European Law Open (2024), page 1 of 16
doi:10.1017/elo.2024.35

DIALOGUE AND DEBATE: ESSAY

Protecting the climate through EU supply chain legislation? Two critiques and a compromise

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(Received 14 July 2023; revised 9 April 2024; accepted 6 September 2024)

Abstract

Climate change law faces a serious implementation problem. New instruments promoted by states from the Global North to address the implementation gap come from the sphere of trade and supply chain regulation. This article focuses on corporate climate due diligence legislation and its potential contribution to fulfilling the objectives outlined in the Paris Agreement. By examining the EU's legislative process towards adopting a Corporate Sustainability Due Diligence Directive (CSDDD), it explores various approaches to regulating the climate impacts of corporations, including along global supply chains. The article critiques both the ultimately adopted climate transition planning requirement and the European Parliament's alternative proposal, which aimed to incorporate climate mitigation into the general due diligence framework of the Directive but was unsuccessful. It applies two overarching critiques, termed 'not enough' and 'regulatory imperialism', to the specific context of corporate climate due diligence. Although these critiques may initially appear contradictory, the article endeavours to reconcile them through a compromise approach that fosters greater participation, integrates measures to mitigate impacts on self-determination, and specifies the obligations imposed on corporations regarding climate mitigation. Finally, the article discusses the idea of a decentralised enforcement regime and highlights the importance of regulation in states of the Global South to achieve a truly planetary legal order on corporate climate accountability.

Keywords: Corporate sustainability due diligence; climate accountability; supply chain regulation; regulatory imperialism; international climate mitigation law

1. Introduction

Climate change law faces a serious implementation problem. In 2015, states agreed to keep average global warming well below 2.0°C and aim at 1.5°C.[1] However, to date, Nationally Determined Contributions (NDCs) are still far from sufficient to maintain this threshold.[2] In light of this situation, people in many jurisdictions have turned to climate litigation to exert pressure on governments to enact meaningful climate mitigation policies.[3] While there has been a series of major successes in

[1]Art 2 para 1 (a) Paris Agreement to the United Nations Framework Convention on Climate Change, 12th December 2015, 3156 UNTS 79.

[2]Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its fifth session, held in the United Arab Emirates from 30 November to 13 December 2023, Outcome of the First Global Stocktake, Decision 1/CMA.5, para 18; see also: Intergovernmental Panel on Climate Change (IPCC), 2023: Synthesis Report, Summary for Policymakers, p 10 (A 4).

[3]See eg: A Savaresi, 'Plugging the Enforcement Gap: The Rise and Rise of Human Rights in Climate Change Litigation' 77 (2021) Questions of International Law 1.

European countries,[4] some supportive but in many regards also limited findings by the European Court of Human Rights,[5] and notable contributions from the Global South,[6] with the recent decision by the South Korean Constitutional Court potentially being the most comprehensive one,[7] it is unlikely that some of the most heavy greenhouse gas (GHG) emitters will be successfully sued, thus remaining outside the ambit of this 'rule of law' in climate matters.[8]

New instruments promoted by states from the Global North to address the implementation gap come from the sphere of trade and supply chain regulation. These include Carbon Border Adjustment Mechanisms (CBAMs)[9] and various forms of corporate sustainability due diligence (CSDD).[10] Both instruments have the potential to extend the reach of climate legislation in Europe and potentially elsewhere to cover emissions caused by the production of imported products or more generally the emissions of business actors abroad. While the legal implications of CBAMs have already sparked a significant debate,[11] the climate mitigation component of CSDD has received relatively little attention thus far.[12] This is despite the fact that the inclusion of climate mitigation in extraterritorial CSDD regulations raises crucial normative questions on the relationship between self-determination and protecting planetary common interests and its compatibility with common but differentiated responsibility (CBDR) under international climate mitigation law.

This Article analyses these concerns and offers practical guidance on how to address them in CSDD legislation. While the analysis holds general relevance, it primarily draws from the final text and alternative proposals brought forward in the legislative process to adopt the EU Corporate Sustainability Directive (EU-CSDDD).[13] This Directive is particularly noteworthy as it represents

[4]Most notably: *Urgenda v Netherlands* (2019) Appl. no. 19/00135 (Hoge Raad), ECLI:NL:HR:2019:2007; *Neubauer et al v Germany* (2021) 1 BvR 2656/18 and others (Bundesverfassungsgericht), ECLI:DE:BVerfG:2021:rs20210324.1bvr 265618.

[5]Limits concern in particular restrictive interpretations of victim status and extraterritorial applicability, see: *Verein Klimaseniorinnen Schweiz and others v Switzerland* (2024) Appl. no. 53600/20 (EChHR); *Duarte Agostinho and others v Portugal and 32 others* (2024) Appl. no. 39371/20 (EChHR); *Carème v France* (2024) Appl. no. 7189/21 (EChHR).

[6]Overviews are provided in: J Peel and J Lin, 'Transnational Climate Litigation: The Contribution of the Global South' 113 (4) (2019) American Journal of International Law 679; J Setzer and L Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' 9 (1) (2020) Transnational Environmental Law 77.

[7]*Case on the National Greenhouse Gas Reduction Targets Addressing the Climate Crisis* (2024) Appl. No. 2020Hun-Ma389 et al (The Constitutional Court of Korea), Press Release of 29 August 2024 (no official translation of the decision available yet) <https://www.ccourt.go.kr/dext5editordata/2024/08/20240829_164950989_18656.pdf> accessed 20 November 2024.

[8]A Buser, 'National Climate Litigation and the International Rule of Law' 36 (3) (2023) Leiden Journal of International Law 593; see also: C Rodríguez-Garavito, 'Litigating the Climate Emergency The Global Rise of Human Rights-Based Litigation for Climate Action' in C Rodríguez-Garavito (ed), *Litigating the Climate Emergency* (Cambridge University Press 2022), 34.

[9]Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, OJ L 130/52.

[10]See eg existing regulation focusing on deforestation: Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150/206.

[11]See eg J Pauwelyn, 'Carbon Leakage Measures and Border Tax Adjustments under WTO Law' in G van Calster (ed), *Research Handbook on Environment, Health and the WTO* (Elgar 2013) 448; MA Mehling et al, 'Designing Border Carbon Adjustments for Enhanced Climate Action' 113 (3) (2019) American Journal of International Law 433; L Eicke et al, 'Pulling Up the Carbon Ladder? Decarbonization, Dependence, and Third-Country Risks from the European Carbon Border Adjustment Mechanism' 80 (2021) Energy Research & Social Science 102240; GC Leonelli, 'Practical Obstacles and Structural Legal Constraints in the Adoption of 'Defensive' Policies: Comparing the EU Carbon Border Adjustment Mechanism and the US Proposal for a Border Carbon Adjustment' 42 (4) (2022) Legal Studies 696.

[12]See P Gailhofer and R Verheyen, 'Klimaschutzbezogene Sorgfaltspflichten: Perspektiven der gesetzlichen Regelung in einem Lieferkettengesetz' 32 (7) (2021) *Zeitschrift für Umweltrecht* 402; C Bright and K Buhmann, 'Risk-Based Due Diligence, Climate Change, Human Rights and the Just Transition' 13 (18) (2021) Sustainability 10454; C Macchi, *Business, Human Rights and the Environment: The Evolving Agenda* (Asser Press; Springer 2022) 82 and 101; M Rajavuori, A Savaresi and H van Asselt, 'Mandatory Due Diligence Laws and Climate Change Litigation: Bridging the Corporate Climate Accountability Gap?' 17 (2023) Regulation & Governance 944.

