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SYMPOSIUM ON NEW PATHWAYS TOWARD SUPPLY CHAIN ACCOUNTABILITY

EMISSION IMPOSSIBLE? CORPORATIONS, SUPPLY CHAINS, COURTS, AND CLIMATE CHANGE

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The recent enactment of supply chain due diligence regulation in various jurisdictions prompts reflection on how the law might best incentivize corporations to mitigate the impact they have on the environment.[1] Beyond these specific pieces of legislation, judicial actors are similarly playing a role in expanding the responsibility of corporations for the harm their operations, products, and services cause to people and the environment, including throughout their supply chains. In this context, the present contribution takes aim at corporate accountability for climate change and appraises a number of recent developments in domestic jurisdictions that evidence a trend toward supply chain emission responsibility. While the focus of this piece is the contribution of domestic courts, an emphasis is placed on the role that informal international law and global norms have played in the reasoning of those decisions or the claims of litigants. In particular, it highlights the persuasive authority that such international law instruments and initiatives have had in this context.

Supply Chain Accountability and Greenhouse Gas Emissions

Supply chain accountability seeks to hold corporate actors responsible for their impact on the environment and the climate caused by their operations, products, and services. Corporations are increasingly expected to report on their greenhouse gas (GHG) emissions, but the scope of such emission accounting has been a matter of contention. GHG emissions can be categorized into three scopes under a widely adopted international accounting method for measuring the carbon footprint of corporations. This tool is known as the GHG Protocol.[2] Under this method, scope 1 emissions emanate directly from sources that are owned and controlled by the corporation. Scope 2 emissions refer to indirect emissions that come from, for example, the generation of electricity or other fuel that the corporation uses in the conduct of its operations. Scope 3 emissions cover all other indirect emissions that result up and down a company's value chain.

The GHG Protocol—developed over several decades—has been spearheaded by the World Resources Institute, the World Business Council on Sustainable Development, a range of NGOs, and multinational

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[1] *See, 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, (7) (July 5, 2024) [hereinafter CSDDD]; Uyghur Forced Labor Prevention Act, 135 Stat. 1525 (Dec. 23, 2021); Lieferkettensorgfaltspflichtengesetz [Supply Chain Due Diligence Act], Bundesgesetzblatt [Federal Law Gazette], Teil I [Pt. I], at 2959 (July 22, 2021) (Ger.).

[2] Greenhouse Gas (GHG) Protocol.

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enterprises as well as other stakeholders.[3] While it is not binding or the product of states as such, it provides an important global standardized framework for GHG emission accounting. It complements municipal environmental legislation, which often fails to explicitly mandate accounting for emissions throughout a company's value chain.[4]

Just as such normative frameworks have assisted domestic courts in their interpretation of domestic and regional environmental regulation,[5] international law—including soft law—has similarly played a not inconsequential role in elaborating obligations. Indeed, municipal legislation has been interpreted by courts having reference to international law instruments and standards in a way that has had the effect of expanding the responsibility of corporations. Prominent multilateral initiatives and instruments that courts have had recourse to include, for example, the UN Guiding Principles on Business and Human Rights (UNGPs),[6] the Paris Agreement,[7] and the Sustainable Development Goals.[8] While their normativity may be relative, few would doubt today that these instruments have normative value.[9] That said, although there is now a complex normative framework that has been developed at the multilateral level around state and corporate responsibilities for climate change and human rights, the non-binding nature of many of the abovementioned instruments and initiatives means that their effect depends on how specific actors—including states, corporations and domestic courts—voluntarily embrace, apply, and pursue the norms within them.

Courts and Corporate Responsibility for Supply Chain Emissions

Climate litigation has typically challenged government inaction or lack of ambition with respect to climate policy.[10] However, a growing number of domestic cases against multinational corporations seek to mitigate the harm their economic activities have on the climate. In some of the cases, domestic courts in various jurisdictions have had occasion to consider the extent to which corporations ought to be responsible for scope 3 emissions.

