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Climate and
Law Initiative

Directors' Liability and Climate Risk: White Paper on India

By Umakanth Varottil

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Contents

LIST OF ABBREVIATIONS **6**
EXECUTIVE SUMMARY **7**
1. INTRODUCTION **9**
1.1. CLIMATE CHANGE AS A MATERIAL FINANCIAL RISK 10
1.1.1 Physical risks *10*
1.1.2 Transition Risks *11*
1.1.3 Litigation Risks *13*
1.2 OVERVIEW OF DIRECTORS' DUTIES 15
1.3 RELATIONSHIP BETWEEN STATUTORY AND COMMON LAW DUTIES 16
2. DUTIES OF TRUST AND LOYALTY **18**
2.1 POSITION OF DIRECTORS 18
2.2 GOOD FAITH AND BEST INTERESTS 19
2.2.1 Nature of the duty *19*
2.2.2 Best interests of the company *20*
2.2.3 Best interests of various stakeholders *21*
2.3 DUTY TO AVOID CONFLICTS 23
2.4 APPLICATION OF THE DUTIES OF TRUST AND LOYALTY IN A CLIMATE RISK CONTEXT 23
2.4.1 Climate risk and the best interests of the company *24*
2.4.2 Climate risk and the best interests of stakeholders *25*
2.4.3 Climate change and conflicts of interest *26*
2.5 CONCLUSION ON THE DUTIES OF TRUST AND LOYALTY 26
3. DUTIES OF COMPETENCE **28**
3.1 DUTIES OF DUE AND REASONABLE CARE, SKILL AND DILIGENCE 28
3.2 RISK MANAGEMENT FRAMEWORK 30
3.3. APPLICATION OF COMPETENCE DUTIES IN A CLIMATE RISK CONTEXT 31
3.3.1 Directors' failure to consider climate risk *32*
3.3.2 Directors' inadequate consideration of climate risk *33*
3.4 CONCLUSION ON THE DUTIES OF COMPETENCE 33
4. DUTY OF DISCLOSURE **35**
4.1 PRIMARY MARKETS: DISCLOSURES DURING SECURITIES ISSUANCES 35
4.2 SECONDARY MARKETS: CONTINUOUS DISCLOSURES 37
4.2.1 Annual reports *38*
4.2.2 Continuous disclosure to the market *38*
4.2.3 Business responsibility and sustainability reporting (BRSR) *39*
4.3 CONCLUSION ON THE DUTY OF DISCLOSURE 41
5. DUTIES APPLICABLE TO OTHER CATEGORIES OF DIRECTORS **42**
5.1 DIRECTORS' DUTIES IN SPECIFIC CATEGORIES OF FINANCIAL INSTITUTIONS 42
5.1.1 Banks *42*
5.1.2 Insurance companies *43*
5.1.3 Asset management funds *44*
5.2 SHAREHOLDER STEWARDSHIP REGIME 45
6. ESTABLISHING LIABILITY **47**
6.1 EVIDENTIARY REQUIREMENTS 47
6.2 POSSIBLE DEFENCES 48
6.2.1 Business judgment rule *48*
6.2.2 Safe harbour for certain non-executive directors *48*
6.2.3 Power of the court to grant relief *49*
6.3 PERSONAL LIABILITY AND AVAILABILITY OF DIRECTORS' AND OFFICERS' ('D&O') INSURANCE 50
6.3.1 Corporate indemnity *50*
6.3.2 D&O insurance *50*
7. PROCEDURAL CONSIDERATIONS **52**
7.1 PRIVATE ENFORCEMENT 52
7.1.1 Derivative actions *53*
7.1.2 Oppression, prejudice and mismanagement actions *55*
7.1.3 Class Actions *59*
7.2 PUBLIC ENFORCEMENT 60
7.2.1 Actions by the Central Government *60*
7.2.2 Actions by SEBI *62*
7.3 LIMITATION PERIODS 63
8. CONCLUSION **64**

About the Commonwealth Climate and Law Initiative (CCLI)

The CCLI is a legal research and stakeholder engagement initiative founded by Oxford University Smith School of Enterprise and the Environment, ClientEarth and Accounting for Sustainability (A4S). We are a UK non-profit organisation funded by environmental philanthropy and research grants.

We apply existing company law to climate risk in order to drive a rapid and orderly transition towards a net zero carbon economy. We examine the legal basis for directors and trustees to manage and report on climate change-related risk and climate mitigation. Our legal research is at the forefront of the intersection of climate and biodiversity risks under existing companies and securities laws. We commission legal opinions from independent experts within a jurisdiction to build the authoritative evidence base on which to shift mainstream understanding of the requirements of corporate and securities laws to nature crises. We convene conferences, host webinars and stakeholder events to disseminate our findings and build capacity across the corporate, regulator and civil society ecosystem. Our approach is outcome-focused and evidence-led. We have partnered with world-leading behavioural science consultancy Influence at Work to undertake research on the role that psychology plays in understanding how boards engage with the subject of climate change in the boardroom.

We collaborate with leading organisations, such as the World Economic Forum, the Law Society of Singapore, the Society of Indian Law Firms and the C.D. Howe Institute.

Our Canadian partner, the Canada Climate Law Initiative, convenes 60 experts to educate Canadian boards on climate change under the Canadian Climate Governance Experts project. They also provide an online knowledge hub for climate risk and sustainable finance resources.

More information here.

About the Author

Umakanth Varottil is an Associate Professor at the Faculty of Law, National University of Singapore. He specializes in corporate law and governance, mergers and acquisitions and corporate finance. While his work is generally comparative in nature, his specific focus is on India and Singapore. He has co-authored or co-edited five books, published articles in international journals and founded the IndiaCorpLaw Blog. He has also taught on a visiting basis at law schools in Australia, India, Italy, New Zealand and the United States.

Umakanth is an editor of the Oxford Business Law Blog, Indian Law Review, Asian Journal of Comparative Law and Singapore Journal of Legal Studies. He is also a Research Member of the European Corporate Governance Institute. Prior to his foray into academia, Umakanth was a partner at a pre-eminent law firm in India. During that time, he was also ranked as a leading corporate/mergers & acquisitions lawyer in India by the Chambers Global Guide.

He has obtained law degrees from the Faculty of Law, National University of Singapore (PhD), the New York University School of Law (LLM) and the National Law School of India University, Bangalore, India (BA, LLB (Hons)).

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List of Abbreviations

AIFs	Alternative investment funds
BRR	Business responsibility reporting
BRSR	Business responsibility and sustainability reporting
CLB	Company Law Board
D&O	Directors and officers
ESG	Environmental, social and governance
ESV	Enlightened shareholder value
GDP	Gross domestic product
GHG	Greenhouse gases
GRI	Global Reporting Initiative
IIRC	International Integrated Reporting Council
IL&FS	Infrastructure Leasing and Financial Services Limited
INR	Indian Rupees
IRDAI	Insurance Regulatory and Development Authority of India
IPO	Initial public offering
MCA	Ministry of Corporate Affairs, Government of India
MD&A	Management discussion and analysis
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
NDC	Nationally determined contribution
NGRBCs	National Guidelines for Responsible Business Conduct
NGT	National Green Tribunal
NVGs	National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business
RBI	Reserve Bank of India
ROC	Registrar of Companies
SAT	Securities Appellate Tribunal
SDG	Sustainable Development Goals
SEBI	Securities and Exchange Board of India
SEBI Act	Securities and Exchange Board of India Act, 1992
SEBI ICDR Regulations	SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018
SEBI LODR Regulations	SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015
TCFD	Task Force on Climate-related Financial Disclosures
UK	United Kingdom

Executive Summary

Climate change as a material financial risk

Climate change has garnered significant attention given that it poses a serious challenge to sustainable development. No longer is it merely within the domain of voluntary conduct on the part of corporations. Instead, it is a material financial risk that corporations encounter, thereby imposing duties on the boards of directors of corporations to recognise and address climate risk.

Directors' duties of trust and loyalty

In India, the jurisprudence in the context of section 166(2) of the Companies Act, 2013 suggests that directors ought to consider the long term interests of the company. The duty to act in the interests of the company would require directors to examine climate risk and engage in a balancing act between the long term sustainable value for the company as a whole on the one hand and any other interest, including their own, on the other. Practical manifestations of this duty would include making a detailed assessment of climate risk for their company, considering expert advice (where appropriate), determining strategies to address the risks, following through and implementing the strategies, and constantly reviewing the risks and updating the strategies and their implementation. Directors could be exposed to liability if they display conscious disregard or wilful neglect towards the associated financial risks arising from climate change.

Directors' duties of competence

The Companies Act (in section 166(3)) also requires directors to act with reasonable care, skill and diligence. In addition, independent directors are subject to several specific duties, including risk management. Given that climate risk is not only a key risk for Indian companies, but is one that is gaining greater prominence over time, directors' duties to account for climate risk can undoubtedly be determined against the aforesaid legal framework in India. Hence, directors of Indian companies cannot afford to ignore climate risk without exposing themselves to the risk of consequences for breach of directors' duties. Even if they were to acknowledge climate risk, the competence duties they owe require them to make further investigations to obtain adequate information, to appoint experts and obtain their advice, and to oversee and supervise management to whom they may have delegated tasks for identifying, strategising and implementing a framework to address climate risk. Illustratively, this would include making appropriate levels of disclosure under recognised frameworks such as the Taskforce on Climate-related Financial Disclosures ('TCFD'), undertaking scenario modelling to assess the viability of the business under different carbon price and temperature settings, and formulating strategies to ensure that the business of a company can sustainably operate in a net zero globalised economy.

Directors' duties of disclosure

Both corporate law as well as securities law in India impose considerable disclosure obligations on directors of companies. Both bodies of law recognise the need for transparency regarding climate risk – as a matter of recognising and dealing with financial risk and also as a matter of non-financial disclosure. When a company is in the process of engaging in a securities transaction, disclosures are required to be made in a prospectus, giving rise to the risk of both criminal and civil liability for directors for misstatements. Secondary market disclosures require directors to disclose matters of climate risk in the annual reports, as well as on an ongoing basis in the case of material occurrences that impact the company's business and finances, such

as extreme weather events. Finally, as part of the annual reports, companies must specifically include business responsibility and sustainability reporting, of which the issue of climate change plays a crucial part. In all, directors of Indian companies bear the responsibility that their companies engage in climate risk disclosures through this multi-pronged approach, the failure of which would expose them to liability under both corporate and securities law.

Enforcement mechanisms for breach of directors' duties

When it comes to enforcement mechanisms, shareholders have a number of avenues through which they can agitate claims for breach of directors' duties to deal with climate risk, including to make adequate disclosures. These include both private enforcement measures as well as public ones. While the private enforcement tools seem wide in nature and, in certain cases such as class actions, wider than other Commonwealth jurisdictions, constraints, such as costs, delays and a lack of litigation funding mechanisms, may limit the effective use of such remedies.

Even though the substantive law goes as far as requiring directors of companies to act in the interest of stakeholders, this provision is not justiciable by the stakeholders for whose benefit the directors are required to act. This is because duties are owed to the company, which only can bring an action. Even a derivative action or other forms of claims enumerated under the Companies Act can be brought only by shareholders. It remains unclear whether they can do so for anyone's benefit other than their own.

1. Introduction

Climate change has garnered significant attention given that it poses a serious challenge to sustainable development.[1] There is also a growing nexus between climate change and the manner in which corporations are governed.[2] This is because large corporations bear a two-way relationship to climate change. On the one hand, mounting scientific evidence has established that activities of corporations, for example emissions of greenhouse gases ('GHG'), cause climate change.[3] On the other hand, such anthropogenic climate change in turn poses a significant material financial risk to corporations, their shareholders and other stakeholders.[4] Hence, corporations play a vital role in addressing climate risk, as does the law governing corporations.[5]

Until recently, the role of corporations in tackling climate change was embedded in the concept of voluntariness and social responsibility.[6] By this, companies are required, generally by 'soft law', to have regard to matters pertaining to the environment, and also engage in environmental, social and governance ('ESG') reporting.[7] More recently though, the discourse has taken a dramatic shift. No longer is climate change merely within the domain of voluntary conduct on the part of corporations. Instead, it is a material financial risk that corporations encounter, thereby imposing duties on the boards of directors of corporations to recognise and address climate risk.[8] Corporate boards can afford to undermine the importance of climate risk only at the peril of reputational and legal consequences.

The goal of this paper is to analyse the duties that corporate and securities laws in India impose on corporate boards to recognise climate risk, devise strategies to deal with it, and make appropriate disclosures to shareholders and other stakeholders. In doing so, the paper examines Indian law, albeit in a comparative setting. This paper supplements the legal opinion issued by Mr. Shyam Divan, Senior Advocate, and Ms. Sugandha Yadav and Ms. Ria Singh Sawhney, Advocates, relating to the subject-matter covered herein,[9] and draws inspiration from similar papers commissioned by the CCLI in jurisdictions such as Australia,[10] Japan,[11] and Singapore,[12] among others.

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1 World Economic Forum, *The Global Risks Report 2020* (15th edn), at 12; United Nations, 'Transforming our world: the 2030 Agenda for Sustainable Development', *Resolution adopted by the General Assembly on 25 September 2015*, A/Res/70/1, at [14].

2 Lisa Benjamin, 'Directors are in the crosshairs of corporate climate litigation', *The Conversation* (9 July 2019).

3 Richard Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010', (2014) *Climate Change* 229, 230.

4 Lisa Benjamin, 'The Road to Paris Runs Through Delaware: Climate Litigation and Directors' Duties', [2020(2)] *Utah Law Review* 313, 325.

5 Jacqueline Peel, Anita Foerster, Brett McDonnell and Hari M. Osofsky, 'Governing the Energy Transition: The Role of Corporate Law Tools', https://ssrn.com/abstract=3439212.

6 Ellie Mulholland, Sarah Barker, Cynthia Williams and Robert G. Eccles, 'Climate Change and Directors' Duties: Closing the Gap between Legal Obligation and Enforcement Practice' in Richard LeBlanc (ed.), *The Handbook of Board Governance* (2nd edn, John Wiley & Sons, Inc., Hoboken, New Jersey, 2020), at 335.

7 Ibid.

8 Sarah E. Light, 'The Law of the Corporation as Environmental Law', (2019) 71 *Stanford Law Review* 137, 140; Minter Ellison, *The Carbon Boomerang: Litigation Risk as a Driver and Consequence of the Energy Transition* (September 2017), at 47.

9 Shyam Divan, Sugandha Yadav & Ria Singh Sawhney, 'Legal Opinion: Directors' obligations to consider climate change-related risk in India' (7 September 2021) (hereinafter the 'Divan et al. Opinion').

10 Sarah Barker, *Directors' Liability and Climate Risk: Australia – Country Paper* (April 2018).

11 Yoshihiro Yamada, Janis Sarra & Masafumi Nakahigashi, *Directors' Duties Regarding Climate Change in Japan* (February 2021).

12 Ernest Lim, *Directors' Liability and Climate Risk: White Paper on Singapore* (April 2021).

1.1. Climate change as a material financial risk

The fact that climate change poses material financial risks for corporations has become incontrovertible. Various stakeholders such as financial regulators, debt and equity investors and credit rating agencies, both globally and in India, have begun recognising risks arising from climate change and have been calling upon companies to act to mitigate them. This includes a realisation of the magnitude of climate risks, which gives rise to threat multipliers such as supply-chain risks, which can adversely affect business in a significant way.[13] Climate-related risks are also unique in terms of their breadth, depth and magnitude across the economy, and their radical uncertainty.[14]

These developments have already altered corporate behaviour. Several world-leading companies have adopted net zero carbon policies.[15] Investors with trillions of dollars of assets under management have also announced net zero commitments.[16] Moreover, recent accelerations in policy responses or signals of policy and regulatory changes on the horizon in several jurisdictions will likely have global ramifications, with an impact on India. These include trends in climate-related financial disclosures and guidance from accounting and audit standard setters on the relevance of climate change as a material financial risk for purpose of corporate reporting.[17]

Companies and their directors bear a duty to act to protect long term sustainable value for various stakeholders, which the importance of climate risk brings into sharp focus. This would require them to make a detailed assessment of climate risk, consider appropriate advice, and prepare and implement strategies to deal with the risk. Failure to account for the financial risks arising from climate change may expose companies and their directors to liability. Before dealing with the duties and liabilities of corporate directors, it would be necessary to examine the financial risks arising from climate change, which can be categorised into (i) physical risks, (ii) transition risks and (iii) litigation risks.[18]

1.1.1 Physical risks

Physical risks include rising sea levels, melting polar ice, loss of mountain glaciers and snow pack, changing weather patterns, and more hurricanes, droughts, and flooding.[19] These phenomena impact human health as well as the environment. India is one of the countries that is most adversely affected by climate change. It has seen a rise in average temperature of about 0.7°C during the period between 1901 and 2018, which is largely attributed to GHG emissions.[20] In terms of projections, India's average temperature is expected to go

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13 Mercer, 'Investing in a Time of Climate Change: The Sequel 2019', *Global Wealth* (2019); Sustainability Accounting Standards Board, 'Climate Risk: Technical Bulletin' (October 2016).

14 Prudential Regulation Authority, Bank of England, 'Annual Report 1 March 2018–28 February 2019' (2019); Patrick Bolton, et al., 'The green swan: Central banking and financial stability in the age of climate change', *Bank for International Settlements* (January 2020).

15 Jack Graham, 'Net-zero emissions targets adopted by one-fifth of world's largest companies', *Reuters* (24 March 2021).

16 Katherine Dunn, 'BlackRock's Larry Fink to CEOs: Get serious on net-zero targets, or else', *Fortune* 27 January 2021).

17 See e.g., Sustainability Accounting Standards Board, above n 13; Huw Jones, 'UK proposes requiring businesses to disclose climate risks by 2022', *Reuters* (24 March 2021); Vivien Shao, 'Climate-linked financial disclosures to be legally binding, align to one global standard: MAS chief', *Business Times* (9 June 2021).

18 Janis Sarra, 'Duty to Protect: Corporate Directors and Climate-Related Financial Risk', *Trusted Policy Intelligence* (28 January 2021), at 2.

19 David Eckstein, Vera Kunzel, Laura Schafer and Maik Winges, 'Global Climate Risk Index 2020', *German Watch* (2019), at 4.

20 R. Krishnan, et al, *Assessment of Climate Change over the Indian Region: A Report of the Ministry of Earth Sciences (MoES), Government of India* (Springer Open, 2020), at xiii.

up by approximately 4.4°C by the end of the 21st century in comparison with the average during the period between 1976 and 2005.[21]

India continues to experience extreme weather events such as heatwaves, floods and irregular monsoons. It suffered from 'one of the longest recorded heatwaves' in 2018, which resulted in several deaths.[22] Several prominent cities such as Chennai, Bangalore, Hyderabad and Delhi have suffered from prolonged water scarcities.[23] In 2018, the State of Kerala experienced unusually heavy rainfall and its worst flooding in nearly a century, which resulted in nearly 400 deaths and displacement of at least a million people.[24]

Apart from the direct financial losses caused by such aberrations in weather patterns, the physical impact of climate change is likely to bring material adverse consequences from an economic perspective. One study predicts that 'between 160 million and 200 million people could live in regions with an average 5 percent annual probability of experiencing a heat wave that exceeds the survivability threshold for a healthy human being'.[25] The study also goes on to show that heat-exposed work constitutes about 50 percent of India's GDP, and employs nearly 380 million people, representing about 75 percent of the workforce.[26] Unless stringent measures are adopted, by 2030 heat stress would erode 5.8 percent of working hours, much of it from sectors such as agriculture and construction which also accommodate some of the country's poorest.[27] Overall, empirical findings report a statistically significant macroeconomic impact of climate change on the Indian economy.[28]

Such physical risks pose considerable threat to India's corporate sector by causing damage or destruction to property, affecting human capital and disrupting supply chains. The preparedness of companies in adapting to climate change and dealing with its physical effects will prove crucial in differentiating companies that are successful in handling climate risks from others.

1.1.2 Transition Risks

Economic transition risks arise due to the shift to a lower carbon economy.[29] Such a shift is driven by various factors, including policy or regulatory responses that rein in activity contributing to climate change or promote a transition to more sustainable industrial and business practices.[30] Supporting this trend are factors such as emerging technologies in renewable energy generation and electric vehicles, burgeoning market trends in the real and financial economies that encourage a greener approach, and the active pursuit by investors, financiers, consumers, employees and other stakeholders to induce companies to reduce the adverse impacts of climate change.[31]

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21 Ibid, at xiv. This is under the IPCC's RCP8.5 scenario.

22 Eckstein, et al, above n 19, at 12, 19.

23 Complaint in *Commonwealth of Massachusetts v Exxon Mobil Corporation*, at 9.

24 Eckstein, et al, above n 19, at 7; Kieran M.R. Hunt and Arathy Menon, 'The 2018 Kerala floods: a climate change perspective', (2020) 54 *Climate Dynamics* 2433.

25 Jonathan Woetzel, et al, 'Climate risk and response: Physical hazards and socioeconomic impacts', *McKinsey Global Institute* (January 2020), at viii.

26 Ibid, at 16.

27 Eckstein, et al, above n 19, at 7.

28 Archana Dilip and Sujata Kundu, 'Climate Change: Macroeconomic Impact and Policy Options for Mitigating Risks', *RBI Bulletin* (April 2020), at 105.

29 Task Force on Climate-Related Financial Disclosures, *Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosures* (June 2017), at 5.

