

CLIMATE CHANGE IMPACTS: AN ANALYSIS ON THE POSSIBILITY OF LEGAL LIABILITY ON THE PARENT DUE TO THE ACTIONS OF ITS FOREIGN SUBSIDIARY

MUHAMMAD SHAHZEB USMAN

Muhammad Shahzeb Usman completed his Bachelor of Laws (BA-LL.B.) from the Lahore University of Management Sciences (LUMS) in 2021. He graduated with the degree of Master of Laws (LL.M.) in 2022 from the University of Nottingham, UK where he studied as the Developing Solution Scholar. He also completed the International Course on Global Refugee Crises on Merit Scholarship in 2019 at Koc University, Istanbul, Turkey. He is currently working as a Legal Researcher for the Chair of Lawfare and International Law at Islamabad Policy Research Institute (IPRI). His areas of interest include analysing the impact of International Financial Institutions (IFIs) from TWAIL perspective, International Human Rights Laws, Labour Laws, Tax Laws, Competition Laws, and Refugee Laws.

ABSTRACT

In the last three decades, several subsidiaries of Western incorporated parent companies have caused and exacerbated climate change impacts in many poor countries. These climate change impacts have also intensified environmental disasters in these countries. Therefore, it is essential that parent companies of these subsidiaries are also held responsible for the impact of climate change. This article highlights legal cases from various Western courts to form a jurisprudential picture to explore the evolution of legal doctrines to hold parent companies accountable for the environmental harm caused by their subsidiaries overseas. In this process, intricacies of the legal tests and national laws are also perused to understand the implications of this evolution in law on the internal functioning and corporate structure of parent companies so that parent companies ensure compliance to the current legal apparatus. Lastly, the economic impact of the changing business milieu owing to the intensification of legal responsibility on parent companies shall also be evaluated to elucidate the loss of financial competitive advantage for the parent companies.

KEYWORDS: Climate Change, Company Law, Corporate Veil, Chandler v Cape, Parent Companies, Due Diligence.

1. INTRODUCTION

In company law, a company and its subsidiaries are generally considered separate legal entities, a concept termed as the ‘corporate veil’. Because of this, parent companies escape liability arising from the actions of their subsidiaries as the ‘corporate veil’ cannot be pierced. Multinational companies are structured in such a way that parent companies and subsidiaries are incorporated in different nation states.¹ One example of this is British Petroleum, which owns 1,200 subsidiaries in different jurisdictions.²

¹ Michael Anderson, ‘Transnational Corporations and Environmental Damage: Is Tort Law the Answer?’ (2002) 41 Washburn Law Journal 399, 401.

² P. I. Blumberg, ‘Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity’ (2004) 24 Hastings International and Comparative Law Review 297, 304.

This separate legal personality is often used to the parent company's benefit: subsidiaries incorporated in low-income, investment-hungry countries cause detrimental impacts on their natural environment and, by extension, the citizens dependent upon those national environments. At the same time, parent companies of these subsidiaries are mostly incorporated in the European Union ('EU'), the United States of America ('USA'), Australia, New Zealand and the United Kingdom ('UK'). Therefore, because of their separate legal personality, parent companies cannot be held responsible for the damage to the natural environment and to local citizens, which means that courts in the aforementioned States deprive plaintiffs of the poorer States of their right of access to justice.³

In light of this context, the aim of this article is twofold. First, it argues that the evolving global and national jurisprudence is strong enough to implicate Western parent companies in their own countries. For this purpose, the case law of different Western jurisdictions shall be evaluated to comb out basic principles which have the potential to hold parent companies responsible for the environmentally hazardous actions of their foreign subsidiaries. This article will then analyse the impacts of potential liability on parent companies by outlining the effects on the internal structure and working of parent companies so that they can legally comply with evolving jurisprudence of law. Moreover, the external business implications on parent companies for non-compliance to the changes in evolving jurisprudence shall also be analysed.

2. ESTABLISHMENT OF LIABILITY ON PARENT COMPANIES

Historically, Western courts have been considerably reluctant to hold parent companies accountable. The *Chevron* case⁴ is a prime example of this reluctance. In this case, the indigenous community native to the Amazon rainforest suffered from oil contamination to their river caused by Chevron's subsidiary which operated in Ecuador. The Ecuadorian courts provided considerable relief to the plaintiffs. The community filed a subsequent plea for the enforcement of the relief in Canada against a Chevron subsidiary which was incorporated in Canada. In response to this plea, the Court of Appeal for Ontario held that the Ecuadorian plaintiffs could not enforce the original

³ Claire Bright and Benedict S. Wray, 'Corporations and Social environmental Justice: The Role of Private International Law' (2018) European University Institute Law Working Paper 2/2012 < [Corporations and Social Environmental Justice: The Role of Private International Law by Claire Bright, Benedict S. Wray :: SSRN](#)> accessed 16 May 2022.

