

Corporate Due Diligence and Climate Change

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Why is corporate due diligence needed in relation to climate change?

The complex reality of climate change explains the actual need of having another legal instrument to be added to the already rich toolbox existing in the environmental field. Therefore, my answer is threefold: based on scientific, geopolitical and legal considerations.

The first consideration is already quite known and is generally based on the urgency of the issue of climate change, and on the necessity of enriching this toolbox that in the last 30 years, since 1992 (year of the creation of the United Nations Framework Convention on Climate Change) has been developed yet has not been completely adequate to address the always worsening challenge of climate change. Greenhouse gas emissions have risen 60% since 1992, and if at that time the use of fossil fuels constituted 80% of the global energy system, in 2020 their use still amount for this 80%. Moreover, we are already at 1.1°C of increased warming over pre-industrial times and the Intergovernmental Panel on Climate Change (IPCC) in its last reports, including the Special one issued in 2018, warned on the consequences of aiming to a 2°C increase in global temperature, compared to keeping the increase below 1.5°C. Comparing the effects of these two kinds of scenario, the authors concluded – among many other consequences – that a 2°C increase would wipe out 99% of the world's coral reefs by the end of the century, rather than its 70–90% with a 1.5°C increase, and also it would double the number of plant and vertebrate species that would lose their habitats.

Whilst some were hoping for a silver lining in the dramatic global experience of COVID-19 crisis, the UN Environment Programme in last year Emission Gap Report highlights that the current pandemics “offers only a short-term reduction and will not contribute significantly to emissions reductions by 2030 unless countries pursue an economic recovery that incorporates strong decarbonization”. This shows us the non-efficient or insufficient

instruments currently used to reduce greenhouse gas emissions, especially from corporations.

From a geopolitical point of view, there are certainly good news related to the EU Green Deal and its objective of greenhouse gas net-zero emissions by 2050. The goal for Europe to become the world's first climate-neutral continent is really comforting, as well as EU ambition to position itself as a global leader in the fight against climate change. In the route to boost an always more efficient use of resources by moving to a clean and circular economy, the Members of the European Parliament yesterday [21.04.2021] reached an informal agreement on the new EU Climate Law, increasing the EU's 2030 reductions target from 40% to at least 55%. That was just in time for attending the US Climate Summit today and tomorrow with a concrete objective, with the hope of pressuring the US into increasing its own ambition. As we all know, the cooperation is critical in this kind of global fight against climate change, and so it is the need for new legal instruments capable of pushing other States and their companies, such as an increased due diligence obligations, as was highlighted by the UN Special Rapporteur on Human Rights and the Environment, David Boyd, in his 2019 report presented to the UN General Assembly; and that was also discussed by Professor Boyd during our webinar series on Human rights Due Diligence for Climate Change Impacts, organized in September at BIICL with Senior Fellow Lise Smit.

Finally, from a legal point of view, the need for corporate due diligence in relation to climate change is generally to engage directly and more effectively with the main actors behind environmental externalities and climate change: businesses. This kind of path, as was already discussed during the previous episodes of this webinar series, has been already taken in France and followed with proposals tabled in other countries, such as the Netherlands, Germany, Switzerland and Norway. However, there is also some attractiveness for companies in a mandatory due diligence law regime: on one hand, as a means to promote harmonization and to level the playing field, at least across the EU, on the other hand, in the sense of an improved legal certainty as to the standards that corporates will be held to, in a common and more harmonious path toward sustainability.

How could a corporate due diligence duty be used in the perspective of climate change litigation in the European context?

In order to properly address this question, it seems necessary a rapid introduction to the climate change litigation phenomenon, before responding about the possible uses of a corporate due diligence duty in the European context.

As you may know, climate change litigation has spread rapidly and far beyond the borders of Europe in the last decades. Starting from a handful of cases in the 1990s, as of today, there are more than 1600 cases identified globally in the 'Climate Change Litigation Databases' developed by the Sabin Center for Climate Change Law at Columbia University, covering 37 countries and 8 regional or international jurisdictions. We must, however, mention that more than three-quarters of the total of the cases are identified in the United States alone. When we talk about climate change litigation, we are talking about a very heterogeneous category of legal actions, including court cases, administrative proceedings, petitions and prosecutions, addressing both issues of mitigation as well as adaptation. Among all the cases considered to have "flooded" the courts, especially domestic courts, several types of climate change litigation have been distinguished. On one hand, we have what are called "strategic cases", which are climate-related cases with a visionary approach, aiming to influence public and private climate accountability. On the other hand, we have also the so-called 'routine cases', less visible ones, dealing with, for example, planning applications or allocation of emissions allowances under schemes like the EU emissions trading system. Another important distinction is generally made in the literature between: 'proactive' litigation, initiated in order to engender policy change (for example, by requesting the adoption or reform of legislation); and 'reactive' litigation, initiated to resist such change (for example, by challenging the adoption of new or reformed legislation). Whilst the majority of climate litigation cases (approximately 75%) have been filed against States, climate change-related cases have also been filed against private actors, mostly

'Carbon Majors' – fossil fuel and cement companies, which are major greenhouse gas emitters. Unfortunately, this kind of cases against private actors has not been successful so far.

However, I think we can start seeing interesting developments, notable related to corporate due diligence in relation to climate change in the European context.

