
**DIRECTORS' DUTIES & RESPONSIBILITIES
AND DISCLOSURE OBLIGATIONS UNDER
PHILIPPINE LAW ON CLIMATE CHANGE RISKS**

**Cesar L. Villanueva
Lily K. Gruba
Angelo Patrick F. Advincula
Joyce Anne C. Wong**

Makati, Metro Manila, Philippines, 18 October 2022

TABLE OF CONTENTS

A. SCOPE OF OPINION AND EXECUTIVE SUMMARY	3
B. CLIMATE CHANGE AND ITS EFFECTS ON THE PHILIPPINES	17
C. PHILIPPINES' RESPONSES AND COMMITMENTS TO INTERNATIONAL ACTIONS ON CLIMATE CHANGE	26
D. DIRECTORS' DUTIES AND RESPONSIBILITIES IN RELATION TO CLIMATE CHANGE	35
E. DIRECTORS' POTENTIAL LIABILITIES IN RELATION TO CLIMATE CHANGE	57
F. DIRECTORS' DISCLOSURE OBLIGATIONS IN RELATION TO CLIMATE CHANGE	77
G. LITIGATION RISKS IN RELATION TO CLIMATE CHANGE	101
H. CONCLUSIONS AND ADVICE	112

A. SCOPE OF OPINION AND EXECUTIVE SUMMARY

1. The Commonwealth Climate and Law Initiative (CCLI), a UK non-profit organization that pursues legal research and stakeholder engagement initiative, has asked for this legal opinion on the responsibilities and disclosure obligations under Philippine law of directors of *for-profit* corporations with regard to climate change, with the objective that such an opinion would help directors fulfill their responsibilities to preserve value, reduce liability risks and protect against the effects of climate change.

2. The views expressed in this opinion should not be construed as providing legal advice to any particular director, company, sector or circumstance. The opinion is intended to help directors of *for-profit* corporations operating in the Philippines to understand their duties and obligations in respect to climate change and related nature crises under existing laws and jurisprudence in the Philippines. The opinion reflects the status of Philippine law as of the date it is rendered.

3. Climate change means “*a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.*”¹ Climate change refers to the variations in the climate resulting from increase in global average temperatures caused by the accumulation of excess heat-trapping greenhouse gases (GHGs). The physical risks — those arising from climate change impacts and climate-related hazards — and the transition risks — those arising from the transition to a net-zero or low carbon economy — of climate change threaten national and regional economies and pose foreseeable financial risks to corporations and other commercial endeavors across the world.

4. The Philippines is already experiencing a range of climate change impacts, including a rise in average temperatures, a decrease in monsoon precipitation, a rise in extreme temperature and rainfall events, droughts and sea levels, and an increase in the intensity of severe tropical storms. Physical risks from rapid-onset events like cyclones, hurricanes or floods and from slow-onset events like sea-level rise or droughts have caused both direct and indirect

¹ United Nations Framework Convention on Climate Change, 9 May, 1992, 1771 U.N.T.S 107.

impacts on the Philippine economy and its underlying financial and commercial enterprises. Direct impacts include material damage to assets, infrastructure or facilities, while indirect impacts include disruptions to supply chains, water and raw material availability, food security, transport and employee safety. The economic transition risks relating to the Philippines' commitment to a low carbon regime have had a business impact on certain key industries, such as oil and power companies, the automotive industry, the logging industry, and even the construction industry. These economic transition impacts already have, and will continue to have, profound effects on key industries' business models, revenues and costs, and financing and investment profiles.

5. As an archipelagic nation located in the *Tropical Cyclone Belt* and the *Pacific Ring of Fire*, the Philippines is extremely vulnerable to the physical impacts of climate change.² The 2021 Global Climate Risk Index placed the Philippines as the fourth (4th) most impacted country by extreme weather events between 2000 and 2019, with a total of 317 weather-related events, the highest among the most affected countries.³ The Philippines is also one of the most cyclone-prone countries in the world, with an estimated 20 tropical cyclones annually and the damage from which costs the country an average of 0.5% of its gross domestic product (GDP).⁴ The loss and damage alone from super typhoon *Haiyan* in 2013 equated to 4% of the Philippine GDP, and the successive typhoons in October and November 2020 (*e.g.*, *Molave*, *Goni* and *Vamco*) resulted in US\$852 million worth of damage to agriculture, industries and infrastructure.⁵

6. The 2020 McKinsey Report on the physical risks of climate change impacting livability and workability, food systems, physical assets, infrastructure assets and natural capital, identified the Philippines as one of the countries that

² Note: The Philippine Climate Change Commission – National Panel of Technical Experts has identified top 10 climate-related risks in the country: (1) the rising sea levels, (2) coastal erosion, (3) flooding, (4) increasing frequency and severity of tropical cyclones, (5) extreme drought, (6) temperature increase and rising urban heat index, (7) extreme rainfall, (8) climate-influenced diseases, (9) wind patterns, and (10) biodiversity loss. See Department of Finance, CCC Experts Panel lists 10 PHL hazards requiring urgent climate action (15 December 2021) <<https://www.dof.gov.ph/ccc-experts-panel-lists-10-phl-hazards-requiring-urgent-climate-action/>>.

³ David Eckstein, Vera Kunzel, Laura Schafer & Maik Winges, Global Climate Risk Index 2021: Who Suffers Most from Extreme Weather Events? Weather-related Loss Events in 2019 and 2000 to 2019 (25 January 2021) <<https://www.germanwatch.org/en/19777>>.

⁴ Republic of the Philippines, Nationally Determined Contribution to the UNFCCC (15 April 2021) <<https://unfccc.int/sites/default/files/NDC/2022-06/Philippines%20-%20NDC.pdf>>.

⁵ *Id.*

have high risks for changes in outdoor working hours affected by extreme heat and humidity, and at high risk of flood damage.⁶ Further, the rate of sea-level rise in the Philippines is also one of the fastest in the world, with twice the highest global average rate observed from 1993-2010,⁷ threatening not only the country's food security and water resources, but also the displacement of small island communities.⁸ It is estimated that the Philippines has lost about 68% and 82% coral and seagrass cover, respectively, from 2009-2016, which were exacerbated by climate change impacts, such as coral bleaching and ocean acidification.⁹

7. The Philippines' Nationally Determined Contribution (NDC)¹⁰ submitted to the United Nations Framework Convention on Climate Change (UNFCCC) does not mandate a net-zero emissions goal for the country; however, the Philippine Government has committed to reduce and avoid national greenhouse gas emissions by 75% by 2030 against the business-as-usual scenario for 2020-2030, of which 72.29% is conditional on multilateral support under the Paris Agreement.¹¹ The Philippines' NDC is based on the *Climate Change Act of 2009*,¹² and two key policy documents issued by the Climate Change Commission:

- (a) The National Framework Strategy on Climate Change 2010-2022,¹³ which recognizes that climate change is "*the most serious and pervasive threat facing humanity today*" and sets out the Philippines' principles of climate change mitigation and

⁶ Jonathan Woetzel, Dickon Pinner, Hamid Samandari, Hauke Engel, Mekala Krishnan, Brodie Boland & Carter Powis, *Climate risk and response: Physical hazards and socioeconomic impacts*, McKinsey Global Institute, January 2020.

⁷ Department of Finance: CCC meets new experts' panel on strategies to deal with PHL top climate-induced risks (27 December 2021) <https://www.dof.gov.ph/climate-related-hazards-led-to-us10-b-losses-for-low-carbon-emission-phl-over-10-year-period/?utm_source=rss&utm_medium=rss&utm_campaign=climate-related-hazards-led-to-us10-b-losses-for-low-carbon-emission-phl-over-10-year-period>.

⁸ World Bank, *Philippines - Technical Note: Climate change and environmental risks and Opportunities*, June 2019.

⁹ Department of Finance: Climate-related hazards led to US\$10-B losses for low-carbon emission PHL over 10-year period (2 November 2021) <https://www.dof.gov.ph/climate-related-hazards-led-to-us10-b-losses-for-low-carbon-emission-phl-over-10-year-period/?utm_source=rss&utm_medium=rss&utm_campaign=climate-related-hazards-led-to-us10-b-losses-for-low-carbon-emission-phl-over-10-year-period>.

¹⁰ Republic of the Philippines, *Nationally Determined Contribution to the UNFCCC* (15 April 2021) <<https://unfccc.int/sites/default/files/NDC/2022-06/Philippines%20-%20NDC.pdf>>.

¹¹ Paris Agreement (13 Dec. 2015), *in* UNFCCC, COP Report No. 21, Addendum, at 21, U.N. Doc. FCCC/CP/2015/10/Add. 1 (29 Jan. 2016) [hereinafter Paris Agreement].

¹² Republic Act No. 9729, as amended by R.A. 10174.

¹³ Climate Change Commission, *National Framework Strategy on Climate Change 2010-2022* (28 April 2010) <<https://climate.gov.ph/files/NFSCC.pdf>>.

adaptation, the risks arising from climate change, and overarching strategies for mitigation and adaptation, including developments and growth in sustainable infrastructure, clean energy and sustainable transport;

- (b) The National Climate Change Action Plan 2011-2028,¹⁴ which outlines the Philippine Government's comprehensive commitments to respond to climate risks that involves both the public and the private sectors, centered around seven key policy areas: food security, water sufficiency, ecological and environmental sustainability, human security, climate-friendly industries and services, sustainable energy and knowledge and capacity development.

8. The *Climate Change Act* was amended¹⁵ in 2011 to establish a People's Survival Fund, which provides the mechanism for long-term finance streams to enable the Philippine Government to effectively address climate change, support adaptation activities, and prevent and mitigate disasters. The amendatory law explicitly recognized the Philippines' vulnerability "*to potential dangerous consequences of climate change, such as increasing temperatures, rising seas, changing landscapes, increasing frequency and/or severity of droughts, fire, floods and storms, climate-related illnesses and diseases, damage to ecosystems, and biodiversity loss that affect the country's environment, culture, and economy.*"

9. Even prior to the 1992 formulation of the UNFCCC, the Philippine Government, in coordination with the business and civil society sectors, had promulgated numerous laws and regulations that provide for industry standards and practices to protect the environment, and prescribed penalties on prohibited acts that undermine the environment. *(See discussion in Section E below)*

10. The enactment of the various environmental laws that preceded the UNFCCC could be attributed to the fact that the Philippines' 1987 Constitution recognizes the citizens' "*right to health*" and "*right to a balanced and healthful*

¹⁴ Climate Change Commission, National Climate Change Action Plan 2011-2028 (2011) <<https://climate.emb.gov.ph/wp-content/uploads/2016/06/NCCAP-1.pdf>>

¹⁵ Republic Act No. 10174.

ecology,” with corresponding obligations of the State to “*protect and promote the right to health of the people,*”¹⁶ and to “*protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.*”¹⁷ The Philippine Supreme Court has affirmed “*the right of Filipinos to a balanced and healthful ecology*” and “*the correlative duty to refrain from impairing the environment.*”¹⁸ It also held that even without the constitutional provisions on the rights to health and to a balanced and healthful ecology, the same would be part of the law of the land because the Philippines is a signatory to the *Universal Declaration of Human Rights* which recognizes health as a fundamental human right.¹⁹

11. This legal opinion sets out the context of climate change and its effects, particularly on the Philippines (See *discussion in Sections B and C below*). It then considers: (1) whether, and if so to what extent, directors of *for-profit* Philippine-incorporated companies are required to consider and act on climate change-related risks under constitutional law and company law (See *discussion in Section D below*); (2) whether directors could be held liable for failing to consider and act on climate change-related risks under existing legal frameworks (See *discussion in Section E below*); (3) the extent to which directors are required to disclose climate and other sustainability-related information (See *discussion in Section F below*); and (4) litigation risks in relation to climate change (See *discussion in Section G below*).

1a. Climate-related Risks and the Philippines’ 1987 Constitution

12. Philippine commercial, industrial and business sectors play an indispensable role alongside the government and civil society in contributing solutions to complex global challenges on climate change. Although the Philippines’ 1987 Constitution guarantees the principles of private ownership²⁰ and free-market system,²¹ it decrees the “*social function of private property and*

¹⁶ Sec. 15, Art. II (*Declaration of Principles and State Policies*), 1987 Constitution.

¹⁷ Sec. 16, Art. II (*Declaration of Principles and State Policies*), 1987 Constitution.

¹⁸ *Oposa v. Factoran*, G.R. No. 101083, 30 July 1993; 224 SCRA 792 (1993).

¹⁹ *Laguna Lake Development Authority v. Court of Appeals*, G.R. No. 110120, 16 March 1994; 231 SCRA 292, 307-308.

²⁰ Sec. 1, Art. III of the 1987 Constitution particularly provides: “*No person shall be deprived of ... property without due process of law.*” Section 9 thereof provides: “*Private property shall not be taken for public use without just compensation.*”

²¹ Sec. 20, Art. II of the 1987 Constitution provides: “*The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments.*”

*economic enterprises,” even when pursued through a corporate medium, as it provides that “the use of property bears a social function, and economic agents shall contribute to the common good; that all individuals and private groups, **including corporations**, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands.”²²*

13. When read in relation to the foregoing constitutional backdrop, our review of the *Climate Change Act* and climate-related Philippine environmental laws shows that no institutional duty or responsibility is imposed upon the private sector in general, and on the private corporate sector in particular, to promote environmental activism, and a failure to pursue actions in furtherance of a low carbon economy beyond the targets set by the government does not *per se* lead to personal liabilities to directors of private corporations.

14. However, the constitutional rights to health and to a balanced and healthful ecology, coupled with the constitutionally-mandated ‘social function to contribute to the common good’ of all private economic enterprise, would include the obligation to refrain from harming the environment. This means that directors of *for-profit* corporations assume the functions of their office with the understanding that their fiduciary duties of obedience and diligence is owed not just to the shareholders but other stakeholders, as well, which duties **include within their scope of responsibility a stewardship role to ensure that company operations do not degrade the environment or contravene environmental laws.**

1b. Climate-related Risks and Directors’ Fiduciary Duties

15. The emerging role of directors in addressing climate change includes an **obligation to include within directors’ stewardship over the company’s long-term success a due regard for climate change risks**, and, as set out below, imposes a duty to refrain from harming the environment based on the standards and the “*prohibited acts*” laid down by the State in various environmental laws, commission of which may lead to both criminal and civil liabilities.

²² Sec. 6, Art. XII of the 1987 Constitution; *emphasis supplied*.

16. It is now globally recognized that climate change poses serious physical, transition, and liability risks to companies, and that climate change must be included in companies' enterprise risk management (ERM) framework. Under the 'comply or explain' approach of the Philippine corporate governance framework for publicly-held companies, boards of directors are encouraged to foster the corporation's long-term success, and to sustain its competitiveness and profitability in a manner consistent with its corporate objectives and "*the long-term best interests of its shareholders and other stakeholders*".²³ In particular, the framework adopts the principle that "*the company should have a strong and effective [...] enterprise risk management framework,*"²⁴ which "*typically includes such activities as the identification, sourcing, measurement, evaluation, mitigation and monitoring of risk.*"²⁵ In addition, it is considered best practice for the board to oversee that "*a sound enterprise risk management (ERM) framework is in place to effectively identify, monitor, assess and manage key business risks. The risk management framework should guide the Board in identifying units/business lines and enterprise-level risk exposures, as well as the effectiveness of risk management strategies.*"²⁶

17. Based on all the foregoing, directors' duties and responsibilities in relation to climate change — and the consequent liabilities they may be exposed to — must be gauged from two fronts, namely, from: (a) those owed to shareholders and other investors based on principles under Philippine Corporation Law, related securities laws, as well as from corporate governance framework that covers publicly-held companies; and (b) those owed to other stakeholders based on the Philippines' corporate governance framework, the constitutional obligation to refrain from harming the environment, and related provisions of various environmental laws that seek to pursue the Philippine Government's commitments to the UNFCCC.

