

Legal Opinion

Directors' obligations to consider climate change-related risk in India

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Legal Opinion

A. Scope and summary of conclusions

1. We are asked to provide an opinion to the Commonwealth Climate and Law Initiative (CCLI) on the obligations of company directors to have regard to the issues associated with climate change in the discharge of their obligations under Indian law. We provide this opinion for the purposes of the CCLI project to study the issue in jurisdictions around the world. This opinion is not for any individual director or company and reflects the status of Indian law on the query, as on 7 September 2021.
2. For the purposes of this opinion ‘climate change-related risk’ includes ‘*physical risks*’ arising from acute, catastrophic and gradual impacts of climate change; ‘*transition risks*’ from the transition towards a net zero emissions economy; and ‘*litigation exposure*’ from the attribution of climate change to a company’s activities or the failure to manage the impacts of climate change on the business.
3. For reasons set out below, it is our opinion that:
 - (i) Directors of companies must have regard to climate change-related risks in the course of discharging their duties under section 166 of the Companies Act, 2013. Directors’ duties extend beyond shareholders to the community on matters concerning the environment.
 - (ii) The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 make disclosures on risks and concerns mandatory for public listed companies. In particular, SEBI requires disclosures from top 1000 listed entities (by market capitalization) under the Business Responsibility and Sustainability Report. The Report requires disclosure on climate change-related risk.¹

¹ The format for the disclosure is periodically updated by SEBI. The latest format for the disclosure was updated on 10 May 2021 and is discussed below.

- (iii) Independent directors have elevated duties. Independent directors must keep themselves informed about the company and the external environment, which would include climate change-related risks to the company. Independent directors are required to discharge their duties on the board in light of these factors.
- (iv) In a milieu of growing climate activism and climate-conscious investors, companies are potentially exposed to the following actions:
 - a. Public interest litigation under Article 32 and Article 226 of the Constitution of India by environmental groups and activists;
 - b. Petitions before the National Green Tribunal for causing environmental harm;
 - c. Actions initiated by the environment regulator, the Union Ministry of Environment, Forest and Climate Change, against a company for breach of conditions in the environmental clearance granted with respect to projects covered by the Environment Impact Assessment (EIA) Notification, 2006. The regulatory action may extend to cancellation/suspension/non-extension of the environmental clearance granted to the company, including where a condition pertaining to climate change mitigation measures is breached.
- (v) Directors are potentially exposed to the following actions:
 - a. Prosecutions under environmental laws, that may render directors liable to penal sanction for the company's failure to comply with statutory provisions or directions of the regulator;
 - b. In case of failure to make required disclosures pertaining to risk (including climate change-related risk), regulatory action by SEBI in terms of regulation 98 of the SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015, sections 23A and 24 of the Securities Contracts (Regulation) Act, 1956.
- (vi) Both companies and their directors may potentially face a shareholders' action for mismanagement based on a breach of 'public interest' under

section 241, or a class action under section 245 of the Companies Act, 2013.² This could include a material failure on the part of the directors to adapt to climate change-related risks. Such an action under Indian law is largely untried.

- (vii) Directors are best advised to have in place a climate risk management policy, disclose climate change-related risks, assess and mitigate material risks, integrate climate change-related risks management in their business risk management strategy, develop and execute plans to reduce carbon emissions and plans for more sustainable operations of the company.

B. Impact of climate change in India and the national policy outlook

4. According to the United Nations Climate Change Annual Report 2019, the world is 1.1°C warmer than pre-industrial times.³ The first instalment of the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) found that ‘unless there are immediate, rapid and large-scale reductions in greenhouse gas emissions, limiting warming to close to 1.5°C or even 2°C will be beyond reach.’⁴
5. India’s average temperature has risen by around 0.7°C during 1901-2018 according to the first comprehensive climate change assessment report issued by the Government of India in 2020.⁵ The rising temperature has led to a fall in

² The law imposes a threshold to initiate such actions. Section 244 specifies that this action may be initiated by not less than 100 members, or 10% shareholders in case of a listed company. In case of a non-listed company the threshold for bringing an action is one-fifth of the members. On an application made to it, the National Company Law Tribunal (NCLT) may waive these conditions. The central government may also make an application to the NCLT to initiate a mismanagement action against directors if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest. For the threshold standing requirement in respect of a class action under section 245, see n 123 below.

³ United Nations, ‘Annual Report, Climate Change’ 2019 <https://unfccc.int/sites/default/files/resource/unfccc_annual_report_2019.pdf> accessed 29 August 2021.

⁴ IPCC, ‘Climate change widespread, rapid and intensifying – IPCC’ <<https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/>> accessed 29 August 2021.

⁵ R. Krishnan, J. Sanjay, Chellappan Gnanaseelan, Milind Mujumdar, Ashwini Kulkarni, Supriyo Chakraborty, ‘Assessment of Climate Change over the Indian Region - A Report by the Ministry of Earth Sciences (MoES), Government of India’ (2020). Hereinafter, the ‘Government of India’ is

monsoon precipitation, rise in extreme temperature and rainfall, droughts, sea level rise, extreme weather events and particularly an increase in the intensity of cyclones.⁶ The average temperature in India is set to rise by 4.4°C by the end of 2100 relative to the average temperature over 1976–2005.⁷

6. With a coast of nearly 7000 km and retreating Himalayan glaciers that feed North India's perennial rivers and shifting precipitation, India is vulnerable to the impacts of climate change on several fronts. The Global Climate Risk Index 2021 found India to be the seventh most vulnerable of 180 countries.⁸ Recent reports found that India has the most cities vulnerable to climate change.⁹ The country's central bank, Reserve Bank of India (RBI), noted in its annual report for 2019-2020 that the number of dry days as well as days with extremely high levels of rainfall have increased in India, droughts have become more intense and water tables have depleted at an alarming rate.¹⁰ This has had a direct impact on agriculture with a marked increase in the extent of crop area damaged due to unseasonal rains and heavy floods. There was also a notable deceleration in mining and electricity generation as a result of the extended monsoon.¹¹ As a result of the government's push to move away from carbon fuels, the share of renewables increased in the total electricity generation, and hydro electricity generation registered double digit growth.¹²

referred as 'the Government' <<https://www.springer.com/gp/book/9789811543265>> accessed 29 August 2021 at xiii of the 'Executive Summary'.

⁶ *ibid* at xv, xvi of the 'Executive Summary'.

⁷ n 5 at 16.

⁸ David Eckstein, Vera Künzel, Laura Schäfer, German Watch, Global Climate Risk Index 2021 'Who Suffers Most from Extreme Weather Events? Weather-Related Loss Events in 2019 and 2000-2019' <https://germanwatch.org/sites/default/files/Global%20Climate%20Risk%20Index%202021_2.pdf> accessed 29 August 2021 at page 8.

⁹ Bloomberg News, '43 of 100 — India has most cities in the world vulnerable to environmental risks' (*The Print*, 13 May 2021) <<https://theprint.in/environment/43-of-100-india-has-most-cities-in-the-world-vulnerable-to-environmental-risks/657466/>> accessed 29 August 2021. *See further*, Department of Science and Technology, Government of India and Swiss Agency for Development & Cooperation SDC, Climate Vulnerability Assessment for Adaptation Planning in India using a Common Framework <<https://dst.gov.in/sites/default/files/Full%20Report%20%281%29.pdf>> accessed 29 August 2021.

¹⁰ Reserve Bank of India, Annual Report 2019-2020 <<https://rbidocs.rbi.org.in/rdocs/AnnualReport/PDFs/0RBIAR201920DA64F97C6E7B48848E6DEA06D531BADF.PDF>> accessed 29 August 2021 at 29-30.

¹¹ *ibid* at 32.

¹² n 10.

7. The RBI's report acknowledged that the impact of climate change is likely to be the most severe on India with accompanying physical and transition risks. The report noted the critical need for an appropriate framework to identify, assess and manage financial risks arising out of climate risk. It indicated the need for a standard disclosure format for firms to address climate risks, and to incorporate Environment, Social and Governance (ESG) policy principles in financial stability assessments.¹³
8. There is no independent parliamentary statute that specifically addresses climate change in India.¹⁴ The government announced the National Action Plan on Climate Change (NAPCC) in 2008 that sets out the governing principles for the various policies that the government mandates from time to time.¹⁵ The plan sets out eight core missions focused on enhanced energy efficiency, water conservation, the Green India Mission and the Sustainable Agriculture Mission. The plan mandates states to develop State Action Plans on Climate Change (SAPCC), to meet climate targets at sub-national level. So far 33 out of a total of 36 states and union territories have prepared SAPCCs.¹⁶
9. India ratified the Paris Agreement in October 2016.¹⁷ The Ministry of Environment, Forest and Climate Change¹⁸ is the nodal agency for the

¹³ n 10 at 151.

