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## Reflection 5: Non-State Actors

### The Role of Non-State Actors in Climate Law

MIKKO RAJAVUORI

This chapter engages the key legal debates surrounding the role of non-state actors (NSAs) in climate law.<sup>1</sup> NSAs – a wide category that reflects the expansion of international climate governance beyond the state – include entities as diverse as individuals, companies, international organizations, industry associations, cities, indigenous peoples, and civil-society organizations. Over the past decades, and especially since the adoption of the Paris Agreement, the many roles of NSAs in addressing climate change have attracted significant interest from treaty negotiators, business managers, environmental activists, policymakers, and researchers. Seen as performing vital functions ranging from innovation and agenda-setting to implementation, monitoring, and enforcement, NSAs are widely considered as bringing about dynamic forms of climate governance. The potential of direct mitigation effort by NSAs, such as voluntary emission reduction commitments by companies and cities, is similarly highlighted as a key component in any future solution to climate change.

The growing climate action by NSAs forces a rethink of the legal underpinnings of the climate regime and opens new perspectives on the logic of NSA-driven climate governance. This chapter discusses the legal dynamics of non-state climate governance. Using three archetypal NSAs – companies, cities, and civil-society organizations – as proxies, the chapter isolates three primary debates that frame the interactions between NSAs and climate law. These debates focus on the responsibility of NSAs for causing climate change, the legal techniques of NSA governance, and the role of NSAs as agents of legal change, and they reflect the rise of polycentric climate governance and illustrate the expansion of climate law beyond its original emphasis on states. However, the discussion also exposes the difficulties that emerge when embedding different

<sup>1</sup> This work has been supported by the Academy of Finland (grant no. 324037).

NSAs in a single conceptual frame, as well as the limits of NSA-driven governance more broadly.

### Non-State Actors in International Climate Governance

It is rare to define the most significant actors in a given social system through a negation.<sup>2</sup> Yet this is how NSAs are characterized in the climate change regime. Conceptually, the category of NSAs may include virtually anything: companies, international organizations, investors, social movements, religious communities, industry associations, and, ultimately, individuals. Even though the concept has become more expansive over the years,<sup>3</sup> the one actor which the category of the NSA cannot include has always been the state – and especially the state’s institutions and representatives involved in multilateral negotiations and lawmaking at the international level.<sup>4</sup>

States as aggregate political entities have assumed regulatory authority to manage their internal affairs and arrange the relationships with each other in the way they see fit. As a corollary to such sovereign prerogative, states also remain the actors responsible for keeping their commitments under various regional and international treaties across areas as diverse as trade and investment, human rights, and environmental protection.<sup>5</sup> This privileged position also forms the cornerstone for the organization and operationalization of global efforts to curb the adverse effects of climate change.

The conceptual rift between state and non-state actors has been engrained in the international climate regime since its inception. While the boundaries of NSA action have expanded along with the idea of ‘polycentric governance’,<sup>6</sup> the fact remains that it was initially the states – individually

<sup>2</sup> Natasha Affolder, ‘Non-State Actors’ in Michael Faure (ed.), *Elgar Encyclopedia of Environmental Law: Volume III* (Elgar 2017) 388.

<sup>3</sup> Writing in the early 2000s, Raustiala considered NSAs primarily refer to ‘private interest groups’ and ‘epistemic communities’ such as research organizations. Companies and cities, among other actors, had no room in this analytical scheme. See Kal Raustiala, ‘Nonstate Actors in the Global Climate Regime’ in Urs Luterbacher and Detlef Sprinz (eds.), *International relations and global climate change* (MIT Press 2001) 97–8.

<sup>4</sup> Philip Alston, ‘The “Not-a-Cat” Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?’ in Philip Alston (ed.), *Non-State Actors and Human Rights* (Oxford University Press 2005).

<sup>5</sup> Math Noortmann, August Reinisch and Cedric Ryngaert (eds.), *Non-State Actors in International Law* (Hart 2015).

<sup>6</sup> Andrew Jordan and others, ‘Emergence of Polycentric Climate Governance and Its Future Prospects’ (2015) 5 *Nature Climate Change* 977.

and collectively – that bound themselves to limit greenhouse gas emissions. Even though the ambition of this obligation was rather modest in the UNFCCC,<sup>7</sup> and only slightly bolder in the Kyoto Protocol,<sup>8</sup> the logic of the law on climate change rested on the authority of sovereign states to negotiate internationally, and then to roll out nationally, laws and policies that would make emission reduction targets a reality.<sup>9</sup> In this scheme, NSAs were, in principle, designated either as potential observers in the multilateral negotiation processes, as is the case with industry associations and civil-society organizations (CSOs), or as targets of state regulation at the national level, as is the case with companies.

In reality, neither the UNFCCC system nor other international environmental regimes have ever fully embraced the model of state-led governance in its idealized form. Rather, even the ‘monocentric’ expressions of the climate regime can be characterized as pursuing a hybrid governance model with ample room for non-state experimentation.<sup>10</sup> Accordingly, NSAs were far from rule-takers even in the early years of the climate regime. For instance, the significance of non-governmental organizations (NGOs), such as industry associations and research institutions, in lobbying, agenda-setting, policy implementation, and monitoring was acknowledged from the start.<sup>11</sup> Reflective of the prominent role of NSAs in international environmental law more generally, the climate regime has continued to further involve NSAs in its formal procedures. Even if climate negotiations still operate by colour-coding the participants based on institutional affiliation, the 2015 Paris Agreement<sup>12</sup> and subsequent developments have further strengthened the role of NSAs in reviewing ambition, implementation, and compliance with emission-reduction targets.<sup>13</sup> Scholars of environmental politics refer to the increasing involvement of NSAs within the UNFCCC system as ‘hybrid multilateralism’, which

<sup>7</sup> UN Framework Convention on Climate Change (adopted 9 May 1992, EIF 21 March 1994) 1771 UNTS 107.

