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The special features of corporate governance in the energy sector. Challenges, risks and opportunities for the Directors and the Board. Assessment of the ESG factors.

Master's Thesis

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This Thesis is dedicated to my brother, Harry, who always shows awareness about environmental issues.

Declaration of Originality

I hereby declare that this thesis has been composed by myself independently and only with the aid referred to in References/Bibliography and that no means other than those declared were used. In every single case, I have marked parts that were taken out of published or unpublished work, either verbatim or in a paraphrased manner, as such through a quotation. This thesis has not been handed in or published before in the same or similar form. A review of the work for plagiarism using appropriate software may be made.

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List of Abbreviations

ANLA:	Autoridad Nacional de Licencias Ambientales (National Authority for Environmental Licences)
BoD:	Board of Directors
CJEU:	Court of Justice of the European Union
CSR:	Corporate Social Responsibility
EC:	European Commission
ECHR:	European Convention on Human Rights
EHS:	Environment, Health and Safety
EP:	European Parliament
EPM:	Empresas Públicas de Medellín
ESG:	Environmental and Social Governance
EU:	European Union
EU law:	European law
EU treaties:	European Treaties (TEU and TFEU)
FIDH:	International Federation for Human Rights
GHG:	Greenhouse gas
GRI:	Global Reporting Initiative
RDS:	Royal Dutch Shell
RWE:	RWE AG
SEC:	US Securities and Exchange Commission
TEE:	Treaty of European Union
TFEU:	Treaty of the functioning of the European Union
PV:	Photovoltaic
UKSC:	UK Supreme Court

Abstract

This thesis discusses the link between specific features of the members of the BoD and corporation's sustainability performance in the energy sector. Moreover, it argues and shows why directors of energy corporations should be obliged to always take into consideration esg factors when making decisions. Finally, it examines through relevant cases from all over the world the main reasons why energy companies have been brought before the courts.

Strengthening corporations in the energy sector along with energy access, energy sustainability, and energy security are undoubtedly important issues. Improving governance in companies and institutions is an essential activity for companies worldwide during this demanding period of energy sector transformation.

Boards are responsible for ensuring that a company is nimble enough to respond to changing market conditions, by taking advantage of opportunities and managing risks. One of the key roles of directors is to develop, often with management, a company's vision, and strategic direction, to scrutinize key financial risks and to ensure effective management of risk and compliance. Boards need to be confident that they can be alert to any triggers that could see a change in risks. Furthermore, it is critical for boards to understand and manage the strong interconnectivity of risks in their company and understand how they impact on each other.

The thesis is unique for its proposal of a conceptual framework analyzing the link between corporate governance attributes and the degree of sustainability practice and performance by companies when the members of its BoD own specific attributes. Moreover, for its proposal to the establishment of two new duties that directors of energy corporations should own to them. Lastly, for its taxonomy and cumulative presentation of cases of energy corporations that have been brought before the courts.

Key words: energy sector, corporate governance, board of directors, esg concerns, committees, esg litigation, sustainability

1. Introduction

The world is more interconnected and changing faster than ever before. Corporate directors, regulators and policymakers must be able to see change as a possibility and have the skills and mindset to turn ideas into action. The energy industry is during a deep and wide-ranging transformation. Strengthening institutions and companies in the energy sector along with energy access, energy sustainability, and energy security are undoubtedly important energy issues.

The most important aspect is to carefully design how corporations evaluate, deploy, train, test, secure, monitor and manage the new systems and solutions. Strong internal governance, policies, oversight, and accountability are critical to any material business change, and particularly to a successful sustainable transformation. Thus, improving governance in companies and institutions is an essential activity not only for the EU companies but also for companies in the US, Asia, and Australia during this period of energy sector transformation.

This thesis argues that environmental strategies and decisions made by the top executives and the board of directors of corporations affect a large group of stakeholders with conflicting financial and nonfinancial interests, therefore, the role of the board is crucial in addressing issues raised by various stakeholders. Especially, the energy corporations must take full responsibility for their manufacturing processes and operations, ensuring sustainable practices and the wellbeing of their stakeholders since they are the ones that affect the environment the most. Good corporate governance must mitigate agency problems, reduce externalities, and force executives to take into consideration the interests of both shareholders and other stakeholders.

The aim of this thesis is on the one hand to highlight the special features of corporate governance in the energy sector, and on the other to highlight through the examination of recent case law that for energy corporations, the rise of environmental concerns, the climate change and the energy transition are the main causes for legal, financial, and reputational risks.

This thesis is structured in 7 chapters, including this introduction. In the second chapter I present my methodology and the way I examine the research questions.

Next, I discuss the special features of corporate governance in the energy sector, focusing on the Board of Directors. Furthermore, I illustrate through theoretical and empirical research how the composition of the board of directors plays a crucial role in the way an energy company is governed. More specifically, it is argued that the BoD has the potential through its special features, namely its size, independent directors, and its diversity feature (gender, nationality and age) adopt a sustainable strategy which will not only promote environmental goals but will succeed in maximizing shareholders' profits as well. This thesis, based on the theoretical

foundation I discuss and formulate, and the relevant scholarship on the composition of the BoD, proposes a conceptual framework to analyze the link between corporate governance attributes and the degree of sustainability practice and performance by companies when the members of its BoD own specific attributes.

In the fourth chapter, I develop a theoretical framework by answering crucial corporate governance questions such as to whom directors own fiduciary duties, whether directors have an obligation to consider esg concerns when planning corporate strategy and making decisions. Furthermore, I conduct an analysis and assessment of the ESG factors and based on this, propose the development of two separate fiduciary duties for directors in energy corporations.

In the fifth chapter, I examine through the relevant case law the main reasons why energy companies have been brought before the courts. Then, I develop my own taxonomy for a more accurate examination. First, I make a general classification of the esg parameters and refer to indicative cases and how they have been dealt with by the judicial authorities. Then, I analyze specifically cases from climate change litigation which has taken on large scale and is a major source of risk (i.e., financial, reputational) for energy companies.

In the sixth chapter, I present my conclusions, and discuss based on them what the BoD should do to avoid litigation and in general improve the internal governance of the corporation. In the last chapter, I recognize the limitations of this thesis and propose areas and issues on which further research should be done.

Lastly, I discuss the limitations of this thesis and propose areas of further research.

2. Methodology

The thesis adopts a mixed-method approach, invoking doctrinal analysis; theoretical approaches; the derivative/secondary use of empirical research and multi-disciplinarity.

More concretely, the scope of this thesis encompasses qualitative research of a doctrinal and comparative nature. The doctrinal methodology is imbued with several interdisciplinary papers from academic literature, especially from economic science.

The main sources of data for doctrinal research are some legal instruments themselves (mostly soft law in nature) and existing commentaries and views of other researchers and organizations. The information is gathered from a variety of sources including textbooks, refereed journals, conference papers, reports and other industry and professional publications.

In addition to this, the thesis also presents and assesses empirical economic papers and based on them, it forms a conceptual framework which analyzes the link between corporate governance attributes and the degree of sustainability practice and performance of the corporation.

The thesis also incorporates a comparative approach; it uses comparative law as a method of research rather than as a methodology. Such an approach has been adopted so that the thesis does not focus the research questions on comparing legal systems; rather, it is using comparative law as a method of measuring the effects of esg concerns and climate change on the regulatory frameworks of different jurisdictions.

3. Special features of corporate governance in the energy sector

The BoD is the engine of corporate governance, and it is responsible to direct the operations of the corporation and to initiate and supervise the decision-making process. More specifically, it determines the corporate policy, ensures corporate profitability and the wealth maximization of the shareholders. Whether it is also responsible to protect the interests of the stakeholders is a heated debate and it is stemming from the issue of what is the purpose of the corporation. This master thesis does not answer this question but instead it discusses the question of whether energy corporations have a special duty to be socially responsible and serve the broader societal interests due to the adverse impact of those corporations' operations on the environment.

Since decision-makers are ultimately responsible for agency costs, the BoD might introduce and adopt environmental policies to minimize the agency costs. Recently, stakeholders have raised their concerns on the environmental damage caused by the corporation's business operations, especially in energy sectors due to fossil fuel burning, which adversely impacts global warming and climate change-related health risks. A study conducted in 2014 found that 81% of the energy supply globally was produced by burning fossil fuel (coal, oil, and gas), which causes a continuous rise of greenhouse gas (GHG) emissions in the environment[1].

The impact of these corporations on the environment is huge and multifactored. Unquestionably, they cause air pollution which in turn is one of the most significant cause of diseases and premature deaths. A study in 2015 revealed that total premature deaths due to air pollution were 9 million, while in the year 2012, 7 million people died due to air pollution globally[2]. Thus, the energy sector in general and the corporations more specifically should not only generate high financial profits for their shareholders but have a special duty to protect the interests of all stakeholders since they adversely affect their health and wellbeing[3].

To address the environmental damage they cause, and the concerns that the stakeholders have because of that, the energy industries must take full responsibility for their manufacturing processes and operations, ensuring sustainable practices and the wellbeing of their stakeholders[4]. Good corporate governance must mitigate

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[1] Herrero, M., Henderson, B., Havlík, P. *et al.* (2016). Greenhouse gas mitigation potentials in the livestock sector. *Nature Clim Change* **6,** 452–461. https://doi.org/10.1038/nclimate2925.

[2] Landrigan, P. J., Fuller, R., Acosta, N. J., Adeyi, O., Arnold, R., Balde, A. B., . . . Breysse, P. N. (2018). The Lancet Commission on pollution and health. The Lancet, 391(10119), 462-512. http://dx.doi.org/10.1016/.

[3] Joshi, S., & Li, Y. (2016). What is corporate sustainability and how do firms practice it? A management accounting research perspective. Journal of Management Accounting Research, 28(2), 1-11. https://doi.org/10.2308/jmar-10496.

[4] Gardazi, S. S. N., Hassan, A. F. S., & Johari, J. B. (2020). Board of Directors Attributes and Sustainability Performance in the Energy Industry. *The Journal of Asian Finance, Economics and Business*, *7*(12), 317–328. https://doi.org/10.13106/JAFEB.2020.VOL7.NO12.317.

agency problems, reduce externalities, and force executives to take into consideration the interests of both shareholders and stakeholders[5]. To achieve social support from various stakeholders, energy corporations must participate in social and environmental corporate practices[6]. Therefore, corporations should now more than ever implement policies and practices that responds to the rapid changes in environmental needs such as climate change, global warming, GHG emissions, and pollution, which are damaging the environment and affect the stakeholder's interests directly or indirectly.

Nevertheless, there are a lot of scholars and also business leaders who do not propose and adopt these kinds of policies adequately because they argue that although these policies are beneficial for everyone only corporations pay the cost and consequently their shareholders who see their profits minimizing. Thus, studies illustrate that energy corporations are lagging in green initiatives[7].

The research of scholars so far mainly investigates whether issues like, the composition of the board of directors, board independence, gender diversity, CEO duality, board size, have an impact on the financial performance of service industries like health care, information technology and real estate[8]. Although scholars have already started studying the relationship between corporate governance and sustainable development, the studies on the composition of the board of directors and its response to environmental sustainability initiatives remains an issue in empirical and theoretical studies development[9].

This thesis argues that the BoD can through its special features, independent directors, gender diversity, size of the board, special committees and directors' duties adopt a sustainable strategy which will not only promote environmental goals but will succeed in maximizing shareholders' profits as well. Figure 1 illustrates the proposed conceptual framework that analyzes the link between corporate governance attributes and the degree of sustainability practice and performance by companies when the members of its BoD own specific attributes.

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[5] See Nazir, M. S., & Afza, T. (2018). Does managerial behavior of managing earnings mitigate the relationship between corporate governance and firm value? Evidence from an emerging market. Future Business Journal, 4(1), 139-156. https://doi.org/10.1016/j.fbj.2018.03.001.

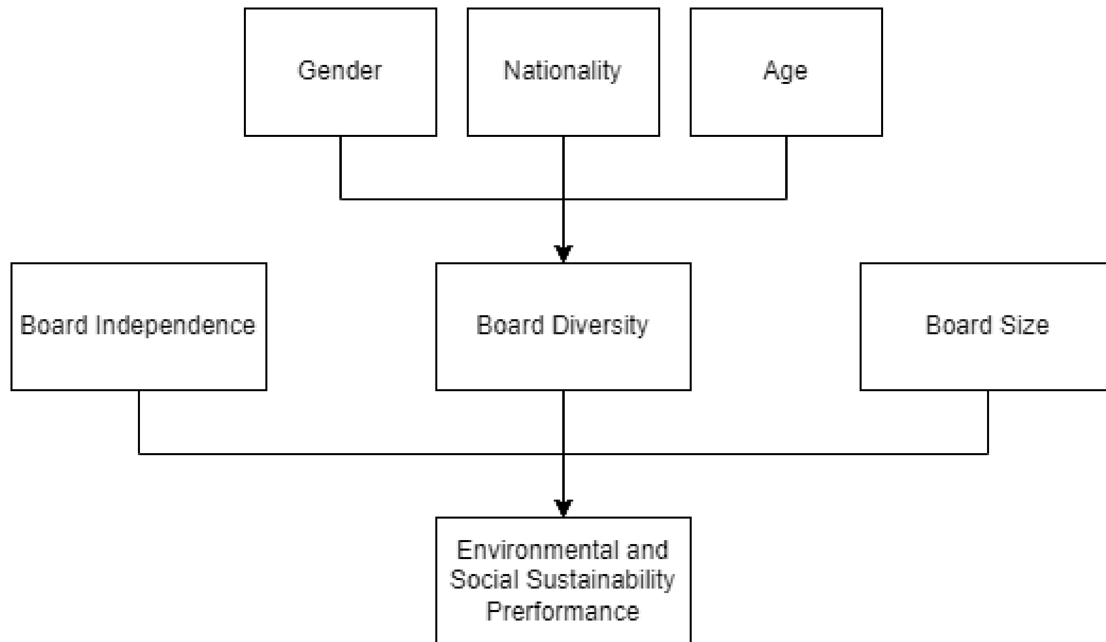
[6] Florini, A., & Saleem, S. (2011). Information disclosure in global energy governance. Global Policy, 2, 144-154. https://doi.org/10.1111/j.1758-5899.2011.00135.x.