¹⁴ A private member's bill was introduced in Parliament 'Bill No. 23 of 2015' <https://www.sebi.gov.in/sebi_data/commondocs/may-2021/Business%20responsibility%20and%20sustainability%20reporting%20by%20listed%20entities%20Annexure2_p.PDF> accessed 29 August 2021. In March 2021, another private member's bill was introduced in Parliament. Sanjeev Miglani 'Exclusive: India baulks at carbon neutral target as pressure grows' (*Reuters* 30 March 2021) <<https://www.reuters.com/article/us-climate-change-india-exclusive-idUSKBN2BM1AA>> accessed 29 August 2021.

¹⁵ Prime Minister's Council on Climate Change, Government of India, National Action Plan for Climate Change < <http://moef.gov.in/wp-content/uploads/2018/04/Pg0152.pdf>> accessed 29 August 2021.

¹⁶ MoEF&CC Annual Report 2019-20 at 181 <<http://moef.gov.in/wp-content/uploads/2017/06/ENVIRONMENT-AR-ENGLISH-2020.pdf>> accessed 29 August 2021. See further, MoEF&CC Annual Report 2020-21 <<http://moef.gov.in/wp-content/uploads/2021/03/Environment-AR-English-2020-21.pdf>> accessed 29 August 2021.

¹⁷ India Deposits Instrument of Ratification for Paris Agreement, Announcement 19 September 2016 <<https://unfccc.int/node/61082>> accessed 29 August 2021.

¹⁸ Hereinafter, the 'Environment Ministry'.

implementation of India's environment policies. Climate change and related issues were added to the items of work allocated to the Environment Ministry in 2014.¹⁹ At the UN Climate Action Summit in September 2019, India announced its plan to increase the share of non-fossil fuel energy by increasing the renewable energy capacity to 450 GW and the launch of the Coalition for Disaster Resilient Infrastructure.²⁰ India has put forward eight goals as part of its Nationally Determined Contribution (NDC) commitment under the Paris Agreement, three of which set quantifiable targets to be met by 2030. Under Goal 3, India aims to reduce the emissions intensity of its GDP by 33%-35% from 2005 levels and under Goal 4, India aims to achieve 40% of cumulative electric power installed capacity from non-fossil sources.²¹

10. The requirement for corporations to report on environmental impact and mitigation strategies branched out from early corporate social responsibility frameworks mandated by the Government.²² In 2009, the Ministry of Corporate Affairs (MCA) published voluntary Corporate Social Responsibility (CSR) Guidelines which mandated businesses to formulate CSR policies on the basis of core elements identified, including respect for the environment. In 2011, the MCA published National Voluntary Guidelines on Social, Environmental, and Economic Responsibilities of Business (NVGs). The Guidelines were designed to be used by all businesses in India to report on nine principles in the form of a Business Responsibility Report. In 2012, the Securities and Exchange Board of India (SEBI) made it mandatory for the 100 largest listed companies (by market capitalization) to publish an annual Business Responsibility Report. The requirement was extended to 500 companies in 2015. MCA revised the NVGs, now called the National Guidelines on Responsible Business Conduct

¹⁹ Amendment series No. 306 dated 31.07.2014.

²⁰ n 16.

²¹ Ministry of Environment, Forest and Climate Change, <<http://moef.gov.in/en/environment/climate-change/>> accessed 29 August 2021.

²² Ministry of Corporate Affairs, Government of India, Corporate Social Responsibility Voluntary Guidelines <https://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf> accessed 29 August 2021.

(NGRBC). In 2019, SEBI extended the requirement for a Business Responsibility Report to the top 1000 listed companies.²³

11. Indian companies have responded to the changing regulatory landscape favourably. A 2020 report found that 98% of the top 100 companies by revenue had included sustainability information in their statutory annual reports.²⁴ The Annual National Stock Exchange Report on Business Responsibility Reporting 2019, which analyses the disclosure practices of the top 100 listed companies, found 90% of the companies studied stated that they identified environmental risks.²⁵ The Bombay Stock Exchange (BSE) launched themed indices in 2012. The S&P BSE Carbonex tracks the performance of the companies within the S&P BSE 100 index based on their commitment to mitigating risks arising from climate change. The S&P BSE Greenex assesses 'carbon performance' of stocks based on quantitative performance-based criteria.²⁶ BSE also published guidance on voluntary ESG disclosures mapping on global sustainability reporting frameworks.²⁷

²³ Yes Bank, 'ESG Investing Scenario in India Co-creating a better future' <https://www.yesbank.in/pdf/esg_investing_scenario_in_India#:~:text=In%20India%2C%20ESG%20investing%20has,in%20the%20next%2010%20years.> accessed 29 August 2021.

²⁴ KPMG, 'The Time has Come: KPMG Survey of Sustainability Reporting 2020' <<https://assets.kpmg/content/dam/kpmg/xx/pdf/2020/11/the-time-has-come.pdf>> accessed 29 August 2021. In 2018, 16 Indian businesses noted threats to their business due to water scarcity and climate change. The list of these companies include Infosys Ltd, Tata Consultancy Services(TCS), GAIL, Axis Bank, Kotak Mahindra Bank, State Bank of India, Mahindra and Mahindra Financial Services, Hindustan Zinc, Indian Hotels Co. Ltd, Shree Cement, Tata Chemicals, Tata Global Beverages, Tata Motors, Tata Power Co, Wipro and Arvind Ltd. Climate and Business Partnership of The Future CDP India Annual Report 2019<https://6fefcbb86e61af1b2fc4-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/004/862/original/CDP_India_Report_2019.pdf?1584010372> accessed 29 August 2021.

²⁵ National Stock Exchange, Business Responsibility Reporting in India, April 2019 <https://www1.nseindia.com/content/equities/bbr_2017_18.pdf> accessed 29 August 2021.

²⁶ BSE Sustainability <<https://www.bseindia.com/static/about/sustainability.aspx?expandable=4>> accessed 29 August 2021. S&P BSE Carbonex <<https://www.spglobal.com/spdji/en/indices/equity/sp-bse-carbonex/#overview>> 29 August 2021. BSE Greenex Index Fact Sheet <<https://www.bseindia.com/downloads/about/abindices/file/BSE-GREENEX%20Factsheet.pdf>> accessed 29 August 2021.

²⁷ BSE Guidance Document on ESG Disclosures <https://www.bseindia.com/downloads1/BSEs_Guidance_doc_on_ESG.pdf> accessed 29 August 2021.

12. Twenty four (24) top private companies, including Tata, Reliance, Mahindra, ITC, ACC, Adani and Dalmia Cement, have signed a declaration on climate change, pledging to move towards ‘carbon neutrality’.²⁸ Reliance Industries, a conglomerate engaged in businesses which include energy, oil & gas, and telecom, pledged to go net-zero and carbon-neutral by 2035.²⁹ Other Indian companies that have pledged to go net-zero include Wipro and Tata Consultancy Services.³⁰ According to the 2020 Annual Report by the Carbon Disclosure Project, investor-requested corporate disclosures for climate change grew by 17% compared to 2019. Companies calculated climate change-related risk to be Rs. 7,138 billion. The report found that climate change-related issues are overseen by individuals who are at the top of the corporate ladder and are addressed as issues that affect the bottom line.³¹
13. This review finds a convergence of policy objectives among several independent regulators when it comes to Indian companies and climate change. The financial regulator (RBI), the market regulator (SEBI), and the company regulator (Union Ministry of Corporate Affairs) are all pointing corporations in the direction of enhanced awareness and mitigation in business operations so as to reduce the environmental risk from climate change. These regulatory initiatives are complemented by new private sector indices such as the BSE Carbonex which tracks corporate sustainability.

²⁸ Vishwa Mohan ‘24 companies, including Tata & RIL, pledge to be ‘carbon neutral’ (*The Times of India*, 6 November 2020) <<https://timesofindia.indiatimes.com/business/india-business/24-companies-including-tata-ril-pledge-to-be-carbon-neutral/articleshow/79072359.cms>> accessed 29 August 2021.