30 Ibid.

31 Climate Action 100+, *2020 Progress Report* (2020), at 22.

One of the main transition risks is that of stranded assets. Assets become 'stranded' when they are incapable of being exploited due to policies that seek to reduce GHG emissions and otherwise curb the adverse impact of climate change.[32] For example, arresting global warming 'requires keeping a large proportion of existing fossil fuel reserves in the ground'.[33] This has contributed to oil companies needing to write down the value of their assets, thereby impacting their shareholders.[34]

Spearheading domestic regulatory policies is the Paris Agreement which sets out a global response to climate change, and aims at 'holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels'.[35] Towards achieving goals under the Paris Agreement, India set out its Nationally Determined Contribution ('NDC'), and seeks to adopt a 'climate friendly and a cleaner path' to development by reducing 'the emissions intensity of its GDP by 33 to 35 percent by 2030 from the 2005 level'.[36] It also commits to 'achieve about 40 percent cumulative electric power installed capacity from non-fossil fuel based energy resources by 2030'.[37]

India has already adopted policy measures towards reducing emissions, and is on track to achieving its goals set out in the Paris Agreement.[38] The Government has also constituted an Apex Committee for Implementation of Paris Agreement to oversee the achievement of the accord's goals.[39] As the world's cheapest producer of solar power,[40] India is 'running one of the largest renewable capacity expansion programs in the world'.[41]

All of these developments suggest that companies with significant fossil fuel holdings risk suffering losses.[42] In the Indian context, the thermal energy sector has already faced billions of dollars in stranded or non-performing assets.[43] This has caused the Government of India to set up a Parliamentary Committee to examine the problems arising from stranded assets in the sector.[44] The problems are only likely to be exacerbated given India's drive towards clean energy. These risks not only afflict the thermal energy sector, but also allied industries, including the banking and insurance sectors. Transition risks in India, therefore, command the attention of a variety of segments within India's corporate sector, which boards of directors can ill afford to ignore.

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32 Janis Sarra, 'The Anthropocene in the Time of Trump, Financial Markets, Climate Change Risk and Vulnerability', (2018) 51 *UBC Law Review* 479, at 482; Network for Greening the Financial System, 'A call for action: Climate change as a source of financial risk' (April 2019), at 16.

33 Patrick Bolton, et al, 'The green swan: Central banking and financial stability in the age of climate change', *Bank for International Settlements* (2020), at 19. See also, Laura Deeks, 'Discourse and Duty: University Endowments, Fiduciary Law, and the Cultural Politics of Fossil Fuel Disinvestment', (2017) 47 *Environmental Law* 335, at 370.

34 Laura Hurst, '"Stranded Assets" Risk Rising With Climate Action and $40 Oil', *The Washington Post* (20 September 2020).

35 United Nations, *Paris Agreement* (22 April 2016) (entered into force 4 November 2016), Article 2(1)(a).

36 Government of India, *India's Intended Nationally Determined Contribution: Working Towards Climate Justice* (September 2015), at 29.

37 Ibid.

38 NRDC, 'The Road from Paris: India's Progress towards its Climate Pledge', *Issue Brief* (September 2020), at 1.

39 Ministry of Environment, Forest and Climate Change, Government of India, Notification dated 27 November 2020.

40 Hannah Ellis-Peterson, 'India plans to fell ancient forest to create 40 new coalfields', *The Guardian* (8 August 2020).

41 Government of India, above n 36, at 9.

42 Mercer, above n 13, at 9.

43 Tim Buckley, Vibhuti Garg, Simon Nicholas and Kashish Shah, 'Seriously Stressed and Stranded: The Burden of Non-Performing Assets in India's Thermal Power Sector', *Institute for Energy Economics and Financial Analysis* (December 2019), at 2.

44 Ministry of Power, Government of India, *Stressed/Non-Performing Assets in Electricity Sector*, Thirty Seventh Report of the Standing Committee on Energy (March 2018).

1.1.3 Litigation Risks

Companies and their boards could be subject to litigation if they fail to consider and address the physical and transitional risks arising from climate change. Although climate change litigation began gradually and with limited success, it has acquired the status of a key tool in addressing climate risk.[45] The initial wave of litigation was largely initiated against governments. Even where private entities such as companies were arraigned as defendants, the actions were based on torts such as negligence or public nuisance.[46] The so-called 'second wave' of litigation has been rather innovative.[47] It has witnessed a rights-based approach by way of claims under public law.[48] Examples include *Urgenda*[49] in the Netherlands and *Leghari*[50] in Pakistan, which have also spawned such litigation in a host of countries, particularly in the developing world.[51] Another strategy is the use of private law claims, such as under corporate and securities law, against companies and directors for failing to account for climate risk.[52] Although relatively recent and untested, this global trend towards climate change litigation ups the ante for companies, especially those whose businesses and finances are vulnerable to the impact of climate change.[53]

Zooming in on India, while legal claims were hitherto lodged on environmental matters to which climate change was only peripheral,[54] the issue is more recently gaining greater traction. This development builds upon the rapid evolution of environmental law spearheaded by the legislature as well as the judiciary in India. This includes the enactment of several pieces of environmental legislation,[55] as well as the judicial recognition of vital principles of international environmental law,[56] such as the polluter pays principle,[57] the

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45 Joana Setzer and Rebecca Byrnes, 'Global trends in climate change litigation: 2019 snapshot' (July 2019), at 1.

46 Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the "Next Generation" of Climate Change Litigation in Australia', (2017) 41 *Melbourne Law Review* 793, 797.

47 This wave has also received support from 'the increasing sophistication of climate change science'. Peel, Osofsky & Foerster, above n 46, at 811. See also, Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change', (2018) 38 *Oxford Journal of Legal Studies* 841, 842.

48 Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?', (2017) 7 *Transnational Environmental Law* 37, 40.

49 *Urgenda Foundation v The State of the Netherlands* (case number / cause list number: C/09/456689 / HA ZA 13-1396), The Hague District Court (judgment of 24 June 2015); *The State of the Netherlands v Stichting Urgenda* (Number 19/00135), Supreme Court of the Netherlands, Civil Division (judgment of 20 December 2019). See also the more recent decisions of the Hague District Court in *Milieudefensie and Ors. v Royal Dutch Shell plc* C/09/571932 / HA ZA 19-379, which was based on an expansion of tort law to address climate change claims.

50 *Ashgar Leghari v Federal of Pakistan* (W.P. No. 25501/2015), Lahore High Court.

51 Joana Setzer and Lisa Benjamin, 'Climate Litigation and the Global South: Constraints and Innovations', (2019) 9 *Transnational Environmental Law* 77, 80.

52 Elisa de Wit, Sonali Seneviratne and Huw Calford, 'Climate change litigation update', *Norton Rose Fulbright* (February 2020).

53 Setzer and Byrnes, above n 45; Peel and Osofsky, above n 48, at 40, 62.

54 Shibani Ghosh, 'Litigating Climate Claims in India', (2020) 114 *American Journal of International Law Unbound* 45, 45.

55 See e.g., Disaster Management Act, 2005; Environment Protection Act, 1986; Air (Prevention and Control of Pollution) Act, 1981; Forest (Conservation) Act, 1980.

56 Lavanya Rajamani and Shibani Ghosh, 'India' in Richard Lord, Silke Goldberg, Lavanya Rajamani & Jutta Brunnee, *Climate Change Liability: Transnational Law and Practice* (Cambridge: Cambridge University Press, 2021), at 150.

57 *Indian Council for Enviro-Legal Action v Union of India*, (1996) 3 SCC 212, where the Supreme Court of India observed at [67] that the 'polluter pays' principle 'has now come to be universally accepted as a sound principle and that 'according to this principle, the responsibility for repairing the damage is that of the offending industry'.

precautionary principle,[58] the principle of intergenerational equity[59] and the doctrine of public trust.[60] Indian courts' embrace of public interest litigation has paved the way for greater protection of groups vulnerable to environmental hazards.[61] The creation of the National Green Tribunal ('NGT') has enhanced the avenues available to climate change litigants to initiate legal action.[62]

Aside from the ever-expanding environmental jurisprudence, India has witnessed the emergence of cases (i) that are either founded on climate change, or (ii) where the courts veer towards climate change as a hinge upon which to rationalise its stance on wider environmental issues. In an instance involving the first category, even though the NGT declined to be drawn into the merits and instead decided to defer to the executive arm of the Government, the case of *Ridhima Pandey v Union of India*[63] represents an important step in the use of climate change as basis for claim.[64] In the second category of cases, the NGT has taken cognisance of the need for sustainable development and preservation of the ecology of eco-sensitive areas, even when that is accompanied by a decline in economic development in the region or a loss in the state's revenues.[65] Here, the Supreme Court too has expressed the need to pay attention to the effects of climate change.[66] More recently, in *Himachal Pradesh Bus Stand Management and Development Authority v The Central Empowered Committee*,[67] the Indian Supreme Court articulated the concept of 'environmental rule of law',[68] which brings climate risk within its fold. Speaking through Dhananjaya Y. Chandrachud, J, the Court observed:[69]

> … The environmental rule of law seeks to facilitate a multi-disciplinary analysis of the nature and consequences of carbon footprints and in doing so it brings a shared understanding between science, regulatory decisions and policy perspectives in the field of environmental protection. … it seeks to draw within the fold all stakeholders in formulating strategies to deal with current challenges posed by environmental degradation, climate change and the destruction of habitats. … The environmental rule of law is founded on the need to understand the consequences of our actions going beyond local, state and national boundaries. The rise in the oceans threatens not just maritime communities. The rise in temperatures, dilution of glaciers and growing desertification have consequences which go beyond the communities and creatures whose habitats are threatened. They affect the survival of the entire eco-system. The environmental rule of law attempts to weave an understanding of the connections in the natural environment which makes the issue of survival a unified

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58 *Vellore Citizens' Welfare Forum v Union of India*, (1996) 5 SCC 647, where the Supreme Court of India noted (in [14]) that, much like the polluter pays principle, the precautionary principle is a 'part of the environmental law of the country' which, the Court noted (in [11]) requires the state to address environmental degradation before it occurs.

59 *State of Himachal Pradesh v Ganesh Wood Products*, (1995) 6 SCC 363, where the Supreme Court found (in [51]) that 'the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations'.

60 *M.C. Mehta v Kamal Nath*, (1997) 1 SCC 388, where the Supreme Court remarked (in [34]) that India's 'legal system – based on English common law – includes the public trust doctrine as part of its jurisprudence', by which the 'State as a trustee is under a legal duty to protect the natural resources'.

61 Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South', (2019) 113 *American Journal of International Law* 679, 706.

62 See, National Green Tribunal Act, 2010, s. 14.

63 Original Application No. 187/2017, National Green Tribunal (order dated 15 January 2019).

64 Scholars have argued that even unsuccessful cases make an important contribution in highlighting the environmental, legal and financial risks arising from climate change. Ganguly, Setzer and Heyvaert, above n 47, at 842; Peel and Lin, above n 61, at 695.

65 *Sher Singh v State of Himachal Pradesh*, National Green Tribunal (Application No. 237 (THC)/2013 (CWPIL No. 15 of 2010) (order dated 6 February 2014); *State of Himachal Pradesh v Abhimanyu Rathor*, National Green Tribunal (Original Application No. 237 of 2013) (order dated 9 May 2016).

66 See *Hanuman Laxman Aroskar v Union of India*, (2020) 12 SCC 1.

67 2021 SCCOnline SC 15.

68 See Dhvani Mehta, *The Environmental Rule of Law in India*, DPhil Thesis Submitted to the University of Oxford (2017), https://ora.ox.ac.uk/objects/uuid:730202ce-f2c4-4d2f-9575-938a728fe82a.

69 *Himachal Pradesh Bus Stand Management and Development Authority*, above n 67, at [52].

> challenge which confronts human societies everywhere. ... The environmental rule of law recognises the overlap between and seeks to amalgamate scientific learning, legal principles and policy intervention. ...

Despite these giant strides in environmental and climate jurisprudence in India, climate change litigants would do well to exercise cautious optimism. Experts have advised 'not to overstate the significance of climate claims being brought to Indian courts'[70] both because of the courts' overreliance on principles of international law and the lack of robustness in their reasoning, as well as well-known constraints in litigating in India due to the colossal judicial pendency.[71] Moreover, existing litigation is largely grounded under public law, with India yet to witness any significant claims under private law for matters involving climate change.[72] Nevertheless, several legal avenues exist for claims to be initiated under corporate and securities laws against companies and their directors on matters pertaining to climate risk.

1.2 Overview of directors' duties

Since corporations face greater scrutiny and responsibility in the context of climate risk, the nature of their governance gains prominence and the duties and liabilities of directors on corporate boards become pivotal.[73] Consistent with other Commonwealth corporate law regimes, directors of Indian companies are considered fiduciaries who are bound to act in the interest of the companies on whose boards they sit.[74] In the past, Indian law offered scant guidance regarding the duties of directors. The pre-existing Companies Act, 1956 did not expressly stipulate directors' duties, which made it necessary to fall back on common law principles (to be articulated by courts while delivering specific decisions). The statutory uncertainty was compounded by the availability of limited jurisprudence on duties and liabilities of directors, although the fiduciary nature of corporate directorship was never in doubt.[75]

The Companies Act, 2013 (hereinafter the 'Companies Act'), which replaced the 1956 legislation, is rather explicit about directors' duties. The new provisions not only provide greater certainty to directors regarding their conduct, but also enable the beneficiaries as well as courts and regulators to judge the discharge of directors' duties more objectively. The duties are codified in section 166 of the Companies Act, and can be divided into three categories. *First*, directors are subject to fiduciary duties to act in good faith and in the best interests of the company.[76] These can be categorised as the fiduciary **duties of trust and loyalty**. Related duties require directors to avoid situations of conflict of interest,[77] and to avoid any undue gain or advantage either to the directors or to their relatives, partners, or associates.[78] *Second*, directors must exercise their duties with due and reasonable care, skill and diligence and shall exercise independent judgment.[79] These comprise the non-fiduciary **duties of competence**. *Third*, directors also bear some residual duties to act in

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70 Ghosh, above n 54, at 49.
71 Ibid.
72 Rajamani and Ghosh, above n 56, at 164.
73 Benjamin, 'The Road to Paris Runs Through Delaware', above n 4; Light, above n 8.
74 See Part 2.1.
75 Ibid.
76 Companies Act, 2013, s 166(2).
77 Companies Act, 2013, s 166(4).
78 Companies Act, 2013, s 166(5). This statutory provision also mandates that if directors are found guilty of making any undue gain, they shall be liable to pay an amount equal to that gain to the company.
79 Companies Act, 2013, s 166(3).

accordance with the articles of association of the company,[80] and not to assign their office.[81] This paper is concerned with the first two categories of duties and not the third.

These duties apply to both private companies and public companies. They also apply to all types of directors, whether executive directors or non-executive directors. However, independent directors receive special treatment under the Companies Act, as they are both subject to specific duties and responsibilities[82] and, when it comes to liability, can also avail of certain safe harbour provisions.[83]

Given the relatively short span for which the Companies Act, 2013 has been in existence, the codified directors' duties thereunder are only beginning to receive the attention of the courts. Hence, prior jurisprudence developed under the Companies Act, 1956 and common law will continue to hold sway in aiding the interpretation of the new legislation, except in areas where it displays a stark departure from the previous regime.

1.3 Relationship between statutory and common law duties

The effort to codify directors' duties in India is similar to other Commonwealth jurisdictions such as the United Kingdom (UK), Australia and Singapore.[84] However, in one significant respect, the Indian codification exercise is different from the UK, Australia and Singapore. Under the Companies Act in India, there is no provision that reserves the application of common law following codification.[85] Contrastingly, in the UK, Australia and Singapore, the applicability of common law has been preserved to the extent that it can be utilised to interpret the statutory provisions relating to directors' duties.[86]

A question, therefore, arises whether section 166 of the Companies Act is exhaustive regarding duties of company directors, or whether directors are also bound by common law duties (that are either in addition to the statutory duties or that can be used to interpret or explicate the statutory duties). One strain of thought, emerging from a plain and textual interpretation of section 166, suggests that the codification exercise under the Companies Act is exhaustive, and that directors' duties must be determined solely by the language of the statutory provision.[87] It leaves no room for the application of common law. Another view suggests, however, that the codification in the Companies Act is incomplete, as the statutory provisions lay down only the broad and basic principles, and do not provide the details as to how the duties must be discharged by the directors.[88] Those details are to be determined by the courts based on the facts and circumstances of each case.[89] Therefore, any inability to import principles of common law will substantially diminish the scope of remedies for breaches of directors' duties.

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80 Companies Act, 2013, s 166(1).

81 Companies Act, 2013, s 166(6).

82 Companies Act, 2013, schedule IV.

83 Companies Act, 2013, s 149(12). These are discussed in Part 6.2.2.

84 Companies Act 2006 (UK), ss. 171-177; Corporations Act (Australia), ss. 180-184; Singapore Companies Act (Rev Ed 2006), ss. 156, 157.

85 Umakanth Varottil, 'Codification of Directors' Duties: Is Common Law Excluded?' in Umakanth Varottil, Mihir Naniwadekar and V. Niranjan (eds.), *The Reform Decade: Corporate and Commercial Law in India* (Eastern Book Company, 2019), at 28.

86 Companies Act 2006 (UK), ss. 170(3); Corporations Act (Australia), ss. 185; Singapore Companies Act (Rev Ed 2006), ss. 156(14), 157(4).

87 Varottil, above n 85, at 29.

88 Ibid, at 29-30.

89 Mihir Naniwadekar, 'Remedies against Directors' Undue Gains: Personal or Proprietary?' in Varottil, Naniwadekar and Niranjan, above n 85, at 40-43.

Available trends thus far indicate that common law ought not to be excluded despite the absence of a statutory provision that explicitly retains it. In *Rajeev Saumitra v Neetu Singh*,[90] the Delhi High Court observed that section 166 'is akin to the common law right'.[91] It also went on to note, albeit in the context of rights of a shareholder, that a person is not prevented from availing of the 'protection of common law rights, even if the statute excludes it specifically'.[92] Although the Court only discussed this issue in passing,[93] the implication is that common law duties continue to apply even after codification of directors' duties under the Companies Act. Such an approach is persuasive for a number of reasons.[94] *First*, nothing in section 166 is inconsistent with common law as regards directors' duties. *Second*, despite the absence of any express language, it is entirely reasonable to view section 166 as supplementing rather than supplanting common law. *Third*, a general savings provision contained in section 465(2)(c) arguably retains the operation of common law: it states that notwithstanding the repeal of the Companies Act, 1956, 'any principle or rule of law … shall not be affected' even though it is 'affirmed or recognised or derived by, in or from,' that legislation. In these circumstances, it is reasonable to conclude that common law continues to bear importance in interpreting directors' duties under section 166 and otherwise supplementing them. Accordingly, the jurisprudence developed by the Indian judiciary in the company law regime preceding the Companies Act, 2013 bears considerable relevance in sketching out the contours of section 166 of the new legislation.

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90 2016 SCC OnLine Del 512.

91 Ibid, at [75].

92 Ibid.

93 This is because, on the facts of the case, the Court found a breach of the statutory duties enshrined in the Companies Act, s. 166.

94 See, V. Niranjan, 'Comment on "Codification of Directors' Duties: Is Common Law Excluded?"', *IndiaCorpLaw Blog* (31 May 2014).

2. Duties of Trust and Loyalty

2.1 Position of Directors

That directors of an Indian company stand in a fiduciary capacity in relation to their company is beyond doubt.[95] It requires them to 'act for the paramount interest of the company'.[96] Directors have been variously described as agents, representatives and trustees of the company.[97] The relationship of agency or representation vis-à-vis a company is used in a broader sense because, contractually speaking, directors are not in a position to bind the company to third parties unless properly authorised to do so.[98] This is only to re-emphasise that directors carry out their duties and actions for the benefit of the company, and any personal benefit they derive ought to be handed over to the company.[99]

More interesting is the enunciation by Indian courts that directors are, in some respects, trustees for the company, a proposition that has long been established.[100] Where directors have acted not for the company's benefit 'but *simply and solely* for their personal aggrandisement and to the detriment of the company',[101] courts will not hesitate to intervene on the basis of 'the existence of the relationship of a trustee and of *cestui que trust* as between the directors and the company'.[102] The Delhi High Court summarised the trustee position of directors as follows:[103]

> Thus it cannot be disputed that the fiduciary duties of directors are basically the same as those of other trustees and they are expected to display the utmost good faith towards the company whether their dealings are with the company or on behalf of the company. They should not use the company's money or other property or information or other matters in their possession in their capacity of directors, in order to gain any advantage to themselves at the expense of the company, and if they make any profit for themselves or cause any damage to the company, they will be liable to make good the same to the company.

In imposing trustee-like duties on directors, courts have drawn inspiration from trust law. The concept of trust under Indian law encompasses various categories of trusts as well as other relationships and obligations that are in the nature of a trust.[104] The overarching reach of trust law in encompassing analogous relationships is evident from section 88 of the Indian Trusts Act, 1882, which reads as follows:

> **Advantage gained by fiduciary.** Where a trustee, executor, partner, agent, director of company, legal advisor, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of

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95 *AES OPGC Holding (Mauritius) v Orissa Power Generation Corporation Ltd*, 2004 SCC OnLine CLB 35, at [20]; *Tristar Consultants v Vcustomer Services India Pvt Ltd*, 2007 SCC OnLine Del 359, at [20]; *Far Pavilions Tours & Travels Private Limited v Manish Pratik*, 2014 SCC OnLine Bom 1843, at [20]; *Ram Parshottam Mittal v Hotel Queen Road Private Limited*, (2019) 20 SCC 326, at [81], [84]; *Future Retail Ltd v Amazon Com Investment Holdings LLC*, 2020 SCC OnLine Del 1636, at [126].

96 *Sangramsinh P. Gaekwad v Shantadevi P. Gaekwad*, (2005) 11 SCC 314, at [42].

97 *Dale and Carrington Invt (P) Ltd v PK Prathapan*, (2005) 1 SCC 212, at [11]; *Paschim Gujarat Vij Company Limited v Manibhadra Ispat Ltd*, MANU/GJ/2251/2019, at [47]; *Tristar Consultants*, above n 95, at [20]. See also, Vijay P. Singh, 'Directors' Fiduciary Duties to the Company: A Comparative Study of the UK and Indian Companies Act', 2021 *Trusts & Trustees* 1-19, https://doi.org/10.1093/tandt/ttaa117, at 4.

98 *Dale and Carrington Invt (P) Ltd*, above n 97, at [11]; *Paschim Gujarat Vij Company Limited*, above n 97, at [47]; *Tristar Consultants*, above n 95, at [23].

99 Ibid.

100 *Chevalier I.I. Iyyappan v Dharmodayam Company, Trichur*, AIR 1966 SC 1017, at [9]-[10]. See also, *Far Pavilions Tours & Travels Private Limited*, above n 95, at [22].

101 *Nanalal Zaver v Bombay Life Assurance Co Ltd*, AIR 1950 SC 172, at [41] (emphasis in original).

102 Ibid (emphasis in original).

103 *Globe Motors Ltd v Mehta Teja Singh*, 1983 SCC OnLine Del 193, at [8].