[13]Directive EU 2024/1760 of the European Parliament and of the Council on Corporate Sustainability Due Diligence of 13 June 2024 and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L 2024/1760 (EU-CSDDD).

https://doi.org/10.1017/elo.2024.35 Published online by Cambridge University Press

the first instance of mandatory supply chain legislation explicitly targeting climate change going beyond more issue specific requirements on deforestation.[14]

The article first examines to what extent climate mitigation has been incorporated in due diligence requirements under the Directive and – absent explicit coverage – could be read into human rights related due diligence. As the wording of the environmental human rights provision and the intention of the legislator speak against such an expansive interpretation, the article highlights how alternative proposals would have deviated from the current limited focus on corporate climate planning. This mapping of alternative forms of regulating corporate climate due diligence provides the basis for the following normative assessment. In this section, the article applies two overarching critiques commonly raised in the realm of supply chain regulation – termed here as the 'not enough' and 'regulatory imperialism' critiques – to the specific domain of climate supply chain due diligence. Drawing from these insights, the article proposes a compromise approach. This compromise aims to enhance participation, effectiveness and alignment with key principles of international climate protection law, and specifies the obligations imposed on corporations regarding climate mitigation. Finally, the article provides an outlook emphasizing the importance of regulation in states of the Global South to achieve a truly planetary legal order on corporate climate accountability.[15]

2. Corporate climate supply chain due diligence legislation

Most greenhouse gas (GHG) emissions stem from private actors. Empirical studies show that 90 major corporate carbon emitters (carbon majors) are responsible for up to 63 per cent of cumulative worldwide emissions of industrial CO2 and methane between 1751 and 2010.[16] According to a report by the Special Rapporteur on Extreme Poverty and Human Rights, 70% of GHG emissions in 2015 were attributed to fossil fuel companies.[17]

International efforts to hold companies legally accountable for their impacts on climate change arguably remain primarily in the realm of soft law or non-law.[18] While it had been proposed that the UN Treaty on Business and Human Rights might at least acknowledge the role of private actors in mitigating climate change, the most recent draft text omits such a reference and it is generally unclear whether it will receive sufficient support from states, particularly those from the

[14]Note that among existing mandatory due diligence regulation at the level of EU member States only the French provision on 'environmental damage or health risks' (Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre) could be interpreted to include effects of climate change whereas other legislative acts covering environmental issues such as the German Lieferkettengesetz are limited to a list of obligations stemming from international environmental agreements not covering climate agreements, see: Lieferkettensorgfaltspflichtengesetz of 16 July 2021 (BGBl. I p 2959).

[15]The term planetary legal order is used here to describe a particular form of cross-border governance, such as in global (legal) governance or transnational law, addressing 'planetary crises' or severe Earth system interference by all – or at least all relevant – actors; for a distinction between global governance and planetary governance, see: OR Young, *Grand Challenges of Planetary Governance: Global Order in Turbulent Times* (Edward Elgar Publishing 2021) 2, at footnote 1; more generally on the distinction but also interrelatedness between global and planetary thinking: D Chakrabarty, *The Climate of History in a Planetary Age* (The University of Chicago Press 2021); see on the related distinction between global and planetary commons: J Rockström et al, 'The Planetary Commons: A New Paradigm for Safeguarding Earth-Regulating Systems in the Anthropocene' 121 (5) (2024) Proceedings of the National Academy of Sciences e2301531121.

[16]R Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010' 122 (1–2) (2014) Climatic Change 229.

[17]'Climate Change and Poverty', Report of the Special Rapporteur, Philp Alston, on Extreme Poverty and Human Rights, 17 July 2019, A/HRC/41/39, 2019 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/218/66/PDF/G1921866.pdf?OpenElement> accessed 20 November 2024.

[18]See P Gailhofer et al, 'Synthesis' in P Gailhofer et al (eds), *Corporate Liability for Transboundary Environmental Harm: An International and Transnational Perspective* (Springer 2023); Bright and Buhmann (n 12) 7.

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Global North.[19] The recent version of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct contains recommendations for companies to address adverse climate impacts but these guidelines remain within the sphere of non-law or at best soft-law.[20]

Although Companies have increasingly been sued in national courts,[21] the success of these lawsuits is mixed.[22] Consequently, scholars increasingly note the potential of legislation to strengthen corporate accountability for climate mitigation.[23] In several jurisdictions, regulation predominantly focuses on disclosure requirements.[24] Disclosure requirements may play a role in informing investors and consumers, thereby guiding their decisions. Yet, they lack the capacity to establish legal accountability. In this context, the mandatory sustainability due diligence outlined in the EU-CSDDD could be deemed a significant advancement, if it effectively addresses the transnational impact of companies on the climate. After providing a concise overview of the general functioning of the EU CSDDD (A.), the following sections demonstrate the limited incorporation of climate mitigation measures (B. and C.). Section D proceeds to analyse alternative proposals and assess their potential to establish more robust corporate climate due diligence measures.

A. EU-CSDDD: an overview

Sustainability due diligence under the EU-CSDDD generally establishes procedural requirements applicable to human rights and environmental norms listed in an Annex and subjects these requirements to its enforcement mechanisms. Separately the Directive establishes climate planning requirements which are only partially subject to enforcement.[25] Both sets of obligations apply to companies incorporated in EU Member States as well as foreign companies above certain thresholds.[26] These obligations include the integration of due diligence into corporate policies and risk-management strategies; identifying and assessing actual or potential adverse impacts; and preventing and mitigating adverse impacts, including through contractual assurances or ultimately temporary suspension or termination of business relationships.[27] Where adverse impacts nonetheless occur, companies are required to bring actual adverse impacts to an end and under certain circumstances to provide remediation.[28] As regards compliance, companies must

[19]Human Rights Council, Text of the updated draft legally binding instrument, A/HRC/55/59/Add.1, 13 February 2024; for the earlier proposal, see: Human Rights Council, Text of the third revised draft, A/HRC/49/65/Add.1, 28 February 2022, 14; D Iglesias Márquez, 'Towards the Adoption of A Treaty on Business and Human Rights: Old Debates, New Opportunities' 4 (2019) Deusto Journal of Human Rights 145.

[20]'OECD Guidelines for Multinational Enterprises on Responsible Business Conduct' <https://www.oecd.org/publications/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct-81f92357-en.htm> accessed 20 November 2024.

[21]For an overview of cases see eg: M-P Weller and M-L Tran, 'Climate Litigation Against Companies' 1 (1) (2022) Climate Action 1.

[22]The one major success remains *Milieudefensie et al v Royal Dutch Shell PLC* (2021) No. C/09/571932/HA ZA 19-379 (Hague District Court), ECLI:NL:RBDHA:2021:5339. Many other cases have been dismissed, eg most German cases: Landgericht Stuttgart, Judgement of 13 September 2022, No. 17 O 789/21 (Mercedes Benz); Landgericht Detmold, Judgement of 24 February 2023, No. 01 O 199/21 (VW); Landgericht Braunschweig, Judgement of 14 February 2023, No. 6 O 3931/21 (VW); see also in France: *Notre Affaire à Tous and others v Total*, Order of the pre-trial judge of 6 July 2023, No. RG 22/03403, which was dismissed on procedural grounds.

[23]Rajavuori et al (n 12); Gailhofer and Verheyen (n 12).