²⁹ Kalpana Pathak ‘The aim is to become a net zero-carbon company by 2035: Ambani’ (*Mint*, 16 July 2020) <<https://www.livemint.com/companies/news/the-aim-is-to-become-a-net-zero-carbon-company-by-2035-ambani-11594859016543.html>> accessed 29 August 2021.

³⁰ Azman Usmani ‘What net-zero means and how Indian firms plan to meet targets’ (*Bloomberg Quint*, 19 July 2021) <<https://www.bloombergquint.com/business/what-net-zero-means-and-how-indian-firms-plan-to-meet-targets>> accessed 29 August 2021.

³¹ Carbon Disclosure Project ‘Building Back Greener – India Inc. Demonstrates Climate Resilience, CDP India Annual Report 2020’ <https://6fefcbb86e61af1b2fc4-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/005/595/original/CDP_India_Report_2020.pdf?1615972085> accessed 29 August 2021 at pages 5, 7 and 11.

C. Directors' duties under the Companies Act

14. Company law in India is governed by the Companies Act, 2013.³² A 'director' is defined under section 2(34) of the Companies Act and means 'a director appointed to the Board of a company.' The Act mandates that every company must have a board of directors and a minimum of three directors.³³ Every listed public company shall have one-third of the total number of directors as independent directors.³⁴

15. The Companies Act lays down the duties of directors in section 166.

16. Section 166 in pertinent part reads:

166. *Duties of directors.*— (1)....

(2) A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.

(3) A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.³⁵

17. There was no provision corresponding to section 166 in the predecessor statute, the Companies Act, 1956. Guidance in common law was also limited. Before the Act of 2013, director's duties were owed solely to the shareholders of the company.³⁶ Under the Act of 2013, directors are required to have due regard to a 'triple-bottom line'. They must discharge their duties with concern not just for

³² Hereinafter, 'Companies Act' or 'Act of 2013.'

³³ Section 149 (1) (a) and (b) of the Act of 2013.

³⁴ Section 149 (4) of the Act of 2013. Independent directors are defined under section 149(6).

³⁵ In terms of section 4 sub-paragraph (c) of the Act of 2013, the memorandum of a company shall state 'the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.' Definition of a memorandum is set out in section 2 sub-paragraph (56) 'memorandum means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act.'

³⁶ *Sagramsinh P. Gaekwad and Others v. P. Shantadevi Gaekwad and Others* (2005) 11 SCC 314 at paragraphs 42, 49 and 55. *Rajeev Saumitra v. Neetu Singh & Ors.* 2016 SCC OnLine Del 512 at paragraph 85.

the shareholders but for the community and the environment.³⁷ The SEBI Circular for Business Responsibility Reporting 2015 endorses this position by stating that enterprises are no longer only accountable to their shareholders from the perspective of revenue and profits.³⁸ They are also accountable to the larger society, which is a stakeholder. According to the circular the ‘...adoption of responsible business practices in the interest of the social set-up and the environment are as vital as their financial and operational performance.’³⁹

18. Principles with respect to director’s duties laid down by courts in the pre-2013 Act regime, also continue to apply.⁴⁰ Directors who act *bona fide* with reasonable care based on their knowledge and experience, in the interests of the company are considered to have discharged their duty.⁴¹ Directors are not liable for mere errors of judgment.⁴²

19. Illustrating corporate responsibility and the accountability of directors to wider stakeholders in the context of the Act of 2013, is a recent decision of the Supreme Court regarding the critically endangered Great Indian Bustard. Collisions with overhead power lines cause numerous Bustard fatalities.⁴³ In April

³⁷ A. Ramaiya, *Guide to the Companies Act* (Sections 128-246) (19th Edition LexisNexis 2020) at page 2878.

³⁸ SEBI Circular 4 November 2015 ‘Format for Business Responsibility Reporting’ <<https://www.sebi.gov.in/legal/circulars/nov-2015/format-for-business-responsibility-report-brr-30954.html>> accessed 29 August 2021.

³⁹ *ibid.*

⁴⁰ Umakanth Varottil, Chapter 7 ‘Codification of Directors’ Duties: Is Common Law Excluded?’ in Umakanth Varottil, Mihir Naniwadekar and V. Niranjan, *The Reform Decade: Corporate and Commercial Law in India* (EBC 2019).

⁴¹ *Supreme Bank of India Ltd., In re*, 1963 SCC OnLine Kar 153, *Brazilian Rubber Plantations and Estates Limited, Re*, 1 Ch 425, A. Ramaiya, *Guide to the Companies Act (Sections 128-246)* (19th Edition LexisNexis 2020), Jehangir M. J. Sethna, *Sethna’s Indian Company Law* (11th Edition Modern Law Publications).

⁴² *Institute of Chartered Accountants of India and Others v. P. K. Mukherjee & Anr.* (1968) 3 SCR 330, *Dale & Carrington Invt. (P) Ltd. v. P.K. Prathapan* (2005) 1 SCC 212 at paragraphs 11, 21 and 22.

⁴³ Press Trust of India, ‘Great Indian Bustard nearing extinction due to high voltage power lines: Environment Ministry’ (*The Hindu*, 28 July 2019) <<https://www.thehindu.com/news/national/great-indian-bustard-nearing-extinction-due-to-high-voltage-power-lines-environment-ministry/article28737317.ece#:~:text=The%20critically%20endangered%20Great%20Indian,by%20the%20Ministry%20of%20Environment.&text=They%20are%20dying%20at%20the,with%20high%20voltage%20power%20lines.>> accessed 29 August 2021; Ria Singh Sawhney and Sugandha Yadav, ‘Of the Classes of Environmental Regulations, Grasslands are Poorest of the Poor’ (*The Wire*, 29

2021, the Supreme Court directed that overhead power lines be laid underground in Great Indian Bustard habitat.⁴⁴ In arriving at this conclusion, the Supreme Court referred to section 166(2) of the Act of 2013 and held that the expression ‘environment’ would include ‘inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property.’⁴⁵ The interpretation adopted by the Court drawing on section 2(a) of the Environment (Protection) Act, 1986 would cover climate change-related impacts.

20. The petitioners in the Bustard case argued that the operation of existing overhead powerlines and installation of new powerlines, in areas critical to the Great Indian Bustard, is a violation of duties of directors of power companies. In its order, the Court noted the duty imposed on directors under section 166 and the statutory mandate for corporate social responsibility under section 135.⁴⁶ The Court concluded that the high cost of adopting mitigation measures would not deter it from passing suitable directions to save the bird from extinction. These observations by the Court and its reasoning reflect the new duty-to-stakeholders approach enshrined in the Act of 2013.

21. The Supreme Court’s order in the Bustard case is the first to explain the broad scope of directors’ duty to the environment under section 166. The Bustard case demonstrates that there is no fixed hierarchy in the duties owed to the company and other stakeholders identified under section 166. A decision taken seemingly in the financial interest of the company and its shareholders, but which is detrimental to the environment, may transgress section 166. Such a decision may additionally expose the company to litigation risk, transition risk from tightening regulations, and render the company’s assets stranded.

September 2019) <<https://thewire.in/environment/grasslands-afforestation-bustard-biodiversity-uncdd>> accessed 29 August 2021.

⁴⁴ *M.K. Ranjitsinh & Ors. v. Union of India & Ors.* (2021) SCC Online SC 326.

⁴⁵ *ibid* at paragraph 14.

⁴⁶ Section 135 of the Companies Act 2013 requires certain minimum expenditure as part of activities listed under Corporate Social Responsibility, including the environment in terms of Schedule VII. Sub-paragraph (iv) includes activities relating to: ‘(iv) ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agroforestry, conservation of natural resources and maintaining quality of soil, air and water [including contribution to the Clean Ganga Fund set-up by the Central Government for rejuvenation of river Ganga].’

22. Directors would be best advised to integrate regular monitoring, assessment and mitigation of climate change-related risks to the company, towards fulfilling their duties to shareholders and the wider community. For instance, the Climate Disclosure Project's (CDP) 'A list' of companies for climate risk transparency, which reflects the views of 515 investors, recognizes some Indian companies for the steps taken by them for climate risk disclosures.⁴⁷ Tech Mahindra, one of the companies on the list, declared that it would become carbon neutral by 2040.⁴⁸ The company adopted the recommendations of the Taskforce on Climate-Related Financial Disclosures (TCFD) for its carbon disclosures, appointed a chief sustainability officer, considered material risks due to climate change at 2°C and 4°C scenarios in its annual report in addition to identifying mitigation strategies and action plans.⁴⁹
23. The Act of 2013 states that every listed public company shall have one-third of the total number of directors as independent directors.⁵⁰ The roles and functions of independent directors are set out in Schedule IV, Part II of the Companies Act. Independent directors are required to 'help bring independent judgment to bear on the board's deliberations especially on issues of risk management and must satisfy themselves that the systems of risk management are robust and defensible. Duties of independent directors are set out in Schedule IV, Part III and require independent directors to, amongst others, 'keep themselves well informed about the company and the external environment in which it operates'. This would likely require being informed of the changing regulatory landscape and the evolving scientific understanding on the consequences of climate change.

