



Directors' Duty of Care and Climate Change – an International and Comparative Study

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Short Presentation of PhD Project

Bergen, 13 December 2023

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## WHY A PHD (IN CLIMATE LAW)?

- Background in Litigation & White Collar Crime/Compliance, Swiss Bar Exam 2014
- LL.M. (UNSW) 2017/2018
  - Climate Change Law!
- 2019 → PhD
- Email from 8 April 2019:

«Dear Andreas

(...) I admire you for taking on a PHD, it will be a lot of work. But it will be incredibly rewarding also.”



# PROJECT OVERVIEW



Project 2019-2023/2024



Supervisors:

Prof. Christine  
Kaufmann, University of  
Zurich

Prof. Beate Sjøfjell,  
University of Oslo



Research Visits

University of  
Copenhagen  
University of Oslo  
University of Bergen



Products

Thesis (2024)  
(10 peer-reviewed  
articles)  
(12 presentations)  
(1 book chapter)  
(2 newspaper articles)  
(2 panels (moderator))  
(1 podcast episode)

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# OVERARCHING RESEARCH QUESTION

- From a comparative and international point of view, does the duty of care in company law require directors to address climate change-related risks?

# STAGE I: EXPLORATION

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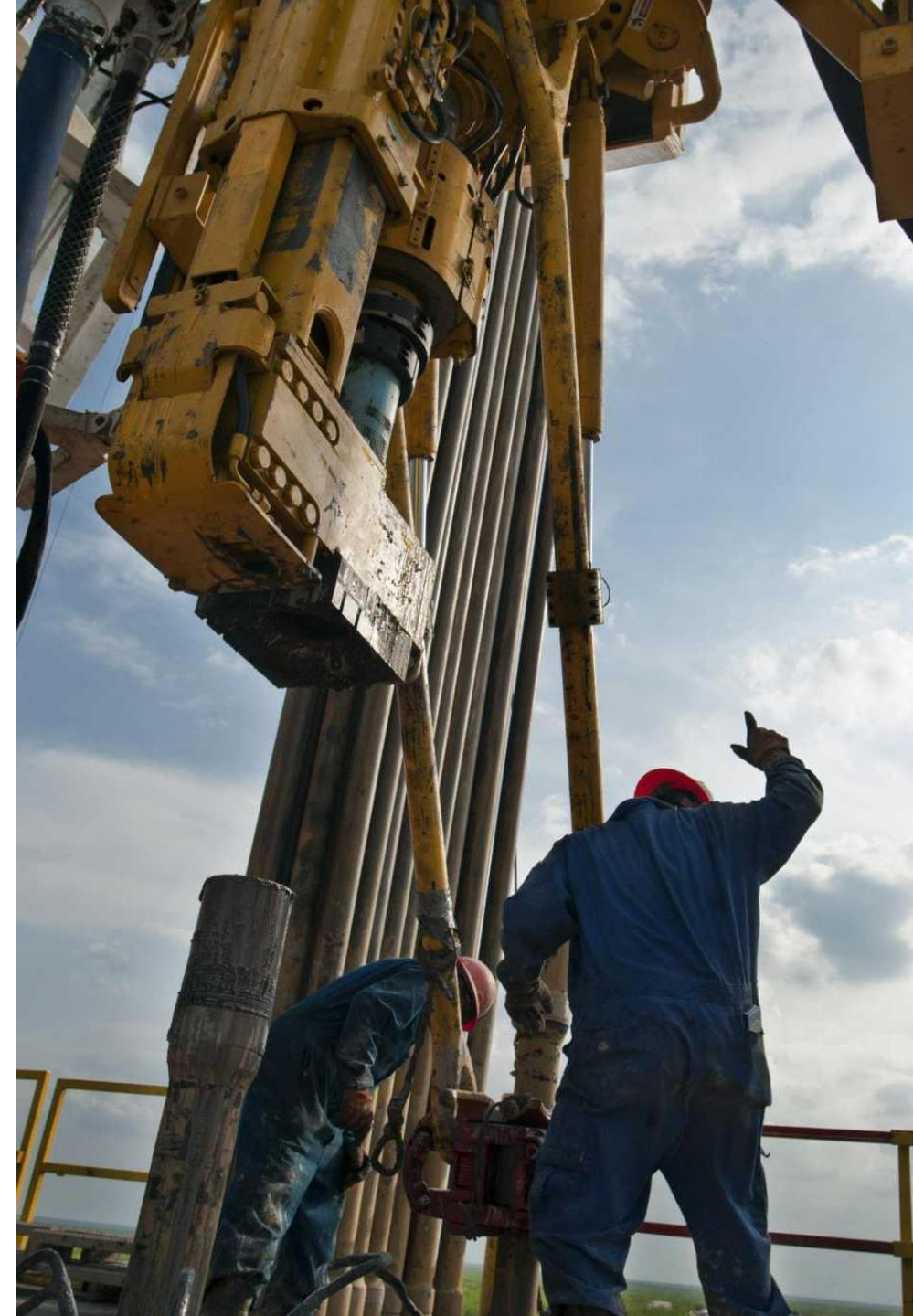