⁴ *Pacific Coast Federation of Fishermen's Associations v. Chevron* (2018) CGC – 18 – 571285

judgment against Chevron's Canadian subsidiary as the subsidiary had no links with Chevron which operated in Ecuador. Thus, the plea of the plaintiffs in Canada was unsuccessful.⁵

The reluctance of Western courts is further exhibited in USA where doctrines such as *forum non conveniens*, i.e., a discretionary power allowing courts to dismiss a case where another court is better suited to hear the case, continue to reign supreme and cause problems in terms of enforcement against a parent. As a result, domestic plaintiffs are provided an advantage over foreign plaintiffs as the victims of the environmental effects of subsidiaries are considered outside the jurisdiction of the courts in the country of the incorporation of the parent.⁶

2.1. Evolution of Legal Jurisprudence on Parent Company Liability

However, various cases have increasingly emerged which make parent companies liable for the actions of their subsidiaries. The pioneer case in this context was *Chandler v Cape plc*⁷ wherein the English Royal Court of Justice held that the extension of the duty of care to a parent can arise if the following three conditions are met: the businesses of the parent company and subsidiary are relatively similar; the parent might or should have knowledge of the safety concerns arising from the industry; and that there was considerable evidence to demonstrate that the parent did intervene in the affairs of the subsidiary.⁸

Similarly, in *United States v. Bestfoods*,⁹ the U.S. Supreme Court stated in a nuanced fashion that a parent can only be held liable for the conduct of the subsidiary for emitting hazardous wastes if the corporate veil is pierced. However, at the same time, the Court reasoned that if a parent is actively participating in the operations of a facility, they can be held liable for the conduct of the subsidiary. The Court further noted that an agency relationship can also arise between the subsidiary and the parent which can make the parent liable if there is a 'consensual' transaction rather than a 'controlling' transaction.¹⁰ In this context, a consensual transaction entails mutual

⁵ Tracy Hester, 'Transnational Liability in U.S. Courts for Environmental Harms Abroad' (2018) 64 Rocky Mountain Mineral Law Institute Annual Proceedings 27-1 <[Transnational Liability in U.S. Courts for Environmental Harms Abroad by Tracy Hester SSRN](#)> accessed 16 May 2022.

⁶ Ibid.

⁷ *Chandler v Cape plc* [2012] 1 WLR 3111

⁸ Ibid. [80]

⁹ *United States v. Bestfoods* 524 U.S. 51 (1998)

¹⁰ *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d, 265 (2d Cir. 1929) 267; *Bendix Corp. v. Adams* (1980) 610 P.2d 24, 32-33

cooperation between the parent company and the subsidiary on an equal footing; in contrast, a controlling transaction would entail greater coercive control from the parent company.

2.2. Assumption of Responsibility Test

Emerging jurisprudence in various countries highlights an increasing willingness of courts to implicate parent companies for the harmful environmental effects of their subsidiaries. In *Lungowe v Vedanta Resources*,¹¹ the UK Supreme Court coined the ‘assumption of responsibility’ test, whereby the responsibility of a parent over a subsidiary depends upon the extent to which the parent company assumes control of the management and operations of the subsidiary. This would require an active interest in the management, supervision, and training of the subsidiary company beyond merely issuing guidelines on the policy materials of the parent company. In essence, the parent company would need to ensure that the subsidiary does not substantially contribute to environmental disasters.

Moreover, if the parent company portrays, in these policy materials, to have undertaken the responsibility of such active management of the environmental concerns of the subsidiary, and proceeds to fall short of said portrayed responsibility, the parent company can be held liable. It must also be noted that if businesses are established along functional lines with a parallel corporate structure, and they have considerable input from the functional head, these businesses can be considered as a ‘group business’ which might attract the liability of the parent company over its subsidiaries.¹²

2.3. How the Level of Control can be Determined

One of the most important cases in establishing a level of control and responsibility of the parent company over its foreign subsidiary is *His Royal Highness Okpabi v Royal Dutch Shell plc*.¹³ In this case, the Nigerian subsidiary of Royal Dutch Shell (‘RDS’), a UK-based holding company, caused significant environmental damage in the surrounding areas of its operations due to oil spills. The UK Supreme Court claimed that it is extremely important to peruse the relevant documents, especially the internal documents of the company, when establishing a particular style of

¹¹ *Lungowe v Vedanta Resources plc* [2019] UKSC 20 [51], [52], [53], [63]

¹² *Ibid.*

¹³ *His Royal Highness Okpabi v Royal Dutch Shell plc* [2021] UKSC 3

relationship between the subsidiary and the parent company. If the relationship is considered to be an operational one, a link can be established through the operational documents of the company to decide the level of engagement between the subsidiary and the parent company.

