of corporate sustainability and climate change responsibilities in the field of consumer law. The EU has undertaken several legislative initiatives that affect the legal relationship between business and consumers to ensure that consumers are facilitated in, and sometimes even influenced towards, sustainable and carbon neutral consumption. Yet, the question remains to what extent the foundations and specific rules of consumer law offer room for this goal.<sup>10</sup> In particular, the debate in this domain concerns maintaining an adequate level of consumer protection while ensuring that this consumer protection stimulates, or at least does not hinder, the transition to a carbon-neutral society. Possible solutions to this debate are explored in Chapter 7.

### 4.3 Corporate Law and Fiduciary Duties

Issues of climate change governance are also entering the domain of corporate law. Think, for instance, of the potential liability of financial institutions and the relationship between fiduciary duties and climate change policies.<sup>11</sup> The risk of claims for damages for a failure to warn against the danger of stranded assets due to climate change-related effects is real: it is quite conceivable that financial institutions have a duty of care to clients and stakeholders not to make risky investments in sectors where there is a risk of stranded assets or a risk of liability claims against the companies that would affect the long-term return on investments in those companies. Similar questions arise in relation to

---

<sup>10</sup> E.g., V. MAK & E. TERRY, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment through Consumer Law' (2019) 8 *Journal of Consumer Policy* 1, 1–22.

<sup>11</sup> See for a typology of climate change litigation against financial institutions J. SOLANA, 'Climate Litigation in Financial Markets: A Typology' (2020) 9 *Transnational Environmental Law* 1, 103–135; See e.g., the case of *Milieudefensie* against ING, a Dutch bank. For more information see: E.R. DE JONG & D. VAN MAURIK, 'Corporate Climate Change Litigation in the Netherlands, National Report: the Netherlands' (2024) *BIICL Project Global Perspectives on Corporate Climate Legal Tactics*, p. 24.

major financial players, such as pension funds. On the one hand, pension funds and their directors might have a responsibility for portfolio decarbonisation; a failure to meet these responsibilities creates liability risks. On the other hand, a lack of sufficient guidance on the investment governance of pension funds and the confusing concept of fiduciary duties in different areas of (corporate) law leads to legal unclarity and hence uncertainty about the applicable responsibilities. Therefore, Chapter 8 addresses the boundaries of pension fund responsibilities and liabilities by defining pension fund climate risk and the regulatory hurdles to portfolio decarbonisation. Among regulatory hurdles, the chapter emphasises the confusing concept of fiduciary duties and the lack of sufficient guidance on investment governance. Second, the chapter sets forth a functional legal framework for integrating fiduciary duties within the functions that pension funds are called to discharge in investment governance. The regulatory enablers of the proposed functional legal framework constitute an opportunity to incorporate more transparent and long-term investment governance in pension fund operations. Third, the chapter assesses the reliability of the proposed framework for the sociological premises of pension funds and outlines an appropriate policy response.

#### **4.4 Non-contractual Liability Law**

Next, an appeal is made to non-contractual liability law (and civil courts) to hold corporations accountable and liable for their (assumed) failing climate change policies. In particular, claims dealing with unlawful greenhouse gas emissions and a failure to reduce these emissions, i.e., mitigation claims, have gained attention. Also in this specific context, the two interrelated questions discussed in section 1.2 arise. First, there is the doctrinal question regarding the extent to which non-contractual liability law doctrines on, e.g., unlawfulness and causation, are suited for capturing the specific issues that arise in the context of mitigation responsibility and liability. Second, the question arises as to what extent non-contractual liability law is effectively contributing to the reduction of greenhouse gas emissions. This second question specifically arises because the use of non-contractual liability law in the context of mitigation accountability and liability, acknowledges the potential regulatory impact of civil proceedings and the (considerable) potential of private law to change the societal status quo. That is, starting from the filing of a claim, the collection of evidence, and eventually the final verdict, all kinds of risk regulatory effects may occur that transcend the legal and non-legal interests of the litigating parties, thereby potentially influencing and changing the risk management policies of government and corporate actors.

By seeking injunctive relief, civil law-based litigation can aim for the prevention of future harm (i.e., preventive litigation). Litigation can also seek

compensation for climate damage and adaptation costs (i.e., compensatory litigation). Moreover, one should take into account that compensatory litigation also serves prevention purposes. The threat of liability could lead to an internalisation of the climate costs of a company's activities, with the possible result that those costs will be included in future climate policy making. And under certain circumstances, these costs may be so high that an actor makes an effort to reduce them, for example, by including these (potential) costs in setting its corporate climate policy and reducing harmful emissions. However, whether this theoretical idea might work in practice depends on several factors.

Crucial for a successful application of non-contractual liability law is the issue of proof. In particular, in compensatory litigation, issues arise about the proof of causation and the existence, nature and extent of the harm incurred by the claimant. In order to fulfil the criteria for establishing liability, the use of climate change science is paramount. On the one hand, the integration of climate science into issues of liability creates challenges:<sup>12</sup> after all, the civil judge must deal with subject matter in which he is not, or to a lesser extent, specialised. On the other hand, recent developments in climate science also offer possibilities for opening up new legal avenues for corporate accountability and liability. Therefore, in order to arrive at an adequate use of such evidence in lawsuits seeking compensation for losses or adaptation costs resulting from climate change, Chapter 9 addresses the potential, but also the obstacles and safeguards that must exist when using climate attribution science.

