

Schriften zum Klimaschutzrecht

Paul Mougeolle

# Transnational Climate Due Diligence (CDD)

Existence, Limitations and Potentialities  
in International and Comparative Law



Nomos



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Volume 7

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**Nomos**

Diese Veröffentlichung wurde aus Mitteln des Publikationsfonds für Open-Access-Monografien des Landes Brandenburg gefördert./This publication was supported by funds from the Publication Fund for Open Access Monographs of the Federal State of Brandenburg, Germany.

Publié avec le concours de l'université Paris Nanterre./ Published with the support of the University of Paris Nanterre.

The author also received a dissertation prize from the French-German University (DFH-UFA).

**The Deutsche Nationalbibliothek** lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

a.t.: Potsdam, Univ., Diss., 2025

1st Edition 2026

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Published by

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

[www.nomos.de](http://www.nomos.de)

Production of the printed version:

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-7560-3572-4 (Print)

ISBN 978-3-7489-6631-9 (ePDF)

DOI <https://doi.org/10.5771/9783748966319>



Online version  
Inlibra



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## Foreword

First and foremost, I would like to express my sincere appreciation to Professor Laurence Sinopoli (University of Paris Nanterre) and Professor Norman Weiß (University of Potsdam) for their support and the freedom they have given me, not only during this PhD, but also during my Master's thesis ten years ago. I must admit that the topic of my thesis has often raised eyebrows among lawyers, given its broad scope and mix of public and private law. Despite this, and the time and energy it required to finish it, I still believe that studying the concept of "due diligence" on this scale was worthwhile. Indeed, the wide comparative approach enabled drawing trends across legal systems, which may be useful for both practice and academia. Furthermore, the comparison of the existence and extent of due diligence requirements for States and corporations, and their relationship with each other, remains largely unexplored. Lastly, historic legal responsibility, which is largely argued in US litigation and deemed possible by the International Court of Justice, remains poorly addressed in legal scholarship.

I also thank Professor Harro van Asselt and Research Director Sandrine Maljean-Dubois for their thorough review of my thesis and for their comments. I was truly honoured by the depth of engagement with my ideas. Thanks as well to Professor Helmut Aust for evaluating my work during the defence.

Furthermore, I am grateful to the people and lawyers behind the *Urgenda* case, especially Dennis Van Berkel and Roger Cox, as this case inspired my work and formed the basis of my dissertation hypothesis. Even after having analysed their cases with critical legal thinking, I remain one of their "biggest fans".

I also express my profound gratitude to the French NGO Notre Affaire à Tous, for which I worked the most so far. My path would have been completely different without the trust and space its members gave me. Special thanks to Marie Toussaint, Christel Cournil, and Jérémie Suissa.

Sincere thanks go as well to the NGO Our Children's Trust, particularly Allison Kole and Elizabeth Brown, for providing me with my first exceptional litigation experience. As well as being extremely exciting, suing the US federal government because of defective climate action allowed me to engage with the evolution of climate science over time.

## *Foreword*

More generally, I would like to express my appreciation to all the people who made this journey possible, both intellectually and financially, among others: Stephanie Rolphing-Dijoux, Aurore Chaigneau, Yann Robiou du Pont, Gerry Liston, and Jasper Teulings.

Last but not least, I cannot end this foreword without thanking my family, my friends and, in particular, my partner Joy and my son Ian, for their love, patience and continuous support.

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## Abbreviations

|               |                                                                              |
|---------------|------------------------------------------------------------------------------|
| API           | American Petroleum Institute                                                 |
| AR            | Assessment Report (of the IPCC)                                              |
| BGB           | <i>Bürgerliches Gesetzbuch</i> (German Civil Code)                           |
| CAT           | Climate Action Tracker                                                       |
| CDD           | Climate Due Diligence                                                        |
| CDR           | Carbon Dioxide Removal                                                       |
| CJ            | Chief Justice                                                                |
| CJEU          | Court of Justice of the EU                                                   |
| COP           | Conference of the Parties                                                    |
| CSDDD         | Corporate Sustainability Due Diligence Directive                             |
| DARSIWA       | Draft Articles on State Responsibility of the ILC                            |
| DD            | Due diligence                                                                |
| ECHR          | European Convention of Human Rights                                          |
| ECtHR         | European Court of Human Rights                                               |
| EU            | European Union                                                               |
| GHG           | Greenhouse Gases                                                             |
| HRDD          | Human Rights Due Diligence                                                   |
| HRC           | Human Rights Committee                                                       |
| ICJ           | International Court of Justice                                               |
| IEA           | International Energy Agency                                                  |
| ILC           | International Law Commission                                                 |
| IPCC          | International Panel on Climate Change                                        |
| ITLOS         | International Tribunal on the Law of the Sea                                 |
| KP            | Kyoto Protocol                                                               |
| LTTG          | Long-term temperature goal of the Paris Agreement (1.5°C, or well-below 2°C) |
| <i>op cit</i> | already quoted above                                                         |
| PA            | Paris Agreement                                                              |