<sup>8</sup> Kyoto Protocol to the UNFCCC (adopted 11 December 1997, EIF 16 February 2005) 2303 UNTS 162.

<sup>9</sup> Benoit Mayer, *The International Law on Climate Change* (Cambridge University Press 2018).

<sup>10</sup> Harro van Asselt and Fariborz Zelli, ‘International Governance: Polycentric Governing by and Beyond the UNFCCC’ in Andrew Jordan and others (eds.), *Governing Climate Change: Polycentricity in Action?* (Cambridge University Press 2018).

<sup>11</sup> Joyeeta Gupta, ‘A History of International Climate Change Policy’ (2010) 1 *WIREs Climate Change* 636.

<sup>12</sup> Paris Agreement (adopted 12 December 2015, EIF 4 November 2016) (2016) 55 ILM 740.

<sup>13</sup> Harro van Asselt, ‘The Role of Non-State Actors in Reviewing Ambition, Implementation, and Compliance under the Paris Agreement’ (2016) 6 *Climate Law* 91.

reflects the 'intensified interplay between state and non-state actors in the new landscape of international climate cooperation'.<sup>14</sup>

The turn to non-state climate governance is often viewed in a positive light.<sup>15</sup> Voluntary emission-reduction pledges by companies, industry-wide certification schemes, activist campaigns, and subnational regulatory action, among other forms of polycentric governance, are seen as an opportunity to ratchet up climate ambition and galvanize transnational governance arrangements in the absence of a swift governmental response. But even though NSAs have assumed functions that supplement, or in some cases replace, national mitigation efforts, NSA-driven governance is beset with significant conceptual, institutional, and practical hurdles that call its operational logic and effects into question.<sup>16</sup>

Conceptually, the mitigation action of NSAs can be seen to replicate the so-called 'waterbed effect' – usually associated with emission-trading schemes – whereby voluntary emission reductions by some NSAs merely make it easier for states to achieve their reduction targets.<sup>17</sup> But even if voluntary efforts may enable states to overachieve targets or enhance their ambition, this is by no means a given. Moreover, even if some NSA governance is beneficial to climate change mitigation, other NSAs may actively resist and reduce its potential. For example, the creation, funding, and operation of climate change counter-movement organizations<sup>18</sup> is a clear expression of NSA-driven climate governance, just as pro-climate lobbying by international NGOs such as Greenpeace is. Distinguishing NSA-led action from state-centric governance efforts is also difficult, as many non-state initiatives ultimately either rely on the state's financial and regulatory infrastructure or take the form of public-private partnerships.<sup>19</sup> Likewise, the practical hurdles relating to the transparency, effects, and legitimacy of NSA-driven governance are formidable. Tracking the realization of

<sup>14</sup> Karin Bäckstrand and others, 'Non-State Actors in Global Climate Governance: From Copenhagen to Paris and Beyond' (2017) 26 *Environmental Politics* 561, 562.

<sup>15</sup> Jonathan Kuyper, Björn Ola Linnér and Heike Schroeder, 'Non-State Actors in Hybrid Global Climate Governance: Justice, Legitimacy, and Effectiveness in a Post-Paris Era' (2018) 9 *WIREs Climate Change* 1.

<sup>16</sup> Sander Chan and others, 'Promises and Risks of Nonstate Action in Climate and Sustainability Governance' (2019) 10 *WIREs Climate Change* 1.

<sup>17</sup> Knut Einar Rosendahl, 'EU ETS and the Waterbed Effect' (2019) 9 *Nature Climate Change* 734.

<sup>18</sup> Robert Brulle, 'Institutionalizing Delay: Foundation Funding and the Creation of US Climate Change Counter-Movement Organizations' (2014) 122 *Climatic Change* 681.

<sup>19</sup> Philipp Pattberg, 'Public-Private Partnerships in Global Climate Governance' (2010) 1 *WIREs Climate Change* 279.

corporate climate pledges, for instance, has proven tricky, as has the elimination of double-counting of potential emission reductions.<sup>20</sup> Finally, the geography of NSA-driven initiatives is heavily skewed towards the developed world, thus raising questions about the main beneficiaries, and, with that, the legitimacy of non-state climate governance.<sup>21</sup>

Even though the abundant environmental-politics scholarship has already documented and typologized the many roles of NSAs in climate governance,<sup>22</sup> an overarching legal analysis of the new 'NSA regime complex' is still missing. To be sure, the existing body of legal principles and rules – whether national or international, public or private, hard or soft – that has emerged as a response to climate change already occupies multiple levels and sites of governance. However, the gradual rise of hybrid multilateralism, and the emergence of various self-organizing governance initiatives on the national level, will render the legal universe more complex and further blur the distinction between states as rule-makers and NSAs as rule-takers. For instance, companies' voluntary carbon pledges may be characterized as a species of contract or consumer-protection law. In this way, the rise of NSA-driven transnational-governance initiatives increasingly turns the analytical lens away from international climate law to domestic law, whether constitutional, administrative, or private.

The following section analyses the key legal debates on NSA-driven climate governance. Diffuse and fluid, the analysed debates emerge with varying intensities among different NSA groups. The governance role of companies, for instance, has spurred an active debate on liability, whereas CSOs are most often discussed with reference to lobbying for legal change and norm diffusion. While no debate has fully matured, together they provide the initial bearings that help to systematize both established and emerging legal discourses prompted by the rise of non-state climate governance.

