British Institute of International and Comparative Law

Corporate Accountability and Liability Mechanisms for Climate Change

Developments and Comparative Models

Event Report

British Institute of
International and
Comparative Law

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To be a leading research institute of international and comparative law and to promote its practical application by the dissemination of research through publications, conferences and discussion.

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This report contains the respective presentations made by the speakers as part of the British Institute of International and Comparative Law (BIICL) Webinar on 'Corporate Accountability and Liability Mechanisms for Climate Change: Developments and Comparative Models' (September 2021). The recording of the webinar can be found here: https://www.youtube.com/watch?v=y7H-EVx602g&t=116s.

BIICL wishes to thank the distinguished speakers for their participation and for making the event a success. Special thanks to the logistical support staff at BIICL, for their help in ensuring the smooth running of the webinar, and to Ms Chloe Gershon, for her assistance in the drafting of this report.

Summary

The question as to how companies should be addressing their impacts on climate change has never been as urgent. The recent decision in the Netherlands in *Milieudefensie v Royal Dutch Shell* is another example of legal and societal expectations that companies should take proactive steps towards reducing and even eliminating their contributions to the various factors that fuel climate change. These concerns have not only surfaced in litigation around the world, but also in other methods of holding companies accountable, such as through investor pressure, public procurement, financial decisions, and reputation-focused campaigns by civil society. Many of these accountability models have legal implications for companies although they do not necessarily provide for legal liability or access to remedy for people and the planet.

On the 27th September, The British Institute of International and Comparative Law (BIICL) hosted a panel discussion entitled 'Corporate Accountability and Liability Mechanisms for Climate Change: Developments and Comparative Models', which was followed by a closed, invitation-only workshop for practitioners. The present report provides a summary of the main contributions to the discussion from the panel discussion, drawing on themes dealt with in the moderated roundtable discussion from the practitioner's workshop.

The events were convened by Ivano Alogna, Arthur Watts Research Fellow in Environmental and Climate Change Law; Lise Smit, Senior Research Fellow in Business and Human Rights and Director, Human Rights Due Diligence Forum; and Duncan Fairgrieve, Senior Research Fellow in Comparative Law and Director, Product Liability Forum. Panellists in order of presentations: Catherine Higham (Climate Change Laws of the World Coordinator, Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science), Lydia Omuko-Jung (Research Fellow, Institute of Public Law and Political Science at University of Graz), Lisa Benjamin (Assistant Professor, Lewis & Clark Law School), Francesco Quarta (Assistant Professor, Department of Sociology and Business Law, University of Bologna), Arianne Griffith (Senior Campaigner, Global Witness), Ina Ebert (Leading Expert Liability and Insurance Law, Munich Re), and Mads Andenæs QC (Professor, University of Oslo and Institute of Legal Studies, School of Advanced Study, University of London).

Introduction

It is clear that there is a growing appetite for corporate climate accountability. This may be evidenced by the rising tide of corporate climate litigation, as well as current legislative developments seeking to ensure that corporate actors consider the potential climate impacts of their operations. The recent judgment of the Hague District Court in *Milieudefensie v Royal Dutch Shell* is yet another example demonstrating the legal and societal expectations that companies should take proactive steps towards reducing and even eliminating their contributions to the various factors that fuel climate change.

BIICL has approached the question of corporate accountability for the effects of climate change from numerous angles in the past, from a conference on climate change litigation in January 2020, to a webinar series on human rights due diligence for climate change impacts in September 2020. This panel discussion and workshop aimed to take stock of existing corporate accountability mechanisms, as well as anticipate future mechanisms by looking to, and learning from, comparative frameworks. The speakers discussed a range of corporate accountability and liability mechanisms for climate change, for example through investor pressure, ESG requirements, financial decisions and more. In essence, the idea is to map the various mechanisms in order to identify the gaps and shortcomings of the current framework.

What is more, many of these accountability mechanisms entail legal implications for corporations but may not actually provide for legal liability, strictly speaking. Thus, the panel members address and tease out the various concepts that underpin this discussion. For example, accountability and liability are considered, as well as their relationship to access to justice and how this elucidates the steps that companies must take in tackling the climate crisis.

A clear message that came through from the discussion is the need to look beyond merely litigation and legal liability as a model of corporate accountability. Without even addressing issues of funding, evidence and the length of proceedings, panellists and discussants questioned whether the nature of litigation, both being ad hoc and typically centred around the parties to the claim, is the best way to drive systemic change. Besides representative actions and strategic climate litigation, other modes may more effectively bring about the comprehensive change needed — according to Dr Benjamin, these additional models of accountability may affect the fossil fuel industry’s continued social, regulatory and economic license to operate. As such, it is necessary to consider a framework that encompasses various models of accountability, targeting all relevant sectors.

A number of questions warrant attention in this regard. For example, how can we translate these various mechanisms into concrete steps that corporate actors can and must take to address the impacts of operation on the climate? More importantly, perhaps, what exactly is the endgame? Surely it must be to prevent real harm to individuals, the climate and the planet. In this way, are models that drive prevention more effective than those that look backwards to compensate? These questions, amongst many others, provide a backdrop to the discussions that will follow.

It is right to say that corporate action is essential to tackle the climate crisis. That said, we are now at a place in time where we can design and push forward those legal models (or a combination of models) that will motivate virtuous corporate action on climate. More than ever, this is crucial to ensure a coherent and effective response to the climate crisis for companies, public bodies and stakeholders that represent people and the planet.

The Legislative and Policy Landscape

Catherine Higham

Climate Change Laws of the World Coordinator, Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science

The panel discussion began with a presentation from Ms Higham on the current legislative and policy landscape relating to corporate climate change accountability, with the analysis largely informed by the Climate Change Laws of the World (CCLW) Database. At the time of the presentation, the database recorded 2,324 climate laws, of which five explicitly cover the notion of corporate accountability. According to Ms Higham, this should not be understood to mean that corporate accountability is not addressed at all through climate laws and policies. Rather interestingly, it demonstrates that the issue is being addressed from a diverse range of perspectives where corporate accountability is not the predominant framing. It is also worth noting that the database defines what counts as a climate law or policy quite narrowly, whereby the provisions must explicitly be framed as a response to climate change.