⁴⁷ Carbon Disclosure Project 'Building Back Greener – India Inc. Demonstrates Climate Resilience, CDP India Annual Report 2020' <https://6fefcbb86e61af1b2fc4-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/005/595/original/CDP_India_Report_2020.pdf?1615972085> accessed 29 August 2021

⁴⁸ Tech Mahindra Newsletter <<https://www.mahindra.com/enewsletter-echo/2018/sep20>> accessed 29 August 2021.

⁴⁹ Tech Mahindra <<https://www.techmahindra.com/en-in/tech-mahindra-recognized-as-global-leader-on-climate-change-for-four-years-in-a-row/>> accessed 29 August 2021. Tech Mahindra Integrated Report 2020 <<https://files.techmahindra.com/static/img/pdf/integrated-report-20.pdf>> accessed 29 August 2021.

⁵⁰ Section 149 (4) of the Companies Act. Independent directors are defined under section 149(6).

24. Section 166 (7) of the Companies Act imposes fiscal penalties on directors who contravene the provisions of section 166.⁵¹ In terms of section 149(12) independent directors and non-executive directors are liable only in respect of an act or omission by a company which occurred with their knowledge, attributable to board processes, and with their consent, or where they have not acted diligently.⁵²
25. In addition to the duties under the Companies Act, the SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015 define responsibilities and key functions of the board of directors under regulation 4(2)(f) in Chapter II titled 'Principles Governing Disclosures and Obligations of Listed Entity'. These include 'reviewing and guiding corporate strategy, risk policy, to review that appropriate systems of control are in place, in particular, systems for risk management, overseeing the process of disclosure and communications.' The regulations also require members of the board of directors to act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the listed entity and the shareholders. In our opinion, the heightened awareness and concern about climate change casts a duty on all directors to be responsive to climate change-related risks.

D. Disclosure Obligations

26. This section discusses the disclosures required to be made to SEBI with respect to listed companies, the disclosures required to be made in the Annual Report under the Companies Act of 2013, and the threshold of materiality applied to information required to be disclosed.

⁵¹ The fine under this provision ranges between Rs. 100,000 and Rs. 500,000. The fine could be imposed by an adjudicating authority notified by the central government under section 454 read with the Companies (Adjudication of Penalties) Rules, 2014.

⁵² The Ministry of Corporate Affairs has clarified the scope of liability of independent directors in its circular dated 2 March 2020, which in material part reads: 'Section 149(12) is a *non obstante* clause which provides that the liability of an independent director (ID) or a non-executive director (NED) not being promoter or key managerial personnel would be only in respect of such acts of omission of commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently. In view of the express provisions of section 149(12), IDs and NEDs (non-promoter and non-KMP), should not be arrayed in any criminal or civil proceedings under the Act, unless the above mentioned criteria is met.' <https://www.mca.gov.in/Ministry/pdf/Circular_03032020.pdf> accessed 29 August 2021.

I. Disclosures under the Business Responsibility and Sustainability Report

27. SEBI has made certain disclosures mandatory for designated listed companies under the SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015.⁵³ The SEBI Regulations of 2015 are applicable to listed entities who have listed securities on recognized stock exchange(s) as set out under regulation 3. Regulation 34(1) mandates listed entities to submit their annual reports to the stock exchange and publish them on their website. Regulation 34(2) sets out the contents of the Annual Report and sub-paragraph (f) of regulation 34(2) states that the annual report must include a ‘business responsibility report’.

28. On 5 May 2021, SEBI amended regulation 34(2)(f).⁵⁴ According to the amended regulation:

(f) for the top one thousand listed entities based on market capitalization, a business responsibility report describing the initiatives taken by the listed entity from an environmental, social and governance perspective, in the format as specified by [SEBI] from time to time: Provided that the requirement of submitting a business responsibility report shall be discontinued after the financial year 2021–22 and thereafter, with effect from the financial year 2022–23, the top one thousand listed entities based on market capitalization shall submit a business responsibility and sustainability report in the format as specified by [SEBI] from time to time: Provided further that even during the financial year 2021–22, the top one thousand listed entities may voluntarily submit a business

⁵³ Hereinafter, ‘the SEBI Regulations of 2015’. SEBI Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015. <<https://www.sebi.gov.in/legal/regulations/sep-2015/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirement-regulations-2015-last-amended-on-may-5-2021-37269.html>> accessed 29 August 2021.

⁵⁴ Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2021, 5 May 2021 <https://www.sebi.gov.in/legal/regulations/may-2021/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-second-amendment-regulations-2021_50100.html> accessed 29 August 2021.

responsibility and sustainability report in place of the mandatory business responsibility report:

Provided further that the remaining listed entities including the entities which have listed their specified securities on the SME Exchange, may voluntarily submit such reports.

Explanation: For the purpose of this clause, market capitalization shall be calculated as on the 31st day of March of every financial year.

29. The format for the Business Responsibility Report is based on the principles identified under the National Guidelines for Responsible Business Conduct (NGRBC), specified and updated from time to time by SEBI. The NGRBC was developed for businesses to align themselves with key national and international developments in sustainable development and in particular, India's ratification of the Paris Agreement. NGRBC is based on nine principles. Each principle is accompanied with a list of 'core elements' to ensure the execution of the principle. Implementation of the core elements and adherence to the guidelines is part of the duty and responsibility of the 'highest governance structure' of the business. The highest governance structure in the case of companies is identified to be the board of directors.⁵⁵
30. The principles from NGRBC relevant for this opinion are principles two (2) and six (6). Principle two states, 'businesses should provide goods and services in a manner that is sustainable, to enhance the quality of life while preserving natural resources.'⁵⁶ Principle six states 'businesses should respect and make efforts to protect and restore the environment.'⁵⁷ 'The principle encourages businesses to assess the environmental impacts of their products and operations, to minimize and mitigate its adverse impacts, to adopt environmental practices and processes that minimize or eliminate the adverse impacts of their operations and across the value chain.'⁵⁸ The principle encourages businesses to follow the Precautionary Principle in all their actions.⁵⁹

⁵⁵ Ministry of Corporate Affairs, Government of India, National Guidelines for Responsible Business Conduct <https://www.mca.gov.in/Ministry/pdf/NationalGuideline_15032019.pdf> accessed 29 August 2020 at page 8.

⁵⁶ *ibid* at page 17.

⁵⁷ n 55 at page 25.

⁵⁸ n 55 at 25.

⁵⁹ *ibid*.

31. In line with the report of the MCA, the format for the report was updated on 10 May 2021.⁶⁰ The Business Responsibility Report is now called Business Responsibility and Sustainability Report (BRSR) and requires disclosures against each principle under NGRBC. The reporting under each principle is divided into ‘essential’ and ‘leadership’ indicators. The former are mandatory and the latter voluntary. The circular indicates that listed entities must endeavor to report on the leadership indicators as well.⁶¹ Filing of BRSR is mandatory for the top 1000 listed companies (by market capitalization) from financial year 2022 - 2023 and will replace the existing Business Responsibility Reporting Format. Filing BRSR is voluntary for the financial year 2021-2022.⁶²

32. With respect to principles two and six, the new format requires amongst others:

- a. Disclosure of the company’s material responsible business conduct issues ‘that present a risk or an opportunity to the business, the rationale for identifying the risk and the mitigation strategy.’⁶³ What constitutes ‘material issues’ is not defined. According to an illustration in the Guidance Note on climate change:

For instance, risk arising from climate change can include impact on operations, worker health, demand for products or services etc. Climate change opportunities can include cost savings through resource efficiency, development of new products and services, access to new markets etc. Rationale for identifying the

⁶⁰ SEBI Circular, 10 May 2021 ‘Business responsibility and sustainability reporting by listed entities’ <https://www.sebi.gov.in/legal/circulars/may-2021/business-responsibility-and-sustainability-reporting-by-listed-entities_50096.html> accessed 29 August 2021.

⁶¹ ibid paragraph 4.

⁶² ibid paragraph 7.