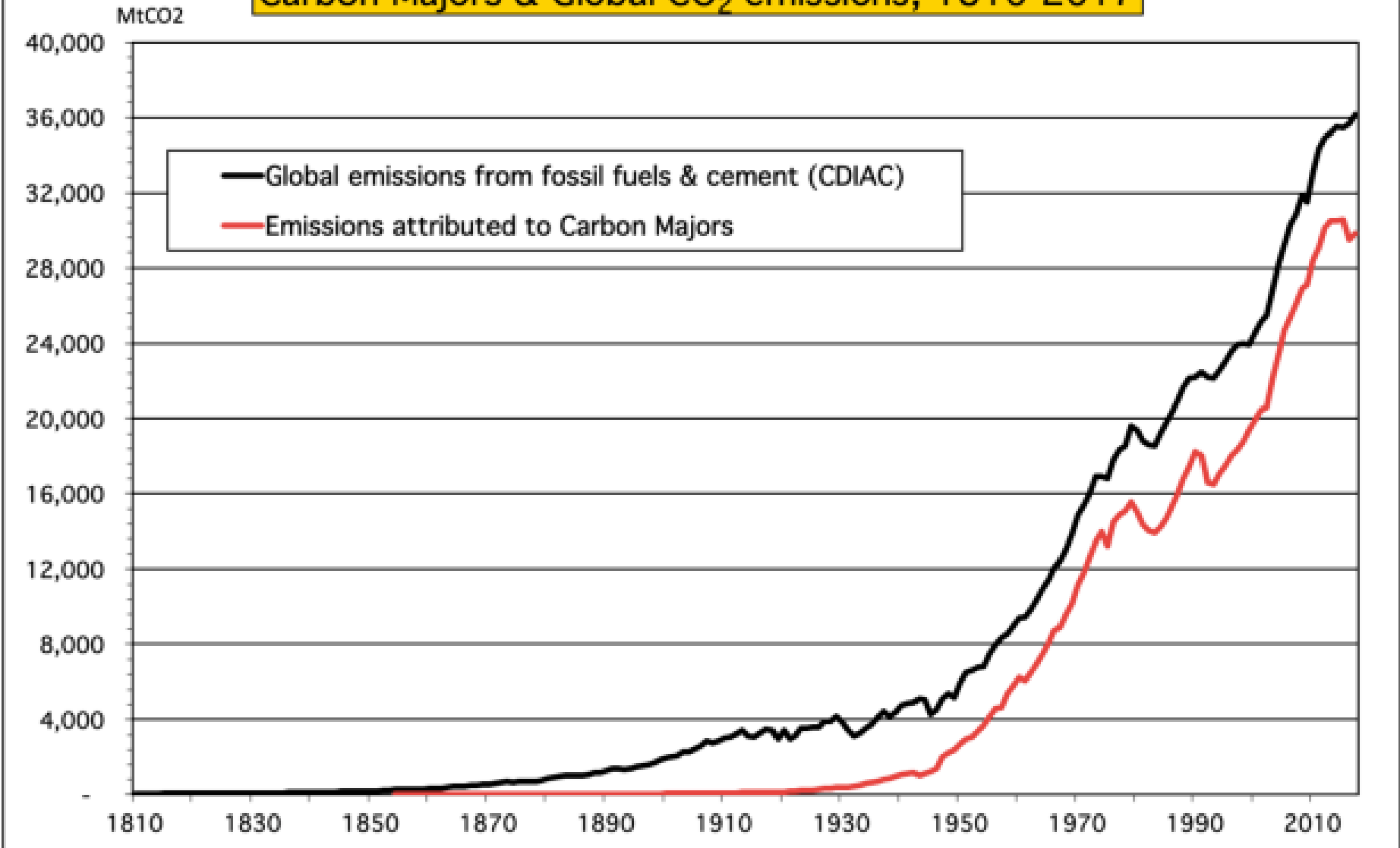
# EXPLORATION PHASE 2 / DRILLING DOWN

- no established 'regime' → multi-layered patchwork
- Corporate law & climate change?
- Fragmentation in international law
- Multinational enterprises
- National v. international
- Companies = Non-State Actors