Moving to the broader picture, that is, beyond those laws that explicitly mention climate change, Ms Higham 'buckets' the policy and legislative landscape into three distinct categories. The first category, comprising of international instruments, sits across the entire landscape. It encompasses both binding and non-binding international instruments, the Paris Agreement being an example of the former and the UN Guiding Principles on Business and Human Rights an example of the latter. Though not the focus of Ms Higham's presentation, they are interesting for how they inform policy and legislative developments at the national level. The second category comprises of climate change framework law, or what Ms Higham terms 'flagship laws'. These are the sorts of laws that would meet the required aforementioned definition for the CCLW Database whilst addressing some aspect of climate accountability. The final category of laws are those that are not deliberately framed as relevant to climate but are nevertheless being utilised by climate litigators to regulate the behaviour of companies (covered in greater depth in Ms Omuko-Jung's presentation).

It is primarily the second category that Ms Higham's presentation homed in on. These laws are often 'multisectoral and overarching in nature, [setting] systemic, strategic priorities for a country's response to climate change'. Though typically associated with accountability for government action, Ms Higham notes that over half of such laws include provisions that would be pertinent to corporate accountability. Sitting below these flagship laws are emissions trading schemes, sectoral regulations, as well as disclosure and reporting requirements. Ms Higham also cautiously includes due diligence obligations, noting that current due diligence laws are yet to explicitly mention climate-related matters. That said, if the proposed European Human Rights and Environmental Due Diligence legislation passes in its current form, it would break with this tradition, demonstrating how due diligence laws might be an 'emerging frontier' in this regard.

Narrowing in on three specific examples of such climate change framework laws, Ms Higham highlights how a number of them, particularly in Europe, contain provisions that implement EU Directive 2003/87/EC, which created the EU Emissions Trading System (EU ETS). In Ms Higham's view, this is a strong and direct regulatory regime, supplemented by 'naming and shaming' provisions. In this regard, Member States are meant to ensure that companies in breach of their obligations under the EU ETS will be published in a registry. Though this provision has been underutilised in the past, it is an interesting aspect of corporate accountability.

Furthermore, some framework laws include provisions that implement disclosure obligations on private parties. For example, Article 173 of the French Energy Transition Law imposes reporting obligations on various private parties, including listed companies, banks and credit providers, and institutional investors. Specifically, it provides that:

'[L]isted companies … disclose financial risks related to the effects of climate change and measures adopted by the company to reduce them; banks and credit providers shall disclose the risks evidenced by the stress-tests that are regularly implemented in their mandatory risk reports; and institutional investors must disclose information to beneficiaries on how their investment decision-making process takes social, environmental and governance criteria into consideration (including climate risk), and the means implemented to contribute to the financing of the ecological and energy transition'[1].

What is particularly of note is the range of private parties that are targeted, such that it goes beyond just companies. In this regard, according to Ms Higham, 'the idea behind some of these provisions is that they might mobilise incentives relating to the cost of capital … even if they don't have hard sanctions written into them'.

Another example is Uganda's National Climate Change Act (2021), which incorporates a strong sanctions-based accountability regime. Section 26, on climate change litigation, establishes broad standing for any person to apply to the High Court for relief against, amongst other options, a private entity, 'whose action or omission threatens or is likely to threaten efforts towards adaptation to or mitigation of climate change'. Though we have yet to see a case filed under this provision, given the Act's recent passage, Ms Higham emphasises that it 'could be an interesting next frontier' with regard to the issue of corporate accountability for climate change.

[1] 'Law No. 2015-992 On Energy ... - France - Climate Change Laws Of The World' (Climate-laws.org) <https://climate-laws.org/geographies/france/laws/law-no-2015-992-on-energy-transition-for-green-growth-energy-transition-law> accessed 19 October 2021.

Catherine Higham is a Policy Analyst and the Coordinator of the Climate Change Laws of the World project at the Grantham Research Institute on Climate Change and the Environment, at the London School of Economics and Political Science (LSE). Catherine joined the Grantham Research Institute after nearly a decade of policy and advocacy work in the not-for-profit sector. Catherine holds an LLM from the University of British Columbia, where she also worked with the University Sustainability Initiative as the Coordinator of the UBC Climate Hub.

Global Trends and Developments in Climate Change Litigation

Lydia Omuko-Jung

Research Fellow, Institute of Public Law and Political Science at University of Graz

The conversation then turned to Ms Omuko-Jung, whose presentation focused on global trends and developments in climate change litigation. At the outset, Ms Omuko-Jung noted that there has been a significant increase in litigation that seeks to hold companies responsible for the impacts of climate change. Furthermore, though most cases have emanated from the United States, since 2015, an expansion to other regions has been observed.

First of all, teasing out what claimants generally seek in corporate climate cases, Ms Omuko-Jung highlights four different types of cases. First, those that seek damages (*City of Oakland v BP plc*; *Lluiya v RWE*). This may be for a loss of property due to the effects of climate change on the basis that such companies have contributed to climate change, or for the costs of adaptation. Second are those that seek disclosure of the climate risks (*McVeigh v REST*). Third, claimants may pursue concrete emissions reductions, as in *Milieudefensie v Royal Dutch Shell.* Finally, individuals may use quasi-judicial mechanisms to establish accountability for climate harms, such as the *Carbon Majors Enquiry* being undertaken by the Philippines' Commission on Human Rights.

Climate litigation that targets corporate actors is not a new phenomenon. Such litigation originated in the United States in the early 2000s, mainly focusing on common law torts, such as nuisance, trespass and negligence (*Kivalina v ExxonMobil Corp.).* This all said, most cases relying on common law were dismissed on various grounds, such as the political question doctrine, foreign policy exemption, standing and the displacement doctrine, given that greenhouse gases are regulated at the federal level. Besides tort, there were also enquiries into disclosure of climate risk, particularly regarding financial risk. Ms Omuko-Jung pointed out that these cases predominantly took place in New York, because of the Martin Act, which 'grants the Attorney General quite expansive powers to conduct investigations of securities fraud and bring civil or communal actions against alleged violators'.

In more recent times, there has been a continued use of common law causes of action, but strategies have shifted. Plaintiffs have started to file cases using state law, in contrast to federal common law (for example, *City of Oakland v BP plc*, filed using California state law, as well as *Baltimore v BP plc*, filed using Maryland's Consumer Protection Act). According to Ms Omuko-Jung, this shift in strategy partly comes down to a hope that state courts might approach the question of the separation of powers differently to federal district courts, which have been more reticent in this regard. Outside of the United States, claimants in continental Europe have also turned to civil courts in claims relating to corporate accountability (*Lluiya v RWE* and *Milieudefensie v Royal Dutch Shell*).

