

Introduction

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1. Introduction

Michael Faure and Marjan Peeters

1. PROBLEM DEFINITION: REASONS FOR THIS BOOK

Climate change has undoubtedly been the most important topic in environmental law and policy on the agenda of both policy makers and environmental lawyers since the beginning of the 21st century. Moreover, it is highly likely that this will continue to be the case for at least a large part of the remainder of it as well. Lawyers critically accompany the political process by commenting on instruments that are developed at international, regional and local level to attempt to mitigate climate change and to adapt to its consequences. Much research has therefore understandably been devoted to the legal aspects of the document that constitutes the basis for the international legal framework to fight climate change, being the United Nations Framework Convention on Climate Change (UNFCCC) and more particularly to its most important legal instrument, the Kyoto Protocol.¹ Much research has more particularly been focused on the question of which would be the legal or policy instrument most suited to provide incentives to industry and other sources to reduce greenhouse gas emissions. In line with the use traditionally suggested by economists of Pigovian taxes to internalize environmental externalities, the market-based instrument of emissions trading has become very popular not only in theory but also in practice. Economic literature is however still divided on the preference for carbon taxes or carbon trading,² and some still argue for taxes, or even a hybrid system between emissions trading and a tax.³ Despite the fact that the best instrumental setting for climate change has yet to be explored, we can see that with a few exceptions⁴ the main instrument used worldwide has become emissions trading. While policy makers interestingly enough have decided to apply this innovative regulatory instrument, not least because they can distribute allowances for free, there are still serious doubts with respect to its effectiveness. These doubts are not caused by problems with the instrument as such, but are rather related to short-falling environmental ambition on the part of the legislature, for

instance with regard to the stringency of the cap on total emissions, and design failures, such as grandfathering and overallocation of emission rights as a result of which the system may not have generated incentives sufficient for a reduction of emissions.⁵

As a result of enthusiasm for emissions trading as seemingly the most attractive instrument to provide incentives to polluters to reduce emissions, initially other possible instruments (largely used to internalize other environmental externalities) seem to be to some extent forgotten. Nevertheless as early as 2003 David Grossman published an often-quoted article in the *Columbia Journal of Environmental Law* with the provocative title: 'Warming up to a Not-so Radical Idea: Tort-based Climate Change Litigation'.⁶ Another important publication followed, by Tol and Verheyen, pointing to the possibility of using state responsibility as a tool to prevent and compensate for consequences of climate change.⁷ Later Verheyen published her dissertation on this topic.⁸ Gupta devoted her inaugural lecture at the Free University of Amsterdam to this topic⁹ and honorary chair Spier of the Hoge Raad (Supreme Court) in the Netherlands also examined possibilities of climate change liability.¹⁰ Besides that, these studies by lawyers interested in the use of classic liability law were supported by an important study from Allen, showing that from a technical perspective it is possible to link specific damage (resulting from extreme weather events) to climate change.¹¹ Also, a special combined issue of the *Stanford Environmental Law Journal* and the *Stanford Journal of International Law* of June 2007 was devoted to climate change liability and the allocation of risks.¹² These legal studies not only addressed possibilities of applying national tort law to the damage caused by climate change, but equally examined the possibility for holding states liable under international law if emissions originating from their country were to cause damage to (the citizens of) other nations.¹³

Whereas earlier it seemed that the application of liability law to climate change was merely of theoretical interest, this is surely no longer true since climate change litigation has meanwhile really taken off. Several public authorities or individuals have tried to sue large emitters of greenhouse gases and in some cases claims were directed against governmental authorities for failure to take measures to reduce emissions of greenhouse gases. Most of these claims would probably not qualify as liability suits in the strict sense, since it is usually not compensation for damage suffered that is asked by the plaintiffs, but rather injunctive relief in order to obtain a reduction of greenhouse gases.

Most of the claims brought so far (the majority of which were also in the United States of America) were either not successful, were withdrawn or have not yet led to a specific result. That, however, changed

with the often-discussed decision of the US Supreme Court in the case of *Massachusetts v. EPA* in which the US Environmental Protection Agency was successfully sued by a coalition of states for the failure to regulate emission of CO₂ under the Clean Air Act. Again, this decision shows that it is rather injunctive relief than compensation which is strived for by plaintiffs. In the meantime, the regulation by the EPA will lead to further case law since a petition for review has been filed by companies and trade associations to the US Court of Appeals for the D.C. Circuit.¹⁴ In this procedure, it will be contested that new motor vehicles and engines cause or contribute to greenhouse gases, and that greenhouse gases in the atmosphere threaten public health and welfare of current and future generations. This shows that fundamental questions will be posed in case law with regard to the legality of public regulations, and that the case law resulting from this will be of crucial importance for liability cases.