The Shell Saga: Two Steps Forward and One Step Back

One prominent example is the Dutch case *Milieudefensie et al. v. Royal Dutch Shell PLC*.[11] This case was recently heard by the Hague Court of Appeal, which handed down its decision on November 12, 2024, setting aside a widely lauded and highly influential prior judgment of the Hague District Court of May 26, 2021. The Appeals Court ultimately concluded that Shell could not be held responsible for breaching its unwritten social standard of care under Dutch tort law because it will not reduce its GHG emissions by 45 percent by 2030 compared to 2019

[3] *Id.*

[4] *See, e.g.*, EU Environmental Impact Assessment (EIA) Directive 2011/92/EU, as Amended by EU Directive 2014/52/EU. *See also* R (on the Application of Finch on Behalf of the Weald Action Group) v. Surrey County Council and Others [2024] UKSC 20 (UK).

[5] *See, e.g.*, Milieudefensie et al. v. Royal Dutch Shell PLC, Appellate Judgment, ECLI:NL:GHDHA:2024:2100, para 3.5 (The Hague Ct. App. Nov. 12, 2024) (Neth.).

[6] Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Pillar II (UNGPs), Prin. 18, UN Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter UNGPs].

[7] Paris Agreement, Dec. 12, 2015, 3156 UNTS 79; UNFCCC Decision 1/CP.21: Adoption of the Paris Agreement, UN Doc. FCCC/CP/2015/10/Add.1.1_32 (Nov. 30–Dec. 13, 2015).

[8] *See* GA Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015).

[9] Prosper Weil, *Towards Relative Normativity in International Law?*, 7 AJIL 413, 414, 416 (1983).

[10] *See, e.g.*, The Netherlands v. Urgenda, Appellate Decision, ECLI:NL:GHDHA:2018:2610 (The Hague Ct. App. Oct. 9, 2018) (Neth.).

[11] Milieudefensie et al. v. Royal Dutch Shell PLC, Judgment, ECLI:NL:RBDHA:2021:5339 (The Hague Dist. Ct. May 26, 2021) (Neth.); *Milieudefensie et al. v. Royal Dutch Shell PLC*, Appellate Judgment, *supra* note 5.

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levels.[12] The Appeals Court opined that, while there was a broad consensus on the need to reduce emissions by 45 percent by 2030, this was a global net target—derived from Intergovernmental Panel on Climate Change (IPCC) reports—that could not bind Shell specifically.[13] The Appeals Court did say, however, that instruments like the OECD Guidelines for Multinational Enterprises and the UNGPs—to which Shell has subscribed—place a responsibility on companies "to take appropriate measures themselves to counter dangerous climate change" and "[c]ompanies like Shell . . . have their own responsibility in achieving the targets of the Paris Agreement."[14] This may mean that companies should be guided by climate concerns when making corporate decisions like whether to exploit new oil and gas fields.[15] What is more, the Appeals Court accepted that "Shell may have obligations to reduce its scope 3 emissions" but it could not find that Shell was under a legal obligation to reduce those emissions by a specific percentage.[16] Despite the disappointing outcome for *Milieudefensie et al.* and environmentalists around the world, it is evident that the Appeals Court has nevertheless made a number of important statements of principle that should inform corporate responsibility for climate change, including with respect to supply chains.

The preceding judgment of the Hague District Court, while now quashed, has already been influential in cases decided or underway in other jurisdictions. It is therefore appropriate to consider the contribution it made. In 2021, that court decided the case against Shell. Due to the "imminent threat" of Shell's failure to meet its unwritten standard of care under Dutch law, the District Court held that the Shell Group must achieve a net 45 percent reduction in GHG by 2030 compared to 2019 levels.[17] For the District Court, this meant "the sum of the reduction of CO^2 emissions of the Shell Group's entire energy portfolio" and it made a distinction between scope 1, scope 2, and scope 3 emissions.[18] The District Court was clear that Shell exercised "control and influence" over the scope 2 emissions of its suppliers and that Shell "controls and influences the scope 3 emissions of the end-users of the products produced and sold by the Shell group."[19] In other words, the District Court opined that the responsibility of Shell to reduce CO^2 emissions extended up and down the value chain from suppliers to buyers. The District Court concluded that there was an "internationally endorsed" responsibility borne by companies for scope 3 emissions, and that this responsibility was a relative one mediated by the control and influence companies have over these emissions.[20]