[7] Chen, F., Ngniatedema, T., & Li, S. (2018). A cross-country comparison of green initiatives, green performance and financial performance. Management Decision, 56(5), 1008-1032. https://doi.org/10.1108/MD-08-2017-0761.

[8] Chams, N., & Garcia-Blandon, J. (2019). Sustainable or not sustainable? The role of the board of directors. Journal of Cleaner Production, 226, 1067-1081. https://doi.org/10.1016/j.jclepro.2019.04.118.

[9] Naciti, V. (2019). Corporate governance and board of directors: The effect of a board composition on firm sustainability performance. Journal of Cleaner Production, 237, 1-7. https://doi.org/10.1016/j.jclepro.2019.117727.

Figure 1: Board's Features leading to an efficient ESG Performance



i) Literature Review on Board Structure

The fast-growing energy industry has been the center of attention of many different stakeholders' groups from investors and shareholders to regulators and politicians since it causes destructive effects such as release of big amount of GHG emissions. The number of relevant studies can be categorized into four district groups.

The first group examines corporate sustainability performance of the energy industry[10]. Renewable energy corporations have become vital to supporting sustainable development in mitigating the impact of climate change. For example, researchers[11] explore how shifting from fossil fuel-based energy towards renewable energy sources can reduce problems of climate change and promote social equity. In another study, scholars argue that corporations should take into consideration economic and esg concerns to improve sustainability performance in the energy sector. They recognize that financial stability and market competition could be

[10] Sartori, S., Witjes, S., & Campos, L. M. (2017). Sustainability performance for Brazilian electricity power industry: An assessment integrating social, economic and environmental issues. Energy Policy, 111, 41-51. https://doi.org/10.1016/j.enpol.2017.08.054.

[11] Elum, Z. A., & Momodu, A. (2017). Climate change mitigation and renewable energy for sustainable development in Nigeria: A discourse approach. Renewable and Sustainable Energy Reviews, 76, 72-80. https://doi.org/10.1016/j.rser.2017.03.040.

obstacles to achieve the desired performance level[12]. Furthermore, sustainability performance and CSR can play a vital role in reducing corporate level fraud, such as corruption in the energy industry[13].

The second group of studies explores sustainability practices and environmental disclosure in the energy sector. Raufflet et al.[14], indicate that corporations need to adopt international CSR frameworks and standards such as Global Compact and ISO 26000 to implement CSR practices in the oil, gas, and mining sectors for sustainability initiatives. Other scholars[15], suggest that energy corporations have to adopt the Global Reporting Initiative (GRI) framework in order to become more sustainable. Additionally, other researchers[16] stated that corporations engaged in the energy industry must have abundant knowledge related to environmental matters more than other sectors, such as consumer goods, the telecommunication industry, and insurance and banking sectors.

The third group examines corporate sustainability initiatives and the financial performance of energy entities. For example, Sidhoum and Serra[17] examined in 2017 the relationship between sustainability initiatives and financial performance in the electric utility sector of the United States and found that there is a strong association between sustainability initiatives and financial performance suggesting that the adoption of environmentally friendly technologies may improve corporation financial health and efficiency in the energy sector. Moreover, other researchers[18] examined the strong relationship between sustainability practices and the financial performance in Malaysian oil and gas corporations and found that sustainability reporting positively impacts financial performance.

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[12] Meijer, L., Huijben, J., Van Boxstael, A., & Romme, A. (2019). Barriers and drivers for technology commercialization by SMEs in the Dutch sustainable energy sector. Renewable and Sustainable Energy Reviews, 112, 114-126. https://doi.org/10.1016/j.rser.2019.05.050.

[13] Lu, J., Ren, L., Yao, S., Qiao, J., Strielkowski, W., & Streimikis, J. (2019). Comparative review of corporate social responsibility of energy utilities and sustainable energy development trends in the baltic states. Energies, 12(18), 1-21. https://doi.org/10.3390/en12183417.

[14] Raufflet, E., Cruz, L. B., & Bres, L. (2014). An assessment of corporate social responsibility practices in the mining and oil and gas industries. Journal of Cleaner Production, 84, 256-270. https://doi.org/10.1016/j.jclepro.2014.01.077.

[15] Del Mar Alonso-Almeida, M., Llach, J., & Marimon, F. (2014). A closer look at the Global Reporting Initiative sustainability reporting as a tool to implement environmental and social policies: A worldwide sector analysis. Corporate Social Responsibility and Environmental Management, 21(6), 318-335. https://doi.org/10.1002/csr.1318.

[16] Thorne, L., Mahoney, L. S., & Manetti, G. (2014). Motivations for issuing standalone CSR reports: A survey of Canadian firms. Accounting, Auditing & Accountability Journal, 27(4), 686-714. https://doi.org/10.1108/AAAJ-07-2013-1393.

[17] Sidhoum, A. A., & Serra, T. (2017). Corporate social responsibility and dimensions of performance: An application to US electric utilities. Utilities Policy, 48, 1-11. https://doi.org/10.1016/j.jup.2017.06.01.

[18] Amacha, E., & Dastane, O. (2017). Sustainability practices as determinants of financial performance: A case of Malaysian corporations. The Journal of Asian Finance, Economics and Business, 4(2), 55-68. https://doi.org/10.13106/jafeb.2017.

The fourth group of studies which is more relevant to our thesis explores the nexus between internal corporate governance features and sustainability performance. Hussain et al.[19], recognized that board composition plays a crucial role in nurturing the sustainability performance of the corporations. Zaid et al.[20], determined the relationship between corporate governance attributes and sustainability disclosures, and results show that corporate governance attributes have a decisive role in sustainability disclosure practices of energy corporations.

ii) Composition of the BoD

Undoubtedly, structure, composition of the board, and skill set variety of directors are important contributors to the quality of corporate governance. The goal of corporate governance is to solve agency problems, and the board of directors is an important part of the corporate governance structure. In this section I discuss to what extent board's composition in the energy corporations play an important role and what the first empirical findings of other countries indicate about the issue. If board structure matters, it must be because particular structures induce different behaviors on the part of board members and thus, I examine not only the effects of board structure but also the specific characteristics of directors such as their independence status and also their gender. Almost all corporate governance guidelines refer to board composition.

a) The issue of the independent directors

Typically, there is a recommendation that a board of a listed public company should contain a minimum number or proportion of 'independent' directors. 'The Board believes that a substantial majority of the Company's directors, in addition to satisfying the qualification criteria set forth above, should be independent of the Company. For a director to be deemed "independent," the Board must determine affirmatively that he or she has no direct or indirect material relationship with the Company'.[21] These kind of guidelines[22] can stem either from an institutional investor

[19] Hussain, N., Rigoni, U., & Orij, R. P. (2018). Corporate governance and sustainability performance: Analysis of triple bottom line performance. Journal of Business Ethics, 149(2), 411-432. https://doi.org/10.1007/s10551-016-3099-5.

[20] Zaid, M. A., Abuhijleh, S. T., & Pucheta-Martinez, M. C. (2020). Ownership structure, stakeholder engagement, and corporate social responsibility policies: The moderating effect of board independence. Corporate Social Responsibility and Environmental Management, 27(3), 1344-1360. https://doi.org/10.1002/csr.1888.

[21] Marsh Mc Lennan, GUIDELINES FOR CORPORATE GOVERNANCE, 23 September 2021, available at https://www.marshmclennan.com/content/dam/mmc-web/v2/esg/Guidelines-for-Corporate-Governance%202021-09-23.pdf.

organization or a multinational corporation or even from a stock exchange. The recommended practice is in all cases to have independent non-executive directors sitting on the BoD and additionally to have a certain amount of them in each committee of the corporation (i.e., audit, remuneration, sustainability).

The rationale behind this practice is that independent directors play a vital role in reducing agency costs, increasing access to capital markets, ensuring accountability in executive remuneration and increasing firm value. More specifically, independent directors who are mainly nonexecutives, can perform the task of monitoring while the executive directors are responsible for activities which it is the duty of the board as a whole to monitor. The board's role is seen as having the "direction and control of the company" and "overseeing the management of the business". This means that the nature of the monitoring role is ipso facto different for non-executive directors"[23].

The bodies which are promoting independent directors through their corporate governance guidelines adopt this agency-cost rationale for independent directors. More specifically, OECD's[24] recommendation for boards to be composed of at least 50% independent directors is the most common voluntary standard. Some jurisdictions link the board independence requirement with the ownership structure of a company. OECD states[25] that 'in the cases of Chile, France, Israel and the US, companies with more concentrated ownership are subject to less stringent requirements or recommendations. In Italy, a stricter requirement for a majority of independent directors is imposed in cases involving integrated company groups with pyramid structures that may contribute to more concentrated control. Portugal requires an "adequate" number of independent directors that takes into account shareholder structure and free float. In Israel, according to a list of recommended (not binding) corporate governance rules set forth in the First Addendum to the Companies Law, board independence requirements is correlated to the ownership structure of the company (companies with dispersed shareholding are required to have a majority of the independent directors, while companies with controlling shareholders are required to have at least one-third of the independent directors)'.

In one of its latest Factsheet, OECD emphasizes that 'almost all jurisdictions require or recommend a minimum number or ratio of independent directors. Definitions of independent directors have also been evolving during this period: 80% of

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[22] See also indicatively: Corporate Governance Guidelines — Philip Morris International Inc., 5 May 2021, Article B2, available at https://www.pmi.com/resources/docs/default-source/our_company/2021-corporate-governance-guidelines.pdf?sfvrsn=2c376ab7_4, channel advisor, Corporate Governance Guidelines, 21 January 2020, available at https://ir.channeladvisor.com/static-files/e8dd5f88-f86f-4080-a618-cf13fbede136.

[23] Jonathan P. Charkham, (1989), Corporate Governance and the Market for Control of Companies Bank of England Panel Paper No 25, Bank of England, London, p 13.

[24] OECD, Flexibility and Proportionality in Corporate Governance, 06 Nov 2018, https://doi.org/10.1787/9789264307490-en

[25] Ibid.

jurisdictions now require directors to be independent of significant shareholders in order to be classified as independent, up from 64% in 2015.'[26]

The following figure illustates the number of independent directors on the Board that each jurisdiction requires and/or recommends. Greece has set a legally mandated minimum requirement of 2-3 persons and established a minimum ratio between 30-49%.

Figure 2: Minimum number ratio of independent directors on the (supervisory) board

Figure 4.2 Minimum number or ratio of independent directors on the (supervisory) board

Blue denotes Rule/regulation
Black italic denotes Code

				Minimum number		Minimum ratio		
			No threshold	1 person	2-3 persons	20-25%	30-49%	50%+
One-tier board	CEO ≠ Board Chair	REQUIRED			Israel Greece	Colombia	*Israel* *Greece*	*Israel* *Sweden*
	CEO ≠ Board Chair	RECOMMENDED			Belgium Costa Rica Hong Kong (China) New Zealand Malaysia		Hong Kong (China) Malaysia *Peru* Singapore *Turkey*	*Australia* *Ireland* *New Zealand* *Singapore* *United Kingdom*
				Chile	*Turkey* Canada Greece Saudi Arabia Spain	Mexico	Saudi Arabia India *Turkey*	India Korea United States
One-tier board or two-tier board (supervisory)	CEO ≠ Board Chair	REQUIRED			Norway	Brazil	Lithuania	*Denmark* *Netherlands* *Norway*
	CEO ≠ Board Chair	RECOMMENDED	Slovak Republic				*Brazil*	*Finland* *Switzerland*
			Czech Republic Luxembourg				France	Hungary *France* *Slovenia*
Two-tier board (supervisory)			Germany		Russia *Poland*	Russia	Indonesia *China* *Russia*	*Argentina* *Austria* *Estonia* *Iceland* *Latvia* South Africa
Hybrid multiple options				Italy Japan (A)	Japan (C) (S) *Italy* *Japan*			*Portugal*

Source: OECD 2021 Factbook

[26] OECD Factbook 2019.

Secondly, independent directors contribute to the increase of access to capital markets. In their study, Australian scholars observed anecdotal evidence in the Australian marketplace of US investors turning to Australia during the Russian and South American financial crises due to perceived benefits of Australian governance structures. They support that 'the evidence indicates that important investors do believe that independent directors are value adding: major institutional investors (like the large US pension scheme, CalPERS) and institutional investor representative bodies (like IFSA) have been high-profile proponents of independent directors.'[27]

When discussing the matter of executive remuneration, scholars in the debate have focused on two key points: (i) that executive pay should be linked to performance; and (ii) that executive pay should be determined by appropriate persons not being the recipients themselves. There is an obvious conflict of interest – and thus agency costs – where executive directors have significant influence over the process by which their pay is determined. Thus, there is greater accountability if independent directors are responsible for determining the executives' remuneration. Therefore, there is also the need to have independent directors sitting on the remuneration committee.