## Non-State Actors in Climate Law: Key Debates

### *Companies*

Companies may well be the most important NSAs in climate governance. Most commercial carbon-emitting activities are organized through the

<sup>20</sup> Angel Hsu et al., 'Track Climate Pledges of Cities and Companies' (2016) 532 *Nature* 303.

<sup>21</sup> Chan and others (n. 16).

<sup>22</sup> John Dryzek, 'The Meanings of Life for Non-State Actors in Climate Politics' (2017) 26 *Environmental Politics* 789.

corporate form. For this reason, companies have taken centre stage in key debates on the historical<sup>23</sup> and contemporary responsibility<sup>24</sup> for climate change. They are also considered vital for any future climate change solution, whether it is through the development of low-carbon technologies or a contribution to broader societal sustainability transitions.<sup>25</sup> Reflective of this, most research on ‘company NSAs’ has focused either on the potential of their mitigation actions or on their more covert attempts to support, change, or undermine climate law and policy.<sup>26</sup> So far, the activities of some companies, such as large-scale carbon emitters, have attracted more attention than others. This suggests that the roles and functions of companies in the overarching climate regime are heavily dependent on their size, sector, geography, and ownership structure.

From the perspective of the climate change regime, companies are principally understood as regulatory objects. While mediated by national law, internationally agreed emission-reduction targets and policies are often operationalized at the company level. Accordingly, the primary responsibility companies have is to accommodate their operations to the increasingly complex national climate regulation, which spans from elaborate environmental performance metrics to novel tax incentives and emission-trading schemes.<sup>27</sup> A natural corollary of this basic schema is that no corporate responsibilities for the adverse effects of climate change exist under international climate law. A nuanced discussion on the moral responsibilities of large carbon producers notwithstanding,<sup>28</sup> the prospects for establishing direct ‘corporate climate responsibility’ are currently slim to non-existent.

In lieu of international responsibility, however, companies are increasingly entangled in domestic liability regimes built on a mix of administrative,

<sup>23</sup> Peter Frumhoff, Richard Heede and Naomi Oreskes, ‘The Climate Responsibilities of Industrial Carbon Producers’ (2015) 132 *Climatic Change* 157.

<sup>24</sup> Luis Antonio López and others, ‘The Carbon Footprint of the U.S. Multinationals’ Foreign Affiliates’ (2019) 10 *Nature Communications* 1.

<sup>25</sup> Derk Loorbach and Katinka Wijsman, ‘Business Transition Management: Exploring a New Role for Business in Sustainability Transitions’ (2013) 45 *J Cleaner Production* 20.

<sup>26</sup> Naghmeh Nasiritousi, ‘Fossil Fuel Emitters and Climate Change: Unpacking the Governance Activities of Large Oil and Gas Companies’ (2017) 26 *Environmental Politics* 621 and Geoffrey Supran and Naomi Oreskes, ‘Assessing ExxonMobil’s Climate Change Communications (1977–2014)’ (2017) 12 *Environmental Research Letters* 084019.

<sup>27</sup> Alina Averchenkova, Sam Fankhauser and Michal Nachmany (eds.), *Trends in Climate Change Legislation* (Elgar 2017).

<sup>28</sup> Henry Shue, ‘Responsible for What? Carbon Producer CO<sub>2</sub> Contributions and the Energy Transition’ (2017) 144 *Climatic Change* 591.

criminal, and private-law mechanisms, which, historically, have had little to do with responding to global environmental externalities. The growing momentum of 'strategic private climate litigation' against companies (notwithstanding its numerous hurdles relating to standing, jurisdiction, and causation) hints at the emergence of new forms of accountability that link the international climate change regime with the operationalization and enforcement of domestic climate liability, such as tort litigation and financial-reporting violations.<sup>29</sup> Litigation has, however, so far mostly been taking place in a few, mostly common law, jurisdictions, and has been confined to a narrow category of fossil-fuel producers. This strategy has the advantage of focusing on the responsibilities of easily identifiable 'climate culprits', such as large oil-and-gas companies, but it neglects the multitude of lesser, widespread sources of carbon emissions, including the operations of other emission-intensive-sector companies or their financiers.<sup>30</sup>

Moral or legal debates on corporate climate responsibility often hinge on the potential that companies have in climate change mitigation and adaptation. Changes in company practices, whether prompted by new regulation, litigation, or business opportunities, are considered crucial for the sustainability transition and achieving the goals of the Paris Agreement.<sup>31</sup> Steering away from carbon-intensive business models and investing in renewable-energy technologies are the most concrete ways in which companies can contribute to mitigation efforts, but companies are also involved in less direct forms of climate governance and capacity building. Many companies are already perceived to have ratcheted up climate ambition, and distinctly *private* climate governance has become more prominent over time. For instance, following the announcement of the withdrawal of the United States from the Paris Agreement, a large group of American companies and local governments pledged to continue to reduce emissions.<sup>32</sup> More generally, companies and industry associations have established and joined numerous climate initiatives since the early 1990s.<sup>33</sup> Ranging from company-specific

<sup>29</sup> Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38 *OJLS* 841.

<sup>30</sup> Rolf Weber and Andreas Hösli, 'Climate Change Liability: Comparing Risks for Directors in Jurisdictions of the Common and Civil Law' (2020) 10 *Climate Law* 151.

<sup>31</sup> Jaakko Salminen and Mikko Rajavuori, 'Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and a Framework for Analysis' (2019) 26 *Maastricht J Eur & Comp L* 602.

<sup>32</sup> Jay Butler, 'The Corporate Keepers of International Law' (2020) 114 *AJIL* 189.