=> *quid iuris?*

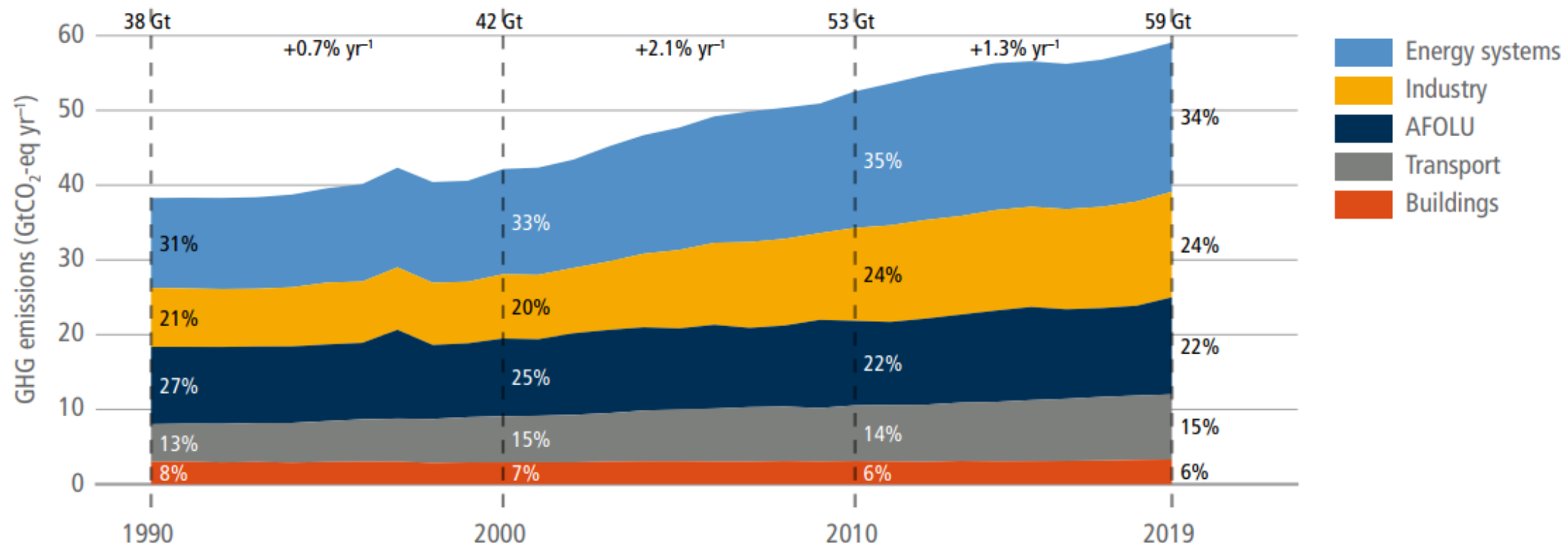


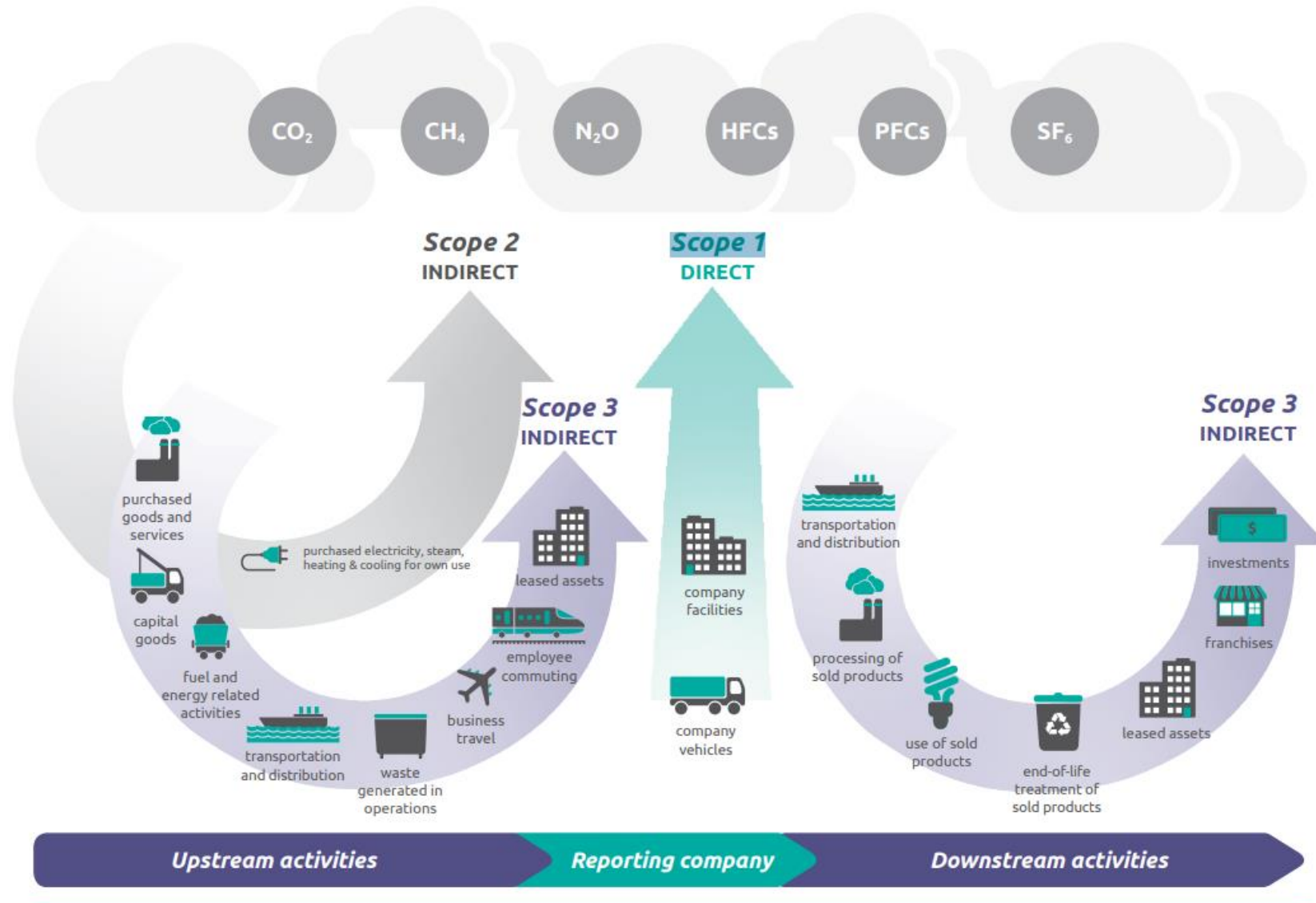
Carbon Majors & Global CO<sub>2</sub> emissions, 1810-2017