⁶³ SEBI, BRSR Reporting Format 10 May 2021 <https://www.sebi.gov.in/sebi_data/commondocs/may-2021/Business%20responsibility%20and%20sustainability%20reporting%20by%20listed%20entities Annexure1_p.PDF> accessed 29 August 2021 at Entry No. 24 under Section A ‘Section A: General Information about the company.’ Hereinafter, referred in footnotes as ‘BRSR Reporting Format’.

risk, which may include a description of the impact associated with the risk or opportunity.⁶⁴

- b. The statement of the director responsible for the business responsibility report highlighting ESG targets and achievements.⁶⁵
- c. Details of the responsible entity (including a director) within a company responsible for decision making on sustainability and related issues.⁶⁶
- d. Details of who undertook the review on NGRBC in the company (including the concerned director) and how often the review is undertaken.⁶⁷
- e. Disclosures of complaints against the company with respect to any of the principles under NGRBC and reasons why the complaints are pending.⁶⁸ The Guidance Note explains that such complaints may be from stakeholders of the company that include civil society actors and members of the community.⁶⁹
- f. Disclosure in the event the company does not cover certain principles in its policies regarding NGBRC principles and the reasons for it.⁷⁰
- g. Disclosure of total fuel and water consumption, air emissions, Scope 1, Scope 2 greenhouse gas emissions.⁷¹ Companies may volunteer to disclose Scope 3 emissions with a breakup of emissions into CO₂, CH₄, N₂O, HFCs, PFCs, SF₆, NF₃.⁷² Unlike the previous format, disclosures sought

⁶⁴ SEBI, Guidance Note for Business Responsibility and Sustainable Reporting Format <https://www.sebi.gov.in/sebi_data/commndocs/may-2021/Business%20responsibility%20and%20sustainability%20reporting%20by%20listed%20entities Annexure2 p.PDF> accessed 29 August 2021 at Entry No. 24, page 7. Hereinafter, referred in footnotes as ‘SEBI Guidance Note’.

⁶⁵ BRSR Reporting Format at Entry No. 7 and 8 under ‘Section B: Management and Process Disclosures.’ 10, 11 and 12.

⁶⁶ BRSR Reporting Format at paragraph 23 under ‘Section A: General Information about the company.’ Entry No. 9 under ‘Section B: Management and Process Disclosures.’

⁶⁷ BRSR Reporting Format at paragraph 23 under ‘Section A: General Information about the company.’ Entry No. 10 under ‘Section B: Management and Process Disclosures.’

⁶⁸ BRSR Reporting Format at paragraph 23 under ‘Section A: General Information about the company.’

⁶⁹ SEBI Guidance Note at Entry No. 23, page 6. The grievance redressal mechanism is an internal redressal mechanism in the company.

⁷⁰ BRSR Reporting Format at Entry No. 12 under ‘Section B: Management and Process Disclosures.’

⁷¹ BRSR Reporting Format at Entry No. 1, 3, 5 and 6 under ‘Principle 6’ accessed 29 August 2021.

⁷² SEBI Guidance Note at page 28.

on emissions are more comprehensive and beyond open ended questions on whether the entity concerned has a strategy on issues such as climate change.⁷³ According to the Guidance Note, companies must also disclose how the data disclosed on emissions is compiled.⁷⁴

33. The BRSR provides a declaration mechanism for reporting entities. The present format does not prescribe any sector-specific reporting. Since the MCA report recommended that sector-specific formats be provided,⁷⁵ it is likely that they will be introduced soon.

34. In addition, some Indian companies have adopted the framework under TCFD. A 2020 analysis by the Climate Disclosure Project (CDP) of 67 Indian companies surveyed concluded:

- a. 33% provided information on all TCFD recommended disclosures;
- b. 31% respond to 9-10 out of 11 of the TCFD recommended disclosures;
- c. 64% disclosed information on at least 80% of the recommended disclosures; and
- d. 99% exercised board level oversight.⁷⁶

35. As on June 2021, TCFD has listed 53 companies as its supporters.⁷⁷ A report by Ernst and Young on climate risk disclosures noted that in the coming year in India greater TCFD reporting is expected driven by pressure from financiers, investors and customers.⁷⁸ The report examined the efforts made by more than 1,100 organizations across 42 countries to publish their climate-related risks and opportunities, based on the recommendations set by the TCFD. India was graded 28% on the quality of disclosures and 49% on coverage of disclosures (i.e. number of TCFD recommendations addressed).

⁷³ SEBI, 'Format for Business Responsibility Report' November 4 2015 <<https://www.sebi.gov.in/legal/circulars/nov-2015/format-for-business-responsibility-report-brr-30954.html>> accessed 29 August 2021 at paragraph 3, under 'Principle 6', page 8.

⁷⁴ SEBI Guidance Note at Entry No. 24, page 7.

⁷⁵ Ministry of Corporate Affairs, Report of the Committee on Business Responsibility Reporting <http://www.mca.gov.in/Ministry/pdf/BRR_11082020.pdf> accessed 29 August 2021 at 33.

⁷⁶ Ibid.

⁷⁷ TCFD Supporters <<https://www.fsb-tcfid.org/supporters/>> accessed 29 August 2021.

⁷⁸ Ernst & Young, 'Climate Risk Disclosure Barometer' June 2021 <https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/assurance/ey-if-the-climate-disclosures-are-improving-why-isnt-decarbonization-accerlating.pdf> accessed 29 August 2021.

II. Disclosures in the Annual Report and Financial Statements

36. In addition to the BRSR disclosures mandated by the SEBI Regulations of 2015 regulation 34(3) requires that the '[a]nnual report shall contain any other disclosures specified under the Companies Act, 2013 along with disclosures specified in Schedule V of the Regulations.' Schedule V of the Regulations states that the Annual Report must contain a section on 'Management discussion and analysis' and should include a discussion on opportunities, threats and risks to the company. In our opinion, climate change-related risks are covered by this obligation.
37. Section 134 of the Companies Act states the details to be included in the financial statements and the board's report. Section 134(3) states the statements laid before the company in the general meeting must be accompanied with a report of the board of directors which must include details of issues regarding conservation of energy⁷⁹ and a statement indicating the development and implementation of a risk management policy.⁸⁰ The Companies (Accounts) Rules, 2014 under Rule 8(A) require matters regarding conservation of energy to be disclosed in the board's report, including 'steps taken or impact on conservation of energy, steps taken to utilize alternative sources of energy and capital investment on energy conservation equipment.' Disclosure on this indicator has been high in annual reports of listed companies.⁸¹

III. Threshold of materiality applied to information disclosed

38. What is the threshold of materiality applied to information required to be disclosed under Indian law, including under the Companies Act of 2013 and the SEBI Regulations, 2015?

⁷⁹ 134(3)(m) of the Companies Act, 2013.

⁸⁰ 134(3)(n) of the Companies Act, 2013.

⁸¹ National Stock Exchange, Stakeholder Empowerment Service, 'ESG Analysis on 50 listed companies' 2020 <https://www.sesgovernance.com/pdf/home-reports/1594458276_ESG-Analysis-on-50-Listed-Companies-in-India_2020.pdf> accessed 29 August 2021.

39. In our opinion, in the context of the evolving law on non-financial disclosures, including the RBI Annual Report (2019-2020) referred to above, identifying climate change as a financial risk to the economy, climate change-related risk and concerned information is material information to be disclosed by companies for the purposes of regulation 30, read with Schedule III, of the SEBI Regulations of 2015. The relevant provisions and the judgments in support are discussed below.

40. Regulation 30 of the SEBI Regulations of 2015 sets out the disclosure of information and events that is material. Events specified in paragraph A of Part A of Schedule III are deemed to be material events and the listed entity shall make disclosure of such events. Events specified in paragraph B of Part A of Schedule III, are to be disclosed based on application of the guidelines for materiality, as specified in sub-regulation 30(4):

30(4)(i) The listed entity shall consider the following criteria for determination of materiality of events/ information:

(a) the omission of an event or information, which is likely to result in discontinuity or alteration of event or information already available publicly; or

(b) the omission of an event or information is likely to result in significant market reaction if the said omission came to light at a later date;

(c) In case where the criteria specified in sub-clauses (a) and (b) are not applicable, an event/information may be treated as being material if in the opinion of the board of directors of listed entity, the event / information is considered material.

(ii) The listed entity shall frame a policy for determination of materiality, based on criteria specified in this sub-regulation, duly approved by its board of directors, which shall be disclosed on its website.