<sup>33</sup> Jonatan Pinkse and Ans Kolk, *International Business and Global Climate Change* (Routledge 2009).

supply-chain mechanisms to industry-wide certification schemes and commercial carbon-inventory and accounting methods, these arrangements are usually set up as private initiatives that require participants to adopt and meet various environmental targets or reporting practices. The most prominent private initiatives, such as the Greenhouse Gas Protocol or the insurance sector's ClimateWise principles, have already emerged as de facto standards in their own niches of transnational climate governance.<sup>34</sup>

However, the impact of corporate climate governance is hard to discern. Even if an active stance on climate change may help to boost a company's image or help it discover new business opportunities over time, the immediate costs of transnational governance initiatives may be detrimental to first movers.<sup>35</sup> Setting up robust greenhouse gas inventories as a part of reporting the company's carbon footprint, for example, is expensive and can yield an advantage to less climate-conscious competitors.<sup>36</sup> Moreover, voluntary company responses to climate change are mostly driven by a wish to be prepared in the face of impending regulatory change, as opposed to being a response to the physical risks that are expected to materialize in the more distant future.<sup>37</sup> The promise of governance instruments is similarly contested. Tracking the realization of corporate climate pledges, for instance, is beset with problems pertaining to data quality and transparency, particularly in the case of Scope 3 emissions that represent the carbon footprint of the company's entire value chain.<sup>38</sup> Accordingly, corporate climate governance experiments likely require further standardization and institutionalization through regulatory action, both nationally and internationally, so as to create a level playing field and align company incentives more effectively.<sup>39</sup>

<sup>34</sup> Aled Jones and Alexander Phillips, 'Voluntary Business Engagement in Climate Change: A Study of the ClimateWise Principles' (2016) 137 *J Cleaner Production* 131.

<sup>35</sup> Lily Hsueh, 'Transnational Climate Governance and the Global 500: Examining Private Actor Participation by Firm-Level Factors and Dynamics' (2017) 43 *Intl Interactions* 48.

<sup>36</sup> Karen Fisher-Vanden and Karin Thorburn, 'Voluntary Corporate Environmental Initiatives and Shareholder Wealth' (2011) 62 *J Environmental Economics & Management* 430.

<sup>37</sup> Alice Sakhel, 'Corporate Climate Risk Management: Are European Companies Prepared?' (2017) 165 *J Cleaner Production* 103.

<sup>38</sup> Mo Li, Thomas Wiedmann and Michalis Hadjikakou, 'Enabling Full Supply Chain Corporate Responsibility: Scope 3 Emissions Targets for Ambitious Climate Change Mitigation' (2020) 54 *Environmental Science and Technology* 400.

<sup>39</sup> Thomas Hickmann, 'Voluntary Global Business Initiatives and the International Climate Negotiations: A Case Study of the Greenhouse Gas Protocol' (2017) 169 *J Cleaner*

The legal dimensions of corporate climate-governance arrangements are rarely engaged with in detail. Aside from the perceived need for greater regulatory coverage and stability, the current scholarship usually characterizes private governance initiatives simply as ‘non-binding’, with little systematic analysis. This stands in sharp contrast to the developments in the sphere of business and human rights, where the voluntary social-responsibility commitments and procedures that companies assume increasingly attract public and private litigation. Contract law and consumer-protection law, for example, have provided ample opportunities to turn seemingly non-binding instruments, such as supply-chain-wide codes of conduct, into binding and enforceable obligations.<sup>40</sup> Even though the success of litigation has varied from jurisdiction to jurisdiction and from one social externality to another, the most recent judicial developments suggest a growing opportunity for climate-change-related civil suits based on companies’ voluntary governance commitments.<sup>41</sup> However, much will depend on the particularities of a given governance initiative and on a company’s disclosures, including the specificity of the commitments, as well as the choice of forum. Outside of contract law, corporate law and governance have emerged as key sites for governing the climate-related performance of companies. For example, large institutional investors, such as asset-management firms and sovereign wealth funds, increasingly base their investment and stewardship strategies on the investee companies’ climate risk profile.<sup>42</sup> As a whole, however, the contemporary system of corporate law is more often viewed as an impediment to effective climate change mitigation.<sup>43</sup>

Yet companies can and do affect the structure and content of international climate law by seeking to influence law and policy through industry associations or by challenging domestic law and policy on administrative, constitutional, or international-law grounds, including in investment-treaty arbitration.<sup>44</sup> More nefarious means of corporate

*Production 94*; Jayme Walenta, ‘The Limits to Private-Sector Climate Change Action: The Geographies of Corporate Climate Governance’ (2018) 94 *Economic Geography* 461.

<sup>40</sup> David Hess, ‘The Transparency Trap: Non-financial Disclosure and the Responsibility of Business to Respect Human Rights’ (2019) 56 *Am Business LJ* 5.

<sup>41</sup> Carrie Bradshaw, ‘Corporate Liability for Toxic Torts Abroad: Vedanta v Lungowe in the Supreme Court’ (2020) 32 *JEL* 139.

<sup>42</sup> Philipp Krueger, Zacharias Sautner, and Laura Starks, ‘The Importance of Climate Risks for Institutional Investors’ (2020) 33 *Rev Financial Studies* 1067.

<sup>43</sup> Beate Sjäffell, ‘Redefining the Corporation for a Sustainable New Economy’ (2018) 45 *J Law & Society* 29.

<sup>44</sup> Kyla Tienhaara, ‘Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement’ (2018) 7 *TEL* 229.

lobbying, such as financing climate-sceptic research, also play a role in spurring or slowing regulatory developments.<sup>45</sup> The role that companies play in the high and low politics of climate change may be contested, but it is quite natural that they seek to alter the trajectories of climate law and policy for their own advantage.