<b>Entity</b>	<b>MtCO<sub>2e</sub></b>	<b>% of global</b>
1. Saudi Aramco, Saudi Arabia	59,262	4.38%
2. Chevron, USA	43,345	3.20%
3. Gazprom, Russia	43,230	3.19%
4. ExxonMobil, USA	41,904	3.09%
5. National Iranian Oil Co.	35,658	2.63%
6. BP, UK	34,015	2.51%
7. Royal Dutch Shell, The Netherlands	31,948	2.36%
8. Coal India, India	23,124	1.71%
9. Pemex, Mexico	22,645	1.67%
10. Petroleos de Venezuela (PDVSA)	15,745	1.16%
11. PetroChina / China Natl Petroleum	15,632	1.15%
12. Peabody Energy, USA	15,385	1.14%
13. ConocoPhillips, USA	15,229	1.12%
14. Abu Dhabi, United Arab Emirates	13,840	1.01%
15. Kuwait Petroleum Corp., Kuwait	13,479	1.00%
16. Iraq National Oil Co., Iraq	12,596	0.93%
17. Total SA, France	12,352	0.91%
18. Sonatrach, Algeria	12,302	0.91%
19. BHP Billiton, Australia	9,802	0.72%
20. Petrobras, Brazil	8,676	0.64%
Top Twenty	480,168	35.45%
Global	1,354,388	100.00%





A tall, blue ladder stands vertically in the center of a vast, hazy landscape. The landscape consists of rolling, low hills under a bright blue sky with scattered white clouds. The ladder is positioned in the foreground, and its shadow is cast on the ground. The overall scene conveys a sense of exploration and reaching for a goal.