18. Directors play a critical role in managing climate change risks to which the corporate business enterprise is exposed, as well as in fulfilling the companies' social responsibilities towards the protection of the environment. Under the '*doctrine of centralized management*' that governs

²³ Principle 1, Code of Corporate Governance for Public-listed Companies (SEC Memorandum Circular No. 19, 20 November 2016).

²⁴ Principle 12, CG Code for Publicly-held Companies.

²⁵ Explanation to Principle 12, CG Code for Publicly-held Companies.

²⁶ Recommendation 2.11 to Principle 2.10, CG Code for Publicly-held Companies.

all private corporations, the Revised Corporation Code of the Philippines²⁷ directly vests in the board of directors the exercise of all corporate powers, the conduct of all business and the control of all properties of the corporation, save in those specifically enumerated instances where shareholders' ratification vote is required.²⁸ In addition, directors are mandated to perform their duties "as *prescribed by law, rules of good corporate governance, and bylaws of the corporation.*"²⁹ Although the day-to-day affairs of the corporation are understood to be in the hands of Management, it is mandated that officers shall manage the corporation and perform such duties as may be provided in the by-laws and/or "as resolved by the board of directors."³⁰

19. Under Philippine Corporation Law, the trust relationship that is created by the statutory-vesting in the board of directors of nearly all corporate powers to conduct all business and to control all properties of the corporation,³¹ imposes upon directors the common law **duty of obedience** — to pursue corporate affairs in accordance with the purpose for which it is constituted and in compliance with the laws; the **duty of diligence** — to exercise corporate powers with the diligence of a prudent person, in good faith and in the best interests of the corporation and its shareholders; and the **duty of loyalty** — which disqualifies or prohibits directors from acquiring any personal or pecuniary interest in conflict with the best interests of the company.

20. Insofar as shareholders are concerned, directors' duties to properly identify, assess and manage the physical and transition (including liability and reputational) risks of climate change are geared towards preserving the long-term value or profitability of the corporate business enterprise (as distinguished from the damage to the environment that undermines other stakeholders' constitutional right to a balanced and healthful environment). **Under Philippine Corporation Law, the risks facing, and losses sustained by, the corporation relating to climate change fall within the same category as other foreseeable financial risk faced by directors of *for-profit* corporations, and**

²⁷ Republic Act No. 11232, 21 February 2019, hereinafter referred to as "Revised Corporation Code."

²⁸ Sec. 22, Revised Corporation Code (Republic Act No. 11232).

²⁹ *Id.*; *emphasis supplied.*

³⁰ Sec. 24, Revised Corporation Code; *emphasis supplied.*

³¹ This embodies the principle of "*centralized management*" that is provided for under Section 23 of the Revised Corporation Code (Rep. Act No. 11232)

are within scope of their duties to act in the best interest of the corporation and its shareholders, *albeit* under the aegis of the business judgment rule.

21. The Philippine corporate governance framework for publicly-held companies extends directors' fiduciary duties to other stakeholders of the company, which includes among others, customers, creditors, employees, suppliers, investors, "*as well as the government and the community in which they operate*".³² Publicly-held companies are encouraged to be socially responsible in all their dealings with the communities where they operate, ensure that their interactions serve their environment and stakeholders in a positive and progressive manner that is fully supportive of their comprehensive and balanced development,³³ which best-practice is encapsulated in the term "*sustainable development*" which is defined by the SEC to mean that companies "*not only [comply] with existing regulations, but also voluntarily [employ] value chain processes that take into consideration economic, environmental, social and governance issues and concerns*", recognizing that publicly-held companies play "*an indispensable role alongside the government and civil society in contributing solutions to complex global challenges like poverty, inequality, unemployment and climate change*".³⁴

22. When it comes to climate change, the emerging role of directors — which in turn defines the potential liabilities to which they are exposed to in relation to climate change — is a bit nuanced. Under Philippine corporate governance framework which adheres to the 'comply or explain' approach, directors are **encouraged** (not mandated) to "*adopt a clear and focused policy on the disclosure of non-financial information, with emphasis on the management of economic, environmental, social and governance (EESG) issues of its business, which underpin sustainability ... [and] should adopt a globally recognized standard/ framework in reporting sustainability and non-financial*

³² Code of Corporate Governance for Public-listed Companies, Definitions. Principle 14 of the Code of Corporate Governance for Public-listed Companies states: "*The rights of stakeholders established by law, by contractual relations and through voluntary commitments must be respected. Where stakeholders' rights and/or interests are at stake, stakeholders should have the opportunity to obtain prompt effective redress for the violation of their rights.*"

³³ Principle 16, Code of Corporate Governance for Public-listed Companies (SEC Memorandum Circular No. 19, 20 November 2016)

³⁴ Explanation to Recommendation 16.1, Code of Corporate Governance for Public-listed Companies (SEC Memorandum Circular No. 19, 20 November 2016)

issues.”³⁵ Other than the disclosure obligations for publicly-listed companies on ESG matters (See discussion in Section F below), there are no regulations specifically providing the requirements or processes by which directors are to monitor, manage and take steps to mitigate climate change risks.

23. Under the common law doctrine of ‘**business judgment rule**,’ the manner of fulfilment of directors’ fiduciary duties to the company, its shareholders and other stakeholders is addressed to the board’s business judgment.³⁶ The exercise of that business judgment, even when it causes damage to the corporation, its shareholders or other stakeholders, does not make directors’ personally liable,³⁷ **unless it is shown that the directors’ have in the process violated the law, acted with fraud, negligence or bad faith.**³⁸

24. The deference to the board’s business judgment means that directors are able to take actions to mitigate the impacts of climate change on their company without exposing themselves to the risk of liability for breaching their duties. For instance, directors that implement a strategy to address climate impacts to ensure the long-term viability of the company during the energy transition — even where this may risk incurring greater costs in the short term — will be protected from fiduciary liability unless they have violated the law, or acted with fraud, negligence or bad faith.

2. Liability for Failing to Consider and Act on Climate Change-related Risks under Existing Legal Frameworks

25. When it comes to potential criminal liabilities facing directors, our review of the criminal penalty clauses of the climate-related environmental laws shows that: (a) as a general rule, when such prohibited acts are committed on behalf of the corporation, directors do not become criminally punishable by the

³⁵ Recommendation 10.1, Code of Corporate Governance for Publicly-listed Companies (SEC Memorandum Circular No. 2016-19, 22 November 2016)

³⁶ *Montelibano v. Bacolod-Murcia Milling Co., Inc.*, G.R. No. L-15092, 18 May 1962; 5 SCRA 36, 42 (1962); *Gamboa v. Victoriano*, G.R. No. L-40620, 05 May 1979; 90 SCRA 40 (1979).

³⁷ *Western Agro Industrial Corp. v. Court of Appeals*, G.R. No. 82558, 20 August 1990; 188 SCRA 709 (1990); *Rustan Pulp & Paper Mills v. Intermediate Appellate Court*, G.R. No. 70789, 19 October 1992; 214 SCRA 665 (1992).

³⁸ Section 30 of the Revised Corporation Code provides in part: “*Directors or trustees who willfully and knowingly vote for or assent to patently unlawful acts of the corporation or who are guilty of gross negligence or bad faith in directing the affairs of the corporation or acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees shall be liable jointly and severally for all damages resulting therefrom suffered by the corporation, its stockholders or members and other persons.*”

mere fact of being members of the board, but only those directors, officers and employees of the corporation who directly are responsible for the commission of the prohibited acts shall be penalized for the corporate criminal offense committed; and (b) when the corporation itself is held to be the criminal offender, it is a rare case that directors are *ipso facto* held personally liable by the mere fact of their positions as directors, or that directors passively agreed, assented or knowingly tolerated the commission of prohibited acts. The prevailing rule is that directors are criminally liable for the corporate offense only when they direct, participate or supervise the acts constituting the prohibited acts. (See *discussion in Section E below*)

26. Nonetheless, while the enumeration of ‘prohibited acts’ under the various environmental laws provide for the limited areas whereby directors may be held criminally liable for acts pursued in the corporate affairs, the commission of the prohibited acts in the pursuit of the corporate business enterprise may provide the legal basis — especially when the commission of such prohibited acts is egregious — under Section 30 of the Revised Corporation Code to make the members of the board of directors personally and solidarily liable (civil) with the corporation for “*willfully and knowingly assenting to patently unlawful acts of the corporation,*” or at least for “*gross negligence or bad faith in directing the affairs of the corporation.*”

27. If shareholders were able prove that the directors’ failure to identify, monitor and manage climate change risks constitute a breach of their fiduciary duties as to make such erring directors personally liable, a derivative suit, filed on behalf of the company, may be brought against the erring directors, in which the damages and reliefs recoverable would pertain to losses suffered by the corporation itself.

3. Disclosure of Climate- and Sustainability-related Information

28. Disclosure obligations relating to climate change currently apply only to publicly-listed companies in the Philippines. Under the ‘comply or explain’ approach of the Securities and Exchange Commission’s (SEC’s) *Code of Corporate Governance*, publicly-held companies are mandated to ensure that

material and reportable non-financial and sustainability issues are disclosed,³⁹ with recommendation to the board to have a clear and focused policy on the disclosure of non-financial information with emphasis on the management of EESG issues of its business, which underpin sustainability, and to adopt a globally recognized standard/framework in reporting sustainability and non-financial issues.⁴⁰

29. The SEC's Sustainability Reporting Guidelines for Publicly Listed Companies are based on, and refer to, the Task Force on Climate-related Financial Disclosures (TCFD) recommendations, as well as other global reporting standards. The guidelines include reporting on environmental risks and impacts, including the board's governance, strategy, risk management and metrics and targets in respect to climate-related risks and opportunities. Publicly-listed companies must report in accordance with these guidelines on a 'comply or explain' basis and submit the sustainability report as part of its annual reportorial requirements with the SEC.⁴¹ It is our understanding that the SEC is planning to make sustainability reporting mandatory for publicly-listed companies by 2023.⁴²

30. Disclosures in the sustainability report should reflect the publicly-listed company's significant economic, environmental, and social impacts, including climate-related risks and opportunities and UN sustainability goals, and should consider the reasonable expectations and interests of key shareholders. Further, such disclosures should be quantifiable and measurable, adequately providing a comprehensive record of the company's non-financial performance for the relevant reporting period.

31. We note that the specific disclosures for climate change risks and opportunities fall under the category of economic disclosures for sustainability reporting, **which emphasizes the recognition by the SEC of climate change as a material financial risk for publicly-listed companies.** Philippine

³⁹ Principle 10, Code of Corporate Governance for Publicly-listed Companies (SEC Memorandum Circular No. 19, 20 November 2016).

⁴⁰ Recommendation 10.1, Code of Corporate Governance for Publicly-listed Companies (SEC Memorandum Circular No. 19, 20 November 2016).

⁴¹ Securities and Exchange Commission Philippines, Memorandum Circular No.4 of 2019 – Sustainability Reporting Guidelines for Publicly-listed Companies (15 February 2019) <<https://www.sec.gov.ph/wp-content/uploads/2019/10/2019MCNo04.pdf>>.

⁴² Anne Ruth Dela Cruz, "SEC to make sustainability reporting mandatory by 2023", *Business Mirror* (30 August 2021) <<https://businessmirror.com.ph/2021/08/30/sec-to-make-sustainability-reporting-mandatory-by-2023/>>.

companies have leeway in determining what may constitute material climate-related risks that arise in the pursuit of the companies' business operations, plans and strategies. This is consistent with the policy of the Philippine Government and its regulators allowing company discretion in determining and disclosing its corporate climate policy, particularly for publicly-listed companies which are subject to the materiality threshold under the Philippine Stock Exchange (PSE) disclosure rules.

32. The broad materiality threshold provided under the PSE disclosure rules, which require publicly-listed companies to disclose "*any material fact or event that occurs which would reasonably be expected to affect investors' decisions in relation to trading the securities*"⁴³ and "*such information [which] may reasonably be expected to materially affect market activity and the price of its securities,*"⁴⁴ would include the disclosure of climate-related risks when they have impact on the trading and price of company shares.

33. Based on our review of current disclosure rules for publicly-listed companies, which adopt the 'comply or explain' approach, the obligation to disclose and submit the sustainability report, including material climate-change disclosures, is primarily a corporate responsibility, as it is the publicly-listed company itself which faces the administrative penalties of reprimand, fine, delisting or revocation of license for failure to do so. Under Philippine law, directors are not directly and personally liable for corporate disclosures, unless they make false or misleading statements of material fact in required SEC filings which are tantamount to "*market manipulation,*"⁴⁵ or "*fraudulent transactions,*" as defined under the Securities and Regulation Code.⁴⁶ We note, however, that in the event the SEC makes sustainability reporting mandatory, that would remove company discretion in determining and disclosing its corporate climate policy, since the regulatory rule that will apply would state that climate change risks pose foreseeable material financial risks for publicly-listed companies, subject to the same materiality threshold under the PSE disclosure rules. *(See discussion in Section F below)*

⁴³ Sec. 4, Art. VII, PSE Disclosure Rules.

⁴⁴ Sec. 4.3(c), Art VII, PSE Disclosure Rules.

⁴⁵ Sec. 24 (d), Securities Regulation Code.

⁴⁶ Sec. 27, Securities Regulation Code.

4. Litigation Risks in Relation to Climate Change

34. With climate change posing foreseeable material financial risks, the Philippines will continue to experience increased litigation against corporations. The Supreme Court of the Philippines promulgated the Rules of Procedure for Environmental Cases,⁴⁷ to “govern the procedure in civil, criminal and special civil actions before [trial and appellate courts] involving enforcement or violations of environmental and other related laws, rules and regulations.”⁴⁸ The Rules formally institute “*citizen suits*” that allow any Filipino citizen in representation of others, including minors or generations yet unborn, to file an action to enforce rights or obligations under environmental laws, with power by the courts to issue an environmental protection order; and allow the issuance of a *writ of kalikasan* as a remedy to a natural or juridical person, entity authorized by law, people’s organization, non-governmental organization, or any public interest group on behalf of persons whose constitutional right to a balanced and healthful ecology is violated by, or threatened with or by an unlawful act or omission of a public official or employee, or private individual or entity, any possible large-scale ecological threats. (See discussion in Section G below)

35. With the growing focus of local and international investors on ESG considerations, directors of publicly-held companies and other *for-profit* corporations are well-advised to adopt a clear and focused policy on the disclosure on climate change and other environmental issues of their companies’ business, and adopt globally-recognized standard/framework in reporting sustainability and non-financial issues, on pains of suffering from stakeholder activism and litigation risks that may impinge upon their professional reputation.

⁴⁷ Administrative Matter No. 09-6-8-SC, 13 April 2010, hereinafter referred to as “Rules of Procedure for Environmental Cases.”

⁴⁸ Sec. 2 (Scope), Rule 1, Part I, Rules of Procedure for Environmental Case.

B. CLIMATE CHANGE AND ITS EFFECTS ON THE PHILIPPINES

a. *Meaning and Coverage of the Term “Climate Change”*

1. A globally accepted definition of “*climate change*” — which has been adopted by 197 countries, including the Philippines,⁴⁹ as signatories to the UNFCCC — is “*a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.*”⁵⁰ Essentially, climate change refers to the variations in the climate resulting from increase in global average temperatures caused by the accumulation of excess heat-trapping greenhouse gases (GHGs).