In sum, both the dynamics and the legal ramifications of corporate climate governance remain poorly understood. This is largely due to the 'company NSAs' forming an exceedingly heterogenous category that resists legal definition and generalization. Aside from their legal form as joint-stock companies, there seems to be little in common between national oil companies and small renewable-energy start-ups, industrial multinationals and local retailers, or internet giants and asset-management institutions. Yet it is precisely companies' legal constitution as entities of domestic corporate law that is likely to further differentiate them from other NSAs and shape their involvement in transnational climate governance in the future. The most promising drivers of progressive company behaviour may also reside in corporate law, provided that the trend towards greater shareholder activism continues to recalibrate the company-level incentives.

### *Cities*

Private companies are obviously 'non-state', but designating cities, among other local or regional entities, as NSAs requires some conceptual work. After all, the varying constitutional and administrative law systems around the world usually maintain strict institutional hierarchies that incorporate subnational entities into the public sector. The same applies to international law, which rests on the unity of the state and state responsibility.<sup>46</sup> It is therefore not surprising that the early definitions of NSAs in the climate change regime classified cities and other 'constituent subunit[s] of a state' as belonging to the category of the 'state'.<sup>47</sup> More recently, however, subnational actors have been defined widely, simply as actors that are 'not negotiating parties within the UNFCCC'.<sup>48</sup> The

<sup>45</sup> Justin Farrell, 'Corporate Funding and Ideological Polarization About Climate Change' (2016) 113 *Proceedings of the National Academy of Sciences* 92.

<sup>46</sup> James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013).

<sup>47</sup> Raustiala (n. 3) 97–8.

<sup>48</sup> Jill Duggan, 'The Role of Sub-state and Non-State Actors in International Climate Processes: Subnational Governments' (Chatham House 2019) 2.

double life that 'city NSAs' lead as domestic public authorities, on the one hand, and transnational governance actors, on the other, necessarily affects the ways in which they are embedded in international climate governance and the ways in which they interact with climate law.<sup>49</sup>

The UNFCCC system has grown more inclusive towards some subnational entities over the course of the last decade. Local and subnational governments, for instance, were recognized as 'governmental stakeholders' in the 2010 Cancun Agreements,<sup>50</sup> and the Paris Agreement further acknowledges the significance of local and subnational levels for climate change adaptation and capacity building.<sup>51</sup> None of these references establishes international responsibility for climate change, of course. The internalization of international climate change obligations by city NSAs is still considered to be no more than a trickle-down effect, first from the international level to 'the state level and further down to cities when these sub-national entities implement the law'.<sup>52</sup>

At the same time, however, major cities, provinces, and non-sovereign 'states' within federations have started to act as if they had a distinct set of climate change responsibilities. Likely driven by the major share of carbon emissions traceable to urban areas, as well as by the lacklustre progress of climate action and by political factors, several cities have deployed ambitious governance schemes to interact with the climate regime.<sup>53</sup> Some initiatives rely on unofficial city diplomacy or the halo effect of established international instruments. As an example, many subnational entities seek to differentiate themselves from the general trajectory of state-level climate policy both internationally and nationally. Several US cities and states pledged to ensure that the country as a whole would achieve the emission-reduction target contained in the Nationally Determined Contribution of the United States, despite the Trump Administration's rejection of the Paris Agreement.<sup>54</sup> Another

<sup>49</sup> Helmut Philipp Aust, 'The Shifting Role of Cities in the Global Climate Change Regime: From Paris to Pittsburgh and Back?' (2019) 28 *RECIEL* 57.

<sup>50</sup> UNFCCC Decision 1/CP.16 (2010) [7], in FCCC/CP/2010/7/Add.1.

<sup>51</sup> Paris Agreement (n. 12) arts. 7(2) and 11(2); UNFCCC Decision 1/CP.21 (2015) [133–4], in UN Doc FCCC/CP/2015/10/Add.1.

<sup>52</sup> Jolene Lin, *Governing Climate Change. Global Cities and Transnational Lawmaking* (Cambridge University Press 2018) 47.

<sup>53</sup> Emilia Smeds and Michele Acuto, 'Networking Cities After Paris: Weighing the Ambition of Urban Climate Change Experimentation' (2018) 9 *Global Policy* 549.

<sup>54</sup> Mark Cooper, 'Governing the Global Climate Commons: The Political Economy of State and Local Action, After the U.S. Flip-Flop on the Paris Agreement' (2018) 118 *Energy Policy* 440.

confrontational strategy centres on litigation, whereby subnational entities seek to enforce national emission-reduction targets and regulatory standards, or to hold private companies to account for loss and damage.<sup>55</sup>

Like private companies, cities have also crafted their own, distinctive transnational governance arrangements that seek to align the goals and ambition of the climate regime with the strategies and implementation measures that local-level actions can mobilize and sustain.<sup>56</sup> The most prominent are the transnational city networks, such as Cities 40 (C40) and the Covenant of Mayors for Climate and Energy (CoM).<sup>57</sup> These networks are designed as spaces of mutual learning and scaling up of climate-governance efforts, and they link up not only participant cities but also private firms, CSOs, and international organizations such as the World Bank and the European Union. The most ambitious city networks require members to commit to clear mitigation targets based on carefully prepared emission inventories and regular reporting.<sup>58</sup> The methods for achieving mitigation and adaptation goals range from finance to education, and from regulation to adoption of novel forms of municipal self-governance, such as setting energy-saving targets for the companies owned by the municipality.<sup>59</sup> If implemented to its full potential, the city NSAs' direct mitigation effort could be significant, provided that no displacement of climate action occurs.<sup>60</sup>

The operation of the various transnational initiatives, or city-driven climate governance in general, is no panacea. Already at the practical level, issues with data quality and transparency hamper effective monitoring and make estimating the impact of city climate governance difficult.<sup>61</sup> Moreover, the participation of affluent global megacities in

<sup>55</sup> Ganguly, Setzer and Heyvaert (n. 29).