Ms Omuko-Jung also highlighted how human rights are also influencing corporate accountability cases, with the point of departure being the aforementioned *Carbon Majors Enquiry*. Though the Commission concluded that legal responsibility for climate change is not covered by current instruments in international human rights law, it noted that fossil fuel companies have an obligation to respect human rights under the UN Guiding Principles.

Furthermore, some states have implemented their own human rights and environmental due diligence legislation, like the French Corporate Duty of Vigilance Law, which currently forms the basis of litigation against a carbon major (Total). The claimants allege that Total has failed to adequately assess the risks to human rights and the environment in its vigilance plan for its failure to mention a large-scale drilling project in Uganda. In Ms Omuko-Jung's view, the case 'presents a good opportunity for the courts to define corporate climate due diligence and climate standards of care, especially under the French law'.

More indirectly, human rights may also be used to flesh out existing civil liability provisions, as in *Milieudefensie v Royal Dutch Shell*. In that case, the Hague District Court noted that even though human rights instruments could not be directly invoked against Shell, they could be used to flesh out the 'unwritten standard of care' in the Dutch Civil Code. Interestingly, the court used both human rights treaties, such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights, as well as soft law instruments, like the UN Guiding Principles and the OECD Guidelines.

Beyond human rights, it is also notable that securities and financial regulations are also being used in cases against corporations. For example, this was attempted in in *State of New York v Exxon Corp*., where the State asserted that Exxon misled investors regarding the material climate-relevant risks to the company. (The trial court ruled in favour of Exxon). Furthermore, it is possible that banks, pension and investment funds may face legal action from shareholders. In *McVeigh v REST*, for example, it was alleged that the Australian pension fund had failed to disclose business risks due to climate change, as well as its strategies to deal with such risks. The case settled before trial, with the pension fund acknowledging the financial risk of climate change and agreeing to manage this risk through the implementation of a 'net-zero carbon footprint 2050 goal'.[2]

Finally, Ms Omuko-Jung touched on a more general trend in environmental litigation that might present an opportunity for climate litigation against corporate actors in the future. There is an emerging pattern of cases whereby claimants from the Global South sue companies domiciled in the Global North for their activities abroad. This may use due diligence legislation that explicitly allows for victims to hold French-domiciled parent companies liable for human rights and environmental abuses committed by subsidiary companies abroad. But it may also be based on an environmental duty of care, which largely comes down to the parent company either setting policies and standards for the entire group that it then advises on and supervises,

[2] 'Mcveigh v Retail Employees Superannuation Trust - Climate Change Litigation' (Climate Change Litigation, 2021) <http://climatecasechart.com/climate-change-litigation/non-us-case/mcveigh-v-retail-employees-superannuation-trust/> accessed 17 October 2021.

as well as making decisions for the subsidiary (as in *Four Nigerian Farmers & Milieudefensie v Royal Dutch Shell*) or on the basis of a degree of control and de facto management of the subsidiary (*Vedanta Resources plc v Lungowe*). Ms Omuko-Jung then went on to explain what this might mean for climate litigation and how it might provide a degree of leeway in holding parent companies (or, carbon majors) responsible for the effects of climate change. For example, it might be possible to group together the emissions of a subsidiary and the parent company and assess the impacts of those emissions cumulatively. This works to mitigate the 'drop in the ocean' argument, whereby the emissions of a subsidiary alone may not be sufficient to give rise to liability.

Interestingly, in the sphere of climate, though *Milieudefensie v Royal Dutch Shell* was not so much a case of liability of a parent company for the acts of its subsidiary, the court did mention that:

'Due to the policy-setting influence RDS has over companies in the Shell Group, it bears the same responsibility for these business relations as for its own activities. The far-reaching control and influence of RDS over Shell Group means that RDS' reduction obligation must be an obligation of result for emissions connected to own activities of the Shell Group'.[3]

The Court makes reference to this with regard to Shell's obligation of result for its scope 1 and part of its scope 2 emissions, which bears resemblance to the arguments based on control made in transnational tort cases. As such, Ms Omuko-Jung remarked that transnational tort litigation provides 'lessons from environmental law that could now open the floodgates for litigation against transnational companies'.

Lydia Omuko-Jung is a Research Fellow at the Institute of Public Law and Political Science, University of Graz and a doctoral candidate within the Doctoral Programme Climate Change. Her research focusses on climate change litigation and on legal aspects of consumption-based climate policies. She is also engaged as a Legal Analyst at the Climate Change Litigation Initiative (C2LI) based at University of Strathclyde. Lydia is an Attorney admitted to the Kenyan bar. She previously worked as a litigation counsel in Nairobi where she represented government and non-governmental entities in national and regional courts within East Africa on constitutional law, judicial review, and environmental law cases. She has consulted for subnational governments in Kenya on mainstreaming climate change considerations into sectoral legislations and policies and formulated climate-related policies for them.

[3] Judgment In Milieudefensie And Others V Royal Dutch Shell (The Hague District Court of The Netherlands 2021) <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-2.pdf> accessed 17 October 2021. [4.4.23]

Developments in US Climate Litigation and Accountability Beyond Litigation

Lisa Benjamin

Assistant Professor, Lewis & Clark Law School, Portland, Oregon

Professor Benjamin began her discussion by explaining how climate cases fall into two waves: the first wave in 2007–2012 and a second, more corporate-focused waved from 2017 onwards. The former were a mixed bag of claims against corporates and federal agencies. Though largely unsuccessful for reasons explained by Ms Omuko-Jung, the first wave did contain the widely-known *Massachusetts v Environmental Protection Agency* (*EPA*) case, a regulatory claim finding that the EPA did have the power to regulate greenhouse gases.

In terms of recent developments, second wave cases have spent a lot of time in what Professor Benjamin terms 'jurisdictional wrangling'. Defendants have put forward numerous reasons why cases should be removed to federal courts. These include, for example, that the cases deal with inter-state issues like emissions in the ambient air, or that they concern a foreign affairs or political issue. As noted in Ms Omuko-Jung's presentation, many of these arguments have been successful (for example, *City of Oakland v BP plc*) — 'courts have said that if anything cries out for a federal solution it is climate change'. That said, one of these later cases (*BP v Mayor and City Council of Baltimore*) went up to the US Supreme Court on a narrow jurisdictional ground, where the Supreme Court reviewed the Fourth Circuit's remand order with regard to the Federal Officer Removal Statute. Though the Court agreed with the defendants, it declined to decide on further removal grounds, feeling it wiser to leave those issues to the Fourth Circuit. Evidence, according to Professor Benjamin, that the Supreme Court is looking to avoid getting involved with jurisdictional issues.