An interesting example comes from France, where there has been already the first legal proceedings based on the French Duty of Vigilance Law, which have been brought against the oil company Total. In this case, 14 local authorities and 5 associations (including *Notre Affaire à Tous* and *Sherpa*) brought Total to court because of its major contribution to climate change and the inadequacy of the measures taken by the company to prevent the resulting human rights, health and safety, and environmental damage. The claimants rely on the Duty of Vigilance Law, but also on the judge's power to order measures to stop or prevent environmental damage under the new Article 1252 of the French Civil Code. The claimants seek an order requiring Total to devise a corporate strategy for addressing the risks of climate change. The case is ongoing and in an order issued on last February, the judge was questioned on the jurisdiction competent for the case, and the judge confirmed the jurisdiction of the civil court.

Another interesting case, which goes in the sense of a climate due diligence, is the one of *ClientEarth v. Enea*. This case has been one of the most high profile cases in the EU, and it relates to the idea of the campaign 'beyond coal'. This particular power plant was meant to be the last coal-fired power plant to be built in Poland, for the cost of € 1.2 billion. There was a shareholder resolution consenting to the construction of this coal fired power plant. However, ClientEarth filed a shareholder lawsuit that sought to annul the resolution and to hold that the resolution was invalid. One of the core arguments behind the claimants' case was that the power plant harmed the company's economic interests due to climate-related financial risks. In other words, this power plant would be a stranded asset, and it was not in the country or the company's interest to build this power plant. The case was brought in the Polish Commercial Companies Court, and in August 2019 the regional court in Poland found the resolution to be invalid. This was one of the obstacles in the construction of this coal-fired power plant. Since then, there have been other factors that have stood in the way, mostly to do with decisions by investors that they will not be investing in this coal-fired plant, also because of the direction taken by the EU Green Deal.

While many companies currently interpret the duty of vigilance restrictively, as a compliance exercise limited to the implementation of internal risk management processes, the forthcoming decisions in the various litigations underway will be decisive as to the actual content of these requirements, which are now inspiring the European legislator.

However, we should mention, there is also an argument that, in fact, mandatory due diligence will increase climate litigation not only for companies who do not comply, which is probably justifiable but also against those companies who, by complying and providing details of their climate change impacts and the steps they are taking to address those. They may therefore be targeted by claimants both for the impacts that they have identified or by it being said that they are not doing enough. I think that would really be an unintended consequence of any due diligence law but it is perhaps an inevitable one.

To conclude, an important point is the extent to which corporate due diligence can be used also as a mean of defence. I think that most corporate practitioners would advocate that this should be the case, especially considering that at the moment there is significant uncertainty about what the climate-related standard of care amounts to and what companies need to be doing to discharge their duties and reduce their litigation risk. That is without considering the harmonization point I made earlier which is related to the risk of Member States exploring different avenues on this, and companies being left facing a jungle of different standards to comply with in the European context. An European harmonized and mandatory corporate due diligence would be then considered as a safe harbor to climate-related claims. And where a company can demonstrate that it has

undertaken adequate and appropriate measures to comply with its due diligence, that can be a defense to a claim of breach. The forthcoming European legislation may really can help in this sense, providing more clarity on such standard of care for corporation – notably in relation to climate change – which is already existent through a soft law normative framework at the international level or through fragmentary regulatory developments in the different European legislations. This new EU legislation will (hopefully) provide better regulatory guidance to business, on one side, and facilitate a better access to remedies for individuals and communities affected by climate change, on the other side.

What role should trade and investment agreements play in mitigating against climate change?

To state the obvious, international trade and investment agreements are treaties that have the objective of promoting and protecting cross-border trade and investment flows. They could potentially play a key role in the efforts to boost climate-friendly trade and to direct investments to meet climate change mitigation (and also adaptation needs), and of course at the same time directing investments away from business-as-usual practices. So in a way this kind of agreements can help overcome the chronic lack of ambition necessary to create transformative solutions, if we want to avoid the most catastrophic effects of climate change and to limit global warming below 1.5 °C. That could be done – if we want to resume it very simplistically – by removing tariffs and harmonizing standards on environmental goods and services, and eliminating distortionary and poorly designed subsidies on fossil fuels and agriculture. However, this harmonization should be conducive to what we can call as a “race to the top”, towards always better standards and in the sense of improving climate policies.

Unfortunately, history tells a different story. International tariff reduction has increased trade in carbon-intensive and environmentally destructive products, such as fossil fuels and timber, more than it has for environmental goods. Moreover, also in the context of climate change, there is the classical divide between environment and trade, with a real concern that potential ambitious climate policies will fall foul of WTO rules if they are perceived to arbitrarily or unjustifiably discriminate against third countries. The classical divide now is even more evident if we consider that on one side we have the always more clear and evidence-based limits of our climate system, and the other we have trade and its centrality for economic growth. In my opinion, the original sin here is related to the old fashioned paradigm of development, considered as a synonym of economic growth, which traditionally is considered strictly interlinked with trade. Now, the problem with climate change can be resumed through the famous bathtub analogy: the bathtub represents the climate system, and the water level represents CO₂. Adding water from the tap represents addition of greenhouse gases into the atmosphere from human sources. If you keep adding water, eventually the tub will overflow and spill water on the floor (in our case, this represents our incapability of limiting the most dangerous effects of climate change). Simply said, trade and investment agreements should avoid to provide additional load to the climate system.

In the case of the EU's trade and investment agreements, we can just agree that they should be aligned with the forthcoming EU legislation on mandatory human rights, environmental and climate change due diligence. This kind of agreements should galvanize and reinforce the efforts required of business to conduct human rights, environmental and climate change due diligence under the EU legislation, and help moving in the sense of an ecological carbon neutral transition.

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