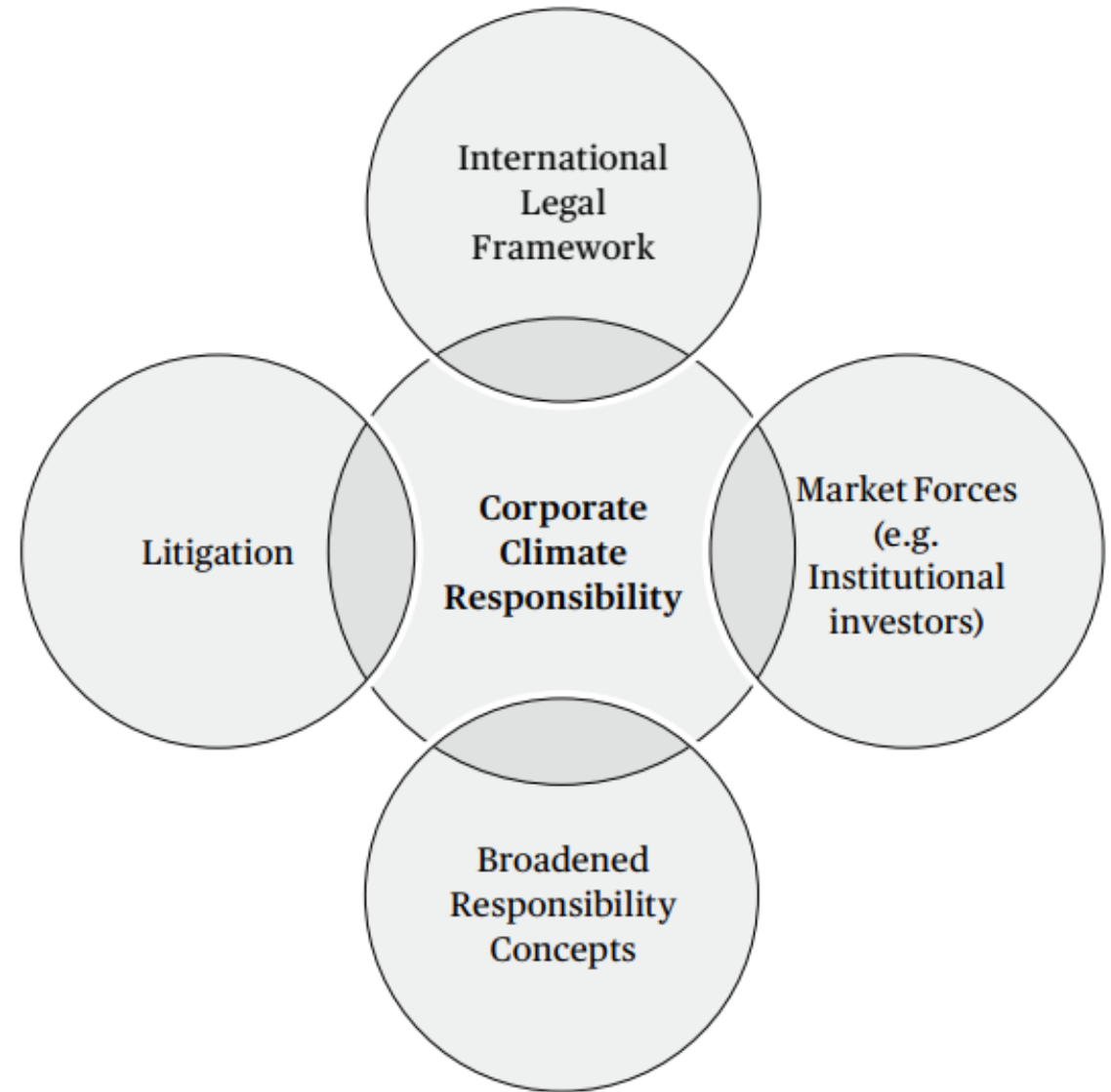
**TENTATIVE FINDINGS EXPLORATION PHASE**

# THE 'REGIME COMPLEX' OF CORPORATE CLIMATE OBLIGATIONS

- Market-based v. command & control
- National (& regional) level
  - Carbon Pricing Mechanisms
  - Product standards, etc
  - Corporate law → ?
- International level
  - Non-State Actors → ?
  - International Standards → Due Diligence
- Currently no legal norm that directly requires a company (or its directors) to reduce its GHG emissions at the entity level
- But: open-ended norms in national law? Duty of Care?

# CORPORATE CLIMATE RESPONSIBILITY

(WEBER & HÖSLI 2021)



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**STAGE II:  
CORPORATE  
LAW**



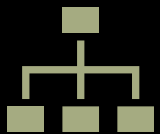
# (HOW) DOES CORPORATE LAW DEAL WITH CLIMATE CHANGE?



Reporting



(due diligence?)



Corporate governance  
(risk management,  
strategy, ...)?



→ directors' duties?