Even though some literature has now paid attention to the role of the courts in mitigating climate change,¹⁵ until the present time there has been no book in which climate change liability was discussed in a broader perspective, not only looking at actual cases, but also at the potential role under the law of various legal systems, and equally addressing the question to what extent it is useful to use the civil liability system to strive for a mitigation of greenhouse gas emissions in addition to the existing framework which largely relies on emissions trading and regulation. Filling that gap is precisely the goal of this book.

The reader will by now have understood that the notion of ‘climate change liability’, central to this book, has to be interpreted broadly: the authors are not only interested in the question to what extent victims of climate change could use the liability system to obtain compensation for damages resulting from climate change (the more traditional liability setting) but equally are looking at the question to what extent civil liability and the courts in general may be useful to force potential polluters (or governmental authorities) to take measures to reduce (the effects of) climate change.

2. METHODOLOGY

2.1 Legal Interdisciplinary

It may be clear that the question of the precise role of climate change liability in the general climate change legal framework is one which goes beyond the classic tort law setting. Hence the contributors in this book will address this question from a variety of legal disciplines. To some extent

climate change liability will indeed be addressed from the traditional tort law perspective, asking the question whether traditional tort law can realistically assist potential plaintiffs in a claim against emitters of greenhouse gases or governmental authorities that fail to take effective measures. Such a traditional tort law approach is for example followed in the contributions by Kaminskaitė-Salters (Chapter 7), van Dijk (Chapter 9) and van den Biesen (Chapter 10). However, even within these more traditional approaches, questions have to be asked, for example, about who appropriate plaintiffs may be to sue for climate change damage and whether NGOs too may have standing.

Climate change liability is also to be addressed from a more public law perspective, for example questioning whether public law in a particular legal system could realistically be used by potential victims to call on a governmental liability for a failure to take action to prevent climate damage (for example short falling protection against flooding) by public authorities. That question is more particularly addressed by Schueler in Chapter 11.

Specific liability questions also arise as far as the situation of member states in the EU are concerned. After all, the EU may be held liable for a failure to comply with the commitments of the Kyoto Protocol, which raises important questions with respect to the liability of not only the EU itself, but also of the specific member states in case of failure of the EU as a whole to comply with the Kyoto Protocol commitments. This raises questions of liability under European law (of the member states) but also under international law, and equally raises questions of division of responsibility between member states and the EU. These issues are addressed by de Cendra de Larragán in Chapter 4. State liability could also arise under the European Convention of Human Rights if a failure to take measures could be considered to constitute a violation of human rights, as this has been developed in the case law of the court in Strasbourg. That potential liability of European states will be addressed by Gouritin in Chapter 6.

Important questions also arise in the interface between the liability regime in private law and public law. For example, public law principles, such as the precautionary principle, could impose duties upon public authorities to take measures to mitigate climate change or could also impose similar duties on emitters of greenhouse gases. The question then can be asked to what extent a failure to fulfil these duties can give rise to liability in private law, for example for failure to comply with the precautionary principle (or for taking too harsh measures based on the precautionary principle). These interfaces are discussed by Haritz in Chapter 2. It can however be doubted if liability is the right instrument to address climate change. Jaap Spier in Chapter 3 is very concerned about an overly traditional approach towards liability claims in climate cases, and emphasizes the need to identify courts

with innovative, brave judges. He is also very critical on too much emphasis on liability law solely, and argues that climate change should be tackled from as many angles as possible, and he notably refers to the need to consider criminal liability as well. Finally the question could also be addressed to what extent the current regulatory system to control greenhouse gases, which largely relies on emissions trading, totally excludes alternative compensation regimes. After all, in comparable but different settings like nuclear accidents or oil pollution a regulatory regime aiming at the prevention of damage is accompanied by a liability and compensation regime in case damage nevertheless occurs. This interface between measures aiming at prevention on the one hand and liability and compensation issues on the other hand are addressed by Peeters in Chapter 5.