2. The overwhelming scientific consensus is that human-induced climate change has caused widespread adverse impacts and related losses and damages to the environment and people, beyond natural climate variability.⁵¹ The Intergovernmental Panel on Climate Change (IPCC), the UN body for assessing the science related to climate, has reported that emissions of greenhouse gases from human activities are responsible for approximately 1.1°C of warming since the pre-industrial period (1850-1900), and when averaged over the near-term 20 years (2021-2040), global temperature is expected to reach or exceed 1.5°C of warming.⁵² The IPCC has stated that it is unequivocal that human influence has warmed the Earth’s atmosphere, ocean, and that every additional 0.5°C increment of global warming causes clearly discernible increases in the intensity of hot extremes, including heatwaves, and heavy precipitation, as well as agricultural and ecological droughts.⁵³

3. The IPCC’s October 2018 Special Report on Global Warming of 1.5°C set out the deep and widespread impacts of even 1.5°C warming, such as the loss of 70-90% of the world’s coral reefs, and highlighted the significant

⁴⁹ The Philippines signed the UNFCCC on 12 June 1992 and ratified it on 2 August 1994.

⁵⁰ UNFCCC, May 9, 1992, 1771 U.N.T.S 107.

⁵¹ IPCC, 2021: *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.*

⁵² Intergovernmental Panel on Climate Change (IPCC), 2022: *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.*

⁵³ IPCC, 2021: *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.*

differential in impacts between 1.5° and 2°C of global average warming.⁵⁴ Limiting global warming to 1.5°C is still technically feasible, but requires “*rapid, far-reaching and unprecedented*” changes in all aspects of society and the economy and “*deep reductions in CO₂ and other greenhouse gas emissions occur in the coming decades*”.⁵⁵ Under the IPCC’s high, medium and low emissions scenarios, warming of 1.5°C is more than likely in the near term (between 2021-2040). Reaching 1.5°C of warming in the near term “*would cause unavoidable increases in multiple climate hazards and present multiple risks to ecosystems and humans*”.⁵⁶

4. At this time, we should already be preparing for the likely scenario that the increase in global average temperature would be beyond 1.5°C. In September 2021, the UNFCCC published a report on the efficacy of the NDCs of parties to the Paris Agreement to date, and found that, if adhered to, the NDCs would use up 89% of the remaining carbon budget consistent with a 50% likelihood of limiting global average temperature rise to 1.5°C by 2030.⁵⁷ Research by NGO Climate Action Tracker in November 2021 predicts that while current policies are projected to result in approximately 2.9°C warming, recent increases in ambition on climate policy, if implemented, has put the world on track to limit global average temperature rise to 2.1°C by 2100.⁵⁸ During COP26, the IEA updated its October 2021 analysis on the projected temperature rise if pledges are fully implemented to show that policies and commitments following COP26 may limit global average temperature rise to 1.8°C if these are fully implemented (an improvement over its earlier estimate of 2.1°C of warming).⁵⁹ Given the likely effects of climate change in a 1.5°C warmer world, the shortfall in the current NDC targets may indicate that businesses may face increased

⁵⁴ IPCC Special Report: Global Warming of 1.5C (Summary for Policymakers) (2018) <<https://www.ipcc.ch/sr15/chapter/spm/>>.

⁵⁵ *Id.* Also IPCC, Climate change 2021: The Physical Science Basis (Full Report) (2021) <<https://www.ipcc.ch/report/ar6/wg1/>>.

⁵⁶ IPCC, Climate Change 2022: Impacts, Adaptation and Vulnerability (Full report) (2022) <<https://www.ipcc.ch/report/ar6/wg2/>>.

⁵⁷ UNFCCC, Nationality determined contributions under the Paris Agreement, Synthesis report by the Secretariat (17 September 2021) <https://unfccc.int/sites/default/files/resource/cma2021_08_adv_1.pdf>.

⁵⁸ Climate Action Tracker, Temperatures <<https://climateactiontracker.org/global/temperatures/>>.

⁵⁹ IEA, World Energy Outlook 2021: Technical note on the emissions and temperature implications of COP26 pledges (November 2021) <<https://iea.blob.core.windows.net/assets/aa17bd09-2ad0-4d0a-b5aa-ee418900c4af/Theimpactsofnewemissionspledgesonlongtermtemperatures.pdf>> See also Fatih Birol, COP26 climate pledges could help limit global warming to 1.8 °C, but implementing them will be the key (4 November 2021) <<https://www.iea.org/commentaries/cop26-climate-pledges-could-help-limit-global-warming-to-1-8-c-but-implementing-them-will-be-the-key>>.

transition risk in the short to medium term, as governments may introduce additional policies, or may face increased physical risks in the medium to long term as the effects of climate change materialize.

5. There is international consensus, both scientific and governmental, of the significant adverse risks brought about by climate change. Climate change risks that organizations face are generally classified into two categories: (1) ‘physical risk’ which are closely related to risks arising from climate change impacts and climate-related hazards, and (2) ‘transition risk’ refers to risks arising from the transition to a low carbon economy.⁶⁰

b. *Physical Climate Risks in the Philippines*

6. Physical risks resulting from climate change can either be (a) acute or event-driven such as severity of extreme weather events like cyclones, hurricanes, or floods; or (b) chronic or longer-term shifts in climate patterns causing sea-level rise or heat waves.⁶¹ Physical risks may have financial implications on organizations, such as causing direct damage to assets, infrastructure or facilities, and indirect impacts to supply chains such as disruption, water and raw materials availability and sourcing, food security, transport needs, and employee safety.⁶²

7. As an archipelagic nation located in the *Tropical Cyclone Belt* and the *Pacific Ring of Fire*, the Philippines is extremely vulnerable to the physical impacts of climate change.⁶³ The 2021 Global Climate Risk Index placed the Philippines as the fourth (4th) most impacted country by extreme weather events between 2000-2019, with a total of 317 weather-related events, the highest

⁶⁰ Reisinger, Andy, Mark Howden, Carolina Vera, et al., *The Concept of Risk in the IPCC Sixth Assessment Report: A Summary of Cross-Working Group Discussions*. Intergovernmental Panel on Climate Change, Geneva, Switzerland (2020).

⁶¹ Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures (June 2017). See also the TCFD: 2019 Status Report (June 2019).

⁶² Reisinger, Andy, Mark Howden, Carolina Vera, et al., *The Concept of Risk in the IPCC Sixth Assessment Report: A Summary of Cross-Working Group Discussions*. Intergovernmental Panel on Climate Change, Geneva, Switzerland (2020).

⁶³ Note: The Philippine Climate Change Commission – National Panel of Technical Experts has identified top 10 climate-related risks in the country: (1) the rising sea levels, (2) coastal erosion, (3) flooding, (4) increasing frequency and severity of tropical cyclones, (5) extreme drought, (6) temperature increase and rising urban heat index, (7) extreme rainfall, (8) climate-influenced diseases, (9) wind patterns, and (10) biodiversity loss.

among the most affected countries.⁶⁴ The Philippines is also one of the most cyclone-prone countries in the world, with an estimated 20 tropical cyclones annually, the damage of which costs the country an average of 0.5% of its gross domestic product (GDP).⁶⁵ The loss and damage from super typhoon *Haiyan* in 2013 equated to 4% of the Philippine GDP, and the successive typhoons in October and November 2020 (e.g., super typhoon *Molave*, *Goni* and *Vamco*) resulted in a net loss of US\$852 million worth of damage to agriculture, industries and infrastructure.⁶⁶

8. The 2020 McKinsey Report on the physical risks of climate change impacting livability and workability, food systems, physical assets, infrastructure assets and natural capital, identified the Philippines as one of the countries that have high risks for changes in outdoor working hours affected by extreme heat and humidity, and at high risk of flood damage.⁶⁷ Further, the rise of sea level in the Philippines is also one of the fastest in the world, with twice the highest global average rate observed from 1993-2010,⁶⁸ threatening not only the country's food security and water resources, but also the displacement of small island communities.⁶⁹ It is estimated that the Philippines has lost about 68% and 82% coral and seagrass cover, respectively, from 2009-2016, which were exacerbated by climate change impacts, such as coral bleaching and ocean acidification.⁷⁰

⁶⁴ David Eckstein, Vera Kunzel, Laura Schafer & Maik Winges, *Global Climate Risk Index 2021: Who Suffers Most from Extreme Weather Events? Weather-related Loss Events in 2019 and 2000 to 2019* (25 January 2021) <<https://www.germanwatch.org/en/19777>>.

⁶⁵ Republic of the Philippines, *Nationally Determined Contribution to the UNFCCC* (15 April 2021) <<https://unfccc.int/sites/default/files/NDC/2022-06/Philippines%20-%20NDC.pdf>>.

⁶⁶ *Id.*

⁶⁷ Jonathan Woetzel, Dickon Pinner, Hamid Samandari, Hauke Engel, Mekala Krishnan, Brodie Boland & Carter Powis, *Climate risk and response: Physical hazards and socioeconomic impacts*, McKinsey Global Institute (January 2020) <<https://www.mckinsey.com/capabilities/sustainability/our-insights/climate-risk-and-response-physical-hazards-and-socioeconomic-impacts>>.

⁶⁸ Department of Finance: *CCC meets new experts' panel on strategies to deal with PHL top climate-induced risks* (27 December 2021) <<https://www.dof.gov.ph/ccc-meets-new-experts-panel-on-strategies-to-deal-with-phl-top-climate-induced-risks/>>.

⁶⁹ World Bank, *Philippines - Technical Note: Climate change and environmental risks and Opportunities*, June 2019.

⁷⁰ Department of Finance: *Climate-related hazards led to US\$10-B losses for low-carbon emission PHL over 10-year period* (2 November 2021) <https://www.dof.gov.ph/climate-related-hazards-led-to-us10-b-losses-for-low-carbon-emission-phl-over-10-year-period/?utm_source=rss&utm_medium=rss&utm_campaign=climate-related-hazards-led-to-us10-b-losses-for-low-carbon-emission-phl-over-10-year-period>.

c. Transitional Climate Risks in the Philippines

9. The transition risks of climate change arise from the transition towards a low carbon or net zero emissions economy, which entail extensive policy, legal, technology and market changes, and pose varying levels of financial and reputational risks to organizations.⁷¹ Transition risks can result in stranded assets, loss of markets, reduced returns on investment, and financial penalties.⁷²

10. Transition climate risks include: (a) policy risks, which either constrain actions contributing to adverse effects or promote adaptation to climate change like carbon-pricing mechanisms, shifting to energy- and water-efficient solutions, and sustainable land-use practices; and also litigation or legal risks from failure to mitigate impact and insufficiency of disclosure; (b) technology risks, which are innovations that support lower-carbon, energy-efficient systems and the creative destruction of old technologies; (c) market risks, which shift supply and demand for certain commodities, products and services; and (d) reputation risks, which result in changing customer or community perceptions of an organization's contribution.⁷³

11. In the Philippines, transition risks of climate change are an emerging consideration. While the Philippines does not have a legally-mandated net zero emissions goal, the government has set a national target to reduce greenhouse gas emissions. There has also been an active and growing support by both public and private sectors in the Philippines to encourage the transition into a lower carbon economy.

12. A technical note by the World Bank states that "*the Philippines is one of the most vulnerable countries in the world to natural catastrophes and climate change,*" with over 60% of the Philippine land area and 74% of the population exposed to multiple hazards, which renders the country's financial

⁷¹ TCFD, Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures (June 2017) <<https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf>>. See also the TCFD: 2019 Status Report (June 2019) <<https://assets.bbhub.io/company/sites/60/2020/10/2019-TCFD-Status-Report-FINAL-0531191.pdf>> .

⁷² Reisinger, Andy, Mark Howden, Carolina Vera, et al., *The Concept of Risk in the IPCC Sixth Assessment Report: A Summary of Cross-Working Group Discussions*. Intergovernmental Panel on Climate Change, Geneva, Switzerland (2020).

⁷³ TCFD, Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures (June 2017) <<https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf>>. See also the TCFD: 2019 Status Report (June 2019) <<https://assets.bbhub.io/company/sites/60/2020/10/2019-TCFD-Status-Report-FINAL-0531191.pdf>> .

sector highly vulnerable to climate risk.⁷⁴ The technical note also states that in addition to physical risks, Philippine banks can be exposed to transition risks that emerge during the transition towards a more sustainable and carbon-neutral economy, noting that “*Philippine supervisory authorities should build capacity to better understand and manage climate risks and foster transparency. At the same time, there is opportunity for deepening financial markets for green growth, by addressing several market and institutional barriers. With limits in public spending, there is greater need, but also a significant opportunity for the private sector to contribute to green inclusive growth, including finance for climate resilience and mitigation efforts.*”⁷⁵

13. A good example of transition risks faced by Philippine companies would be in the power generation sector. Despite the enactment of the Renewable Energy Act in 2008, the proportion of energy generated from renewable sources has steadily decreased, whilst that from coal has steadily increased. In 2020, coal-based energy constituted over 57% of the country’s energy mix,⁷⁶ while renewable energy constituted 21.2% of the country’s energy mix, edging out natural gas which provided 19.2% of the country’s energy requirements.⁷⁷

13.1 In October 2020, the Philippine Department of Energy announced a moratorium on green-field coal-based power projects to encourage investment in natural gas and renewables,⁷⁸ which effectively cancelled over 10GW of planned coal power projects.⁷⁹ In March 2021, the Philippine Government held a virtual public consultation on the proposed National Renewable Program 2020-

⁷⁴ World Bank, Philippines - Technical Note: Climate change and environmental risks and Opportunities, (June 2019) <<https://documents1.worldbank.org/curated/en/244321629266625579/pdf/Philippines-Financial-Sector-Assessment-Program-Climate-Change-and-Environmental-Risks-and-Opportunities-Technical-Note.pdf>>.

⁷⁵ *Id.*

⁷⁶ Department of Energy, Republic of the Philippines, Philippine Power Statistic (2021) <<https://www.doe.gov.ph/energy-statistics?q=energy-statistics/philippine-power-statistics>>.

⁷⁷ *Id.*

⁷⁸ Department of Energy, Advisory on the Moratorium of Endorsements for Greenfield Coal-Fired Power Projects in Line with Improving Sustainability of the Philippines’ Electric Power Industry, 22 December 2020 <<https://www.doe.gov.ph/announcements/advisory-moratorium-endorsements-greenfield-coal-fired-power-projects-line-improving>>.

⁷⁹ World Resources Institute, Indonesia and the Philippines Take Action to Accelerate Clean Energy Transition (6 April 2021) <<https://www.wri.org/outcomes/indonesia-and-philippines-take-action-accelerate-clean-energy-transition#>>; Department of Energy, Republic of the Philippines, Philippine Power Statistic, 2021 <<https://www.doe.gov.ph/energy-statistics?q=energy-statistics/philippine-power-statistics>>.

2040, which includes a national target of 35% renewable energy by 2030, a commitment which will require approximately 20GW of additional renewable capacity.⁸⁰ Under the new administration of President Ferdinand R. Marcos, Jr., the Philippine Department Energy confirmed the continuation on the moratorium on building new coal-fired plants.⁸¹

13.2 Despite its current heavy reliance on coal as an energy source, the Philippines is seeing a movement away from coal financing. In December 2020, one of the Philippines' largest banks, Rizal Commercial Banking Corporation (RCBC) announced that it would no longer finance green-field coal-fired power projects in the Philippines.⁸² In April 2021, the Bank of Philippine Islands announced its plans to reduce its coal financing in half by 2026 and to finance no coal projects by 2037.⁸³ In May 2021, the Philippine-based Asian Development Bank (ADB) made the same commitment, and in November 2021, announced the development of the Energy Transition Mechanism (ETM) by which it intends to channel public and private investments to retire coal plants on an earlier schedule than if they remained with their current owners.⁸⁴ The Philippines is one of the pilot countries for the ETM.