## *Abbreviations*

|         |                                                                              |
|---------|------------------------------------------------------------------------------|
| RECIEL  | <i>Review of European, Comparative &amp; International Environmental Law</i> |
| SCOTUS  | Supreme Court of the United States                                           |
| SR1.5   | Special Report on 1.5°C of the IPCC                                          |
| SPM     | Summary for policymakers                                                     |
| UN      | United-Nations                                                               |
| UNFCCC  | United-Nations Framework Convention on Climate Change                        |
| UN-HRTB | United-Nations Human Rights Treaty Bodies                                    |
| UNGA    | United-Nations General Assembly                                              |
| UNGPs   | Guiding Principles on Business and Human Rights.                             |
| US      | United States (of America)                                                   |
| WEO     | World Energy Outlook                                                         |
| WG      | Working Group                                                                |
| WMO     | World Meteorological Organization                                            |

## Abstract and executive summary

### Abstract

This PhD thesis explores the existence and boundaries of “climate due diligence” (CDD) owed by States and corporations in international law, human rights law and domestic law in selected Global North jurisdictions. It finds that due diligence applies to climate change, since prevention remains possible at the individual level, despite the cumulative nature of global warming. CDD is also enforceable: courts recognise climate-related impacts as injuries and establish causation through the concept of shared responsibility. The redressability of CDD claims depends, however, on the existence of either specific legislation or scientific and institutional consensus. Absent such conditions, States and corporations must benefit from wider discretion while implementing best efforts. A historical analysis of compliance with CDD reveals past and ongoing breaches by public and private Global North actors, which may give rise to secondary obligations, such as compensation or enhanced mitigation. This thesis concludes that CDD has emerged as a transnational legal norm with growing recognition across jurisdictions, and that it provides a meaningful tool to advance climate accountability and action.

### Executive summary

This PhD thesis explores “due diligence” to assess whether and to what extent this legal concept, generally used to refer to norms whose functions require harm prevention, and which mandate a careful and reasonable man standard, oblige States and corporations to mitigate climate change (i.e., in short: climate due diligence (CDD)).

### 1. Applicability

In international law, due diligence requires prevention when activities might cause significant harm overseas. This thesis found that the collective and cumulative features of global warming are not insurmountable obstacles to applying *general* or customary due diligence to climate change, given

the serious dangers and the possibility of reducing emissions, and thus the risk of harm.

Since global warming imperils human rights as well, States must - *mutatis mutandis* - mitigate global warming, requiring due diligence too.

In domestic law, whether in the civil or common law traditions, *general* due diligence in tort law or *specific* due diligence in statutory law analogically require public and private actors (including multinationals) to tackle climate change. However, certain areas may be pre-empted by *lex specialis* (see, notably, the US case *American Electric Power Cie*).

## 2. Extent of the enforceability

Some courts still have rejected climate lawsuits for lack of demonstrated individual and specific climate-related injuries, but many others have recognised individual and/or collective harms. Given the progress of science and the aggravation of global warming, many injuries are likely to be established in the future.

Courts all over the world have accommodated the causation pillar to global warming, thanks to the removal of any uncertainty as to the occurrence of climate change and the acceptance of the concept of shared responsibility, enabling the attribution of a part of the harm to an individual actor, implying in turn a duty to do (only) its share. Further, due diligence attributes responsibility regarding indirect and transnational events, grounding causation in this respect against States and corporations.

As to the redressability of CDD, judicial bodies accept enforcing targets and measures enshrined in *specific* legislation. Regarding claims based on *general* due diligence, which aim to increase the ambition of the public or private actors, they pose significant redressability challenges, especially in light of the separation of powers. Given this consideration, courts are only willing to admit strongly consensual elements when interpreting *general* CDD. In their absence, it appears that courts and legislators can still impose best efforts obligations while granting discretion on the substance (see, notably, *KlimaSeniorinnen*, *Milieudefensie v Shell*, or Article 22 CSDDD).

## 3. Historical Responsibility

Before the IPCC's creation in 1988, scientific and institutional consensus on the risks of GHG emissions emerged, and, as a result, the general due diligence obligation to mitigate climate harm.

Between 1988 and 2015, the establishment of the IPCC and the UNFCCC implied a clear recognition of the risks and the ability to act individually. Despite reuniting those clear due diligence criteria, key public and private Global North actors manifestly failed to meet their duties.

After the 2015 adoption of the Paris Agreement, the international community recognised the 1.5°C objective by leaving leeway to individual States. Nonetheless, the world remains far from being aligned with these temperature goals, and Global North actors do not meet their fair share.

This dissertation infers that these individual historical breaches of CDD could give rise to secondary obligations, which may include monetary compensation for climate losses and damages, or increased mitigation to make up for past shortcomings. Awarding these remedies could contribute to a more equitable global burden-sharing.

## Conclusion

Although CDD has gained judicial traction transnationally, significant differences regarding compliance enforcement remain, particularly in the USA compared to the other assessed legal systems (France, Germany, the UK, the Netherlands, human rights law, and international law), pointing to a persistent fragmentation risk. While it remains unclear whether CDD can really reinforce climate action, it still provides a judicial mechanism which has the potential to do so.





