

Schriften zum Klimaschutzrecht

Paul Mougeolle

Transnational Climate Due Diligence (CDD)

Existence, Limitations and Potentialities
in International and Comparative Law



Nomos

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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.

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Foreword

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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 & 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, Milieudéfensie 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.