14. Another transition risk faced by Philippine companies is in the construction and housing sectors. In 2019, the Philippine Government enacted the Energy Efficiency and Conservation Act,⁸⁵ mandating that all new buildings and renovations comply with minimum requirements contained in the Guidelines on Energy Conserving Design of Buildings.⁸⁶ As a part of the broader Philippine Energy Plan 2018-2040, the Department of Energy has also developed the

⁸⁰ Philippine News Agency, New RE Plan Targets 35% Share of Power Generation by 2030 (13 November 2021) <<https://www.pna.gov.ph/articles/1159659>>.

⁸¹ Myrna Velasco, "Coal Moratorium to stay under Marcos admin", *Manila Bulletin* (9 August 2022) <<https://mb.com.ph/2022/08/09/coal-moratorium-to-stay-under-marcos-admin-doe/>>; Paige Javier, "Local sources, nuclear regulatory framework, coal moratorium – DOE bares plans on power supply" *CNN Philippines* (9 August 2022) <<https://www.cnnphilippines.com/news/2022/8/9/DOE-bares-plans-on-power-supply.html>>.

⁸² IEEFA, In the Philippines, coal's demise makes way for a renewable energy boom (31 July 2021) <<https://ieefa.org/resources/ieefa-philippines-coals-demise-makes-way-renewable-energy-boom>>.

⁸³ *Id.*

⁸⁴ Asian Development Bank, Energy Transition Mechanism Explainer: How ETM Will Support Climate Action in Southeast Asia (3 November 2021) <<https://www.adb.org/news/features/energy-transition-mechanism-explainer-support-climate-action-southeast-asia>>.

⁸⁵ Republic Act No. 11285, 12 April 2019.

⁸⁶ Department of Energy, Republic of the Philippines, *What Is Energy Conserving Design for Building?* <<https://www.doe.gov.ph/energy-efficiency/overview?q=gecdb&withshield=1>>.

Energy Efficiency & Conservation Roadmap 2017-2040 to improve energy usage across the transport, industrial, residential and commercial sectors.⁸⁷

15. A further transition risk that the Philippines is facing would be the use of trade mechanisms, such as carbon border tax adjustments, tariffs and even importation bans, to ‘incentivize’ progress on emissions reduction by laggard countries. For example, the EU has proposed legislation linked to its European Green Deal which includes a Carbon Border Adjustment Mechanism (CBAM), which will require non-EU producers to show that they have paid a price for the carbon used in the production of goods which are being imported into the EU.⁸⁸ The US is currently considering implementing a similar scheme with effect from 2024.⁸⁹ The potential for an operational global carbon market has been strengthened by the COP26 agreement on the operation of Article 6 of the Paris Agreement, which relates to carbon markets, and provides for the establishment of a supervisory body which will be responsible for the development of methodologies and other processes required to facilitate the market mechanism.⁹⁰

15.1 The Philippines does not currently have an ETS. However, in early 2020, the Committee on Climate Change of the Philippine House of Representatives conditionally approved the “*Low Carbon Economy Act*” House Bill (HB) No. 2184, which includes provisions for a domestic cap-and-trade system.⁹¹ The Department of Finance has expressed a preference for an ETS, as opposed to a general carbon tax.⁹²

⁸⁷ Department of Energy, Republic of the Philippines, Energy Efficiency & Conservation Roadmap 2017-2040 <<https://www.doe.gov.ph/pep/energy-efficiency-conservation-roadmap-20172040?ckattempt=1&withshield=1>>.

⁸⁸ European Commission, European Union Law, “Fit for 55”: Delivering the EU’s 2030 Climate Target on the way to climate neutrality (14 July 2021) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0550&from=EN>>.

⁸⁹ New York Times, Democrats Propose a Border Tax Based on Countries’ Greenhouse Gas Emissions, (August 2021) <<https://www.nytimes.com/2021/07/19/climate/democrats-border-carbon-tax.html>>.

⁹⁰ UNFCCC, FCCC/PA/CMA/2021/L.19: Rules, Modalities and Procedures for the Mechanism Established by Article 6, Paragraph 4, of the Paris Agreement (13 November 2021) <https://unfccc.int/sites/default/files/resource/cma2021_L19_adv_0.pdf>.

⁹¹ International Carbon Action Partnership, ETS Detailed Information: Philippines, (17 November 2021) <<https://icapcarbonaction.com/en/ets/philippines>>.

⁹² Beatrice M. Laforga, “Finance Department prefers emissions trading scheme over carbon tax,” Business World (18 June 2021) <<https://www.bworldonline.com/topstories/2021/06/18/376630/finance-department-prefers-emissions-trading-scheme-over-carbon-tax/>>.

16. A more recent response to transition risks arising from technology trends, such as the ‘creative destruction’ of ‘old’ technologies and developments in renewable energy generation, electric vehicles, battery storage for the stationary energy and transport sectors, energy efficiency and carbon capture usage and storage, would be the passage of the Electric Vehicle Industry Development Act,⁹³ that seeks *inter alia* to ensure the country’s energy security and independence by reducing reliance on imported fuel for the transportation sector, and to provide an enabling environment for the development of electric vehicles (EVs), including options for micro-mobility as an attractive and feasible mode of transportation to reduce dependence on fossil fuels.⁹⁴ The Act provides for the “*Comprehensive Roadmap for the Electric Vehicle Industry*,” a development plan designed to serve as a guideline for relevant stakeholders, and includes standards and specifications of EVs as well as charging stations, setting up of the local EV manufacturing industry and supply chain infrastructure, strengthening R&D for EV-related technologies, and training the workforce to deal with EVs.⁹⁵

17. Climate change is a clear and present risk that is within the consciousness of Philippine society. Seventy-five percent (75%) of Filipinos stated they are “*alarmed*” and “*concerned*” over climate change, with 78% acknowledging the issue is of personal importance and that they would likely participate in a campaign to pressure their leaders to take action.⁹⁶ There is no denying the legal truism that consideration of climate change risks would form part of directors’ exercise of business judgment in seeking the long-term interests of their companies. (See *discussion in Section D below*)

⁹³ Republic Act No. 11697, 15 April 2022.

⁹⁴ Sec. 2 (a) and (b), Electric Vehicle Industry Development Act.

⁹⁵ Sec. 6, Electric Vehicle Industry Development Act.

⁹⁶ Ludwig Federigan, “75% of Filipino are ‘alarmed’ and ‘concerned’ about climate change”, The Manila times (3 July 2021) <<https://www.manilatimes.net/2021/07/03/business/green-industries/75-of-filipinos-are-alarmed-and-concerned-about-climate-change/1805565>>.

C. PHILIPPINES' RESPONSES AND COMMITMENTS TO INTERNATIONAL ACTIONS ON CLIMATE CHANGE

1. The Philippines' international participation and commitment to address climate change is embodied in numerous international treaties, conventions and protocols which the Philippines has adopted, signed, or ratified.

2. Pursuant to Section 2, Article II of the 1987 Constitution, the Philippines “*adopts the generally accepted principles of international law as part of the law of the land.*”⁹⁷ Under this doctrine of incorporation, customary international law becomes part of the laws of the Philippines, despite the lack of an actual domestic legislation. It bears stressing that certain international environmental law principles are evolving as part of customary law, and can be applicable in the Philippines even without specific local enabling laws.

3. The Philippines, as a participant or signatory to various international environmental treaties, agreement, and covenants, and under customary international law, has an international obligation to address climate change and promote sustainable development. Beyond state commitments, regulators and even private stakeholders in the Philippines have voluntarily adopted international disclosure standards and frameworks relating to climate change risks and international principles and guidelines on sustainable financing and investment.

4. The Philippine Supreme Court has ruled that apart from the constitutional right of citizens to a healthful ecology which imposes a duty on both the public and private sectors to refrain from harming the environment, the Philippines is bound to the Universal Declaration of Human Rights which recognizes “*health as a fundamental human right.*”⁹⁸

a. 1992 Rio Declaration on Environment and Development

5. In June 1992, the UN Conference on Environment and Development (UNCED), also known as the “*Earth Summit*”, was held in Rio de Janeiro, Brazil and concluded with the *Rio Declaration on Environment and Development* (the

⁹⁷ Sec. 2, Art. II, 1987 Constitution.

⁹⁸ *Laguna Lake Development Authority v. Court of Appeals*, G.R. No. 110120, 16 March 1994; 231 SCRA 292, 307-308.

Rio Declaration) that enumerates 27 principles for states to follow to promote sustainable development and the obligation for environmental protection.⁹⁹

5.1 The 1992 Rio Declaration mandated states to enact effective environmental legislation¹⁰⁰ and introduced the precautionary principle providing that “*where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*”¹⁰¹ The declaration also required a national environmental impact assessment for “*activities that are likely to have a significant adverse impact on the environment.*”¹⁰²

5.2 While there were no signatories or convention bodies attached to the 1992 Rio Declaration, its principles have become the foundation of international environmental laws and have been adopted in national laws by various states, including the Philippines. More importantly, the 1992 Rio Earth Summit gave impetus to three conventions, namely the UNFCCC, the Convention on Biological Diversity (CBD), and the United Nations Convention to Combat Desertification (UNCCD).

b. 1992 United Nations Framework Convention on Climate Change

6. Entered into force on 21 March 1994, the UNFCCC was adopted with the objective of “*stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*”.¹⁰³ The UNFCCC outlines a framework of principles and commitments by state parties to reduce the impact of climate change and commit to limiting carbon dioxide and GHG emissions.

6.1 The UNFCCC distinguishes between Annex I Parties, comprising of developed countries with specific targets to mitigate climate change; and Non-Annex I Parties, which are mostly developing countries, including the Philippines, which are given special consideration due to their limited capacity and resources,

⁹⁹ Rio Declaration of the United Nations Conference on Environment Development, 13 June 1992, U.N. Doc. A/conf.151/26.

¹⁰⁰ *Id.* Principle 11.

¹⁰¹ *Id.* Principle 15.

¹⁰² *Id.* Principle 17.

¹⁰³ UNFCCC, 9 May 1992, 1771 U.N.T.S 107 . The Philippines signed it on 12 June 1992 and ratified it on 2 August 1994.

and consistent with the principle of common but differentiated responsibilities.

6.2 The UNFCCC provides the guidelines for the formation of protocols, decisions and rules to be adopted by the Conference of the Parties (COP), composed of all the state parties to the UNFCCC, and the highest decision-making body under the convention. The Philippines is a state party to the UNFCCC and actively participates in the COP, including the adoption of the 1997 Kyoto Protocol and 2015 Paris Agreement.

c. 1997 Kyoto Protocol

7. The Kyoto Protocol, which was adopted at the 3rd session of the UNFCCC COP (COP3) in 1997 and entered into force in 2005, took effect as an international and legally binding agreement to reduce greenhouse gas emissions to an average of five percent (5%) against 1990 levels over the five (5) year period between 2008-2012.¹⁰⁴ There are 192 parties to the Kyoto Protocol, including the Philippines, which signed it on 15 April 1998 and ratified it on 20 November 2003.

7.1 Only Annex I countries have binding targets under the Kyoto Protocol. Since the Philippines is a non-Annex I party, there is no mandatory obligation to reduce its greenhouse gas emissions under the Kyoto Protocol. Despite this, the Philippine government enacted in 2009, the *Climate Change Act of 2009*¹⁰⁵ which sets the Philippines' national policy on climate change consistent with international objectives to stabilize levels of greenhouse gases affecting our climate system.

d. Philippines' Climate Change Act of 2009

8. Under the Philippines' original Intended NDC (INDC) communicated in advance of COP21 in 2015 (ahead of the Paris Agreement being finalized and adopted), the country committed to reduce its emissions by 70% by 2030 against a business-as-usual trajectory over the 2000-2030 period conditional on the receipt of financial, capacity building and technological support.¹⁰⁶ Under the UNFCCC process, a country's INDC could be converted into its first NDC when it submitted its instrument of ratification, accession, or approval to join the Paris

¹⁰⁴ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, U.N. Doc. FCCC/CP/1997/7/Add.1 [hereinafter Kyoto Protocol].

¹⁰⁵ Republic Act No. 9729, as amended by R.A. 10174.

¹⁰⁶ Republic of the Philippines, Intended Nationally Determined Contribution (October 2015) <<https://www4.unfccc.int/sites/submissions/INDC/Published%20Documents/Philippines/1/Philippines%20-%20Final%20INDC%20submission.pdf>>.

Agreement, unless it decides otherwise. The Philippines did not convert its INDC into an NDC.

8.1 Instead, in April 2021, the Philippines formally communicated its first NDC to the UNFCCC, whereby the Philippine Government shall endeavor to peak its emissions by 2030 and committed to reduce its emissions by 75% against a business-as-usual trajectory by 2030; however, 79.29% of this is conditional, meaning that enacting the policies underlying these reductions will require support under the Paris Agreement.¹⁰⁷

8.2 The Philippines' NDC is based on the *Climate Change Act* and two key policy documents issued by the Climate Change Commission:

- (a) The *National Framework Strategy on Climate Change 2010-2022*,¹⁰⁸ which recognizes that climate change is “*the most serious and pervasive threat facing humanity today*” and sets out the Philippines' principles of climate change mitigation and adaptation, the risks arising from climate change, and overarching strategies for mitigation and adaptation, including developments and growth in sustainable infrastructure, clean energy and sustainable transport; and
- (b) The National Climate Change Action Plan 2011-2028,¹⁰⁹ which outlines the Philippine Government's comprehensive commitments to respond to climate risks that involves both the public and the private sectors, centered around seven key policy areas: food security, water sufficiency, ecological and environmental sustainability, human security, climate-friendly industries and services, sustainable energy and knowledge and capacity development.

¹⁰⁷ Republic of the Philippines, Nationally Determined Contribution to the UNFCCC (15 April 2021) <<https://unfccc.int/sites/default/files/NDC/2022-06/Philippines%20-%20NDC.pdf>>.

¹⁰⁸ Climate Change Commission, National Framework Strategy on Climate Change 2010-2022 (28 April 2010) <<https://climate.gov.ph/files/NFSCC.pdf>>.

¹⁰⁹ Climate Change Commission, National Climate Change Action Plan 2011-2028 (2011) <<https://policy.asiapacificenergy.org/sites/default/files/National%20Climate%20Change%20Action%20Plan%202011-2028.pdf>>.

8.3 The *Climate Change Act* was amended¹¹⁰ in 2011 to establish a People's Survival Fund, which provided the mechanism for long-term finance streams to enable the Philippine Government to effectively address climate change, support adaptation activities, and prevent and mitigate disasters. The amendatory act explicitly recognized the Philippines' vulnerability to potential dangerous consequences of climate change, such as increasing temperatures, rising seas, increasing frequency and/or severity of droughts, fire, floods and storms, climate-related illnesses and diseases, damage to ecosystems, and biodiversity loss that affect the environment, culture, and economy. The economic transition risks relating to the Philippines' commitment to a low carbon regime has had a business impact on certain key industries, such as oil and power companies, the automotive industry, the logging industry, and the construction industry. These economic transition impacts have, and will continue to have, profound effect on key industries' business model, revenues and costs, and financing and investment profiles.

e. 2015 Paris Agreement

9. The Philippines, together with 174 countries, signed the Paris Agreement which was adopted at the 21st COP (COP21) on 12 December 2015 and entered into force on 4 November 2016.¹¹¹ Currently, there are 195 signatories to the Paris Agreement.