104 *Canbank Financial Services Ltd v The Custodian*, (2004) 8 SCC 355, at [43].

> his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.
>
> [emphasis added]

Hence, a trust relationship is created not merely by an express formal document of trust, but may be implied in the circumstances of a case and includes relationships that are fiduciary in nature that may be analogous to a trust relationships. Directorship of a company is but one such relationship.[105]

Such an amalgam of company law and trust law that helps determine the nature and extent of directors' duties continues to hold sway in the post-codification era. In *Rajeev Saumitra*,[106] the Delhi High Court observed that section 166 of the Companies Act is in consonance with section 88 of the Indian Trusts Act, 1882.[107] On the facts of the case, the Court found that the concerned directors' violation of section 166 also amounted to a contravention of section 88.[108] Hence, even under the present dispensation, directors are fiduciaries who are not only bound by duties under company law, but also by trust-like obligations.

2.2 Good faith and best interests

Section 166(2) of the Companies Act states as follows:

> 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.

Before embarking on a more substantive analysis of the provision, it is appropriate to address some interpretational matters.

2.2.1 Nature of the duty

A key question arises whether the 'good faith' qualification applies only to the first part of the clause, i.e., to the words 'in order to promote the objects of the company for the benefit of its members as a whole', or whether it also extends to the second part as well, i.e. the best interests of the company and various stakeholders.[109] The difference is not merely semantic. If the 'good faith' qualification does not extend to the second part, then the directors' duties to act in the best interests of the company and various stakeholders ought to be judged objectively, and not subjectively. It is submitted that the language is capable of both meanings. However, given the lack of opportunity thus far to the courts to engage with the issue and clarify the legal position, this paper proceeds on the assumption that the 'good faith' qualification applies to both parts of the provision.[110] This would lead to a determination of whether (a) directors are acting in good faith

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105 See *Sangramsinh P. Gaekwad*, above n 96, at [38]-[39].

106 Above n 90.

107 Ibid, at [29].

108 Ibid, at [48]. See also, *Akshay Raheja v Gopal Narang*, 2020 SCC OnLine Bom 5578, at [64].

109 Note that this paper is only concerned with the second part of the clause (as discussed in Parts 2.2.2 and 2.2.3) and not the first.

110 This is a reasonable assumption to make, as elaborated in Mihir Naniwadekar and Umakanth Varottil, 'The Stakeholder Approach towards Directors' Duties under Indian Company Law: A Comparative Analysis' in Mahendra Pal Singh (ed.), *The Indian Yearbook of Comparative Law* (Oxford University Press, 2016), at 111.

in order to promote the objects of the company for the benefit of its members as a whole, and (b) directors are acting in good faith in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment.

Given the expansive application of the 'good faith' test, the duty would essentially be subjective in nature. It would suffice if the directors subjectively believe that they are acting in the interests of the company and various stakeholders.[111] Indian courts have previously displayed deference to such a subjective approach.[112] This is best encapsulated in *Tea Brokers (P) Ltd v Hemendra Prasad Barooah*,[113] where the Calcutta High Court found:[114]

> If the directors exercise their powers of allotment of shares bona fide and in the interest of the company, the said exercise of powers must be held to be proper and valid and the said exercise of powers may not be questioned and will not be invalidated merely because they have any subsidiary, additional motive, even though this be to promote their advantage. An exercise of power by the directors in the matter of allotment of shares, if made mala fide and in their own interest and not in the interest of the company, will be invalid even though the allotment may result incidentally in some benefit to the company.

However, what if the director simply does not consider the interests of the company or other stakeholders at all? Can such a director take shelter under the subjectivity of the 'good faith' qualification to circumvent duties and liabilities? That would be an unreasonable outcome, which undermines section 166(2) of the Companies Act. Other jurisdictions have applied an objective assessment in such circumstances. In *Charterbridge Corporation Ltd v Lloyds Bank Ltd*,[115] an English court applied the test 'whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company'.[116] This test has also been accepted in Singapore.[117] Although Indian courts have been bereft of the occasion to consider the acceptability of *Charterbridge*, its reasoning is compelling as well as consistent with the objectives of section 166(2).

2.2.2 Best interests of the company

Section 166(2) of the Companies Act treats the interests of the company as separate and distinct from those of stakeholders such as shareholders, employees, the community and the environment.[118] This is consistent with the separate legal personality of the company. What then does the interest of the company denote? The legislation itself provides no textual guidance, but there is ample support for the proposition that, from

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[111] See eg, *Smith v Fawcett*, [1942] Ch 304 (CA).

[112] *Needle Industries (India) Ltd v Needle Industries Newey (India) Holding Ltd*, (1981) 3 SCC 333, at [111], noting that '[i]f the shares are issued in the larger interest of the Company, the decision to issue shares cannot be struck down on the ground that it has incidentally benefited the Directors ...'. See also, *Kamal Kumar Dutta v Ruby General Hospital Ltd*, (2006) 7 SCC 613, at [36].

[113] (1998) 5 Comp LJ 463 (Cal).

[114] Ibid, at [48].

[115] [1970] Ch 62.

[116] Ibid, at 74. See also, Debevoise & Plimpton, *The Duty of UK Company Directors to Consider Relevant ESG Factors* (September 2019), at 5

[117] *Intraco Ltd v Multi-Pak Singapore Pte Ltd*, [1994] 3 SLR(R) 1064; *Ho Kang Peng v Scintronix Corp Ltd*, [2014] 3 SLR 329; *Goh Chan Peng v Beyonics Technology Ltd*, [2017] 2 SLR 592.

[118] The company statute also imposes certain specific duties on independent directors to exercise their 'responsibilities in a *bona fide* manner in the interest of the company' and to ensure that there are no 'extraneous considerations that will vitiate [the] exercise of objective independent judgment in the paramount interest of the company as a whole'. See, Companies Act, 2013, Schedule IV, clauses I(3), I(5).

a temporal perspective, directors have to consider the long term interests of the company rather than its short term interests.

At the outset, Indian company law has rarely, if ever, insisted that directors cater to the short term interests of the company, usually represented by profitability to the then existing shareholders of the company.[119] To the contrary, directors have been foisted with the duty to act in the paramount interest of the company and have regard to the property and funds of the company, as opposed to the interests of the current shareholders.[120] Moreover, the combination of directors' duties in section 166(2) to act in the best interests of the company as well as a varied body of stakeholders (rather than merely shareholders) is clear enunciation of the legislative intent to preserve the company's long term sustainable value.[121]

Courts have expounded on this duty further. Directors ought to discharge their duty to act for the company's wellbeing and interest.[122] Failure to do so would render the director liable for misfeasance, for which it is not necessary that fraud in the strict sense of the term needs to be proved.[123] Relevant in this context are the Supreme Court's observations in *Official Liquidator v P.A. Tendolkar*:[124]

> A Director may be shown to … have been so closely and so long associated personally with the management of the Company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of the business of a Company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the Company due to his neglect even if he is not shown to be guilty of participating in the commission of fraud.

It is clear that the best interests test is not synonymous with the interests of the shareholders, and that too of the current shareholders. On the other hand, the longer term vision for the company that directors are encouraged to employ will align with the interests of shareholders as well other stakeholders.[125] This leads to an examination of the extent to which Indian law requires directors to account for the interests of those constituencies.

2.2.3 Best interests of various stakeholders

As in other jurisdictions, the question of corporate purpose – i.e., whether companies are to be run solely for the benefit of shareholders, or whether the interests of non-shareholder constituencies must be considered as well – has taken centre stage in India.[126] Although the initial manifestations of Indian company law were shareholder-centric, since the 1960s both legislative and judicial developments in Indian corporate

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119 Naniwadekar and Varottil, above n 110, at 99.

120 *Sangramsinh P. Gaekwad*, above n 96, at [42], although this case was concerned more with the distinction between duties owed by the directors to the company as opposed to the shareholders directly. See also, Part 7.1.

121 See, Vikramaditya S. Khanna, 'Global Asset Managers and the Rise of Long Term Sustainable Value', *NSE Quarterly Briefing* (October 2018); Umakanth Varottil, 'Environmental and Social Reporting by Indian Companies', *NSE Quarterly Briefing* (January 2019).

122 *Ferruccio Sias v Shri Jai Manga Ram Mukhi*, 1994 (28) DRJ 143 (Delhi), at [72].

123 *Globe Motors Ltd.*, above n 103, at [9].

124 (1973) 1 SCC 602, at [45].

125 See, Shirley Quo, 'Corporate governance and climate change: what are the obligations of companies and directors?', (2020) 41 *Company Lawyer* 294, at 294. See also, European Commission, 'Study on directors' duties and sustainable corporate governance', *Report prepared by EY for the European Commission DG Justice and Consumers* (July 2020), at 23 indicating that 'shareholder primacy in corporate governance has been pointed out as a key driver of short-termism and a powerful barrier against more environmentally sustainable companies'.

126 Umakanth Varottil, 'The stakeholder approach to corporate law: a historical perspective from India' in Harwell Wells (ed.), *Research Handbook on the History of Corporate and Company Law* (Cheltenham: Edward Elgar, 2018), at 381-382.

law have extended it beyond the mere protection of shareholders.[127] The Supreme Court had occasion to enunciate as follows:[128]

> The traditional view of a company was that it was a convenient mechanical device for carrying on trade and industry, a mere legal frame work providing a convenient institutional container for holding and using the powers of company management. … But gradually this doctrine was eroded by the emergence of new social values which recognised the role of the State as an active participant in the social and economic life of the citizen in order to bring about general welfare and common good of the community. … [O]ne thing is certain that the old nineteenth century view which regarded a company merely as a legal device adopted by shareholders for carrying on trade or business as proprietors has been discarded and a company is now looked upon as a socio-economic institution wielding economic power and influencing the life of the people.

Section 166(2) of the Companies Act very much adopts this tenor. As seen, apart from the best interests of the company, directors of Indian companies must also act in the best interests of various constituencies, being 'employees, the shareholders, the community and for the protection of the environment'.[129] Both the language of the statutory provision as well as its drafting process indicate that there is a positive duty on directors *requiring* them to consider various stakeholder interests, and that it is not merely in the nature of an enabling provision *permitting* them to do so.[130] While the broad theme of section 166 of the Companies Act appears superficially similar to section 172 of the UK Companies Act 2006, there are fundamental distinctions between the two approaches.

The design of the Indian statute is reflective of the 'pluralist' approach by which directors' duties aim to cater to a broad range of interests, each of which stands on its own.[131] There is no stated hierarchy between the various interests, and it is not as if they represent a means to achieving shareholder value.[132] This is different from the enlightened shareholder value ('ESV') model embodied in the UK approach under which the protection of interests of various stakeholders acts also as the best means to engender shareholder value.[133] Moreover, it is entirely reasonable to argue that, unlike the UK position where directors are to *have regard* to stakeholder interests, the Indian statute even casts a definitive *duty to act in the best interests* of the stakeholders.

In the context of climate risk, it is clear that directors are foisted with the specific duty in section 166(2) of the Companies Act of 'the protection of the environment'. This duty is on par with duties to other stakeholders, including the shareholders. Recently, in *M.K. Ranjitsinh v. Union of India*[134] (also known as the Great Indian Bustard case), the Supreme Court clarified that section 166(2) 'ordains the [d]irector of a [c]ompany to act in good faith, not only in the best interest of the [c]ompany, its employees, the shareholders and the community, but also for protection of environment.'[135] Since the expression 'environment' does not find a definition in the Companies Act, the Court readily imported the meaning ascribed to the term under section 2(a) of the Environment (Protection) Act, 1986, which defines the word to include the '*inter-*

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127 Ibid, at 386-389.

128 *National Textile Workers' Union v PR Ramakrishnan*, (1983) 1 SCC 228, at [4].

129 Companies Act, 2013, s. 166(2). In addition, the statute also imposes certain specific duties on independent directors to 'safeguard the interests of all stakeholders…' and 'balance the conflicting interest of the stakeholders'. See, Companies Act, 2013, Schedule IV, clauses II(5), II(6).

130 See, Naniwadekar and Varottil, above n 110, at 100-103.

131 Varottil, above n 126, at 396-397.

132 Ibid.

133 Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's "Enlightened Shareholder Value Approach"' (2007) 29 *Sydney Law Review* 577; Virginia Harper Ho, '"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide' (2010) 36 *Journal of Corporation Law* 59.

134 2021 SCC OnLine SC 326.

135 Ibid, at [14].

relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organisms and property.'[136] The width of this definition is adequately capable of accommodating the risks corporations face due to climate change. In their legal opinion accompanying this paper, legal counsel Divan, Yadav and Sawhney underscore the significance of the Court's ruling:[137]

> 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.[138]

Hence, consideration of matters such as climate risk and other environmental protection is not merely an option for directors on Indian companies that they may account for on a voluntary basis, but it is an obligation, which they can afford to ignore only at risk of liabilities for breach.

2.3 Duty to avoid conflicts

While section 166(2) of the Companies Act represents the broader duties of trust and loyalty borne by company directors, the legislation also provides for two more specific duties in the same vein. Section 166(4) provides that a director shall not be involved in a situation of conflict with the interests of the company. In such a case, the director ought not to take any action that benefits the director at the cost of the company.[139] One manifestation of this rule is that, since directors are fiduciaries, 'they cannot participate in decisions in their own favour'.[140]

As an offshoot of the duty to avoid conflicts, section 166(5) prevents directors from achieving any undue gain either for themselves or for their relatives, partners or associates. If they do obtain any such gain, they are liable to pay such amount to the company. This encapsulates the duty under common law[141] by which directors are not permitted to receive or retain secret profits which they obtain by using their position in the company or information received from it.[142] This is so even if the company would not have been entitled to the benefit in the first place.[143] Such a duty is also consistent with the trust obligations imposed by section 88 of the Indian Trusts Act, 1882.[144]

2.4 Application of the duties of trust and loyalty in a climate risk context

This part examines the intersection between the material risks (financial or otherwise) that climate change poses to Indian companies[145] and the duties of trust and loyalty of the directors of such companies under Indian company law. At the outset, it is clear that the scope of section 166(2) of the Companies Act is wide enough to impose duties on corporate directors to account for climate risk. Understandably, the impact of

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136 Ibid [emphasis in original].
137 Divan et al. Opinion, above n 9.
138 Ibid, at [21]. See also, *Tata Consultancy Services Limited v. Cyrus Investments Pvt. Ltd.*, 2021 SCC OnLine SC 272, at [218].
139 *Rajeev Saumitra*, above n 90, at [58].
140 *Ram Parshottam Mittal*, above n 95, at [81].
141 See *Industrial Development Consultants Ltd v Cooley*, [1972] 1 WLR 443; *Regal (Hastings) Ltd v Gulliver*, [1967] 2 AC 134.
142 *Rajeev Saumitra*, above n 90, at [58].
143 Ibid.
144 See Part 2.1.
145 See Part 1.1.

climate change would vary for each company, but directors' duties are in general 'purposefully open-textured',[146] and require directors to mould their analysis of climate risks in line with advancements in the science surrounding climate change. The growing understanding of climate risks will entail that company directors keep pace with developments in the field.[147] Similarly, the interpretation of the duties by courts too will invoke a dynamic approach.

Consistent with the structure of the duties of trust and loyalty set out in section 166, it is possible to analyse climate risk across three categories: (i) whether, and the extent to which, directors must consider climate risk as a factor while discharging their duty to act in the **best interests of the company**; (ii) the scope of the directors' duty to consider climate risk while acting in the **best interests of various stakeholders** and, in particular, for the protection of the environment; and (iii) how climate risk could create actual or potential **conflicts of interests** for directors, which need to be addressed.

2.4.1 Climate risk and the best interests of the company

The jurisprudence in the context of section 166(2) of the Companies Act suggests that directors ought to consider the long term interests of the company.[148] Such a long term perspective compels directors to identify and assess the risks emanating from climate change, and implement strategies to address them.[149] As one author observes in the context of Delaware law:[150]

> … fiduciary duties as currently interpreted are sufficiently flexible to allow directors to take into account the risks of climate change to their businesses and take a longer-term perspective on value creation that incorporates the risks and opportunities of energy transitions. In particular, fiduciary duties as guided by the shareholder wealth maximization norm at the very least require directors to be informed of and take into account the risks of climate change to their businesses.

If this is true in the context of a shareholder-oriented regime, it is likely that the obligations of directors regarding climate risk will only be more stringent in a stakeholder-based approach followed in India. Such duties to act in the best interests of the company emanate because climate change poses different types of risks to companies. At the outset, the well-known risks are the direct financial impact that climate change may have on companies, especially those that are vulnerable to its effects.[151] Besides, a company's lackadaisical attitude towards climate risk could render itself susceptible to reputational repercussions,[152] with its shareholders and stakeholders left bearing the brunt.

In the context of climate change, directors could be exposed to liability if they display conscious disregard or wilful neglect towards the associated financial risks.[153] This arises when directors are driven by extraneous considerations that militate against the long term sustainable value of the company, including on account of any overriding concern to enrich themselves at the cost of the company. For example, if directors measure their performance against myopic yardsticks, they may be motivated to seek short-term profitability. The

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146 Benjamin, 'The Road to Paris Runs Through Delaware', above n 4, at 347.

147 Peel, Foerster, McDonnell and Osofsky, above n 5, at 14.

148 See discussion in Part 2.2.2.

149 Benjamin, 'The Road to Paris Runs Through Delaware', above n 4, at 320, 363. See also, Shawn McCarthy, 'Canadian boards legally obliged to address climate risk, new study reveals', *Corporate Knights* (26 June 2020).

150 Benjamin, 'The Road to Paris Runs Through Delaware', above n 4, at 368.

151 This includes physical risks and transition risks, as discussed in Part 1.1. See also, Lord Sales, 'Directors' duties and climate change: Keeping pace with environmental challenges', *Anglo-Australian Law Society, Sydney* (27 August 2019), at 10.

152 Ibid, at 6.

153 Mulholland, Barker, Williams and Eccles, above n 6, at 346-349.

cost of such an approach is that the board may be compelled to defer further capital investments or alternative strategies that would have more effectively addressed climate risk. Such conduct would involve sacrificing long-term interests in favour of short-term profitability. Involving an element of *mala fide*, directors in such circumstances would fail to discharge the good faith obligation imposed by section 166(2) to act in the interest of the company.

Another circumstance arises when directors forgo a consideration of climate risk due to their honest subjective belief, for example, due to their own political perspective or scepticism regarding climate change. A subjective interpretation of the 'good faith' requirement in section 166(2) would ordinarily exonerate the directors. However, as discussed,[154] it is possible that a court may conduct an objective assessment of the situation, which may give rise to questions whether an honest and intelligent person in the directors' position would have rationally arrived at the same conclusion. If not, directors would have failed to satisfy their good faith obligation to act in the interests of the company, thereby exposing them to liability.

In all, the duty to act in the interests of the company would require directors to examine climate risk and engage in a balancing act between the long term sustainable value for the company as a whole on the one hand and any other interest, including their own, on the other. Practical manifestations of this duty would include making a detailed assessment of climate risk for their company, consider expert advice (where appropriate), determine strategies to address the risks, follow through and implement the strategies, and constantly review the risks and update the strategies and their implementation.

2.4.2 Climate risk and the best interests of stakeholders

The duty of directors under section 166(2) to act in the best interests of the company, represented by its long term interests, ensconces within itself the idea of climate change as a financial risk. However, the additional element in section 166(2) that requires directors to act in the best interests of various named stakeholders moves the needle far beyond merely considering climate change as a financial risk. The stakeholder-oriented approach of Indian corporate law arguably imposes a greater onus on directors with regard to climate change. As one commentator notes:[155]

> Unavoidably, questions of climate change and corporate governance are wound up in the broader debate (and dynamism) about society's expectations of corporate purpose, because different concepts of corporate purpose likely require different levels of attention to and action on climate change. Corporate purpose informs the duties that corporate leaders face. Narrower conceptions of corporate purpose often yield a set of duties wound tightly around shareholder interests and profit maximization. By contrast, more capacious conceptions of corporate purpose give way to a broader set of emerging duties …

The fact that 'the protection of the environment' commands its own space in the statutory provision is indicative of the fact that directors are obligated to garner their attention towards the topic regardless of the associated financial implications. In other words, section 166(2) now treats climate change, which has already gained a status of eminence within the environmental discourse under Indian law, as an end in itself, and not merely as a financial risk. In this sense, Indian corporate law is arguably different from that of other Commonwealth jurisdictions, wherein the treatment of directors' duties in the context of climate change is etched in the detection and treatment of financial risk.

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154 See Part 2.2.1.

155 Ali A. Zaidi, 'Mandates for Action: Corporate Governance Meets Climate Change', (2020) *Stanford Law Review Online* 122, at 124.

Due to the pluralistic approach that section 166(2) adopts, the protection of the environment stands on an equal footing as catering to the interests of the shareholders or other stakeholders.[156] Hence, directors are not entitled to side-step issues of climate change (whether or not they bear financial risk) in favour of other stakeholders such as shareholders.[157] Directors have to consider what is fair as between the interests of various stakeholders.[158] This, though, could cut both ways. For instance, the transition towards a low carbon economy could adversely affect the interests of stakeholders such as employees, whose interests have to be balanced against those of the environment.[159] These decisions could very well complicate decision-making for directors, for which they must be adequately equipped.

2.4.3 Climate change and conflicts of interest

In the context of climate change, conflicts of interest may arise if the directors' financial incentives are based on short term profitability of the company, while the interests of the company are best represented by long term sustainable value. In the context of the fossil fuel industry, one manifestation of this scenario is the linkage of executive pay to reserve replacement ratios.[160] Essentially, in several companies, the pay structures for the top management incentivise conduct that leads to a slower transition away from fossil fuels, which may not be in the best interests of the company. Such conflicts have the potential to arise,[161] but no cases seem to have emerged in India on this count. Companies would do well to address these conflicts while setting the parameters for executive compensation, especially any incentive payments.

Directors' duties to avoid conflicts of interest or secret profits could arise in other circumstances as well. For example, directors who obtain corporate opportunities arising from climate change, such as clean energy initiatives, may be liable if they take those opportunities for themselves without offering them to the company, thereby constituting a violation of section 166(5) of the Companies Act. Directors must pay to the company any undue gain they obtain from such opportunity. This may be of concern to companies vulnerable to climate change, who may be left with stranded assets.

