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Review of Spier, J. (2023) Climate litigation in a changing world

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Citation

Baars, L. P. (2024). Review of Spier, J. (2023) Climate litigation in a changing world. *Netherlands International Law Review*, 70(3), 407-412. doi:10.1007/s40802-024-00248-6

Version: Publisher's Version

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Note: To cite this publication please use the final published version (if applicable).



J. Spier, *Climate Litigation in a Changing World*

Eleven, The Hague, 2023, 609 pp., ISBN 978-94-6236-326-7

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Published online: 26 February 2024
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The adverse effects of climate change are painfully tangible in large parts of the world, yet the prevailing political stalemate makes a timely solution implausible. As a consequence, NGOs and individuals around the globe are exploring novel avenues to increase international efforts against climate change. One of those avenues is climate litigation. Despite early success stories—including *Ashgar Leghari v. Federation of Pakistan* (2015)¹ and *Urgenda Foundation v. State of The Netherlands* (2019)²—the notion of climate litigation continues to pose a challenge for the courts, since the law is both ambiguous and unresolved while hugely diverging interests dominate the playing field.

Jaap Spier's *Climate Litigation in a Changing World* sheds light on the phenomenon of climate litigation, its underlying legal rationale, and the (potential) development of climate obligations for states and enterprises. The book's aspiration to help stakeholders understand what role the law plays in shaping climate obligations, and to pin down the content of their respective obligations, is supported by its innovative dichotomous design (p. 3). Part A explores various legal sources of climate obligations, as well as certain fundamental, yet controversial, questions pertaining to climate litigation, such as the availability of remedies, the responsibility for historical emissions, and the appropriate function of the courts. Subsequently, the account of twelve hypothetical climate cases in Part B allows the reader to apply their newly gained knowledge on climate litigation to scenarios drawn from practice. Although the book only focusses on climate cases in domestic courts (p. 4), it skilfully draws on both domestic legal infrastructure—concerning, for example, tort law and remedies—and public international law—concerning, for example, the precautionary principle and climate change law. As such, it demonstrates that international law

¹ Lahore High Court 4 September 2015, Case No. W.P. No. 25501/2015.

² Supreme Court of the Netherlands 20 December 2019, ECLI:NL:HR:2019:2006.

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forms an indispensable foundation for climate litigation, even where such litigation occurs within a state's national legal system.

Spier commences with the observation that anthropogenic climate change constitutes a global crisis, but states and enterprises are failing to create binding, enforceable and sufficient international instruments in time to curb its consequences due to their short-term focus (p. 25). Despite small steps in the right direction, such as the adoption of the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction in June 2023,³ the alternative pathway of climate litigation is thus a justifiable option when the international political arena is unable or unwilling to agree on organized efforts (pp. 36, 39).

The backbone of Part A consists of Chapter V, which outlines the legal bases of climate obligations to assert that such obligations exist and their content is discernible, even 'in the absence of pertinent black letter law' (p. 49). Numerous sources of law, including the Paris Agreement, human rights law, and tort law, are touched upon as the author considers that climate obligations are more easily derived from a combination of solid legal bases (p. 52). While this comprehensive enumeration of sources has its advantages, it inevitably results in a somewhat fragmented analysis of the law. On the one hand, certain sections could have benefited from a more thorough evaluation to adequately synthesize the author's arguments. The discussion of the human rights obligations of states (pp. 62–80) is largely dependent on quotations from United Nations Special Rapporteurs and case law with few additions from the author himself. This section emphasizes the human rights violations stemming from the adverse effects of climate change, and shows little regard for the notion that climate mitigation and adaptation activities can also negatively affect the enjoyment of human rights. The author could have taken this opportunity to include a discussion on just transition cases, such as *Sindicato de Trabajadores de Empresa Sociedad Maritima y Comercial Somarco Limitada et al. v. Ministry of Energy* (2021),⁴ to underline that a state's decarbonization strategy and mitigation action can also result in a violation of human rights. On the other hand, he offers a profound examination of relevant soft law instruments and their fragmentation—for example concerning the human rights obligations of multinational corporations (pp. 80–102). Spier convincingly argues that such soft law instruments are valuable for climate litigation because they are capable of colouring equivocal norms of hard law (p. 101), a position already endorsed by the courts in certain climate cases, e.g., *Milieudefensie v. Royal Dutch Shell* (2021).⁵ In a similar vein, he contends that the value of states' and enterprises' pledges to reduce emissions should not be underestimated, since courts have already interpreted them as contributing to the creation of climate obligations in e.g., *Urgenda Foundation v. State of The Netherlands* (2019) (pp. 152–162). This perception especially bears merit if one considers that voluntary emission reduction

³ The Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (adopted 19 June 2023, not yet entered into force) addresses climate change in the preamble and Arts. 7(h) and 17(c).