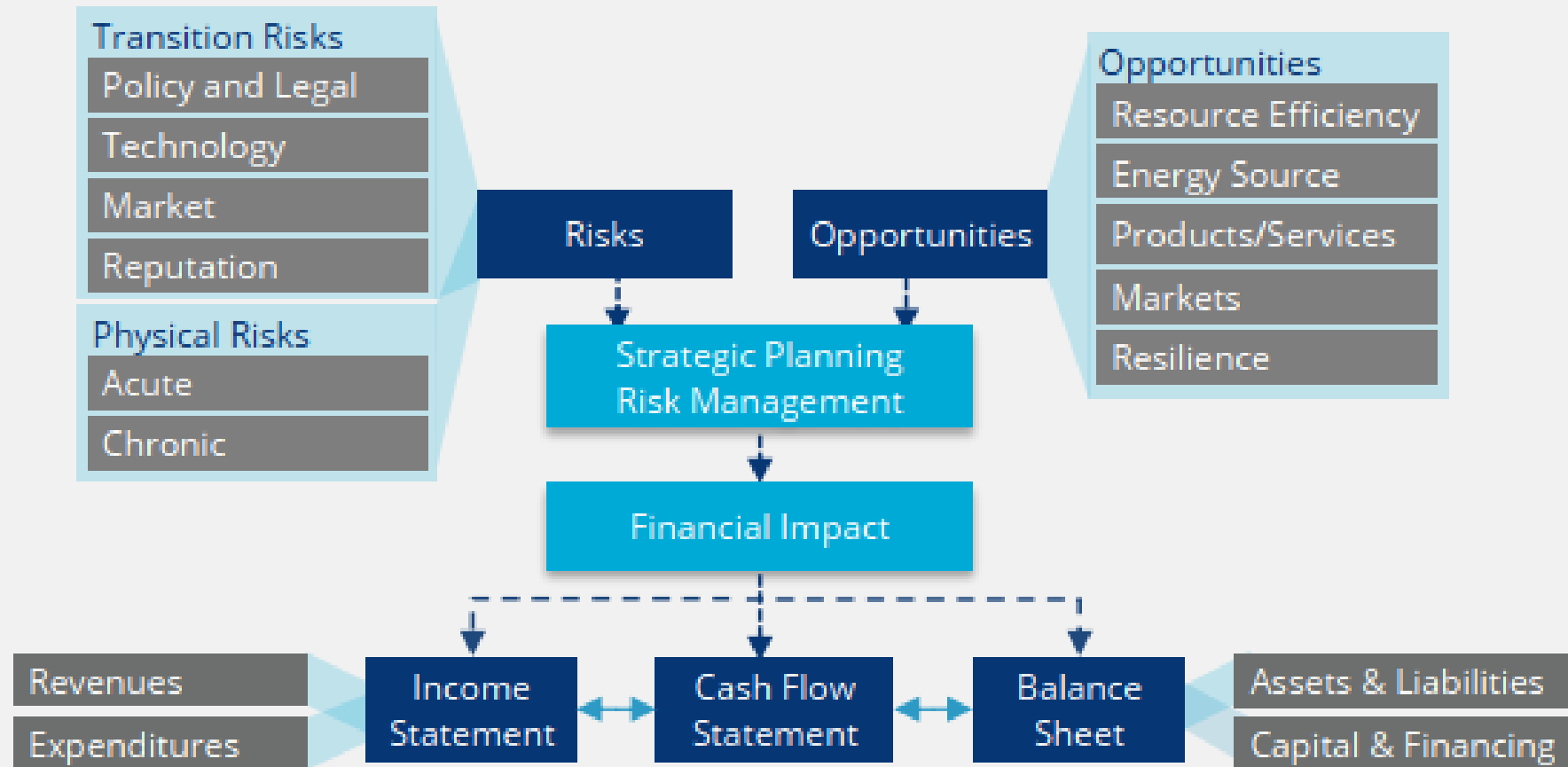
# CHANGING THE RISK PERSPECTIVE



- Traditional Risk Approach (ERM) Business Risk / Financial Materiality / 'Reasonable Investor'
  - Climate change = externality, stakeholder concern, etc
  - *Not adequate to assess climate risks!*
- Paradigm Change: Climate change = financial risk! (ECB, Financial Stability Board → TCFDR, IFRS/ISSB, NGFS, etc)

Figure 1

## Climate-Related Risks, Opportunities, and Financial Impact





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## OPEN-ENDED NORMS

- Intentionally drafted in an open-ended way, allowing the standard to be flexible and adaptable to changing circumstances (eg tort law, development through case law, *Donoghue v. Stevenson* [1932])
- → climate risks?
- See eg, *Milieudefensie et al. v. Royal Dutch Shell* (2021) \*

## METHOD FOR COMPARATIVE ANALYSIS: FUNCTIONAL COMPARISON

- a specific type of comparative corporate law analysis (eg, Siems)
- **Not:** Country A vs. Country B vs. Country C
- based on the assumption that certain issues arise similarly in any modern system of company law
- aims at identifying common patterns of how the company laws of different jurisdictions deal with a selected point of comparison (*tertium comparationis*)
  - Here: director's duty of care / climate risks
- Drawing on comparative research
- **Results:**
  - The duty of care sets a fairly similar standard across jurisdictions (act with reasonable care, diligence, or similar)
  - Central feature: **interest of the company** (vs. 'shareholder primacy')
  - Possible liability for a) inadequate reporting on climate risks  
b) inadequate addressing of climate risks

A red velvet rope stanchion with a gold ball top is the central focus of the image. The stanchion is made of polished metal and has a red velvet rope draped over it. The background is dark with several out-of-focus, warm-toned bokeh lights. The text "STAGE III: INTERNATIONAL LAW" is overlaid on the right side of the image in a bold, white, sans-serif font.