Within this second wave there are a number of subdivisions. The first grouping, according to Professor Benjamin, includes the older cases that failed on grounds of displacement. It also includes the newer cases where claimants have attempted to sidestep this issue by arguing that it is a state issue (for example, *County of San Mateo v Chevron Corp.*, *BP v Mayor and City Council of Baltimore*). This grouping of cases succumbed to jurisdictional issues, as seen above. The second grouping includes new claims that focus on other causes of action, such as shareholder deception, breach of fiduciary duty or consumer deception (for example, investigations by the *New York Attorney General*, *Massachusetts Attorney General*, *Fentress v ExxonMobil Corp*., *Ramirez v ExxonMobil Corp.*). Not all of the cases in this grouping, however, have been dismissed yet. A tentative third newer grouping includes cases that target greenwashing, using state consumer deception law, as well as cases based on a failure to adapt. These include, amongst others, *Beyond Pesticides v ExxonMobil Corp*., and *Conservation Law Foundation v Exxon Mobil Corp*. Such cases based on consumer deception, according to Professor Benjamin, may affect the company's social licence to operate, given that it is easier for consumers to see and understand how this is a public-facing issue.

Professor Benjamin particularly homed in on the Conservation Law Foundation case, which alleges violation under both the Clean Water Act and Resource Conservation and Recovery Act permit. The Conservation Law Foundation alleges that Exxon is exceeding allowable levels of discharge in the nearby river due to climate change and associated flooding. Though the case had been stayed under the doctrine of primary jurisdiction whilst waiting for the EPA to consider an application by Exxon for permit renewal, the 1st Circuit Appeals Court vacated the stay order and remanded the case on the basis that a decision on new permits from the EPA fails to cure the past discharges and the harms caused. Though a traditional federal permits case, Professor Benjamin highlights how the case may be interesting to follow, particularly given that the Conservation Law Foundation seeks civil penalties, which could amount to thousands of dollars per day of violation.

It is worth noting here that challenging permits as a method for holding corporate actors directly or indirectly to account for the climate impacts of their carbon intensive infrastructure also came up in the practitioner's workshop. Through litigation, claimants can ensure that both climate impacts and climate-relevant legislation are being considered in environmental impact assessments and permits. *Save Lamu et al. v National Environmental Management Authority and Amu Power Co. Ltd* and *EarthLife Africa Johannesburg v Minister of Environmental Affairs and Others* are two examples of this practice from the African context. In this way, pre-existing regulatory systems may be instrumentalised for climate purposes.

The remainder of Professor Benjamin's talk was focused on the world of corporate accountability outside of litigation from the perspective of the new Administration in the United States. Notably, this mixture of additional modes of accountability may significantly impact fossil fuel companies' continued social, regulatory and economic license to operate.

First of all, Professor Benjamin explained the Biden Administration's Executive Order on climate-related financial risk. It aims to develop a whole of government approach with regard to climate-related financial risk, involving key federal agencies. Part of the Executive Order that has been comparatively underexamined, in Professor Benjamin's view, is the procurement mandate. It asks the Federal Acquisition Regulatory Council to 'consider amending the Federal Acquisition Regulation (FAR) to … require major Federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets'[4]. This would apply to both public and private suppliers, and as Professor Benjamin notes, 'one of the largest private suppliers to the US Federal Government, particularly the military, is the oil and gas industry'. The Executive Order further asks that 'major Federal agency procurements minimize the risk of climate change, including requiring the social cost of greenhouse gas emissions to be considered in procurement decisions and, where appropriate and feasible, give preference to bids and proposals from suppliers with a lower social cost of greenhouse gas emissions'.[5]

[4] US White House, 'Executive Order On Climate-Related Financial Risk' (The White House 2021).
[5] Ibidem.

This idea was picked up again in the practitioner workshop. The participants felt that orders like this one, particularly procurement mandates, can be more easily prioritised whilst driving systemic change in a way that litigation cannot. Climate cases are both ad hoc and often focused on the parties to the case. Encompassing these forms of accountability could, perhaps, makes it easier to bring the whole of an industry onboard when it comes to meeting climate targets.

Further to this, the change in Administration has led to changes in climate-relevant developments emanating from the United States Securities Exchange Commission (SEC), with three out of five commissioners having now been appointed by President Biden. Though the SEC had issued guidance in 2010 for the disclosure of risk as a result of climate change, these guidelines had rarely been enforced. In March of this year, however, the SEC announced that it welcomed public input on climate change disclosures. According to Professor Benjamin, there is some expectation that the SEC will issue rules on climate disclosure, and the SEC has specifically said that they will enforce existing guidelines more than it has until now. As evidence of this, the SEC published a sample letter to companies regarding climate change disclosure in September.

There are also climate-relevant proposals on infrastructure and the budget reconciliation. One such proposal, put forward by the Democrats, is a Clean Electricity Performance Program (CEPP), which would be focused on utilities. According to Professor Benjamin, the CEPP 'would provide uplift payments to utilities for use of clean energy'. The way that the Bill defines clean electricity is significant, as it effectively excludes natural gas, though it must be noted that the bill has some way to go before being passed.

In terms of economic license to operate, in 2020, one of the largest institutional investors in the US (BlackRock) published a letter to CEOs regarding its concern over climate change and asking companies to disclose and take material action to address climate financial risks. For example, the letter mentioned that BlackRock had announced:

'[A] number of initiatives to place sustainability at the center of our investment approach, including: making sustainability integral to portfolio construction and risk management; exiting investments that present a high sustainability-related risk, such as thermal coal producers; launching new investment products that screen fossil fuels; and strengthening our commitment to sustainability and transparency in our investment stewardship activities'[6].

Latterly, however, BlackRock has been criticised for its lack of action to follow up and enforce the contents of the letter to CEOs. In May of this year, the small hedge fund Engine No. 1, with activist shareholder support, caused an upset at ExxonMobil by successfully electing three of its more progressive-thinking nominees to the board of directors. The move stemmed from frustrations over weak financial returns, as well as a perceived lack of company leadership on the issue of climate change and the need to transition to cleaner forms of energy. Chevron also

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[6] Larry Fink, 'Larry Fink's Letter To CEOs | Blackrock' (BlackRock, 2020) <https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter> accessed 19 October 2021.

faced a similar, but less comprehensive, shareholder request. Notably, in the practitioner workshop, participants felt as though shareholder actions are an effective mode of accountability, and are considerably quicker than litigation.