The District Court found that the company's responsibility for scope 3 emissions could be interpreted via the unwritten standard of care under the Dutch Civil Code from the UNGPs. The UNGPs provide that companies should actively ensure respect for human rights throughout their value chains. Indeed, Principle 13 of the UNGPs sets out that business enterprises should "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts." Importantly, the District Court noted that the UNGPs represented a global standard of conduct for businesses, thus establishing the basis on which Shell—a private actor—could be held accountable.[21]

[12] *Milieudefensie et al. v. Royal Dutch Shell PLC*, Appellate Judgment, *supra* note 5, para 7.111.

[13] *Id.*, para 7.73.

[14] *Id.*, paras 7.26–7.27.

[15] *Id.*, para 7.61; *see also*, André Nollkaemper, *Lessons of a Landmark Lost: The Judgment of the Hague Court of Appeal in* Shell v Milieudefensie, VERFASSUNGSBLOG (Nov. 12, 2024).

[16] *Milieudefensie et al. v. Royal Dutch Shell PLC*, Appellate Judgment, *supra* note 5, para 7.111.

[17] *Milieudefensie et al. v. Royal Dutch Shell PLC*, Judgment, *supra* note 11, para 4.4.55.

[18] *Id.*, para 4.4.39.

[19] *Id.*, para 4.4.25.

[20] *Id.*, para 4.4.18.

[21] *Id.*, para 4.4.13.

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An Expanding Circle of Accountability?

As alluded to, the District Court's decision in *Milieudefensie v. Shell* has influenced another case brought in Switzerland, *Asmania et al. v. Holcim*.[22] Holcim is a Swiss-based company that specializes in building materials. The plaintiffs live on the Indonesian island of Pari and they are suing Holcim for damage caused by climate change there. They seek compensation for damage that has already occurred, a financial contribution from Holcim for measures that must be taken so that Pari can adapt to the effects of climate change, as well as a commitment that there be a reduction in GHG emissions by 43 percent before 2030 and by 69 percent before 2040.[23] While the plaintiffs rely on domestic law, the case is a novel example of a transnational claim for the reduction of GHG emissions and compensation. The Court will nevertheless have to interpret the relevant Swiss law in light of fundamental rights under the Swiss Federal Constitution as well as the European Convention on Human Rights and other international human rights instruments to which Switzerland is a party.[24]

The methodology proposed by the plaintiffs for ascertaining the historical contribution of Holcim to global GHG emissions is based on a study conducted by the Climate Accountability Institute (CAI).[25] CAI's analysis for the plaintiffs takes into account Holcim's scope 3 emissions and thus seeks to extend Holcim's responsibility for emissions that result from its supply chain.[26] The study concluded that, "[c]umulatively, Holcim's scopes 1, 2 and 3 emissions account for 0.477% of global 'industrial emissions' . . . from 1950 to 2021."[27] Notably, several of the scientific insights—particularly in relation to the causal link between GHG emissions and sea level rise—are based on the findings of the IPCC, a UN body with a mandate for appraising climate change science. As in the *Shell* case, international law and global norms will likely play a significant role in assessing whether Holcim has violated its domestic law obligations.