**STAGE III:  
INTERNATIONAL LAW**

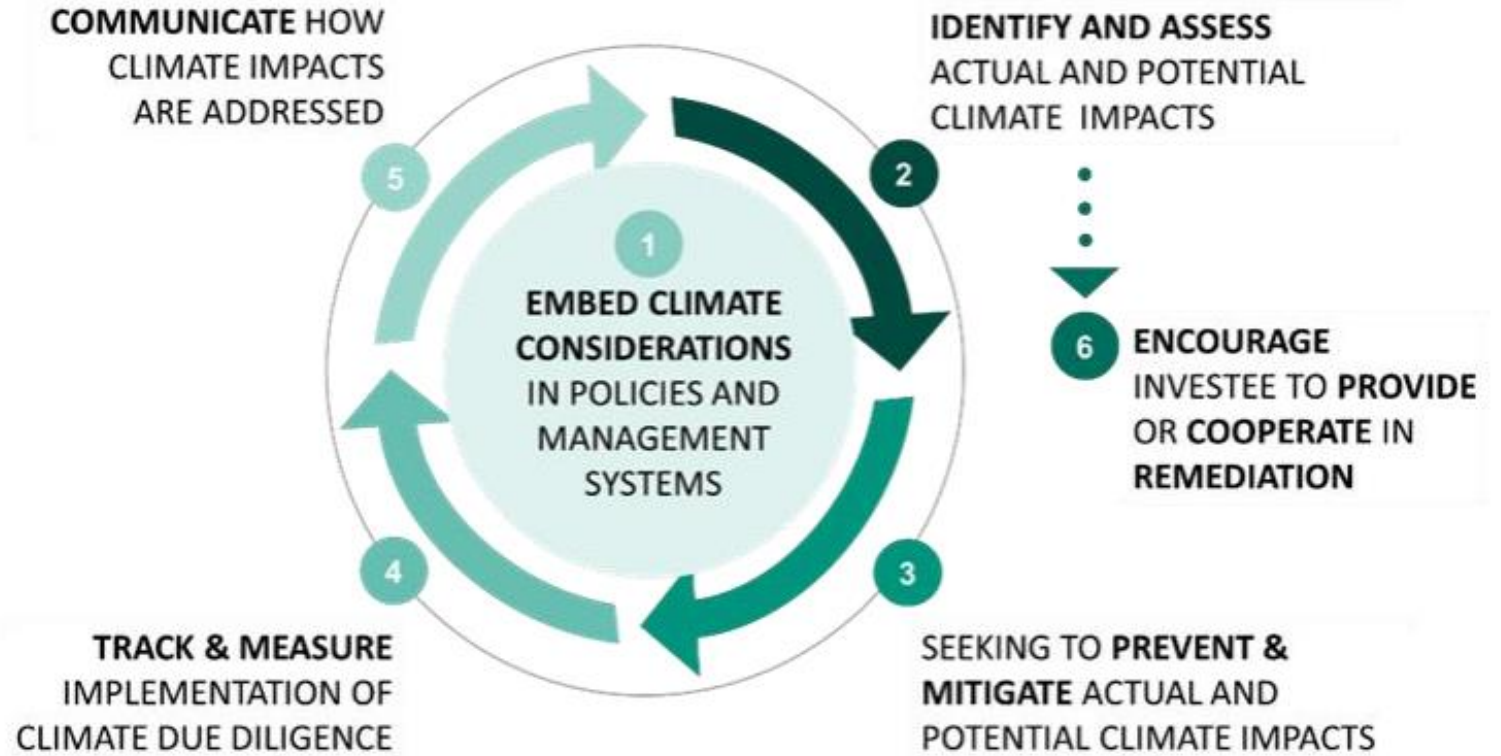
# COMPANIES UNDER INTERNATIONAL LAW

- Companies = non-state actors
- Despite various attempts since the 1970ies, no binding obligations for corporations directly under international law (very few exceptions)
- **BUT: international standards**
  - UN Guiding Principles (2011)
  - OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (1976/.../2023)

# DUE DILIGENCE

- Key Concept for implementing Corporate Responsibility (UNGP: Pillar II)
- Identify, assess and address any potential or actual adverse impacts (on human rights holder, environment, ...) = *outward* risk perspective (vs. corporate law)
- **Derived from company law!**
- OECD GL & UNGP → Climate Change Due Diligence?
- **Adjustments needed**