The Court further reasoned that *de facto* control is an inherent part of the literal meaning of the term ‘subsidiary’. The Court maintained that the establishment of the element of ‘control’ must be considered in relation to the ‘relevant activity’. This is important because there is no general doctrine within tort law which recognises the responsibility of the parent company over the subsidiary.¹⁴ In light of these factors, the Court decided that RDS was an autonomous company with considerable separation and size, and the operations of RDS were limited to their financial matters.¹⁵

Similarly, in the *AAA v Unilever* case,¹⁶ the UK Court of Appeals further elaborated that the ‘level of control’ will not normally arise if the subsidiary handles the management structure on its own, along with incorporating relevant safety policies in line with local conditions and regulations.¹⁷ Therefore, it was noted that the liability of the parent company extends to the actions of its subsidiary if organisational, legal, and economic linkages between the two entities can be established. For this purpose, there should be a holistic analysis of these linkages while determining the liability for the parent company. Generally, a full disclosure is required to establish the link between the parent company and the subsidiary.¹⁸ Thus, the determination of a ‘level of control’ requires considerable divulgence into the functioning of companies which is exhibited through various forms of evidence which can ultimately reflect a certain pattern of control of the parent company over the subsidiary to hold the parent company liable.

2.4. The Liberal (Pro-Environment) View of the Dutch Courts

The Dutch courts are among the most progressive in holding parent companies accountable for environmental damage caused by their subsidiaries. The *Urgenda Foundation* case¹⁹ is one of the most

¹⁴ Ibid. [143] – [149]

¹⁵ Claire Bright, ‘The Civil Liability of the Parent for the Acts or Omissions of Its Subsidiary: The Example of the Shell Cases in the UK and in the Netherlands’ in *A. Bonfanti* (eds), *Business and Human Rights in Europe* (1st edn, Routledge 2018) 217 – 219.

¹⁶ *AAA v Unilever plc* [2018] EWCA Civ 1532

¹⁷ Ibid. [37]

¹⁸ *Tesco Stores Ltd v. Mastercard Inc* [2015] EWHC 1145 [73]

¹⁹ *Urgenda Foundation v The State of The Netherlands* (2018) HAZA C/09/00456689

important cases in establishing the liability of a parent company over its subsidiary. The Dutch Supreme Court reasoned that the duty of care of a parent company extends to all climate change obligations of its subsidiaries. Moreover, the Court stipulated that those obligations extend to the end user of the company's value chain, as the end user is the most vulnerable to the harmful effects of carbon emissions according to the United Nations Guiding Principles ('**UNGP**'). The level of obligation will be proportional to the control and influence a parent company exercises in relation to the carbon emissions which impact the end user. Along with its directors, a parent company can be held liable for the lack of effective implementation of an internal policy which can be used to manage and mitigate the adverse effects of climate change.²⁰

The implication of directors along with the company is necessary as the lack of an effective system to counter climate change within the corporate structure of the parent company can cause the company considerable financial damage and subject the directors to derivative claims. This line of thinking is in consonance with the reasoning of *Antuzis*,²¹ wherein it was held that a company's directors can be held liable for the damage to the reputation of the company by acting in a manner which is wilfully ignorant, crass and careless.²² Thus, a parent company can suffer a loss of goodwill due to breaches of environmental law of its foreign subsidiary. It necessarily follows that subsequent human rights issues in developing countries caused by these subsidiaries can be attributed to the parent company and, by extension, its directors.

In *Akpan v. Royal Dutch Shell*,²³ the Dutch courts further examined the actions of RDS' subsidiary, Shell Petroleum Development Company of Nigeria ('**SPDC**') over the damages caused by their oil spills. The Dutch Court reasoned that it has jurisdiction over claims against both RDS and SPDC. However, the claims against both companies must be intertwined, and must have a legal basis under the law of the parent company's country of incorporation. Article 7(1) of the Dutch Code of Civil Procedure allowed the Court to hear connected claims to the extent that reasons of efficiency require a joint hearing. The Court considered it totally irrelevant whether the liability would be established once the judicial proceedings come into play.²⁴

²⁰ Ibid.

²¹ *Antuzis v DJ Houghton* [2019] EWHC 843

²² Ibid. [121]

²³ *Akpan and others v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria Ltd*, [2013] LJN BY9854

²⁴ Ibid.

Lastly, the expansive attitude of the Dutch courts towards jurisdiction is further manifested by the fact that even non-governmental organisations (“NGOs”) which are not impacted by the effects of the actions of the subsidiary, can bring claims if they fit within the ambit of their advocacy. The claim must fit within the statutory objective of the NGO and must fulfil the criteria of standing under the relevant law of the country.²⁵ Therefore, it can be claimed that Dutch courts are one of the most environmentally progressive courts in the Western world in holding a parent liable for the actions of foreign subsidiaries, provided the requisite legal requirements are clearly fulfilled to bring a claim within the ambit of the Dutch courts.

2.5. What is an Appropriate Jurisdiction?

The question of jurisdiction is a central concern in transnational corporate responsibility. A determination of jurisdiction requires a court to consider several factors, such as the irreconcilability of multiple judgments if a case is pursued in two jurisdictions; the places where the incident occurred; the ease with which the case can be pursued between the two different jurisdictions; and the substantive access to justice in terms of economic and technical circumstances across the different jurisdictions.²⁶ Considering these complex issues, the UK Supreme Court held that a case could be heard in the UK if the country was the most convenient forum to hear the case, and if the case was triable in the UK. Moreover, if there is a risk that absence of legal and financial apparatus would restrict justice in countries like Zambia, the convenient forum would then be in the UK.²⁷

In terms of establishing jurisdiction in foreign countries, the importance of local law remains intact in all cases. A German court did not entertain a case under its jurisdiction, although for a different subject matter unrelated to climate change, since the local law of limitations in Pakistan did not allow filing of the case after two years.²⁸ This example highlights that if any local law bars filing of a case for an environmentally hazardous activity due to procedural matters, the relevant foreign court should consider the technicalities of the procedural law of that country where hazardous

²⁵ Nicola Jägers, Katinka Jesse and Jonathan Verschuuren, *The Future of Corporate Liability for Extraterritorial Human Rights Abuses*, (2014) 107 *AJIL Unbound* 36, 40 – 41.