<sup>56</sup> Taedong Lee, 'Global Cities and Transnational Climate Change Networks' (2013) 13 *Global Environmental Politics* 108.

<sup>57</sup> C40, 'C40 Cities' (2020) <[www.c40.org/](http://www.c40.org/)> and Covenant of Mayors, 'Covenant of Mayors for Climate & Energy' (2020) <[www.covenantofmayors.eu/](http://www.covenantofmayors.eu/)>.

<sup>58</sup> Covenant of Mayors, 'Join' (2020) <[www.covenantofmayors.eu/join/join-as-a-signatory.html](http://www.covenantofmayors.eu/join/join-as-a-signatory.html)>. For discussion, see Lin (n. 52) 156–8.

<sup>59</sup> Valentina Palermo and others, 'Assessment of Climate Change Mitigation Policies in 315 Cities in the Covenant of Mayors Initiative' (2020) 60 *Sustainable Cities and Society* 102258.

<sup>60</sup> Takeshi Kuramochi and others, 'Beyond National Climate Action: The Impact of Region, City, and Business Commitments on Global Greenhouse Gas Emissions' (2020) 20 *Climate Policy* 275.

<sup>61</sup> Hsu and others (n. 20).

transnational governance arrangements masks the vast differences in size, economic status, political leaning, and geographical location that often come to determine the role that cities can or will play with regard to climate change. Cities are not unitary actors pursuing only pro-climate policies, but rather 'complex and dynamic sites of contested interests, concerns, and powers'<sup>62</sup> that display a range of responses to climate change both within individual cities and between them.<sup>63</sup> Accordingly, active city involvement in transnational climate networks may already be motivated by mostly self-serving ends, such as attempts to attract investment from 'clean tech' companies.<sup>64</sup>

In the legal literature, the climate efforts by city NSAs are increasingly referred to as 'urban climate law'.<sup>65</sup> As is the case with other NSAs, this covers everything from attempts to influence global and national climate policy to local regulation and the use of financial leverage. The distinctive feature of city NSAs' lawmaking, however, relates to their public authority. In general, the starting point for any legal examination of city NSAs' governance efforts rests with the public functions that cities fulfil. Thus, the often far-reaching powers pertaining to planning, building, and land-use standards, or the issuance of environmental and other administrative permits, render cities and municipalities the prime regulatory leverage points for translating global emission-reduction targets into practical policy prescriptions.<sup>66</sup> However, the use of novel regulatory tools is likely to raise difficult legal issues and spur further litigation. On the one hand, the particular administrative and constitutional traditions and frameworks of a given polity may preclude the use of the most innovative governance arrangements. On the other, regulatory and policy innovations may be challenged as too modest to meet the broader emission-reduction targets.<sup>67</sup>

The proper legal characterization of city NSAs' transnational governance commitments is more difficult. In general, however, their involvement in transnational governance initiatives can be seen more as an

<sup>62</sup> Jeroen van der Heijden and others, 'Advancing the Role of Cities in Climate Governance—Promise, Limits, Politics' (2019) 62 *J Envtl Planning & Management* 365, 366.

<sup>63</sup> Craig Johnson, *The Power of Cities in Global Climate Politics: Saviours, Supplicants or Agents of Change?* (Palgrave Macmillan 2018).

<sup>64</sup> Zhanna Kapsalyamova and others, 'Are Low Carbon Cities Attractive to Cleantech Firms? Empirical Evidence from a Survey' (2014) 13 *Sustainable Cities and Society* 125.

<sup>65</sup> See especially Lin (n. 52).

<sup>66</sup> *Ibid.*

<sup>67</sup> Felix Mormann, 'Constitutional Challenges and Regulatory Opportunities for State Climate Policy Innovation' (2017) 41 *Harvard Envtl L Rev* 189.

extension of the cities' political and public-law authority than the private-law-backed voluntary schemes entered into by companies. That having been said, there is a dearth of legal analysis of the typology of cities' voluntary commitments under various governance schemes. While CoM, for instance, requires the participant cities to submit a political dedication letter, the flexibility mechanisms built into the initiative are likely to frustrate any attempt to ascertain compliance or to enforce commitments, whether through public or private law.<sup>68</sup> Naturally, much depends on the domestic context, as some jurisdictions allot cities and municipalities a greater regulatory competence than others.<sup>69</sup>

As a whole, cities and other subnational entities are a curious group of NSAs. In a historical view, understanding them as NSAs in the first place would likely prompt significant analytical, political, and legal resistance. Under the current mode of transnational climate governance, however, subnational entities exemplify the blurring that takes place at the 'established boundary between public and private actors'.<sup>70</sup> While the publicness of subnational entities adds new dimensions (such as the potential for issuing binding regulation) to the broader NSA-driven governance matrix, the city NSAs as a group are too heterogeneous for a conclusive assessment on their governance roles, operation, and impact. The divide between global megacities pushing for novel transnational governance schemes and the weakening non-urban areas hit by the adverse economic consequences of the accelerating energy transition is wide.