2.2 Comparative Approach

As the above described problem definition makes clear, providing some insight into the way the law handles climate change liability requires not only a legal interdisciplinary approach, but equally a comparative approach. It would of course be pointless to discuss possibilities of climate change liability merely from the context of one national legal system. A national legal system that is extensively discussed to analyse potentials of climate change liability is the Netherlands, but within that system attention is paid to traditional tort law (Chapter 9), to NGOs using climate change liability (Chapter 10) and to governmental liability (Chapter 11). Similar questions are also addressed under the perspective of English law in Chapter 7. Since most of the climate change cases that have actually been litigated arose in the US an overview of climate change-related cases in domestic courts is discussed in Chapter 8.

European law is also explicitly addressed, more particularly when the EU regime (mostly the EU ETS) is compared with the possibilities of liability and compensation claims (in Chapter 5) and when addressing the potential liability of EU member states in case of a failure to comply with international commitments (Chapter 4). That chapter equally addresses the question of the liability of member states and the EU under international law in case of violation of international commitments. Similar questions of state liability also arise under European human rights law and are addressed in Chapter 6.

The only type of liability not explicitly addressed in this book is whether in addition to the member state liability for non compliance with the international regime (addressed in Chapter 4) there could also be international liability for climate change. That is an issue that has, however, been addressed earlier in the literature.¹⁶

3. FRAMEWORK

This book originated within the Maastricht European Institute for Transnational Legal Research (METRO) to which the two editors of this book and many of the authors are connected.¹⁷ Many of the researchers who contributed to the book also participate within the Transboundary Environmental Law Programme of the Ius Commune Research School.¹⁸ The Ius Commune Research School is a collaboration between the universities of Amsterdam, Leuven, Maastricht and Utrecht and focuses on the role of law in integration processes. The contributions to this book were originally presented as draft papers at a workshop organized at the annual conference of the Ius Commune Research School on 27 November 2009. The chapters in this book are the updated and improved versions of those draft papers.

Many researchers connected to both METRO and the transboundary environmental law group of the Ius Commune Research School are interested in environmental law and more particularly climate change issues. The current book is in that respect building upon earlier projects with Edward Elgar. For example, after a conference on 'Institutions and Instruments to Control Global Climate Change' held in Maastricht in June 2001, resulting in a publication (M. Faure et al. (eds.), *Climate Change and the Kyoto Protocol. The Role of Institutions and Instruments to Control Global Change*, 2003) subsequent projects focused on the role of environmental law in developing countries, more specifically paying attention to the role of market-based instruments (M. Faure and N. Niessen (eds.), *Environmental Law in Development. Lessons from the Indonesian Experience*, 2006) and on EU climate change policy (M. Peeters and K. Deketelaere (eds.), *EU Climate Change Policy. The Challenge of New Regulatory Initiative*, 2006). A critical analysis of the European Emissions Trading Scheme was equally provided (M. Faure and M. Peeters (eds.), *Climate Change and European Emissions Trading. Lessons for Theory and Practice*, 2008). The current book focuses specifically on climate change liability, thus to a large extent building upon this earlier research.

4. STRUCTURE OF THE BOOK

As the table of contents shows, the book is divided into five parts and twelve chapters. The first part contains this editorial foreword drafted by the editors to the book.

Part II discusses various cross-cutting themes. Miriam Haritz addresses in Chapter 2 the role of the precautionary principle in climate change

liability. She examines the possibilities of using the precautionary principle to establish liability (liability with the precautionary principle) and deals with the question to what extent actions taken (mostly by public authorities) based on the precautionary principle could specifically lead to liability (liability from the precautionary principle). Chapter 3 by Jaap Spier deals with the prevention of climate change as the primary goals of liability and urgently calls for an extensive use of liability, but not to seek compensation but rather to prevent damage resulting from climate change.

In Part III attention is paid to European law (in the broad sense as including also the European Convention on Human Rights). In Chapter 4 Javier de Cendra de Larragán addresses liability of member states and the EU in view of the international climate change framework, addressing both the liability of the EU and the member states for an eventual failure to comply with Kyoto Protocol commitments as well as the duty of individual member states to contribute to the compliance of the EU as a whole. In Chapter 5 Marjan Peeters focuses on the interesting question of whether the EU should not develop a climate change liability and compensation regime to complement the current EU ETS. After all, even in case of compliance with the EU ETS damage may be caused, whereas the question as to how this damage should be compensated is largely unregulated. Peeters argues that there could be a combination of individual liability of CO₂ emitters and an international or European compensation fund (to be financed by emitters) in addition to the EU ETS. A failure of European states to take appropriate measures to adapt to climate change could under some circumstances be considered as a violation of human rights. Armelle Gouritin addresses in Chapter 6 the detailed case law of the European Court for Human Rights in this respect and asks the question to what extent this case law could also lead to liability of states, member of the European Convention of Human Rights in case they fail to take appropriate measures to adapt to climate change.