²⁶ *Lungowe v Vedanta Resources plc* [2019] UKSC 20 [79] – [87]

²⁷ Anita Lloyd, ‘UK Supreme Court Considering Parent Liability for Environmental Harm Caused by Overseas Subsidiaries?’ (*frESH*, 1 May 2019) <www.freshlawblog.com/2019/05/01/uk-supreme-court-considering-parent-company-liability-for-environmental-harm-caused-by-overseas-subsidiaries/> accessed 16 May 2022.

²⁸ *Jaber and others v. KiK Textilien and Non-Food GmbH* (2015) Case No. 7 O 95/15

activity occurred. In essence, the determination of jurisdiction over environmentally hazardous activities which have occurred overseas requires the courts in the parent company's jurisdiction to undertake complex legal analysis which involves multiple considerations.

2.6. Foreign Cubed Cases

The Dutch Courts are also more receptive to hear 'foreign cubed' cases. This is best demonstrated by the Palestinian Doctors cases where the Dutch Court allowed the application against unnamed perpetrators who were instrumental in the incarceration of the Palestinian doctors for eight years in Libya under false charges. There was no manifest link with the Netherlands, but the Court invoked the doctrine of *forum necessitates*, i.e., court exercising jurisdiction on account of no other appropriate court able to exercise jurisdiction, for allowing the case within the jurisdiction of the Netherlands.²⁹ Despite this case's irrelevance to climate change, the holding does imply that those human rights which can be tarnished due to climate change impact might be justiciable in a Dutch court as *forum necessitates* even if a parent company or its subsidiary are not incorporated in the Netherlands. This supports the notion that environmental risks created by corporate entities are directly linked to human rights issues such as the right to life, the right to health, and the right to shelter. Thus, cases of the Western courts which outline the legal contours to hold the parent company under their jurisdiction liable for violations of human rights committed overseas, can also make the parent company liable for the climate change impacts of its foreign subsidiaries.

3. IMPLICATIONS OF THE LIABILITY ON PARENT COMPANIES

Despite the increased judicial scrutiny and development of these legal principles, companies continue to be involved in causing extremely disastrous impacts on the natural environment. Cargill, the largest privately held corporation in the United States in terms of revenue, has caused numerous environmental problems, including the spillage of wastes from hog farms and fertiliser plants into nearby streams. Cargill has also caused significant carbon monoxide emissions, and is reported to have been growing crops in protected areas in the Ivory Coast.³⁰ Large oil and gas

²⁹ Editorial, 'Dutch court compensates Palestinian for Libya jail' *BBC* (London, 28th March 2012) <<https://www.bbc.com/news/world-middle-east-17537597>> accessed 26th October 2022

³⁰ Lucy Jordan and others, 'Cargill: the company feeding the world by helping destroy the planet', (Unearthed, 25th November 2020), <<https://unearthed.greenpeace.org/2020/11/25/cargill-deforestation-agriculture-history-pollution/?fbclid=IwAR0fZGlfDVCqs5s8XhqDmGujanFh7ddDg98pkmMCewiyOBIjxlaUSOBoz?>> accessed 17th May 2022.

companies including ExxonMobil, Shell, Chevron, BP, and Total have also invested over one billion US dollars in three years on misleading climate-related branding and lobbying.³¹ Crab fishing waters have also been forced to close down due to the creation of algae blooms in the warming Pacific waters, which was caused by the activities of oil companies. This harm to food sources in turn threatens the livelihoods of many people.³²

Considering the jurisprudence that has evolved, there are several legal doctrines that can be invoked to hold a parent company liable for the environmental impacts of its subsidiaries. Therefore, parent companies are exposed to a risk of protracted litigation for the environmentally hazardous activities of their subsidiaries. However, parent companies are still not taking reasonable precautions to reduce their impacts on climate change which can result in legal liability for them sooner or later. As a result, the implications of evolving legal principles as well as subsequent domestic legal developments are that parent companies must take considerable precautions to escape tentative legal liability and business contraction in future.