9.1 The Paris Agreement sets the goal of: (a) limiting the “*increase in the global average temperature to well below 2°C above pre-industrial levels*” and to pursue “*efforts to limit the temperature increase to 1.5°C above pre-industrial levels*”, to be achieved through countries' nationally determined contributions (NDCs); and (b) achieving a balance between emissions and removals of human-caused GHGs in the second half of the century.¹¹²

9.2 In 2015, the Philippines originally committed to reduce its GHG emissions by 70% by 2030 against a business-as-usual trajectory over the 2000-2030 period, and conditional on the receipt of financial, technological, and

¹¹⁰ Republic Act No. 10174.

¹¹¹ Paris Agreement (13 Dec. 2015), in UNFCCC, COP Report No. 21, Addendum, at 21, U.N. Doc. FCCC/CP/2015/10/Add, 1 (29 Jan. 2016).

¹¹² United Nations, Paris Agreement, 2015.

capacity building support.¹¹³ In terms of greenhouse gas emissions, the Philippines emits an average of 1.98 metric tons of carbon dioxide equivalent per capita in 2020, or way below the global average of four (4) metric tons per capita.¹¹⁴

9.3 In 2021, the Philippines updated its NDC. While this does not mandate a net-zero emissions goal for the country, the NDC states that the Philippines commits to peak its emissions by 2030, and to reduce its greenhouse gas emissions by 75% against the business-as-usual scenario for 2020-2030 by 2030. This commitment is 2.71% unconditional and 72.29% conditional, meaning that enacting the policies underlying these committed reductions will require support under the Paris Agreement.¹¹⁵

f. 2030 Agenda for Sustainable Development

10. The 2030 Agenda and its 17 Sustainable Development Goals (SDGs) were adopted in 2015 by all member countries of the UN, including the Philippines.¹¹⁶ The SDGs are a comprehensive set of goals recognizing the connections between the people and the planet, comprising 169 targets, integrated and indivisible to balance the three dimensions of sustainable development: the economic, social, and environmental.¹¹⁷

10.1 The 17 SDGs are as follows: (1) No Poverty, (2) Zero Hunger, (3) Good Health and Well-being, (4) Quality Education, (5) Gender Equality, (6) Clean Water and Sanitation, (7) Affordable and Clean Energy, (8) Decent Work and Economic Growth, (9) Industry, Innovation and Infrastructure, (10) Reduced Inequality, (11) Sustainable Cities and Communities, (12) Responsible Consumption and Production, (13) Climate Action, (14) Life Below Water, (15) Life On Land, (16) Peace, Justice, and Strong Institutions, and (17) Partnerships for the Goals.¹¹⁸

¹¹³ Republic of the Philippines, Intended Nationally Determined Contribution to the UNFCCC, October 2015.

¹¹⁴ Republic of the Philippines, Nationally Determined Contribution to the UNFCCC (15 April 2021) <<https://unfccc.int/sites/default/files/NDC/2022-06/Philippines%20-%20NDC.pdf>>.

¹¹⁵ *Id.*

¹¹⁶ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

¹¹⁷ National and Economic Development Authority: <https://philippines.un.org/en/sdgs>

¹¹⁸ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

10.2 While the SDGs may not be legally binding, governments are expected to establish national frameworks to achieve these 17 goals. The Philippines has integrated the SDGs in its overall national development plan, as well as in various sectoral development plans in the country. Even publicly-listed companies in the Philippines need to report on their contributions to the SDGs under the latest sustainability reporting guidelines.

g. Sendai Framework for Disaster Risk Reduction

11. At the conclusion of the Third UN World Conference on Disaster Risk Reduction, on 18 March 2015, the Sendai Framework for Disaster Risk Reduction (the Sendai Framework) was signed by 187 countries, including the Philippines.¹¹⁹ The Sendai Framework is the successor to the Hyogo Framework and observes that disaster risk reduction is a cross-cutting issue in the context of sustainable development, which is a critical element to achieving the SDGs.¹²⁰

11.1 The Sendai Framework focuses on the adoption of measures which address the three (3) dimensions of disaster risk (exposure to hazards, vulnerability and capacity, and hazard’s characteristics) in order to prevent the creation of new risk, reduce existing risk, and increase resilience.¹²¹ The Sendai Framework also outlines seven (7) global targets to measure progress made by countries in disaster risk reduction by 2030, including reducing mortality rate, number of people affected, direct economic loss in relation to GDP, damage to critical infrastructure and disruption of basic services.¹²²

11.2 The Sendai Framework and its goals are not mandatory and legally binding, but serve as a guide to assess reduction of disaster risks, including those resulting from climate change. The Philippines has enacted the Philippine Disaster Risk Reduction and Management Act,¹²³ institutionalized the Sendai Framework reporting and monitoring for the national and local governments, and adopted strategic goals to build national and local resilience to climate change-

¹¹⁹ United Nations Office for Disaster Risk Reduction (UNDRR): What is the Sendai Framework for Disaster Risk Reduction? <<https://www.undrr.org/implementing-sendai-framework/what-sendai-framework>>.

¹²⁰ *Id.*

¹²¹ Sendai framework for disaster risk reduction 2015–2030. In: UN world conference on disaster risk reduction, 14–18 March 2015, Sendai, Japan. Geneva: United Nations Office for Disaster Risk Reduction (2015).

¹²² *Id.*

¹²³ Republic Act No. 10121 (2010), hereinafter referred to as “Philippine Disaster Risk Reduction and Management Act.”

related disasters.

h. G20's Financial Stability Board – Task Force on Climate-related Financial Disclosures

12. In June 2017, the G20 Financial Stability Board (FSB) Task Force on Climate-related Financial Disclosures (TCFD) issued its final recommendations on governance and management of climate-related risks, impact on strategy and financial planning, and use of climate-related metrics and targets, to be applied to non-financial companies and financial-sector organizations.¹²⁴ The TCFD recommended that climate-related financial disclosures be: (1) adoptable by all organizations, (2) included in financial filings, (3) designed to solicit decision-useful, forward looking information on financial impacts, and (4) encourage a strong focus on risks and opportunities related to the transition to a lower-carbon economy.¹²⁵

12.1 The TCFD recommendations are globally recognized as the leading standard on disclosure of financially material climate-related information. As of October 2022, the TCFD had the support of over 3,900 public and private institutions located in 101 jurisdictions, including the Philippines' Securities and Exchange Commission (SEC), which adopted the TCFD recommendations in its sustainability reporting guidelines, and 19 other companies headquartered in the Philippines: Aboitiz Equity Ventures Inc, AC Energy Corporation, AREIT, Inc., Asian Development Bank, Ayala Corporation, Ayala Land, Inc., Bank of the Philippine Islands, Converge Information and Communications Technology Solutions, Inc., Globe Telecom Inc., Integrated Micro-Electronics Inc., Manila Electric Company, Manila Water Company, Metro Pacific Investments Corporation, NEO, Pilipinas Shell Petroleum Corporation, PLDT Inc., SM Investments Corporation, SM Prime Holdings, Inc., and Universal Robina Corporation.¹²⁶

12.2 The Philippine SEC's Sustainability Reporting Guidelines for Publicly Listed Companies are based on, and refer to, the TCFD, as well as other global reporting standards. Public companies in the Philippines must report in

¹²⁴ TCFD, Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures (June 2017) <<https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf>>. See also the TCFD: 2019 Status Report (June 2019) <<https://assets.bbhub.io/company/sites/60/2020/10/2019-TCFD-Status-Report-FINAL-0531191.pdf>> .

¹²⁵ *Id.*

¹²⁶ TCFD: Supporters, accessed at: <https://www.fsb-tcf.org/supporters/>

accordance with these guidelines on a 'comply or explain' basis.¹²⁷ The Philippine SEC is reportedly planning to make sustainability reporting mandatory for publicly listed companies by 2023.¹²⁸ (See discussion in Section F below)

i. 2017 Network of Central Banks and Supervisors for Greening the Financial System

13. The Network of Central Banks and Supervisors for Greening the Financial System (NGFS), which launched on 12 December 2017 at the Paris One Planet Summit, is an international group of central banks and supervisors with 114 members and 19 observers as of April 2022.¹²⁹ The NGFS guidance on climate-related disclosures for central banks highlights the areas of: (a) *Governance* – disclosing high-level approach to climate-related risks and governance structures around monetary policy; (b) *Strategy* – disclosing strategies for identifying, assessing, and describing climate-related risks; and (c) *Risk Management* – disclosing the current state of climate-related risk management.¹³⁰

13.1 The Philippines' Central Bank, the *Bangko Sentral ng Pilipinas* (BSP), joined the NGFS in August 2020, and has also adopted a sustainable finance framework for banks in the Philippines.¹³¹ The BSP recognizes that the physical (loss or damage to tangible assets) and transitional (economic adjustment cost) risks of climate change could significantly affect banks and stakeholders, and expects that by 2023 all banks in the Philippines, including branches of foreign banks, will have embedded sustainability principles in their corporate governance framework, risk management systems, and strategic objectives.¹³²

¹²⁷ SEC Memorandum Circular No. 2019-04, 15 February 2019.

¹²⁸ Anne Ruth dela Cruz, "SEC to make sustainability reporting mandatory by 2023," Business Mirror (30 August 2021) <<https://businessmirror.com.ph/2021/08/30/sec-to-make-sustainability-reporting-mandatory-by-2023/>>.

¹²⁹ NGFS: About Us and Membership: <https://www.ngfs.net/en/about-us/membership>

¹³⁰ NGFS, Guide on climate-related disclosure for central banks (December 2021) <https://www.ngfs.net/sites/default/files/medias/documents/guide_on_climate-related_disclosure_for_central_banks.pdf> ; See also: NGFS, A Call for Action: Climate Change as a Source of Financial Risk (April 2019) <https://www.ngfs.net/sites/default/files/medias/documents/synthese_ngfs-2019_-_17042019_0.pdf>.

¹³¹ *Bangko ng Sentral Philippines*, Circular No. 1085: Sustainable Finance Framework, 2020.

¹³² Sec. 153, Manual of Regulations for Banks (MORB), as amended by *Bangko ng Sentral Philippines*, Circular No. 1085: Sustainable Finance Framework, 2020.

D. DIRECTORS' DUTIES AND RESPONSIBILITIES IN RELATION TO CLIMATE CHANGE

1. In the Philippine legal jurisdiction, the duties and responsibilities of directors of *for-profit* corporations in relation to climate change, which constitute the bases for the potential liabilities that directors are exposed to, are circumscribed within the following legal framework: (a) The constitutional recognition of the citizens' 'right to health' and 'right to a balanced and healthful ecology,' coupled with characterization of the 'social functions of private corporations'; (b) The characterization of the 'role of private corporations in addressing climate change' under the *Climate Change Act*; and (c) The corporate governance framework that incorporates sustainable development in general, and consideration of climate change risks, in particular, in defining the directors' duties of obedience and diligence in the collective exercise of their business judgment.

a. **Constitutional Underpinning of Directors' Duties and Responsibilities in relation to Climate Change**

2. *Constitutional Rights to Health and to a Balanced and Healthful Ecology.* – The 1987 Constitution of the Philippines recognizes the citizens' "right to health" and "right to a balanced and healthful ecology," with corresponding obligations of the State to "protect and promote the right to health of the people,"¹³³ as well as to "protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."¹³⁴ These constitutional principles were engrafted into the Philippine constitution as a manifestation of "a clear desire to make environmental protection and ecological balance conscious objects of police power" of the State.¹³⁵

¹³³ Sec. 15, Article II (*Declaration of Principles and State Policies*), 1987 Constitution: *The State shall protect and promote the right to health of the people and instill health consciousness among them.*"

¹³⁴ Sec. 16, Article II (*Declaration of Principles and State Policies*), 1987 Constitution: "The State shall protect and advance the right of the people to a balance and healthful ecology in accord with the rhythm and harmony of nature."

¹³⁵ Bernas, Joaquin G., *The 1987 Constitution of the Republic of the Philippines* (Rex Book Store, Manila, Philippines, 2009 edition), at p. 90.

2.1 In its landmark decision in *Oposa v. Factoran, Jr.*,¹³⁶ the Philippine Supreme Court ruled that the constitutional provisions on the right to health and right to a balanced and healthful ecology are self-executing fundamental rights of Filipino citizens which do not need enabling statutes and would constitute the requisite “*standing to sue*” by any Filipino citizen, and necessarily impose “the correlative duty to refrain from impairing the environment.”¹³⁷ *Oposa* further held: “*While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation ... the advancement of which may even be said to predate all governments and constitutions.*”¹³⁸

2.2 Subsequently, in *Laguna Lake Development Authority v. Court of Appeals*,¹³⁹ the Supreme Court relied on the same constitutional provisions to hold that: “*As a constitutionally guaranteed right of every person, it carries the correlative duty of non-impairment. This is but in consonance with the declared policy of the state ‘to protect and promote the right to health of the people and instill health consciousness among them’ (Article II, Section 15, 1987 Constitution). It is to be borne in mind that the Philippines is party to the Universal Declaration of Human Rights and the Alma Conference Declaration of 1978 which recognize health as a fundamental human right.*”¹⁴⁰

¹³⁶ G.R. No. 101083, 30 July 1993; 224 SCRA 792.

¹³⁷ 224 SCRA 792, 804.

¹³⁸ *Id.*, at pp. 804-805. The Court went further to state that “**As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come — generations which stand to inherit nothing but parched earth incapable of sustaining life.**” at p. 805; *emphasis supplied*.

¹³⁹ G.R. No. 110120, 16 March 1994; 231 SCRA 292, 307-308.

¹⁴⁰ **In July 2022, the UN General Assembly adopted a landmark resolution declaring access to clean, healthy and sustainable environment a universal human right, with the Philippines voting in favor of the resolution.** See United Nations News, UN General Assembly declares access to clean and healthy environment a universal human right (28 July 2022) <<https://news.un.org/en/story/2022/07/1123482>>.

2.3 In *Metropolitan Manila Development Authority v. Residents of Manila Bay*,¹⁴¹ the Supreme Court held that the protection of the environment as embodied in Section 16 of Article XII of the 1987 Constitution is essentially a duty directed to the government, and that the public has a right to seek through a writ of *mandamus* from appropriate government agencies to perform statutory-mandated measures to protect the environment.

2.4 In May 2022, the Commission on Human Rights (CHR) of the Philippines concluded an investigation into climate change and human rights. While non-binding, the Commission's findings and recommendations include: climate change poses a threat to individual's human rights; international treaties and resolutions, including the Universal Declaration on Human Rights, form part of Philippine law; and that therefore entities incorporated or doing business in the Philippines in the value chain of high-emission companies could be compelled to undertake human rights due diligence.¹⁴²

2.5 In essence, Sections 15 and 16, Article XII of the 1987 Constitution are the legal bases by which the State can use its police power to impose on the private sector measures provided for in various environmental laws to promote a healthful ecology for the Filipino citizenry, and to define the role and responsibilities of private corporations on environmental concerns confronting Philippine society.

3. *Social Function of Economic Enterprises.* – Although the 1987 Constitution recognizes the indispensable role of the private sector, encourages private enterprise and provides incentives to needed investments,¹⁴³ guarantees the principles of private ownership,¹⁴⁴ as well as the free-market system,¹⁴⁵ it has in unmistakable terms decreed the 'social function of private property and economic enterprises,' even when held or pursued through the medium of the

¹⁴¹ G.R. No. 171947-48, 18 December 2008; 574 SCRA 661, 665.