Finally, in a leaked video shared by Greenpeace UK, an Exxon executive was caught affirming that the company had supported and been involved with groups that spread disinformation on the climate crisis. Soon after, the US House of Representatives' Committee Oversight and Reform launched an investigation into disinformation on climate change in the fossil fuel industry. It requested 'documents on the reported role of the fossil fuel industry in a long-running, industry-wide campaign to spread disinformation about the role of fossil fuels in causing global warming',[7] and has invited the executives of the major oil and gas companies to testify in front of Congress in October. Professor Benjamin suspects that this might be patterned on the tobacco industry hearings. Suffice to say that, beyond litigation, there is a lot of activity on the corporate accountability front.

Lisa Benjamin (PhD) is an Assistant Professor at Lewis & Clark Law School in Portland Oregon. Her research includes climate impacts and actions of non-state actors, including companies and institutional investors, with a focus on energy companies. Her doctoral studies focused on carbon major companies, corporate and energy law and climate change, and is the basis for her monograph with Cambridge University Press Companies and Climate Change: Theory and Law in the United Kingdom. She is currently a member of the Compliance Committee (Facilitative Branch) of the United Nations Framework Convention on Climate Change, nominated by GRULAC states, and a Director of the Northwest Environmental Defense Center.

[7] US House Committee on Oversight and Reform, 'Oversight Committee Launches Investigation Of Fossil Fuel Industry Disinformation On Climate Crisis' (2021) <https://oversight.house.gov/news/press-releases/oversight-committee-launches-investigation-of-fossil-fuel-industry> accessed 17 October 2021.

ESG Requirements in the Banking and Financial Services Sector in Europe

Francesco Quarta

Associate Professor, Department of Sociology and Business Law, University of Bologna

Turning to ESG requirements in the banking and financial services sector, Professor Quarta spoke about recent developments in the area in Europe. To begin, Professor Quarta underscored that 'a systematic approach to this emergency requires a multidisciplinary team effort and a systemic emergency such as this one requires a systemic change'. What is more, it is essential that finance, as we know it, is part of this systemic change. If significant effort is not made to amend the philosophy that currently governs financial markets, 'the road towards our climate goals [and] targets will become more and more difficult'.

Article 2(c) of the Paris Agreement states that:

This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:

…

(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

According to Professor Quarta, this is an unmistakeable call to both the public and private sector to ensure the compatibility of 'extant financial techniques of existing financial markets architecture with sustainable development goals'. However, since the Agreement was signed, the financial sector has done little to achieve this. In fact, since 2015, investment from international banks in the fossil fuel industry has continually increased, and the world's top 60 banks have injected a massive $3.8 trillion into the fossil fuel industry[8] — perhaps a sign that leaving the sector to its own devices will spell disaster for meeting our climate goals.

According to Professor Quarta, capitalism is not the issue, but rather greed-driven capitalism. He notes that financial, techno-capitalism — 'the financialisation of the entire economy' — is the driver here. Using the example of the 2008 Financial Crisis, Professor Quarta stresses that it was not merely a matter of failed estimates and forecasts, but it was, in essence, 'the by-product of a system whose main actors had no interest in what was going to happen in the real

[8] 'Banking On Climate Chaos 2021 - Banking On Climate Chaos' (Banking on Climate Chaos, 2021) <https://www.bankingonclimatechaos.org/> accessed 18 October 2021.

economy'. The underlying motive of financial capitalism is the need to ensure the maximisation of short-term profit, even at the expense long-term issues.

The climate emergency requires a comprehensive overhaul in our understanding of market architecture; it is not sufficient to disregard future generations. Professor Quarta then posed the following question: 'Do we want mobilise product capital and redirect it towards socially and environmentally beneficial initiatives?' Private capital is, indeed, a necessary part of this, but the rules of the game must change. Professor Quarta, therefore, suggests that we look to new models of corporations so that corporate finance can chart a new, more sustainable, course. These include: low profit liability companies, flexible purpose corporations, blended value enterprises and public benefit companies. In his view, it is vital that we look to these various corporate structures, because in these structures, 'fiduciary duties, … officers and directors duties … can be approached from a different angle'.

That said, it is not only the corporate structure that will need an overhaul, but also the financial instruments that are used. Professor Quarta made a number of suggestions in this regard. First, he discussed the use of social impact bonds and green bonds. In particular, what he finds to be the most fascinating aspect of these instruments is how the impact is measured, or how the realisation of stated goals is determined — a topic on which the European regulator is currently working. Second, green loans or energy-efficient mortgages present an opportunity to structure a traditional loan contract such that it highlights a special purpose. In Professor Quarta's view, this might 'encourage sustainability in some traditionally controversial sectors such as the mining sectors'. He highlights an emerging frontier, that is to say, sustainability linked credit facilities that can motivate borrowers 'to achieve certain ESG objectives through pricing mechanisms that make borrowing terms more or less favourable'[9]. A particular example that was given coupled a company's high ratings from S&P and Morgan Stanley with decreased interest on its draw balances[10]. Finally, Professor Quarta mentioned the importance of taking into account Green Sukuk (or Islamic Finance). To reach our climate targets will require the inclusion all possible actors, so it is necessary to consider Islamic finance, which has the 'potential to shift the focus from an interest-based finance to goal-oriented finance'.

Professor Quarta then turned to one of the major issues in this particular sphere. How does one measure these impacts? Or, more importantly, who is the one to do this measuring, grading and rating? The International Organization of Securities Commissions (IOSCO) warned that because 'asset managers running ESG focused funds rely on about 160 different raters globally to help categorize stocks and bonds, the disparate methodologies raise investor protection

[9] Kelsey Rolfe, 'Sustainability-Linked Loans A New Frontier For Responsible Mining' (Magazine.cim.org, 2021) <https://magazine.cim.org/en/news/2021/sustainability-linked-loans-a-new-frontier-for-responsible-mining-en/> accessed 18 October 2021.

[10] Ibidem.

questions'[11]. Furthermore, formal verification of these ratings is rarely carried out by users, raising serious questions about transparency. In fact, the IOSCO Chair noted that '[h]aving multiple ESG ratings and data products can cause confusion, raising serious questions about relevance, reliability, and greenwashing'.[12]

This issue of measuring and supervising impact was picked up again in the practitioner's workshop. In the context of banking and loan services, one suggestion was for banks to equip themselves with the appropriate departments needed to analyse achievement. This form of internal transformation would reduce the need to delegate this job to the borrowers and their self-declarations or external ESG service providers. Though, of course, tensions may arise. Banks, however, have traditionally been viewed as a transactional lifeline. Injecting long-term goals into a transaction may introduce a conflicting timespan into the potentially shorter horizon of an investment.