However, the empirical literature on board independence does not explicitly answer the question of whether the independent directors promote shareholders' interests. Some studies have found that independent boards do well at performing discrete tasks such as disciplining poor CEO performance or responding to takeover bids[28]. However, scholars generally find insignificant relationships between board independence and accounting or long-term stock market performance.[29] The works of Agrawal and Knoeber[30], Yermack[31], Wintoki, Linck, and Netter[32] or Borlea et al.[33], find a negative and significant relationship between independent directors and performance of the corporation, whereas in others no type of relationship is found at all.[34] A recent Swiss study concluded that 'first finding has to be interpreted in a

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[27] Lawrence, Jeffrey J. and Stapledon, Geofrey P., Is Board Composition Important? A Study of Listed Australian Companies (September 1999). Available at SSRN: https://ssrn.com/abstract=193528 or http://dx.doi.org/10.2139/ssrn.193528

[28] Bhagat S, Black BS (2002) The non-correlation between board independence and long-term firm performance. JCL 27:231–273.

[29] Baysinger BD, Butler HN (1985) Corporate governance and the board of directors: performance effects of changes in board composition. J Law Econ Organ 1:101–124.

[30] Agrawal, A., & Knoeber, C. R. (1996). Firm performance and mechanisms to control agency problems between managers and shareholders. *The Journal of Financial and Quantitative Analysis, 31*, 377–397.10.2307/2331397

[31] Yermack, D. (1996). Higher market valuation of companies with a small board of directors. *Journal of Financial Economics., 40*, 185–211.10.1016/0304-405X(95)00844-5

[32] Wintoki, M. B., Linck, J. S., & Netter, J. M. (2012). Endogeneity and the dynamics of internal corporate governance. *Journal of Financial Economics, 105*, 581–606.10.1016/j.jfineco.2012.03.005

[33] Borlea, S. N., Achim, M. V., & Mare, C. (2017). Board characteristics and firm performances in emerging economies. Lessons from Romania. *Economic Research-Ekonomska Istraživanja, 30*, 55–75.10.1080/1331677X.2017.1291359

[34] See indicatively: Bhagat, S., & Black, B. (2002). The non-correlation between board independence and long-term firm performance. *The Journal of Corporation Law, 27*, 231–273, Brick, I. E.,

way so that after a certain threshold is met, adding more independent directors to the board does not increase, but decreases firm value.'[35] To sum up, there is little evidence to show that the percentage of independent directors on a board increases firm value.[36]

So far I have briefly examined the importance of independent directors in the context of corporate governance in general. The companies involved in the energy sector are mainly multinationals with high demands in terms of being reliable and efficient. It is thus useful to discuss what the scholars and the studies reveal about the current situation of these corporations regarding their corporate governance practices. The main question at stake is whether independent directors sitting on the BoD of energy corporations increase not only firm value but promote sustainability and stakeholderism.

In the energy sector, the role of independent directors may be particularly important in the case of public utilities where the government relations and the private-public ownership may divert CEO decisions from the maximization of firm performance. In a recent study, the authors questioned whether independent directors and other board variables correlate with the performance, the growth and the dividend policy of European energy utilities. They found evidence that the relationship between firm performance and independent directors is negative and statistically significant. Using different econometric techniques and controlling for the type of control, their results illustrate that independent directors are less concerned with the improvement of the shareholders' value. They argue that this finding suggests that in the public utilities they may be a corporate mechanism that enhances stakeholders' protection and social welfare rather than financial performance[37]. More concrete, one reason could be related to the problem of asymmetric information since by definition, independent directors are members of the board who do not have affiliation with the corporation[38] and thus, they do not possess all information about the company. Their decisions are based on the information they have from the CEO and the other executive directors. This lack of information can decrease their ability to effective monitor.

Another possibility is that some directors who are classified as independent are not truly independent, because they could be under extreme influence and pressure by the CEO and other directors.

& Chidambaran, N. K. (2010). Board meetings, committee structure, and firm value. *Journal of Corporate Finance, 16*, 533–553.10.1016/j.jcorpfin.2010.06.003

[35] Jentsch, V. Board Composition, Ownership Structure and Firm Value: Empirical Evidence from Switzerland. *Eur Bus Org Law Rev* 20**,** 203–254 (2019) https://doi.org/10.1007/s40804-018-00128-6

[36] Hermalin BE, Weisbach MS (2003) Boards of directors as an endogenously determined institution: a survey of the economic literature. FRBNY Econ Policy Rev 9:7–26.

[37] Claudio Becagli, Sara De Masi & Andrea Paci, (2019). The Independent Directors in the Energy Utilities: An Empirical Analysis. 10. 10.30845/ijbss.v10n12a1.

[38] Praveen Kumar & K. Sivaramakrishnan, (2008). Who Monitors the Monitor? The Effect of Board Independence on Executive Compensation and Firm Value. Review of Financial Studies, 21(3), pp. 1371–1401.

Additionally, a possible explanation could be that independent directors try to serve wider societal interests and not exclusively related to the shareholders' value need. They may be more interested in decisions that enhance the social welfare rather than shareholders' wealth maximization.

Other studies show that the appointment of independent directors is a valuable because they can provide their expertise in the implementation and execution of sustainability initiatives, and they can monitor efficiently the transparency in sustainability reporting[39]. Most of the empirical research reveals a positive relationship between independent directors and CSR[40] and regarding their esg performance[41]. Additionally, another research argues that sitting on the BoD a high number of independent directors can convince corporations to follow environmental and social sustainable practices and policies while maintaining the shareholders' interest[42].

In summary, the research, and data I have examined show that there is generally no positive correlation between the presence of independent directors on boards and better financial performance. This does not mean that we could overlook the other positive aspects mentioned above, namely that they mainly contribute to reducing agency costs and promote a greater accountability in the setting of CEO pay. Also, companies operating in the energy sector show evidence that the relationship between firm performance and independent directors is negative and statistically significant. More specifically, it appears that independent directors do not contribute to both the maximization of shareholders' profits and the financial performance of the company as they do to wider societal interests. Thus, I support that those independent directors should sit on BoD of energy corporations since they promote stakeholders' interests which is of a great importance for these companies.

[39] Wang, M. C. (2017). The relationship between firm characteristics and the disclosure of sustainability reporting. Sustainability, 9(4), 624. https://doi.org/10.3390/su9040624.

[40] See Barako, D. G., & Brown, A. M. (2008). Corporate social reporting and board representation: Evidence from the Kenyan banking sector. Journal of Management and Governance, 12(4), 309. https://doi.org/10.1007/s10997-008-9053-x.

[41] Hussain, N., Rigoni, U., & Orij, R. P. (2018). Corporate governance and sustainability performance: Analysis of triple bottom line performance. Journal of Business Ethics, 149(2), 411-432. https://doi.org/10.1007/s10551-016-3099-5.

[42] Nguyen, A. H., & Nguyen, L. H. (2020). Determinants of sustainability disclosure: Empirical evidence from Vietnam. Journal of Asian Finance, Economics, and Business, 7(6), 73-84. https://doi.org/10.13106/jafeb.2020.vol7.no6.073.

b) The number of Directors

Another important feature of board composition is board size which is determined by the number of directors. The debate and the research on the relationship between board size and corporate performance is based on two distinct theories: agency theory and resource dependency theory. According to the agency theory[43], a small BoD can reduce a lot of costs which are caused by the agent-principal relation such as communication costs, coordination costs and free-riding problems while it can also better weigh the advantages and disadvantages of agency issues. Therefore, a small BoD is more effective when it comes to maximize the shareholder value. Consequently, researchers believe that the relationship between board size and company performance is negative.

However, based on the resource dependence theory, some studies support the positive correlation between the board size and corporate performance[44]. The rationale behind this theory is that a larger BoD can more easily ensure that non-executives directors could monitor managers in a more efficient way and at the same time it consists of more directors who cover a broad area of expertise from different fields. For example, board size increases according to company performance as troubled firms are more likely to add directors to increase their monitoring capacity. Thus, high-quality boards can make better decisions for the corporation.

The scholars heated debate on the issue is long standing in the last decades. Jensen argued that large corporate boards are less effective in making decisions[45]. CEOs believe that it is easier to persuade directors of large boards to follow their intentions. Yermack[46] finds evidence in support of Jensen's argument. He supports that companies with small BoDs exhibit a superior financial ratio and provide strong performance incentives for CEOs through compensation and the threat of dismissal.

German scholars analyzed the effects of BoD size and composition on the valuation and performance of all German firms listed in the DAX, MDAX and SDAX over the period 1998-2007. In their analysis they included 294 companies with 2,382 firm-year-observations[47]. However, they were unable to find a consistent effect of either

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[43] Ahmad, R., Said, R., & Arsad, S. (2017) The board governance mechanism and the effect of concentration ownership on Malaysia companies performance. International Journal of Academic Research in Business and Social Sciences, 7(2), 757– 768.

[44] Liu, Y., Miletkov, M., Wei, Z. and Yang, T. (2015) Board independence and firm performance in China. Journal of Corporate Finance, 30, pp.223-244.

[45] Jensen, M. C., 1993, "The modern industry evolution, exit, and the failure of internal control system", Journal of Finance, 48, pp. 831-880.

[46] Yermack, D., 1996, "Higher market valuation of companies with a small board of directors," Journal of Financial Economics, 40, pp. 185-211.

[47] Bermig, Andreas and Frick, Bernd, Board Size, Board Composition, and Firm Performance: Empirical Evidence from Germany (June 10, 2010). Available at SSRN: https://ssrn.com/abstract=1623103 or http://dx.doi.org/10.2139/ssrn.1623103

board size or board composition on firm valuation and performance. The same observation was made by researchers studying American companies who examined the size and composition of corporate boards for a sample of 82 U.S. companies that survived during the period 1935-2000[48]. However, another recent study of the US corporations which analyzed 372 companies in the US S&P 500 from 2013 to 2017, concluded that the size of the BoD has a negative correlation with corporate performance. After considering industry factors, the size of the board of directors in the high-tech industry has a more significant impact on corporate performance. Further testing the effect of the even-numbered nature of the board of directors on corporate performance shows that an odd numbered board of directors is more effective than an even-numbered board[49].

Another interesting study found that BoD's size and its changes in size during time affects the corporation only in short term[50]. Large changes in board size provide a good opportunity for a firm to optimize its board structure by increasing board independence and retiring elder directors. The researchers found no evidence that large decreases or increases in board size affects firm value for shareholders in the long term.

When it comes to the effect of the size of the BoD on energy corporations, according to resource dependency theory, large board size enhances corporate sustainability performance[51], because more directors can bring more experience, knowledge, expertise[52]. A study conducted on the Indonesian mining industry, showed that Western companies in Indonesia have a large board size, which ensured transparency in environmental disclosure[53].

Besides of it, there is no agreement on whether the board size is positively related to a high performance of the corporation in sustainability issues. I argue that multinational corporations should have big BoDs in order to have directors who represent almost all different groups of stakeholders and thus, ensure that all of their interests are respected when a decision is reached. Small and medium companies can take advantage of smaller BoDs consisted of directors who show

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[48] Patro, Sukesh and Lehn, Kenneth and Zhao, Mengxin, Determinants of the Size and Structure of Corporate Boards: 1935-2000 (November 1, 2003). Financial Management 38, 2009, Available at SSRN: https://ssrn.com/abstract=470675 or http://dx.doi.org/10.2139/ssrn.470675

[49] Cao Chu yan , Yang Zhi hui, Liang Xin, The relationship between board size and firm performance, 2021, E3S Web of Conferences 257, 02079, AESEE 2021, https://doi.org/10.1051/e3sconf/202125702079

[50] Ning, Y., Metghalchi, M., Du, J. (2009). Large changes in board size, corporate governance and firm value. *Corporate Ownership & Control, 7(2-4)*, 440-450. https://doi.org/10.22495/cocv7i2c4p4

[51] Cheng, S. (2008). Board size and the variability of corporate performance. Journal of Financial Economics, 87(1), 157-176. https://doi.org/10.1016/j.jfineco.2006.10.006.

[52] Emmanuel, O., Uwuigbe, U., Teddy, O., Tolulope, I., & Eyitomi, G. A. (2018). Corporate diversity and corporate social environmental disclosure of listed manufacturing companies in Nigeria. Problems and Perspectives in Management, 16(3), 229-244. https://doi.org/10.21511/ppm.16(3).2018.19.

[53] Trireksani, T., & Djajadikerta, H. G. (2016). Corporate governance and environmental disclosure in the Indonesian mining industry. Australasian Accounting, Business and Finance Journal, 10(1), 18-28. https://doi.org/10.14453/aabfj.v10i1.3.

social responsibility to safeguard the commitment of energy companies to corporate sustainability.

c) Diversity of the Board – Gender, Nationality, and Age Attributes

c.1.) Gender Diversity

In the literature on corporate governance, gender diversity, age and different cultural backgrounds of directors have gained significant attention. More specifically, Carter et al[54] argues that diversity increases board independence since directors with different genders and ethnic or cultural backgrounds tend to ask questions that would not come from directors with more traditional backgrounds. Agrawal and Knoeber[55] document significant positive relationships between firm value and the fraction of women and minorities on boards. Erhardt et al.[56] indicate that if women are seen to be adding new perspectives, then they would become more prevalent on boards, and be associated with good firm performance.