¹⁴² Commission on Human Rights of the Philippines, National Inquiry on Climate Change (May 2022) <<https://chr.gov.ph/wp-content/uploads/2022/05/CHRP-NICC-Report-2022.pdf>>.

¹⁴³ Sec. 20, Art. II, 1987 Constitution provides: "*The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments.*"

¹⁴⁴ Sec. 1, Art. III of the 1987 Constitution particularly provides: "*No person shall be deprived of ... property without due process of law.*" Section 9 thereof provides: "*Private property shall not be taken for public use without just compensation.*"

¹⁴⁵ Sec. 20, Art. II of the 1987 Constitution.

corporation.¹⁴⁶ The Philippine Supreme Court has held that the constitutional principle of the ‘social function of property’ trumps the constitutional policy recognizing the indispensable role of the private sector and encouragement of private enterprise.¹⁴⁷

4. *Public Trust Doctrine.* – In the field of environment protection, the Philippine Supreme Court formally adopted in *Maynilad Water Services, Inc. v. Secretary of DENR*,¹⁴⁸ the “*public trust doctrine*” which proceeds from the constitutional principle of *jura regalia*¹⁴⁹ that reserves to the State ownership of all natural resources. The *public trust doctrine* “*reaffirms the superiority of public rights over private rights for critical resources. It impresses upon states the affirmative duties of a trustee to manage these natural resources for the benefit of present and future generations and embodies key principles of environmental protection: stewardship, communal responsibility, and sustainability. ... The public is regarded as the beneficial owner of trust resources, and courts can enforce the public trust doctrine even against the government itself.*”¹⁵⁰

5. *Summation.* – When it comes to climate change, the constitutional rights to health and to a balanced and healthful ecology, coupled with the constitutionally-mandated ‘social function to contribute to the common good’ of all private economic enterprise — which would include the obligation to refrain from harming the environment — would mean that the entire citizenry could potentially fall within the coverage of ‘stakeholders’ of all *for-profit* corporations insofar as their operations may adversely affect the environment. Additionally, the application of the *public trust doctrine* means that private economic enterprises — including private corporations — operate under the police power of the State in pursuit of its climate change agenda, as expressed in statutory and administrative

¹⁴⁶ Sec. 6, Art. XII of the 1987 Constitution: “*The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands.*”

¹⁴⁷ *Marine Radio Communications Association of the Phils., Inc. v. Reyes*, G.R. No. 86953, 06 November 1990; 191 SCRA 205, 208-210.

¹⁴⁸ G.R. Nos. 202897, 206823 & 207969, 06 August 2019; 912 SCRA 136.

¹⁴⁹ Sec. 2, Art. XII of the 1987 Constitution provides in part: “*All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. ... The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. ...*”

¹⁵⁰ *Id.*, at pp. 187-189; *emphasis original*.

issuances relating to the protection of the environment. **As discussed more in-depth below**, this would mean that directors of *for-profit* corporations assume the functions of their office with the understanding that their fiduciary duties of obedience and diligence is owed not just to the shareholders but other stakeholders, as well, which duties **include within their scope of responsibility a stewardship role to ensure that company operations do not degrade the environment or contravene environmental laws.**

b. Role of the Private Business under the Climate Change Act

6. Our understanding of the Philippines' national policy on climate change as expressed in Section 2 of the *Climate Change Act*,¹⁵¹ is to the effect that the obligation to afford full protection and advance the right of the people to a healthful ecology, the achievement of the Philippine Agenda 21 Framework that espouses sustainable development and the UNFCCC on the stabilization of greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, among others, are the primary responsibility of the State and its various instrumentalities.

7. The operative provisions of the *Climate Change Act* are essentially to constitute the Climate Change Commission (and its advisory Board), an independent and autonomous body having the same status as that of a national government agency (chaired by the President), and which "*shall be the lead policy-making body of the government, which shall be tasked to coordinate, monitor and evaluate the programs and action plans of the government in order to ensure the mainstreaming of climate change into the national, sectoral and local development plans and programs pursuant to the provisions of this Act.*"¹⁵² In particular, the Climate Change Commission is mandated to evolve the components of the Framework Strategy and Program on Climate Change¹⁵³ and formulate a National Climate Change Action Plan in accordance with the Framework.¹⁵⁴ It provides for the role of Local Government Units in adopting local

¹⁵¹ Republic Act No. 9729, as amended by R.A. 10174.

¹⁵² Sec. 4, Climate Change Act.

¹⁵³ Sec. 12, Climate Change Act.

¹⁵⁴ Sec. 13, Climate Change Act.

climate change action plans,¹⁵⁵ and for the roles of designated government agencies.¹⁵⁶

7.1 Apart from the mandate that the Climate Change Commission shall “coordinate with nongovernment organizations (NGOs), civic organizations, academe, people’s organization, the private and corporate sectors and other concerned stakeholder groups,”¹⁵⁷ in the development and implementation of the National Climate Change Action Plan, the *Climate Change Act* does not define any institutional obligation on the part of the private sector, much less of the private corporate sector, to pursue climate change activism. The implementing rules enjoin the participation of “**businesses**, nongovernmental organizations, the academe, local and indigenous communities and the general public to prevent and reduce the adverse impacts of climate change, and at the same time, maximize the benefits of climate change.”¹⁵⁸ In addition, the Act allows and encourages counterpart funding arrangements with private sector for the People’s Survival Fund that will be used to support adaptation activities of local governments and communities.¹⁵⁹

7.2 In essence, the *Climate Change Act* provides the opportunities that the private corporate sector may take advantage of in fulfilling their social responsibilities towards meeting climate change risks, but it does not define, much less impose an institutional responsibility on the private corporate sector to address climate change beyond the legal parameters set out by the State in its environmental laws. How the directors perceive their companies’ social responsibilities towards climate change risk as it affects the long-term viability of their business enterprise, and how they take advantage of the incentives and other business opportunities offered under the *Climate Change Act* and its implementing regulations, are addressed to the directors’ collective exercise of business judgment.

8. *Climate Change-Related Environmental Laws.* – Our review of the Philippines’ environmental laws that are related directly to climate change (See *discussion in Section E below*) indicates that there is no attempt by the

¹⁵⁵ Sec. 14, Climate Change Act.

¹⁵⁶ Sec. 15, Climate Change Act.

¹⁵⁷ Sec. 16, Climate Change Act; *emphasis supplied*.

¹⁵⁸ Sec. 1(f), Rule II, Revised IRR to the Climate Change Act.

¹⁵⁹ Sec. 20, Climate Change Act.

Government to define a legally binding ‘role of the business sector,’ when it comes to protecting the environment. This is in line with the constitutional provisions that imposes **primarily upon the State** the obligation to “*protect and promote the right to health of the people and instill health consciousness among.*”¹⁶⁰ What is extant from the Philippine legal environmental framework is that the State defines and penalizes “*prohibited acts*” which are essential for the protection of the environment, but does not impose on the private sector a duty or obligation ‘to promote environmental protection.’ It is the Government that is primarily burdened to promote environmental consciousness and volunteerism in the private sector, through a system of education, consultations, rewards and incentives.

9. Since the Philippines’ *Climate Change Act* and the supporting environmental laws do not impose an institutional role on private corporations towards climate change activism, much less provide for directors’ specific duties and responsibilities in relation to climate change, we look upon the provisions of the Revised Corporation Code and related administrative issuances of the Securities and Exchange Commission (SEC) to evolve the nature of the duties and responsibilities of directors of *for-profit* corporations in relation to climate change risks.

9.1 The discussion immediately below will analyze directors’ duties and responsibilities in relation to climate change measured on two levels: (a) **With respect to the shareholders and other investors**, which shall be gauged on the basis of the corporate governance framework that incorporates within the directors’ duties and responsibilities the proper consideration of climate change risks in their exercise of business judgment and the fulfillment of their fiduciary duty to act in the best interest of the corporation and its shareholders; and (b) **With respect to other stakeholders**, which should be gauged on the following bases: (i) the companies’ obligations to comply with the directives of the State and avoidance of violating the prohibited acts found in various environmental laws; and (ii) the corporate governance framework that expands the directors’ fiduciary duties to the long-term success of the company that promotes the

¹⁶⁰ Sec. 16, Article II, 1987 Constitution.

interests of other stakeholders as well in pursuit of sustainable development which includes climate change as among the primary concerns.

c. Directors' Fiduciary Duties – in General

10. *Attribute of Centralized Management.* – The legal bedrock upon which the Philippines' corporate governance framework is based upon is the 'attribute of centralized management' expressed in Section 22 of the Revised Corporation Code of the Philippines,¹⁶¹ that directly vests in the board of directors the exercise of all corporate powers, the conduct of all its business, and the control of all properties of the corporation, save in those specifically enumerated instances where shareholders' ratification vote is required.¹⁶² Although the day-to-day affairs of the corporation are in the hands of management, it is mandated that the executive officers shall manage the corporation and perform such duties as may be provided in the bylaws **and/or as resolved by the board of directors.**¹⁶³

11. *Directors' Fiduciary Duties.* – The 'attribute of centralized management' embedded in the governance structure of private corporations is the basis under Philippine Corporation Law for the **fiduciary duties of obedience, diligence, and loyalty,**¹⁶⁴ that every director assumes upon being qualified into his office. The Philippine Supreme Court has ruled that the fiduciary or trust relationship between directors and shareholders "*is not a matter of statutory or technical law. It springs from the fact that directors have the control and guidance of corporate affairs and property and hence of the property interests of the stockholders.*"¹⁶⁵

12. *Duty of Obedience.* – Since the corporation remains defined in Philippine Corporation Law as a 'creature of limited powers' — a corporation possesses or may exercise only the powers that are conferred by law, or articles of incorporation and those necessary or incidental to the exercise of the powers

¹⁶¹ Republic Act No. 11232, 21 February 2019.

¹⁶² Sec. 22, Revised Corporation Code provides in part: "... *Unless otherwise provided in this Code, the board of directors or trustees shall exercise the corporate powers, conduct all business, and control all properties of the corporation.*"

¹⁶³ Sec. 24, Revised Corporation Code provides in part: "*The officers shall manage the corporation and perform such duties as may be provided in the bylaws and/or as resolved by the board of directors.*"

¹⁶⁴ *Strategic Alliance Development Corp. v. Radstock Securities Ltd.*, G.R. No. 178158, 04 December 2009; 607 SCRA 413.

¹⁶⁵ *Gokongwei, Jr. v. Securities and Exchange Commission*, G.R. No. L-45911, 11 April 1979; 89 SCRA 336, 367.

conferred¹⁶⁶ — the duty of obedience imposes upon the directors the fiduciary responsibility to exercise corporate powers and pursue the corporate business enterprise in accordance with the purpose and powers granted to the corporation.¹⁶⁷

12.1 Section 23 of the Revised Corporation Code provides for a more comprehensive coverage of directors' duty of obedience that formally incorporates compliance with "*rules of good corporate governance*," thus: "*The directors or trustees elected shall perform their duties as prescribed by law, rules of good corporate governance, and bylaws of the corporation.*" Further, Section 30 of the Revised Corporation Code provides one of the manners by which a director may breach his duty of obedience, *i.e.*, when he "*willfully and knowingly vote for or assent to a patently unlawful act of the corporation.*"

13. *Duty of Diligence.* – The duty of diligence covers the common law obligation of directors to act with the diligence of a prudent man in pursuing the affairs of the corporation and in looking after the interests of shareholders, and other stakeholders. Section 30 of the Revised Corporation Code defines the manner by which the duty of diligence may be breached thus: "*Directors or trustees who **willfully and knowingly vote for or assent to patently unlawful acts of the corporation** or who are guilty of gross negligence or bad faith in directing the affairs of the corporation ... shall be liable jointly and severally for all damages resulting therefrom suffered by the corporation, its stockholders or members and other persons.*"

14. *Duty of Loyalty.* – In Philippine Corporation Law, the directors' duty of loyalty has limited application, applying only to conflict-of-interest situations which disqualifies or prohibit directors from acquiring any personal or pecuniary interest in conflict with the best interests of the company.¹⁶⁸ Section 33 of the Revised Corporation Code provides that "*disloyalty of a director*" occurs: "*Where a director, by virtue of such office, acquires a business opportunity which should*

¹⁶⁶ Sec. 2 (*Corporation Defined*) of the Revised Corporation Code reads: "*A corporation is an artificial being created by operation of law, having the right of succession and the powers, attributes, and properties expressly authorized by law or incidental to its existence.*"

¹⁶⁷ Sec. 44 (*Ultra Vires Acts of Corporations*) of the Revised Corporation Code provides: "*No corporation shall possess or exercise corporate powers other than those conferred by this Code or by its articles of incorporation and except as necessary or incidental to the exercise of the powers conferred.*"

¹⁶⁸ *Strategic Alliance Development Corp. v. Radstock Securities Ltd.*, G.R. No. 178158, 04 December 2009; 607 SCRA 413.

belong to the corporation, thereby obtaining profits to the prejudice of such corporation, the director must account for and refund to the latter all such profits, unless act has been ratified by a vote of the stockholders owning or representing at least two-thirds (2/3) of the outstanding capital stock. This provision shall be applicable, notwithstanding the fact that the director risked one's own funds in the venture."

14.1 On the other hand, under Philippines' corporate governance framework for publicly-held companies, as it relates to the principle of establishing clear roles and responsibilities of the board of directors,¹⁶⁹ the CG Codes for Publicly-held Companies (*as defined below*) explain that directors "*should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and all shareholders,*"¹⁷⁰ with the directors' duty of loyalty explained to mean that "*the board member should act in the interest of the company and all its shareholders, **and not those of the controlling company of the group or any other stakeholders.***"¹⁷¹

14.2 With such limited, if not peculiar, application of the directors' duty of loyalty, we shall be referring to the particular aspect of the duty of loyalty as referring to 'acting in the best interest of the corporation and its shareholders', which necessarily includes the duties of obedience and of diligence.

d. Directors' Duties and Responsibilities to Shareholders in Relation to Climate Change

15. Directors' duties and responsibilities to shareholders in relation to climate change are essentially intramural in character as they pertain to the shareholders' equity interests in the corporate business enterprise. Insofar as shareholders are concerned, directors' duties to properly identify, assess and manage the physical and transition (including liability and reputational) risks of climate change are geared towards preserving the long-term value or profitability of the corporate business enterprise (as distinguished from the damage to the environment that undermines other stakeholders' constitutional right to a

¹⁶⁹ Principle 2 of the Code of Corporate Governance for Publicly-listed Companies (SEC Memorandum Circular No. 19-2016), and the Code of Corporate Governance for Public Companies and Registered Issuers of Securities (SEC Memorandum Circular No. 24-2019), herein collectively referred to as "CG Codes for Publicly-held Companies."

¹⁷⁰ Recommendation 2.1 under Principle 2, CG Codes for Publicly-held Companies.

