Evolving corporate climate liability:
Perspectives from the US and Europe

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Overview

1) Traditional perspective of corporate climate liability;

2) Very recent developments in US and Europe;

3) What does all of this mean (for corporate governance)?
Why an international approach?
Thematic approach – corporate licences to operate
1) Traditional perspective

Shareholders want to make as much money as possible while conforming to basic rules of the society.....
Environmental controversy in 1980s
Social criticism continued....

Business and human rights – Shell shocked and in the dock
1) Traditional perspective: CSR = fix
1) Traditional perspective

Oil and gas opposition

Public deception
1) Traditional perspective: internationally

OECD Guidelines MNEs

UN Guiding Principles on Business and HRs
UN ‘compact’ with non-state actors

About the UN Global Compact

We are a voluntary initiative based on CEO commitments to implement universal sustainability principles and to take steps to support UN goals.

OUR GOVERNANCE
What changed?
And then......in 2015
And then……in 2019

Global Warming of 1.5°C

An IPCC special report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty.

POLITICO

ENERGY & ENVIRONMENT

U.N. chief warns of ‘point of no return’ on climate change

Thousands of school students and protesters gather in Sydney, Australia, ahead of a climate march. Rallies held across the world today are part of a global mass day of action demanding action on the climate crisis.

PHOTOGRAPH BY JENNY EVANS, GETTY IMAGES
2) Recent developments - US

- Regulatory licence
  - Slew of corporate climate litigation suits;
  - ‘Second wave’ (first wave failed);
  - Brought predominantly by states, cities for adaptation costs;
  - Also by businesses (fishermen);
  - Also for failure to adapt by oil and gas.
2) Recent developments - US

- Litigation is mired down in jurisdictional wrangling;
- US Supreme Court (Baltimore decision, May 2021):
  - Fourth Circuit review of remand order limited to whether it was removed under the federal officer removal statute;
  - But declined to decide other removal grounds – ‘wiser course’ leave it to Fourth Circuit;
  - US Sup. Ct. really does not want to get involved.
New administration, new priorities....

Executive Order on Climate-Related Financial Risk

MAY 20, 2021 • PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. The intensifying impacts of climate change present physical risk to assets, publicly traded securities, private investments, and companies — such as increased extreme weather risk leading to supply chain disruptions. In addition, the global shift away from carbon-intensive energy sources and industrial processes presents transition risk to many companies, communities, and workers. At the same time, this global shift presents...
2) Recent developments - US

- **Regulatory licence:**
  - Significant sections in Executive Orders for financial federal agencies to act;
  - Developing a ‘whole of government’ approach to climate-related financial risk;
  - Key federal agencies involved – Treasury Secretary through Financial Stability Oversight Council;
2) Recent developments - US

- EO asks the Federal Acquisition Regulatory Council to consider amendments to the Federal Acquisition Regulation (FAR) that would require “major federal suppliers,” to disclose their greenhouse gas emissions and climate risks and set science-based reduction targets;
- Covers both public and private suppliers;
- Federal agencies will consider these when making procurement decisions.
Public Statement

Public Input Welcomed on Climate Change Disclosures

Acting Chair Allison Herren Lee

March 15, 2021

In light of demand for climate change information and questions about whether current disclosures adequately inform investors, public input is requested from investors, registrants, and other market participants on climate change disclosure.

The Securities and Exchange Commission (SEC or Commission) has periodically evaluated its regulation of climate change disclosures within the context of its integrated disclosure system. In 2010, the Commission issued an interpretive release that provided guidance to issuers as to how existing disclosure requirements apply to climate change matters. [1] The 2010 Climate Change Guidance noted that, depending on the circumstances, information about climate change-related risks and opportunities might be required in a registrant’s disclosures related to its description of business, legal proceedings, risk factors, and management’s discussion and analysis of financial
2) Recent developments - US

- **Economic licence:**
- 2020 BlackRock’s Statement to CEOs;
- May 2021 - Engine No. 1 – activist hedge fund’s shareholder proposal was accepted by majority of shareholders at ExxonMobil:
  - “more disciplined capital allocation strategy, improved long-term strategic planning, more shareholder-aligned management compensation, and a board of directors with the skills, experience, and independence to make these goals a reality.”
- Chevron faced similar (less comprehensive) shareholder request;
It’s time to Reenergize Exxon

No public company in the history of oil and gas has been more influential than ExxonMobil, and yet the Company has failed to evolve with the industry’s transition, resulting in significant underperformance to the detriment of shareholders.

The energy industry and the world are changing. To protect and enhance value for shareholders, we believe ExxonMobil must change as well. We believe that for ExxonMobil to avoid the fate of other once-iconic American companies, it must better position itself for the future.
2) Recent developments - UK

- **Regulatory developments:**
- Climate Change Act 2008;
- Less successful climate litigation efforts;
- But litigation has been developing over duty of parent companies’ for acts/omissions of their subsidiaries;
- Piercing the veil has waned but this duty has gained traction as UK Supreme Court and early 2021 accepted jurisdiction to hear claim by Ogoni people in Nigeria.
Timeline of cases

Chandler v Cape
Court of Appeal

Lungowe v Vedanta
High Court

Okpabi v Shell
High Court (Jan 2017)

AAA v Unilever
High Court (March 2017)

Lungowe v Vedanta
Court of Appeal (Oct 2017)

Okpabi v Shell
Court of Appeal (Feb 2018)

AAA v Unilever
Court of Appeal (July 2018)