Human Rights Continue to Gain Prominence

In France, a particularly notable case has been brought against Total—the multinational energy and petroleum company—by a group of NGOs, French local councils and, interestingly, the City of New York.[28] The Paris Court of Appeal has already held that the case was partly admissible and could proceed in June 2024.[29] The case concerns the end use of goods and services that Total produces and thus is about scope 3 emissions. The applicants seek an order from the Court directing Total to modify its climate plan to ensure compliance with French law on due diligence, international climate law and norms. It is suggested that Total's scope 3 emissions make up around 90 percent of its overall emissions, represent approximately 1 percent of global GHG emissions annually and,

[22] Asmania et al. v. Holcim (Swiss Cantonal Ct. Zug, filed Feb. 1, 2023) (Switz.); *see* Laura Andrea Duarte Reyes & Nina Burri, *Transnational Corporate Liability in the Era of Loss and Damage: The Case of* Asmania et al. v Holcim, *in* What Future for Environmental and Climate Litigation? Exploring the Added Value of a Multidisciplinary Approach from International, Private and Criminal Law Perspectives (Stefano Zirulia, Lidia Sandrini & Cesare Pitea eds., 2024).

[23] Global Climate Change Litigation Database.

[24] Reyes & Burri, *supra* note 22, at 114.

[25] *See* Richard Heede, *Carbon History of Holcim Ltd: Carbon Dioxide Emissions 1950–2021*, Climate Accountability Inst. (July 7, 2022).

[26] *Id.* at 19.

[27] *Id.* at 22.

[28] Notre affaire tous et autres v. Total, No. RG 23/14348, Appellate Decision (Cour d'Appel de Paris June 18, 2024) (Fr.).

[29] *Id.*

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in fact, amount to more than the overall emissions from the territory of France.[30] The applicants' case relies in part on statements made in the UN Human Rights Council, the work of the UN human rights committees, and IPCC reports to illustrate the impact that climate change has on the enjoyment of human rights.[31]

Cases have also been initiated against various companies in Germany, including *Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG*[32] and *Deutsche Umwelthilfe (DUH) v. BMW*.[33] In a similar way to some of the above cases, the plaintiffs in these cases argue that these companies' GHG emissions fall foul of the global consensus around climate change ambitions as reflected, for example, in the Paris Agreement and this, in turn, has an impact on fundamental human rights as well as the rights of future generations. They also argue that these companies are violating German law. In both cases, DUH has asked the courts to hold that unless the companies can prove they will achieve scope 3 emission neutrality in the intended use of their combustion engine cars, they should be obliged to refrain from placing such cars on the market.

Environmental Impact Assessments and Scope 3 Emissions

In a landmark case recently decided in the UK, the Supreme Court held that a local authority—Surrey County Council—failed to include scope 3 emissions in an environmental impact assessment (EIA) of an application for oil extraction by a private company.[34] Determining whether scope 3 emissions were required in an EIA under the EU's EIA Directive (itself informed by the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998), the Court opined that the impact fossil fuels have on the environment from their extraction by oil companies to their combustion by end-users should be accounted for.[35] Since it is "known with virtual certainty . . . that the oil will be refined and ultimately used as fuel . . . combustion emissions are a direct effect of the activity of extracting the oil."[36] In other words, scope 3 emissions ought to have been included in the EIA.

The Paris Agreement played an important part in the Court's reasoning. While noting that specific measures to meet the goals of the Paris Agreement were left to the discretion of states, it also observed that few states had made commitments to reduce fossil fuel production itself as opposed to reducing GHG emissions from the consumption of fossil fuels.[37] Relying on a series of reports published by the UN Environment Program, the Court highlighted that there existed a significant "production gap" between individual states' "planned fossil fuel production and global production levels consistent with limiting global warming to 1.5°C or 2°C."[38] As such, the Court emphasized that current levels of production were inconsistent with international climate obligations and ultimately rejected an argument that planning authorities should not take into account that uses of land involving

[30] *Id.*; *see also* Paul Mougeolle, Notre affaire à tous et autres c. Total *(2020)*, *in* LES GRANDES AFFAIRES CLIMATIQUES, para. 3 (Christel Cournil ed., 2020).

[31] Assignation devant le tribunal judiciaire de Nanterre, 24–25 (2020).

[32] Deutsche Umwelthilfe (DUH) v. Mercedes-Benz, Petition to the Regional Court of Stuttgart (Sept. 20, 2021) (appealed to Higher Regional Court of Stuttgart).

[33] Deutsche Umwelthilfe (DUH) v. BMW, Petition to the Regional Court of Munich (Sept. 20, 2021).