¹⁷¹ Explanation to Recommendation 2.1, CG Codes for Publicly-held Companies (*emphasis supplied*).

balanced and healthful environment). **Under Philippine Corporation Law, the risks facing, and losses sustained by, the corporation relating to climate change fall within the same category as other foreseeable financial risk faced by directors of *for-profit* corporations, and are within scope of their duties to act in the best interest of the corporation and its shareholders, *albeit* under the aegis of the business judgment rule as discussed in Section E below.**

16. The Revised Corporation Code and the Securities Regulation Code do not have specific provisions on the manner by which directors shall comply with their duties and responsibilities relating to the protection of the environment, in general, or the management of climate change risks, in particular. The directors' governance responsibilities on climate change are located within SEC's *Code of Corporate Governance for Publicly-listed Companies (PLCs)*,¹⁷² and the *Code of Corporate Governance for Public Companies (PCs) and Registered-Issuers of Securities (RIs)*,¹⁷³ which shall hereinafter be collectively referred to as "*CG Codes for Publicly-held Companies*" or simply as "*CG Codes*". **In essence, the specificity of how directors discharge their duties to act in the best interests of the corporation in relation to climate change risks fall are specified within Philippine corporate governance framework.**

17. The CG Codes for Publicly-held Companies have similar provisions on ESG matters, and both are based on the 'comply or explain' approach which combines voluntary compliance with mandatory disclosure, thus: "*Companies do not have to comply with the Code, but they must state in their annual corporate governance reports whether they comply with the Code provisions, identify any areas of non-compliance, and explain the reasons for non-compliance.*"¹⁷⁴ No penalties are imposed on publicly-held companies for non-compliance with the principles and recommended best practices under the codes, and the expectation is that it is the market which will vote with their investment decisions on whether they believe in the publicly-held companies' explanation for non-compliance with the principles, recommendation and best practices of the CG Codes.

¹⁷² SEC Memorandum Circular No. 19, series 2016 (22 November 2016), hereinafter referred to as "CG Code for PLCs."

¹⁷³ SEC Memorandum Circular No. 24-2019 (19 December 2019), hereinafter referred to as "CG Code for PCs and RIs."

¹⁷⁴ Para. 2 of the Introduction, CG Code for Publicly-held Companies.

17.1 The CG Codes adopt the principle that a truly competent board of directors should “*foster the long-term success of the corporation, and to sustain its competitiveness and profitability in a manner consistent with its corporate objectives and the long-term best interests of its shareholders and other stakeholders.*”¹⁷⁵

17.2 When it comes to establishing the roles and responsibilities of the board, the CG Codes adopt the principle that “[t]he fiduciary roles, responsibilities and accountabilities as provided under the law, the company’s articles and by-laws, and other legal pronouncements and guidelines should be clearly made known to all directors.”¹⁷⁶ In line with such principle, the CG Codes recommend that directors “*should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and all shareholders;*”¹⁷⁷ and “*should oversee the development of and approve the company’s business objectives and strategy, and monitor their implementation, in order to sustain the company’s long-term viability and strength.*”¹⁷⁸

17.3 When it comes to directors’ duty to properly oversee the company’s Enterprise Risk Management (ERM) system, which would include climate change risks that would undermine the company enterprise value, the CG Codes adopt the principle that “*The Board should oversee that a sound enterprise risk management (ERM) framework is in place to effectively identify, monitor, assess and manage key business risks. The risk management framework should guide the Board in identifying units/business lines and enterprise-level risk exposures, as well as the effectiveness of risk management strategies.*”¹⁷⁹ In addition, the CG Codes consider it best practice that every publicly-held company should have a strong and effective internal control system and enterprise risk management framework, to ensure the integrity, transparency and proper governance in the conduct of its affairs.¹⁸⁰ An “*effective enterprise risk management framework typically includes such activities as the*

¹⁷⁵ Principle 1 (*Establishing a Competent Board*), CG Codes for Publicly-held Companies.

¹⁷⁶ Principle 2 (*Establishing Clear Roles and Responsibilities of the Board*), CG Code for Publicly-held Companies.

¹⁷⁷ Recommendation 2.1, CG Code for Publicly-held Companies.

¹⁷⁸ Recommendation 2.2, CG Code for Publicly-held Companies.

¹⁷⁹ Recommendation 2.11, CG Code for Publicly-held Companies.

¹⁸⁰ Principle 12, CG Code for Publicly-held Companies.

*identification, sourcing, measurement, evaluation, mitigation and monitoring of risk.”*¹⁸¹

17.3.1 The term “*Enterprise Risk Management*” is defined as “*a process, effected by an entity’s Board of Directors, management and other personnel, applied in strategy setting and across the enterprise that is designed to identify potential events that may affect the entity, manage risks to be within its risk appetite, and provide reasonable assurance regarding the achievement of entity objectives.*”¹⁸²

17.3.2 The CG Codes explain the rationale behind the corporate governance best-practice of the board formally adopting a strong and effective ERM framework, thus: “*Risk management policy is part and parcel of a corporation’s corporate strategy. The Board is responsible for defining the company’s level of risk tolerance and providing oversight over its risk management policies and procedures.*”¹⁸³

17.3.3 The CG Codes recommend that, subject to its size, risk profile and complexity of operations, a publicly-held company should have a separate risk management function to identify, assess and monitor key risk exposures, and explain that the directors’ risk management function involve the following activities:

- (a) Defining a risk management strategy;
- (b) Identifying and analyzing key risks exposure relating to economic, environmental, social and governance (EESG) factors and the achievement of the organization’s strategic objectives;
- (c) Evaluating and categorizing each identified risk using the company’s predefined risk categories and parameters;
- (d) Establishing a risk register with clearly defined, prioritized and residual risks;
- (e) Developing a risk mitigation plan for the most important risks to

¹⁸¹ Explanation under Principle 12, CG Codes for Publicly-held Companies.

¹⁸² Para. 7 of INTRODUCTION, CG Codes for Publicly-held Companies, adopted from the Committee of Sponsoring Organizations of the Treadway Commission (COSO Framework).

¹⁸³ Explanation to Recommendation 2.11, CG Codes for Publicly-held Companies.

the company, as defined by the risk management strategy;

- (f) Communicating and reporting significant risk exposures including business risks (*i.e.*, strategic, compliance, operational, financial and reputational risks), control issues and risk mitigation plan to the Board Risk Oversight Committee; and
- (g) Monitoring and evaluating the effectiveness of the organization's risk management processes.¹⁸⁴

17.3.4 The CG Codes recommend that in managing the company's ERM system, the company should have a Chief Risk Officer (CRO) who will ultimately champion the ERM and who should have adequate authority, stature, resources and support to fulfill his/her responsibilities,¹⁸⁵ which includes communicating top risks and status of implementation of risk management strategies and actions plans to the Board Risk Oversight Committee (BROC).

17.3.5 The CG Codes recommend that, subject to its size, risk profile and complexity of operations, the board should establish a separate BROC that should be responsible for the oversight of the ERM system to ensure its functionality and effectiveness.¹⁸⁶ The CG Codes explain: "*Enterprise risk management is integral to an effective corporate governance process and the achievement of a company's value creation objectives. Thus, the BROC has the responsibility to assist the Board in ensuring that there is an effective and integrated risk management process in place. With an integrated approach, the Board and top management will be in a confident position to make well-informed decisions, having taken into consideration risks related to significant business activities, plans and opportunities.*"¹⁸⁷

17.3.6 The CG Codes indicate the elements that may constitute a "*strong and effective*" ERM system, thus: "*(a) common language or register of risks, (b) well-defined risk management goals, objectives and oversight, (c) uniform processes of assessing risks and developing strategies to manage prioritized risks, (d) designing and implementing risk management strategies, and (e)*

¹⁸⁴ Explanation to Recommendation 12.4, CG Codes for Publicly-held Companies.

¹⁸⁵ Recommendation 12.5, CG Codes for Publicly-held Companies.

¹⁸⁶ Recommendation 3.4, CG Codes for Publicly-held Companies.

¹⁸⁷ Explanation to Recommendation 3.4, CG Codes for Publicly-held Companies.

continuing assessments to improve risk strategies, processes and measures".¹⁸⁸

18. The 'comply or explain' approach under the CG Codes for Publicly-held Companies means that the corporate governance framework does not dictate the manner and processes by which directors should consider and meet the challenges of climate change risks as they impinge upon the company's business enterprise. **Nonetheless, the climate change governance principles and best practices recommended and explained in the CG Codes constitute a robust benchmark by which the courts may gauge whether directors' actuations with respect to meeting the climate change risks facing their company may have amounted to "gross negligence or bad faith in directing the affairs of the corporation."**¹⁸⁹ In other words, compliance by the board of directors with ERM best practice of identifying, sourcing, measuring, evaluating, mitigating and monitoring of climate change risks would constitute the best defense in climate change litigations that directors have acted in the best interest of the company, its shareholders and shareholders in facing up to the climate change risks besetting the company.

19. Finally, despite the 'comply or explain' approach under the CG Codes for Publicly-held Companies, Section 23 of the Revised Corporation Code now expressly provides that "**directors or trustees elected shall perform their duties as prescribed by law, rules of good corporate governance, and bylaws of the corporation.**" There is no Supreme Court decision on the legal effect of this relatively new provision incorporating 'rules of good corporate governance' promulgated by the SEC within fiduciary duties of directors 'to act in the best interest of the corporation and its shareholders'. Section 23 of the Revised Corporation Code provides legal basis to the position that directors' management of climate change risks now fall within their fiduciary duties 'to act in the best interest of the corporation and its shareholders' in promoting the long-term value of the company. The liability that directors may be exposed to in relation to climate change risks depends upon the surrounding facts by which they breach such fiduciary duties. (*See discussion in Section E below*)

¹⁸⁸ *Id.*

¹⁸⁹ Sec. 30, Revised Corporation Code.

e. Directors' Duties and Responsibilities to Other Stakeholders in relation to Climate Change

20. Directors' duties and responsibilities to stakeholders (other than shareholders) in relation to climate change must be assessed in the following terms: (a) *on how the company's operations affect the country's ecological environment and thereby impinge upon the stakeholders' rights health and to a balanced and healthful ecology;* and (b) *on how the company's operations impinge upon the financial interests of such stakeholders.*

21. *Filipino Citizens as Constitutional Stakeholders of All For-Profit Corporations.* – As a general proposition, when it comes to enforcement of environmental laws in general, and claims that may be interposed against the company for exacerbating the effects of climate change, every Filipino citizen falls within the definition of 'stakeholder' of every *for-profit* corporation, based on every Filipino's constitutional 'right to health' and 'right to a balanced and healthful ecology,' and constitutional principle that every corporation bears a 'social function' to contribute to the common good based on the directives of the State, expressed in its laws, rules and regulations. The extent to which other stakeholders may hold the directors personally liable for breach of such obligations to refrain from harming the environment depends on the nature of sanction or damage that is imposed under particular language of the environmental law whose prohibited acts have been breached. (See *discussion in Section E below*)

22. *Stakeholder of Publicly-held Companies Legal Standing on Sustainable Development.* – Even under the old Corporation Code,¹⁹⁰ the SEC implemented for publicly-held companies a corporate governance framework that recognizes the 'Stakeholder Theory' whereby "[a] director assumes certain responsibilities to different constituencies or stakeholders, **who have a right to expect that the institution is being run in a prudent and sound manner.**"¹⁹¹

23. Eventually, the SEC evolved within such corporate governance framework both the 'environmental' and 'social' aspects of corporate governance, when in its CG Codes for Publicly-held Companies it provided specific sections on "*Duties to Stakeholders,*" defining the term "*stakeholders*" to mean "*any*

¹⁹⁰ *Batas Pambansa Bilang 28.*

¹⁹¹ Part B, Section 6(a), Code of Corporate Governance (SEC Memorandum Circular No. 2, s. 2002).

individual, organization or society at large who can either affect and/or be affected by the company's strategies, policies, business decisions and operations, in general... includes, among others, customers, creditors, employees, suppliers, investors, as well as the government and community in which it operates."¹⁹² The CG Codes outline the corporate governance framework for publicly-held companies insofar as their stakeholders are concerned, as follows:

23.1 Directors are expected to respect the rights of stakeholders that are 'established by law, by contractual relations and through voluntary commitments.' Where stakeholders' rights and/or interests are adversely affected, stakeholders should have the opportunity to obtain prompt effective redress for the violation of their rights.¹⁹³ There can be little argument that among the stakeholders' rights 'established by law' would be the constitutional right of members of communities to a healthful ecology, as well as the company's obligation to operate within the country's environmental laws.

23.2 A publicly-held company should have a strong and effective internal control system and enterprise risk management framework, to ensure the integrity, transparency and proper governance in the conduct of its affairs, which involves, among others, "[i]dentifying and analyzing key risks exposure relating to economic, **environmental, social and governance (EESG)** factors and the achievement of the organization's strategic objectives."¹⁹⁴ (See the previous discussion from the point of view of shareholders on the directors' duty and functions in the managing the company's ERM system, which apply in equal force from the point of view of stakeholders of the company.)

23.3 Every publicly-held company is encouraged to "**be socially responsible in all its dealings with the communities where it operates. It should ensure that its interactions serve its environment and stakeholders in a positive and progressive manner that is fully supportive of its comprehensive and balanced development,**"¹⁹⁵ which it encapsulates into the term "sustainable development" that is defined as follows: "The company's value

¹⁹² Para. 7, Introduction, CG Code for PLCs; Para. 5, INTRODUCTION, CG Code for PCs and RIs; *emphasis supplied.*

¹⁹³ Principle 14, CG Codes for Publicly-held Companies; *emphasis supplied.*

¹⁹⁴ Explanation to Recommendation 12.4, CG Codes for Publicly-held Companies.

¹⁹⁵ Principle 16, CG Codes for Publicly-held Companies.

*chain consists of inputs to the production process, the production process itself and the resulting output. **Sustainable development means that the company not only complies with existing regulations, but also voluntarily employs value chain processes that takes into consideration economic, environmental, social and governance issues and concerns.** In considering sustainability concerns, the company plays an indispensable role alongside the government and civil society in contributing solutions to complex global challenges like poverty, inequality, unemployment and **climate change.***¹⁹⁶

24. In essence, the Philippines' corporate governance framework encourages that every publicly-held company, acting through its board of directors, should not only comply with all existing regulations on environment protection, but should, in the exercise of business judgment, take into consideration the climate change risks that would affect the long-term interests of the corporation, as well as the society's right to a healthful ecology, and always pursue disclosure to the State and other stakeholders of the risks relating to the environment.

24.1 The 'comply or explain' approach under the CG Codes for Publicly-held Companies, as well as the 'voluntary' nature by which sustainable development is recommended to be pursued, mean that the corporate governance framework does not dictate upon the directors the manner and processes by which to consider and meet the challenges of climate change risks as they impinge upon the company's business enterprise. **Nonetheless**, the climate change governance principles and best-practices recommended and explained in the CG Codes for Publicly-held Companies constitute a robust benchmark by which the courts may gauge whether directors' actuations with respect to meeting the climate change risks to which the company is exposed amounted to "*gross negligence or bad faith in directing the affairs of the corporation.*"¹⁹⁷

25. As in the case of shareholders, the breach of the fiduciary duties to act in the best interests of the company in promoting its long-term value as they may encompass the interests of other stakeholders, by failing to manage climate change risks, is determined with reference to the directors' collective exercise of

¹⁹⁶ Explanation to Principle 16, CG Codes for Publicly-held Companies; *emphasis supplied*.