It is for these reasons that the EU regulator is working to establish oversight in this market where companies are competing to be first place in the market. In this regard, Professor Quarta touched on aspects of the EU Sustainability Package. For example, it is recognised that in order to align financial flows with the objectives of the European Green deal, 'further consideration of sustainability impacts in the strategies and investment decision-making processes of investors'[13] are needed. In April, the European Commission published six amending delegated acts, 'which require financial firms, such as advisers, asset managers and insurers, to include financially material sustainability risks in their procedures and to consider the sustainability preferences of their clients'[14].

In a Communication from the EU Commission this July, the Commission noted various actions that it will be undertaking. First, it will 'take action to ensure that relevant ESG risks are systematically captured in credit ratings and rating outlooks in a transparent manner'[15] subject to the findings in an impact assessment by the European Securities and Markets Authority.

[11] 'Greater Calls For Regulators To Keep ESG Corporate Ratings Honest' (Nasdaq, 2021) <https://www.nasdaq.com/articles/greater-calls-for-regulators-to-keep-esg-corporate-ratings-honest-2021-07-28> accessed 18 October 2021.

[12] Huw Jones, 'Regulators To Unlock 'Black Box' Of ESG Corporate Ratings' (Reuters, 2021) <https://www.reuters.com/article/climate-change-regulator-ratings-idCNL8N2OZ2YS> accessed 18 October 2021.

[13] European Commission, 'Strategy For Financing The Transition To A Sustainable Economy' (European Commission 2021).

[14] European Commission, 'Strategy For Financing The Transition To A Sustainable Economy' (European Commission 2021).

[15] European Commission, 'Strategy For Financing The Transition To A Sustainable Economy' (European Commission 2021).

Second, it will take action in order to 'strengthen the reliability and comparability of ESG ratings'[16]. Both of these measures will be taken by 2023.

Francesco Quarta is Associate Professor of Private Law and Comparative Law at the Bologna Business School, University of Bologna. From 2013 to 2019 served as an Arbitrator for the Banking and Financial Ombudsman, instituted by the Bank of Italy as an alternative dispute resolution permanent board (*Arbitro Bancario Finanziario*, ABF), authoring over 500 decisions. He is also member of the European Law Institute (ELI), where is working on sustainability in the banking and financial markets within the Special Interest Group (SIG) on Environmental Law.

[16] European Commission, 'Strategy For Financing The Transition To A Sustainable Economy' (European Commission 2021).

The Relevance of Ongoing Legislative Efforts at the European Level for Corporate Accountability and Liability

Arianne Griffith

Senior Campaigner, Global Witness

Moving to Ms Griffith, the discussion turned to ongoing legislative efforts at the European level and the relevance of these legal mechanisms for corporate accountability and liability. For Ms Griffith, there are three crucial distinct but interrelated concepts to consider here: accountability, liability and access to justice. Accountability is a broad theme, and is multi-faceted in nature, involving matters of liability and access to justice but also 'procurement obligations, and ESG requirements, shareholder activism, civil society campaigns'.

Moving to her discussion of EU legislative proposals, Ms Griffith began by noting that the EU Parliament's Resolution of March 2021 explicitly refers to 'corporate due diligence and corporate accountability'[17] in the title — a clear signal of intentions. It is, therefore, a possibility that the upcoming legislation will be able to establish accountability for negative effects of corporate activities on human rights and the environment, including their effects on the climate.

In Ms Griffith's view, there are at least five ways that the legislation could serve to ensure that it is not simply about due diligence but also provides real opportunities for corporate accountability. First, it will introduce a binding requirement that may be used to hold companies to account. Second, it should introduce a liability mechanism that, at a minimum, consists of both civil and administrative mechanisms. Third, it will establish opportunities for victims of human rights abuse or environmental degradation to access justice in front of EU courts. Fourth, it will provide regulatory oversight for businesses. Finally, it should go beyond the basics by bearing upon multiple sectors, by applying beyond tier one suppliers or scope one emissions, and by going further than direct causation to include other relationships to harm, such as contribution and direct linkage (as elaborated in the framework of the UN Guiding Principles). The legislation, therefore, has the potential to step up corporate accountability for climate change impacts by coupling due diligence obligations with various other modes of accountability.

Ms Griffith homed in on the potentially cross-sectoral nature of the legislation and the importance of this when considering the impacts of climate change. For example, the decision issued by the Dutch National Contact Point (NCP) on the matter of climate risk disclosure by ING Bank highlighted that the bank's biggest climate impacts resulted from its financing

[17] European Parliament, 'European Parliament Resolution Of 10 March 2021 With Recommendations To The Commission On Corporate Due Diligence And Corporate Accountability' (European Parliament 2021).

activities, or rather, its indirect emissions. Furthermore, Global Witness investigations uncovered that European banks have been found to be supporting highly destructive agribusinesses that are associated with forest destruction in climate critical regions. Ms Griffith reiterated, therefore, that it is imperative that the financial sector is part of European legislative efforts. The Dutch NCP decision further resulted in a promising outcome for corporate accountability. The NCP concluded that the OECD Guidelines require ING Bank to set targets that align with the Paris Agreement and Ms Griffith hopes that more of this will be seen in the future, that is, 'embedding the standards agreed in the Paris Agreement into domestic legal frameworks, including obligations for companies'.

Oil and gas companies are similarly problematic in this regard. When it comes to reporting on climate-related impacts or setting climate targets, very often it is the case that scope three emissions are not included. This is the case even though scope three emissions cover roughly 85% of the oil and gas industry's emissions. Therefore, a target or strategy that fails to take into account scope three emissions, therefore, fails to 'allow for meaningful accountability', according to Ms Griffith. To compound this, the industry's targets invariably rely on carbon sequestration, carbon capture and storage, as well as offsetting. In Ms Griffith's view, offsets are particularly problematic, given that they allow companies to continue to pollute rather than reduce absolute emissions. This is not to mention the issues of quality and quantity, as well as the environmental justice and human rights impacts of taking large swathes of land in the Global South to offset emissions emanating from the Global North. In essence, offsets are often presented as a solution to allow companies to get off the hook and make progress in the eyes of the public, without making meaningful changes to their business models.