[34] R (on the Application of Finch on Behalf of the Weald Action Group) v. Surrey County Council and Others [2024] UKSC 20, para. 174 (UK).

[35] *Id.*, paras. 80, 123, 174.

[36] *Id.*, para. 85.

[37] *Id.*, para. 141.

[38] *Id.*, para. 142.

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fossil fuel extraction would contribute to global warming.[39] While the case does not directly concern a corporation, it nevertheless signals further support for the relevance of scope 3 emissions in assessing corporate activity and thus provides another example of a comprehensive approach to supply chain accountability.

The Power of Persuasive Authority

What the above cases have in common is that the domestic courts and litigants involved drew on informal international law and initiatives to construe—and often extend—domestic law. The instruments and initiatives referred to by domestic courts and litigants were persuasive because of their merit as opposed to their binding authority.[40] They have what might be characterized as persuasive authority.[41] An international instrument or initiative acquires persuasive authority in the eyes of domestic courts by virtue of its association with formal law, the impartiality of the content of an instrument or of its authors, or the broad acceptance the instrument or initiative has achieved internationally.[42] Whether it be the UN Guiding Principles on Business and Human Rights, the GHG Protocol, or the reports of the IPCC, domestic courts and litigants have drawn on informal sources to elaborate the content of open-ended domestic obligations like the duty of care, due diligence or EIA. At the very least, the former provide compelling reasons for the judge to interpret the latter in a given direction.[43]

The contribution of these cases has been and will continue to be multifaceted. In turn, the cases themselves are likely to become elements of persuasion in the normative field of corporate supply chain accountability. In some contexts, climate litigation has helped make up for a lack of legislation on supply chain accountability but in others it has provided a catalyst for the adoption of such legislation.[44] What is more, the kind of climate litigation discussed above is helping to ensure more comprehensive environmental reporting or impact assessment among various actors. Further still, cases like these that stand for a holistic approach to supply chain accountability (or have the potential to) may have an impact beyond climate cases, perhaps—for example—extending corporate accountability for plastic pollution throughout a company's value chain.[45] In sum, they seed the potential for a virtuous circle of environmental protection.

Conclusion

This essay has sought to highlight several notable developments that concern the responsibility of corporations for climate change. Domestic courts have played an increasingly significant role in extending the supply chain accountability of businesses, not least with respect to scope 3 emissions. However, this has only been possible because of the normative impact of informal international law and initiatives, providing reasons that have persuaded municipal judges to interpret domestic law obligations in a certain way. Given the virtual impossibility of holding corporate actors legally responsible at the international level for their contribution to climate change—despite a growing number of international norms in this context—the work of domestic courts is making

[39] *Id.*, para. 150.

[40] Machiko Kanetake and André Nollkaemper, *The Application of Informal International Instruments Before Domestic Courts*, 46 George Washington Int'l L. Rev. 765, 787 (2014).

[41] *See, e.g.*, Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 Oklahoma L. Rev. 55 (2009); Kanetake & Nollkaemper, *supra* note 40.

[42] Kanetake & Nollkaemper, *supra* note 40, at 789–800.

[43] Joseph Raz, Practical Reason and Norms 15 (1999).

[44] Mikko Rajavuori, Annalisa Savaresi & Harro van Asselt, *New Avenues for Corporate Climate Accountability*, Oxford Bus. L. (May 2, 2023).

[45] *See, e.g.*, Te Rūnanga o Ngāti Awa v. Bay of Plenty Regional Council [2022] NZCA 598 (N.Z.); Kierra Parker, *Climate Change Litigation Update: Downstream Greenhouse Gas Emissions*, DLA Piper (Oct. 9, 2024).

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real accountability for corporate GHG emissions possible. And this work may, in fact, be essential for the future of our planet. To quote the closing line of the latest Mission Impossible movie: "There isn't much time. The world doesn't know it, but they're counting on you."[46]

[46] *Mission Impossible: The Dead Reckoning Part One* (Eugene Kittridge, directed by Christopher McQuarrie).

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