Climate change disputes

An increasing number of legal claims and actions against oil and gas companies may herald the start of a new trend in climate change disputes, write Mark Clarke, Partner, and Katherine Daley, Associate, at international law firm White & Case.

Mark Clarke
Partner, London

Katherine Daley
Associate, London

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As legal action on climate change-related grounds intensifies, claimants are increasingly seeking to bring legal action against oil and gas companies. To date, common causes of action have included public nuisance, failure to warn and breaches of environmental laws and regulations. For example, the County of San Mateo previously pursued causes of action in negligence and failure to warn against Chevron, alleging the company had taken affirmative steps to conceal the foreseeable impacts of the use of fossil fuel products on people and the climate.[1]

Chevron denies liability and is robustly defending the allegations and, thus far, there have been very few significant findings against oil and gas companies on these grounds. However, the legal claims and actions brought against corporate defendants are becoming increasingly novel and may herald the start of a new trend in climate change-related disputes.

Shareholder action

The scientific and public consensus on the impact of climate change is now a prime consideration for investors and shareholders, who are taking action against companies that do not align with their views. This is evident by the establishment of groups such as Climate Action 100+, a group of investors who have signed a voluntary statement setting out their commitments and the expectations of various companies on the initiative's focus list. The initiative seeks to ensure commitment from boards and senior management to implement a strong governance framework for oversight of climate risk and opportunities, to take actions to reduce greenhouse gas (GHG) emissions across the value chain, and to provide enhanced corporate disclosure.

The group claims to have 450 investor signatories worldwide, collectively managing over $450 trillion in assets. In May 2019, 99% of BP's shareholders voted in favour of a resolution proposed by Climate Action 100+, directing BP to adopt a business strategy in line with the goals of the Paris Agreement.

1 *County of San Mateo v. Chevron Corp. et al,* No. 17-03222 (Cal. Super. Ct. 2017).

More recently, in January 2020, it was reported that a group of shareholders at Barclays bank had been formally challenged by shareholders to stop financing fossil fuel companies. A shareholders' resolution has been filed by 11 institutional investors, managing between them over £130 billion, and is set to be voted on at Barclays' annual meeting in May 2020. If passed, the resolution will require the bank to stop funding any company that has not aligned itself with the Paris goals. The shareholders filing the resolution were co-ordinated through ShareAction, a charitable organisation that campaigns for what it describes as 'a more responsible investment system'.

In addition to exercising their voting rights and exerting political pressure, shareholders have also proved that they are not opposed to legal action. In *Abrahams v. Commonwealth Bank of Australia*, shareholders sued the Commonwealth Bank of Australia (CBA), alleging that its 2016 annual report violated Australian company law by failing to disclose climate change-related business risks – specifically, risks related to possible investment in a controversial coal mine. The shareholders withdrew the claim following publication of CBA's 2017 annual report, which included an acknowledgment from the directors that climate change posed a risk to CBA's operations – the first time such a statement was included in its annual reporting. CBA has since also published its first climate policy position statement and has pledged not to lend money to the coal mine project that triggered the litigation.

Financial disclosure and fraud

The case against the CBA signals another growing trend in legal action against oil and gas corporations – an increased focus on the inadequate or fraudulent disclosure of climate-related risks in financial and strategic reporting. Such action is being brought by shareholders, activists and those affected by the impacts of climate change.

In December 2019, the New York Supreme Court heard the high-profile civil case filed by the NYAG against ExxonMobil for allegedly misleading investors about the business costs of climate change.[2] Specifically, the NYAG alleged that ExxonMobil had engaged in a 'longstanding fraudulent scheme' to deceive investors by providing misleading statements that (i) ExxonMobil was effectively managing risks posed by regulations to address climate change, such as carbon taxes, and (ii) such regulations did not pose a significant risk to the company. NYAG asserted that ExxonMobil's internal practices were inconsistent with these statements, were undisclosed to investors, and exposed the company to greater risk from climate change regulation than investors were led to believe.