2.5 Conclusion on the duties of trust and loyalty

Indian law treats directors as fiduciaries and, in one sense, even as trustees, who owe their duties to the company. The duties of trust and loyalty, as codified in section 166 of the Companies Act, require directors to act in the long-term interests of the company. In this vein, directors are obligated to pay attention to climate change, which could carry a material financial risk to the company. Although directors can discharge

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156 Some scholars have normatively argued for the recognition of an 'environmental priority principle', which would require the environment to be considered 'a first-order concern' and, in case of a conflict among various interests, for the scales to tip 'in favor of promoting long-term environmental values and goals'. Light, above n 8, at 205. However, Indian corporate law does not stretch that far, and only ensures *parity* between the environment and other stakeholders, but stops short of bestowing the environment any *priority*.

157 See, Will Heath, Nicola Charlston and Robert Kelly, 'Can directors see the regulatory threat on climate?', *Financial Review* (10 January 2020).

158 In this regard, the duty to act for proper purpose could be relevant as well. However, thus far, Indian courts have only had occasion to consider the duty in the context of different groups of shareholders, but not different groups of stakeholders. See, *Dale and Carrington Invt (P) Ltd*, above n 97, at [11]; *Needle Industries (India) Ltd*, above n 112, at [105]-[108]; *Tea Brokers (P) Ltd*, above n 113, at 38.

159 Climate Action 100+, above n 31, at 79.

160 'Energy firms do better when CEO pay isn't tied to production', *The Business Times* (15 February 2019).

161 See, Barker, above n 10, at 11; Alexia Staker and Alice Garton, *Directors' Liability and Climate Risk: United Kingdom – Country Paper* (April 2018), at 15.

this duty subjectively based on their honest belief, an utter disregard of climate risk, which is inconsistent with what an honest and intelligent person in that position would undertake, would bring about liability for such directors.

Apart from considering the material financial risk that climate change poses to a company, directors are required under the pluralist approach of section 166(2) to treat the protection of the environment on its own footing. In doing so, directors must balance the interests of the various stakeholders which, apart from the environment, includes the shareholders, employees and the community.

Finally, directors must not suffer from conflicts of interest that will impinge upon their ability to exercise their independent judgment in the best interests of the company as well as various stakeholders, including the environment. All of these duties of trust and loyalty assume considerable importance given that India, and in turn companies operating therein, face increasing vulnerability from the effects of climate change.

3. Duties of competence

Indian company law addresses directors' duties of competence in two ways. First, section 166(3) of the Companies Act stipulates that directors of a company shall exercise their 'duties with due and reasonable care, skill and diligence and shall exercise independent judgment.' Second, the Indian corporate and securities law regimes prescribe a detailed risk management framework that directors are required to adopt and implement. This paper considers each of these before dealing with the impact of both sets of duties in the context of climate change.

3.1 Duties of due and reasonable care, skill and diligence

Historically, the duties of care, skill and diligence emanated from the common law, much the same way as other directors' duties. Although there have only been a handful of cases involving the duties of care, skill and diligence, the Indian courts considered the English case of *In re City Equitable Fire Insurance Co*[162] as the starting point for analysis. Therein, the Court held that directors must exercise such degree of skill, care and diligence as ordinary persons would be expected to take, having regard to their circumstances.[163]

Given this scenario, a principal question arises whether this duty is a subjective one or whether it bears any minimum objective standard. Compared with other Commonwealth jurisdictions which have explicitly adopted the minimum objective standard,[164] neither the Indian Parliament nor the courts have stipulated the precise nature of the test to determine whether directors in a given case have discharged the duty of care, skill and diligence. Nevertheless, there is sufficient reason to assert that the test is not purely subjective, and that an objective assessment cannot be discarded. This is evident from pre-existing case law, a textual analysis of the Companies Act as well as the overall dynamic nature of jurisprudence surrounding these duties, particularly in the context of climate risk.

In *Official Liquidator v P.A. Tendolkar*,[165] the Supreme Court of India was concerned with the breach of duties of directors, including the managing director, in the context of a fraud perpetrated by the employees of a banking company. After considering a line of cases led by *In re City Equitable Fire Insurance Co*, the Supreme Court appears to be persuaded by commentary[166] expressing doubt that a court several years after *In re City Equitable Fire Insurance Co* would adopt its view, given that 'nowadays the courts take a stricter view of the duties of a director'.[167] When it came to the question of care, skill and diligence, the Supreme Court's observations resonate with an objective assessment when it observed that a director 'cannot shut his eyes to what must be obvious to everyone who examines the affairs of the Company even superficially.'[168] The Court went on to note:

> … it is clear to us that, although the Managing Director was conducting the day to day affairs of the Company and must, therefore, be held responsible for a greater share of the losses incurred due to misappropriations,

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162 [1925] 1 Ch 407.

163 See, *Govind Narayan Kakade v Rangnath Gopal Rajopadhye*, (1930) 54 ILR 226 (Bom), at 259.

164 Companies Act 2006, s 174 (for the UK); *Daniels v Anderson*, (1995) 37 NSWLR 438 (for Australia); *Lim Weng Kee v PP*, [2002] 4 SLR 327 (for Singapore).

165 Above n 124.

166 *Palmer's Company Law* (21st edn, 1968), at 575.

167 *Official Liquidator v P.A. Tendolkar*, above n 124, at 44.

168 Ibid, at [45].

> dishonesty, and misuse of managerial powers, yet, his Co-Directors could not possibly be ignorant of the nature of such dealings and activities of the employees ...[169]

Although the Supreme Court did not explicitly pronounce a minimum objective standard, the ultimate outcome of its analysis is not altogether dissimilar from that set out by other Commonwealth courts.[170] For instance, it is clear that all directors have oversight responsibilities, which they failed to discharge on the facts of the case. Moreover, the managing director was held to a higher standard, although the impact more closely related to the extent of the remedies, namely the losses that the managing director had to bear. Such an implicitly objective approach has been followed in other cases both preceding[171] *Official Liquidator v P.A. Tendolkar* and thereafter.[172]

The codification of the directors' duties in section 166(3) of the Companies Act is not only consistent with the objective approach, but in fact furthers it. Moreover, any doubts may be set to rest if one were to consider the rather extensive roles and functions specified for independent directors. For example, the legislation expressly mandates that independent directors shall 'regularly update and refresh their skills, knowledge and familiarity with the company',[173] and 'take and follow appropriate professional advice and opinion of outside experts'.[174] Schedule IV of the Companies Act enumerates various other obligations of independent directors in fairly microscopic detail. If the law casts such onerous duties on independent directors, it would be anachronistic for the other directors (whether executive or non-executive) to be subject to a lower standard of liability. The tone and tenor of the Companies Act has only been to enhance the standard of the directors' duties of care, skill and diligence under common law rather than to diminish it.

Although Indian courts have not yet interpreted the recently codified regime for the directors' duties of care, skill and diligence, the elevated standards will likely form the new reality. As Lord Sales remarked in a more international context:[175]

> ... the effect of directors' legal obligations cannot be understood simply by referring to the bald statement of them in the relevant legislation. An assessment of the practical implications of those duties has to take account of the general environment of expectation created by initiatives by regulators and in civil society.

In the overall analysis, directors must inform themselves sufficiently about the business of the company and its associated risks. They must also employ adequate monitoring and oversight over the management of the company. In doing so, they are able to engage outside experts to obtain and rely upon their advice. While it is open for directors to delegate matters to other executives in the company, they continue to bear the responsibility for adequate supervision. In undertaking all of these tasks, directors have to 'exercise independent judgment'.[176] Available jurisprudence also indicates that the position that the director holds in the company matters: for instance, a managing director will likely be held to a higher standard.

Finally, the duty to act with care, skill and diligence cannot be altogether alienated from the directors' duty to act in the best interests of the company. This would require directors to take a comprehensive view of the

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169 Ibid, at [48].

170 See also, ibid, at [72], where the Supreme Court noted: 'Any Director conscious of his managerial responsibilities, who had cared to examine the affairs of the Bank, could not have failed to find out what was really happening in the Bank'. This is again clearly indicative of an objective standard the Court has implicitly sought to impose.

171 *In the Matter of the Union Bank, Allahabad, Limited*, (1925) 47 ILR 669 (All).

172 *Globe Motors Ltd.*, above n 103, at [9]. See also, *SMS Pharmaceuticals Ltd v Neeta Bhalla*, (2005) 8 SCC 89; *Shantanu Rastogi v The State of Karnataka*, MANU/KA/0182/2021.

173 Companies Act, 2013, Schedule IV, clause III(1).

174 Companies Act, 2013, Schedule IV, clause III(2).

175 Lord Sales, above n 151, at 10.

176 Companies Act, 2013, s 166(3).

composite set of duties in exercising their competence, much the same way courts have done in determining whether directors have breached one or more duties on the facts and circumstances of each case.[177]

3.2 Risk management framework

Indian corporate law embellishes directors' duties of competence by stipulating a specific framework for risk management. Such a framework provides the means by which directors can not only discharge their duties of competence more effectively, but it also enables courts, regulators and stakeholders to hold directors accountable in a more effective manner. Such an approach is even more appropriate in the context of climate risk. For example, the World Economic Forum has identified extreme weather, climate action failure and human environmental damage as the three most prominent risks in terms of likelihood.[178] Moreover, the failure by corporate boards to offer strategic responses to these risks not only engages legal liability, but could also result in considerable reputational harm.[179]

In India, the board of directors plays a vital role in instituting and implementing risk management within a company.[180] Such an approach is consistent with the monitoring role that corporate governance norms in India impose on directors.[181] The risk management framework is contained in the Companies Act, which applies to all companies, and in the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (the 'SEBI LODR Regulations') issued by India's securities regulator, the Securities and Exchange Board of India ('SEBI'), which apply only to listed companies.

The Companies Act requires the board of directors to issue a report annually, which includes 'a statement indicating development and implementation of a risk management policy for the company including identification therein of elements of risk, if any, which in the opinion of the Board may threaten the existence of the company'.[182] Given the significance of climate change as a risk, boards cannot afford to ignore it from their analysis for this purpose. As in the case of other directors' duties, the legislation places a more specific onus on independent directors to 'help in bringing an independent judgment to bear' on matters relating to risk management, among others,[183] and to satisfy themselves that 'the systems of risk management are robust and defensible'.[184] Despite the recognition of risk management as a crucial part of directors' role, there is minimal treatment in the legislation regarding the exact manner in which directors are to go about recognising and addressing risks, including climate risks.[185]

Under the SEBI LODR Regulations, responsibilities of the board include reviewing and guiding the company's risk policy,[186] and ensuring that appropriate systems for risk management are in place.[187] These regulations even go to the extent of prescribing an attitudinal outlook: 'The board of directors shall ensure that, while rightly encouraging positive thinking, these do not result in over-optimism that either leads to significant

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177 See, for example, *Official Liquidator v P.A. Tendolkar*, above n 124, at [45]; *Globe Motors Ltd*, above n 103, at [9].

178 World Economic Forum, *The Global Risks Report 2021* (16th edn, 2021), at 12. See also, OECD, *Risk Management and Corporate Governance* (OECD Publishing, 2014), at 10; COSO, *Enterprise Risk Management: Applying enterprise risk management to environmental, social and governance-related risks* (October 2018), at 2.

179 Zaidi, above n 155, at 129.

180 Afra Afsharipour and Manali Paranjpe, 'The Evolution of Risk Management Oversight by Indian Boards', (2021) 33 *National Law School of India Review* (forthcoming), https://ssrn.com/abstract=3836169, at 2.

181 Ibid, at 1.

182 Companies Act, 2013, s 134(3)(n).

183 Companies Act, 2013, Schedule IV, clause II(1).

184 Companies Act, 2013, Schedule IV, clause II(4).

185 See, Afsharipour and Paranjpe, above n 180, at 12.

186 SEBI LODR Regulations, reg 4(1)(f)(ii)(1).

187 SEBI LODR Regulations, reg 4(1)(f)(ii)(7).

risks not being recognised or exposes the listed entity to excessive risk.'[188] The board also preserves the 'ability to 'step back' to assist executive management by challenging the assumptions underlying' various matters, including risk appetite.[189] Moreover, the company is required to set out processes that inform the directors about 'risk assessment and minimization procedures'.[190] The board also holds responsibility for 'framing, implementing and monitoring the risk management plan for the listed entity.'[191]

More stringent regulations on risk management apply to the top 1,000 listed entities on the basis of market capitalisation.[192] Such companies are also required to constitute a risk management committee.[193] It is open for the board of directors to define the roles and responsibilities of the risk management committee and to delegate functions to it.[194] After consulting on a proposal to strengthen the board's risk management functions even more,[195] SEBI introduced amendments to the LODR Regulations to strengthen the edifice of the risk management framework.[196]

As is evident, the competence duties of directors in Indian companies are not only set forth in company law in the conventional manner, but they are also subsumed within the risk management framework that enables the operationalisation of these duties. Such a framework is even more crucial given that climate risk is found to be foremost among the risks that directors must identify and address.

3.3. Application of competence duties in a climate risk context

The increasing impact of climate change suggests that directors of companies must be conscious of the associated risks, which tend to be material and are increasingly becoming so.[197] Hence, directors would be well advised to pay attention to climate risk, failing which they run the risk of liability.[198] This also substantially increases the onus of directors to obtain relevant information and 'act on the financial risks and opportunities posed by climate change'.[199] As one group of researchers notes:[200]

> Directors now need to add a base level of climate competency to their governance skill set, as is necessary to guide their companies through the physical impacts of climate change and the transition to the net-zero emissions economy set out in the goals of the Paris Agreement. And for most, if not all, directors climate competence is not optional; governance failures and misleading disclosures relating to climate change may be actionable against individuals and companies.

In the absence of specific jurisprudence in India relating to directors' duties for climate risk, it is necessary to rely on more universal governance considerations that could apply to the local context. By this, the application of competence duties to climate risk can be considered under two categories: (i) when directors fail altogether to consider climate risk in their analysis; and (ii) when they consider climate risk inadequately.

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[188] SEBI LODR Regulations, reg 4(1)(f)(iii)(9).
[189] SEBI LODR Regulations, reg 4(1)(f)(iii)(10).
[190] SEBI LODR Regulations, reg 17(9)(a).
[191] SEBI LODR Regulations, reg 17(9)(b).
[192] SEBI LODR Regulations, reg 21(5).
[193] SEBI LODR Regulations, reg 21(1).
[194] SEBI LODR Regulations, reg 21(4).
[195] Securities and Exchange Board of India, *Consultation Paper on the Applicability and Role of the Risk Management Committee* (10 November 2020).
[196] SEBI (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2021.
[197] Benjamin, 'Directors are in the crosshairs of corporate climate litigation', above n 2.
[198] Heath, Charlston and Kelly, above n 157.
[199] Benjamin, 'The Road to Paris Runs Through Delaware', above n 4, at 351.
[200] Mulholland, Barker, Williams and Eccles, above n 6, at 336.

3.3.1 Directors' failure to consider climate risk

As noted at the outset,[201] climate risk has acquired materiality status for Indian companies. Hence companies in general, and those that are vulnerable to the effects of climate change in particular, would need to establish clear systems and processes to identify and address climate risk. This includes appropriately disclosing climate risks (on the lines of well-known reporting frameworks such as the TCFD) and ensuring they are represented on the balance sheet, and more generally formulating strategies to ensure that the company will resiliently and sustainably operate in a net zero carbon global economy. All this is evident from the scope and tenor of the duties of directors in section 166(3) of the Companies Act to exercise their duties with reasonable care, skill and diligence and to exercise independent judgment. The details regarding the degree and nature of risk, though, may vary from company to company.

Such an approach is consistent with the jurisprudence emanating with reference to duties of competence. For instance, in *Official Liquidator v P.A. Tendolkar*,[202] the Supreme Court clarified that directors cannot be oblivious to risks that should be observable to everyone. Due to the predominance of climate change as a leading risk that companies face, ignorance or non-action on the part of directors to assess and deal with the risk would cause them to breach their duty owed to the company on lines identified by the Supreme Court. Unlike the duty of 'good faith' in section 166(2), competence duties are not subject to the honest belief of directors, but must be judged through a more objective assessment. Hence, even an honest failure on the part of directors to account for climate risk cannot be raised as an excuse against a breach of the competence duties under section 166(3).

Moreover, the Companies Act also imposes an obligation on directors to keep up with developments regarding matters that affect the business of the company, including possible risks, such as those emanating from climate change. Although expressly specified in the context of independent directors, who must regularly update and refresh their knowledge, skills, and familiarity with the company, such a duty is implicit for other directors as well. The duties of independent directors (which would, *prima facie*, extend equally to other directors) to deploy and implement adequate risk management measures, which include climate risk, are similar. The risk management duties of boards also expressly require directors to produce a statement in its annual report regarding the identification of elements of risk, of which climate risk would constitute an important component. An inaccurate or misleading statement as to climate risk would also give rise to directorial liability, apart from constituting a breach of the disclosure-related obligations.[203]

In cases where companies are required to establish risk management committees, the directors on such committees arguably carry a greater responsibility to identify risks of climate change and deal with them. In the context of such express duties of competence stipulated in the Companies Act and the SEBI LODR Regulations, overlooking climate risk is no longer an option for directors.

In order to fulfil their duties, directors of Indian companies must, therefore, turn their minds towards issues of climate change more generally and in relation to specific projects or transactions. While the board as a whole bears overall responsibility, the risk management committees would carry a more specific burden as well. These duties would rise to the fore in companies that operate in high risk sectors such as agriculture, energy and transportation[204] that are more vulnerable to climate risk.

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201 See Part 1.1.

202 Above n 124.

203 See Part 4.

204 National Intelligence Council, 'India: Impact of Climate Change to 2030 – A Commissioned Research Report' (April 2009), https://www.dni.gov/files/documents/climate2030_india.pdf.

3.3.2 Directors' inadequate consideration of climate risk

In this scenario, directors may take cognisance of climate risk, but may nevertheless come up with strategies or processes that are inadequate to deal with the risk. Even here, directors could end up breaching their competence duties under section 166(3) of the Companies Act and the more specific risk management obligations under the Companies Act as well as the SEBI LODR Regulations. A number of situations could arise.

First, where directors have been made aware of material information pertaining to climate risk that their company is facing, their duty to act with care and diligence will require them to make further investigations. Where they see the proverbial 'red flag', they shoulder a duty to make further enquiry as any reasonable person in their circumstance would have done.[205] By way of illustration in the climate context, a 'red flag' could be a significant shareholder vote on a climate-related issue, inaccuracies in a report produced before the board on climate risk, or the imposition of a new climate-related regulation on the company that its operations currently do not comply with. Moreover, this duty to enquire further is not merely what the director believes, but carries an objective assessment. Given the ever increasing scientific and market information regarding climate risk, this duty has taken on expansive proportions.

Second, where directors do not have sufficient expertise to assess and deal with climate risk, the discharge of their competence duties would involve seeking professional advice by engaging experts. At the same time, directors cannot outsource their responsibility entirely to the experts and must assimilate and synthesise the advice as it applies to the company. Also, while appointing such experts, directors have to conduct appropriate due diligence to ensure the capabilities and independence of professional advisors or experts.

Third, where directors delegate responsibility to members of management to monitor climate risk and draw up and implement strategies to address them, the directors bear the duty to oversee and supervise the delegates. In doing so, they have to delegate in good faith after ensuring that the delegate is capable of carrying out the delegated task. They cannot blindly rely on the actions of the management of the companies, as the Supreme Court emphasised in *Official Liquidator v P.A. Tendolkar*.[206] This is also evident in the various duties of directors enumerated in the Companies Act. Supplemental to the preceding point, directors must enquire further to satisfy themselves of the veracity of the tasks performed or advice provided by the management in relation to climate risk. Directors must not hesitate to engage in further probes or ask additional questions of management if they are to discharge their competence duties adequately.

3.4 Conclusion on the duties of competence

The main doctrine of the duties of competence consists of section 166(3) of the Companies Act, which requires directors to act with reasonable care, skill and diligence. Although this statutory provision has yet to receive interpretation by the judiciary, the pre-existing common law regime governing competence duties offers a strong indication regarding the nature and extent of these duties. In addition, several specific duties for independent directors and those relating to risk management are contained in the Companies Act, which supplement the generality of section 166(3). As regards listed companies, the SEBI LODR Regulations specify a risk management framework, including the requirement for large companies to establish a risk management committee.

Given that climate risk is not only a key risk for Indian companies, but is one that is gaining greater prominence over time, directors' duties to account for climate risk can undoubtedly be determined against the aforesaid legal framework in India. Hence, directors of Indian companies cannot afford to ignore climate

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205 See Michael Peregrine, 'New Pressure on Corporate Directors To Recognize Red Flags', *Forbes* (23 October 2019).

206 Above n 124.

risk without exposing themselves to consequences for breach of directors' duties. Even if they were to acknowledge climate risk, the competence duties they owe require them to make further investigations to obtain adequate information, to appoint experts and obtain their advice, and to oversee and supervise management to whom they may have delegated tasks for identifying, strategising and implementing a framework to address climate risk. Illustratively, this would include making appropriate levels of disclosure under recognised frameworks such as the TCFD, undertaking scenario modelling to assess the viability of the business under different carbon price and temperature settings, and formulating strategies to ensure that the business of a company can sustainably operate in a net zero globalised economy. Along with broader efforts, both globally as well as locally within India, to address concerns pertaining to climate change, the competence duties of directors will also operate in a dynamic manner to keep pace with the developments.

4. Duty of disclosure

The duty of directors under corporate and securities law to make disclosures of matters pertaining to climate risk is not a mere end in itself, but also is a means to ensure that directors comply with other duties regarding such risk, such as in section 166 of the Companies Act.[207] The nature and extent of disclosure required usually turns on the question of the 'materiality' of the risk.[208] Disclosure norms that deal with the financial risks of climate change as well as those that relate to ESG have proliferated both internationally and within individual jurisdictions.[209] Climate disclosures have already become the subject matter of litigation elsewhere.[210] In this context, this paper delves into the climate risk disclosure requirements in India, first in relation to securities issuances by companies (primary market transactions) and then to continuous disclosures (in the secondary markets) for companies that are already listed on the stock exchanges.