[24]UK Department for Business, Energy and Industrial Design, Mandatory climate-related financial disclosures by publicly quoted companies, large private companies and LLPs, February 2022. <https://assets.publishing.service.gov.uk/media/62138625d3bf7f4f05879a21/mandatory-climate-related-financial-disclosures-publicly-quoted-private-cos-llps.pdf> accessed 20 November 2024; the US Securities and Exchange Commission also enacted Climate Disclosure Requirements for US registered companies in 2024 (but not covering Scope 3 emissions), the implementation of which is now paused because of pending lawsuits against these requirements <https://www.sec.gov/files/rules/final/2024/33-11275.pdf> accessed 20 November 2024.

[25]Art 22 and 25 para 1 EU-CSDDD.

[26]Art 2 para 1 and 2; 3 para 1 (a) (i)–(iii); and 22 para 1 EU-CSDDD.

[27]Summarized in: Art 5 and Recital 20 EU-CSDDD.

[28]Art 11 EU-CSDDD.

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establish a complaints procedure, monitor the effectiveness of their due diligence policy, and publicly communicate on due diligence.[29]

The due diligence requirements imposed on covered corporations in principle cover the entire value chain. This includes own operations, operation of subsidiaries, and operations carried out by business partners in companies' chains of activities.[30] The latter includes both direct and indirect business relationships and thus not necessarily requires a commercial agreement but only the performance of business operations related to the company's own operations.[31] The covered 'chain of activities' is defined broadly, encompassing both upstream operations (the entire production process) and downstream operations (such as disposal).[32]

On enforcement the Directive generally foresees two mechanisms: State supervision and civil liability. First, Member States are required to designate authorities that supervise implementation by companies.[33] These supervisory authorities shall generally have the power to request information from companies and carry out own investigations, including inspections without notice. Competences include the issuance of orders of cessation, remedial action, pecuniary sanctions, and interim measures.[34] Importantly, Member States must ensure that natural and legal persons have the power to provide 'substantial concerns' about individual companies' non-compliance with the requirements of the Directive to authorities.[35] The authorities are required to assess these concerns and where appropriate exercise their powers accordingly.[36] Decisions rendered and failures to act must be subject to legal review.[37] All entities with a 'legitimate interest' (in accordance with national law) must have access to court to initiate respective judicial proceedings to review the decision or failure to render a decision by state authorities. Second, the EU-CSDDD requires Member States to allow for civil liability of companies.[38] If companies fail to comply with due diligence requirements under Article 10 and 11 to prevent potential adverse impacts and to end actual adverse impacts, affected people may refer to civil courts for remedy.

B. Climate due diligence within human rights due diligence?

Corporate due diligence applies to a list of human rights and environmental concerns outlined in a separate Annex to the EU-CSDDD. The list of environmental agreements relevant to determining environmental due diligence does not include any reference to international climate treaties.[39] Whereas some overlap may exist with the listed obligations to avoid or minimise adverse impacts on biodiversity, for example with regard to deforestation and wetlands, the EU-CSDDD does not explicitly establish climate change due diligence.[40]

Considering that climate change is increasingly recognized as a human rights concern by courts and UN human rights bodies,[41] one could however argue that climate mitigation should be

[29]Art 14–16 EU-CSDDD.

[30]Art 1 para 1 (a) EU-CSDDD.

[31]Art 3 para 1 (f) (i) and (ii) EU-CSDDD.

[32]Ibid., para 1 (g) (i) and (ii) EU-CSDDD; Note that this is different for regulated financial undertakings for which only the upstream part of their chain of activities is covered: Recital 19.

[33]Art 24 para 1 EU-CSDDD.

[34]Art 25 and 27 EU-CSDDD.

[35]Art 26 EU-CSDDD.

[36]Ibid., para 5 EU-CSDDD.

[37]Ibid., para 6 EU-CSDDD.

[38]Art 29 EU-CSDDD.

[39]Annex 1 Part II EU-CSDDD.

[40]Ibid. No. 1 ('avoid or minimise adverse impacts on biological diversity') and 14 ('avoid or minimise adverse impacts on wetlands').

[41]See eg: *Urgenda v Netherlands* (n 4); *Chiara Sacchi et al v Argentina, Brazil, France, Germany and Turkey*, Committee on the Rights of the Child, CRC/C/88/D/107/2019 et al, Decisions of 8 October 2021; *Billy et al v Australia*, Committee on Civil and Political Rights, Concluding Observations of 22 September 2022, UN-Doc. CCPR/C/135/D/3624/2019; *Verein Klimaseniorinnen Schweiz and others v Switzerland* (n 5).

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considered a requirement under the listed human rights. Yet, as the following paragraphs shall demonstrate, restraints in the wording of the Directive and the intention of the legislator does not support such a progressive reading.

The Directive includes a comprehensive list of rights and prohibitions derived from international human rights treaties which are of particular relevance for corporations. Within this list, several rights and prohibitions are pertinent to the case of climate change, such as the right to life and children's rights. More specifically, the list includes a provision on human rights-related environmental harm.[42] Accordingly, it applies due diligence to:

> *The prohibition of causing any measurable environmental degradation, such as harmful soil change, water or air pollution, harmful emissions, excessive water consumption, degradation of land, or other impact on natural resources, such as deforestation, that:*
>
> *(a) substantially impairs the natural bases for the preservation and production of food;*
> *(b) denies a person access to safe and clean drinking water;*
> *(c) makes it difficult for a person to access sanitary facilities or destroys them;*
> *(d) harms a person's health, safety, normal use of land or lawfully acquired possessions;*
> *(e) substantially adversely affects ecosystem services through which an ecosystem contributes directly or indirectly to human wellbeing;*

At first glance, this provision seems suitable for addressing GHG emissions and their impact on the climate. GHG emissions could be considered 'harmful emissions', and climate change is known to have various effects on people and ecological integrity. However, the narrow formulation of the provision, which requires 'measurable environmental degradation' and a causality link between harmful emissions and the listed effects on humans ('that'), could significantly restrict the ability to hold companies accountable for the cumulative impacts that contribute to climate change. Establishing a causal link between GHG emissions by individual companies and specific impacts on humans is challenging, if not impossible.[43]

An alternative approach would be to rely on more general references in the Annex to individual human rights, such as the right to life or the right to health listed in the Directive.[44] However, ultimately the intention of the legislator and systematic considerations speak against coverage of carbon emissions by the Directive's human rights due diligence part. Notably, the European Parliament had proposed to explicitly cover climate change under the Directive's general due diligence framework, but this proposal ultimately failed.[45] This is not to indicate that climate change could not be incorporated into the due diligence part *de lege ferenda* and the Directive includes a provision to review and potentially revise its rules on combatting climate change.[46] Yet, at present, bringing in climate mitigation via human rights provisions is at odds with the intention of the legislator and would break with the adopted approach to cover climate change in a separate provision outside the general due diligence framework.

[42]Annex 1 para 1 no 15.

[43]See the related case of *Luciano Lliuya v RWE AG,* Case No. 2 O 285/15, Essen Regional Court, decision of 15 December 2016 (appealed); English transcript available at: <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2016/20161215_Case-No.-2-O-28515-Essen-Regional-Court_decision.pdf> accessed 20 November 2024.

[44]EU-CSDDD, Annex I Part 1, para 1 and para 2.

[45]Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071–C9-0050/2022–2022/0051(COD)), P9_TA(2023)0209, Amendment 377 (in the following referred to as EP Amendments); see for an earlier discussion of different options how to include corporate climate mitigation requirements: COM, Impact Assessment Report, SWD(2022) 42 final of 23 February 2022, 30.

