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Research Handbook on Climate Finance and Investment Law

By Michael Mehling and Harro van Asselt (eds)

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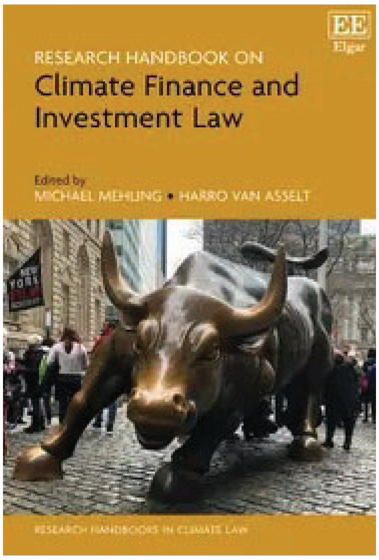

The *Research Handbook on Climate Finance and Investment Law* (2024), edited by Michael Mehling and Harro van Asselt, provides a comprehensive analysis of how global capital intersects with climate policy, climate risk and emerging fiduciary responsibilities associated with the green transition. Split into four distinct yet interrelated sections on climate finance, trade, climate risk, and financial instruments, the book offers ideas for managing and scaling up climate finance and sustainability in ways that are inclusive from financial, social, and environmental perspectives. Authors include academics from several Western universities and research institutes, legal practitioners, practitioners in climate finance from multilateral development institutions, and the private sector. This breadth of authorship reflects the breadth and complexity of debating, researching, and ultimately working on climate finance, thus making this edited volume comprehensive and a particularly useful reference for a wide range of readers.

After the initial chapter on mapping the field of climate finance and investment law and establishing the book's objectives, the opening section lays out the legal and structural bedrock of climate finance and its evolution over five additional chapters. In the initial chapters (2, 3 and 4), the authors present key developments in climate policy and climate finance through the lens of climate institutional development, tracing the evolution of financial mechanisms under the United Nations Framework Convention on Climate Change (UNFCCC), the Paris Agreement and the Nationally Determined Contributions (NDCs); as well as the role of the Gren Climate Fund (chapter 3) and the multilateral development banks (chapter 4) as vehicles to support countries meet the pledges under international climate targets. A central point arising from this overview is the need to expand the financial base for climate finance, as public

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finance alone cannot bridge the climate investment gap. A primary purpose of climate law is to support the creation of regulatory frameworks that de-risk and therefore facilitate private investments. For instance, blended finance through the three traditional UNFCCC-mandated climate funds such as the Global Environment Facility (GEF), the Green Climate Fund (GCF), and the Adaptation Fund (AF), as well as the non-UNFCCC Climate Investment Funds (CIFs), can serve to de-risk projects by subsidising or incentivising them through lower interest rates, guarantees, insurance, or first-loss equity positions. Chapter 5 starts from the premise of the growing role of these institutions in the delivery of international climate finance, and the all-too-necessary systems of monitoring and standard-setting for accountability. Ensuring that climate impacts are achieved alongside other social and institutional objectives, as fully detailed in the Sustainable Development Goals, is paramount for transparency and to ensure integration, rather than fragmentation, of reporting and outcomes. As climate finance further expands beyond mitigation and adaptation to also include finance for loss and damage, detailed in chapter 6, the issue of the size of available resources and their allocation continues to occupy an important space in the debate: fund mobilisation, governance and conceptual debate on roles and responsibility must be voiced more cohesively in order to achieve real transformations in the countries that mostly need climate finance.

These debates depict a fragmented and often conflictual landscape. Governance and decision-making in the context of multilateral climate finance have been marred by operational delays and patchy institutional reforms. While the rephrased principle of Common But Differentiated Responsibilities has provided the foundational drive towards a shift from a rigid North-South divide to a more nuanced, dynamic system of NDCs, persistent structural tensions remain. For instance, the gap between public commitments made in diplomatic forums and the actual legal enforceability of those pledges has resulted in smaller resource pools and, therefore, fewer investments. At the same time, the focus on bridging financial gaps through market mechanisms and enhanced private-sector participation fails to provide sufficient resources for adaptation, climate resilience, and loss and damage.

Section II on International Trade and Investment Law introduces a discussion of subsidies for the green transition and their potential implications over three chapters that delve into the legal friction between international trade law and climate subsidies. For example, the need for blended finance, generally heralded as a given in climate finance, has also brought additional considerations on the legality of subsidies. For instance, World Trade Organization (WTO) rules on subsidies and countervailing measures could conflict with domestic green industrial policies like the U.S. Inflation Reduction Act or the EU's Green Deal. While subsidies, including those for renewable technologies, can help lower costs and facilitate the uptake and scaling of clean energy generation, they have also been seen as being trade- and market-distorting. It is key here to find a way forward for reforming international investment law in ways that advance, rather than hamper, investments in the green economy. This could mean exceptions for renewables, but also additional restrictions to address harmful fossil fuel subsidies, notwithstanding individual countries' transition plans and CBDR.