OECD's 2019 Factbook provides data for the first time on measures to promote gender balance on corporate boards and in senior management, mostly via disclosure requirements and measures such as mandated quotas and/or voluntary targets. Nearly half of surveyed jurisdictions (49%) have established requirements to disclose gender composition of boards, compared to 22% with regards to senior management. Nine jurisdictions have mandatory quotas requiring a certain percentage of board seats to be filled by either gender. Eight rely on more flexible mechanisms such as voluntary goals or targets, while three resort to a combination of both[57].

The theories of agency and resource dependency are used also in the context of board diversity and CSR. According to agency theory, the more diversity a board has, the better the monitoring and management of the corporation[58]. Furthermore, scholars based on the resource dependency theory argue that diverse people contribute to the BoD many resources such as skills, expertise, experience as well as

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[54] Cater. D. A., B. J. Simkins and W. G. Simpson, 2003, "Corporate governance, board diversity and firm value", The Financial Review, 38, pp. 33-53.

[55] Agrawal, A. and C. R. Knoeber, 1996, "Firm performance and mechanisms to control agency problems between managers and shareholders, Journal of Financial and Quantitative Analysis, 31, pp. 377-397.

[56] Erhardt, N. L., J. D. Werbel and C. B. Shrader, 2003, "Board of director diversity and firm financial performance", Corporate Governance: An International Review, 11, pp. 102-111.

[57] Mats Isaksson, Daniel Blume, and Kenta Fukami, OECD Corporate Governance Factbook 2019, 24 June 2019, available at https://corpgov.law.harvard.edu/2019/06/24/oecd-corporate-governance-factbook-2019/

[58] Madhani, P. M. (2017). Diverse roles of corporate board: Review of various corporate governance theories. The IUP Journal of Corporate Governance, 16(2), 7-28. https://ssrn.com/abstract=2981605.

access to the external market[59]. In addition to this, diversity in terms of qualities, attributes, demography, and expertise improves corporate decision- making quality, especially as related to environmental and social activities, which leads to improving sustainability performance[60].

Studies on gender diversity and CSR illustrate that having female directors sitting on the Bod improves the while corporate sustainability performance[61]. Women also contribute more to social intelligence and collaborative decision making as compared to their male counterparts[62]. According to researchers, women show more affection, sympathy and welfare and thus, they are more effective in addressing environmental and social issues.

In a recent study[63] which examined the impact of board gender diversity on corporate environmental strategy and financial performance, the results of the role of the women in the BoD were impressive. The authors, based on 12 corporate environmental policies in 3,389 firms worldwide, identified four types of corporate environmental strategies by using the latent class regression model[64]. The empirical evidence shows that women on boards contribute to the promotion of proactive environmental strategies, including the pollution prevention strategy, which is found to bring about sustained competitive advantage in both short-term and long-term financial performance, and the sustainable development strategy, which is positively associated with long-term financial performance. The paper argues that 'following the natural resource-based view of the firm, these findings indicate that women can be seen as a key resource in the organizational process, which provides a shared vision of the future and strong moral leadership to the top management team'.

Therefore, the presence of women on the board can enhance the effectiveness of stakeholder management and the promotion of esg concerns and solutions[65].

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[59] See Enache, L., & Garcia-Meca, E. (2019). Board composition and accounting conservatism: The role of business experts, support specialist and community influentials. Australian Accounting Review, 29(1), 252-265. https://doi.org/10.1111/auar.12279, Fakir, A., & Jusoh, R. (2020). Board gender diversity and corporate sustainability performance: Mediating role of enterprise risk management. Journal of Asian Finance, Economics, and Business, 7(6), 351-363. https://doi.org/10.13106/jafeb.2020.vol7.no6.351.

[60] Chams, N., & Garcia-Blandon, J. (2019). Sustainable or not sustainable? The role of the board of directors. Journal of Cleaner Production, 226, 1067-1081. https://doi.org/10.1016/j.jclepro.2019.04.118.

[61] See supra note 52.

[62] Harjoto, M., Laksmana, I., & Lee, R. (2015). Board diversity and corporate social responsibility. Journal of Business Ethics, 132(4), 641-660. https://doi.org/10.1007/s10551-014-2343-0.

[63] Jun Xie, Wataru Nozawa, Shunsuke Managi, The role of women on boards in corporate environmental strategy and financial performance: A global outlook, Corporate Social Responsibility and Environmental Management, *27*(5), 2044-2059. https://doi.org/10.1002/csr.1945.

[64] an inactive strategy, a reactive strategy, a pollution prevention strategy, and a sustainable development strategy.

[65] 'One such example is the involvement of women on the board of directors in Arab countries (Ibrahim and Hanefah, 2016; Issa and Fang, 2019). Despite rigid culture and gender discrimination, a positive association has been observed between the female members on a board and CSR. Based on

c.2.) Nationality Diversity

Regarding nationality the empirical evidence is also in favor of diversity. Foreign directors appear less attached to short-term economic goals and more concerned with sustainability performance. Studies have shown that having board diversity increases the financial performance of the corporation[66]. In terms sustainability performance, agency theory shows that corporations with a high proportion of foreign directors has a positive impact on CSR since they can monitor the behavior of internal management and intervene when necessary[67].

Thus, I argue that having an heterogenous BoD in an energy company is beneficial for its environmental and social performance.

c.3.) Age Diversity

Another attribute which may impact on the sustainability performance of the corporation is the age of the directors sitting on the BoD. Age diversity of the BoD is related to the presence of different generation gaps which are responsible for contributing to the decision-making process a variety of experience, personal and ethical values and judgment[68]. Young directors are usually more open-minded, culture-vulture, innovative and liberal while on the contrary elder people offer their experience, expertise, skills and are more conservative. Although some studies have found that there is no significant link between age diversity and sustainability disclosures[69], a study on environmental reporting of 120 Malaysian corporations revealed that the older directors show more involvement in environmental disclosure, which is attributed to their higher level of maturity, exposure, and experience[70]. Additionally, researchers found that a corporation has a higher score in

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empirical evidence, this study concluded that a corporation with a higher proportion of female directors exhibits higher environmental and social responsibility.' from Gardazi et al. (see supra note 4).

[66] See Hambrick, D. C., Cho, T. S., & Chen, M.-J. (1996). The influence of top management team heterogeneity on firms competitive moves. Administrative science quarterly, 659-684. https://doi.org/10.2307/2393871, Masulis, R. W., Wang, C., & Xie, F. (2012). Globalizing the boardroom. The effects of foreign directors on corporate governance and firm performance. Journal of Accounting and Economics, 53(3), 527-554. https://doi.org/10.1016/j.jacceco.2011.12.003.

[67] Dahya, J., & McConnell, J. J. (2005). Outside directors and corporate board decisions. Journal of Corporate Finance, 11(1-2), 37-60. https://doi.org/10.1016/j.jcorpfin.2003.10.001.

[68] Cucari, N., Esposito De Falco, S., & Orlando, B. (2018). Diversity of board of directors and environmental social governance: Evidence from Italian listed companies. Corporate Social Responsibility and Environmental Management, 25(3), 250-266. https://doi.org/10.1002/csr.1452.

[69] Giannarakis, G. (2014). The determinants influencing the extent of CSR disclosure. International Journal of Law and Management, 56(5), 393-416. https://doi.org/10.1108/IJLMA-05-2013-0021.

[70] Said, R., Zainuddin, Y. H., & Haron, H. (2009). The relationship between corporate social responsibility disclosure and corporate governance characteristics in Malaysian public listed companies. Social Responsibility Journal, 5(2), 212-226. https://doi.org/10.1108/17471110910964496.

sustainability rating when the age of board members is around 55 to 60 years[71]. On the contrary, only a few studies found evidence that young directors express more concerns about the environment and have more knowledge about environmental issues[72].

After taken into consideration all the above empirical evidence, I argue that the BoDs of energy corporations should have a variety of generation gaps to achieve a positive environmental and social corporate performance.

Based on the theoretical foundation and the current literature on the composition of the board of directors, this thesis has investigated the association between corporate governance attributes and the degree of sustainability practice by companies when their board of directors exhibit specific characteristics. Moreover, I suggest that energy companies should take into consideration and implement the above-mentioned recommendations not only because their corporate sustainability performance will be improved but because they will also be prepared for the mandatory regulations which will request from them to have diversity in the board.

4. Directors' Duties and ESG concerns

So far, I have shown that certain characteristics of the BoD can drive the company to have a good corporate sustainability performance which is crucial under the changing conditions that include the increasing investor interest and engagement over ESG information that impacts financial and operating performance too. This is especially important for the energy corporations for all the reasons I have already analyzed. However, the question that arises is whether directors have an obligation to consider esg concerns when planning corporate strategy and making decisions. To be more precise, is it within their fiduciary duties to consider both the interests of stakeholders and shareholders? What happens if the former conflict with the latter? Are fiduciary duties a constrain for directors to take into account esg matters? Do directors of specifically energy corporations have a fiduciary duty to identify and mitigate besides long-term economic risks, social and environmental risks as well?

In the US, the majority of the decisions which a director must make on behalf of a corporation are governed by the business judgement rule. In most cases where director decides, designs a policy, adopts a strategy there is no conflict between his

[71] See supra note 68 and Fernandes, S. M., Bornia, A. C., & Nakamura, L. R. (2019). The influence of boards of directors on environmental disclosure. Management Decision, 57(9), 2358-2382. https://doi.org/10.1108/MD-11-2017-1084.

[72] Jansson, J., Marell, A., & Nordlund, A. (2010). Green consumer behavior: Determinants of curtailment and eco-innovation adoption. Journal of Consumer Marketing, 27(4), 358-370. https://doi.org/10.1108/07363761011052396.

decision and the interest of the corporation and shareholders who want directors to maximize their profits. The directors are called on to use their best judgement in any given set of circumstances.

The standard of reasonable care applies for these types of decisions. The civil liability of directors to the company and/or to the shareholders for ordinary business decisions is limited by the 'business judgement rule' first laid down in Re City Equitable Fire Insurance Co. Ltd.[73] and now codified in almost all federal and provincial corporations' statutes. This rule allows the directors to make a wide range of business decisions as they believe is the best in cases where there is no actual or potential conflict of interest between the directors and the company. The directors must only act honestly and with due diligence. The essence of the business judgment rule is that it allows the directors to take a certain degree of risk without being obliged to exhibit a greater degree of skill than may reasonably be expected of persons who have the same degree of knowledge and experience.

The last decades there is the tension to recognize a fiduciary duty owed by corporate directors to future generations in relation to environmental protection. Although, traditionally, a fiduciary must have undertaken to act only for the interest of the beneficiary, courts and scholars have shown an increasing tension to expand the scope of fiduciary duties where lower standards of care do not appear to be sufficient to protect important interests such as the protection of the environment. Besides of it, I argue that corporate directors should have as a fiduciary duty the protection of the environment not only for the environment itself and for the future generations but also because empirical research and findings have shown that a corporation which is socially responsible, performs better in financial terms as well.

i) To whom directors own fiduciary duties?

The vast majority of scholars, managers and politicians who argue in favor of including esg concerns either in the duty of care or in the duty of good faith of directors, support stakeholderism. On the contrary, the supporters of the shareholder theory do believe that it is not neither the duty of a corporation nor of its directors the protection of the environment. They argue that the purpose of any corporation is only the profit maximization of its shareholders and its value creation.

Directors own their duties in principle, in all jurisdictions, to the corporation, rather than its shareholders or any other third parties[74].

Some jurisdictions, however, suggest that directors' duties are to some extent, owed to not only shareholders but also to other stakeholders. In the UK, duties are owed

[73] Re City Equitable Fire Insurance Co. Ltd. [1925] ICh. 407 (C.A.).
[74] Companies Act 2006 (UK) s. 172.

to the company but it is the shareholders who are expressly stated to benefit from the company's interests, as a director is required 'to act in the way he considers, in good faith would be most likely to promote the success of the company for the benefit of its members as a whole.' Thus, it can be argued that in the UK directors' duties are owed to the shareholders, although it has been clarified by the courts that this is not generally the case.[75]

In India, directors are required to act 'in the best interests of the company, its employees, shareholders, the community and for the protection of the environment'.[76]

The French regulator has expressed a similar approach through the French Government Action Plan which has suggested the Civil Code to be amended in order "to affirm the need for companies to take into consideration social and environmental issues inherent to their activity". In doing so, the French Government Action Plan refers to the report 'L'entreprise, objet d'intérêt collectif', which was commissioned by four ministers of the government,[77] and specified that the Civil Code should state that the 'the Company must be managed in its own interest, considering the social and environmental issues of its activity.'

Another example of this approach is the case of the Netherlands, where directors should act in the best interests of the company and its enterprise, which includes all relevant stakeholders.[78] The Dutch Supreme Court has stated that shareholder interests 'do not take priority over the interests of other stakeholders'. The newly revised Dutch Corporate Governance Code also requires that the BoD considers 'the environment, social and employee-related matters, the chain within which the enterprise operates, respect for human rights, and fighting corruption and bribery.'[79] However, there is no guidance on how it could be implemented.

These examples show that regulators and courts have started rethinking to whom directors own duties and they pay much attention to the environmental concerns. Nevertheless, it is very difficult and time-consuming (consultations prior to reforms, reforms, legislation, implementation, enforcement) before the status quo of shareholder primacy changes. Moreover, recent legislative interpretations of directors' duties, especially the ones that are promoting sustainability, have caused confusion as to whom they are owed and have, generally, failed to disrupt the prevailing strength of shareholder primacy.