Lungowe v Vedanta
Supreme Court

Okpabi v Shell
2021

Supreme Court

2012

2016

2017

2018

2019

2021

4 Chandler Factors
Subsidiary in UK

Extended 4-factors
in principle to third parties

Okpabi – 4-factors
could not be extended
Vedanta – 4-factors
could be extended

Okpabi – upheld High Court decision,
but with dissent
Unilever – 4-factors
could not be extended to subsidiary
employees

Vedanta – upheld extension of 4 factors to third parties (cast doubt on Unilever approach)

Overturned Court of Appeal – accepted jurisdiction to hear case

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4 Chandler Factors

1.) businesses of the parent and subsidiary are in a relevant respect the same;
2.) the parent has, or ought to have, superior knowledge in industry;
3.) parent knew subsidiary’s system of work is unsafe; and
4.) the parent knew subsidiary (or employees) would rely on that superior knowledge of parent.
Lungowe v Vedanta

• Subsidiary KCM Ltd. in Zambia;
• High Court – extended Chandler factors to Zambian citizens;
• Court of Appeal – duty could arise:
  • Group policies;
  • Actions of company.
Lungowe v Vedanta

• Supreme Court agreed;

• Duty rests on actions of parent;

• Left open corporate models the duty could be applied in;

• Group policies could establish a duty.
Okpabi v Shell – Court of Appeal

• Affirmed High Court decision to not extend Chandler factors;
• LJ Sales – dissent:
  • Clearly mismanagement by SPDC;
  • RDC facing reputational and financial risks as a result;
  • Demonstrated practical assumption of control;
• Sir Goffrey Vos – policies did not indicate control;
• But in some circumstances they could (harmful products).
Supreme Court 2021

- Accepted jurisdiction to hear *Okabapi v Shell* appeal:

  - Statements pick up on LJ Sales’ dissent;

- Consider the Court of Appeal had taken too narrow of a view of parent duties for actions of subsidiaries.
2) Recent developments in Europe

- Regulatory licence:
- ESG disclosure regime more advanced;
- French Duty of Vigilence law (disappointing reports);
- Large spate of climate litigation suits;
- Most class action claims against Governments:
  - *Urgenda v Dutch State* (2019 Sup Ct.);
2) Recent developments in Europe: RWE v Lliuya (2017)
3) Recent developments in Europe

- *Royal Dutch Shell v Milieu Defensie* (2021):
  - Claim in Dutch tort law unlawful endangerment;
  - Relied Heede’s study that RDS responsible for 1.8% of all CO2 emissions (compared to 0.5% by Dutch State);
  - RDS knew risks, and its inaction is threat to human rights;
3) Recent developments in Europe

• Cited heavily IPCC report on 1.5C:
  – Because RDS is a multinational company it should follow global reduction pathways of IPCC;
  – Its parent company headquartered in The Netherlands establishes the climate policies for the whole group;
• Relied heavily on *Urgenda* decision (2019);
Relied on soft law documents to frame liability

OECD Guidelines MNEs

UN Guiding Principles on Business and HRs
RDS has legal obligations to:

• Respect human rights under UNGP:
  – This obligation to respect is non-avoidable;
  – It applies everywhere, regardless of local legal contexts, and it is not passive;
  – It requires action by business;
  – That action should be proportional to:
    • business size and operations and;
    • severity of impacts.
RDS has legal obligations to:

• ‘Best efforts obligation’ to reduce emissions by 45% by 2030;
• Applies to Scope 1-3 emissions (Scope 3 are end use of its products):
  – ‘RDS controls and influences the Scope 3 emissions of the end-users of the products produced and sold by the Shell group;’
• Applies to group as a whole;
What about Milton Friedman?

• ‘However, the interest served with the reduction obligation outweighs the Shell Group’s commercial interests……Due to the serious threats and risks to the human rights of Dutch residents and the inhabitants of the Walden region, private companies such as RDS may also be required to take drastic measures and make financial sacrifices to limit CO2 emissions to prevent dangerous climate change.’ (para 4.4.43)
3) What does all of this mean?

BP’s ambition is to be a net zero company by 2050 or sooner.

A net-zero emissions energy business by 2050 or sooner.

Net Carbon Footprint ambition 1.5°C

Net-zero emissions from own operations

Partnering for decarbonisation of energy use
Recent WMO statement on 1.5°

• Geneva, 27 May 2021 (WMO) - There is about a 40% chance of the annual average global temperature temporarily reaching 1.5°C above the pre-industrial level in at least one of the next five years – and these odds are increasing with time….
The firm must pay attention to economic licence, regulatory licence, and social licence.
Regulatory licence:
- Mandatory climate risk disclosures regimes;
- Potential for litigation imposing climate-related liability in Europe;
- Lead to increased national targets and more aggressive state-imposed corporate emissions targets on corporations.

Economic licence:
- Substantial investor pressure;
- Increased investment in renewables, transitions to natural gas, methane capture, CCUS

Social licence:
- As impacts escalate public will become more concerned.

The firm
3) What does all of this mean?

- Traditional CSR approach no longer works (as well);
- Need climate expertise on boards or subcommittee of boards;
- Prepare for, and start disclosing climate risks (appropriately, accurately, timely, in comparable and consistent way);
- Will be resistance by some firms;
- But some firms will (already) be considering new business models and transitions away from predominantly fossil fuels;
- Consider long term, more sustainable value.
Second edition of Enterprise Obligations
Creative destruction.....older than Friedman

Creative Destruction is the essential fact about capitalism.

Joseph A. Schumpeter