[46]Art 36 para 2 lit (e); see for an earlier draft of the clause explicitly indicating the coverage of climate change under the general due diligence framework: Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final 2022/0051 (COD) Art 29 (d) (COM Proposal).

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C. Corporate climate planning

Instead of incorporating companies' climate impacts into the general due diligence framework under the CSDDD and in line with the initial proposal by the Commission, the EU ultimately adopted only a soft provision on climate planning. Accordingly, Member States are required to ensure that certain companies within the scope of the Directive 'adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5°C in line with the Paris Agreement' and the intermediate and 2050 climate neutrality targets under the so-called EU Climate Law.[47] As proposed by the EP,[48] the requirements for such transition plans are elaborated in more detail and include (a) science-based time-bound targets for 2030 and in five-year steps up to 2050, (b) the identification of 'decarbonisation levers' and 'key actions' planned to reach the targets, (c) a summary and explanation of investments and funding for implementing transitions plans, and (d) a description of the role of administrative, management and supervisory bodies with regard to the transition plan.[49] Notably, the text covers scope 1, scope 2 and scope 3 GHG emissions along global supply chains, an issue that was controversial during the legislative process. However, the provision provides companies much leeway in setting absolute emission reduction targets for each category ('where appropriate') and also with regard to the overall objective of the transition plans ('which aims to ensure, through best efforts').[50] As highlighted in the recitals:

> *Being an obligation of means, due account should be given to the progress companies make, and the complexity and evolving nature of climate transitioning. While companies should strive to achieve the greenhouse gas emission reduction targets contained in their plans, specific circumstances may lead to companies not being able to reach these targets.*[51]

In line with this soft approach, Member States are not necessarily required to subject the implementation of transition plans to administrative oversight and enforcement. Companies must be required to 'adopt and put into effect' a climate transition plan but the Directive does not require Member States to supervise the implementation of the plan or provide for legal remedies if companies fail to achieve set targets. Supervisory bodies must only assess 'the adoption and design of the plan' but this does not necessarily require Member States to oversee and supervise the implementation of absolute reduction targets.[52] Nonetheless, the recitals also highlight that this is the absolute minimum, indicating that Member States could also subject the implementation to administrative oversight.[53]

Equally Member States are not required to provide for civil liability in that regard, as the respective provisions only refer to the general due diligence framework but not climate transition planning.[54] After opposition from Member States, the final text did not even enact the initial

[47]Art 22 para 1 EU-CSDDD referring to Regulation (EU) 2021/1119.

[48]EP Amendment 247–58.

[49]Art 22 para 1 (a)–(d) EU-CSDDD.

[50]Scope 1 emissions cover all directly caused GHG emissions (eg, burning fossil fuels in the production process of a product); Scope 2 emissions cover emissions caused by the production of electricity used for the production process, and Scope 3 emissions also cover indirect emissions along the supply chain such as emissions caused by suppliers and even emissions caused by end users in using the product.

[51]Recital 73 EU-CSDDD.

[52]Art 25 para 1 EU-CSDDD.

[53]Recital 73 EU-CSDDD ('Supervisory authorities should be required to *at least* supervise the adoption and design of the plan and the updateds thereof, in accordance with the requirements laid down in this Directive'. Highlighting added).

[54]Art 29 para 1 EU-CSDDD.

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proposal by the Commission to connect the fulfilment of procedural climate planning requirements with variable remuneration of companies' directors.[55]

D. Alternative Pathway: Explicit coverage of climate change within due diligence

The planning approach ultimately adopted is not without alternatives. In particular, the EP Amendments proposed not only to concretize the climate planning provision but also to explicitly cover climate mitigation within the due diligence framework.[56] As per the proposed Amendments, the Annex to the Directive would have required companies to achieve GHG emission reductions – a commitment to be 'interpreted in line with' several provisions of the Paris Agreement, the European Climate Law, and the Global Methan Pledge.[57] In particular, the EP Proposal referred to Article 2 para 1, (a), Article 4 para 1, Article 4 para 2, and Article 5 para 1 of the Paris Agreement. The referenced articles establish the global temperature target (Article 2 para 1 (a)), the requirement to reach global peaking of carbon emissions as soon as possible and to achieve net zero emissions in the second half of the 21th century (Article 4 para 1), the requirement to adopt NDCs and implement them (Article 4 para 2), and the obligation to take actions to protect and conserve sinks and other reservoirs of greenhouse gases (Article 5 para 1). The referenced European Climate Law obliges the EU and Member States to achieve climate neutrality by 2050 and also sets intermediate emission reduction targets.[58]

This proposal would have fully subjected climate due diligence to the Directive's enforcement mechanisms. However, this alternative pathway equally suffers from weaknesses. The issue at hand is that all referenced legal commitments address States rather than individual companies. The EP's proposal gives the impression that the Paris Agreement and climate mitigation targets could simply be downscaled to companies. However, the guidance provided is rather limited. The cited provisions are not easily applicable to smaller scale entities. Currently, it appears that international law and regional or national climate acts offer little clarity on the expectations placed on individual companies. Even if we were to agree on national carbon budgets (such as based on a per capita share of the global carbon budget left to meet the 1.5°C of average global warming target with a particular likelihood), these budgets could potentially be achieved by prioritizing emissions reductions in sectors that are easier to transform (such as phasing out coal burning for energy production) while companies in sectors requiring more structural and costly transformations, such as steel or aviation, may be required by legislators to reduce their emissions at a later stage. While the EU's goal of reaching net zero emissions by 2050 provides an indication for GHG emission within the EU's territory, the target itself does not encompass emissions along the supply chain in non-EU territories.[59] All in all, it is questionable whether the mere reference to international and regional climate targets is concrete enough to require companies to increase their mitigation efforts and go beyond voluntary mitigation targets which are currently insufficient to meet the 1.5°C target.[60]

Admittedly, the lack of legal clarity on allowable corporate GHG budgets has not hindered the Hague District Court to hold Shell accountable for reducing emissions by a fixed percentage for a given year (45 per cent by 2030, relative to 2019) which judges deemed appropriate under an unwritten standard of care under Dutch civil law.[61] Yet, such an approach has not been followed

[55]Art 15 para 1 COM Proposal.

[56]EP Amendments, Annex I part 2.

[57]UN Framework Convention on Climate Change – Conference of the Parties: Adoption of the Paris Agreement; UN Doc. FCCC/CP/2015/L.9/Rev.1, 2015; Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243.

[58]Art 2 and 4 European Climate Law.

[59]Art 1 and 2 European Climate Law.

[60]T Day et al, 'Corporate Climate Responsibility Monitor' (2023) New Climate Institute <http://newclimate.org/publications/> accessed 20 November 2024.

[61]*Milieudefensie et al v Royal Dutch Shell PLC* (n 22).

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by courts in other jurisdictions.[62] Irrespective of the question whether courts can or should develop such quantitative targets it is thus unclear whether administrative agencies and courts in individual EU Member States would follow the Dutch approach. Whereas some States provided more clarity to companies by adopting sectoral reduction targets to be pursued by respective ministries,[63] so far, no initiatives are known of legislatures setting mitigation targets for individual companies or fixed percentage reduction commitments for all companies within a jurisdiction.

