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Legal Obligations under the Paris Agreement:

Implications for Business

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Global Legal Architecture of Climate Change Policy: From "Top-Down" to "Bottom-Up"

- **Major accomplishment of the Paris Agreement: a shift from (1) the dreams of philosopher kings (also today sometimes known as academic economists) who advocated top-down comprehensive solutions that may recommend, for example, a global agreed "tax on carbon" and other universal solutions that naively assume effective global governance regimes to (2) a realistic bottom-up global architecture that requires individual nation-states to compose and publicize plans to meet climate management targets. A focus of international governance is placed correctly on the global, regional, and national reporting and scientific verification of information about climate performance.**

- **Major challenge of the Paris Agreement: legal obligations are relatively open-ended and leave potential room for backsliding. A critical question is whether civil society – including businesses as well as various nonprofit organizations (e.g., political action groups, educational institutions, religious groups, etc.) – can mobilize effectively and efficiently enough to avert a global cataclysm.**

No Direct Legal Obligations for Business Under the Paris Agreement

- As with most international agreements, business firms are not subjected to any direct legal obligations under the Paris Agreement. Their primary role is therefore conceived as influencing the development of bottom-up plans in the nation-states in which they operate.

- The Paris Agreement includes “the private sector” and other institutions of “civil society” as “non-Party stakeholders” who are urged “to scale up their efforts and support actions to reduce emissions and/or to build resilience and decrease vulnerability to the adverse effects of climate change and demonstrate these efforts via the Non-State Actor Zone for Climate Action platform.” See Adoption of the Paris Agreement, paragraphs 118, 134-36.

- Even the non-legally binding precatory recommendations for business under the Paris Agreement, though, are rather weak and unspecific.

Actions Business Should Take Under the Agreement

- Join the Non-State Actor Zone for Climate Action platform. Companies and investors should indicate what general categories of measures they are adopting. To date, participation is relatively sparse: at this time, only 2,090 companies have signed on. And only 448 investor groups. Compare these numbers to 2,364 cities. http://climateaction.unfccc.int/.

- One sign of progress appears in increasingly common commitments by business firms to reduce greenhouse gas emissions and carbon footprints. Historically, however, these efforts are often relatively easily justified in terms of long-term (and often even short-term) cost savings.

- A major challenge: business firms must get political on the issue of climate change. The weight of influence to date has been the opposite: business interests (especially in the fossil fuel energy sector) have effectively opposed climate policy and even somewhat effectively denied climate science.

Warm-Glow Altruism and Feel-Good Complacency

- Leading, forward-thinking, and relatively well-established companies—such as those, for example, likely to attend global conferences such as this one—must guard against the temptation to focus too inwardly and to congratulate themselves on successfully meeting on their own internal benchmarking standards, such as hitting targets for greenhouse gas reductions by the company and making the introduction of new climate friendly products and services a priority. Feelings of what scholars have called "warm-glow altruism" should not lead to a status quo orientation of complacency. More than leading by example is required.

- Solutions: engage seriously with non-profit organizations and academics who challenge complacency. Take a broader perspective and consider how alliances of business with other actors, including governments, can begin to truly "move the needle" and bend the curve of global greenhouse emissions downward. Take seriously the possibility (and maybe even probability) of a grim future with respect to predicted global consequences of climate change.

Toward Climate Contracts

- **The bottom-up framework of the Paris Agreement encourages business to adopt an approach that I have called "climate contracts." This means that business firms should examine many points of interaction both within and outside of the boundaries of the firm to advance climate friendly policies, especially when they can find justification in "the business case," namely, enhancing long-term profits for the firm. Focus on the future.**

- **The main nodes of interaction include: employees, consumers, investors, governments, non-profit organizations, and educational institutions. Other business firms may also serve as allies on various projects. Consultants may also sometimes make sense.**

Source: Eric W. Orts, "Climate Contracts," *Virginia Environmental Law Journal*, vol. 27, pp. 197-236 (2011). Cf. also Michel Serres, *The Natural Contract* (trans. Elizabeth MacArthur & William Paulson) (1995).