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[75] Sharp and others v Blank and others [2015] EWHC 3220.

[76] Companies Act 2013 (IN) s.166(2).

[77] Notat, N., Sénard , J. (2018). L'entreprise, objet d'intérêt collectif.

[78] Sjafjell, B., Johnston, A., Anker-Sorensen, L. and Millon, D. (2015). Shareholder primacy: the main barrier to sustainable companies. In B. Sjafjell, B. Richardson (Eds.), Company Law and Sustainability (p. 104) Cambridge University Press.

[79] Ibid.

The King IV Report in South Africa[80] has, however, more successfully made the distinction between who the duties are owed to and who benefits from them:

> 'directors owe their duties to the company and the company alone as the company is a separate legal entity from the moment it is registered until it is deregistered. The company is represented by several interests and these include the interests of shareholders, employees, consumers, the community and the environment. Thus, requiring directors to act in good faith in the interest of 'the company' cannot nowadays mean anything other than a blend of all these interests, but first and foremost they must act in the best interest of the company as a separate legal entity. Any interest that may be primary at one particular point in time in the company's existence may well become secondary at a later stage.'[81]

I also argue that the primary interest of the company is to survive in the long-term, in order to be able to achieve the purpose for which it was incorporated in the first place, taking into consideration the economic, social and environmental issues to which its activities give rise. However, in this thesis, which is devoted to special corporate governance issues of energy corporations, I will not comment on neither of these theories and approaches (shareholderism vs. stakeholderism) but instead I will analyze if and why directors of energy corporations should have a special duty in relation to esg concerns.

ii) Analysis and assessment of the ESG Factors

The letter G which represents the corporate Governance factors, has a direct theoretical relationship to firm performance. Investors do consider factors such as the executive compensation arrangements, the existence of controlling shareholders, board committees and the internal governance of a corporation. Empirical findings confirm the effect of governance factors on firm performance[82]. However, there is no consensus about the degree to which current studies have reliably measured the relationship between governance and firm value[83]. In any case, optimal corporate governance might be contextual. To be more precise, corporations which belong to the same industry may require heterogeneity in governance. Indeed, the prevailing academic view of corporate law is that it should allow different structures and practices to district industries and corporations. The contextual nature of optimal governance requires subjective judgments in applying G

[80] Institute of Directors Southern Africa (2016). King IV Report on Corporate Governance 2016.
[81] Ibid.
[82] Lucian Bebchuk et al., What Matters in Corporate Governance?, 22 REV. FIN. STUD. 783 (2009).
[83] Klausner Michael, Empirical Studies of Corporate Law and Governance: Some Steps Forward and Some Steps Not, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 184, 198-99 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

factors. For instance, there is evidence that for many firms a classified board is a minus, but for certain kinds of firms it may be an advantage[84].

The letters E and S stands for Environmental and Social factors which are at first sight not directly related to firm value and performance in comparison to governance factors. However, both E and S factors can affect firm performance through at least two district mechanisms. Firstly, they can contribute to identifying specific risks. Corporations which are characterized by weak internal controls, poor compliance records and are especially in socially and/or environmentally risky industries could face a variety of risks ranging from regulatory and litigation to political ones.

Secondly, E and S factors may serve as proxies for management quality, an important investment consideration that is difficult to recognize otherwise. More specifically, surveys show that investors do believe that ESG factors are proxies for the quality of the management[85]. Scholars[86] have found that corporate social responsibility increases as firm governance improves which means that a firm which is better at regulatory compliance and managing environmental and social risks may be better managed and governed in general. Moreover, studies have also concluded that corporations with high environmental and social scores perform higher earnings with lower risk, both on stock returns and on accounting performance measures, than firms with low environmental and social scores[87]. Additionally, it is argued that firms who invest in their socially responsible activities can be protected against reputational risks from adverse events[88].

Besides of these positive empirical results, there are important concerns that either directors could invoke ESG factors to enact their own policy preferences at the expense of shareholders, a common agency problem, and additionally that the regulatory and political risks of a corporation are not reflected in its ESG scoring. Regarding the first concern, scholars have found negative shareholder reactions to both positive and negative corporate social responsibility announcements[89]. For instance, corporations that use renewable energy sources may indeed score high on ESG indexed but nevertheless deal with important regulatory and political risk due to current government policy[90].

In any case, the results confirming that being sustainable increases the overall performance of the corporation are much more. For instance, Harvard Business

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[84] Ibid.

[85] See CFA INST., ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG) SURVEY 11 (2017), https://perma.cc/2YLA-8LAN.

[86] See Allen Ferrell et al. (2016), Socially Responsible Firms, 122 J. FIN. ECON. 585, 586.

[87] Mozaffar Khan et al., Corporate Sustainability: First Evidence on Materiality, 91 ACCT. REV. 1697, 1697-70 (2016).

[88] Paul C. Godfrey et al., (2009) The Relationship Between Corporate Social Responsibility and Shareholder Value: An Empirical Test of the Risk Management Hypothesis, 30 STRATEGIC MGMT.J. 425, 441-42.

[89] Krüger Philipp, (2015) Corporate Goodness and Shareholder Wealth, 115 J. FIN. ECON. 304, 312-14.

[90] See Michael Kavanagh, A World Map of Subsidies for Renewable Energy and Fossil Fuels, FIN. TIMES (July 25, 2016), https://perma.cc/KYK3-7SGG.

School has collected evidence which shows that sustainable companies deliver significant positive financial performance and investors are beginning to value them more highly. The American Consultancy, Arabesque, and the University of Oxford have reviewed academic literature on sustainability and corporate performance and found that 90% of 200 studies analyzed concluded that good esg standards lower the cost of capital; 88% show that good environmental and social governance practices result in better operational performance; and 80% show that stock price performance is positively correlated with good sustainability practices[91].

iii) Proposal to develop new and separate fiduciary duties for directors in energy corporations

All the above-mentioned data and theoretical analysis are important because they serve the long-term interests of the company. Since it has been clear that the fiduciary duties are owed to the company and that its interests take precedence over the interests of its shareholders, I should examine how directors of energy corporations will be obliged to always take into consideration esg factors when making decisions as far as considering these factors benefit the overall and long-term performance of the corporation.

a) Duty to identify and mitigate long-term social and environmental risks

Until now, there is only a moral duty to ensure that development is sustainable. Directors of energy corporations should have an explicit duty to identify and mitigate the environmental and social factors that materially affect the long-term performance of the corporation. Therefore, they will act in the interests of the company that belongs to a such a special industry. The standard for assessing the materiality impact will not focus on corporation's financial indexes and success but instead the directors will have to manage all the resources of the company in order to use them in a way that will secure the company's survival in the long-term. Thus, I argue that the nature of this duty will be internal rather than external since directors would be expected to consider risks of the corporations, they are running rather than the impact of their management to external factors like the stakeholders.

[91] 2018 address by Judge Professor Mervyn King, Chairman of the Council, IIRC, available at: https://www.integratedreporting.org/news/2018-address-by-judge-professor-mervyn-king-chairman-of-the-council-iirc/

I suggest that a sustainability taxonomy which defines the material risks for each industry, similar to the one of the EC's work[92] for the purpose of sustainable finance [(1) climate change mitigation; 2) climate change adaptation; 3) sustainable use and protection of water and marine resources;4) transition to a circular economy, waste prevention and recycling; 5) pollution prevention and control; and 6) protection of healthy ecosystems], has to be established. A good example of this, is Article 173 of Grenelle II Law 2010 that recognizes climate change as a material risk for companies and requires them to report on climate change's impact on the business, and what the company is doing to mitigate such effects[93].

Some risks would have to be further defined and specified by the BoD of each corporation which will consider the specific nature of the company. For example, chemical companies rely heavily on hydrocarbon feedstocks as a value creation input and thus, their energy and feedstock management is especially important for them[94]. We could measure their performance based on the percentage of raw materials they use from renewable resources. More specifically, this metric shows how well positioned the company is to benefit from gains in revenue and cost reductions as it uses a higher percentage of renewable raw materials. Corporations that utilize renewable feedstocks will benefit from cost savings as the price of oil rises in the long term, and volatility in fossil fuel prices. Companies that utilize a large percentage of renewable raw materials may realize lower risk premiums as fossil fuels become scarcer and government regulation of such fuels becomes stricter.

Furthermore, the directors should be expected to report both the analysis of the identification and mitigation of environmental and social risks in an integrated report. More specifically, this report should contain a statement of material issues that are most likely to affect the longevity of the company and their recommended sustainability strategy to address those issues[95]. Both the statement and the strategy could be in the framework of the annual reporting obligations of the corporation and thus, bridge between strategic reporting and the current requirement to contain a non-financial statement in the annual report.

The most important part of our proposal is the effective implementation. This can take place only if directors are skilled and experienced to identify and classify what is material beyond the financial impact on shareholders' interests. Additionally, they

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[92] European Commission (2018). Frequently Asked Questions: Commission proposals on financing sustainable growth. Available at: http://europa.eu/rapid/press-release_MEMO-18-3730_en.htm.

[93] LOI n° 2015-992 du 17 août 2015 relative à la transition énergétique pour la croissance verte (FRA) article 173. Available at: https://www.legifrance.gouv.fr/eli/loi/2015/8/17/DEVX1413992L/jo#JORFARTI000031045547.

[94] Park Douglas Y., The Board's Role in Sustainability Governance Connecting Long-Term Value Creation and Executive Compensation, (2016) p.643 in The Handbook of Board Governance: A Comprehensive Guide for Public, Private, and Not-For-Profit Board Members, First Edition. Edited by Richard Leblanc.

[95] Ministère de l'économies et des finances (2018). Le Plan d'action pour la croissance et la transformation des entreprises présenté en Conseil des ministres, 71. Available at: https://www.economie.gouv.fr/plan-entreprises-pacte.

should identify the environmental and social concerns that those material issues could give raise to. Next, they have to prepare and adopt a strategy to mitigate their impact and ensure long-term success.

b) Duty to consider the impact of the corporation on external resources

The abovementioned proposed duty does not require directors to take into consideration when deciding and implementing the strategy of the corporation, the impacts of the company on external resources if these impacts do not directly affect the long-term survival of the corporation. These considerations are crucial especially for energy corporations whose directors adopt strategies that are beneficial for the companies in the short-term but may have a negative impact in the longer-term. A typical example of this may be an oil and gas producer company which initially adopts a strategy that contributes to climate change but avoids the financial risks and then, has the resources and the potential to change its behavior and use renewable energy.

Moreover, under the current status quo, directors are free to assess the material risks (i.e. reputational damage) and decide that it is in their company's best interests to tolerate participants in their supply chain committing serious environmental or social harm with potentially systemic impacts, such as depleting fish stock, massive deforestation, degradation of soil, or labor exploitation. To overcome this problem, directors should be required to operate within specific environmental and social parameters[96].

One formulation of this idea is to manage corporations in a way that enables the economy to "meet...the needs of all within the means of the planet." Under this concept, the 'needs of all' are referred to as 'social foundations' such as food; health; education; income and work; peace and justice; political voice; social equality; gender equality, housing; networks; energy; and water which directors could consider including, at a minimum, whilst the means of the planet[97] are various scientifically determined factors. These factors are also called planetary boundaries, and these are: climate change; ocean acidification; chemical pollution; nitrogen and phosphorus loading; freshwater withdrawals; land conversion; biodiversity loss; air pollution; and ozone layer depletion. Thus, imposing this duty on directors would force them to operate the company in a way that does not conflict with planetary boundaries or undermine social foundations.

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[96] Sjafjell, B., Johnston, A., Anker-Sorensen, L. and Millon, D. (2015). Shareholder primacy: the main barrier to sustainable companies. In B. Sjafjell, B. Richardson (Eds.), Company Law and Sustainability (p. 147). Cambridge, England: Cambridge University Press.
[97] Raworth, K. (2017). Doughnut Economics. London, Random House Business.

This new duty would provide directors with a powerful defense against the pressure to exploit short-term strategies with adverse impacts on sustainability, and at the same time it will empower sustainable investors. For instance, oil producers that benefit from climate change, if due to the Arctic ice melting, new areas for oil exploration open. Several companies already seem to be taking advantage of this 'opportunity'[98]. The proposed directors' duty that requires planetary boundaries to be considered would oblige directors not only to focus on financial benefits for the corporation but also to consider whether exploitation of such an opportunity would be within the planetary boundaries.

Regulators across the globe should define planetary boundaries and social foundations to the maximum extent possible. They should especially consider the legal foundations of international human rights and environmental law and the Sustainable Development Goals set by the United Nations. Relevant international treaties and declarations should in any case be respected. This legal mandate could be further extended by requiring the BoDs to identify specific boundaries that are particularly relevant to the company's industry and business model.

Further work will need to be done to ascertain key performance indicators in respect of each of the planetary boundaries and social foundations, so that companies can report against a consistent baseline for the purposes of comparison and objectivity. I also suggest that corporations belonging to the same sector and industry should have the same planetary boundaries so that a fair allocation of resources is achieved.