3. Two critiques and a compromise

Despite the broad support from NGOs, scholarship, and activists for the project of establishing mandatory corporate human rights and environmental due diligence, several critiques have been voiced in recent years of which two have been quite prominent which I refer to here as the 'not enough' (A) and the 'regulatory imperialism' critiques (B). The implications of these critiques for corporate climate supply chain legislation are the subject of the next three sections.

A. Not enough?

The EU's reluctance to incorporate climate impacts into the legal due diligence framework is likely to attract substantial criticism resonating with general 'not enough' critiques. These critiques can be subdivided into two categories: 'not enough light', which argues for expanding personal scope, stronger substantial requirements, and mandatory administrative oversight and enforcement; and more fundamental critiques that advocate for revolutionary changes to the current global economic order instead of mere reform.

Not enough light critiques tend to highlight the limitations in scope and substance. The limited scope of the EU-CSDDD in terms of covered companies attracted much criticism, and the significant rise of thresholds to accommodate concerns by some Member States that companies may be overburdened with sustainability due diligence requirements has exacerbated the problem. More specifically on climate change, many NGOs and activists had hoped for the incorporation of climate change into the due diligence framework and the explicit and unqualified coverage of scope 3 emissions.[64] Given that scope 3 emissions often amount to the bulk of carbon emissions attributable to products or services offered by individual companies, they sought to explicitly take into account the total amount of GHG emissions attributable to an individual company. Additionally, they expressed the need to curb offsetting schemes due to their unreliability.[65]

More fundamental critiques accused the EU of 'greenwashing' global supply chains.[66] There are concerns that focusing on corporations' human rights and environmental due diligence obligations may overlook the need for more fundamental reform.[67] Furthermore, recent empirical

[62]Notably in Germany, see: Landgericht Stuttgart, Judgement of 13 September 2022, No. 17 O 789/21 (Mercedes Benz); Landgericht Detmold, Judgement of 24 February 2023, No. 01 O 199/21 (VW); Landgericht Braunschweig, Judgement of 14 February 2023, No. 6 O 3931/21 (VW); in other jurisdictions comparable cases were rejected on procedural grounds, see eg the case brought by several NGOs against Total Energies under the French Duty of Vigilance Law; for an overview of the procedural history available at: <https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-climate-change-france/> accessed 20 November 2024.

[63]See German Federal Climate Protection Act, BGBl. I p 2513 (2019), § 4 para 1 and Annex 1; note that these sectoral targets according to current government initiatives will be abandoned because several sectors proved unwilling or unable to meet their targets.

[64]Letter to the EU Commission signed by over 200 NGOs and activists: 'EU must make business legally accountable for the climate crisis' <https://justice-business.org/civil-society-supporters/> accessed 20 November 2024.

[65]Ibid.

[66]See J Wilde-Ramsing, B Vanpeperstraete, and D Hochfeld, 'Respecting Rights or Ticking Boxes?: Legislating Human Rights Due Diligence' in *Briefing Paper of January 2022* (Clean Clothes Campaig, ECCHR, Public Eye and SOMO 2022) available at: <https://cleanclothes.org/file-repository/2022_publiceye_respecting-rights_report.pdf/view> accessed 20 November 2024.

[67]M Leite, 'Beyond Buzzwords: Mandatory Human Rights Due Diligence and a Rights-Based Approach to Business Models' 8 (2) (2023) Business and Human Rights Journal 197.

https://doi.org/10.1017/elo.2024.35 Published online by Cambridge University Press

studies indicate that private social and environmental supply chain initiatives have not only failed to achieve their intended goals but have come with hidden costs and unintended negative effects.[68] These hidden costs include the displacement of local industries and producers by powerful transnational corporations capable of bearing the expenses of costly certification schemes; higher prices for local workers and residents; increased informality of work; declining real wages, and – most troublesome in the context of climate due diligence – even increased overall emissions.[69]

From the perspective of such strong not enough critiques, supply chain laws may serve to mask rather than address the social and environmental impacts of the current global economic order. While supply chain regulations address certain externalities of corporate conduct, they do not promote degrowth, which is seen as necessary by some to stay within planetary boundaries, including for climate change, or challenge other fundamental assumptions of the economic system.[70] For instance, due diligence may require companies to increase sustainability of cotton farming and reduce impacts on biodiversity by pesticides but does not challenge fast-fashion business models and overall may lead to an increase in carbon emissions rather than a decline.[71] Instead of addressing the structural issue of overconsumption – three planets would be required if current consumption patterns within the EU would be replicated globally – such mechanisms are merely reducing negative externalities.[72] The dark side of due diligence may be that such mechanisms improve businesses ethical standing.[73] The shift from soft to hard law may exacerbate this problem by institutionalizing it.[74]

B. Regulatory imperialism?

Approached from a different angle, corporate supply chain due diligence legislation may rather be too much than not enough. The EU is taking a leading role in developing unilateral mechanisms to increase corporate accountability along global supply chains. At the same time, Member States show reluctance to engage in multilateral discussions concerning the UN Treaty on Business and Human Rights. This turn to unilateralism, allegedly purposefully bypassing multilateral forums, has faced heavy criticism.[75]

[68]G LeBaron and J Lister, 'The Hidden Costs of Global Supply Chain Solutions' 29 (3) (2022) Review of International Political Economy 669; J-C Graz, 'Grounding the Politics of Transnational Private Governance: Introduction to the Special Section' 27 (2) (2022) New Political Economy 177.

[69]P Le Billon and S Spiegel, 'Cleaning Mineral Supply Chains? Political Economies of Exploitation and Hidden Costs of Technical Fixes' 29 (3) (2022) Review of International Political Economy 768; S Ponte, 'The Hidden Costs of Environmental Upgrading in Global Value Chains' 29 (3) (2022) Review of International Political Economy 818.

[70]See on the need for degrowth eg: J Vogel and J Hickel, 'Is Green Growth Happening? An Empirical Analysis of Achieved Versus Paris-Compliant CO2-GDP Decoupling in High-Income Countries' 7 (9) (2023) The Lancet Planetary Health e759–69; for the related critique that the content of CSDD is stacked against transformation in the sense of a fundamental rethink of the role of corporations: L Moncrieff, '"Creabimus!" Creatively Re-Thinking the Corporation and the Social Contract' 1 (4) (2022) European Law Open 914, 951–3.

[71]C Schepper, 'The Dark Side of Global Supply Chain Cooperation' (2023) Global Cooperation Research – A Quarterly Magazine <https://www.gcr21.org/publications/gcr/global-cooperation-research-1-/-2023> accessed 20 November 2024.

[72]J Scott, 'Reducing the EU's Global Environmental Footprint' 21 (1) (2020) German Law Journal 10, 14; who nonetheless is in favour of limiting the EU's external footprint through unilateral trade regulation.

[73]Schepper (n 71) 3; on non-binding corporate responsibility: R Kaplan, 'Who Has Been Regulating Whom, Business or Society? The Mid-20th-Century Institutionalization of "Corporate Responsibility" in the USA' 13 (1) (2015) Socio-Economic Review 125.

[74]Schepper (n 71) 5.

[75]S Luthango and M Schulze, 'The EU and the Negotiations for a Binding Treaty on Business and Human Rights' (2023) <https://www.swp-berlin.org/publikation/the-eu-and-the-negotiations-for-a-binding-treaty-on-business-and-human-rights> accessed 20 November 2024; relatedly for the German supply chain act: D Endres and N Krisch, 'Das Lieferkettengesetz als Global Governance' 13 (4) (2022) Rechtswissenschaft 463, 467.