ExxonMobil vigorously denied the allegations and the Honorable Barry Ostrager, a judge on the New York State Supreme Court, concluded that NYAG failed to prove that ExxonMobil had misled shareholders. Nevertheless, this case shows that companies should be on alert and that they could be scrutinised by shareholders, governmental officials and the public for how they disclose and internally account for climate change-related risks. The outcome of a previous claim against ExxonMobil brought by the Massachusetts Attorney General on similar grounds is currently pending.

Voluntary rules and guidance

In recent months, claimants have increasingly looked to commence action grounded in voluntary rules and guidance regulating the business world.

In December 2019, Client Earth launched a complaint against BP following the release of its 'Possibilities Everywhere' campaign. In their complaint, Client Earth relied on the Organisation for Economic Co-Operation and Development (OECD) Guidelines for Multinational Enterprises, which are non-binding principles and standards for responsible business conduct.[3] Client Earth argued that BP's marketing campaign was misleading consumers in contravention of the OECD Guideline for 'clear, honest, accurate and informative communication between enterprises and the public'.

Specifically, Client Earth alleged that BP's campaign was misleading and sought to burnish renewable credentials without explaining how the transition to cleaner fuels was taking place.

2 *People of the State of New York v. ExxonMobil Corp.*

3 Organisation for Economic Co-Operation and Development Guidelines for Multinational Enterprises, http://www.oecd.org/daf/inv/mne/48004323.pdf

Climate change disputes

The complaint was filed against BP with the UK National Contact Point for the OECD Guidelines for Multinational Enterprises (UK NCP) and seeks to make BP take certain steps to correct the allegedly misleading information or, in the alternative, asks that the UK NCP find BP in violation of the OECD guidelines if they do not take the requested action.

Although the UK NCP can make formal recommendations to respondents, the complaints procedure is not a legal process and the UK NCP has no formal investigatory powers and cannot compel a business to act or implement its findings. With limited statutory power or enforcement, it is unlikely that this avenue poses a real legal threat to oil and gas companies. Nonetheless, this novel complaint signals that such companies are facing new challenges related to their advertising and transparency, not least of which is the negative publicity that follows a challenge. Indeed, Client Earth has credited BP's decision to end its Possibilities Everywhere advertising campaign as evidence of its successful challenge.

Further, whilst the UK NCP does not have legal powers, other regulatory bodies that do have already made rulings on misleading advertising in this area. In September 2019, the Norwegian energy company Equinor faced a warning from the UK Advertising Standards Agency (ASA) when it was told not to imply that gas was a 'low carbon energy' source. This is the latest in a series of warnings by the ASA, given to companies promoting the environmental benefits of gas, such as its 2018 ban on Ineos claiming that the gas produced by fracking has 10% less emissions than imported gas.

Human rights

Until now, there have been few legal actions against companies based on alleged breaches of human rights, despite the increasing prevalence of a rights-based approach to climate change related lawsuits worldwide. In the significant case of *Urgenda Foundation v. Netherlands*, the claimants successfully employed a rights-based approach in convincing the Dutch Supreme Court to require the government to make a higher emissions reduction target. Specifically, the Court was persuaded by the claimants' argument that rights under the European Convention on the Protection of Human Rights, including the right to life (*Article 2*) and the right to respect for private life (*Article 8*), obliged the Dutch government to achieve a stricter reduction in emissions, due to the potentially severe impacts of climate change on the lives of individuals.

Recent legal action suggests that human rights arguments are also starting to be more widely employed against oil and gas companies. Following a three-year investigation into whether 47 major fossil fuel companies should be accountable for the human rights harms caused to Filipino citizens due to climate change, the Commission on Human Rights of the Philippines indicated that they could. The Commission also considered that the existing laws of the Philippines provided both civil and criminal grounds for action against these companies, suggesting future legal action in this area is very likely.

Similarly, legal action brought against Total by six non-governmental organisations in France regarding its Tilenga oil project in Uganda and Tanzania alleged that Total failed adequately to assess the threat to human rights and the environment.

It is too soon to see the impact of these claims in persuading judiciaries to find against companies for climate change related harms or the legitimacy of their corporate action. However, the unprecedented success of the claimants in the case of *Urgenda* has undoubtedly influenced other claimants in the framing of climate change-related lawsuits and the motivation to employ a rights-based approach.