### *Civil-Society Organizations*

Compared to companies and cities, CSOs are quintessential NSAs or – perhaps more accurately – NGOs. While they claim a long history in the development of international climate law, as governance actors CSOs are both politically and conceptually less controversial than other NSA types.<sup>71</sup> With the exception of a handful global CSOs, such as Greenpeace, they are often portrayed as actors with limited resources that supply new ideas and provide a voice for groups that would

<sup>68</sup> Covenant of Mayors (n. 58).

<sup>69</sup> See Mormann (n. 67).

<sup>70</sup> Aust (n. 49) 59.

<sup>71</sup> Raustiala (n. 3) 97–8.

otherwise be excluded from decision-making in national and international forums.<sup>72</sup> But just as other NSA groups, 'CSO NSAs' are internally fragmented. Industry associations, NGOs pursuing goals only indirectly related to climate change, or looser transnational activist networks that lack centralized command, proper legal standing or, of course, an official role in the UNFCCC system, illustrate the institutional and motivational complexity of CSOs.<sup>73</sup> The institutional variance affects not only CSOs' position in the climate-governance landscape but also the strategies through which they may pursue governance. CSOs are traditionally associated with lobbying for legal change, but extra-legal governance techniques have grown more prominent. Research institutions, for instance, may rely on the dissemination of new scientific findings, whereas activist organizations increasingly opt for more confrontational strategies, such as divestment campaigns.<sup>74</sup>

From the perspective of non-state climate governance, CSOs have traditionally been understood as highly institutionalized NGOs that represent major social or economic groups as observers at the climate negotiations.<sup>75</sup> The UNFCCC regime organizes accredited CSOs in nine constituency groups that include organizations representing business and industry, environmental NGOs, local government and municipal authorities, trade unions, women's organizations, and gender NGOs.<sup>76</sup> The contribution of such CSOs to the development of climate law is readily accepted,<sup>77</sup> but it is not clear whether pro-climate environmental NGOs have had a larger or smaller impact than, for instance, industry NGOs, whose technical expertise may contribute significantly to policy or regulatory design.<sup>78</sup> Despite the complex normative

<sup>72</sup> Peter Spiro, 'Non-governmental Organizations and Civil Society' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2012).

<sup>73</sup> Miquel Muñoz Cabré, 'Issue-Linkages to Climate Change Measured Through NGO Participation in the UNFCCC' (2011) 11 *Global Environmental Politics* 10.

<sup>74</sup> Julie Ayling and Neil Gunningham, 'Non-state Governance and Climate Policy: The Fossil Fuel Divestment Movement' (2017) 17 *Climate Policy* 131.

<sup>75</sup> Farhana Yamin, 'NGOs and International Environmental Law: A Critical Evaluation of Their Roles and Responsibilities' (2001) 10 *RECIEL* 149.

<sup>76</sup> UNFCCC, 'Non-party Stakeholders' (2020) <[unfccc.int/process-and-meetings#:d706f8dc-000a-463f-a74f-18af14cf2ad5:d52c00dd-8d63-4e7b-b2e9-a2a5d5c3dec3](https://unfccc.int/process-and-meetings#:d706f8dc-000a-463f-a74f-18af14cf2ad5:d52c00dd-8d63-4e7b-b2e9-a2a5d5c3dec3)>.

<sup>77</sup> Chiara Giorgetti, 'From Rio to Kyoto: A Study of the Involvement of Non-governmental Organizations in the Negotiations on Climate Change' (1999) 7 *NYU Envil LJ* 201.

<sup>78</sup> Irja Vormedal, 'The Influence of Business and Industry NGOs in the Negotiation of the Kyoto Mechanisms: The Case of Carbon Capture and Storage in the CDM' (2008) 8 *Global Environmental Politics* 36.

discussions on the pros and cons of allotting distinct responsibilities to CSOs under international law,<sup>79</sup> climate CSOs may best be approached from the perspective of political and procedural accountability rather than any kind of responsibility.<sup>80</sup> Similarly, the lobbying efforts by CSOs on the domestic level are rarely viewed through the lens of legal responsibility, although the aggressive tactics used in information campaigns by companies and industry associations may well come up in climate litigation in the future.<sup>81</sup>

As NSAs with few resources and no regulatory power, CSOs' climate-governance efforts naturally rely on lobbying, orchestration, and consensus-building. Law reform, such as signing an environmental treaty or installing an ambitious domestic liability regime, has usually formed a key 'deliverable', at least for pro-climate CSO efforts. The pro-business CSOs have generally sought to nudge regulatory design towards market-based solutions, as was the case with emission-trading schemes.<sup>82</sup> The rise of transnational climate governance has, however, provided new strategies and openings. Perhaps the best example of the new constellations between CSOs' governance activities and legal change is the fossil-fuel divestment movement – an activist-led campaign aiming to convince large institutional investors to sell their holdings in companies that operate in carbon-intensive sectors.<sup>83</sup> Driven by loose transnational networks, fossil-fuel divestment has been heralded as the largest and the fastest-growing divestment campaign in history.<sup>84</sup> Unlike other major divestment campaigns, however, the activists have refrained from lobbying states to pass standalone legislation, such as the US Comprehensive Anti-Apartheid Act of 1986, which mandated

<sup>79</sup> Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100 *AJIL* 348.

<sup>80</sup> Erik Bluemel, 'Overcoming NGO Accountability Concerns in International Governance' (2005) 31 *Brooklyn JIL* 139; Jonathan Kuyper, Karin Bäckstrand and Heike Schroeder, 'Institutional Accountability of Nonstate Actors in the UNFCCC: Exit, Voice, and Loyalty' (2017) 34 *Rev Policy Research* 88.

<sup>81</sup> Riley Dunlap and Aaron McCright, 'Organized Climate Change Denial' in John Dryzek, Richard Norgaard and David Schlosberg (eds.), *The Oxford Handbook of Climate Change and Society* (Oxford University Press 2011).