Clearly, in the context of non-contractual liability law, it is important to determine under which conditions other criteria for establishing liability can be met. The conditions to be fulfilled differ depending on whether the claim is based on fault or strict liability. An important difference between the two types of liability lies in the extent to which the (culpable) conduct of the party held liable bears weight. In the case of strict liability, conduct is usually not, or only to a limited extent, relevant to answering the liability question. Many legal systems operate with strict liability for environmental harm. Although the *potential* relevance of strict liability in the context of climate damage is obvious, it is far from clear what notions of strict liability can actually mean in this context. To that end, Chapter 10, discusses the possible applicability of an unwritten strict liability doctrine in Norwegian law to climate harm partly caused by oil and gas extracted from companies domiciled in Norway. Some criteria may, in principle, be fulfilled, but that would also involve the judicial development of those criteria. The potential answers to the new legal questions

---

<sup>12</sup> See R.F. STUART-SMITH and others, 'Filling the Evidentiary Gap in Climate Litigation' (2021) 11 *Nature Climate Change* 651.

that arise in this context are also relevant for other legal systems, since it is expected that similar questions arise outside the Norwegian context.

In fault-based liability cases, the conduct of the corporation is important. In this context, non-contractual liability law plays a crucial role in formulating and enforcing the applicable responsibilities for companies. For instance, in the first-instance ruling the *Shell* case, for the first time, an (effort) reduction obligation for the scope III emissions of a non-state actor has been imposed (worldwide). Yet, the scope, nature and content of non-contractual liability law-based corporate climate change responsibilities are far from clear. For example, particularly in the context of fault liability, questions may arise as to the existence and scope of a duty of care by companies to reduce their greenhouse gas emissions. Therefore, Chapter 11 discusses how a reduction obligation for scope III emissions of non-state actors can be implemented. This could include a reduction plan, refraining from concrete investments and carbon offset schemes.

Finally, as has been mentioned above, non-contractual liability law is being called upon to influence corporate climate change policies, and ultimately contribute to the prevention of dangerous climate change. Consequently, fundamental questions arise about the suitability of liability law instruments to prevent climate harm. Here, the role of civil courts in particular requires attention. All over the world, they are called upon to formulate standards for corporate climate governance, to force companies to comply with these standards and, ultimately, to influence their climate policies. However, this regulatory role of civil courts is not without problematic aspects.<sup>13</sup> Should and can courts take the regulatory impact and effectiveness of their rulings into account? How do they meet the need for evidence-based lawmaking? These are crucial questions if one starts from the premise that the preventive use of liability law, and the central role of civil courts therein, must actually (efficaciously) contribute to preventing climate change. Should one conclude that courts are insufficiently equipped for this task, the follow-up question inevitably arises: does this mean that the role of civil courts and liability law in preventing climate damage should be restricted? Chapter 12 highlights that courts should obtain sufficient amounts of information in order to underpin their regulatory reasoning with empirical evidence that illustrates how the court's ruling will be effective in terms of achieving the desired societal results. In doing so, courts might be able to achieve higher levels of societal acceptance. In this regard, several positive developments in private climate change litigation will be discussed, such as courts getting greater access to (new) information resources.

---

<sup>13</sup> See e.g., E.R. de Jong, 'Judicial Risk Regulation through Tort Law' (2018) 1, *European Journal of Risk Regulation*, 14.

Courts are, however, confronted by major challenges as well, as they are bound by procedural rules and need to be able to adequately assess scientific data.

Questions about the suitability and effectiveness of non-contractual liability law also arise in relation to compensation for climate damage. Once the criteria for establishing liability for damages are met, questions arise about the proper determination of climate damage: how are these damages calculated and correctly identified? Answering that question is important for the allocation and distribution of harm, but also for the preventive effect of liability law to function optimally. Chapter 13 thus sheds light on climate change damages calculations in courts. Particularly, the state of the art in climate economics is compared with the judicial assessment for claims for compensation of climate change related damage. The comparison allows us to determine whether and to what extent the assessment of climate damages in litigation reflects the current state of the art in climate economics. Based on a review of the main economic scholarship, a variety of methods of assessment emerge. However, none of these approaches seem to be employed by judges in climate change lawsuits. This leads to the conclusion that inaccurate estimates of climate damages might lead polluters to adopt suboptimal levels of care to prevent climate change harm.

Lastly, it is important to reflect on the distribution of climate harm and the settlement of conflicts related to this distribution. How to deal with these issues of compensation and distribution of climate damage is closely related to the type of actor addressed, the kinds of victims, the type of climate damage, and the socio-legal context in which specific compensation questions arise. In that context, the question arises not only whether the current legal and compensation tools available are sufficiently equipped to compensate for and repair different types of climate damage, but also whether alternative compensation mechanisms, such as climate damage funds, should perhaps be explored. Delving into this topic, Chapter 14 addresses the supplementary role of compensation funds in the compensation and reparation of climate change associated damages and losses. These funds are an appropriate vehicle by which the corporate entities most responsible for climate change can be practically levied and made to take responsibility for the consequences of their activities on the planet and society. They can be used in addition to mechanisms to apply formal legal liability to corporate entities. The decision about whether to use a compensation fund mechanism for climate change related losses should ultimately try to strike a balance between two key issues: the needs of the victim(s) and broader public interest issues (such as what proportion of climate change losses should be borne by individuals, the state and other actors).

## 5. CLOSURE

The field of corporate accountability and liability for climate change is rapidly evolving, and by now the relevance of this topic to many areas of the law is undeniable. The use of different areas of the law offers potential to encourage and even compel companies to do their part in addressing the adverse impacts of climate change. It also offers hope for a faster and better approach to dealing with the climate crisis. But whether that hope is justified is not clear at all. It is still too early to determine to what extent these possibilities will make the necessary contribution to addressing climate change. The various chapters have identified and addressed some key bottlenecks and challenges. Finding appropriate solutions for these and other still remaining bottlenecks and challenges is perhaps a key issue for the coming years. The chapters in this volume illustrate this and hopefully provide further insights in dealing with these issues.