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Thus, what is presented by the EU as the regulation of corporate GHG footprints abroad can also be seen as an effort to govern foreign countries.[76] For example, Indonesia criticised the new EU Regulation on Deforestation Free Products, which inter alia lists climate mitigation as one of its objectives,[77] as 'regulatory imperialism'.[78] More generally, Third World Approaches to International Law (TWAIL) critiques point in a similar direction when they speak of 'laws made in the first world' and discuss their imperial quality.[79] The inclusion of climate mitigation may further exacerbate the problem, given the strong reliance of the international legal climate framework on multilateral negotiations and the potential of unilateral regulation to undermine common but differentiated responsibility.[80] In that regard, the turn to unilateral legal instruments to mitigate climate change signals a shift from cooperative multilateralism within the UN Framework Convention on Climate Change (UNFCC) towards the imposition of climate standards via unilateral trade rules on economically weaker States. As such, supply chain regulation is unilateral climate governance and raises concerns over self-determination and power differentials, particularly on North-South lines.[81]

The circumvention of multi-lateral forums has long been criticised from a participatory justice perspective.[82] When participation is limited, states from the Global South may once again find themselves in a position where they need to comply with rules made by others in order to maintain market access to the EU. Human rights and environmental due diligence instruments are acts of global governance that have implications beyond national jurisdictions and interfere with the sovereignty of host States, even though international law does not provide clear boundaries.[83]

The usual justification for this approach is based on output legitimacy. Host States are often perceived as unwilling, lacking sufficient power, or inherently incapable of holding huge companies accountable, leading states from the Global North to act in the (perceived) interest of the common good – in our case climate protection.[84] However, from a holistic legitimacy perspective, the mere reference to output appears dubious.[85] The fact that unilateral climate due diligence instruments can draw on international climate treaties with almost universal membership may provide some justification.[86] The same applies for the fact that such instruments rely on the UN

[76]See generally: SL Seck, 'Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?' 46 (3) (2008) Osgoode Hall Law Journal 565.

[77]Regulation EU 2023/1115.

[78]'Indonesia accuses EU of regulatory imperialism', 8 June 2023 <https://www.reuters.com/business/environment/indonesia-accuses-eu-regulatory-imperialism-with-deforestation-law-2023-06-08/> accessed 20 November 2024.

[79]CO Lichuma, '(Laws) Made in the "First World": A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains' 81 (2) (2021) Heidelberg Journal of International Law 497; see relatedly: BS Chimni, 'The International Law of Jurisdiction: A TWAIL Perspective' 35 (1) (2022) Leiden Journal of International Law 29; and Seck, 'Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?' (n 76); P Okowa, 'The Pitfalls of Unilateral Legislation in International Law: Lessons from Conflict Minerals Legislation' 69 (3) (2020) International and Comparative Law Quarterly 685; for a critique of the anti-imperialist critique: D Palombo, 'Transnational Business and Human Rights Litigation: An Imperialist Project?' 22 (2) (2022) Human Rights Law Review 1.

[80]Cf. J Scott and L Rajamani, 'EU Climate Change Unilateralism' 23 (2) (2012) European Journal of International Law 469.

[81]See on supply chain regulation more generally: N Krisch, 'Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance' 33 (2) (2022) European Journal of International Law 481, 493; Endres and Krisch (n 75) 476.

[82]See eg: E Benvenisti and GW Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' 60 (2) (2010) Stanford Law Revue 595.

[83]Krisch (n 81) 512.

[84]For a good overview with regard to human rights litigation: Palombo (n 79) 5–8.

[85]Endres and Krisch (n 75) 479.

[86]For a related argument with regard to human rights treaties and the German supply chain due diligence act, see: A Zimmermann and N Weiß, 'Völker- und verfassungsrechtliche Parameter eines deutschen Lieferkettengesetzes' 58 (4) (2020) *Archiv des Völkerrechts* 424; more generally: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, J Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN-Doc. A/HRC/17/31 of 21 March 2011, p 7.

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Guiding Principles on Business and Human Rights (UNGPs) which received broad acceptance, including by many states from the Global South. However, corporate climate accountability along global supply chains could interfere with the bottom-up process and the discretion of States in determining national contributions and the idea of common but differentiated responsibility in the light of transformation capabilities and historical contributions.[87] The EU-CSDDD only refers to the objectives of the Paris Agreement but not to CBDR or the commitment of developed countries to provide for technical and financial assistance.[88] Thus, if interpreted expansively, corporate climate due diligence concerning emissions in developing states could require more of suppliers than their governments are willing to accept within climate negotiations. It is also inherently problematic that the regulated companies become quasi-regulators able and legitimised to impose climate standards on suppliers along the value chain.[89]

At the same time, it must be acknowledged that non-regulation of climate impacts abroad and shielding corporations from accountability could equally be seen as imperialistic.[90] In many settings, the 'regulatory imperialism' critique bears a level of cynicism when brought forward by political elites in (semi-)authoritarian regimes to defend the status quo which itself can be seen as a legacy of colonialism. In such cases, sovereignty becomes a shield to defend economic interests of the powerful and unequal power-relations formed through colonialism and imperialism. This insight may not dismantle the critique voiced by states such as Indonesia completely but adds an additional layer of complexity.

In this difficult normative setting, scholarship promotes participation requirements as means to align home state regulation with the needs and demands of affected people in the Global South.[91] To a more limited extent, consultation of affected stakeholders throughout the due diligence process is also endorsed by the UNGPs and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct.[92] Promoted participation requirements could affect national legislative procedures, the administrative process, and enforcement by courts.[93] Ideally participation would go beyond mere consultations and allow for substantial impact on the regulative, administrative, and judicial process. Administrative co-regulation could, for example, include the development of common standards and guidelines by the EU and governments from the suppliers' side, involving local stakeholders as well. For the judiciary, the creation of mixed courts or arbitral tribunals with judges elected by governments of all involved States, which could adjudicate violations by companies taking into account local experiences, would mitigate impacts on self-determination.[94] The big question that remains is whether stakeholder consultation is

[87]For a similar point with regard to the extension of the EU Emissions Trading Scheme to aviation: Scott and Rajamani (n 80) 479–93; on CBAMs and CBDR eg: Mehling et al (n 11) 472; see generally on the structure of the Paris Agreement: L Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' 28 (2) (2016) Journal of Environmental Law 337.

[88]Note that the Directive requires companies to provide technical and financial support to 'Small and Medium Sized Enterprises' (SMEs) but only with regard to the general due diligence framework not with regard to climate transition planning: Art 11 para 3 lit. f EU-CSDDD.

[89]See GA Sarfaty, 'Shining Light on Global Supply Chains' 56 (2015) Harvard International Law Journal 419, 421; Lichuma (n 79) 529; F Dehbi and O Martin-Ortega, 'An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective' 17 (4) (2023) Regulation & Governance 927, at 934.

[90]Palombo (n 79) at 24 ('One should remember that not only the actions but also the inactions of states could be imperialistic'.); Dehbi and Martin-Ortega (n 89) 933: more generally on this dichotomy: SL Seck, 'Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations' 3 (1) (2011) Trade Law and Development 164, 196–9.

[91]See Lichuma (n 79) 520 and 530; Chimni (n 79) 52–3; Dehbi and Martin-Ortega (n 89) 933; M Mason, L Partzsch and T Kramarz, 'The Devil is in the Detail – The Need for a Decolonizing Turn and Better Environmental Accountability in Global Supply Chain Regulations: A Comment' 17 (4) (2023) Regulation & Governance 970, 978.