This succinctly led to the final part of Ms Griffith's presentation, which touched on greenwashing. This is a phenomenon whereby 'some of the biggest polluters are interested in making a concerted effort to make it look like they are doing their part'. In this regard, oil and gas companies have attempted to rebrand themselves as 'energy companies', more broadly, or as leaders in renewable energy. As Ms Griffith points out, looking to the expenditure of these companies tells a different story. A serious consequence of both these 'clever, well-placed, well-crafted advertisements and creative, unrealistic, unevidenced targets' is that it distracts consumers, investors and legislators by lulling them into a false sense of security. This delays real climate action at a time when the science is saying that very little time is left to confront the climate crisis.

Delving more deeply into advertisements in the UK, Ms Griffith explained that the Advertising Standards Agency (ASA) will only take action against advertisements that are misleading, inaccurate or false. That an advertisement would be damaging to the environment or climate is not a sufficient reason to engage the ASA. Furthermore, an adverse finding from the ASA merely requires the advertisement to be removed; no further punitive measures (like a fine) are involved. As such, 'the stakes are low for companies and the reward is high because they continue to enjoy a social licence to operate'. This means that, overall, it is very difficult to hold companies to account for potential greenwashing incidents.

One positive example, however, involved a complaint brought by ClientEarth to the UK NCP for the OECD Guidelines, which alleged that a BP advertisement campaign overstated the role of its low-carbon activities, in comparison to its fossil fuel undertakings. The company later withdrew the advertisements before the NCP considered the claim — evidence, Ms Griffith asserts, of the pressure that BP felt. It was argued in the practitioner workshop that the Guidelines provide an opportunity for more advertisements to be looked at more expansively. Furthermore, by coupling consumer protection and environmental provisions, it allows for wider claims than would be entertained by the ASA. This all said, had the NCP been given the opportunity to issue a decision, such an assessment would have been non-binding, underscoring the lack of hard accountability measures in this area. What is more, in the workshop, it was noted that the onus should not always fall to NGOs, in this regard; national regulators, if equipped with the right regulatory tools, could and should play a bigger role.

As a final point, Ms Griffith points to the increasing levels of scrutiny being paid to the companies that supposedly operate behind the scenes to push these greenwashing campaigns forward, such as advertising agencies and public relations firms. It is important that these companies do not fly under the radar, as they are crucial to the success of such advertising campaigns, but it is very difficult to hold them accountable (and, in particular, liable) for their actions.

Arianne Griffith is a senior campaigner on corporate accountability at Global Witness where she leads on research and policy for the EU corporate accountability campaign which targets the European Commission's sustainable corporate governance initiative and a new campaign to drive accountability for false climate solutions that delay effective climate action. Arianne is an Attorney and researcher who has published in the areas of public international law and business and human rights. She holds a Master of Laws degree in International Law from UCL and completed her undergraduate law degree at the University of the West Indies.

Climate Liability and Litigation and the Role of Liability Insurers

Ina Ebert

Leading Expert Liability and Insurance Law, Munich Re

Speaking to the role of insurers in all of this, Professor Ebert's presentation focused on climate liability and litigation from a liability insurer's perspective. At the outset Professor Ebert provides a reality check. Though there has been an immense amount of litigation (as outlined in previous presentations), the majority of this litigation has not centred on liability. For those that do end up with some form of liability, the liability is not relevant for insurers because it is the result of intentional action (for example, choosing to emit greenhouse gases, or to run deceptive green advertising campaigns), which is not usually covered under liability insurance. The smattering of cases that have touched on damages for greenhouse gas emissions have all been unsuccessful.

This all said, Professer Ebert warns that 'regulation is getting stricter'. What is more, with greater public awareness, NGO oversight and funding for litigation, climate-related liability is likely to step up. This is not to mention there are still costs incurred with unsuccessful claims.

Turning to the question of what sorts of claims could be relevant to the insurance industry, Professor Ebert teased out three types of climate-related claims: strategic claims, claims for regulatory action and/or injunctive relief and claims for damages or abatement. The latter is most relevant to the industry, if the damage is included in the policy. These sorts of damages may include, for example, property loss and the costs incurred by public bodies.

To understand how climate-related litigation might impact insurers, Professor Ebert highlighted the various lines of business in the insurance industry and how they might be affected. First, as a corporation, anything that an insurance company does is relevant to litigation and could form its basis, either as defendants or shareholder actions. Second, as an investor, the question of whether or not to invest in fossil fuel-related businesses must be considered. Third, and most obviously, they act as insurers — 'insurers have always played an important role in insuring climate-related risks, for example, wildfires, floods, hurricanes'. The question is, however, whether insurers should play a role here. The industry will have to consider whether it wants to take on any fossil fuel-related risks — a discussion that has already been seen in the context of coal.

Looking more deeply at these potential claims and how they might affect lines of business in the insurance industry, Professor Ebert outlined four. First, there may be claims based on GHG emissions (or 'direct climate liability'[18]) brought mainly against oil and gas or utility companies. Though some claims might be covered by general or environmental liability, however, as will be expanded on below greenhouse gas emissions are an intentional act for which there is typically no coverage. Second, claims might consider a company's failure to adapt to or consider the consequences of climate change. Such a claim may be tried against a number of defendants (for example, all industries, public bodies, asset management, ESG relevant consulting) and might be covered under general liability, professional indemnity (PI) or errors and omissions (E&O). According to Professor Ebert, 'this, of course, is [the] core business of liability insurers'. Third, claims might involve greenwashing or consumer deception. It is again a claim that might be tried against all industries, asset management companies or ESG relevant consulting companies. Though potentially covered under general liability, PI, E&O, environmental or directors and officers liability insurance (D&O), it is usually an act done intentionally. Finally, claims might cover failure to report, disclose, consider or comply with regulation. This is an area where there is a persistent buzz of attention at the moment, and it looks as though there is even more to come. It is also potentially a claim that applies to all industries and is a 'typical case of a loss that is covered under D&O insurance', as explained by Professor Ebert.

Professor Ebert then outlined various coverage issues that might arise and what the litigation thus far has said. For example, on the question of an occurrence versus an intentional act, *Steadfast v AES Corp.* held that the release of greenhouse gases counted as neither an occurrence nor an accident for the purposes of being covered under the particular insurance policy in question. Therefore, the insurance company had no duty to defend the company against the lawsuit because it was considered an intentional act. Other coverage issues touched on by Professer Ebert included the type of loss that might be covered, that is, whether it is property-based or personal, versus pure economic loss cases or the scope of any pollution exclusion (for example, *Massachusetts v EPA* on greenhouse gases). Furthermore, even when liability is found, it does not mean that liability insurers will be involved. For example, Professor Ebert noted that not only is public nuisance based on intentional acts, but often does not result in a damages award, but rather awards that are not typically a covered loss.