Regulation has not yet dealt explicitly with a similar approach. However, there are soft-law guideline and standards which set some duties and obligations to corporations to address the risks their connected with their operation. More specifically, the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises already require these from companies. The EU Non-Financial Reporting Directive also requires large-listed companies and financial corporations to disclose their analysis of risks of severe impacts. The Swiss government has also released a report on the legal obligations of company directors to conduct due diligence regarding business activities abroad, including a proposal to introduce a specific directors' duty to exercise human rights due diligence[99].

For all the above-mentioned reasons, I argue that a new directors' duty should be established under which directors will be expected to operate companies within planetary boundaries and social foundations. Regulators should define explicitly these boundaries and foundations and managers identify them in the framework of theirs corporation's business model.

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[98] Hyde, R. Industries that will benefit from global warming. Investopedia. Available at: https://www.investopedia.com/articles/investing/092215/industries-will-benefit-global-warming.asp.

[99] Commission des affaires extérieures du Conseil national (2012). Rapport de droit comparé. Mécanismes de diligence en matière de droits de l'homme et d'environnement en rapport avec les activités d'entreprises suisses à l'étranger, 9.

5. ESG issues in energy sector litigation

For energy corporations, climate change and the energy transition could be the causes for the rise of legal, financial, and reputational risk. Litigation over climate change now makes it necessary for companies and their fiduciaries to become familiar with the legal implications of climate change. The number of climate-related cases commenced to date is well over 1,800 and that number continues to rise. At present, a plethora of lawsuits are pending against companies and governmental entities seeking a variety of forms of relief, including damages and injunctive relief in the form of climate change regulation.

Already back in July 2004, the states of California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, along with the City of New York, filed suit[100] against the five largest GHG-emitting companies in the United States: The American Electric Power Company, the Southern Company, the Tennessee Valley Authority, Xcel Energy, Inc. and Cinergy Corporation. Collectively, these companies were the owners or operators of "174 fossil fuel burning power plants in 20 states that emit some 650 million tons of carbon dioxide each year almost a quarter of the U.S. utility industry's annual carbon dioxide emissions and about 10 percent of the nation's total.'[101] This suit reflects the view that "[t]he debate over global warming is gaining a new dimension: litigation.'[102][103]

Especially in 2020, financial institutions and governments encouraged companies across sectors to improve their ESG strategies. The energy industry responded, with a focus on the energy transition but litigation continued in this area. More specifically:

- 'Royal Dutch Shell faced proceedings in the Netherlands, brought by non-governmental organisations seeking orders that Shell reduce its CO2 emissions in line with the Paris Agreement on climate change.
- Litigation in England in relation to whether a UK domiciled parent company may be liable for acts committed by its locally incorporated subsidiary in its country of operations has been prominent. With some court decisions finding that such a duty of care may exist (*Vedanta Resources Plc and Konkola*

[100] Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005)

[101] Press Release, Office of N.Y. State Attorney General Andrew M. Cuomo, Eight States & NYC Sue Top Five U.S. Global Warming Polluters (July 21, 2004), available at http://www.oag.state.ny.us/press/2004/jul/jul21a_04.html

[102] Suing Over Climate Change, BBC NEWS, Apr. 3, 2003, available at http://news.bbc.co.uk/2/hi/science/nature/2910017.stm.

[103] See also James C. Chen & Joanne Rotondl, Raising the Heat: Climate Change Litigation in the United States, SUSTAINABLE DEV., ECOSYSTEMS AND CLIMATE CHANGE COMM. NEWSLETTER (Am. Bar Ass'n, Chi., I.L.), Apr. 2005, at 2-7, available at http://www.abanet.org/environ/committees/climatechange/newsletter/archiveslist.html.

Copper Mines Plc (Appellants) v Lungowe and Ors. (Respondents) [2019] UKSC 20), and others reaching a contrary conclusion [...]

- A similar claim against an international miner, arising from a dam collapse in Brazil was dismissed earlier in the year as "the largest white elephant in the history of group actions" (*Municipio de Mariana v BHP Group plc [2020] EWHC 2930 (TCC)*).'[104]

Notably, over the last five years, the 100 top ranked law firms in the US facilitated $1.36tn of fossil fuel transactions, represented fossil fuel clients in 358 legal cases and received $35m in compensation for their work to assist fossil fuel industry lobbying, according to a recent report[105].

i) Taxonomy of ESG litigation

It is important to examine through the relevant case law the main reasons why energy companies have been brought before the courts. First, I will make a general classification of the esg parameters and refer to indicative cases and how they have been dealt with by the judicial authorities. Then, I will refer specifically to climate change litigation which has taken on large scale and is a major source of risk (i.e., financial, reputational) for energy companies.

More specifically, the esg parameters are a) cases related to corporation's operations; b) cases stemming from the internal corporate governance of the corporation; c) cases brought before the courts due to a corporation's false or misleading disclosure practices; and d) cases that were raised because of violations of fiduciary duties.

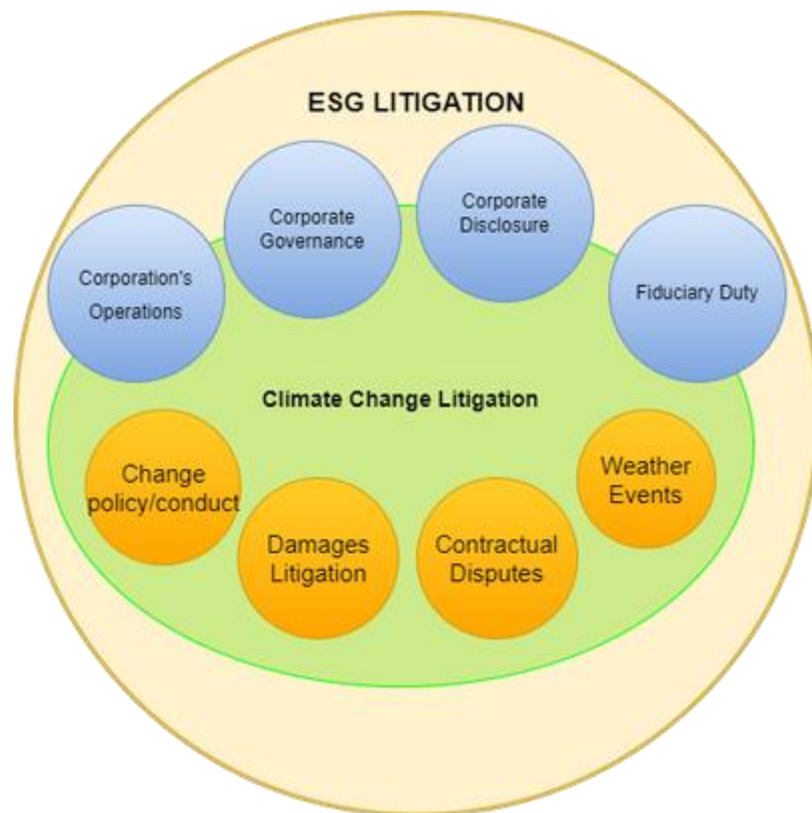
The next group of cases that I examine, belong to the climate change litigation. The climate case litigation is a subcategory of the esg litigation, but I will particularly examine some of its major cases since energy corporations are considered the ones that their effects are significant for the climate change. To be more precise, I examine four different groups of those cases which are: a) cases brought to mandate or change climate policy and/or conduct; b) cases seeking financial redress for damages related to climate change; c) contractual disputes arising out of the energy transition; and d) cases resulting from climate-related weather events. Several cases of all those subcategories may also belong to the general esg parameters. For methodological reasons, however, they are examined to the more special group they belong, namely the climate change litigation.

[104] Ashurst, Energy Disputes: 10 thoughts for 2021, available at: https://www.ashurst.com/en/news-and-insights/insights/energy-disputes---10-thoughts-for-2021

[105] The 2021 Law Firm Climate Change Scorecard, August 2021, available at: https://static1.squarespace.com/static/5f53fa556b708446acb4dcb5/t/611dba29c5ad3077663d4947/1629338162366/2021+Law+Firm+Climate+Change+Scorecard.pdf.

Claims falling within subcategories a and b of the climate change litigation tend to be brought before domestic courts. Cases from subcategories c and d could be brought before both domestic courts or in international arbitration.

Figure 3: Taxonomy of ESG Litigation



a) Corporation's Operation and ESG litigation

This category of litigation aims to hold companies liable for the climate, environmental, and human rights impacts of their operations, including their supply chains and the operations by their subsidiaries. Such claims have been principally framed in tort law and traditionally faced significant jurisdictional and corporate veil constrains. In this category also the recent Shell case could be analyzed but for methodological reasons I choose to discuss it in the special subcategory of climate change litigation.

- **Hidroituango case** (2017)

Hidroituango is a project of Empresas Públicas de Medellín (EPM) that involves the construction of a hydroelectric dam that aims to generate 2,440 MW, with a 79-kilometer-long reservoir and a 225-meter-high wall, which affects more than 300,000 hectares and 27 municipalities in the Cauca River Basin in Antioquia. It is unquestionably, the biggest dam in Colombia and one of the largest in Latin America. The work has already begun, causing forced population displacement, logging, and negative impacts on the tropical dry forest in the area.

Figure 4: The 27 municipalities of Antioquia affected by the Hidroituango

Source: https://www.frontlinedefenders.org/en/campaign/hidroituango-dam-and-struggle-movimiento-rios-vivos-protect-its-territory-water-and-life

In March 2017, FIDH[106] (International Federation for Human Rights) and victims' representatives, filed an action contesting the legality of the environmental license of Hidroituango, claiming the disregard for the fundamental right to effective participation of affected communities, procedural irregularities, and impacts to the peasant and ancestral community culture in the affected territories. The National

[106] Fidh, Colombia: Judge rejects companies' claims and allows proceedings against EPM's Hidroituango Dam to continue, 03/12/2020, available at: https://www.fidh.org/en/impacts/colombia-judge-reject-companies-claims-and-allows-proceedings-against.

Authority for Environmental Licences (Autoridad Nacional de Licencias Ambientales, ANLA) has opened more than 12 sanctioning proceedings. Some have already ended in the imposition of fines and the full or partial suspension of works. Moreover, ANLA has filed criminal charges against EPM for the crime of procedural fraud, after finding that the company repeatedly carried out construction without authorization, affecting the environment and communities.

This case illustrates well enough that a company can find itself in a lawsuit not only for its illegal actions, but also to defend the operating permit of a project if it is too harmful to the environment and contributes to climate change.

b) Corporate Governance and ESG litigation

NGOs and claimant law firms have sought to bring class action lawsuits against the parent companies of large multinational entities. The claims are standard negligence claims. Their novelty is that they bring the claims against the parent companies, and all the cases concern events in Africa involving certain African subsidiaries of said UK parent companies. The claimants argue that the relevant parent companies owe direct duties of care to them. Additionally, they support that this duty exists because the large multinational enterprises have group Environment, Health and Safety (EHS) policies and procedures, and the group annual reports contain comments from an EHS matters discussion group. In addition to claims aimed at the direct conduct of the companies, several plaintiffs are claims of 'supply chain liability' whereby companies are charged with liability for ESG impacts within their supply chains.

- ***Okpabi v Royal Dutch Shell Ltd*** (2021)[107]

In the recent decision *Okpabi v Royal Dutch Shell Ltd[108]*, the UK Supreme Court (UKSC) accepted that it had jurisdiction over Shell regarding the acts of its subsidiary in Nigeria and provided guidance on the circumstances in which a parent company may owe a duty of care to those affected by acts or omissions of its foreign subsidiary which allegedly led to environmental damage or human rights abuses.[109]

[107] Okpabi & Others v Royal Dutch Shell Plc & Another [2021] UKSC 3.
[108] Rob Davies, The Guardian, BAT and Imperial tobacco firms profited from child labour, law firm alleges (18 December 2020), available at: https://www.theguardian.com/business/2020/dec/18/bat-imperial-tobacco-firms-child-labour-law-firm-alleges.
[109] Quinn Emanuel Client Alert, "UK Supreme Court makes England Attractive Forum for ESG Claims": https://www.quinnemanuel.com/the-firm/publications/uk-supreme-court-makes-england-attractive-forum-for-esg-claims.

In particular, the UKSC made it clear that a company's ESG policies could be sufficient to create parent-company liability for the actions of its foreign subsidiaries. This Shell decision is in line with other decisions of the UK courts. For example, in *Vedanta Resources v Lungowe*,[110] the UKSC also accepted jurisdiction and found again that the public ESG commitments of Vedanta could give rise to parent company liability. More specifically, the Supreme Court held that liability of the parent company depended on the extent to which, and the way in which, the parent company availed itself of the opportunity to intervene in, control, supervise or advise the management of the relevant operations of the subsidiary, or alternatively whether it publicly held itself out as doing so.

Interestingly, in counterpart litigation brought in the Netherlands in the framework of Royal Dutch Shell and environmental damage caused from its Nigerian operations, the court applied the UK decision *Vedanta* because English jurisprudence is persuasive in Nigeria.[111]

c) Corporate Disclosure and ESG Litigation

In the US, State Attorneys General have sued corporations for allegedly misleading shareholders by not appropriately disclosing the companies' understanding of climate change risks. Claims alleging misleading disclosure of climate risk rest on the argument that climate change and other environmental issues in general pose financial risks to company interests and therefore must be disclosed as part of financial reporting[112]. Several NGOs, mainly Client Earth, have been active in raising complaints about esg reporting. Client Earth, for example, has made complaints against certain UK companies, one of which, Bodycote, is a provider of heat treatment services and specialist thermal processes.