3.1. Compliance with National Laws

A company must establish effective monitoring systems in accordance with national legislation and regulations to avoid liability. This is crucial, as directors can be subject to considerable statutory obligations and duties under both environmental law and human rights law, as the latter inevitably applies to the former. Evolving jurisprudence on the precautionary principle in environmental law has materialised into statutory legal obligations. This fact can be illustrated in the Spanish Environmental Liability Law of 2007 which extends the liability to a parent company if an environmental harm is caused to the people by the subsidiary company.³³ Accordingly, parent companies incorporated in Spain must conduct environmental impact assessments ('EIAs') to prevent liability for future environmental harms. Similarly, the Austrian National Contact Point

³¹ Editorial, 'InfluenceMap report alleges misleading climate-related branding & lobbying by major oil & gas companies; BP, Chevron, ExxonMobil, Shell & Total responded' (*Business and Human Rights Resource Center*, 6th May 2019) <<https://www.business-humanrights.org/en/latest-news/influencemap-report-alleges-misleading-climate-related-branding-lobbying-by-major-oil-gas-companies-bp-chevron-exxonmobil-shell-total-responded/>> accessed 17th May 2022.

³² David Hasemyer, 'Crab Fishers Sue Fossil Fuel Industry Over Climate Change Damage', (*Inside Climate News*, 14th November 2018) <<https://insideclimatenews.org/news/14112018/crab-fishermen-climate-change-lawsuit-fossil-fuel-companies-ocean-algae-neurotoxin-fishery-closure/>> accessed 17th May 2022.

³³ 'Law 26/2007, Of October 23, Environmental Responsibility' (*Global Regulations*, 23rd October, 2022) <<https://libguides.swansea.ac.uk/oscola/websites#:~:text=To%20reference%20information%20from%20a%20web%20site%20you%20should%20include%20the,the%20URL%20and%20accessed%20date.&text=Format%3A%20Author%20%20%20Webpage,%20accessed%20date.>>> accessed 5th November 2022.

also requires that human rights in all manifestations must be respected by the parent in relation to the subsidiaries.³⁴

The French vigilance plan is the most elaborate as it applies to both direct and indirect foreign subsidiaries.³⁵ The vigilance plan requires parent companies to conduct risk mapping to identify, analyse, and prioritise risks associated with certain business activities. Procedures must also be set within companies for the assessment of suppliers, subcontractors, and subsidiaries. Control procedures need to be present for these harms, and a system of alerts and mechanisms should be in place which realise and monitor these risks.³⁶ Thus, in line with this vigilance plan, a French court required that Total, the oil company, must comply with the vigilance plans to escape any kind of liability.³⁷

Furthermore, parent companies must also consider their corporate structure in which there is no control of a subsidiary and the location of said subsidiary is separated from the parent company. The shareholding in the subsidiary should not be in any preferential manner nor intermediate subsidiaries should be created.³⁸ Different people should sit at different boards of directors for separate representation of each company and there must be fewer guarantees as well as indemnities of the subsidiary on behalf of the parent company.³⁹ Local systems must be designed to gauge environmental impacts, and the management should be operated in such a way that the parent company has absolutely no involvement in the process.⁴⁰ Thus, these processes allow the Western parents to actively comply with the emerging legal doctrines in relation to environmental jurisprudence.

3.2. Codes of Conduct

³⁴ David W. Rivkin and others, *UN Guiding Principles on Business and Human Rights at 10; The Impact of the UNGPs on Courts and Judicial Mechanisms* (Debevoise and Plimpton 2021) .79

³⁵ European Parliament, *Corporate Social Responsibility (CSR) and its implementation into EU Company law*, (PE 658.541, 2020) 27

³⁶ Vidal SS and Charles Dauthier, 'French Companies Must Show Duty of Care for Human and Environmental Rights' (*Morgan Lewis*, 3rd April 2017) <<https://www.morganlewis.com/pubs/2017/04/french-companies-must-show-duty-of-care-for-human-and-environmental-rights>> accessed May 17, 2022

³⁷ 'Climate Change Litigation against Total: A First Victory for the NGOs and Local Authorities' (*Business & Human Rights Resource Centre*, 11th February 2021) <<https://www.business-humanrights.org/en/latest-news/climate-change-litigation-against-total-a-first-victory-for-the-ngos-and-local-authorities/>> accessed May 17, 2022.

³⁸ 'Oil and Gas: Parent Liability for the Tortious Acts of Its Subsidiary - Practical Considerations' (*Fieldfisher*, 8 August 2018) <<https://www.fieldfisher.com/en/insights/oil-and-gas-parent-company-liability-for-the-tortious-acts-of-its-subsidiary-practical-considerations>> accessed May 17, 2022.

³⁹ Ibid.

⁴⁰ Ibid.

Designing ‘Codes of Conduct’ is very important for parent companies to create a framework that prevents future liability claims. In these codes, parent companies should not use language which portrays the imminence of the obligations or the mandatory effect of the promises. In 2013, the Ontario Supreme Court held that public statements are important evidence to establish the link of control between the parent and subsidiary.⁴¹ These codes influence legal standards as they have a substantial impact on the legislation and regulations that are shaped in the future as well as the widespread corporate practices that become commercial norms.⁴² For example, Shell’s Code of Conduct is important as the oil company has a history of ‘importing’ their Codes of Conduct into their contracts and thus creating a ‘pre-sourcing’ approach to make them legally binding. In this way, Shell’s contractors and suppliers take responsibility in case of non-compliance with the Voluntary Principles of Security and Human Rights, which are embedded in their Codes of Conduct. Thus, Shell creates a legal obligation through importing voluntary principles into their contracts and adds to the industry norms which can eventually take the shape of soft law.⁴³