41. In terms of Schedule III, Part A, paragraph B:

B. Events which shall be disclosed upon application of the guidelines for materiality referred sub-regulation (4) of regulation (30)

....

6. Disruption of operations of any one or more units or division of the listed entity due to natural calamity (earthquake, flood, fire etc.), force majeure or events such as strikes, lockouts etc.
7. Effect(s) arising out of change in the regulatory framework applicable to the listed entity
8. Litigation(s) / dispute(s) / regulatory action(s) with impact.

42. The minimum information to be placed before the board of directors is specified in Part A of Schedule II. According to paragraph G, Schedule II this includes '[f]atal or serious accidents, dangerous occurrences, any material effluent or pollution problems.'

43. There is no specific provision setting out the penalty in the event of violation of regulation 30. Under chapter XI of the SEBI Regulations of 2015, titled 'Procedure for Action in case of Default', regulation 98 sets out the general penalty for contravention of the provisions of the regulation which include, imposition of fines, suspension of trading, freezing of promoter/promoter group holding of designated securities.

44. The SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 set out further disclosure provisions for material risks in securities documents.⁸² Under Schedule VI 'Disclosures in the Offer Document, Abridged Prospectus And Abridged Letter Of Offer', Part A – 'Disclosures in offer document/letter of offer' risk factors to be disclosed include:

(C) Risk factors shall be determined on the basis of their materiality.

In doing so, the following shall be considered:

- (1) Some risks may not be material individually but may be material when considered collectively.

⁸² SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 <<https://www.sebi.gov.in/legal/regulations/sep-2018/securities-and-exchange-board-of-india-issue-of-capital-and-disclosure-requirements-regulations-2018-40328.html>> accessed 29 August 2021. The Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 reiterate the disclosure of risk factors mentioned above in Chapter VI 'Contents of Offer Document' at paragraph 6.7. Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 <https://www.sebi.gov.in/sebi_data/attachdocs/1290148750028.pdf> accessed 29 August 2021.

(2) Some risks may have an impact which is qualitative though not quantitative. (3) Some risks may not be material at present but may have a material impact in the future.

45. The concept of what is material has been interpreted liberally in securities litigation. What is material depends on the facts and circumstances of each case,⁸³ however, as a minimum standard in view of the information described as material in the SEBI Regulations and Guidelines discussed above, this includes information which 'if concealed, would have a devastating effect on the decision making process of the investors, and without which the investors could not have formed a rational and fair business decision of investment.'⁸⁴
46. In the case of an IPO of a mining company, it was held that the non-disclosure of rejection of environment clearance to divert forest land for iron ore mining in the prospectus was a failure to disclose a material fact. A penalty of Rs. 5,000,000 was imposed on the issuer and the merchant banks. SEBI initiated an inquiry on complaints received for failure to disclose, in terms of section 23A of the Securities Contracts (Regulation) Act, 1956. Notably, section 24 states '[w]here an offence has been committed by a company, every person who, at the time when the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence, and shall be liable to be proceeded against and punished accordingly.' The Securities Appellate Tribunal held, 'the letter and spirit of the disclosure requirement is the need for disclosing all material events in clear terms with very little discretion for judging the degree of materiality. The emphasis is on disclosure; not otherwise, which means disclose even when the issuer doubts whether there is any materiality. In other words, it would imply that only facts/events which the issuer is undoubtedly sure of having no relevance to the issuer or to the issue can be excluded from disclosure.'⁸⁵ The trend therefore seeks to demand a higher degree of transparency in statutory disclosures to the market regulator.

⁸³ *In the matter of IPO of Onelife Capital Advisors Ltd* . 2013 SCC OnLine SEBI 171.

⁸⁴ *DLF Limited v. Securities and Exchange Board of India* 2015 SCC OnLine SAT 54.

⁸⁵ *Electrosteel Steels Limited. v. Securities and Exchange Board of India* 2019 SCC OnLine SAT 244 at paragraph 16. This order was challenged before the Supreme Court and no stay was granted. Notice was issued to the parties on the question of deciding the quantum of penalties alone. *Electrosteel Steels*

47. In sum, in our opinion, with respect to the duties of directors and their disclosure obligations regarding climate change-related risks:

- (i) Section 166(2) of the Companies Act 2013 lays down the duties of directors to act in good faith, to promote the objects of the company for the benefits of the members as a whole, to act in the best interests of the company, and for protection of the environment. The duty set out under section 166 sets a high standard for directors to meet in the exercise of their powers and functions as fiduciaries of the company. The duty is not limited to an obligation owed to the shareholders but extends to the community and covers the protection of the environment.
- (ii) In particular, independent directors are required to keep themselves informed about the company and the external environment, which would likely include climate change-related risks to the company.
- (iii) Responsibilities of directors under the SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015 require reviewing corporate strategy in view of the risks to the company, and for directors to have an appropriate risk policy in place. This would include climate change-related risks to the company.
- (iv) The SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015 make disclosures on environment related risk, including climate change-related risk, mandatory under the Business Responsibility and Sustainability Report (BRSR) submitted by listed companies to the stock exchange along with their annual report.
- (v) On the basis of regulation 30, climate change-related risk and concerned information is material information to be disclosed by companies in terms of the SEBI Regulations, 2015.

Limited v. Securities and Exchange Board of India (Civil Appeal No. 830 of 2020) order dated 7 February 2020.

- (vi) Companies and directors are exposed to regulatory action by SEBI in terms of regulation 98 of the SEBI Regulations, 2015, sections 23A and 24 of the Securities Contracts (Regulation) Act, 1956 in case of failure to make required disclosures to the market regulator.

E. Litigation Risks to Companies

48. Companies are exposed to broadly three types of climate change-related actions: (i) public interest litigation by environmental groups or activists under Articles 32 and 226 of the Constitution of India; (ii) action before the National Green Tribunal; and (iii) action by the environmental regulator for breach of environmental law, such as conditions relating to climate change prescribed in an environmental clearance issued under the environmental impact assessment regulation. Directors may be exposed to two types of actions: (i) prosecutions under environmental laws; and (ii) regulatory action by SEBI for breach of disclosure obligations.⁸⁶ Although untried, both companies as well as their directors could potentially face shareholders' actions for mismanagement or class actions under the Companies Act, 2013.
49. These actions could pose financial, operational, and transitional (including reputational) risks for both companies and directors. Directors may minimize this exposure by adopting best practices prevailing in the industry with respect to climate change-related adaptation. This would include making a fair disclosure of any material litigation relating to climate change that is faced by the company.

F. Public Interest Litigation

50. India has an active history of environmental litigation in the Supreme Court (under Article 32 of the Constitution), and in the High Courts at the state level (under Article 226). Some of the cases that previously were filed before these courts are now instituted before the National Green Tribunal (NGT), the statutory forum created in 2010 to resolve environmental disputes in India. Public interest litigation on the environment has evolved broad standing

⁸⁶ In terms of regulation 98 of the SEBI Regulations, 2015, read with sections 23A and 24 of the Securities Contracts (Regulation) Act, 1956. This is discussed in part D of this opinion above, under 'Disclosure Obligations'.

requirements, and the judiciary has recognized principles such as the precautionary principle,⁸⁷ absolute liability,⁸⁸ polluter-pays principle,⁸⁹ public trust doctrine,⁹⁰ and sustainable development.⁹¹ Particularly relevant to mitigating climate change is the notion of inter-generational equity, articulated by the Supreme Court.⁹²

51. Despite the long history of environmental public interest litigation, climate litigation is in its infancy in India. There is yet no comprehensive legislation to address climate change mitigation or adaptation in India. Existing constitutional rights and duties, and other laws provide ‘hooks’ that could facilitate climate change claims.⁹³

52. Several of the climate change-related cases filed before the Courts seek to address the lacuna in the law. The NGT has held that it has the jurisdiction to address national climate change policies,⁹⁴ and in a 2019 order, directed a state government to adopt a climate change policy.⁹⁵ The Supreme Court,⁹⁶ and the NGT⁹⁷ have also taken notice of the urgent action required to combat climate change, noting, in particular, India’s NDC commitments, under the Paris Agreement.

53. Given its activist history, it is reasonably foreseeable that the NGT, the Supreme Court and the High Courts could push the executive into framing policies and

⁸⁷ *Vellore Citizens’ Welfare Forum v. Union of India* AIR 1996 SC 2715.

⁸⁸ *MC Mehta v. Union of India*, AIR 1987 SC 1086.

⁸⁹ *Indian Council for Enviro-Legal Action v. Union of India* AIR 1996 SC 1446.