The third section of the volume considers over three chapters the issue of climate risk and the way thinking around different typologies of risks has influenced regulatory supervision (e.g. new requirements by central banks on climate risk disclosures), corporate responses (seeing climate risk as a financial risk and not only as an ethical and corporate social responsibility (CSR) issue; and the understanding of transition risks, included on stranded assets caused by policy shifts or rapid technological changes. Chapter 10, for instance, focuses on the insurance sector, closely linking climate change to a higher incidence of extreme events that are now becoming 'uninsurable'. This recognition highlights the potential of insurance products that, despite the existence of principles and research, remain under-deployed in many countries. Further, climate litigation has also risen, in part shaping corporate sustainability targets, but also constraining investors. As climate change is increasingly recognised as a material financial risk, the potential financial losses are driving changes in fiduciary duties, as presented in chapter 11. In many jurisdictions, directors are becoming legally exposed if they fail to account for long-term climate trajectories, turning climate negligence into a source of corporate liability. This has provided new models of accountability in corporate transactions, including environmental and social safeguards, compliance, and redress mechanisms. These seek to establish robust parameters for climate finance that also consider co-developmental benefits and potential sources of harm, thereby enhancing reporting under ESG, SDGs, and just transition frameworks. The final chapter of this section focuses on fossil fuel divestments; it provides a rich overview that links, in part, to climate risk from the perspective of stranded assets and, in part, to advocacy and activism that insist on providing alternatives to oil and gas through both moral and economic arguments. The final section of this edited volume addresses the very important issue of moving beyond the existing structures in climate finance and considers additional methods of resource mobilisation that can also attract private sector finance, such as through the carbon markets, explored in chapter 13, debt instruments (chapter 14), project finance (chapter 15) and natural capital (chapter 16). Seeing climate finance not only from a purely 'financial' perspective but also as an integrative framework that accounts for risks and safeguards is key to making climate finance more competitive while also responding to needs and ensuring consistent coverage of sectors and subsectors that may be less attractive from a financial return perspective but that have critical public-good value. This approach can make green projects in emerging economies bankable for institutional investors and also provide avenues for markets and governments to address overreliance on private markets. The fourth section seeks to address and overcome these persistent dichotomies (public versus private; global north vs global south; adaptation vs mitigation) to counter the growing fragmentation of the policy and regulatory framework governing climate finance and investment law.

While some chapters, such as those dedicated to the role of multilateral development banks, illustrate many of the positive outcomes of delivering climate finance, including innovative financing mechanisms, financial leverage, and policy-driven initiatives, others point to a potential accountability deficit, particularly in complex interventions involving multiple parties. The authors stress that fragmentation and complexity can create unnecessary conflicts in compliance regimes and may lead to 'regulatory arbitrage' and 'forum shopping' for transnational investors, who will seek to move capital to jurisdictions with weaker definitions of environmental sustainability. Climate finance, investment law, and the regulatory and policy framework surrounding climate and the environment are ever-changing fields. This makes some of the chapters (despite being only one or two years old) already outdated. For example, the fragmentation in regulatory expectations for reporting, including climate risk disclosures and green taxonomies, has been recognised as an issue, and sustained work is underway to merge requirements into globally recognised and applied standards. This is the case of the International Sustainability Standards Board (ISSB) absorbing the requirements of the Task Force on Climate-related Financial Disclosure (TCFD), which now also drives sustainability reporting under International Financial Reporting Standards (IFRS). At the same time, many green taxonomy frameworks seek to converge around principles of interoperability, do-no-significant-harm and the application of minimum safeguards.

At the same time, the book seems to be predominantly driven by market-based responses and is heavily skewed towards Western ideas. It does not address more localised (but still important) responses and practices in the Global South, which also positively contribute to fighting climate change. The book shies away from engaging with some critical debates surrounding climate finance. For example, its discussion of natural capital, REDD+, and nature-based solutions is one-sided. While they represent additional revenue-generating avenues for institutions, they can also come with important challenges that need to be recognised more strongly. If natural capital refers to supporting the exploitation of natural resources that will compromise ecosystem integrity, then its inclusion in climate finance frameworks (including eligibility under green taxonomy frameworks) can be contested. If REDD+ entails the exclusion of traditional/indigenous communities from conserved and regenerated areas that may now be under protection, then any potential climate impact (e.g., increased carbon sinks) will be cancelled out by negative social impacts (e.g., loss of livelihoods and displacements). Without addressing circularity and end-of-life in materials and resources, narrowly solving the climate crisis will create additional stresses, for example, on metals and critical minerals, and on water use.

Ultimately, these concerns need to be fully addressed to improve the effectiveness of climate finance delivery. Stronger cooperation among public agencies, including those within the United Nations family, can help bridge some of the social and environmental gaps in climate finance. Promoting direct access to deliver climate finance from an expanded pool of donors through national entities, as provided by the GCF and AF, is a valuable attempt to move away from relying on the largest players, including all multilateral development banks, to ensure climate investments that more closely respond to the needs of the countries.