Part IV addresses liability for climate change from various national perspectives. The first chapter in this part (Chapter 7) by Giedrė Kaminskaitė-Salters addresses the potential of climate change liability from the perspective of English law. Even though in England so far no real climate change liability cases have been brought, the chapter analyses the potential of climate change liability but also the hurdles potential plaintiffs could face. Chapter 8 by Elena Kosolapova addresses the cases that have already been adjudicated or are currently being brought in domestic courts. In that respect she mostly addresses these cases from the perspective of American law since that is where most of these cases have been conducted. Chapters 9–11 turn to the potential of liability law within the Netherlands. General climate change liability under the perspective of tort law is addressed by

Chris van Dijk in Chapter 9. The question to what extent NGOs could play an important role in climate change liability under Dutch law is addressed in Chapter 10 by Phon van den Biesen and the (limited) role of governmental liability for climate change damage in the Netherlands is addressed by Ben Schueler in Chapter 11. Part V presents in Chapter 12 concluding remarks from the editors and an outlook to the future.

5. CONTRIBUTORS

As we mentioned above, many of the contributors have worked together either on previous projects or with the editors within the framework of the *Ius Commune* Research School and the Maastricht European Institute for Transnational Legal Research (METRO). Javier de Cendra defended his Ph.D. thesis successfully on 4 March 2010 at Maastricht University, under the guidance of Michael Faure and Marjan Peeters.¹⁹ He is now Senior Research Associate at the UCL Energy Institute/Faculty of Laws, University College London. Miriam Haritz holds a position at the Department of Development Assistance in Bonn, Germany, and she is finalizing her Ph.D. thesis on the precautionary principle and climate change liability under the guidance of Michael Faure and Ellen Vos. Giedrė Kaminskaitė-Salters has a position as a Senior Adviser on Climate Change at the United Kingdom's Department for International Development and her chapter is a product of her Ph.D. project at METRO with Michael Faure and Marjan Peeters. Her Ph.D. thesis was successfully defended on 11 February 2010.²⁰ Jaap Spier is equally honorary chair at the Hoge Raad (Supreme Court) of the Netherlands and holds at the Law Faculty of Maastricht University a honorary chair of liability and insurance in a comparative perspective. They all participate in the *Ius Commune* Research School as well. The same is the case for other contributors who are connected with partners within the *Ius Commune* Research School like Ben Schueler (Utrecht University) and Elena Kosolapova (University of Amsterdam). Chris van Dijk and Phon van den Biesen are attorneys at law, both having a wide experience in environmental liability litigation. Phon van den Biesen is also member of the Scientific Council to the Centre of Environmental Law of the University of Amsterdam. Armelle Gouritin is connected with the Vrije Universiteit Brussels. The editors, finally, are both connected with the Metro Institute of the Law Faculty of Maastricht University. Michael Faure is director of the institute and holds a chair in Comparative and International Environmental Law, and Marjan Peeters holds a special chair in Environmental Policy and Law, in particular climate change issues. Michael Faure is also a

professor of Comparative Private Law and Economics at the Law Faculty of Erasmus University Rotterdam. A complete list of contributors and their affiliation is provided in this book.

6. WORD OF THANKS

As editors of this book we are grateful to all contributors for their willingness to participate in this challenging project and for meeting the deadlines we imposed upon them. We owe thanks to Marina Jodogne and Marjo Mullers of the secretariat of the Maastricht European Institute for Transnational Legal Research (METRO) for assistance in organizing the workshop on environmental law at the *Ius Commune* conference on 27 November 2009 and to Chantal Kuijpers of METRO for editorial assistance in the preparation of this book for publication. We owe special thanks to our research assistant Laura Visser who reviewed the footnotes and the referencing. Finally, we are most grateful to our publisher Edward Elgar for kind professional and efficient support in the publication of this book.

The texts of Chapters 2 to 11 were finalized on 1 January 2010, thus developments after that date could not be taken into account.