⁹⁰ *MC Mehta v. Kamal Nath* (1997) 1 SCC 388.

⁹¹ *Vellore Citizens Welfare Forum v. Union of India* AIR 1996 SC 2715.

⁹² *Glanrock Estate v. State* (2010) 10 SCC 96.

⁹³ Shibani Ghosh, ‘Climate litigation in India: Understanding the legal landscape,’ CPR Blog, 15 March 2021. <<https://environmentality.cprindia.org/blog/climate-litigation-in-india-understanding-the-legal-landscape>> accessed 29 August 2021. The Constitution of India creates a framework for environmental and climate-change related public interest litigation, through the right to life and a clean environment (Article 21), and imposing duties on the state, (Article 48A) and citizens (Article 51A(g)) to protect and improve the environment.

⁹⁴ *Gaurav Bansal v. Union of India*, Application No. 498/2014, (23 July 2015) National Green Tribunal.

⁹⁵ *Mahendra Pandey v. Union of India*, Original Application No. 470/2006, (2 January 2019) National Green Tribunal.

⁹⁶ *Hanuman Aroskar v. Union of India* (2019) 15 SCC 401 at paragraphs 151 to 154.

⁹⁷ *Court on its own Motion v. State* (2014) SCC Online NGT 1.

creating administrative frameworks for climate change-related claims under these principles.⁹⁸ Courts have frequently exercised their power to ‘do all that is necessary to do complete justice,’ and in the context of the environment, have been known to exercise that power liberally.⁹⁹

54. Orders and directions passed in public interest litigations could impact the operations of companies. While most public interest litigations are styled against the state, the effect of the directions passed do fall on companies as well. The Supreme Court and the High Courts have ordered industries that violated pollution standards to shut down by requiring the regulator to ensure that there is no deviation from the statutory standards.¹⁰⁰ In cases where environmental harm was established, companies have been required to retribute based on the polluter pays principle.¹⁰¹ The courts have also prohibited the import of certain hazardous substances that were being used by Indian industry with a view to prevent pollution, even though there was no statutory embargo.¹⁰² Through public interest litigations the courts have compelled the introduction of tighter emission norms for motor vehicles.¹⁰³ The courts have issued technology forcing deadlines in the context of vehicular pollution, and have also issued directions in the public interest jurisdiction requiring companies to relocate their plants and facilities away from towns and cities.¹⁰⁴

⁹⁸ The Supreme Court has been known to pass wide orders to state authorities, to ensure that an issue is adequately addressed. In some cases, it has expanded the scope of public interest litigation by directing the government to issue directions and frame policies. See *Indian Council for Enviro-Legal Action v. Union of India* (1996) 5 SCC 281; *MC Mehta v. Union of India* (1998) 8 SCC 648; *Almitra H. Patel & Anr. v. Union of India* (2002) 2 SCC 679; *M.C. Mehta v. Union of India* (2016) 2 SCC 33; (2016) 4 SCC 269, 277. *M.C. Mehta v. Union of India* (2017) 7 SCC 243.

⁹⁹ *Vellore Citizens Welfare Forum v. Union of India* AIR 1996 SC 2715.

¹⁰⁰ *M.C. Mehta v. Union of India* (1997) 2 SCC 411; *Tirupur Dyeing Factory Owners Association v. Noyyal River Ayucudars Protection Association* (2009) 9 SCC 737.

¹⁰¹ *Vellore Citizen Welfare Forum v. Union of India* AIR 1996 SC 2715; *Indian Council for Enviro-Legal Action v. Union of India (Bichhri Case)* (1996) 3 SCC 212, (2011) 8 SCC 161; *Tirupur Dyeing Factory Owners Association v. Noyyal River Ayucudars Protection Association* (2009) 9 SCC 737.

¹⁰² *Research Foundation for Science, Technology and Natural Resource Policy v. Union of India* (2012) 7 SCC 769; *M.C. Mehta v. Union of India* [Order dated 26 July 2018 in W.P. (C) No. 13029 of 1985].

¹⁰³ *M.C. Mehta v. Union of India* (1999) 6 SCC 12, (1999) 6 SCC 14, (2002) 2 SCC 356.

¹⁰⁴ *M.C. Mehta v. Union of India* AIR 1996 SC 2231; *SEIL Foods and Fertilisers Industries v. Union of India* (2010) 5 SCC 169. *FB Taraporewala v. Bayer India Ltd.* AIR 1997 SC 1846.

55. It is likely that the courts may entertain cases in respect of industries that are known to be carbon intensive and require the adoption of technologies that are benign from a climate change perspective. Directors of companies engaged in activities that are considered to be carbon intensive may adopt business strategies in anticipation of such directions, or in response to such directions.

G. Actions before the National Green Tribunal

56. The National Green Tribunal Act, 2010 established a specialized tribunal on environment, the National Green Tribunal. The NGT is mandated to apply the principles of sustainable development, the precautionary principle and the polluter pays principle, when deciding cases.¹⁰⁵ Moreover in the case of death or injury, the tribunal may award damages based on ‘no fault liability’.¹⁰⁶ Tortious liability for environmental harm has been largely subsumed by statutory provisions under the National Green Tribunal Act, which bars civil action in the courts in respect of environmental matters arising from the violation of specific environmental regulations.¹⁰⁷ The jurisdiction of the NGT is circumscribed by a list of statutes set out in a Schedule to the NGT Act.

57. While there is no specific climate change-related statute in India, the Environment (Protection) Act, 1986 (EPA) is an umbrella legislation that allows the central government to frame subordinate legislation on all aspects concerning the environment. The EPA is enumerated in the schedule to the NGT Act and the NGT will have jurisdiction over climate-related issues covered by any subordinate legislation that may be framed on this subject. Even otherwise, having regard to the wide definition of the expression ‘environment,’ in the EPA, the NGT’s jurisdiction would cover climate change-related issues.

58. The power of the NGT extends to issuing appropriate directions, granting injunctions and awarding damages. Just as the Supreme Court or the High Courts

¹⁰⁵ Section 20, National Green Tribunal Act, 2010.

¹⁰⁶ Section 17 (3), National Green Tribunal Act, 2010.

¹⁰⁷ Section 29(2) bars civil action in the courts in respect of environmental matters arising from the violation of specific environmental regulations. In *Ratnagiri Nagar Parishad v. Gangaram Narayan Ambekar* (2020) 7 SCC 275, the Supreme Court held that a civil suit seeking an injunction on a solid waste disposal project was barred by the provisions of Section 29 of the NGT Act.

in public interest litigations have issued directions obliging the use of environmentally-beneficial technologies and injunctions against the use of harmful technologies, likewise the powers of the NGT are wide enough to enable similar directions.

59. Compensation or damages in India are likely to be awarded in environmental cases where there is a violation of black letter law. Until India enacts specific legislation on climate change accompanied by statutory deadlines, in our opinion, a company or its directors could plead a defense based on having acted non-negligently, to resist civil claims for compensation or damages. However, as we have seen, in the sphere of environmental protection, embargoes as well as deadlines are imposed in India by judicial directions in addition to statute. In the event of judicial directions being issued by the NGT in aid of climate change-mitigation, companies and directors would have to comply. Orders passed by the NGT are executable as a decree of a civil court.¹⁰⁸ In the event of a breach or failure to comply with NGT orders, the company as well the concerned director could be fined.¹⁰⁹

60. Illustrative of the NGT process are two cases where the issue of climate change was considered by the tribunal. Declining to issue substantive directions at the request of a 9-year-old applicant who sought general directions to mitigate climate change, the tribunal observed that such mitigation measures could be addressed through the process of environment impact assessment.¹¹⁰ In another case, where the applicant sought directions to halt industries emitting HFC-23, a greenhouse gas, the NGT directed the state to issue measures to regulate emissions of the gas.¹¹¹

H. Actions by Environmental Regulators

61. The regulatory regime in India with respect to the environment has multiple regulators. The primary regulators in pollution-related matters are the State

¹⁰⁸ Section 25, NGT Act, 2010.

¹⁰⁹ Section 26, NGT Act, 2010.

¹¹⁰ *Ridbima Pandey v. Union of India* (2019) SCC OnLine NGT 843.

¹¹¹ *Indian Council for Enviro-Legal Action v. Ministry of Environment, Forest and Climate Change & Ors.* Application No. 170/2014, (10 December 2015) National Green Tribunal.

Pollution Control Boards (SPCB) discharging functions under the Water (Prevention and Control of Pollution) Act, 1974,¹¹² the Air (Prevention and Control of Pollution) Act, 1981,¹¹³ and the EPA.