Moreover, parent companies must avoid the use of words that create legally binding obligations, such as ‘shall’, when drafting their Codes of Conduct.⁴⁴ In *Choc v. Hudbay Minerals Inc.*,⁴⁵ the parent company was considered responsible because of the public statements it made regarding its obligations to the human rights of the employees of the subsidiaries. These statements established a relationship of proximity between the parent company and the subsidiary, and by extension, between the parent company and the local community. As a result, these statements resulted in increased expectations from the parent company in relation to those actions of its subsidiary which had detrimental impacts to the environment of the local community.⁴⁶

3.3. What does Compliance with International Standards Entail for the Companies?

To protect parent companies from liability arising from third-party activities, the UNGPs require parent companies conduct due diligence of their conduct and take reasonable steps to prevent and

⁴¹ *Choc v Hudbay Minerals Inc.*, 2013 ONSC 141 [69]; Sarah Rathke, ‘Problem with Palm Oil (Or Next Wave of Supply Chain Class Actions?)’ (*The National Law Review*, 9 December 2015) <www.natlawreview.com/article/problem-palm-oil-or-next-wave-supply-chain-class-actions> accessed 16 May 2022.

⁴² Lara Blecher, ‘Codes of Conduct: The Trojan Horse of International Human Rights Law’ (2017) 38 *Comp Lab L & Pol’y J* 437, 473.

⁴³ *Ibid.*, 449.

⁴⁴ *Ibid.*, 450.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* 465.

mitigate potentially adverse environmental impacts.⁴⁷ Therefore, companies should conduct human rights due diligence to assess potential and actual human rights impacts; track responses; and integrate information from all stakeholders to protect people from any kind of human rights violations which might occur incidental to environmental impacts of the parent's operations.⁴⁸

There is also emerging consensus that the UNGPs must be observed in the internal and external behaviours of the company. The UNGPs are increasingly recognised as soft law in the domain of corporate responsibility.⁴⁹ The presence of a smart mix of soft law and hard law is important as it will allow a bottom-up approach to raise awareness and include the input of all relevant stakeholders for greater corporate accountability.⁵⁰ Thus, in the *Milieudefensie* judgment, the Dutch District Court of The Hague relied on the UNGPs to interpret RDS's duty of care under the Dutch Civil Code and considered it authoritative soft-law as well.⁵¹ Moreover, in *Milieudefensie*, the Dutch court frames the UNGPs as the global standard for conduct which corporations should adhere to, a perspective also in line with the Organization for Economic Co-operation and Development (“OECD”) Guidelines for Multinational Enterprises. There is also an evolving consensus of the legal value of the OECD Guidelines amongst various multinational companies. Similarly, most national commissions consider the OECD Guidelines as one of the standards which need to be complied with, and that parent companies should give evidence that the OECD Guidelines have been incorporated into the various processes of companies.⁵²

To comply with UNGPs and OECD Guidelines, it is essential that parent companies change the way their processes are constituted to incorporate greater due diligence obligations. For instance, Schneider Electric, a French multinational company, constituted a committee of representatives of its CSR, purchasing, environment, and safety teams, to identify risks in all their companies in terms of environment as well as all the streams of supply chain whether downstream or upstream.

⁴⁷ Jonathan Bonnitcha and Robert McCorquodale, ‘The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights’ (2017) 28:3 The European Journal of International Law 899, 903 – 905.

⁴⁸ Working Group on Business and Human Rights, ‘Corporate human rights due diligence – identifying and leveraging emerging practices’ (OHCHR, 2011) <[OHCHR | Corporate human rights due diligence – identifying and leveraging emerging practices](#)> accessed 17th May 2022

⁴⁹ Chiara Macchi and Josephine van Zeben, ‘Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell’ (2021) 30:3 Review of European, Comparative and International Environmental Law <[Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell - Macchi - 2021 - Review of European, Comparative & International Environmental Law - Wiley Online Library](#)> accessed 16 May 2022, 412

⁵⁰ Jennifer Zerk and Kumaravadevel Guruparan, ‘Influence of soft law grows in international governance’ (*Chatham House – International Affairs Think Tank*, 21 June 2021) <[www.chathamhouse.org/2021/06/influence-soft-law-grows-international-governance](#)> accessed 16 May 2022.

⁵¹ *Milieudefensie et al. v Royal Dutch Shell PLC* (2021) HAZA C/09/571932

⁵² Jonathan Bonnitcha and Robert McCorquodale, ‘The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights’ (2017) 28:3 The European Journal of International Law 899, 953.

They also identified risks according to the geographical locations giving more importance to places which are more prone to environmental disasters. In terms of on-site audits, second and third risk assessments were established if the conditions were not improved after the preventive measures implemented during the first risk assessments.⁵³

In sum, to prevent environmental damage and thus liability, parent companies must identify relevant risks; devise processes for assessment of these risks; tailor actions to mitigate or prevent these risks; establish a risk alert system; and create a monitoring system to evaluate the effectiveness of these systems.