So what does this all mean? Professor Ebert issued a number of warnings. First, it is essential that companies are cautious about their promises and targets, particularly those pertaining to net zero. Eventually, such targets will need to be met, and it is not likely that all corporations will achieve them, potentially leading to liability. Second, there will be a need to consider how to enhance compliance with reporting and disclosure obligations. This may force the re-examination of the climate friendliness of investments, as well as involvement, either through investing or insuring, in the coal, oil and gas industries. Third, there may also be reputational risks, outlined earlier, based on increased public awareness, coupled with activism by shareholders and NGOs. In all, the need for insurers to manage risk is imperative. The consequences for liability insurers include: needing to understand that precise wording is

[18] See Professor Ebert's slide (https://www.youtube.com/watch?v=y7H-EVx602g&t=431s, minute 1:14:18 onwards).

critical; appreciating the difference across jurisdictions and certainty of legal change; keeping an eye on the insured's awareness. The latter involves, according to Professor Ebert, awareness of 'procedures to comply with regulation, involvement with fossil fuels, suggested climate friendliness, [and] ESG relevant consulting activities'[19].

To summarise, Professor Ebert asks: what will the role of insurers be in all of this? In her view, the answer is threefold. First, insurers could incentivise climate friendly players and facilitate climate action by making these actions insurable, as well as by investing in these sorts of activities. Second, insurers could 'support, enable, finance and ensure that companies do try to act the right way', but accept that these companies may negligently fail at some point. Finally, insurers can make uninsurable various climate unfriendly activities, as well as refusing to invest in such activities.

Ina Ebert is an expert for liability and insurance law at Munich Re. Before joining Munich Re in 2005, Ina was teaching civil law and legal history at the universities of Berlin, Heidelberg, Erlangen, Kiel and Tübingen. She is the author of numerous books and articles on liability and insurance law. Her main areas of research are mass litigation and legal aspects of new technologies. Besides her work for Munich Re, Ina is a professor of law at the University of Kiel, member of the Advisory Board of the Institute for Robot Law at the University of Würzburg and Vice-Chairwoman of the Supervisory Board of the European Centre for Tort and Insurance Law (Ectil) in Vienna.

[19] See Professor Ebert's slide (1:17:00 onwards).

The Role of State-owned Oil Companies and Wealth Funds

Mads Andenæs QC

Professor, University of Oslo and Director of the Centre for Corporate and Financial Law, Institute of Legal Studies, School of Advanced Study, University of London

Finally, the panel turned to Professor Andenæs QC, who spoke about the role of state-owned oil companies and wealth funds in this conversation on corporate accountability. To begin, Professor Andenæs highlighted that state-owned companies are often thought to be 'particularly well-regulated' — subject to the twin pressures of public policy and the market. However, this is a mistaken assumption; looking more deeply, state-owned companies are susceptible to neither. In Professor Andenæs' view, 'being state-owed creates quasi-immunities', though of course not in the traditional public international law sense. Rather, being state-owned provides immunity in a more practical sense; it comes with a particularly protected position.

The wide array of reporting requirements and what will follow from the European Green Deal and EU Taxonomy for Sustainable Activities focus on the financial sector. Typically, state-owned companies are in such a strong and healthy financial position that private finance is not necessary. Using the example of state-owned energy company Equinor, Professor Andenæs explained how its partial privatisation has led to 'the worst of all worlds, [with] no state control and no real market control'. The company operates in the market with minority private shareholders. However, according to Professor Andenæs, the governance and operation of the company is left to the control of the market through these minority private shareholders, with state authorities stepping back. At the same time, these minority shareholders are less concerned with the company's risk profile, given its status as state-owned — the government would surely step in if any major problem arose.

Moving to a discussion of the Norweigan Oil Fund, a fund that was formed out of the accumulation of wealth that has come from oil extraction over the past thirty years. It transfers money to the state that is then used to subsidise brown investments, such as oil exploration in the Arctic. Therefore, not only did the fund gain its wealth from oil extraction, but it also funds oil extraction, which is 'difficult to fund through private finance', Professor Andenæs notes.

So what can be done? According to Professor Andenæs, it is through webinars (like the current one) that we are able to take stock of the various status quo accountability mechanisms, but also draw inspiration from cases or legislative proposals in other jurisdictions, as well as at other levels of governance (be they international, regional etc.). In this regard, Professor Andenæs finished by touching on an interesting case currently before the European Court of Human Rights (ECtHR). Colloquially termed the '*Portuguese Youth Climate Case*', the claimants in this case seek to invoke Articles 2, 8 and 14 against 33 Governments based on the effects of climate change that this generation will disproportionately face. As evidence of the Court's initiative, it asked the parties to the case to further address Article 3, as well as Article 1, Protocol

1. Furthermore, a sister case emanating from Norway seeks to challenge the grant of various oil exploration licences amidst the climate crisis. While these cases may find states liable, state-owned oil companies and funds may try to argue that they are not a state, per se. But of course, they are both state-owned or state-controlled in various ways; claims could be made out.

Professor Andenæs, therefore, urged civil society to discuss, encourage and replicate these claims in whichever jurisdictions these bodies hold assets. These are assets, which claims can be made against, and 'if that starts … then it will most certainly affect the state-owned oil companies/funds'. Essentially, it comes down to establishing a level of uncertainty, rather than pocketing a particular number of wins in court. In Professor Andenæs' view, it is this uncertainty that will lead to changes that affect corporate behaviour and is, therefore, a method of bringing about corporate accountability.

Mads Andenæs QC is Professor of Law at the University of Oslo and the Director of the Centre for Corporate and Financial Law at the Institute of Advanced Legal Studies, the School of Advanced Study, University of London Member of the Panel of Arbitrators maintained by the International Centre for Settlement of Investment Disputes (ICSID) . When he in 2019 was appointed an honorary Queen's Counsel, the Lord Chancellor said: 'Professor Mads Andenæs is considered a pre-eminent academic and has been recommended for his work in the fields of comparative and international law, and European and domestic private and regulatory law.' He was the Director of the British Institute of International and Comparative Law, London and Director of the Centre of European Law at King's College, University of London and a Senior Fellow of the Institute of European and Comparative Law, University of Oxford. He was Président-rapporteur of the UN Working Group on Arbitrary Detention 2009-2015.

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
F 020 7862 5152
E info@biicl.org

www.biicl.org

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