[92]UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework; UN Doc. A/HRC/17/31, Principle 18 b); para 25, 27, 28, 40, 42.

[93]Endres and Krisch (n 75), 471–6.

[94]Ibid., 489–92.

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ultimately effective, given the power-differentials involved. I will revisit this question in the concluding part and argue for some additional substantial safeguards to mitigate impacts on self-determination in the next section.

C. A compromise proposal

There is something to learn from each of the just explored critiques. Ideally, corporate climate due diligence legislation would achieve meaningful GHG emission reductions with benefits for people all over the world and particularly for the most vulnerable living in the Global South and at the same time respect self-determination and local circumstances. At first sight the not-enough argument inherently conflicts with the regulatory imperialism critique and the concern for common but differentiated responsibility. Only a very strong not enough argument may somewhat align with regulatory imperialism critiques, as both may suggest that efforts to limit the extraterritorial GHG footprint of corporations should be abandoned. In this last part of the Article, I nonetheless want to highlight some elements of what a compromise approach could look like that seeks to both strengthen corporate climate accountability and mitigate effects on self-determination of host-States. This compromise is meant to inform alternative visions of corporate climate supply chain legislation in countries outside the EU and legislative processes within Member States when transforming the EU-CSDDD into national law. The Directive allows Member States to go beyond the minimum requirements established in the Directive, including for corporate climate accountability.[95]

Taking the participatory critique seriously from my perspective does not necessarily disqualify unilateral regulation entirely. Although inclusive multilateral regulation would be preferable, meaningful cooperation in legislative and administrative procedures, and mitigating elements such as subsidiarity or reference to local laws and standards may present a second-best solution.[96] It appears possible in principle to align both 'not enough light' with participatory justice critiques. Even some more fundamental not enough critiques seem to agree that mandatory corporate climate responsibility – if ambitious – has a role to play in mitigating the effects of climate change even if states should also adopt more transformative or even revolutionary economic policies and laws to fundamentally change or even prohibit certain business models.[97]

Speaking of participation and co-regulation, it is too late to substantially increase participation of marginalised voices in the EU's regulatory procedure.[98] However, Member States are free to strengthen participation in national legislative procedures necessary to transform the Directive into national law and there remains room for participation of foreign stakeholders in administrative regulatory processes through the process of developing guidelines 'in consultation with Member States and stakeholders' on due diligence obligations for companies.[99] Although the

[95]Art 4 para 2 EU-CSDDD.

[96]See in that direction also: Krisch (n 81) 511, 513; but see for a critical appraisal of efforts to increase participation of 'weak States' and the clear preference for 'Subaltern internationalism' including a strong emphasize on 'self-determination': Chimni (n 79) 51–3.

[97]See Leite (n 67) 15; S Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' 36 (2) (2023) Leiden Journal of International Law 389, see on the risk that soft forms of corporate social responsibility may be a strategy to ward of stronger regulatory intervention which however ultimately supports stronger legal regulation: Kaplan (n 73) 150; for a more comprehensive theory of how to construct a legal system of corporate responsibility and accountability: SB Banerjee, *Corporate Social Responsibility: The Good, the Bad and the Ugly* (Edward Elgar 2007) 165.

[98]For a critique of insufficient participation: C Lichuma, 'Centering Europe and Othering the Rest: Corporate Due Diligence Laws and Their Impacts on the Global South,' (16th January 2023) <https://voelkerrechtsblog.org/de/centering-europe-and-othering-the-rest/> accessed 20 November 2024; K Davis, R Germano, and E Lauren, 'Did the Global South Have Their Say on EU Supply Chain Regulation?' NYU Law and Economics Research Paper No. 24-13 (2024) available at SSRN <https://ssrn.com/abstract=4735442> accessed 20 November 2024.

[99]As foreseen in Art 13 para 3 EU-CSDDD.

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EU-CSDDD foresees participation requirements concerning the corporate implementation stage only for the general due diligence framework,[100] not for climate planning, Member States remain free to adopt more meaningful participation requirements in that regard.[101]

Substantially, Member State legislation could even take up the European Parliament's proposal for mandatory corporate climate due diligence and, given the lack of enforcement mechanisms associated with climate planning, this appears as a viable way to address the 'not enough' critique. As climate due diligence itself remains imprecise, I propose here to adopt a combination of both corporate climate planning and climate due diligence. The element of transition planning may at first sight appear alien to the general due diligence framework that seeks to eliminate, minimize, or at least compensate for impacts on the environment and human rights. However, climate impacts differ from other environmental or human rights harms as only the accumulation of GHG emissions over time leads to harm. Although to some extent this harm is already a reality in the present, it cannot realistically be expected to stop GHG emissions immediately and such an emergency brake would impact on many social concerns. Thus, if governments would not want to go as far as precisely regulating individual companies carbon budgets, or adopting fixed percentage reduction commitments, they must rely to some extent on corporate target setting.

This must not mean letting companies off the hook of legal accountability for their impacts on the climate. Rather, legislators could establish more detailed guiding principles for climate transition planning and subject it to legal review, such as through administrative oversight and the possibility for civil society actors to submit substantiated concerns. Embracing such linkage between climate due diligence and climate transition planning could lead to a three-step assessment to determine whether companies have fulfilled their climate mitigation responsibilities, integrating procedural and substantive elements.

The first step would be procedural and require companies to conduct climate impact assessments, establish a detailed and science-based mitigation plan including measurable objectives and temporal targets for Scope 1, 2, and 3 emissions.[102] At this stage in particular, companies could be required to meaningfully consult potentially affected stakeholders, including local governments, suppliers, and their workforce. The aim is to tailor mitigation planning to the specific capabilities and needs of the local context and concretise emission reduction targets. Allowing for judicial oversight of consultation processes may not do away with inherent power-differentials but can be seen as one way to mitigate them.

The second step should be a plausibility control of self-set targets. Otherwise, companies may simply adopt unambitious targets. This plausibility control should take into consideration the Paris Agreement's temperature targets, NDCs issued by individual States where companies are active, and the CBDR principle.[103] Taking NDCs and CBDR into account mitigates interference with self-determination. While there is some debate regarding the binding nature of NDCs, a compelling argument can be made that NDCs expressed in clear, concise, and obligatory language can be considered as unilateral binding declarations under international law.[104] Regardless of one's stance on the argument, corporate climate supply chain legislation could potentially reference these documents and legally require corporations to take them seriously.

To mitigate concerns of paternalistic interference with sovereignty, judicial and administrative oversight could be limited to a plausibility control. For instance, if a state has set a net neutrality

[100]See Art 4 EU-CSDDD.

[101]See on the need to strengthen established consultative norms to avoid 'performative and superficial' consultations with limited sets of stakeholders: Mason, Partzsch and Kramarz (n 91) 977 and Dehbi and Martin-Ortega (n 89) 937.

[102]See for a science-based methodology eg: S Rekker and others, 'Measuring Corporate Paris Compliance Using a Strict Science-Based Approach' 13 (1) (2022) Nature Communications 4441.

[103]See for methodologies: ibid.