62. The pollution control laws are based upon a licensing system where the SPCB issues a permission termed as a 'consent' to establish and operate an industry. The consent to operate is granted for a fixed period and requires renewal. The SPCB, when issuing the consent, imposes conditions with respect to technologies and other measures aimed at diminishing the harmful impact of the activity on the environment. These conditions may include measures to mitigate climate change.
63. Where conditions imposed in the consent are breached, the company may find that it cannot continue operations. This is because the SPCB may revoke its permission or refuse to renew the consent. The company as well as its directors are also liable to be prosecuted under the pollution control laws for violating the terms of the license or consent.¹¹⁴
64. Another principal regulator is the Environment Ministry which grants environmental clearances (ECs) under the EIA Regulations, 2006. A prior EC is necessary for certain types of industrial activity enumerated in a Schedule to the EIA Regulations, 2006. Generally, the EC too is conditional on the company complying with enumerated terms that may include measures to mitigate climate change.
65. Where the conditions of an EC are breached, the company as well as its directors are liable to being prosecuted and in extreme cases, the EC itself may be revoked, jeopardizing operations.
66. When applying for an EC for designated projects (either new or expansions) the company is under an obligation to make a full and fair disclosure of expected

¹¹² Hereinafter, 'Water Act'.

¹¹³ Hereinafter, 'Air Act'.

¹¹⁴ Section 41 of the Water Act, 1974; Section 37 of the Air Act; Section 15 of the EPA.

impacts of the project, including elements related to climate change, such as adherence to emission norms, and energy conservation measures.

67. Where an EC is obtained on incorrect representations, the project could be imperiled or delayed. For example, in 2019, on account of flaws in the process of obtaining the EC, including the non-disclosure of vital information, the Supreme Court suspended the EC granted to a greenfield international airport at Goa.¹¹⁵

I. Prosecutions under Environmental Laws

68. The command-and-control design of India's environmental laws employ criminal sanctions for breach of statute or statutory permissions. Since there is no statute specifically dealing with climate change, and most regulatory measures on climate change are introduced through conditions specific to individual projects/ companies, invocation of criminal law is unlikely. Generally, for the criminal law machinery to be set in motion, a clear violation of the statute is required.

69. The environmental laws¹¹⁶ have a template provision with respect to criminal liability. One of the standard form provisions, Section 40 of the Air Act reads:

Section 40. Offences by companies.

(1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was directly in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this subsection shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

¹¹⁵ *Hanuman Aroskar v. Union of India* (2019) 15 SCC 401.

¹¹⁶ That is, the Water Act, Air Act, and EPA.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

70. Where an offence is made out under the environmental laws, a convicted director may face a term of imprisonment up to a maximum of six years under the Water Act and the Air Act, and seven years under the EPA.

71. Criminal liability is attracted where a person is ‘in charge of, and responsible to the company for, the conduct of business of the company.’ On an interpretation of similar provisions in other statutes, the Supreme Court has noted this would cover the managing director, or a whole-time director.¹¹⁷ However, no criminal liability will lie if the director can demonstrate that she exercised due diligence, or had no knowledge.¹¹⁸ The burden to prove that she did not know of the offence, or had exercised all due diligence to prevent the commission of the offence, is on the person charged.¹¹⁹

72. While these principles apply to statutory provisions in the environmental laws, they are not likely to be invoked at present, in the absence of a statute on climate change.

J. Shareholder-led Actions

73. The Companies Act, 2013 provides a special remedy to aggrieved shareholders where the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company.¹²⁰ Shareholders who meet the prescribed threshold for maintaining such an action may petition the National Company Law Tribunal to prevent mismanagement.¹²¹

¹¹⁷ *K.K. Abuja v. V.K. Vobra* (2009) 10 SCC 48 at paragraph 21.

¹¹⁸ Section 40 of the Air Act; Section 42 of the Water Act, and Section 16 of the EPA.

¹¹⁹ *U.P Pollution Control Board v. Modi Distillery & Ors.* (1987) 3 SCC 684.

¹²⁰ Section 241 of the Companies Act, 2013.

¹²¹ Section 244 of the Companies Act, 2013 specifies that this action may be initiated by not less than 100 members, or 10% shareholders in case of a listed company. In case of a non-listed company the

74. This remedy is generally employed in commercial disputes where the management has breached mandates under the Companies Act in the conduct of company affairs. With the widening of directors' duties in terms of section 166 of the Act of 2013, it is possible now for shareholders to allege mismanagement where directors disregard climate change-related obligations to the community.

75. Section 245 is a new provision inserted into the Act of 2013 by which member or members, depositor or depositors or any class of them can initiate a 'class action' in the NCLT seeking directions against the company, directors, auditors, or any expert, advisor or consultant. In material parts, it specifies that the class of members must be of the opinion that 'the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interest of the company or its members or depositors'.¹²² This is a wide power, which permits, *inter alia*:

245. Class action

- (1)(g) the class of members to 'claim damages or compensation or demand any suitable action from or against –
- i. the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or likely act or omission of conduct on its or their part;

76. This can be exercised by a threshold of not less than 100 members, or not less than a percentage of shareholders which may be prescribed, in the case of a listed firm. In case of a non-listed company, the threshold is defined as not less than one-fifth of the members.¹²³ Companies and officers of the company who fail to

threshold for bringing an action is one-fifth of the members. On an application made to it, the National Company Law Tribunal (NCLT) may waive these conditions. The Central Government may also make an application to the NCLT to initiate a mismanagement action against directors if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest.

¹²² Section 245, Companies Act, 2013 has come into force as of 1 June 2016.

¹²³ Section 245 (3), Companies Act, 2013. The threshold to be met for initiating such an action is explained in the National Company Law Tribunal (Second Amendment) Rules of 2019, which were notified on 8 May 2019, as '(i)(a) at least five per cent. of the total number of members of the company; or (b) one hundred members of the company, whichever is less; or (ii) (a) member or members holding

comply with an order of the NCLT made under this provision are liable to be punished by fine or a term of imprisonment. This remedy is as yet untried in Indian law.¹²⁴ In light of the expanded notion of directors' duties under section 166 which underscore the duty to protect the environment, class actions under section 245 may develop as a remedy for shareholders to ensure that a company and its directors assess and mitigate climate change-related risks.

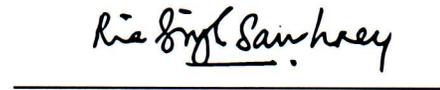
7 September 2021



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not less than five per cent of the issued share capital of the company, in case of an unlisted company; (b) member or members holding not less than two per cent. of the issued share capital of the company, in case of a listed company. (4) The requisite number of depositor or depositors to file an application under sub-section (1) of Section 245 shall be – (i) (a) at least five per cent. of the total number of depositors of the company; or (b) one hundred depositors of the company, whichever is less; or; (ii) depositor or depositors to whom the company owes five per cent. of total deposits of the company.'

¹²⁴ Mihir Naniwadekar, Chapter 12: Class Actions in the Companies Act, 2013: A Recipe for Confusion? in *The Reform Decade: Corporate and Commercial Law in India* (EBC 2019) at pages 50 – 52.

Glossary

BRSR	Business Responsibility and Sustainability Report
BSE	Bombay Stock Exchange
CDP	Climate Disclosure Project
CSR	Corporate Social Responsibility
EIA	Environment Impact Assessment
EC	Environmental Clearance
ESG	Environment, Social and Governance
EPA	Environment (Protection) Act, 1986
IPCC	Intergovernmental Panel on Climate Change
IPO	Initial Public Offering
MCA	Ministry of Corporate Affairs
MoES	Ministry of Earth Sciences
MOEF&CC	Ministry of Environment, Forest and Climate Change
NAPCC	National Action Plan on Climate Change
NCLT	National Company Law Tribunal
NDC	Nationally Determined Contribution
NGRBC	National Guidelines on Responsible Business Conduct
NGT	National Green Tribunal

NVGs	National Voluntary Guidelines on Social, Environmental, and Economic Responsibilities of Business
RBI	Reserve Bank of India
S&P BSE Carbonex	Standard and Poor's Bombay Stock Exchange Carbonex.
S&P BSE Greenex	Standard and Poor's Bombay Stock Exchange Greenex.
SEBI	Securities and Exchange Board of India
SAPCC	State Action Plans on Climate Change
SPCB	State Pollution Control Board
TCFD	Taskforce on Climate-Related Financial Disclosures