4.1 Primary markets: disclosures during securities issuances

The Supreme Court of India has recognised a duty of the directors 'to make full and honest disclosure to the shareholders regarding all important matters relating to the company'.[211] This is particularly so when a company is issuing further shares.[212] Apart from the judicially recognised duty of disclosure, two sets of legislation extensively govern the duties of directors to make disclosures in case of issuance of securities. The first is the Companies Act, and the other the Securities and Exchange Board of India Act, 1992 (the 'SEBI Act') and various regulations issued thereunder, particularly the SEBI (Issue of Capital and Disclosure Requirements) Regulations 2018 (the 'SEBI ICDR Regulations').

Section 26 of the Companies Act provides that a prospectus issued by a company in the context of securities issuance must contain the information specified by SEBI (in consultation with the Central Government). Hence, it would be necessary to refer to the SEBI ICDR Regulations, which prescribe the detailed disclosures that a company must make in its prospectus when it decides to issue securities to the public. They encapsulate disclosures regarding climate risk in a number of ways:

A) The SEBI ICDR Regulations require a description of the business and business strategy of the issuer company.[213] A discussion of the corporate profile should include any environmental issues.[214] How the company deals with issues pertaining to the environment and climate change would constitute a necessary disclosure for this purpose.

B) The prospectus must contain details regarding such litigation 'whose outcome could have a

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[207] V. Umakanth, 'A Dose of Sunlight Therapy: Using Corporate and Securities Laws to Treat Climate Change', [2019] *Indian Yearbook of International Law and Policy* 112, at 117. See also, Perry E. Wallace, 'Climate Change, Fiduciary Duty, and Corporate Disclosure: Are Things Heating Up in the Boardroom?', (2008) 26 *Virginia Environmental Law Journal* 293, at 311.

[208] Peel, Foerster, McDonnell and Osofsky, above n 5, at 9; Light, above n 8, at 168.

[209] COSO, above n 178, at 5; PRI, *Principles for Responsible Investing*, Principle 1; BlackRock, Our approach to sustainability, *BlackRock Investment Stewardship* (2020), at 5. See also, Jill E. Fisch, 'Making Sustainability Disclosure Sustainable', (2019) 107 *Georgetown Law Journal* 923, at 930.

[210] Benjamin, 'The Road to Paris Runs Through Delaware', above n 4, at 355; Ganguly, Setzer and Heyvaert, above n 47, at 859.

[211] *Dale and Carrington Invt (P) Ltd*, above n 97, at [11].

[212] Ibid. The Court also noted that directors of private limited companies will be 'tested on a much finer scale in order to rule out any misuse of power for personal gains or ulterior motives'.

[213] SEBI ICDR Regulations, Schedule VIII, Item (VIII)(B)(1)-(2).

[214] SEBI ICDR Regulations, Schedule VIII, Item (VIII)(D)(1)(d).

materially adverse effect of the position of the issuer.'[215] This may include climate change litigation or other environmental claims arising from the climate risk that the company is exposed to.

C) The management's discussion and analysis ('MD&A') of the financial condition and results of operations as reflected in the financial statements must contain a discussion of factors that may affect the results of operations, unusual or infrequent events and known trends or uncertainties that may have a material adverse impact on revenue or income.[216] This would obligate boards to make an assessment of climate risk and its impact on the company's fortunes, and disclose their analysis to prospective investors. Any company facing material transition risk on account of climate change will necessarily have to make detailed disclosures regarding management's views under this category.

D) Finally, the prospectus must contain risk factors, which must 'be classified as those which are specific to the project and internal to the issuer and those which are external and beyond the control of the issuer.'[217] The determination of risk factors ought to be based on their materiality.[218] Given the dominance of climate risk in corporate discourse, it would not be possible for boards to ignore that as a risk factor. But the nature and extent of disclosure, including whether climate risk is an internal or external factor, would depend upon the type of business and could vary from company to company.

As is the universal rule, disclosures in India are tested against the touchstone of 'materiality'. The Indian adjudicatory authorities have rendered a rather wide interpretation of the term, which imposes considerable onus on the companies and their boards to make disclosures while raising funds from the capital markets. The 'concept of what is material has been interpreted liberally in securities regulation', and 'what is material depends upon the facts and circumstances of each case'.[219] At a minimum, it includes information that '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'.[220]

The issue of materiality arose squarely in an environmental context before SEBI and thereafter its appellate authority, the Securities Appellate Tribunal ('SAT') in *Electrosteels Ltd v Securities and Exchange Board of India*.[221] In this case, the rejection of an application by the company and its promoters to the Ministry of Environment and Forest for diversion of forest land for an iron ore mine was 'material' information to be disclosed in an initial public offering ('IPO') of the company. Both SEBI and SAT found the rejection of the company's application to be 'material' information, with SAT taking a rather expansive view of the term 'materiality' as follows:[222]

> Therefore, 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,

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[215] SEBI ICDR Regulations, Schedule VIII, Item (X)(A)(1).
[216] SEBI ICDR Regulations, Schedule VIII, Item (IX)(E).
[217] SEBI ICDR Regulations, Schedule VIII, Item (IV)(B).
[218] SEBI ICDR Regulations, Schedule VIII, Item (IV)(C).
[219] Divan et al. Opinion, above n 9, at [45]. See also, Anik Bhaduri, 'Taking the Heat: (Non)Disclosure of Climate Change Risks in India' (2021) 42 *Business Law Review* 152.
[220] *DLF Limited v. Securities and Exchange Board of India*, MANU/SB/0006/2015, at [81].
[221] 2019 SCC OnLine SAT 244.
[222] Ibid, at [16].

> 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.

As leading capital markets practitioners in India have noted,[223] this approach not only has the impact of expanding the disclosure obligations in primary market transactions, but also the liability of issuers (and potentially their directors as well).

A failure to make appropriate disclosures in a prospectus will result in the directors attracting both criminal and civil liability.[224] Section 34 of the Companies Act provides that any person who issued a prospectus that contains an untrue or misleading statement would attract criminal liability, unless such person can prove either that a statement or omission was immaterial or that the person had no reason to believe that the statement was untrue or that any inclusion or omission was necessary.[225] Section 36 of the Companies Act also imposes criminal liability on any person who 'either knowingly or recklessly makes any statement, promise or forecast which is false, deceptive or misleading, or deliberately conceals any material facts, to induce another person to' subscribe for securities or enter into certain types of transactions specified therein. Liability under section 34 is more straightforward as directors are required to sign the prospectus, which they are therefore considered to have authorised.[226] However, liability for directors under section 36 is more fact-specific. In either circumstance, the punishment for directors is prescribed in section 447 of the Companies Act, which includes both imprisonment and fine.[227]

In addition to criminal liability, section 35 of the Companies Act also imposes on the directors the liability to pay compensation to every person who has sustained loss or damage on account of any statement or omission in the prospectus that is misleading. Hence, actions or omissions of directors in relation to matters of climate risk, which are considered material under the Companies Act, could invoke both criminal and civil liability if they amount to misleading disclosures or fraudulently inducing persons to invest into their company.

4.2 Secondary markets: continuous disclosures

In addition to disclosures to be made when companies engage in securities issuances, they are also required to make disclosures on an ongoing basis. While disclosure requirements contained in the Companies Act apply to all companies, those continuous disclosure obligations carried by the SEBI LODR Regulations apply to companies listed on the stock exchanges. This sub-part discusses three types of continuous disclosures: (i) annual reports, (ii) continuous disclosures to the market, and (iii) business responsibility reporting.

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223 Yash J. Ashar, Shatarupa Dasgupta and Anjaneya Das, 'To Disclose or Not to Disclose? An Analysis of the Order of the Securities Appellate Tribunal in Electrosteel Steels Limited v. Securities and Exchange Board of India', *India Corporate Law: A Cyril Amarchand Mangaldas Blog* (2 December 2019).

224 This is particularly so given the increased regulatory focus on climate-related disclosures. See e.g., Noel Hutley SC & Sebastian Hartford Davis, 'Climate Change and Directors' Duties: Further Supplementary Memorandum of Opinion' (23 April 2021), https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf.

225 Companies Act, 2013, s 34. See also, *A.V. Mohan Rao v M. Kishan Rao*, (200) 6 SCC 174; *B.R. Bajaj v State of Maharashtra*, (2009) 148 Comp. Cas. 636 (Bom).

226 Companies Act, 2013, s 26(4).

227 For offences involving material amounts, the penalty is imprisonment for a term between six months and ten years, and fine of a quantum between the amount involved in the fraud and three times such amount. In case of offences involving smaller amounts, the term of imprisonment shall extend up to five years and the fine to INR 5,000,000. Companies Act, 2013, s 447.

4.2.1 Annual reports

Section 134(3) of the Companies Act provides that a report of the board of directors of the company must be placed before each annual general meeting of the shareholders. Such an annual report is required to contain several disclosures that necessitate the boards' consideration of climate risk. *First*, the board's annual report should carry details of material changes affecting the financial position of the company that may have occurred during the period to which the financial statements relate.[228] This would include the financial impact of climate change, including any physical risk, transition risk or litigation risk that may have materialised during the period.

Second, the report must contain a discussion regarding, among other things, the conservation of energy.[229] More specifically, it is to include the steps taken towards that end and their impact, the use of alternative sources of energy, and capital investment made towards energy conservation initiatives.[230] Concurrently with addressing climate change as a risk, this would also incentivise boards to treat it as an opportunity in the transition towards clean energy.

Third, as discussed earlier, the board's annual report must contain details regarding the company's risk management policy and the manner in which it identifies and deals with risks that pose an existential threat.[231] *Finally*, the directors' responsibility statement, which is a part of the board's report, shall state whether 'the directors have devised proper systems to ensure compliance with the provisions of all applicable law and that such systems were adequate and operative effectively'.[232] This would include compliance with environmental laws, particularly in companies whose businesses are environmentally sensitive.

4.2.2 Continuous disclosure to the market

Apart from issuing annual reports, listed companies are required to make disclosures of events or information that are, in the opinion of the board, material in nature.[233] Such disclosures must be made as soon as reasonably possible, and no later than 24 hours after the occurrence of the event or awareness of any information.[234] In case of any delays, the company must provide an explanation.

The SEBI LODR Regulations divide the disclosure requirements into two categories. The first relates to events that are deemed to be material, and must therefore be disclosed.[235] These relate mainly to capital structuring (or restructuring), mergers and acquisitions, corporate governance and insolvency, and do not deal with matters pertaining to climate risk. The second category is where disclosure is to be made only if the event or information satisfies the materiality test.[236] This includes climates events such as disruptions to the 'operations of any one or more units or division of the listed entity due to natural calamity (earthquake, flood,

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228 Companies Act, 2013, s 134(3)(l).

229 Companies Act, 2013, s 134(3)(m).

230 Companies (Accounts) Rules, 2014, r 8.

231 Companies Act, 2013, s 134(3)(n).

232 Companies Act, 2013, s 134(5)(f).

233 SEBI LODR Regulations, reg 30(1).

234 SEBI LODR Regulations, reg 30(6).

235 These are listed in the SEBI LODR Regulations, Schedule III, Part A, paragraph A.

236 These are listed in the SEBI LODR Regulations, Schedule III, Part A, paragraph B. The definition of 'materiality' is set out in regulation 30(4), wherein the listed entity shall consider various criteria such as whether (i) the omission of such information will alter the information already publicly available; (ii) the omission is likely to result in significant market reaction if it were to surface at a later date; and (iii) in other cases, the board of directors of the listed entity in their opinion have treated the event or information as being material.

fire etc)'.[237] Another aspect relates to litigation arising from climate risk that is likely to have an impact on the financial status of the company.[238] Although these issues may arise from climate risk, they have a more general import, and the regulations do not contain more detailed guidance on the manner in which environmental or climate change issues are to be reported on a continuous basis.

4.2.3 Business responsibility and sustainability reporting ('BRSR')

Although the BRSR is a part of the annual report of the company, it bears a separate discussion due to its importance in the climate change context. Over more than a decade, the Government of India sought to establish an appropriate policy framework to encourage companies to undertake sustainability reporting on a wider basis. In 2010, the Ministry of Corporate Affairs ('MCA') released the *Corporate Social Responsibility Guidelines*, which were revamped in 2011 to take the form of the *National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business* ('NVGs'). The NVGs encapsulated the concept of sustainability through nine principles, one of which specified that businesses 'should respect, protect, and make efforts to restore the environment'.[239]

In this background, the BRSR initially took shape in 2012 in the form of business responsibility reporting ('BRR') when SEBI made it mandatory for the top 100 listed companies (based on market capitalisation) to include BRR as part of their annual reports.[240] The BRR format was designed to include disclosures regarding adherence by companies to the nine principles set forth in the NVGs. With the issuance of the SEBI LODR Regulations in 2015, the BRR requirements were expanded to encompass the top 500 listed companies by market capitalisation, thereby enlarging the universe of the BRR. In December 2019, the SEBI LODR Regulations were amended to make the BRR applicable to the top 1,000 listed companies.[241] In the meantime, in March 2019 the MCA revamped and updated the NVGs to take the form of the *National Guidelines for Responsible Business Conduct* ('NGRBCs'), which continue to follow the approach based on the nine principles.[242] In terms of further proposals, an MCA-constituted Committee on BRR issued its report in May 2020 to revise SEBI's BRR framework to bring it in line with the NGRBCs.[243] In August 2020, SEBI followed this up with a consultation paper to make its regime consistent with that proposed by the MCA committee.[244] Following this, SEBI amended the LODR Regulations (specifically regulation 34(2)(f)) to prescribe updated requirements termed Business Responsibility and Sustainability Reporting ('BRSR') (instead of the previous BRR) along the lines of the NGRBC.[245] Two principles from the NGRBCs are relevant from a climate disclosure perspective. One states that 'businesses should provide goods and services in a manner that is sustainable

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237 SEBI LODR Regulations, Schedule III, Part A, paragraph B(6).

238 SEBI LODR Regulations, Schedule III, Part A, paragraph B(8).

239 Ministry of Corporate Affairs (2011) National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business, Principle 6.

240 Securities and Exchange Board of India, Circular on *Business Responsibility Reports* (13 August 2012).

241 SEBI (Listing Obligations and Disclosure Requirements) (Fifth Amendment) Regulations, 2019.

242 Ministry of Corporate Affairs, Government of India, *National Guidelines for Responsible Business Conduct* (2019).

243 Ministry of Corporate Affairs, Government of India, *Report of the Committee on Business Responsibility Reporting* (May 2020).

244 Securities and Exchange Board of India, *Consultation Paper on the Format for Business Responsibility and Sustainability Reporting* (18 August 2020). See also, Reena Zachariah, 'Sebi chief chairs meeting with corporate India on business responsibility and sustainability reporting', *The Economic Times* (15 January 2021); Sunil Sanghai, 'How BRSR reporting standards are likely to look like for India Inc', *The Economic Times* (18 January 2021); Amit Tandon, 'Hear the drumbeat, it is green', *Business Standard* (21 December 2020).

245 SEBI (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2021. See also, Securities and Exchange Board of India, Circular on Business responsibility and sustainability reporting by listed entities (10 May 2021) ('BRSR Circular').

and safe'.[246] Another states that 'business should respect and make efforts to protect and restore the environment'.[247] The format also stipulates specific informational requirements regarding 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.[248]

Apart from these essential indicators, the NGRBCs also require companies to provide information on their leadership indicators, such as (i) information on environmental impact assessments, (ii) risk management strategies and measures for each material environmental risk identified for the business, (iii) details of the company's contribution to India's NDC under the Paris Agreement, (iv) new businesses, products or services created to address the identified material risks, and (v) details of good practices in reduction, recycling and reuse initiatives benchmarked against industry practice.[249]

These developments have brought about a considerable increase in the awareness regarding sustainability issues as well as the incidence of BRSR by Indian companies in recent years. Within the gamut of BRSR, there is clearly a greater focus on environmental issues when it comes to reporting requirement stipulated by the Indian regulators. One study notes that 87 percent of the reporting provisions in India deal with environmental issues, while only 35 percent deal with social issues and 32 percent with governance issues.[250] This is consistent with the environmental challenges and risks from climate change that the country faces. For example, the key subject areas for sustainability reporting in India are:[251]

A) Waste;

B) Emissions/pollution;

C) Water;

D) Energy; and

E) Resources.

In terms of reporting trends, recent studies indicate that 98 percent of the top 100 listed companies in India have developed BRSR,[252] which is largely attributable to the regulatory push in this direction.[253] Of these '50 per cent [of the top 100 listed companies] acknowledge climate as a risk in the financial disclosures and communicate the actions towards its mitigation'.[254] In terms of frameworks, 50 percent of the top 100 listed companies have adopted the Global Reporting Initiative ('GRI') standards, 20 percent the International Integrated Reporting Council ('IIRC'), 40 percent the Sustainable Development Goals ('SDG') and only 5 percent the TCFD.[255]

Despite the tremendous progress made in the development of climate risk reporting initiatives, some concerns continue to linger. As just noted, there is a proliferation of reporting formats that introduces some

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246 BRSR Circular, above n 245, Annexure 1, Principle 2.
247 Ibid, Principle 6.
248 BRSR Circular, above n 245, Annexure 2, paragraph 24(2).
249 Ministry of Corporate Affairs, above n 242, at 44.
250 The Reporting Exchange, *Sustainability reporting landscape in India* (11 October 2018), at 5.
251 Ibid, at 6.
252 KPMG, 'The time has come: The KPMG Survey of Sustainability Reporting 2020', *KPMG Impact* (December 2020), at 11.
253 Ibid, at 19.
254 KPMG, 'Insights on corporate reporting' (March 2019), at 8.
255 Ibid, at 10.

level of uncertainty and undermines comparability of the disclosures across companies.[256] Moreover, concerns abound regarding the quality and comprehensiveness of the disclosures.[257]

4.3 Conclusion on the duty of disclosure

Both corporate law and securities law impose considerable disclosure obligations on directors of companies. Both bodies of law recognise the need for transparency regarding climate risk – as a matter of recognising and dealing with financial risk and also as a matter of non-financial disclosure. When a company is in the process of engaging in a securities transaction, disclosures are required to be made in a prospectus, giving rise to the risk of both criminal and civil liability for directors for misstatements. Secondary market disclosures require directors to disclose matters of climate risk in the annual reports, as well as on an ongoing basis in case of material occurrences that impact the company's business and finances, such as extreme weather events. Finally, as part of the annual reports, companies must specifically include BRSR, of which the issue of climate change plays a crucial part. In all, directors of Indian companies bear the responsibility that their companies engage in climate risk disclosures through this multi-pronged approach, the failure of which would expose them to liability under both corporate and securities law.[258]

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256 Varottil, 'Environmental and Social Reporting by Indian Companies', above 121, at 5.

257 'Report on Sustainability Reporting in India: Getting Better But Miles to Go', *SustainabilityNext*, https://sustainabilitynext.in/report-on-sustainability-reporting-in-india-getting-better-but-miles-to-go/; M Ramesh, 'India Inc fares poorly in climate-related disclosures', *The Hindu Business Line* (5 June 2018).

258 Details regarding the nature of liability and matters of enforcement are discussed in Part 7.

5. Duties applicable to other categories of directors

The discussion thus far has identified the duties of directors within the corporate system as a whole, regardless of the nature of business of their companies. However, it is becoming clear that the financial sector plays an even greater role in identifying and dealing with climate risk. As one study notes,[259] regulators, investors and lenders are increasingly taking cognisance of the risk that climate change poses to the financial system, and seeking possible solutions to address them. This is also evident from the fact that financial regulators around the world have sounded clarion calls for financial institutions within their domain to deal with climate risk.[260] Even climate efforts such as the Paris Agreement[261] and sustainability endeavours such as the Equator Principles[262] have the financial sector at the heart of their agenda. Hence, banks and insurance companies have begun to treat climate risk as any other financial risk.[263] When it comes to institutional investors such as pension funds and mutual funds, the fiduciary duty they owe to their beneficiaries requires them to consider climate risk as part of their investment decision-making process.[264]

In this background, this Part briefly addresses the duties of directors in the financial sector. It first covers various types of financial institutions such as banks and insurance companies and thereafter investment institutions such as pension funds, mutual funds and alternative investment funds, which are the available investment vehicles in India. Finally, it examines how these duties are contiguous with stewardship roles and responsibilities, which have become prominent in the Indian context. This Part is only intended to address the key points that are specific to the financial sector, and is not meant to discuss the duties to the same length as in previous Parts.

5.1 Directors' duties in specific categories of financial institutions

5.1.1 Banks

India's banking regulator, the Reserve Bank of India ('RBI') recently cautioned about the impact of climate change on the economy, especially the agriculture sector.[265] At the same time, Indian banks are severely

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[259] University of Cambridge Institute for Sustainability Leadership, 'Physical risk framework: Understanding the impacts of climate change on real estate lending and investment portfolios' (2019), at 4.

[260] A paradigmatic example of this can be found in the speech by Mark Carney, Governor of the Bank of England, Chairman of the Financial Sustainability Board, 'Breaking the Tragedy of the Horizon – climate change and financial stability', *Lloyd's of London* (29 September 2015).

[261] Above n 35, Article 2(1)(c).

[262] *The Equator Principles* (July 2020), Preamble.

[263] See e.g., Bank of England, Prudential Regulation Authority, *Transition in thinking: The impact of climate change on the UK banking sector* (September 2018), at 4.

[264] See *Principles for Responsible Investing*, 'Signatories' commitment'; Asia Investor Group on Climate Change, 'Integrating Climate Change into Investment Strategy: A Guide for Investors', https://www.aigcc.net/wp-content/uploads/2017/12/AIGCC-CC-Guide-Design-Final.pdf, at 6; European Commission, 'Action Plan: Financing Sustainable Growth', *COM(2018) 97* (8 March 2018), at 8.

[265] Reserve Bank of India, *Annual Report 2019-20* (25 August 2020), at 29. See also, Ashish Fernandes, 'Is India Prepared to Tackle Looming Economic Risks From Climate Change?', *The Wire* (12 February 2021).

exposed, according to some estimates, to risk of extreme weather events to the extent of $84.4 billion.[266] This makes it imperative for the boards of banks to pay adequate attention to climate risk.

The RBI's framework for corporate governance requires directors of banks to bear special skills, including in relation to risk management.[267] Moreover, the RBI has long considered risk management to be essential for banks, and prescribed a framework much before it became more universally accepted in other sectors.[268] Such an outlook would require bank directors to possess greater awareness of climate risk and deal with it, especially since the regulator as well as other bodies have already highlighted the significance of such risk to the Indian banking sector.