3.4. Climate Change Due Diligence

OECD and UNGP Guidelines are in line with the emerging concept of ‘climate due diligence’ which require corporations to assess and address climate change risks through vigilance planning, corporate reporting, external communication, and investment decisions. In this context, larger companies have a more serious effect on the natural environment due to the size of their operations; thus, they have greater disclosure responsibilities of their emissions.⁵⁴ Nevertheless, the UNGPs still require smaller corporate entities to effectively comply equally with climate change due diligence obligations. However, highly hazardous sectors such as oil producing companies and the agricultural sector have enhanced responsibilities to conduct risk assessments of the effects of their actions on climate change, as well as subsequent effects on workers, communities, and local natural resources. For this purpose, Human Rights Impact Assessments (‘**HRIAs**’) and Environmental and Social Impact Assessments (‘**ESIAs**’) must be integrated to understand the complex nature of the threat to the environment.⁵⁵ In this regard, it is important to note that environmental harms such as oil spills and deforestation are connected with climate change impacts such as greenhouse gas emissions. Forests act as carbon sinks that absorb greenhouse gases; similarly, the risk of oil spills increases with climate change especially in low lying coastal

⁵³ Brabant S and Elsa Savourey, ‘French Law on the Corporate Duty of Vigilance’ (*Dossier thématique*, 14 December 2017) <http://www.bhrinlaw.org/frenchcorporatedutylaw_articles.pdf> accessed May 16, 2022

⁵⁴ Chiara Macchi, ‘The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of Climate Due Diligence’ (2001) 6(1) *Business and Human Rights Journal* 93, 99 – 101.

⁵⁵ *Ibid*, 108 – 115.

areas.⁵⁶ Moreover, oil spills and greenhouse emission both also considerably impact human rights such as the rights to food and health.

Environmental Management Systems ('EMS') can be important tools for parent companies to escape liability for their conduct. This system would, *inter alia*, require training and education of employees as well as the consultation of various stakeholders in finding effective cost-efficient measures to reduce harms to the environment. Contingency plans would also be required to control and reduce the serious environmental damages that might be caused along with efficient reporting mechanisms for such harms.⁵⁷ It must be noted that if the parent company seeks any defence from such due diligence obligations, they must provide evidence that they established 'due care' to identify and avoid damage. Consequently, in environmental litigation, the burden of proof is placed on the parent company to establish that they met their due diligence obligations rather than merely asserting that they were not involved in the environmental management of the subsidiary.⁵⁸

3.5. Regional Regulation

Another important implication for parent companies pursuant to the evolving jurisprudence in transnational corporate accountability is regulation at the regional level. Regulations such as the European Union's Environmental Liability Directives ('ELD') of 2004 impact Member States' corporate entities in relation to their working and structure. For example, the 'polluter-pays' principle within the ELD requires that industrial activities that are inherently dangerous to the environment will be held 'strictly liable' to the polluter,⁵⁹ requiring a causal link between the activity and the company without the need to establish culpability. The ELD further enunciates that a damaged environment must be physically reinstated by the culpable party through the replacement of similar or identical natural components in terms of primary remediation. If this is not possible, a complementary remediation with similar primary measures elsewhere is required to cover the

⁵⁶ Audrey Carlton, 'Why More Climate Change Means More Oil Spills' *Vice* (New York, 14th September 2021) <<https://www.vice.com/en/article/93y4ba/why-more-climate-change-means-more-oil-spills>> accessed 5th November 2022.

⁵⁷ FIDH – International Federation of Human Rights, 'Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms' (May 2016) <www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf> accessed 16 May 2022, 393 – 395.

⁵⁸ Office of the United Nations High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights' (2011) < [GuidingPrinciplesBusinessHR_EN.pdf \(ohchr.org\)](http://www.ohchr.org/Documents/Principles/Business/Principles_Business_Human_Rights_EN.pdf)> accessed 16 May 2022, 76 – 77.

⁵⁹ Consolidate Version of the Treaty on the Functioning of European Union [2012] OJ C 326/49 (TEFU) Article 191(2)

interim losses until the environment is fully restored. Therefore, parent companies should adopt a precautionary approach which encompasses the establishment of an EMS and the investment in technologies which reduce the environmental risks of their subsidiaries.⁶⁰ Moreover, parent companies like oil producing companies should also establish a financial guarantee for their subsidiaries which involve high-volume hydraulic fracturing to remedy any foreseeable liability.⁶¹

3.6. Business Implications

The increase in liability on parent companies may ultimately lead to a significant loss of investment. Due to the increase in costs from more stringent environmental regulation, investment capital tends to move from high-risk industries to other industries which are presumably less environmentally dangerous. For example, Norway's Sovereign Wealth Fund decided to sell its stakes in 23 palm oil companies and reduce its investments in the palm oil industry by 40% in 2013 due to the concerns of increased deforestation. Thus, loss of access to the global capital markets due to the abuse of local people and environment can cause a major concern for industries that are inherently associated with environmental risks, such as the palm oil industry.⁶²

Furthermore, access to global capital markets and international funding for parent companies can also be made conditional through certain pre-conditions which parent companies must comply with. For instance, the Norwegian Fund required from the tropical rainforest companies to disclose its footprint on forests if these companies want to access their Fund.⁶³ Parent companies are increasingly also subjected to carbon taxes to disincentivise industries like oil and gas, and are subjected to policies such as a moratorium on cutting of forests to reduce the use of carbon

⁶⁰ European Commission, 'Report from the Commission to the European Parliament and to the Council pursuant to Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage' (April 2016) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0121&from=EN>> accessed 17th May 2022, 7 -14.