# CLIMATE CHANGE DUE DILIGENCE





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# ADJUSTMENTS

- Multiple contributors, cumulative impacts (similar but not equal to other environmental problems)
- Focus on **climate change mitigation**
  - Prevention and precaution (OECD GL, Ch. VI)
  - I.e., identify main sources of GHG emissions (or reduction of carbon sinks) and address those
  - Idea: every ton of CO<sub>2eq</sub> has the same impact
  - (rather than identifying impacts) → those have already been identified by climate science in detail
  - Separate from human rights due diligence



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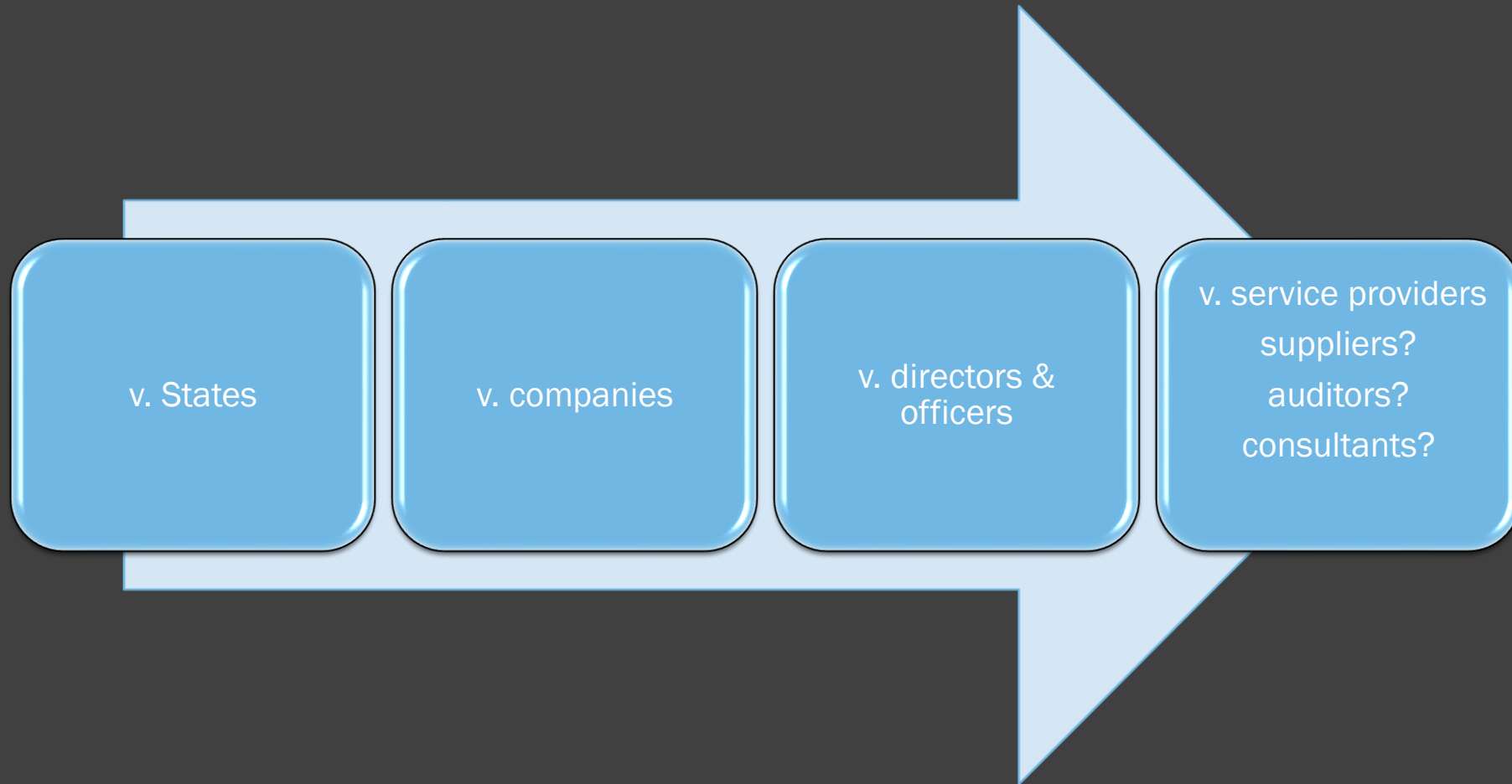
# (SOME OF) THE BIG QUESTIONS OF CLIMATE CHANGE DUE DILIGENCE

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- Scope 3 Emissions? (directly linked?)
  - GHG Emission Reductions?
  - Procedural v. substantive obligation?
  - Tick-the-box'?
  - Enforcement? Private / Public
  - Regulation? → CSDDD (trilogue → today?)
  - Liability? Exclusion of liability?
  - → Litigation? (including non-judicial dispute resolution)

**STAGE IV:  
ENFORCEMENT**



# CLIMATE LITIGATION CASCADE



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# DISCUSSION