[104]B Mayer, 'International Law Obligations Arising in relation to Nationally Determined Contributions' 7 (2) (2018) Transnational Environmental Law 251; H Winkler, 'Mitigation (Article 4)' in DR Klein et al (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (First edition., Oxford University Press 2017) 163.

https://doi.org/10.1017/elo.2024.35 Published online by Cambridge University Press

target for a specific year, it would be unreasonable for a company to emit a substantial amount of greenhouse gases (GHGs) after that year without complementary efforts to increase carbon sinks or credible usage of offsetting schemes. If a state established interim targets, a company's self-set targets should not significantly deviate from these targets unless the company can demonstrate that reductions in other sectors will be sufficient to achieve the state targets. Equally, states' self-set targets should be subject to a plausibility control because all too often they are clearly insufficient, including for developing states or emerging economies with more leeway under CBDR.[105]

The third step requires assessing whether companies have complied with self-set targets. By incorporating these targets into the due diligence assessment, they would become enforceable through all foreseen mechanisms, including administrative oversight and potentially even civil liability, although it may still be challenging if not impossible to establish individual causal damage.[106] Oversight should also critically evaluate the usage of off-setting schemes to achieve self-set targets and whether they really contribute to protecting the climate.[107]

Given the varying influence and capacity of companies – depending on their market share and other factors – to achieve GHG emission reductions along global supply chains, regulators may adopt a differentiated approach, as advocated by the Hague District Court in *Milieudefensie vs. Royal Dutch Shell*. This approach argues that companies face an obligation of result for Scope 1 and 2 emissions, while only a 'significant best-efforts obligation' applies for Scope 3 emissions.[108] However, even for Scope 1 and 2 emissions it should be clarified that companies depend on factors and actors outside of their direct control (eg the availability of green energy which is linked to the speed of administrative approval processes for renewable energy production plants and financial support). In some cases, structural impediments may hamper companies' ability to implement self-set targets, and it may not be reasonable to hold them accountable in that regard if such restraints remain outside their sphere of influence. At the same time, it should not be considered a hindrance that certain business models are simply incompatible with net-zero targets. Implicitly, climate due diligence and transition planning may thus quasi-automatically establish certain red-lines, eg for the development of new fossil fuel extraction projects, in line with stronger not-enough critiques.[109] In that regard, climate transition planning can be an incentive for companies to make necessary strategic choices early to move away from unsustainable business models which at some point may become simply prohibited.

4. Outlook: Decentralised enforcement in a truly planetary legal order?

Even with strong participation requirements and reliance on NDCs and the principle of CBDR, it is not possible to eliminate the concerns raised by the paternalism and participatory justice critique. Particularly along North-South lines, the focus on participation may not fully mitigate interference with self-determination given persisting power differentials.[110] Transnational interactions shaping the emerging regulation of global supply chains cannot be detached from

[105] An overview of the sufficiency of states' NDCs and national climate reduction policies based on a methodology that takes CBDR into account is for example available at: <https://climateactiontracker.org/countries/> accessed 20 November 2024.

[106] Civil liability is much more difficult to establish which is why the promoted three-pronged test does not include aspects of remediation. But see for a proposal to include remediation in corporate climate due diligence: Bright and Buhmann (n 12) 12–13.

[107] Day et al (n 60), 36–48.

[108] *Milieudefensie et al v Royal Dutch Shell PLC* (n 22), para 4.4.23–4.4.24; this approach resonates with the distinction between strict liability and due diligence requirements under the UNGPs, Guiding Principle 13; see also: C Macchi and J Zeben, 'Business and Human Rights Implications of Climate Change Litigation: Milieudefensie et al v Royal Dutch Shell' 30 (3) (2021) RECIEL 409, 413.

[109] For a more skeptical assessment arguing for explicit regulatory red lines: J Dehm, 'Beyond Climate Due Diligence: Fossil Fuels, "Red Lines" and Reparations' 8 (2) (2023) Business and Human Rights Journal 151.

[110] Chimni (n 79) 51.

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unequal power relationships. Therefore, this final section offers some concluding thoughts on the potential of truly planetary supply chain regulation to strengthen corporate climate accountability.

It has often been lamented that states in the Global South are unable to introduce and enforce legal limits on negative corporate impacts on human rights and the environment. However, the capability of the Global South to develop creative regulatory proposals should not be underestimated. In the investment sphere, countries such as Brazil and India promote investment treaties that allow states more policy space to protect social concerns, including human rights.[111] Policymakers and industry representatives in Latin American countries already discuss the introduction of own CBAMs[112] and Brazil is in the process of adopting a national framework law on human rights and businesses.[113] The Philippines Commission on Human Rights accepts an obligation of 'Carbon Majors' to respect human rights in the context of climate change and to conduct corporate climate due diligence assessments.[114] While some developing countries may lack administrative, judicial, and economic resources, or simply the power to engage in confrontational approaches, this might not be the case for emerging powers like India, Brazil, South Africa, or Indonesia. Climate corporate due diligence regulations may take different forms in these countries compared to the EU but on a general level many developing countries seem to support corporate accountability for climate change.[115]

Given that many states in the Global North are not on track to meet their self-imposed mitigation targets, decentralised corporate accountability and enforcement through multiple jurisdictions could give some new impetus for protecting planetary interests and implementation of climate law. Simultaneously, such regulations from the Global South could break away from the 'quasi oligarchic structure'[116] of current supply chain regulation and align more closely with the subaltern regulation of corporations in the 'Capitaloscene', as envisioned by TWAIL scholars like Chimni.[117] Importantly, such legislation should also address environmental and climate impacts caused by companies along South-South supply chains[118] and thereby help to rein in market segmentation – the practice whereby green products are imported to the EU while unsustainable produce is exported to countries with no or very lax environmental standards. Such an approach may give rise to a truly planetary legal order on climate matters, relying on a multitude of overlapping legal regimes and decentralised enforcement through courts and administrative oversight from a plethora of States in the Global North and South.

[111]See eg: A Buser, *Emerging Powers, Global Justice and International Economic Law: Reformers of an Unjust Order?* (Springer International Publishing 2021), chapter 4.

[112]'Latin America may adopt its own carbon border controls in future: Alacero congress' <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/metals/111023-latin-america-may-adopt-its-own-carbon-border-controls-in-future-alacero-congress> accessed 20 November 2024.

[113]Projeto de Lei No. 572, de 2022 <https://www.camara.leg.br/propostas-legislativas/2317904> accessed 20 November 2024.

[114]Philippines Commission on Human Rights: 'National Inquiry on Climate Change Report 2022', p 110–14 <https://www.ciel.org/wp-content/uploads/2023/02/CHRP-NICC-Report-2022.pdf> accessed 20 November 2024; see on a more general level also: Palombo (n 79) 8.

[115]See eg the support for the inclusion of climate change related language by countries such as Brazil, Egypt, Palestine, Panama, and the Philippines, in: Human Rights Council, Text of the third revised draft, A/HRC/49/65/Add.1, 28 February 2022, p 4, 6, 8, 24.

[116]Endres and Krisch (n 75) 478 (own translation from the original German text).

[117]See Chimni (n 79) 53.

[118]See for examples where South–South cases concerning corporate environmental impacts reached courts: *Formosa Plastics lawsuit (re marine pollution in Vietnam, filed in Taiwan)* (2020) Taiwan Supreme Court Appeal No. 1084 (pending); *Class action lawsuit v Anglo American South Africa Ltd* (2020) High Court of South Africa No. 2020/32777 (pending); summaries of both procedures are available at: <https://www.business-humanrights.org/de> accessed 20 November 2024.

Cite this article: A Buser, 'Protecting the climate through EU supply chain legislation? Two critiques and a compromise' (2024) *European Law Open*. https://doi.org/10.1017/elo.2024.35