Going forward, the corporate governance outlook for banks is likely to undergo sea change. The RBI has issued a discussion paper, which seeks to provide granular detail as to the roles and duties on bank boards.[269] When enacted, the proposed norms will impose specific duties of care and of loyalty on bank directors.[270] Among other things, bank boards will also be required to step up their act in relation to risk management, thereby including the treatment of climate risk.

5.1.2 Insurance companies

The insurance sector bears exposure to climate changes, especially to physical risks, thereby highlighting the concern to insurance company directors.[271] The Insurance Regulatory and Development Authority of India ('IRDAI') has issued specific corporate governance norms for insurers in India.[272] They supplement the duties of directors imposed by the Companies Act and have in fact been updated to keep pace with the legislation.[273]

The IRDA governance norms stipulate that directors bear ultimate responsibility for governance matters involving insurers. They owe a duty to seek information from management, as may be necessary for them to discharge their role.[274] Although directors may delegate their functions to board committees, they remain ultimately responsible for decisions. Directors' duties are measured against the touchstone of stakeholder interests, especially policyholders.[275]

Similar to banks, risk management takes on a key role in insurance companies as well, with all insurers required to constitute risk management committees.[276] The board's report must contain details regarding the risk management architecture of the company.[277] Such measures will help 'regulate the risk appetite and

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266 'Extreme weather puts $84 billion at risk at India's top banks: Report', *The Mint* (3 March 2021); Gaurang Raghuvanshi, 'India banks need to account for climate risk with $84B at stake, warns nonprofit', *S&P Global* (7 March 2021).

267 Reserve Bank of India, 'Special knowledge or practical experience useful to banking companies', *RBI/2016-17/152* (24 November 2016).

268 Reserve Bank of India, 'Guidance Notes on Management of Credit Risk and Market Risk', *DBOD. No. BP. 520 /21.04.103/2002-03* (12 October 2002).

269 Reserve Bank of India, Discussion paper on Governance in Commercial Banks in India' (June 2020).

270 Ibid.

271 Carney, above 260, at 7.

272 Insurance Regulatory and Development Authority of India, 'Guidelines for Corporate Governance for insurers in India', *IRDA/F&A/GDL/CG/100/05/2016* (18 May 2016).

273 Ibid, at paragraph 1.2.

274 Ibid, at paragraph 5.2.

275 Ibid.

276 Ibid, at paragraph 7.3

277 Ibid, at paragraph 9.

risk profile of the company' and 'enable identification and measurement of significant risks to which the company is exposed'.[278]

The governance framework for insurers places considerable onus on directors in the context of climate change. It is a key risk that directors must not only assess carefully and bear responsibility for, but in dealing with climate risk, they must act in the interests of the broader set of stakeholders involved in the insurance business, by also shining the spotlight on policyholders.

5.1.3 Asset management funds

Climate risk is an important concern for asset management funds as they look towards maintaining a sustainable portfolio.[279] This has driven funds to adopt an ESG theme, which has become popular in India as well.[280] While this applies to asset management concerns such as mutual funds and pension funds,[281] other alternative investment funds ('AIFs') may also prove to treat climate change as an opportunity in operating as enabling vehicles for investments in green energy.[282] In this context, this sub-part looks at three types of asset management funds in India. It analyses the regulations relating to mutual funds in some detail, and briefly mentions the other two, being pension funds and AIFs.

Mutual funds in India are established in the form of trusts to raise monies from the public through issue of units, which are in turn invested in securities or other prescribed assets or instruments.[283] Since a mutual fund can only avail of the trust structure, it is common to have a company being the trustee rather than individuals.[284] Hence, the issue at hand pertains the duties and liabilities of the directors of the trustee company. Interestingly, where the trustee is a company, the regulations state that they shall be applicable to such directors as if they were individual trustees.[285] Not only does this foist all trustee obligations under the regulations on to the directors, but it also expands the scope of the persons to whom the directors owe their duties. Under this dispensation, the directors of the trustee company owe their duties directly to the beneficiaries (being the unitholders) and not merely to the trustee company.[286]

Accordingly, as trustees, the directors will be accountable for, and be the custodian of, the funds of the mutual fund schemes, which they will hold in trust for the benefit of the unitholders.[287] They must also ensure that the 'trust property is protected'.[288] From an operational perspective, the operation of the mutual fund and the selection of the portfolio of securities must be made 'made in the interests of all classes of

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278 Ibid, Annexure 1, paragraph 5(a).

279 Harsha Jethmalani, 'Covid was a booster shot for ESG theme as funds saw high inflows', *The Mint* (6 January 2021).

280 Ibid.

281 Aditya Agarwal, 'Is sustainable investing a fad or a new trend in India MF industry?', *The Economic Times* (11 March 2021).

282 Divjot Singh, Dhruba Purkayashtha and Gireesh Shrimali, 'From Banks to Capital Markets: Alternative Investment Funds as a Potential Pathway for Refinancing Clean Energy Debt in India', *A CPI Design Case Study for the U.S. – India Catalytic Solar Finance Program* (July 2019).

283 SEBI (Mutual Funds) Regulations, 1996, reg 2(q).

284 This is so that the shareholders and directors of the trustee company can take advantage of the separate legal personality and thereby limit their liability.

285 SEBI (Mutual Funds) Regulations, 1996, reg 2(y), Explanation.

286 The Calcutta High Court also clarified this in *ITC Limited v JP Morgan Mutual Fund India Private Limited*, 2018 SCC OnLine Cal 5730, at [36].

287 SEBI (Mutual Funds) Regulations, 1996, reg 18(12).

288 SEBI (Mutual Funds) Regulations, 1996, reg 18(25)(A)(iii).

unitholders of the scheme'.[289] Allied with this is the obligation of trustees to avoid conflicts of interest.[290] Apart from the duties of loyalty, directors of the trustee company must discharge their competence duties by rendering 'at all times high standards of services, exercise due diligence, ensure proper care and exercise independent professional judgment'.[291]

These duties have also been the subject matter of discussion in *ITC Limited v JP Morgan Mutual Fund India Private Limited*,[292] wherein the Calcutta High Court refused to strike out a claim brought by a unitholder against directors of a trustee company for failure to advise a unitholder on the timing of exit from its investments, as a result of which the unitholder suffered losses. The Court also noted that duties of directors of a mutual fund trustee company were not limited to section 166 of the Companies Act, and observed:

> Any undertaking of a responsibility, whether of person, property or the safe-keeping of another, would imply an entrustment of a duty to take care and to ensure that a sense of security is inseparable to the entrustment. Hence, a failure to ensure that due care is taken to protect that which another has handed over in trust, would constitute breach of the obligation.

Implicit in this overview of duties is a statement that directors have a duty to provide for the long-term interest of the unitholders, where they ought to consider issues of sustainability and the more specific climate risk. This is regardless of their own interest or outlook on the matter. The beneficiaries of these duties are wider than in the Companies Act, given that they are owed directly to the unitholders, who could make a claim directly against the directors, as in *ITC Limited*.[293] Moreover, in interpreting these provisions and determining the scope of the duties, it is necessary to keep in view the rapidly increasing prominence of ESG investing and the greater focus on sustainability.

Somewhat similar obligations apply to the board of trustees of the National Pension System Trust, which holds assets of the subscribers to the scheme of a pension fund for their benefit.[294] When it comes to AIFs, they can be established as trusts, companies or limited partnerships,[295] although most AIFs in India use the trust structure. The SEBI regulations on AIFs contains some duties on the part of the fund, sponsor and manager, including dealing with conflicts of interest and enhancing transparency.[296] At the same time, it is necessary to note that the regulations governing pension funds and AIFs are sparse in their treatment of directors' duties, as compared to mutual funds.

5.2 Shareholder stewardship regime

Most of the financial institutions referred to above make significant investments in other companies in accordance with guidelines set out by their respective regulators. They do so for the benefit of the beneficiaries.[297] This requires them to shoulder their responsibilities towards their beneficiaries by actively monitoring the investments they make and by engaging with the investee companies. The global approach

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289 SEBI (Mutual Funds) Regulations, 1996, Fifth Schedule, Part A, clause (1).

290 SEBI (Mutual Funds) Regulations, 1996, Fifth Schedule, Part A, clause (4).

291 SEBI (Mutual Funds) Regulations, 1996, Fifth Schedule, Part A, clause (4). This is subject to the caveat, however, that the directors 'shall not be held liable for acts done in good faith if they have exercised adequate due diligence honestly.' SEBI (Mutual Funds) Regulations, 1996, reg 18(26).

292 Above n 286.

293 Ibid.

294 See Pension Fund Regulatory and Development Authority Act, 2013, s 2(j); Pension Fund Regulatory and Development Authority (National Pension System Trust) Regulations 2015.

295 Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012, reg 2(b).

296 Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012, regs 21, 22.

297 Insurance companies make and hold investments for the benefit of policyholders, pension funds for subscribers, and mutual funds and AIFs for their unitholders.

of imposing stewardship obligations on such investors has taken root in India as well. The concept of stewardship guides directors of the investing firms in discharging the fiduciary duties they owe under the special legislation discussed herein.

India has a fragmented framework for stewardship, with three different regulators having issued stewardship codes that their respective investment firms must adhere to,[298] but there is a substantial level of commonality among their content. The stewardship codes are clear in that they recognise the need for investment firms to enhance corporate governance in their investee companies with a view to protecting the wealth of the beneficiaries of the investment firms. This is entirely consistent with the fiduciary duties of the boards of directors of such firms. The obligation of investment firms to monitor and engage with investee companies span various matters, including dealing with risk and, in particular, ESG risk (as well as opportunities), for which they must device a policy and publicly disclose it.[299] The stewardship codes also expressly identify ESG risk as one of the circumstances that justify, and even necessitate, intervention by investment firms in their portfolio companies.[300]

This would require the boards of insurance companies, pension funds, mutual funds and AIFs to monitor and engage with their investee companies on matters of climate risk. This is particularly so given the rising popularity of ESG investing in the Indian context. As yet, there is less clarity as to the legal enforceability of the stewardship codes, and whether their breach by investment firms and directors could invite regulatory actions from the respective regulators or other forms of liability.[301] However, the obligations of investment firms in the stewardship codes will certainly go a long way towards guiding the determination of liability of directors of the asset management firms for failure to monitor or engage with climate risk, if the beneficiaries of such firms were to bring a claim for breach of duties against the directors.

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298 IRDAI, 'Revised Guidelines on Stewardship Code for Insurers in India', *IRDAI/F&A/GDL/CPM/045/02/2020* (7 February 2020) (for insurers); PFRDA, 'Common Stewardship Code', *PFRDA/2018/01/PF/01* (4 May 2018); SEBI, 'Stewardship Code for all Mutual Funds and all categories of AIFs, in relation to their investment in listed equities', *CIR/CFD/CMD1/168/2019* (24 December 2019).

299 Ibid, Principles 1, 3.

300 Ibid, Principle 4.

301 Umakanth Varottil, 'Shareholder Stewardship in India: The Desiderata', *NUS Law Working Paper No. 2020/005* (February 2020), at 21-24.

6. Establishing liability

6.1 Evidentiary requirements

In a claim for alleged breach of directors' duties, a plaintiff would have to establish that (i) there was a breach of duty by the director, (ii) the loss caused to the plaintiff was foreseeable, and (iii) the director's breach caused such a loss. In order to answer the question of whether a breach has occurred, it is necessary to refer to the interpretation of the statutory requirements or to the ascertainment of common law as previously discussed.[302]

When it comes to foreseeability, Indian courts have laid down relevant jurisprudence in the context of broader negligence cases involving breaches of duty of care either under statute or under common law. The foreseeability of a risk is adjudged with reference to the available body of knowledge at the time of the negligence.[303] Juxtaposing this to climate risk, it would be difficult to argue the lack of foreseeability at a broader level given the increasing information regarding the adverse effects of climate change as well as the recommendations of regulators and third parties such as TCFD regarding its impact on the financial status of companies who may be vulnerable either directly or indirectly. Although the degree and specificity of risk may vary from company to company, directors would be hard-pressed to ignore climate risk altogether on the ground that it is not foreseeable.

The Indian Supreme Court has also clarified that where duties are imposed by statute, a mere 'breach of the statutory duty would be proof enough of negligence' and that a wrongdoer cannot 'argue that the harm was not foreseeable, since "the very object of the legislation is to put that particular precaution beyond controversy".'[304] Such an approach considerably reduces the bar for plaintiffs making negligence claims for breaches of statutory duty. Separately,[305] the Court has rationalised such an approach in the environmental context by focusing on the practical considerations regarding foreseeability. It noted that an enterprise carrying on hazardous activity 'alone has the resource to discover and guard against hazards or dangers' and any person who is affected by such activity faces practical difficulties in establishing that the losses suffered was foreseeable by the enterprise.[306] Since, as elaborated in this paper, the duty of directors to identify and deal with climate risk is one that is statutorily imposed (in addition to its applicability under common law), plaintiffs could seek to take advantage of the more lenient burden imposed by the Court regarding foreseeability for statutory breaches of duties.[307]

The final factor relates to causation whereby the breach of duty by the directors must cause the damage.[308] Plaintiffs may find it difficult to establish causation in the context of climate risk 'due to the disparate nature of GHG emissions',[309] and the law in this area is said to have 'fallen behind scientific progress in the context

302 See Parts 2 and 3.

303 *V. Krishnakumar v State of Tamil Nadu*, (2015) 9 SCC 388, at [11]. See also, *Vadodara Municipal Corporation v Purushottam V Murjani*, (2014) 16 SCC 14, at [15].

304 *Sushil Ansal v State, Through Central Bureau of Investigation*, (2014) 6 SCC 173.

305 *Indian Council for Enviro-Legal Action*, above n 57.

306 Ibid, at [65].

307 Benjamin, 'The Road to Paris Runs Through Delaware', above n 4, at 333, noting that '[i]mprovements in attribution science are proving foreseeability, which is key to establishing a tort-based duty of care'. See also, Rajamani and Ghosh, above n 56, at 169, observing that '[a]lthough the damage suffered by the plaintiff as a result of climate change … may have several contributory factors, the relaxed causal rules in operation may allow the claim of the plaintiff to proceed'.

308 *Rajkot Municipal Corporation v Manjuben Jayantilal Nakum*, (1997) 9 SCC 552, at [15]

309 Benjamin, 'The Road to Paris Runs Through Delaware', above n 4, at 327.

of corporate climate emissions and, therefore, corporate accountability'.[310] Courts in other jurisdictions are cognisant of the difficulties of a 'but for' causation approach when establishing a claim for breach of fiduciary duties and have adopted more pragmatic standards.[311]

6.2 Possible defences

6.2.1 Business judgment rule

Unlike other jurisdictions in the Commonwealth,[312] India does not have an express business judgment rule. The superior courts in the country have also not commented on the extent to which they might refrain from intervening in commercial decisions taken by directors in good faith. There are some recent references to the business judgment rule in decisions of the National Company Law Tribunal ('NCLT').[313] The NCLT has noted that merely because decisions of the directors may not be palatable to the shareholders, they cannot seek refuge in courts.[314] Ultimately, courts would only look at whether the directors acted in good faith and with fairness and probity. If so, regardless of the effect the decision has on the company, courts would test this against 'the fulcrum of "business judgment rule"'.[315] Courts have recognised that directors' decision making process is a complex one that requires them to take into account a number of factors.[316]

In light of the nebulous position in India surrounding the application of a concept similar to the business judgment rule, there is no certainty that a court will refrain from intervening in a business decision taken by the board of a company in relation to climate risk in case that were to be challenged on the ground of breach of directors' duties. Much would depend on the facts of the case and the gravity of the directors' conduct.

6.2.2 Safe harbour for certain non-executive directors

The duty and liability provisions are softened by certain mitigating factors that operate in favour of directors. The Companies Act contains a safe harbour provision for independent directors. In order to balance the extensive nature of the duties and liabilities imposed on them, the legislation seeks to limit their liability to two sets of directors (referred to hereinafter as 'qualifying directors') only to matters directly relatable to them. Qualifying directors are: (i) independent directors; and (ii) non-executive directors who are neither promoters (being controlling shareholders) nor key managerial personnel of the company.

Qualifying directors are liable 'only in respect of such acts of omission or commission by a company which had occurred with [their] knowledge, attributable through board processes, and with [their] consent or connivance or where [they] had not acted diligently.'[317] This is to insulate qualifying directors from potential liability for acts which result from no fault of their own. While such a provision for limitation of liability is useful, much would depend upon the manner in which courts interpret it based on the specific facts and circumstances of individual cases. In enhancing the operability of the safe harbour provision, the MCA has

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[310] Ibid, at 331.
[311] See, *Sim Poh Ping v Winsta Holding Pte Ltd*, [2020] SGCA 35 (Singapore).
[312] Corporations Act, s 180(2) (Australia); Companies Act 71 of 2008, s 76(4) (South Africa).
[313] *Fidaali Moiz Mithiborwala v STMPL Enterprises Pvt Ltd*, 2017 SCC OnlineNCLT 960; *Cyrus Investments Pvt Ltd v Tata Sons Ltd*, 2018 SCC OnlineNCLT 24460.
[314] *Fidaali Moiz Mithiborwala*, above n 313, at [34].
[315] Ibid.
[316] *Cyrus Investments Pvt Ltd*, above n 313, at [442], [569].
[317] Companies Act, 2013, s 149(12).

issued a clarification suggesting that the nature of the default and the role of the specific directors must be borne in mind when civil or criminal proceedings are initiated against the qualifying directors.[318]

In order to ascertain the scope of this provision, it is useful to dissect the operative expressions: (i) 'knowledge', (ii) 'attributable through board processes', (iii) 'consent or connivance', and (iv) 'not acted diligently'. *First*, it is useful to ask when a matter is within the 'knowledge' of a qualifying director. Questions may arise whether 'knowledge' in this regard would refer to actual knowledge or constructive knowledge. In response to this question, it might be eminently reasonable to include both actual and constructive knowledge within the provision. As discussed earlier,[319] in the climate context, a qualifying director would have an obligation to monitor the wider risk to the company from climate change, and to make more specific enquiries if the director becomes aware of any risk (i.e., 'red flag').

Second, while the question of 'knowledge' (actual or constructive) is not altogether novel and arises in various areas of corporate law, the extension of knowledge to that 'attributable through board processes' makes the concept wider. This would mean that a director would be deemed to have knowledge of all matters that have been taken up at the board level. For example, if board papers are delivered to a director along with the agenda for a meeting that contain details regarding ESG factors relating to the company, the director could be imputed with knowledge regarding the contents of those papers. Similarly, the director would be deemed to have knowledge of all matters discussed at a board meeting. In order to invoke the safe harbour provision, directors may be required to take additional practical steps. For example, in case of a discussion regarding climate change, directors must ensure that any questions raised by them in a board meeting or any dissent expressed is properly recorded in the minutes of the meeting so as to provide prima facie evidence of proceedings before the board in case the role of the director were to be called into question in a liability suit.

Third, 'consent' or 'connivance' is somewhat more straightforward as it requires higher level of mental state on the part of the directors, who are involved more positively in the act or omission. This could arise, for instance, when directors deliberately ignore climate risk owing to a conflict of interest or their own political leaning.

Finally, the element of not acting diligently is linked to the duty of care, skill and diligence whereby directors must comply with a certain minimum standard, and is an alternative to an action taking place with the directors' consent or connivance. Hence, directors can no longer ignore developments relating to climate change, as they would be subject to strict scrutiny while considering whether the directors have complied with the standard of diligence. This discussion indicates that, when viewed in the context of climate risk, the safe harbour provisions for qualifying directors are rather circumscribed.

6.2.3 Power of the court to grant relief

Section 463 of the Companies Act confers powers on the court to grant relief to directors in certain cases. If a proceeding is initiated against a director 'for negligence, default, breach of duty, misfeasance, or breach of trust', and it appears to the court dealing with the case that the director 'has acted honestly and reasonably, and that having regard to all the circumstances of the case [the director] ought to be fairly excused', the court can relieve such director of liability. Section 463(2) also allows a director to pre-emptively approach a court for such relief in case the director has a reasonable apprehension that proceedings may be initiated for breach of duties.

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[318] Ministry of Corporate Affairs, Government of India, 'Clarification on prosecutions filed or internal adjudication proceedings initiated against Independent Directors, non-promoters and non-KMP non-executive directors – reg.', *General Circular No. 1/2020* (2 March 2020).

[319] See Part 3.3.2.

In interpreting these provisions, courts have retained considerable discretion in determining whether directors are entitled to relief based on the facts of a given case.[320] However, directors bear the burden of showing that they satisfy the requirements enshrined in the statutory provision for relief. Merely because certain directors are in a non-executive capacity and do not take part in the day-to-day management of the company, they cannot automatically seek the benefit of the relief.[321] That 'would depend upon the circumstances of each case and no rigid formula can be laid down'.[322] Moreover, courts are slow to grant relief in case where directors have violated the mandatory provisions of statute.[323]

In the climate risk context, an absolute disinclination of directors to assess and deal with risks pertaining to climate change is unlikely to satisfy the test that they acted 'honestly and reasonably' for the purpose of obtaining a fair excuse. Moreover, when interpreting the terms 'honestly' and 'reasonably' for the purposes of section 463 to judge the conduct of directors, regard must be had to the considerable developments in climate science and the increasing awareness and discourse surrounding the risks of climate change. However, despite directors' required efforts, if climate risk were to materialise in a not altogether expected form, the directors (especially those in a non-executive capacity) could seek to be excused. Ultimately, it would be a fact-based determination by the courts.

6.3 Personal liability and availability of directors' and officers' ('D&O') insurance

6.3.1 Corporate indemnity

It may be possible for directors to obtain indemnities from the company, either in the articles of association or by agreement. Under the Companies Act, 1956, companies were constrained from providing such indemnities, as they were not permitted to indemnify directors for negligence, default, breach of duty and the like.[324] The Companies Act, 2013, however, does not contain such a restriction, which may confer greater flexibility on directors to seek indemnities from the company in case they have to meet any liabilities, particularly if no fault can be attached to the directors' conduct. While such indemnities may be possible in private companies or unlisted public companies, they are likely to be subject to greater scrutiny in public listed companies.