⁴ Supreme Court of Chile 9 August 2021, Case No. 25.530–2021.

⁵ District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5337.

pledges are currently the linchpin of international climate change law in the form of nationally determined contributions under the Paris Agreement.⁶

Notwithstanding these potentially solid legal foundations, Chapter V concludes that climate litigation is a lengthy and arduous road to embark upon, and a blueprint or comprehensive plan of global climate obligations—i.e., towards all other actors—for states and enterprises would be preferable (p. 198). Spier proposes a strategy to create this blueprint which decides on the upper limit of the temperature increase, the remaining carbon budget, and the division of this budget (pp. 198–211); a laudable effort for a seemingly impossible project. Given the vigour with which he outlines this blueprint and the manifold references to it throughout the book, it is regrettable that its scope remains narrow. The complex notion of anthropogenic climate change is reduced to a mere temperature goal, whereas climate justice encompasses more than that. Involving considerations of adaptation or loss and damage in the blueprint may have alleviated his assertion that the needs of people and communities that are vulnerable to climate change cannot be the decisive factor in determining global climate obligations, since ‘the law is not a beauty contest’ (pp. 202–204, quote at p. 202). Although the author acknowledges that vulnerable groups should not be completely left to their own devices but should be compensated for the climate harm suffered (pp. 203–204), Chapter VI rightfully points out that awarding damages in climate litigation is a Herculean task (pp. 243–264, 269–271).

On that account, the book presents climate litigation as a means of ‘last resort’ in the fight against climate change (p. 289). One noteworthy justification to support this conclusion is extensively referred to throughout Part A: different courts can rule differently on similar issues, hence the outcome of climate cases will remain uncertain (pp. 300–315). In the absence of clear-cut climate obligations, the predisposition and beliefs of judges towards climate change and societal demands can be pivotal to their judgments because they have considerable freedom to interpret ambiguous provisions (e.g., pp. 35, 128–130, 195, 290–291). In the ensuing chapters, Spier illustrates, with the help of various domestic climate cases, that the morals and values of a court can indeed be crucial to any decision (pp. 339–353). Although he is not outspoken in his criticism, he does critically evaluate the *Milieudefensie v. Royal Dutch Shell* judgement, where the court’s assessment of Shell’s scope 3 emissions is not backed up by an authoritative legal source. Rather, Spier argues, it seems as though the court innovatively interpreted an open norm based on its own belief that emissions need to be reduced (pp. 421–422). In sum, plaintiffs and defendants in climate litigation are advised that they should be prepared to present both legal and moral arguments to advance their case (p. 352).

Accordingly, Part A positions climate litigation as a constructive alternative to regulatory solutions, while, at the same time, refuting the belief that climate litigation is a ‘holy grail’ solution. Spier’s most commendable contribution to the current discourse on climate litigation, however, can be found in Part B of the book. Its casuistic approach contextualizes the key issues set out in Part A and provides

⁶ Arts. 3 and 4(2) of the Paris Agreement (adopted 7 December 2015, entered into force 4 November 2016).

the reader with a myriad of fictional scenarios capable of inspiring real-life climate cases.

Within Part B, every reader will surely be able to find cases that relate to their individual interests, as a multiplicity of topics are explored: the manufacturing of luxurious cars with a high carbon footprint (case 4), the subsidizing of multinational enterprises to increase their reduction of emissions (case 6), or the concept of gap filling by actors already compliant with their climate obligations (case 11). Although many thought-provoking and divisive topics, such as (the lack of) climate finance or declining biodiversity and the associated rights of nature, are not discussed, the book already encompasses an impressive 564 pages. The following considerations aim to illustrate the value of Part B based on three of the fictional cases.

The first case examines the question of states' obligations to reduce emissions; a question which has been, up until now, the primary focus of climate litigation. Eloquently, Spier undertakes to present the various sources of law that could lay the foundations for stringent climate obligations, while supporting his claims with climate judgments (pp. 361–388). Predicting the outcome of any case is, of course, an attempt to square a circle, but the author puts considerable effort into describing the distinct responses that courts could provide when presented with the question of the climate obligations of an affluent state.