Climate Contracts for Business

Under the framework of the Paris Agreement, business firms should commit to the development of solutions to climate change in the following ways:

- Join other forward-thinking business firms and groups to get political and advocate effective and efficient climate change policies at the national and local levels, as well as following events and participating in global discussions (such as this one at COP 22).

Note that climate change is categorically different from other political controversies that businesses may traditionally want to avoid. On some issues—and this is one of them—the consequences to global civilization are grave enough to justify an abrogation of a traditional view of "a separation of business and state."

Source: Eric W. Orts, *Business Persons: A Legal Theory of the Firm*, pp. 122-23 n. 68 (rev. paper ed. 2015). See also Eric W. Orts, *Rethinking the Firm: A Theory of Business*, ch. 4 (forthcoming).

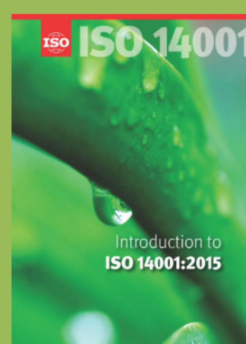
Climate Contracts for Business (continued)

- Monitor and report on internal greenhouse gas emissions and other climate-related performance metrics with a goal of continual progress and improvements.

  Urge consolidation and coordination of standard performance monitoring technologies and reporting methodologies.

  Agree to third-party verification regimes for company reports.

  Avoid greenwashing, complacency, and self-congratulation.



Climate Contracts for Business (continued)

- Develop climate friendly products and services that will contribute solutions by making “doing the right thing” easy economically. This is perhaps the top priority for businesses to embrace.   Examples include:

    - expansion of renewable energy sources (solar, wind, etc.)
    - improvement of electricity transmission and “smart grids”
    - adoption and invention of energy efficiency technologies
    - expansion of energy efficient buildings and materials
    - invention and development of direct carbon sequestration technologies (i.e. artificial photosynthesis)
    - sharing economy options (e.g. car and bicycle sharing)

Climate Contracts for Business (continued)

- Establish and enhance responsible “green supply chains” that benefit climate friendly suppliers and distributors and penalize “dirty” suppliers or distributors. Some large companies have been leaders: e.g., Walmart and Unilever. Work for uniform and expansive standards for verification, reporting, and labelling.

- Revise corporate mission statements and ethics codes to make climate change an explicit priority within the firm.

Climate Contracts for Business (continued)

- If feasible, consider changing the legal status of the firm to allow for a broader "business purpose" beyond profit maximization.

In the United States, for example, a business may consider the relative new legal form known as the benefit corporation which explicitly allow hybrid "profit" and "social/environmental" goals or objectives. Benefit corporations have now been authorized in the state of Delaware (the legal home for many U.S.-based corporations and foreign subsidiaries) as well as many other states. One recent example: Patagonia became the first benefit corporation registered in the state of California.

patagonia

In the UK, there is the option of a community interest company.

Source: Orts, *Business Persons*, op. cit., pp. 206-15.

Conclusion: Rethinking the Firm for Sustainability

A final thought is that global climate change poses a threat to modern human civilization only equaled by the possibility of thermonuclear obliteration through a grossly mistaken war. In response, there is a need to recognize the reality of what Paul Hawken said in *The Ecology of Commerce* (rev. ed. 2010), pp. 1-2, 4:

> "The ultimate purpose of business is not, or should not be, simply to make money. Nor is it merely a system of making and selling things. The purpose of business is to increase the well-being of humankind through service, creative invention, and ethical action. Making money is, on its own terms, meaningless, a craven goal in the complex and troubled world we inhabit. We have reached an unsettling and portentous turning point in industrial civilization.
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> There is no polite way to say that business is destroying the world."

We therefore need a rethinking of the firm and its purposes to include addressing the critical challenge of climate change in all of its dimensions: a change in theory as well as practice.

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Thank you!

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