6.3.2 D&O insurance

Globally, potential securities claims arising out of climate change (physical risk or transition risk) are driving companies to take on D&O insurance policies, thereby leading to substantially increased premiums.[325] There are also some issues relating to D&O liability insurance coverage that are emerging in the context of climate change litigation.[326] Although climate change litigation is relatively nascent in the Indian context, it is a factor to be considered by companies while devising their D&O insurance policies.

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320 *Govind Narayan Kakade*, above n 163, at [28].

321 *Jagjivan Hiralal Doshi v Registrar of Companies, Maharashtra*, 1988 SCC OnLine Bom 234, at [21].

322 Ibid.

323 *Farouk Irani v Registrar of Companies*, 2008 SCC OnLine Mad 435, at [7].

324 Companies Act, 1956, s 201.

325 Sheel Chaudhuri and Catherine Tyndale, 'At the crest of climate change's impact on D&O claims', *Clyde & Co: Market Insight* (6 February 2020).

326 Francis Kean, 'Climate Change Litigation Threats to Directors and Officers', *D&O Diary* (21 January 2020).

D&O insurance has already become prevalent in Indian companies, especially among the larger ones, and is only likely to grow in view of the expansive liability regime under the Companies Act.[327] In fact, the legislation implicitly recognises the ability of the company to incur the premium expense in order to obtain D&O insurance policies.[328] Although D&O insurance is not required as a matter of law under companies' legislation, since 2018 SEBI has required the top 500 listed companies by market capitalisation to take on D&O insurance 'for all their independent directors of such quantum and for such risks as may be determined by [their] board of directors'.[329]

Such a mandate suffers from some limitations. *First*, it applies only to independent directors. *Second*, it leaves decisions regarding the extent and quantum of coverage to the boards of the company to decide. Hence, concerns have been raised that 'comprehensive coverage and adequacy of limits remains an issue for the Indian market.'[330] While the demand for D&O insurance in the Indian market has been on the rise, it has not been commensurate with the increasing exposure to liability due to regulatory changes and market developments.[331] Finally, despite a growth in D&O insurance policies, several challenges continue to afflict their widespread use to be able to fully protect the liabilities of directors on Indian companies. Hence, it remains to be seen whether, and the extent to which, directors can seek refuge under D&O insurance policies for breach of their duties to consider and deal with climate risk as required of them under law.

327 Richa Shukla, Nilam Sharma and Joel Pridmore, 'A Focus on Directors' and Officers' Risks in India', *D&O Diary* (16 January 2017).

328 Companies Act, 2013, s 197(13).

329 SEBI LODR Regulations, reg 25(10).

330 Anup Dhingra, 'D&O Insurance: An Indian Perspective', *Risk Management* (27 April 2020).

331 Ibid.

7. Procedural considerations

In the event of breach of directors' duties to account for climate risk, several enforcement mechanisms could be invoked. One is private enforcement whereby the victims of wrongdoing could bring legal action against directors before the civil courts seeking to recover damages or to obtain injunctive relief.[332] The other is public enforcement by which the government or a regulatory authority brings legal action against the errant directors by way of civil or criminal proceedings.[333] In that sense, while private enforcement is focused on redressing the victims, public enforcement is aimed at deterring the wrongdoers.[334] Both mechanisms are available to victims seeking to initiate legal actions against directors of Indian companies for breach of directors' duties, each of which is considered separately herein.

7.1 Private Enforcement

Within private enforcement, it is possible to initiate legal claims in various forms. The principal factor for determining the nature of the claim relates to who suffers the harm arising from a breach of directors' duties to consider and deal with climate risk. Unlike section 170(1) of the UK Companies Act 2006, there is no specific provision in India clarifying that directors owe their duty to the company and not to the shareholders.[335] Nevertheless, it is a well-established principle of Indian company law that the duties of directors under section 166 are owed to the company.[336] This has also been the accepted judicial position in common law. As India's Supreme Court has noted:[337]

> A Director of a company indisputably stands in a fiduciary capacity vis-à-vis the company. He must act for the paramount interest of the company. He does not have any statutory duty to perform so far as individual shareholders are concerned, subject of course to any special arrangement which may be entered into or a special circumstance that may arise in a particular case.

In such a scenario, it is the company that can bring a claim against errant directors, which power is vested in the board of directors.[338] If the board fails to bring an action, shareholders are entitled to bring a derivative action on behalf of the company, with the benefit of such an action flowing to the company and not to the shareholders. Moreover, a breach of directors' duties owed to the company might, in certain circumstances, constitute oppression, prejudice or mismanagement that provides the shareholders with the ability to bring a claim directly (rather than through the company). Finally, Indian company law also provides a mechanism for class actions, which shareholders can bring against the company as well as directors and other wrongdoers. The remainder of this sub-part engages in an analysis of the three types of actions, being (i) derivative actions, (ii) direct actions in the form of oppression, prejudice and mismanagement actions, and (iii) class actions, all in the context of a breach of directors' duties to account for climate risk.

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332 Vikramaditya Khanna and Umakanth Varottil, 'The rarity of derivative actions in India: reasons and consequences', in Dan W. Puchniak, Harald Baum, and Michael Ewing- Chow (eds.), *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge University Press, 2012), at 372.

333 Ibid, at 371-372.

334 Umakanth Varottil, 'India: The Efficacy of India's Legal System as a Tool for Investor Protection', in Pierre-Henri Conac and Martin Gelter (eds.), *Global Securities Litigation and Enforcement* (Cambridge University Press, 2018), at 814-815.

335 Naniwadekar and Varottil, above n 110, at 105-106.

336 Ibid, at 108.

337 *Sangramsinh P. Gaekwad*, above n 96, at [42]. See also, *Tristar Consultants*, above n 95, at [20]-[23].

338 Companies Act, 2013, s 179.

Before that, it is worth noting that as a precursor to, or as a part of, a legal action for breach of directors' duties in the context of climate risk, a claimant may seek to inspect the books and records of a company. While there are no threshold requirements for shareholders to obtain inspection in India, the scope of records that they can inspect is fairly limited, and so is their usage.[339]

7.1.1 Derivative actions

Nature of the claim: The Companies Act does not provide a statutory mechanism for derivative action by shareholders of Indian companies. Hence, courts rely on English common law to develop the law relating to derivative action. They tend to rely on the principles in *Foss v Harbottle*[340] and its exceptions. Derivative actions are premised on the 'fraud on the minority' exception to the rule in *Foss*. In this exception, the term 'fraud' is not used with its technical connotation but in a wider equitable sense.[341] It involves the appropriation of benefit by the directors at the expense of the company.[342] Shareholders bringing a derivative action must demonstrate that the directors obtained some benefit from the act in question, and also that such benefit was obtained at the expense of the company or that some loss or detriment was caused to the company.

Similarly, under common law, mere negligence of directors does not provide the predicate for minority shareholders to bring a derivative action, unless the directors also benefited from such negligence.[343] Indian courts have been somewhat cautious in defining the scope of circumstances where directors can be said to have benefited from their acts. In *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.*,[344] the Supreme Court of India held that if the directors incidentally benefit from an issue of further shares which, it can be shown, is otherwise for the benefit of the company, then such incidental benefit would be overlooked.

In addition, the fraud on the minority exception is available only when the shareholder initiating a derivative action can demonstrate that the wrongdoer is in control of the company.[345] This is because a wrongdoer in control is unlikely to cause the company to bring an action. The determination of whether someone is in control is usually straightforward in most Indian firms (many of which have a controlling group—a business house),[346] but as the number of more widely-held companies increases the determination of control has become more fraught with subjectivity.[347]

In all, Indian courts treat the rule in *Foss v. Harbottle* as sacrosanct and allow exceptions only in limited circumstances, thereby making it less viable for shareholders to initiate derivative actions against corporate wrongdoers. To that extent, Indian law has not made any significant change to the common law position

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339 Umakanth Varottil & Neha Joshi, 'Shareholder Inspection Rights in India: Restricted Scope and Diminished Effect' (2021) (unpublished manuscript on file with the author).

340 (1843) 2 Hare 461. The case is noted for laying down the 'proper plaintiff rule' by which when an injury is caused to the company, it is only the company that can initiate an action against the wrongdoer.

341 Reisberg, Arad, *Derivative Actions and Corporate Governance*, (New York: Oxford University Press, 2007) at 90

342 Margaret Chew, *Minority Shareholders' Rights and Remedies*, 2nd ed (Singapore: LexisNexis, 2007) at 90.

343 Reisberg, above n. 341, at 91.

344 Above n 112, at [111].

345 Reisberg, above n. 341, at 92. *See also BSN (UK) Ltd. v. Janardan Mohandas Rajan Pillai*, [1996] 3 Comp. Cas. 371 (Bom); *Spectrum Technologies USA Inc. v. Spectrum Power Generation Company Ltd.*, MANU/DE/1147/2001['Spectrum'].

346 Under common law the plaintiff must show that the wrongdoer either held a majority of the voting power in the company or that the wrongdoer exercised *de facto* control. See Chew, above n 342, at 99-102.

347 Reisberg, above n. 341, at 92. Indian courts have not yet opined on the meaning of 'control' in derivative actions, but they have addressed 'control' in the context of other regulations: *ArcelorMittal India Private Limited v Satish Kumar Gupta*, (2019) 2 SCC 1; *Future Retail Ltd*, above 95.

while implementing derivative actions. In the climate risk context, the requirement of 'fraud on the minority' limits the types of instances in which derivative actions can be brought against directors. This is likely to include instances where directors breach their duties of trust and loyalty. Breaches merely of the duties of competence are unlikely to give rise to a derivative claim unless directors have benefited from the same.

Locus standi: Any shareholder is entitled to bring a derivative action. There is no minimum shareholding threshold under Indian law. This makes it easy for shareholders to initiate a derivative action. Another possible suggestion, which could perhaps be made if one were anxious to provide some remedy to stakeholders,[348] would be for the initiation of a derivative action against breaching directors to challenge an action that is against stakeholder interests. A threshold question is: can stakeholders bring a derivative action on behalf of the company against errant directors? The answer to this question is rather straightforward in that the law recognizes that only shareholders can bring derivative actions on behalf of the company against directors who have breached their duties.

A related question is whether a person holding shares in the company is entitled to espouse the cause of a non-shareholder constituency, for instance, for the benefit of the environment.[349] In other words, does a shareholder have the standing to make claims when its own interests in that capacity are unaffected? A derivative action by the shareholder to enforce a duty of directors to consider stakeholder interests (e.g. protection of the environment) is hard to justify under any of the existing exceptions to the rule in *Foss*,[350] unless analogous exceptions are created by legislation or case law.

Procedural considerations: Plaintiff shareholders must clear certain procedural hurdles before they can bring a derivative action. One of the key constraints is the 'clean hands' doctrine, by which plaintiff shareholders are able to bring an action on behalf of the company only if it is for the benefit of the company and not for an ulterior purpose or for personal considerations.[351] Indian courts have also implicitly accepted the 'clean hands' doctrine.[352] However, the doctrine has given rise to tremendous inconveniences in practice, particularly due to its hazy contours.

Furthermore, derivative actions are often brought as representative suits under order I, rule 8, of the Civil Procedure Code, 1908, which requires that the permission of the court be obtained before the action can proceed.[353] In such cases, the company is included as a pro forma defendant in the suit. The treatment of derivative actions as representative suits has caused much confusion. In a representative action, the plaintiff represents the interests of other shareholders, while in a derivative action the plaintiff represents the interests of the company. This oddity has caused plaintiff shareholders to bring derivative actions and direct actions interchangeably, thereby causing some consternation for the courts.[354]

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348 As seen in Part 2.2, the protection of the environment is a specific duty imposed on directors. Companies Act, 2013, s 166(2).

349 Ibid.

350 Above n 340.

351 *Barrett v Duckett*, [1995] B.C.C. 362; *Nurcombe v Nurcombe*, [1985] 1 WLR 370.

352 *M. Sreenivasulu Reddy v. Kishore R. Chhabria*, 1999 SCC OnLine Bom 902; *Incable Net (Andhra) Limited v. Apaksh Broadband Limited*, 2007 SCC OnLine CLB 68; *Darius Rutton Kavasmaneck v Gharda Chemicals Limited*, 2014 SCC OnLine Bom 1851, at [50], remarking that 'it is trite that anyone coming to Court with unclean hands should be shown the door. The Courts have to be very strict on this and should deal with such people with an iron hand.'

353 Civil Procedure Code, 1908, order I, rule 8, providing that '[w]here there are numerous persons having the same interest in one suit, … one or more of such persons may … sue … on behalf of, or for the benefit of, all persons so interested'.

354 *Jaideep Halwasiya v Rasoi Ltd*, 2008 SCC OnLine Cal 871. See also, Khanna and Varottil, above n 332, at 385.

When it comes to costs, India essentially follows the English rule, where the loser pays the reasonable legal costs of its opponent and itself.[355] Although Indian courts are likely to award reasonable (and not abnormal) costs to the winning party in the litigation, such amounts are likely to be substantial for individual shareholders bringing actions against large corporations if the shareholders are likely to fail in the litigation. In addition to these costs, the presence of often substantial court fees, the impermissibility of a contingency fee system for plaintiff lawyers and the well-known delays in the Indian judicial system would further undermine the incentives of shareholders to bring suits.[356] This is because derivative actions are to be brought before the regular civil courts. The delay in recovery, coupled with the uncertainty of any recovery, would reduce the real value of any expected judgment. Hence, derivative actions are generally few and far between in India.

Remedies: The only civil remedy statutorily prescribed is in section 166(5) of the Companies Act, which provides that any director who is found guilty of making an undue gain or advantage (including to related parties) shall be liable to pay an amount equal to that gain to the company. This represents a codification of the law relating to the remedy of an account for profits, which is a personal remedy against the director.[357] This should be considered alongside section 88 of the Indian Trusts Act, 1882, which provides that a fiduciary such as a director of a company must hold any gains or pecuniary advantage so gained for the benefit of the company. Being in the nature of a constructive trust, this provides a proprietary remedy to the company against the errant directors.[358] In a climate risk context, these statutory remedies are likely to be available only if the directors breached their duties of trust and loyalty, and obtained some gains or pecuniary advantage as a result.

As regards competence duties, in particular where the directors do not make a gain on account of their own negligence, the company may sue the directors for damages, a remedy largely available in common law.[359] Other remedies include injunctive reliefs by seeking to prevent the directors from proceeding with any conduct that may result in a breach of their duty in relation to climate risk.

7.1.2 Oppression, prejudice and mismanagement actions

Nature of the claim: Unlike in a derivative action which has to be brought on behalf of the company, shareholders are able to initiate oppression, prejudice and mismanagement actions as direct claims for personal injury caused to them. Moreover, relief in such actions will be granted to shareholders directly. Oppression, prejudice and mismanagement actions are available under section 241 and 242 of the Companies Act. Section 241 outlines the circumstances in which shareholders can file a petition for relief, and section 242 the circumstances in which the court may grant relief.[360] Each of these is dealt with sequentially.

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355 Civil Procedure Code 1908, s 35(2). Furthermore, courts have the power to award compensatory costs in respect of false or vexatious claims or defences. Civil Procedure Code 1908, s 35-A. It must be noted, however, that maximum award of compensatory costs is Rs. 3000, which is immaterial for any corporate litigation.

356 See, Jayanth Krishnan, 'Globetrotting Law Firms', (2010) 23 *Georgetown Journal of Legal Ethics* 57; John Armour and Priya Lele, 'Law, Finance, and Politics: The Case of India', (2009) 43 *Law and Society Review* 491.

357 Naniwadekar, above n 89.

358 Ibid.

359 This would depend upon the yet largely untested question in India as to whether common law rights and remedies continue to be available to the company following the codification of directors' duties in the Companies Act. See Part 1.3.

360 Unless otherwise specified, references to 'courts' in this Part also include the NCLT and the National Company Law Appellate Tribunal ('NCLAT'), as appropriate.

Section 241(1) of the Companies Act governs the substantive limb, and provides:

> **Application to Tribunal for relief in cases of oppression, etc.**—(1) Any member of a company who complains that –
>
> (a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or
>
> (b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, … or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members,
>
> may apply to the Tribunal … for an order …

Viewed from the point of view of offending conduct perpetrated against the petitioning shareholder, sub-section (a) deals with the concepts of 'oppression' and 'prejudice', while sub-section (b) deals with 'mismanagement'. Note that section 241 uses the three expressions disjunctively such that, in order for a petitioning shareholder to be successful, only one of the three offending types of conduct needs to be established. Hence, it is appropriate to consider each one of them separately.

As regards the first conduct of oppression, the statute does not define the term, and hence courts have taken on the role of expounding the principles for determining the concept, and have done so contextually, based on the facts and circumstances of each case.[361] Courts have found that mere illegality on the part of the directors or controlling shareholders would not amount to oppression,[362] and the conduct needs to be 'harsh, burdensome and wrong'.[363] This represents a high bar, and a mere breach by the directors of their duties of trust and loyalty or of competence would not be sufficient to constitute oppression, unless other factors are present.

As for the second conduct of prejudice, section 241 includes circumstances where the conduct of the wrongdoers is prejudicial either to the shareholders or to the company. In other words, it is sufficient for the petitioning shareholders to establish that the wrongful conduct causes prejudice to the company, even though the shareholders may not have suffered the same directly. Although the expression 'prejudice' in the statutory provision has only begun to receive judicial attention,[364] it arguably sets a lower bar for petitioning shareholders as compared with 'oppression'. Directors' conduct that ignores climate risk on an ongoing basis that results not only in a breach of their duty to the company but one that causes prejudice to the company could potentially enable a shareholder to bring an action for prejudice under this provision.

More crucially, section 241(1) can be invoked even if the affairs of the company 'are being conducted in a manner prejudicial to public interest'. This provision is rather wide because it allows for intervention even in matters which go beyond the interests of the company and its shareholders. Its scope covers external stakeholders as well. Read together with the pluralistic approach adopted by section 166(2) of the Companies Act, the prejudice remedy could extend to scenarios where the directors' actions or omissions result in negative externalities. In the climate context, it is reasonable to argue that the impact that directors' inaction causes to the environment could possibly attract the prejudice remedy.

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361 *Shanti Prasad Jain v. Kalinga Tubes Ltd.*, (1965) 35 Comp. Cas. 351 (SC), at [13]; *Yashovardhan Saboo v. Groz-Beckert Saboo Ltd.*, 1992 SCC OnLine CLB 10, at [56].

362 *Mohanlal Ganpatram v Shri Sayaji Jubilee Cotton and Jute Mills Co Ltd*, 1964 SCC OnLine Guj 66, at [25].

363 *VS Krishnan v Westfort Hi-tech Hospital Ltd*, (2008) 3 SCC 363, at [14].

364 *Tata Consultancy Services*, above n 138.

The third type of conduct, i.e., mismanagement, applies when two conditions are fulfilled. *First*, there must be a material change in the management or control of the company. *Second*, such change must be the reason that the affairs of the company are conducted in a manner that is prejudicial to its interests. Courts have observed that the mismanagement remedy is wider than the oppression remedy.[365] This remedy could be potentially exercised if, due to a change in control or management of the company, the new management disregards climate risk the company is facing, which causes prejudice to its own interests or that of its shareholders.

Even if it is possible to establish one or more of the grounds of oppression, prejudice of mismanagement, a successful claimant needs to satisfy one more condition to obtain relief. Section 242(1)(b) provides that an order may be passed only if the court is satisfied that the facts of the case justify a winding up of the company on just and equitable grounds, but that to wind up the company would unfairly prejudice its shareholders. This is generally permissible only when the company constitutes a 'quasi-partnership'.[366] The available jurisprudence indicates that the notion of quasi-partnership is capable of invocation only if the petitioner can establish an arrangement based on mutual trust and confidence, which exists over and above the legal arrangements between the shareholders and the constitutional documents pertaining to the company.[367] This is generally possible only in small or closely-held companies, but rarely in professionally managed companies or publicly listed companies. Hence, this condition substantially limits the types of companies in which the ignorance of climate risk can result in a dispute that is pursued on the ground of oppression, prejudice or mismanagement. Related to this is the lack of clarity on the extent to which stakeholder interests (such as the protection of the environment) can be espoused in a claim for oppression, prejudice and mismanagement, given that they are remedies primarily meant for shareholders.[368]

Locus standi: Not only can oppression, prejudice and mismanagement be brought exclusively by shareholders, but they must also satisfy certain minimum thresholds. Section 244 of the Companies Act provides that a petition needs be supported by at least 100 shareholders or not less than one-tenth of the total number of its shareholders, whichever is less. Alternatively, it can be supported by such shareholders holding at least one-tenth of the issued share capital of the company. The National Company Law Appellate Tribunal ('NCLAT') has clarified that the 'issued share capital' for this purpose includes preference shares, and is not limited to equity shares. Hence, a shareholder holding more than 10% of the equity shares, but lesser in terms of overall share capital, is incapable of bringing an oppression, prejudice or mismanagement action.[369] However, it is possible for the tribunal to waive the minimum threshold requirements,[370] which it has also recently exercised.[371]

Procedural considerations: Petitions for oppression, prejudice and mismanagement are to be initiated before the NCLT,[372] and not before the regular civil courts. The Companies Act sought to sidestep judicial delays by creating special tribunals to deal with most disputes relating to corporate law and insolvency law, which were previously heard by courts and other adjudicatory bodies. The NCLT operates through 15 benches across

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365 See e.g., *Mohanlal Ganpatram*, above n 362, at [24].

366 The concept of quasi-partnership emanated from English law, which has been accepted under Indian law as well. See, *Ebrahimi v Westbourne Galleries Ltd*, [1973] A.C. 360, at 379; *Hind Overseas Private Limited v Raghunath Prasad Jhunjhunwala*, (1976) 3 SCC 259, at [31].

367 *MSDC Radharamanan v MSD Chandrasekhara Raja*, (2008) 6 SCC 750, at [30].

368 Naniwadekar and Varottil, above n 110, at 110.

369 *Cyrus Investment Pvt Ltd v Tata Sons Ltd*, 2017 SCC OnLine NCLAT 261.

370 Companies Act, 2013, s 244(1) proviso.

371 *Cyrus Investment Pvt Ltd*, above n 369.