The climate obligations of a different type of actor, namely fossil fuel enterprises, are engaged with in the third case. In light of the enthusiasm with which COP28 addressed the phasing out of fossil fuel subsidies and the 'beginning of the end' of the fossil fuel era,⁷ Spier's stance on this matter may seem surprising. He expresses his reservations about regarding fossil fuel enterprises as the main perpetrators of climate change and believes that legal action against them is unlikely to directly result in an effective transition towards renewable energy (pp. 409–410). Nonetheless, the third case contends that human rights law and tort law establish elementary legal obligations for fossil fuel enterprises concerning the reduction of emissions from their products and services, i.e., 'scope 3 emissions'. These blanket obligations could then be concretized through principles and soft law initiatives to determine that scope 3 emissions should be phased down and phased out (pp. 410–439). A plethora of soft law instruments are examined, including the United Nations Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, and the Principles on Climate Obligations of Enterprises, since these are able to provide building blocks upon which the courts can base their judgements. An inclination towards soft law, principles, and good practice is discernible in most fictional scenarios of Part B focused on enterprises, which aptly demonstrates the prevailing regulatory gap of climate obligations for non-state actors. Spier's concluding observation states that the scope 3 emissions of multinational enterprises will be a significant subject of future climate litigation (pp. 446–447), a prediction already coming

⁷ Closing speech of COP28 by the United Nations Climate Change Executive Secretary Simon Stiell, <https://unfccc.int/news/we-didn-t-turn-the-page-on-the-fossil-fuel-era-but-this-outcome-is-the-beginning-of-the-end-un>.

to fruition with cases like *Kaiser et al. v. Volkswagen AG*.⁸ More generally, the author seems to suspect that the climate obligations of enterprises are an up-and-coming topic of climate litigation, considering that most of the fictional scenarios from Part B concern either these obligations directly (cases 2, 3, 4, 5, 10, 11, and 12) or states' obligations to regulate enterprises (cases 6, 7, 8, and 9).

The tenth case pertains to another often discussed issue in the discourse on climate change: loss and damage. This case testifies to the complex legal challenges involved in loss and damage cases, such as the delineation of unlawful emissions and the question of causality (pp. 528–532). Due to the absence of comparable cases and straightforward solutions, courts and parties will be required to think outside the box. However, in doing so there is a need to find an equilibrium between the requests for compensation and evading the crushing liability of states and enterprises for climate change (pp. 545–548). The case thus befittingly indicates how one's moral compass can be at odds with legal reality. Furthermore, Spier utilizes this illustration to advance his argument that climate litigation may not be the optimal approach to the loss and damage conundrum because it will, in all likelihood, lead to long-lasting uncertainty and divergent outcomes (pp. 546–547). While a workable global framework with universal support might be the preferable solution, it is demonstrably hard to achieve—'the fate of the Loss and Damage Mechanism is telling' (p. 546)—and strategic climate litigation may thus be the next best option.

Climate Litigation in a Changing World brilliantly demonstrates how academia, practice, and realistic activism can go hand in hand to create an innovative and sensible approach to the phenomenon of climate litigation. The knowledge that Spier has on the topic, undoubtedly by virtue of his vast experience as Advocate General at the Dutch Supreme Court, a professor at various universities, and the co-founder of an Expert Group on climate change, shines through. He strikes the right balance in actively promoting climate litigation as an opportunity to encourage states and enterprises to adhere to their climate obligations, while retaining transparency and honesty about the imperfections of this approach. Part A offers the reader an abundant insight into the development of climate obligations and the key issues of climate litigation, though it is at times somewhat repetitive and excessively reliant on quotations. Part B constitutes a meritorious analysis of potential topics of climate litigation, thereby providing accessible support to plaintiffs and defendants alike in identifying certain starting points for their respective arguments.

Throughout the book, Spier visualizes climate change as the gorgon Medusa, as 'it is unlike any other sustainability issue' that the world faces today (pp. 29, 31, 51, 372, quote at p. 31).⁹ This begs the question of who, or what, will be the hero Perseus that rescues the world from the global climate crisis. As this book

⁸ Pending, filed in November 2021 at the Regional Court of Braunschweig, Germany.

⁹ In Greek mythology, however, Medusa had two other gorgon sisters, Stheno and Euryale. Unlike Medusa they were immortal, which raises the worrisome question of which global challenges they could represent in the comparison.

aptly contends, the law will not be capable of solving all, or even most, climate problems, but it could certainly contribute in a meaningful manner.

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