Some corporations, however, prefer to settle with the SEC than facing their charges before the courts. For example, after the Deepwater Horizon accident, a number of investor plaintiffs brought actions against BP that were ultimately consolidated into a multidistrict action. Among the claims alleged is that BP made material misrepresentations about its safety reform efforts and ability to respond to deepwater oil spills in company sustainability reports, investor calls, and periodic corporate reporting. The SEC alleged that BP had made fraudulent public statements

[110] *Vedanta Resources Plc & Anor v Lungowe & Ors* [2019] UKSC 20, [2019] 2 WLR 1051.

[111] Oguru and Efanga v. SPDC and Royal Dutch Shell (Oruma) C/09/365498 / HA ZA 10-1677 + C/09/330891 / HA ZA 09-0579 (zaak b); see Cees van Dam, Shell liable for oil spills in Niger Delta (February 2021), available at https://media.business-humanrights.org/media/documents/BHRRC_-_Van_Dam_-_Shell_liable_for_oil_spills_in_Niger_Delta.pdf.

[112] Foerster Anita and Peel Jacqueline, (2017) 'Liability for Misleading Disclosure of Climate Risk: could US-style claims happen in Australia?' 32(3) Australian Environment Review.

regarding the flow rate of oil following the accident. BP agreed to a settlement of charges for securities fraud with the SEC and paid a US$525 million penalty.

- **Ramirez v. ExxonMobil (2018)**[113]

Another recent example is the ongoing litigation against ExxonMobil Corporation which started by investor plaintiffs, and it is related to its public statements regarding climate change risks. Exxon publicly released a climate change report, which included a proxy cost for climate change related controls that the company factored into its business metrics and calculations.[114] However, as it was made public during a parallel litigation by the New York attorney general, Exxon's public statements and filings related to its carbon-accounting policies, suggesting the company used a substantially lower proxy cost than publicly stated[115].

Plaintiffs alleged that this discrepancy resulted in a material overvaluation of company assets as oil and gas prices began to fall in 2014. The court agreed with the plaintiffs, denying Exxon's motion to dismiss in 2018.[116] In their complaint, plaintiffs accused both the company and individual officers and directors.

In denying the motion to dismiss the case as to the individual defendants, the court recognized that officers and directors had involved in Exxon's Management Committee, which actively discussed business issues related to climate change and carbon proxy cost. Therefore, the court stated that these individuals "must have had knowledge based on their executive positions within ExxonMobil."[117] This case is still ongoing. A mediation which was ordered by the court was conducted in July 2020 without resolution,[118] and ExxonMobil filed a motion for reconsideration of their motion to dismiss.[119]

- **In Massey Energy Co. Securities Litigation**[120]

Massey produces, processes, and sells bituminous coal extracted from 56 mines in West Virginia, Kentucky and Virginia, and claims to be the largest coal company in

[113] Ramirez v. Exxon Mobil Corp., 334 F. Supp. 832 (N.D. Tex. 2018).
[114] Ibid at 839-840.
[115] Ibid at 844.
[116] Ibid at 859.
[117] Ibid at 853.
[118] Motion for Oral Argument Regarding Lead Plaintiff's Motion for Class Certification, Ramirez v. Exxon Mobil Corp., No. 3:16-cv-03111-K (July 31, 2020).
[119] Motion for Reconsideration Regarding Motion to Dismiss and to Strike, Ramirez v. Exxon Mobil Corp., No. 3:16-cv-03111-K (July 31, 2020).
[120] IN RE MASSEY ENERGY CO. SECURITIES LITIGATION, Civil Action No. 5:10-cv-00689 (2010).

Central Appalachia[121]. Massey argued that it is the "industry leader in safety" and repeatedly was saying that to investors. In fact, however, safety at Massey's mines was frequently sacrificed in order to achieve aggressive production goals, and because of that Massey had received numerous undisclosed citations arising from serious uncorrected safety and other regulatory violations.

Following accidents in 2006 that resulted in the deaths of two miners, the company sought to restore its image and announced that it had a strong commitment to its miners' safety, and that it had begun to implement "safety improvement initiatives." The company stated in its periodic reports filed with the US Securities and Exchange Commission (SEC) that it put its miners' safety before production, and "a safe mine is a productive mine."

Then, on April 5, 2010, an explosion at the Upper Big Branch mine near Montcoal, West Virginia, revealed the falsity of Massey's repeated representations about the safety of its mining operations when twenty-nine miners lost their lives in the deadliest U.S. mine accident in nearly 40 years[122].

After this accident, hundreds of incidents of uncorrected safety violations at Massey's operations came to light. The price of Massey common stock plunged following the explosion and subsequent revelations regarding Massey's safety violations. On April 21, 2010, federal mine safety officials inspected eight Massey mines.

Then, after the market closed, Massey announced its first quarter earnings and told investors that it would take up to $150 million in charges in the second quarter to account for the potential costs and liabilities associated with the Upper Big Branch tragedy. By July 27, 2010, Massey shares had hit a new low-representing a staggering decline that reduced Massey's market capitalization by more than $3 billion and caused massive losses to the class[123].

The reason why the court permitted an investor suit against Massey Energy was that the company had committed securities fraud by misleading the market about its safety and compliance record and its commitment to safety.

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[121] Case Summary, Massey Energy Company Securities Litigation, https://securities.stanford.edu/filings-case.html?id=104477.

[122] Ibid.

[123] Labaton Sucharow, In re Massey Energy Co. Securities Litigation, https://www.labaton.com/cases/massey.

d) Fiduciary Duty and ESG litigation

- ***Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P. (2019)***

The dispute between ETP and Enterprise began in 2011[124], when the latter approached the former in order to build a crude oil pipeline together. Before beginning work, the parties signed three agreements—a confidentiality agreement, a letter agreement with a term sheet, and a reimbursement agreement. All the agreements indicated that the proposed project was still in a preliminary phase and contained provisions purporting to limit the parties' obligations to one another. Additionally, the letter agreement further provided that no binding or enforceable obligations would exist between the two companies until (i) their respective boards had approved the transaction; and (ii) both companies had negotiated and executed the terms and conditions of the transaction. After some months, Enterprise terminated its participation in the project with ETP and instead partnered with Enbridge Inc. for the construction of the pipeline.

ETP sued Enterprise for breach of joint enterprise and breach of fiduciary duty in the 298th District Court. At the end of trial held in 2014, which lasted one month, the jury found that ETP and Enterprise created a partnership to market and pursue a pipeline project and that Enterprise had failed to prove that it complied with its duty of loyalty. It awarded ETP approximately $500 million in damages.

In 2017, however, the Fifth Court of Appeals (Dallas) reversed one of the most significant finding of juries. More specifically, it rejected ETP's argument that a partnership with Enterprise was formed through conduct and held instead that no partnership existed because the conditions precedent in the letter agreement were unmet and ETP did not request a jury finding that they had been waived.

Despite the outcome of this case, it is obvious that energy companies may also be brought before the courts for breach of fiduciary duties. In such cases, the damages they may be required to pay could be significant.

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[124] Liskow & Lewis, Texas Supreme Court to Review $500 Million Verdict in Case Involving Formation of Partnership to Construct Crude Oil Pipeline, 3 July 2019, available at: https://www.theenergylawblog.com/2019/07/articles/energy/energy-natural-resources/texas-supreme-court-to-review-500-million-verdict-in-case-involving-formation-of-partnership-to-construct-crude-oil-pipeline/.

ii) Climate Change Litigation

The IPCC Special Report on the impacts of global warming of 1.5°C recognized the need for "rapid, far-reaching and unprecedented changes in all aspects of society", which includes in particular "rapid and far-reaching transitions in land, energy, industry, buildings, transport and cities".[125] Transitions in these key sectors, individually and collectively, have a great impact not only to our lives but also to the environment. The transition requires massive deployment of all available clean energy technologies, renewables, electric vehicles, and energy efficient building retrofits, and huge investment in research and development for new technologies between now and 2030.

During this transition, besides the huge number of investments that are required and expected by the companies, according to LSE's 2020 study of climate change lawsuit trends, litigation against major oil and gas companies has increased significantly since 2005 with at least 40 ongoing cases worldwide, most of them in the US[126].

Climate change is leading to new economic realities and legal frameworks to which all corporations should adapt. Climate change and sustainability disputes are the new corporate reality, particularly for the energy corporations. Thus, it is useful to examine specifically cases that involved energy corporations in relation to climate change.

Figure 5: The number of climate litigation cases 1986 - 2020

[125] Ippc, Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C approved by governments, 8 October 2018, https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/.

[126] Joana Setzer and Rebecca Byrnes, Grantham Institute, Global trends in climate change litigation: 2020 snapshot (July 2020), available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf.

a) Cases brought to mandate or change climate policy and/or conduct

Litigation against energy corporations is changing. Until recently, the focus has largely been on liability suits, asking corporations to pay damages for past behavior. Attention is now shifting to so-called human rights-based cases which have the potential to redesign the future business models and plans of corporations to mitigate their impact on the environment and their contribution to climate change. These cases are designed to advance climate policies and initiate behavioral shifts by the entire industry.

- **BP P.L.C. v. Mayor and City Council Of Baltimore**[127] (2021)

On May 17, 2021, the United States Supreme Court issued its first decision in the climate change litigation affecting the fossil fuel industry. Although the Court addressed this issue arising out of the City of Baltimore's lawsuit against several energy companies, the decision likely will have impacts in the more than 20 pending climate-related cases.

In the City of Baltimore's case, the City asserted several state-law causes of action centered on the alleged misleading promotion, and failure to warn about the dangers of, fossil-fuel products[128]. The justices ruled 7 to 1 that a federal appeals court should have considered a full suite of industry arguments, rather than focusing on a narrow issue, in a tussle over whether a pioneering lawsuit from Baltimore belongs in state or federal court. The Supreme Court's decision doesn't address the merits of the climate claims, but it provides the oil and gas companies with a new chance to lead litigation toward the federal court system, which is considered as a more favorable venue than state courts for industry defendants.

It is believed that this decision will delay various state court proceedings against oil and gas companies, giving industry lawyers a new opportunity to pursue federal court jurisdiction in some cases. More specifically, Karen Sokol, a law professor at Loyola University New Orleans said:

> "This is a victory in the sense it's a significant delay, and these have already been delayed. So that that's a big victory for the defendants because that's been their part of their strategy all along."

[127] BP Plc v. Mayor & City Council of Baltimore, U.S., No. 19-1189, 5/17/21, available at: https://www.supremecourt.gov/opinions/20pdf/19-1189_p86b.pdf.

[128] Byrne Elizabeth, Brechtel Becker Kelly & Duhe Edward, United States Supreme Court Issues First Decision in Climate Litigation, on May 18,2021https://www.theenergylawblog.com/2021/05/articles/litigation/appellate/united-states-supreme-court-issues-first-decision-in-climate-litigation/.

On the contrary, supporters of Baltimore and other plaintiffs argue that the Supreme Court's decision may change only the timeline but won't derail efforts to hold the industry accountable for allegedly misleading the public regarding the leading role of fossil fuels in climate change.

Whether climate change cases belong in federal, or state court remains an important and yet unanswered question. What is important for this thesis, is to underline the fact that several energy corporations are in danger of being held liable for their impact on climate change. Moreover, this case illustrates the intention and will of the society to stop the environmental harmful actions of those corporations.

- **Royal Dutch Shell PLC case[129]**

The Court's ruling is the first judicial decision in the Netherlands linking climate change directly to the individual responsibility of non-state entities emitting CO2, whereby the Court relied on the UNGP, and internationally accepted human rights to establish that Royal Dutch Shell Plc (RDS) has an individual responsibility to respect human rights which, according to the Court, also protect against hazardous climate change.

The Claimants argued that RDS, the parent company of the Shell group, has a duty of care under the Dutch Civil Code to act in preventing dangerous climate change through the corporate policy it determines for the Shell group.

The Court found that the applicable standard of care must be construed based on all relevant facts and circumstances, including the best available science on hazardous climate change, and the widespread international consensus that human rights offer protection against the impacts of dangerous climate change. More specifically, the Court determined that it follows from the UNGP and other soft law instruments that companies must respect human rights. The Court held that these human rights include Articles 2 (right to life) and 8 (the right to respect for private and family life) of the European Convention on Human Rights ("ECHR") which were found by the Dutch Supreme Court to protect Dutch citizens against the consequences of hazardous climate change because of global warming due to CO2 emissions. The Court further held that the scale and complexity of the means through which companies must comply with human rights was proportional to, among other things, their size. The Court found it particularly relevant in this regard that RDS has a policy-setting position within the Shell group. According to the Court, the Shell group is a major player on the worldwide market for fossil fuels and is responsible for significant CO2 emissions.

[129] English translation of the Dutch case, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339.

On May 26, 2021, the Hague District Court issued a ruling ordering RDS with its registered office in the Netherlands, to ensure that the aggregate annual volume of all CO2 emissions of the Shell group, its suppliers, and customers is reduced by at least net 45% by the end of 2030, relative to 2019 levels[130].

- **Notre Affaire a Tous and Others v. Total**[131] (2019)

Total is a major French oil and carbon company which is brought to court by the French NGOs Notre Affaire à Tous, Sherpa, Zea, and Les Eco Maires and several French local governments. More specifically, in January 2020, plaintiffs filed a complaint asking a Nanterre court to order Total to recognize the risks generated by its business activities and make it conduct consistent with the goal of limiting global warming to 1.5°C.