NOTES

1. See for example Faure, M., Gupta, J. and Nentjes, A. (eds.), *Climate Change and the Kyoto Protocol. The Role of Institutions and Instruments to Control Global Change*, Cheltenham, UK and Northampton, MA, USA, Edward Elgar, 2003.
2. See for example Baldwin, R., 'Regulation Lite: The Rise of Emissions Trading', *Law Society Economy Working Papers*, 3/2008, www.lse.ac.uk/collection/law/wps/wps.atm; Driessen David M., *The Economic Dynamics of Environmental Law*, Massachusetts Institute of Technology, 2003; and see for a plea for the carbon market Wiener, Jonathan B., 'Radiative Forcing: Climate Policy to Break the Logjam in Environmental Law', Duke Public Law & Legal Theory Research Paper Series no. 225, November 2008.
3. Nordhaus, W., *A Question of Balance: Weighing the Options on Global Warming Policies*, New Haven, CT and London, Yale University Press.
4. For example in the United Kingdom where a so-called climate change levy has been introduced. For details see Makuch, K.E. and Makuch, Z., 'Domestic Initiatives in the UK', in Faure, M. and Peeters, M. (eds.), *Climate Change and European Emissions Trading: Lessons for Theory and Practice*, Cheltenham, UK and Northampton, MA, USA, Edward Elgar, 2008, 257–296. Moreover, in France a carbon tax has been foreseen for 2010, and the latest proposal includes appliance of that tax also for the industries covered by the European emissions trading scheme as the Conseil Constitutionnel ruled that exemption of those industries would be in conflict with the principle of equality (more precisely, the French principle called 'egalite devant les charges publiques'), see <http://www.gouvernement.fr/gouvernement/>

- contribution-carbone-une-large-concertation, and <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2009/2009-599-dc/communiqué-de-presse.46805.html>
5. This problem played more particularly with the European Emissions Trading Scheme (EUETS) which runs from 1 January 2005 until 2013 (Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the community and amending Council Directive 96/61/EC, OJ L275/32 of 25 October 2003. For an analysis of the effectiveness of this EUETS see the contributions in Faure, M. and Peeters, M. (eds.), *Climate Change and European Emissions Trading: Lessons for Theory and Practice*, Cheltenham, UK and Northampton, MA, USA, Edward Elgar, 2008.
 6. Grossman, D.A., 'Warming Up to a Not-so Radical Idea: Tort-based Climate Change Litigation', *Columbia Journal of Environmental Law*, 2003, Vol. 28, 1.
 7. Tol, R.S.J. and Verheyen, R., 'State Responsibility and Compensation for Climate Change Damages – a Legal and Economic Assessment', *Energy Policy*, 2004, Vol. 32, 1109.
 8. Verheyen, R., *Climate Change Damage and International Law: Prevention Duties and State Responsibility*, Martinus Nijhoff, 2005.
 9. Gupta, J., 'Who's Afraid of Climate Change?', 2005.
 10. Spier, J., 'Legal Aspects of Global Climate Change and Sustainable Development', *Revista Para El Analisis del Derecho*, April 2006, 346 (http://www.indret.com./pdf/346_en.pdf).
 11. See Allen, M., 'Liability for Climate Change: Will It Ever Be Possible to Sue Anyone for Damaging the Climate?', *Nature*, 2003, Vol. 421, 891–892. See also Allen, M. *et al.*, 'Scientific Challenges in the Attribution of Harm to Human Influence on Climate', *University of Pennsylvania Law Review*, 2007, Vol. 155, 1353–1400.
 12. See *Stanford Environmental Law Journal* (SELJ), Vol. 26A and *Stanford Journal of International Law* (SJIL), Vol. 43A, June 2007.
 13. See on these possibilities of liability under international law Faure, M.G. and Nollkaemper, A., 'International Liability as an Instrument to Prevent and Compensate for Climate Change', *SELJ*, Vol. 26A / *SJIL*, Vol. 43A, June 2007, 124–179.
 14. See the news report from John Wijckhoff on the 'Global Climate Law' website, www.globalclimatelaw.com: EPA endangerment finding and petition for review - the court battle over GHG regulation begins, 14 January 2010.
 15. See more particularly the contributions in Osofsky, A. and Burns, W. (eds.), *Adjudicating Climate Change: State, National and International Approaches*, Cambridge, Cambridge University Press, 2009.
 16. See more particularly Faure, M. and Nollkaemper, A., above, note 12, 124–179.
 17. <http://www.rechten.unimaas.nl/metro>.
 18. <http://www.iuscommune.eu>.
 19. Javier de Cendra de Larragán, *Distributional Choices in EU Climate Change Law and Policy: Towards a Principled Approach?*, Kluwer Law International, Alphen aan den Rijn, The Netherlands, forthcoming 2010.
 20. Giedrė Kaminskaitė-Salters's book, *Constructing a Private Climate Change Lawsuit under English Law: A Comparative Perspective* is due to be published by Kluwer Law International in late 2010.