372 Companies Act, 2013, s 241(1).

India,[373] and enjoys some flexibility as it is not bound by the provisions of the Civil Procedure Code, 1908, but it is guided by the principles of natural justice and the Companies Act and rules made thereunder.[374] At the same time, it enjoys certain powers of a civil court for the purpose of discharging its functions effectively.[375] The composition of the NCLT consists of a mix of judicial and technical members.[376]

Appeals from orders of the NCLT lie to the NCLAT, which consists of a chairperson and judicial and technical members.[377] Appeals from order of the NCLAT lie to the Supreme Court of India.[378] The advantage of the NCLT, which is a quasi-judicial body, is that is a specialised body solely dealing with disputes relating to corporate and insolvency law, which can not only address issues more efficiently (given the expertise it develops), but it also remains less prone to the delays and other concerns afflicting the regular court system.

Remedies: Once a court decides the question of whether the petitioning shareholder is entitled to relief for oppression, prejudice or mismanagement, it has wide powers to grant relief. The general power to grant relief under section 242(1) of the Companies Act stipulates that the court may use it 'with a view to bringing to an end the matters complained of'. This objective guides the nature of relief granted. Moreover, section 242(2) provides for various types of specific relief that the court may grant, including regulating the future conduct of affairs of the company, purchase of shares by a shareholder or the company, setting aside certain transactions, termination or modification of agreements and appointing or removing directors, among others.

At the outset, the Supreme Court has found that 'the jurisdiction of the Court to grant appropriate relief … indisputably is of wide amplitude',[379] and that '[r]eliefs must be granted having regard to the exigencies of the situation'.[380] However, these seemingly wide powers are circumscribed by the objective of granting relief, which is to put an end to the matters in dispute.[381] The quintessential way of achieving this outcome is to provide for an exit of either the petitioning shareholder or the offending shareholder. Hence, such an exit mechanism would naturally be at the forefront of the types of relief a court may order, and that too even though a wide array of relief options are available to the court under section 242(2). Other forms of relief are generally granted only in an exceptional scenario.

From a climate risk perspective, even if shareholders are successful in establishing a case for relief for oppression, prejudice or mismanagement, the principal remedy they may obtain could be an exit from the company on fair terms. This could aid green investors who may seek a divestment on account of a breach of directors' duties to account for climate risk, but only one that satisfies the tests of oppression, prejudice or mismanagement under section 242(1) of the Companies Act. This might arise from investments made in unlisted or closely-held companies, from which market exit is unlikely to be available. While other measures, such as replacing errant directors are available through private shareholder litigation, the grant of such remedies may be rarer than the use of exit mechanisms 'to bringing to an end the matters complained of'.

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373 National Company Law Tribunal, *National Company Law Tribunal Benches*, https://nclt.gov.in/national-company-law-tribunal-benches.

374 Companies Act, 2013, s 424(1).

375 Companies Act, 2013, s 424(2).

376 Companies Act, 2013, s 408.

377 Companies Act, 2013, ss 421, 410.

378 Companies Act, 2013, s 423.

379 *Sangramsinh P. Gaekwad*, above n 96, at [181].

380 Ibid.

381 *K.R.S. Narayana Iyengar v. T.A. Mani*, 1959 SCC OnLine Mad 134, at [18].

7.1.3 Class Actions

Nature of the claim: Section 245 of the Companies Act provides for a statutory class action mechanism. If shareholders are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its shareholders, they can approach the NCLT by way of a class action. In the context of climate change, all that the petitioning shareholders need to establish is that the breach of directors' duties is one that results in prejudice to the company or to the shareholders. As mentioned in the context oppression, prejudice and mismanagement actions,[382] the term 'prejudice' has only begun to receive judicial exposition in the shareholder remedies context,[383] and may arguably be subject to wide interpretation. Referring to section 245, Professors Fitzpatrick and Thomas note that, by way of the Companies Act, 'India enacted one of the most robust private enforcement regimes for securities fraud violations in the world.'[384] They further observe: 'Compared to private enforcement mechanisms available in much of the world, the [Companies] Act puts India in the vanguard.'[385]

Locus standi: Under section 245(3), where a company has share capital, the class action must be supported by 100 shareholders or five percent of the total shareholders, whichever is less.[386] Alternatively, shareholders holding at least five percent of the total issued share capital in case of an unlisted company, or two percent of the total issued share capital in case of a listed company, may initiate a class action.[387] The minimum shareholding requirement is sacrosanct and, unlike in the case of an oppression, prejudice or mismanagement proceeding,[388] the NCLT does not have the powers to waive the requirement. In addition to shareholders, a class action can also be brought by an investor association.[389]

The class action mechanism is shareholder-oriented, and the interests of other stakeholders are not mentioned. However, can shareholders argue that a class action is nonetheless possible, because the directors have breached a duty that they owed to the company, and this breach is prejudicial to the interests of the company? It is not clear if the class action procedure is intended to agitate the interests of members of a class other than the suing class. Hence, it might be that the class action remedy is limited to shareholders (and depositors), and that they may not be in a position to assuage the rights of other stakeholders in pursuing those actions.[390]

Procedural considerations: Like oppression, prejudice and mismanagement actions, class actions are to be brought before the NCLT, thereby sidestepping the regular court system. In considering whether to permit a class action to continue, the NCLT is required to take a number of factors into consideration, including whether the shareholder is making the application in good faith, whether the shareholder could pursue the claim in its own right rather than through a class action, and also the views of disinterested shareholders.[391] The NCLT may require the publishing of a notice to all shareholders of the company, and possible

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382 See Part 7.1.2.

383 *Tata Consultancy Services*, above n 138.

384 Brian T. Fitzpatrick and Randall S. Thomas, 'The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?', (2020) 40 *Northwestern Journal of International Law and Business* 203, at 205.

385 Ibid, at 201.

386 The National Company Law Tribunal Rules, 2016, r 84(3)(i). Class actions may also be initiated by a requisite number of depositors, but that is outside the scope of this paper.

387 The National Company Law Tribunal Rules, 2016, r 84(3)(ii).

388 See Part 7.1.2.

389 Companies Act, 2013, s 245(10).

390 See Naniwadekar and Varottil, above n 110, at 109.

391 Companies Act, 2013, s 245(4) read with National Company Law Tribunal Rules, 2016, r 85.

consolidation of all similar actions into a single petition.[392] However, it is possible for shareholders of a class to opt out of the proceedings at any time with the permission of the NCLT.[393]

Remedies: The NCLT is empowered to grant a wide range of remedies. Several of them relate to restraining the company from carrying out certain actions, including committing breaches of the law and constitutional documents.[394] More importantly, it permits shareholders to seek damages or compensation or demand any suitable action from or against the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct on their part.[395] This is a powerful provision in the climate risk context that could potentially expose directors to monetary liabilities in case their breach of directors' duties amount to 'fraudulent, unlawful or wrongful act or omission'. The scope of persons who could be subject to claims include auditors, experts, advisors or consultants as well.

Despite the overarching nature of the class action mechanism in India, concerns have been raised regarding its utility. Professor Khanna states that the 'overall conclusion is that class actions are likely to be limited value because of', among other things, the glacial speed of the Indian courts' and 'the lack of contingency fees'.[396] The lack of a clear litigation funding mechanism could curb the incentives of shareholders to bring class actions.[397] It is, therefore, not surprising that there is a lack of evidence regarding the utilisation of this mechanism in India thus far.

7.2 Public Enforcement

For the sake of completeness, this Part briefly examines public enforcement in the context of breach of directors' duties for failing to account for climate risk. There are two primary methods of public enforcement, one by the Central Government, represented by the MCA and the Registrar of Companies ('RoC') and the other by SEBI.

7.2.1 Actions by the Central Government

It is not only the shareholders who can invoke section 241 of the Companies Act, which deals with oppression, prejudice and mismanagement,[398] but the Central Government can also approach the NCLT under that provision.[399] It can do so where 'it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest'. While there may be some doubt on whether shareholders can exercise the prejudice remedy for interests of other stakeholders (such as for the protection of the environment), there would be no such doubt in case of actions by the Central Government, as public interest is the only ground on which it can intervene. Hence, if the directors of a company fail to adequately discharge their duties to address climate risk and if, as a result, there is a wider impact on non-

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392 Companies Act, 2013, s 245(5).

393 National Company Law Tribunal Rules, 2016, r 86.

394 Companies Act, 2013, s 245(1).

395 Companies Act, 2013, s 245(1)(g).

396 Vikramaditya Khanna, 'Enforcement of Corporate and Securities Laws in India: The Arrival of the Class Action?', in Robin Hui Huang and Nicholas Calcina Howson (eds.), *Enforcement of Corporate and Securities Law: China and the World* (Cambridge University Press, 2017), at 334.

397 See Fitzpatrick and Thomas, above n 384, at 210-211, finding that the 'one metric on which the Indian class action may not fare as well as those in nations like the United States, Canada and Australia is with regard to how the actions are financed.'

398 See Part 7.1.2.

399 Companies Act, 2013, s 241(2).

shareholder constituencies, such as the environment or the community, the Central Government would be well entitled to intervene and seek the remedies set out in section 242(2).[400]

The Central Government has indeed exercised this power to protect the interests of various constituents, albeit thus far in matters that are extraneous to climate risk. For instance, in the Satyam case, which involved the managing director of the company falsifying its financial statements to the tune of US$1 billion,[401] the Central Government approached the Company Law Board ('CLB'), the predecessor of the NCLT, to have the entire board of the company replaced on an urgent basis. The CLB granted the Central Government a favourable order by observing the magnitude of the impact caused by the fraud.[402] It noted:[403]

> The company has a very huge international presence through a large number of international subsidiaries and they service many important clients across the globe. The admission of fraudulent manipulation of the financial affairs has created an adverse impression in the minds of trade, business and industry across the world. This has also resulted in serious damage to the reputation of Indian Corporate sector and the regulatory mechanism in the eyes of the world. Therefore, the Central government has formed the opinion that the interests of the company will not be safe in the hands of the present board of directors ...

In another case,[404] the NCLT allowed replacement of the board of Infrastructure Leasing and Financial Services Limited ('IL&FS') at the request of the Central Government under section 241(2) of the Companies Act after viewing the issues 'from the point of the financial stability angle, considering the systemically important nature of the IL&FS Group, the impact on the debt, money and capital markets.'[405]

In expanding Central Government action against errant company directors, the Companies Act was amended in 2019[406] to introduce section 241(3) which allows the Central Government to approach the NCLT to determine whether a director (or any other person concerned with the conduct and management of affairs of the company) is a 'fit and proper purpose' to hold the office of director or other managerial office of any company. The Central Government is entitled to so in the following circumstances, among others:[407]

A) such person has been guilty of fraud, misfeasance, persistent negligence or default in carrying out their obligations and functions under the law or of breach of trust;

B) the business of a company is not or has not been conducted and managed by such person in accordance with sound business principles or prudent commercial practices;

C) the company has been managed by such person in a manner which causes serious injury or damage to the interest of the trade, industry or business to which such company pertains; or

D) the business of a company has been conducted and managed by such person in a manner prejudicial to public interest.

When viewed from a climate change perspective, these matters relate not merely to the impact of directors' wrongdoing as regards shareholders, but also to a wider body of interests.

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[400] For a discussion regarding the remedies, see Part 7.1.2.

[401] Letter from B. Ramalinga Raju, Chairman, Satyam Computer Services Ltd., to the Board of Directors, Satyam Computer Services Ltd. (Jan. 7, 2009).

[402] *Union of India v Satyam Computer Services Ltd*, 2009 SCC OnLine CLB 1.

[403] Ibid, at [2].

[404] *Union of India, Ministry of Corporate Affairs v Infrastructure Leasing and Financial Services Limited*, 2018 SCC OnLine NCLT 8537.

[405] Ibid, at [6.6], quoting from an 'Office Memorandum' bearing No. 10/41/SM/2018, dated 30 September 2018 of the Adviser (FSRL), Ministry of Finance, Department of Economic Affairs.

[406] Companies (Amendment) Act, 2019.

[407] Companies Act, 2013, s 241(3).

In terms of criminal liability, if a director of the company contravenes the provisions of section 166 of the Companies Act relating to directors' duties, such director shall be punishable with fine which shall not be less than INR 100,000 but which may extend to INR 500,000.[408] Moreover, in egregious circumstances, prosecution could arise under sections 406 (criminal breach of trust) and 420 (cheating) of the Indian Penal Code, 1860, although these tend to be rare and with low conviction rates.[409]

7.2.2 Actions by SEBI

SEBI's role arises largely when directors of a company breach their disclosure norms in relation to climate risk.[410] The primary role of SEBI is to protect the interests of investors in securities and to promote the development of (and to regulate) the securities markets.[411] In doing so, it has been conferred very wide powers to take 'measures as it thinks fit'.[412] In enforcing these requirements, SEBI can even prohibit any company from 'issuing prospectus, any offer document, or advertisement soliciting money from the public for the issue of securities'.[413] This specific remedy for violation of disclosure norms in primary market transactions is therefore preventive in nature.

In case of breaches of secondary market disclosure requirements, SEBI is empowered to initiate action under regulation 98 of the SEBI LODR Regulations with a view to imposing fines, suspending trading in securities, freezing the shareholding of the controlling shareholders, or any other measures that SEBI may prescribe from time to time. Moreover, for violations of the SEBI LODR Regulations, the company shall be liable to a penalty for an amount between INR 500,000 and INR 250,000,000.[414] Moreover, directors could individually be subject to penalty if, at the time the breach occurred, the director 'was in charge of, and was responsible to, the company for conduct of the business'.[415] Hence, the liability for violation of the listing conditions (primarily the disclosure and reporting obligations) extends to both the companies as well as certain directors.

Apart from the specific remedies set out above, SEBI possesses several other powers and sanctions to deal with securities law violations.[416] For instance, SEBI may restrain persons from accessing the securities markets and prohibit them from dealing in securities for a defined period of time. SEBI has exercised this power quite frequently and effectively to deal with securities law violations. The restraint orders are binding on either the issuer companies, their directors or promoters or all of them.[417] SEBI may also impose other types of orders including impounding the proceeds of the sale of shares effected in violation of securities laws, attaching property such as bank accounts, and issuing restraint against alienation of property. By way of an amendment to the SEBI Act in 2014,[418] the regulator's power to order a disgorgement of profits was expressly recognised. These various powers are intended to operate as a deterrent against companies and

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408 Companies Act, 2013, s 166(7).

409 Khanna, 'Enforcement of Corporate and Securities Laws in India', above n 396, at 341.

410 See Part 4.

411 Securities and Exchange Board of India Act, 1992, s 11(1).

412 *Ibid*.

413 Securities and Exchange Board of India Act, 1992, s 11A(1)(b).

414 Securities Contracts (Regulation) Act, 1956, s 23E.

415 Securities Contracts (Regulation) Act, 1956, s 24.

416 These powers emanate from the Securities and Exchange Board of India Act, 1992, s 11 read with s 11B.

417 These orders are upheld on appeal if they are found to be preventive in nature and not if they are punitive in nature. For a discussion of the relevant case law, *see* Sumit Agrawal & Robin Joseph Baby, *Agrawal & Baby on SEBI Act* (New Delhi: Taxmann, 2011), pp.164-65.

418 Securities Laws (Amendment) Act, 2014.

their directors breaching securities laws, including in relation to matters of risk management and business responsibility reporting, among others, which are relevant to how directors deal with climate risk.

7.3 Limitation Periods

Finally, in terms of the timing of an investor action, it must be brought before a court of law within the statutory limitation period. A claim for compensation under company law[419] or one for rescission under contract law[420] would have to be brought within three years from the time the cause of action arises. The limitation period would usually begin to run from the time the claimant becomes aware of the misrepresentation or omission. In case of significant delays, the court may refuse to entertain a claim, thereby depriving the affected investors of their remedy.[421]

Section 433 of the Companies Act provides that the provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the NCLT and the NCLAT, as they case may be. Any appeals from the NCLT to the NCLAT must be filed within 45 days from the date on which a copy of the order of the NCLT was made available.[422] Furthermore, any appeals from the NCLAT to the Supreme Court must be filed within 60 days of the receipt of the order of the NCLAT.[423]

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419 Limitation Act, 1963, Schedule, Art. 113.

420 Limitation Act, 1963, Schedule, Art. 59.

421 One of the grounds due to which a court refused to intervene to grant the remedy sought by the affected investors was that the investors had 'lost their right to rescind the contract by their laches.' *Shiromani Sugar Mills Ltd. v Debi Prasad*, AIR 1950 All 508, at [19].

422 Companies Act, 2013, s 421.

423 Companies Act, 2013, s 423.

8. Conclusion

In the era of increasing private litigation for climate change, especially against companies, the question of directors' liability for climate risk has acquired tremendous salience. Directors of Indian companies are not spared from this trend, given India's vulnerability to climate risk. Hence, climate risk is top on the agenda in the corporate governance discourse and in corporate boardrooms. Not only is this trend driven by market factors, for instance through increasing insistence of investors that companies adhere to stringent ESG requirements, but also due to rising standards of duties that company law imposes on directors in the context of risk management, in general, and climate risk in particular. Add to the mix the Indian slant towards stakeholderism that seeks to motivate boards to act in the interests of non-shareholder constituencies as an end in itself. Such a combination of market forces and legislative mandates will require corporate boards to both address climate risks and also seize opportunities arising from climate change, such as the drive towards green energy.

While Indian law has historically been reticent in stipulating detailed duties on company directors, the enactment of the Companies Act in 2013 has been a game changer. The codification of directors' duties introduces a great deal of certainty for directors regarding the standards they must adopt in the performance of their roles and responsibilities. This includes an entire schedule, which contains a code of conduct, though focused on independent directors only.[424] In that sense, Indian law is rather prescriptive regarding the role of directors.[425] In fact, the expansive legislative regime adequately makes up for the absence of extensive case law in India regarding directors' duties.

The duties of trust and loyalty require the directors to view the affairs of the company along a long-term horizon. This is consistent with the intergenerational equity considerations accepted by the Supreme Court of India in environmental matters.[426] Directors must ensure not to deplete existing environmental resources for the benefit of the current shareholders at the risk of future generations. Apart from acting in the long-term interests of the company, directors bear a positive obligation to also act in the best interests of various stakeholders, including for the protection of the environment. On this aspect, the Indian legislative regime in section 166(2) of the Companies Act goes farther than any other Commonwealth jurisdiction in directly addressing environmental concerns. Such a legislative approach could not have been timelier given that the Indian courts are increasingly shifting the climate change discourse from the periphery of environmental jurisprudence to one that is intrinsic. This suggests a convergence between the public law approach being adopted by the Supreme Court in environmental litigation and the directors' duty framework adopted legislatively with respect to directors' duties in a pluralistic stakeholder-oriented milieu.

The prescriptive nature of the Indian companies' legislation flows into the duties of competence as well. The sparse nature of judicial exposition on the duty of care, skill and diligence is offset by the requirement of a detailed risk management framework not only in the Companies Act, but also in the SEBI LODR Regulations (although this applies only to top listed companies). With the increased recognition of climate change as a key risk to companies, such a risk management framework draws direct attention of the board.

[424] Companies Act, 2013, schedule IV.

[425] See Umakanth Varottil, 'Corporate Governance in India: The Transition from Code to Statute', in Jean J. du Plessis and Chee Keong Low (eds.) (Springer, 2017), at 110.

[426] See Part 1.1.3.

Moreover, while climate change in most Commonwealth jurisdictions is considered as a matter of risk essentially to be dealt with keeping in mind long-term shareholder interest, India is perhaps the only jurisdiction in the Commonwealth where the duty to deal with climate change can be considered a standalone obligation, regardless of its impact on shareholders. This is because the nature of corporate law in India transgresses the realm of private law, and imbibes larger public interest considerations.

Climate change disclosure has also gained prominence in India. The requirement of companies to shine light on their policies regarding climate change will incentivise directors to pay adequate attention to climate risk, and deal with it effectively. Both the Central Government as well as SEBI have taken giant strides in expanding the disclosure regime surrounding climate risk. The increasing stringency of the disclosure requirements are aimed at mitigating the risk of 'greenwashing'. There is an emerging trend of increased climate reporting, although there are some issues surrounding the quality of the reports.[427]

When it comes to enforcement mechanisms, shareholders have a number of avenues through which they can agitate claims for breach of directors' duties to deal with climate risk, including to make adequate disclosures. These include both private enforcement measures as well as public ones. While the private enforcement tools seem wide in nature and, in certain cases such as class actions, wider than other Commonwealth jurisdictions, severe constraints plague the effective use of such remedies. Exorbitant costs, colossal delays and the lack of litigation funding mechanisms are some factors that come in the way of effective private enforcement of directors' duties. Such enforcement measures are likely to be taken only when there are significant shareholder disputes where the petitioning shareholder has a sufficiently high economic stake as to be able and willing to bear the litigation risk by incurring the hefty costs.

Other constraints that limit the benefits of private enforcement include the fact that Indian companies are controlled by promoters.[428] This limits the incentives of activist shareholders to bring claims. While shareholders in Indian companies have hitherto tended to be passive in nature, the recent advent of shareholder activism and the active intervention of proxy advisory firms in providing advice to shareholders on how they may exercise their democratic rights in the company, will likely make investors more participative in nature. However, the concentrated shareholding structure of Indian companies will come in the way of speeding up the process of shareholder participation and activism, including on matters of climate change.

Even though the substantive law goes as far as requiring directors of companies to act in the interest of stakeholders, this provision is not justiciable by the stakeholders for whose benefit the directors are required to act.[429] This is because duties are owed to the company, which only can bring an action. Even a derivative action or other forms of claims enumerated under the Companies Act can be brought only by shareholders. It remains unclear whether they can do so for anyone's benefit other than their own.

In the overall analysis, the directors' duty regime in relation to climate change can be best described as a combination of a robust set of duties under substantive law, but with considerable limitations as regards enforcement. This might lead to a gap between the 'law in the books' and 'law in action'.[430] Hence, there is a need for a balanced assessment of directors' duties and liabilities and their enforcement.

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427 See Part 4.2.3.

428 Khanna, 'Enforcement of Corporate and Securities Laws in India', above n 396, at 334-335.

429 Naniwadekar and Varottil, above n 110, at 106-110.

430 See Hideki Kanda, 'Western versus Asian Laws on Corporate Governance: The Role of Enforcement in International Convergence', in Jeffrey N. Gordon and Wolf-Georg Ringe (eds.), *The Oxford Handbook of Corporate Law and Governance* (Oxford University Press, 2018).