According to the plaintiffs, their complaint relies on the Law on the Duty of Vigilance, as well as the duty of environmental vigilance based on the French Environmental Charter. The plaintiffs allege that Total didn't provide enough detailed information in its vigilance plan for reducing its emissions and the company is still not in line with international climate agreements. The plaintiffs state that these obligations stem from domestic law Article L. 225-102-4.-I of the Commercial Code[132]. This law requests from a company to produce a strategy of vigilance which will identify and mitigate risks that are related directly or indirectly from the operations of the company and of the companies it controls to human rights, fundamental freedoms, the environment, and public health.

Therefore, the applicants aim to a court order which will force Total to issue a corporate strategy that 1) identifies the risks resulting from GHG emissions resulting from the use of goods and services that Total produces, 2) identifies the risks of serious climate-related harms as outlined in the 2018 IPCC special report, and 3) undertakes action to ensure the company's activities align with a trajectory compatible with the climate goals of the Paris Agreement[133].

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[130] Climate Change Litigation Bombshell: Dutch Lower Court Orders Royal Dutch Shell to Reduce CO2 Emissions, June 2021, available at: https://www.jonesday.com/en/insights/2021/06/climate-change-litigation-bombshell-dutch-lower-court-orders-royal-dutch-shell-to-reduce-co2-emissions.

[131] Case summary, Notre Affaire a Tous and Others v. Total (2019), available at: https://climate-laws.org/geographies/france/litigation_cases/notre-affaire-a-tous-and-others-v-total.

[132] Loi 27 Mars 2017 sur le devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

[133] See supra note 130.

b) Cases seeking financial redress for damages related to climate change - climate change damages litigation

This category of litigation considers companies liable for the climate, environmental, and human rights impacts of their operations, including their supply chains and the operations by their subsidiaries and seek financial redress for damages.

- **Saúl Luciano Lliuya v. RWE AG**[134] (2015)

In November 2015, Saúl Luciano Lliuya of Huaraz, a Peruvian farmer, filed a claim for declaratory judgement and damages against RWE AG (RWE), Germany's largest producer of electricity. The District Court Essen classified his lawsuit as "a legal matter with fundamental significance".

Lliuya alleged that RWE had knowingly contributed to climate change with its company operations, resulting in substantial volumes of GHG emissions, which bore partial responsibility for melting glaciers near Huaraz and associated flood risks. Palcacocha, a glacier lake above Huaraz, has increased in volume at an accelerated rate since 2003.

To prevent flood threats to Huaraz, Lliuya and local authorities have established flood protections at considerable cost. Lliuya therefore alleged that RWE's emissions were a nuisance and that he had incurred compensable costs to mitigate them. Acknowledging that RWE was only a partial contributor to the overall emissions responsible for climate change and the ensuing flood risk, Lliuya requested that RWE reimburse 0.47% of the costs incurred in building flood protections, the same percentage as the Institute of Climate Responsibility's estimate of RWE's contribution to global GHG emissions from 1751 to 2010.

The Court of first instance dismissed the claim, stating it was "impossible to identify anything resembling a linear chain of causation from one particular source of emission to one particular damage."

Next, Luciano filed an appeal before the Higher Regional Court Hamm against the negative ruling of the Regional Court Essen. However, following an appeal from Lliuya in January 2017, on November 30, 2017, the appellate court recognized the claim as admissible.

The Court of Hamm clearly rejects two statements of objection filed by RWE's lawyers against the Court's Order for the Hearing of Evidence and states once again: climate damages can give rise to corporate liability. However, since plaintiff and

[134] Luciano Lliuya v. RWE AG case, http://climatecasechart.com/climate-change-litigation/non-us-case/lliuya-v-rwe-ag/.

defendant cannot agree on experts for the taking of evidence, the Higher Regional Court of Hamm announces that it will select them itself to answer to the question of whether there is a serious threat of impairment to the plaintiff's property. If this question is answered positively, there will be taking of evidence with regards to the defendant's part of responsibility for this impairment due to RWE's CO_2 emissions. In September 2018 the experts accepted their appointment, but the Court awaits the decision of the State of Peru to be allowed to inspect the premises that are the subject of the lawsuit. Unfortunately, the taking of evidence in Huaraz will be further delayed due to the Corona-crisis and resulting travel restrictions[135].

In any case, the court's recognition that a private company may potentially be held liable for climate change-related damages due to its emissions demonstrates a development in the law in this area.

c) contractual disputes arising out of the energy transition

An illustrative example of this category of cases is that of the disputes brought in the wake of a disaster during the construction of the multibillion Hidroituango hydroelectric dam in Colombia (see subcategory (i.a)) which collapsed causing a major flood. A Colombian public utility is seeking USD $1.6 billion from a Spanish insurer following the collapse, and another billion-dollar dispute with the consortiums behind the project has also been referred to arbitration[136].

Changes to markets, especially under the significant fluctuations to commodity prices that have been seen in recent years, price review disputes, as well as disputes over performance and termination that has a direct connection to climate change and sustainability have already begun. For instance, a dispute between a German manufacturer and supplier and a Taiwanese photovoltaic (PV) company related to performance of a long-term supply agreement for silicon wafers which, are an essential component of cells used to generate solar electricity, was referred to arbitration after the PV company refused to continue to perform the contract following a rapid plunge in the cost of silicon and wafer[137].

[135] The "Huaraz Case" at a glance, https://germanwatch.org/en/huaraz.
[136] Norton Rose Fullbright, Climate change and sustainability disputes: Energy sector perspectives, July 2021, available at https://www.nortonrosefulbright.com/en/knowledge/publications/5a4387f4/climate-change-and-sustainability-disputes-energy-perspective.
[137] Ibid.

d) Cases resulting from climate-related weather events

Undoubtedly, the effects of climate change are impacting not only the environment itself but also society and corporations. Any review of reports by insurance companies shows significant increases in losses owed to extreme weather-related events. The fact that they are frequently and sever may be due to climate change. Weather-related issues might negatively affect business (i.e. contractual relations) and result in litigation. Obvious examples are claims of force majeure, frustration, or termination due to the impact of weather-related events. Disputes relating to insurance arrangements consist also a notable example.

For example, several disputes raised due to the severe storms in Texas in early 2021 which caused widespread power blackouts across Texas, shut down oil and gas wells, froze pipelines, and led to the price of natural gas skyrocketing. The same widespread blackouts took place also in Mexico which is a country that relies on the import of natural gas from the US. Notably, a US investment bank initiated the proceedings for international arbitration against Mexico's state electric utility to recover USD $400 million in debt that allegedly arose under a gas purchase agreement as a result in massive surges in the daily price rate as compared to the monthly rate. The utility refused to pay the increase which it said was caused by an unforeseen event.

Disputes have also been referred to both arbitration and litigation in the framework of important infrastructure (i.e., ports and railway lines) which suffered devastating damage from flooding, after which the state and the corporations that were impacted could not agree on who should be liable for repairing the damages and whether the flooding constituted an event of force majeure.

- **County of Marin et al v Chevron, ExxonMobil, BP, Shell, Citigo Petroleum, ConocoPhillips, Peabody Energy, Arch Coal, Total, Eni, Rio Tinto, Statoil, Anadarko Petroleum, Occidental Petroleum, Repsol, Marathon Oil, Hess Corporation, Devon Energy, Encana Corp, Apache Corp and Does 1-100**[138](2017)

In July 2017, three coastal municipalities in California, facing significant loss and damage from sea level rise and associated climate change impacts, sued 21 carbon major companies, such as ExxonMobil, BP, Shell, Petreleum, Repsol, Rio Tindo. The claims alleged that the activities of these companies have contributed to global

[138] County of Marin et al v Chevron, ExxonMobil, BP, Shell, Citigo Petroleum, ConocoPhillips, Peabody Energy, Arch Coal, Total, Eni, Rio Tinto, Statoil, Anadarko Petroleum, Occidental Petroleum, Repsol, Marathon Oil, Hess Corporation, Devon Energy, Encana Corp, Apache Corp and Does 1-100, Case No. CIV1702586 (Cal. Super. Ct., filed 17 July 2017).

climate change and the climate change harms already suffered or predicted within the municipalities. Accordingly, the plaintiffs are seeking compensatory damages for climate-related damage, as well as for costs incurred in adapting communities and infrastructure, including through the construction of seawalls.

6. Conclusions – Discussion

This thesis has proved the link between specific features of the members of the BoD and corporation's sustainability performance in the energy sector. Moreover, it has argued why directors of energy corporations should be obliged to always take into consideration esg factors when making decisions. Finally, it has examined through relevant cases from all over the world the main reasons why energy companies have been brought before the courts.

More specifically, based on empirical data it is showed that independent directors should sit on BoD of energy corporations since they promote stakeholders' interests and at the same time, they do not harm the financial performance of the corporation.

Additionally, this thesis illustrated that there is no agreement on whether the board size is positively related to a high performance of the corporation in sustainability issues or not. However, taking into consideration the theoretical approaches and several empirical research, I argue that multinational corporations should have big BoDs in order to have directors who represent almost all different groups of stakeholders and thus, ensure that all of their interests are respected when a decision is reached. Small and medium companies can take advantage of smaller BoDs consisted of directors who show social responsibility to safeguard the commitment of energy companies to corporate sustainability.

Furthermore, this thesis highlighted that the presence of women on the board can enhance the effectiveness of stakeholder management and the promotion of esg concerns and solutions. Moreover, it was proved that having an heterogenous BoD in an energy company is beneficial for its environmental and social performance. After taken into consideration several empirical evidence, I argue that the BoDs of energy corporations should have a variety of generation gaps to achieve a positive environmental and social corporate performance.

Thus, I propose a conceptual framework to analyze the link between corporate governance attributes and the degree of sustainability practice and performance by companies when the members of its BoD own specific attributes.

In addition to this, it has been clear that the fiduciary duties are owed to the company and that its interests take precedence over the interests of its shareholders. Therefore, I argue that directors of energy corporations will be obliged

to always take into consideration esg factors when making decisions as far as considering these factors benefit the overall and long-term performance of the corporation.

In that framework, I propose two new duties that directors of energy corporations should own to them. First, they should have an explicit duty to identify and mitigate the environmental and social factors that materially affect the long-term performance of the corporation and secondly, directors should be required to operate within specific environmental and social parameters.

Finally, it examined cases from all over the world that showed specific reasons that an energy corporation could be brought before the courts.

Therefore, directors need to know that corporations in the energy sector:

- may need to defend the operating permit of a project if it is too harmful to the environment and contributes to climate change.
- may held liability of the parent company depended on the extent to which, and the way in which, the parent company availed itself of the opportunity to intervene in, control, supervise or advise the management of the relevant operations of the subsidiary.
- may be sued for allegedly misleading shareholders by not appropriately disclosing the companies' understanding of climate change risks.
- may commit securities fraud by misleading the market about its safety and compliance record and its commitment to safety.
- may also be brought before the courts for breach of fiduciary duties. In such cases, the damages they may be required to pay could be significant.
- are in danger of being held liable for their impact on climate change and actions could be brought to court to mitigate or change their conduct.
- may be held liable for climate change-related damages due to its emissions.
- may have contractual disputes arising out of the energy transition.
- may be brought before courts and/or arbitration for disputes arising out of climate-related weather events.

To avoid or mitigate the risk of litigation, directors should complete a risk assessment of the physical and transition climate change risks their company faces, become familiar with the climate change disclosure obligations relevant to their company and ensure adequate procedures are established to make routine and accurate disclosures.

More importantly, the regulators worldwide should make clear that the company, as a legal entity, rather than shareholders or other stakeholders, is the primary beneficiary of directors' duties. Thus, directors should own their duties to corporation directly. However, since I showed that a socially responsible energy corporation performs better in financial terms and avoids several risks, the two proposed duties for directors of energy corporations should be established.

More concretely, directors should be explicitly required to identify and mitigate all of the long-term economic, social, and environmental risks to the company's interests. This analysis and mitigation should be published in an integrated report and the regulator should specify salient material risks for the energy industry. Directors should also be required to operate the company considering its impact on external sources.

From its side, corporation should adopt and implement strict policies regarding esg factors and thus, implement esg training programs for its directors and employees. It could also incorporate esg clauses in all its contracts and be clear on who has responsibility within a group for the operationalization of esg and sustainability policies. Moreover, it should monitor through committees and external audit reports whether obligations are being discharged, paying close attention to international and industry standards. If an esg impact is identified, manage it pro-actively, to prevent litigation.

7. Further Research

This thesis, however, has several limitations worth mentioning. It examined the link between BoD's attributes and sustainability performance based on evidence from literature only conceptually. Therefore, future studies could contribute to the current literature by empirically showing the impact of the characteristics of BoD's members on the sustainability performance of energy corporations.

Secondly, the study is limited to critically reviewing some of corporate governance features (independent directors, board diversity, and board size). Future studies need to include more internal and external corporate governance attributes like the CEO duality and the influence of the sustainability, audit, and remuneration committees on the esg performance of the corporation. Moreover, future research could also take into consideration external variables such as technology to strengthen more the BoD's inclination towards the adaptation of sustainable environmental strategies.

Thirdly, since this thesis is devoted to special corporate governance issues of energy corporations, did not discussed on neither of the theories and approaches of shareholderism and stakeholderism, and only argued that directors of energy corporations should have special duties in relation to esg concerns. Further study could examine these theories in a more general corporate governance framework and consider whether directors of all corporations (regardless of industry) should have fiduciary duties in relation to esg concerns.

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