<sup>82</sup> Jonas Meckling, 'The Globalization of Carbon Trading: Transnational Business Coalitions in Climate Politics' (2011) 11 *Global Environmental Politics* 26.

<sup>83</sup> Go Fossil Free, 'Frequently Asked Questions' (2020) <[gofossilfree.org/divestment/frequently-asked-questions/](http://gofossilfree.org/divestment/frequently-asked-questions/)>.

<sup>84</sup> Sibylle Braungardt, Jeroen Van Den Bergh and Tessa Dunlop, 'Fossil Fuel Divestment and Climate Change: Reviewing Contested Arguments' (2019) 50 *Energy Research & Social Science* 191.

divestment from South African companies. Instead, the fossil-fuel divestment movement has concentrated on changing the views of key market actors, such as banks and asset-management firms, to reflect the growing risks embedded in carbon-intensive stocks, and thus to drive down the share price of target companies.<sup>85</sup> By contrast, critics emphasize that, as every trade in the stock market has a willing counterparty, divestment will likely lead to those less pro-climate investors picking up fossil-fuel stocks at a discount.<sup>86</sup>

Reflective of the broad array of views on climate policy, CSOs may be best understood as vehicles through which different political, economic, and social blueprints of the world are articulated. Even though the transnational operations of pro-climate CSOs have been at the centre of policy and scholarly interest, CSO-NSAs are a more heterogeneous group. For example, business and industry NGOs, which are often regarded as reducing the ambition of climate policy, are actively involved in the development, operation, and monitoring of international environmental law – climate law included.<sup>87</sup> The picture becomes even more complex outside the UNFCCC system, where discerning the impact of the many national and transnational CSOs and their influence on regulatory processes requires intimate understanding of local contexts and legal traditions. The example of the fossil-fuel divestment movement represents an interesting move towards governance techniques that eschew instituting legal change in favour of more diffuse anti-fossil-fuel norms.<sup>88</sup>

## Conclusion

NSA-driven climate governance has emerged as an important touchstone for contemporary mitigation efforts. This chapter has explored the established and emerging legal debates on the role of companies, cities, and

<sup>85</sup> Atif Ansar, Ben Caldecott and James Tilbury, 'Stranded Assets and the Fossil Fuel Divestment Campaign: What Does Divestment Mean for the Valuation of Fossil Fuel Assets?' (2013) <[www.smithschool.ox.ac.uk/publications/reports/SAP-divestment-report-final.pdf](http://www.smithschool.ox.ac.uk/publications/reports/SAP-divestment-report-final.pdf)>.

<sup>86</sup> Daniel Fischel, 'Fossil Fuel Divestment: A Costly and Ineffective Investment Strategy' *Compass Lexecon* (2015) <[divestmentfacts.com/pdf/Fischel\\_Report.pdf](http://divestmentfacts.com/pdf/Fischel_Report.pdf)>.

<sup>87</sup> Simone Pulver, 'Organising Business: Industry NGOs in the Climate Debates' in Kathryn Begg, Frans van der Woerd and David Levy (eds.), *The Business of Climate Change: Corporate Responses to Kyoto* (Routledge 2005).

<sup>88</sup> Fergus Green, 'Anti-fossil Fuel Norms' (2018) 150 *Climatic Change* 103.

CSOs – representative of NSAs more broadly – in international climate governance. Arranged around three core debates focusing on NSAs' legal responsibility, the legal techniques of governance, and the dynamics of legal change, the chapter has noted how the rise of polycentric non-state climate governance is reflected across climate law. The deepening involvement of NSAs in the operation of the UNFCCC system and the greater reliance on private law as the basis for transnational governance instruments are clear expressions of the blurring of different forms of authority that characterize the operation of the international climate 'regime complex'. At the same time, however, the debates reviewed here cast doubt on the analytical utility of NSAs as a conceptual tool, as well as on the practices of NSA-driven climate governance.

A key common thread running through the discussion of different NSAs relates to their institutional breadth and fragmentation. Each NSA category covers a range of entities whose status, size, and geography vary greatly. These modalities affect the ways that NSAs interact with climate law – either by accommodating its demands or pushing its disciplinary boundaries. While the heterogeneity is clearly a driver of polycentric governance and a source of bottom-up innovation, it can also impede the effective systemization and analysis of various governance techniques and their legal underpinnings.

The institutional variance bears also on the conceptual division into 'state' and 'non-state' that remains distinctive of contemporary climate governance. Is there, in short, anything to be gained from lumping together a wide range of NSAs, such as public municipalities, private companies, and diffuse CSO networks, and pitting them against state actors? As the roles, functions, and motivations of NSAs cover the whole spectrum of societal interaction, from pro-climate NGOs to municipalities benefitting from carbon-intensive industry, it becomes virtually impossible to construe non-state climate action as a coherent mode of governance, to disentangle between 'good' and 'bad' outcomes, or to differentiate it from state-driven governance.

From a legal perspective, the view on NSA-driven climate governance as a complex web of reactions and counter-reactions comes across in the multiple regulatory techniques or legal openings that different NSAs rely on when pursuing their objectives. The debates on the shifting contours of NSAs' public and private responsibility, the legal constitution of governance mechanisms, and the techniques in propelling or resisting legal change underscore how an ever-growing catalogue of foundational

legal building blocks is being integrated into the body of climate law. NSA-driven climate governance rests largely on domestic legal modules, such as contract and tort, and while the normative zeal of the international climate regime surely affects their doctrinal or statutory interpretations, a significant disconnect remains.