⁶¹ European Commission Recommendation 2014/70/EU of 22 January 2014 on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high-volume hydraulic fracturing [2014] OJ L39/72 para 12.

⁶² Editorial, 'Norway's wealth fund dumps 23 palm oil companies under new deforestation policy' *Mongabay* (Menlo Park, 11th May 2013) <[https://news.mongabay.com/2013/03/norways-wealth-fund-dumps-23-palm-oil-companies-under-new-deforestation-policy/#:~:text=Norway's%20\\$700%20billion%20pension%20fund,led%20the%20campaign%20for%20divestmen](https://news.mongabay.com/2013/03/norways-wealth-fund-dumps-23-palm-oil-companies-under-new-deforestation-policy/#:~:text=Norway's%20$700%20billion%20pension%20fund,led%20the%20campaign%20for%20divestmen)> accessed 17th May 2022.

⁶³ Editorial, 'Norway's \$650B pension fund to require deforestation disclosure among portfolio companies' *Mongabay* (Menlo Park, 12th November 2012) <<https://news.mongabay.com/2012/11/norways-650b-pension-fund-to-require-deforestation-disclosure-among-portfolio-companies/>> accessed 17th May 2022.

degraded land.⁶⁴ Most agricultural companies are also now signing the Cerrado moratorium which encourages farmers through a financial incentive to move in the direction of not indulging in deforestation.⁶⁵ This particular trend can have a substantial impact on agricultural companies like Cargill which might not be able to access suitable land for their business. Thus, a company's failure to comply with globally evolving regulations results in the loss of financial competitive edge as well as constraints in their supply chain.

4. CONCLUSION

Ultimately, parent companies in various Western countries are increasingly implicated for the adverse environmental impacts of their subsidiaries located in regions such as Latin America, South Asia, South–East Asia, and Sub–Saharan Africa. Many Western courts are creating various expansive doctrines of law allowing claims against Western parent companies to be justiciable in their legal systems by plaintiffs who have suffered wrongs by their subsidiaries in other jurisdictions. There has been a marked change in the attitude of Western courts seeking to expand their jurisdiction in order to impose increased judicial scrutiny on parent companies incorporated under their legal system.

This change of attitude of Western courts is also reflected in changes in the domestic legal system of Western countries, as well as in the developing corpus of international soft law, such as the UNGPs and the OECD Guidelines. These shifts in domestic legal regimes work in tandem with international soft law, resulting in various implications on the business models of parent companies, as they are forced to comply with greater environmental due diligence obligations. These implications include changes in their corporate governance; creating a robust compliance system within companies to provide due diligence to national laws and ELDs; devising a system of climate due diligence; and crafting the language of codes of conducts which are in accordance with the evolution of jurisprudence in Western courts.

⁶⁴Jeremy Hence, 'Norway to double carbon tax on oil industry for climate change programs' *Mongabay* (Menlo Park, 15th October 2012) <<https://news.mongabay.com/2012/10/norway-to-double-carbon-tax-on-oil-industry-for-climate-change-programs/>> accessed 17th May 2022; Editorial, 'Indonesia's moratorium will not significantly reduce emissions, but has other benefits, finds analysis' *Mongabay* (Menlo Park, 27th February 2012) <<https://news.mongabay.com/2012/02/indonesias-moratorium-will-not-significantly-reduce-emissions-but-has-other-benefits-finds-analysis>> accessed 17th May 2022.

⁶⁵ David Bellany, 'From Environmental Leader to 'Worst Company in the World' *New York Times* (New York, 29th August 2019) <[From Environmental Leader to 'Worst Company in the World' - The New York Times \(nytimes.com\)](https://www.nytimes.com/2019/08/29/climate/indonesia-environment.html)> accessed 17th May 2022.

Moreover, if parent companies fail to behave responsibly even under this increased scrutiny, their survival in the international market would be difficult since any environmental hazards caused by any entity linked to them will damage their goodwill and hamper their access to any stable sources of credit from the international financial market. Thus, public communication with all stakeholders about the hazards of products of the company must be taken to make informed decisions in line with environmental due diligence obligations. Parent companies should also refrain from distorting public debates through media and share their research with the public as part of their environmental due diligence obligations. Lastly, they must also invest in renewable energy products which reduce emissions and mitigate their environmental impacts.⁶⁶

⁶⁶ *Pacific Coast Federation of Fishermen's Associations v. Chevron* (2018) CGC – 18 – 571285 [161], [162]