¹⁹⁷ Sec. 30, Revised Corporation Code.

business judgment. The personal liability that directors may be exposed to in relation to climate change risks depends upon the surrounding facts by which they breach such fiduciary duties. (See *discussion in Section E below*)

26. *Other Stakeholders Entitled to Demand Extraordinary Diligence on Companies Vested with Public Interest.* – Even under the old Corporation Code which operated on the principle that the fiduciary duties of directors are owed to the shareholders — and not to other constituencies — with their primary duty being the maximization of shareholders’ value in the pursuit of the corporate business enterprise,¹⁹⁸ the Philippine Supreme Court evolved the doctrine of ‘corporate social responsibility’ of private companies whose business enterprises are affected with public interest, such as common carriers,¹⁹⁹ electric power companies,²⁰⁰ banks²⁰¹ and other financial institutions,²⁰² and hospitals. The ‘doctrine of corporate social responsibility’ imposed the fiduciary duty of extraordinary diligence upon such companies and their directors to stakeholders other than the shareholders, such as the passengers of common carriers,²⁰³ the consumers of power utility companies,²⁰⁴ the depositors of banking institutions,²⁰⁵ those who commercially invest with financial institutions,²⁰⁶ and the patients of doctors who use the facilities of the hospital.²⁰⁷

27. The term ‘business affected with public interest’ also has a constitutional underpinning. Section 17 of Article XII (“*National Economy and Patrimony*”) of the 1987 Constitution provides, “***In times of national emergency, when the public interest so requires, the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any privately owned public utility or business affected with***

¹⁹⁸ *Prime White Cement Corp. v. Intermediate Appellate Court*, G.R. No. 68555, 19 March 1993; 220 SCRA 103,110 (1993).

¹⁹⁹ *Delsan Transport Lines v. Court of Appeals*, G.R. No. 127897, 15 November 2001.

²⁰⁰ *Ridjo Tape v. Court of Appeals*, G.R. No. 126074, 24 February 1998.

²⁰¹ *Simex International, Inc. v. Court of Appeals*, G.R. No. 88013, 19 March 1990; *Philippine National Bank v. Pike*, G.R. No. 157845, 20 September 2005.

²⁰² *Virata v. Ng Wee*, G.R. Nos. 220926, 221058, 221109, 221135 & 221218, 05 July 2017.

²⁰³ *Nedlloyd Lijnen B.V. Rotterdam v. Glow Laks Enterprises, Ltd.*, G.R. No. 156330, 19 November 2014; *KLM Royal Dutch Airlines v. Tiongco*, G.R. No. 212136, 04 October 2021.

²⁰⁴ *Manila Electric Co., v. Nordec Philippines*, G.R. No. 196020, 18 April 2018.

²⁰⁵ *PCI Bank v. Court of Appeals*, G.R. Nos. 121413, 121479 & 128604, 29 January 2001; *Metropolitan Bank and Trust Co. v. Custodio*, G.R. No. 173780, 21 March 2011.

²⁰⁶ *Virata v. Ng Wee*, G.R. Nos. 220926, 221058, 221109, 221135 & 221218, 21 March 2018.

²⁰⁷ *Professional Services, Inc. v. Court of Appeals*, G.R. Nos. 126297, 1264667 & 127590, 02 February 2010; 611 SCRA 282 (2010).

public interest.” The term “*national emergency*” encompasses among others “*calamities, or natural disasters.*”²⁰⁸

27.1 Fr. Joaquin G. Bernas, S.J., a member of the 1986 Constitutional Commission that drafted the 1987 Constitution, reports that the term “*business affected with public interest,*” was adopted by the constitutional writers from “*American Constitutional jurisprudence and it had a special significance especially in the heyday of laissez faire. Even at the time of American constitutional history when governmental regulatory power was deemed drastically restricted by laissez faire in the extreme form, there was an area which was not allowed to escape the regulatory power of the state ... The area of ‘business affected with public interest.’*” He quoted from *Munn v. Illinois*,²⁰⁹ on the expanded coverage of the term, thus: “*Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes their property to a use in which the public has an interest, they, in effect, grant to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest they have thus created.*”

28. When the Revised Corporation Code replaced in February 2019 the old Corporation Code, it recognized the special category of ‘corporations vested with public interest,’ (includes within its enumerations publicly-held companies, banks and other financial intermediaries) as being governed by corporate governance principles such requiring a specified number of independent directors being in their boards.²¹⁰ The Revised Corporation Code’s formal recognition of

²⁰⁸ Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary*, Rex Book Publishing, 2009 ed., at p. 1229; *emphasis supplied*.

²⁰⁹ 94 U.S. 113, 125 (1877).

²¹⁰ Section 22, Revised Corporation Code provides in part: “*The board of the following corporations vested with public interest shall have independent directors constituting at least twenty percent (20%) of such board:*

“(a) *Corporations covered by Section 17.2 of Republic Act No. 8799, otherwise known as “The Securities Regulation Code,” namely those whose securities are registered with the Commission, corporations listed with an exchange or with assets of at least Fifty million pesos (₱50,000,000.00) and having two hundred (200) or more holders of shares, each holding at least one hundred (100) share of any class of its equity shares;*

“(b) *Banks and quasi-banks, NSSLAs, pawnshops, corporations engaged in money service business, preneed, trust and insurance companies, and other financial intermediaries; and*

“(c) *Other corporations engaged in businesses vested with public interest similar to the above, as may be determined by the Commission, after taking into account relevant factors which are germane to the objective and purpose of requiring the election of an independent director, such as the extent of minority ownership, type of financial products or securities issued or offered to investors, public interest involved in the nature of business operations, and other analogous factors.*”

the specific classification of ‘corporations vested with public interest’ mainstreams into Philippine Corporation Law the common law doctrine that directors of corporations vested with public interest owe a ‘fiduciary duty of extraordinary care’ to stakeholders other than shareholders when compared to the standard due diligence of a prudent man.

29. To compare with the business of common carriers (public transportation) which has also been declared as being imbued with public interest and the degree of diligence required being extraordinary diligence,²¹¹ the Philippine Supreme Court held it established doctrine that when the company is bounded to exercise extraordinary diligence in the pursuit of its business enterprise, and injury or damage is caused to its clients or customers, it is presumed *ipso jure* that the company was at fault or was negligent and the courts need not make an express finding of fault or negligence, and the burden of proof is on the part of the company to prove that the injury or damaged was caused by *force majeure*.²¹² The Supreme Court defines “*extraordinary diligence*” to mean “*that extreme measure of care and caution which persons of unusual prudence and circumspection observe for securing or preserving their own property or rights.*”²¹³

30. Although no decision has been rendered by the Supreme Court on what the legal repercussions are under doctrine of extraordinary diligence for corporations vested with public interest, it is our well-considered opinion that it will have the same doctrinal application as that evolved under the Philippines’ *Law on Transportation*.

31. Since the whole of Philippine Government — the Executive on the country’s commitments to UNFCCC, Congress on the promulgation of the *Climate Change Act* and supporting environmental laws, and the Supreme Court which articulated the constitutional right to a balanced and healthful ecology in its *Oposa* and other decisions — have declared as both a national and global concern the serious effect of climate change on the environment, directors of

²¹¹ Art. 1733, Civil Code of the Philippines reads in part: “*Common carriers, from the nature of their business and for reasons of public policy, are bound to observe extraordinary diligence in the vigilance over the goods and for the safety of the passengers transported by them, according to all the circumstance of each case.*”

²¹² *Victory Liner v. Gammad*, G.R. No. 159636, 25 November 2004; 444 SCRA 355 (2004).

²¹³ *Loadmaster Customs Services v. Glodel Brokerage Corp.*, G.R. No. 179446, 10 January 2011; 639 SCRA 69 (2011).

publicly-held companies and other corporations vested with public interest, **bounded by the duty to exercise extraordinary diligence in the pursuit of the corporate business enterprise**, would be hard-pressed to use the exercise of business judgment as a legal defense when the stakeholders are able to prove the effects of the companies' operations towards the degradation of the environment.

32. Unlike in the case of shareholders where the directors can rely initially on the business judgment rule to avoid personal liability and where the burden to prove that directors have acted in fraud, bad faith, or with gross negligence in failing to avoid or anticipate climate risks to which the company is exposed to, in the case of other stakeholders, they need only to show the damage to the environment that the companies' operations had wrought, which then shifts the burden on the directors to prove that they have exercised extraordinary diligence to avoid such adverse consequences on the environment.

E. DIRECTORS' POTENTIAL LIABILITIES IN RELATION TO CLIMATE CHANGE

a. Directors' Personal (Civil) Liability for Corporate Acts – in General

1. *The Business Judgment Rule.* – Pursuant to the primary attribute that 'a corporation has a juridical personality separate and distinct from the directors and officers that represent it,' the rule under Philippine Corporation Law is that directors are not personally liable for their official acts in pursuing the business of the corporation,²¹⁴ unless: (a) the law expressly makes them personally liable for their official actions; (b) they have expressly bound themselves personally;²¹⁵ (c) it is shown that they have exceeded their authority;²¹⁶ or (d) it is shown by sufficient evidence that they have acted with fraud,²¹⁷ bad faith,²¹⁸ or gross negligence.²¹⁹

2. The general rule on non-liability of directors acting in their official capacity for corporate debts and liabilities also finds basis in the provisions of the Law on Agency under Civil Code of the Philippines²²⁰ which holds that an agent cannot be personally made liable for the contracts and transactions he enters into on behalf of the principal,²²¹ except when he acts without or in excess of

²¹⁴ *Lanuza, Jr. v. BF Corp.*, G.R. No. 174938, 01 October 2014; 737 SCRA 275, 295-297.

²¹⁵ *De Asis & Co., Inc. V. Court of Appeals*, G.R. No. L-61549, 27 May 1985; 136 SCRA 599.

²¹⁶ *Rustan Pulp & Paper Mills v. IAC*, G.R. No. 70789, 19 October 1092, 214 SCRA 665; *Mendoza v. Banco Real Dev. Bank*, G.R. No. 140923, 16 September 2005, 470 SCRA 86; *Pamplona Plantation Co. v. Acosta*, G.R. No. 153193, 06 December 2006, 510 SCRA 249; *EDSA Shangri-La Hotel and Resorts v. BF Corp.*, G.R. Nos. 145842 & 145873, 556 SCRA 25; *Price v. Innodata Philippines, Inc.*, G.R. No. 178505, 30 September 2008, 567 SCRA 269.

²¹⁷ *Palay, Inc. v. Clave*, G.R. No. L-56076, 21 September 1983; 124 SCRA 638, 648-649.

²¹⁸ *Benguet Electric Cooperative, Inc. v. NLRC*, G.R. No. 89070, 18 May 1992; 209 SCRA 55.

²¹⁹ *Sanchez v. Republic*, G.R. No. 172885, 09 October 2009; 603 SCRA 229, 237.

²²⁰ Republic Act No. 386.

²²¹ Art. 1897, Civil Code: "The agent who acts as such is not personally liable to the party with whom he contracts, unless he expressly binds himself or exceed the limits of his authority without giving such party sufficient notice of his powers."

Art. 1910, Civil Code: "The principal must comply with all the obligations which the agent may have contracted within the scope of his authority."

authority,²²² or acts with negligence, in fraud or in bad,²²³ or in clear conflict of interests.²²⁴

3. The Civil Law principles find their expression in Philippine Corporate Law under the ‘business judgment rule’ that holds that directors who act on behalf of the corporation, keep within the lawful scope of their authority, and act in good faith, do not become personally liable for the consequences of the corporate acts.²²⁵

b. Directors’ Personal (Civil) Liability to Shareholders and Other Stakeholders in relation to Climate Change

4. *Limited Instances when Directors May Be Held Personally Liable.* – During most of the nearly 40-year effectivity of the old Corporation Code, the provisions of its Section 31 — now Section 30 of the Revised Corporation Code — have been strictly interpreted in favor of upholding the general rule, and as providing the rare exceptions to the primary rule, that directors and officers are not personally liable for the losses or damages sustained by a corporation and the parties it deals with.²²⁶ When it comes to climate change, Section 30 of the Revised Corporation Code provides for the specified statutory exceptions to the business judgment rule that exempts personal (civil) liability to directors, thus:

SEC. 30. Liability of Directors, Trustees or Officers. —
Directors or trustees who [a)] **willfully and knowingly vote for or assent to patently unlawful acts of the corporation** or [b)] **who are guilty of gross negligence or bad faith in directing the affairs of the corporation** or [c)] acquire any

²²² *Price v. Innodata Phils., Inc.*, G.R. No. 178505, 30 September 2008; 567 SCRA 269.

²²³ Art. 1909, Civil Code: “*The agent is responsible not only for fraud, but also for negligence, which shall be judged with more or less rigor by the courts, according to whether the agency was or was not for a compensation.*”

²²⁴ Art. 1889, Civil Code: “*The agent shall be liable for damages if, there being a conflict between his interest and those of the principal, he should prefer his own.*”

²²⁵ *Urban Bank, Inc. v. Pena*, 659 SCRA 418 (2011); *Olivarez Realty Corp. v. Castillo*, 729 SCRA 544 (2014).

²²⁶ *Tramat Mercantile, Inc. v. Court of Appeals*, 238 SCRA 14, 19 (1994); *Santos v. NLRC*, 254 SCRA 673, 682 (1996); *Uichico v. NLRC*, 273 SCRA 35 (1997); *Atrium Management Corp. v. Court of Appeals*, 323 SCRA 23 (2001); *Malaynag Samahan ng mga Manggagawa sa M. Greenfields v. Ramos*, 357 SCRA 77 (2001); *Powton Conglomerate, Inc. v. Agcolicol*, 400 SCRA 23 (2003); *H.R. Carlos Construction, Inc. v. Marina Properties Corp.*, 421 SCRA 428 (2004); *McLeod v. NLRC*, 512 SCRA 222 (2007); *Garcia v. Social Security Commission Legal and Collection*, 540 SCRA 459 (2007); *Magaling v. Ong*, 562 SCRA 152 (2008); *Queensland-Tokyo Commodities, Inc. v. George*, 630 SCRA 304 (2010); *SPI Technologies, Inc. v. Mapua*, 720 SCRA 743 (2014); *Lanuza, Jr. v. BF Corp.*, 737 SCRA 275 (2014); *Montallana v. La Consolacion College Manila*, 744 SCRA 163 (2014); *Spouses Fernandez v. Smart Communications, Inc.*, 909 SCRA 293 (2019).

personal or pecuniary interest in conflict with their duty as such directors or trustees shall be liable jointly and severally for all damages resulting therefrom suffered by the corporation, its stockholders or members and other persons.

A director, trustee or officer shall not attempt to acquire, or acquire any interest adverse to the corporation in respect of any matter which has been reposed in them in confidence, and upon which, equity imposes a disability upon themselves to deal in their own behalf; otherwise, the said director, trustee or officer shall be liable as a trustee for the corporation and must account for the profits which otherwise would have accrued to the corporation.

5. *Voting for or Assenting to Patently Unlawful Acts of the Corporation.*

– The term “*patently unlawful acts of the corporation*” under Section 30 of the Revised Corporation Code has been interpreted by the Philippine Supreme Court to cover “*those **declared unlawful by law** which imposes penalties for commission of such unlawful acts. There must be a law declaring the act unlawful and penalizing the act.*”²²⁷ In effect, the civil liability arising from willfully and knowingly voting for or assenting to a patently unlawful act amounts to a pursuit by the corporation of acts or transactions that have been expressly declared unlawful (*i.e.*, “*prohibited acts*”) and for which a penalty is imposed upon the corporation by express provision of law.

5.1 In relation to climate change, in the absence of gross negligence or bad faith as discussed below, directors may be held personally (civilly) liable only when they have willfully and knowingly voted for or assented to violations of climate-related environmental laws. Strictly speaking, it is the directors’ direct participation in the corporation’s commission of ‘prohibited acts’ under the climate-related environmental laws that makes them criminally liable, that would also give rise to personal (civil) liability to the corporation for the damage sustained by corporation arising from such violations. (*See discussion below on directors’ criminal/civil liabilities on climate-related environmental laws*)

5.2 Depending on the circumstances prevailing in each case, directors of publicly-listed companies may be held personally (civilly) liable for violation of

²²⁷ *Carag v. NLRC*, G.R. No. 147590, 02 April 2007; 520 SCRA 28, 50; *emphasis at the end supplied*.

the disclosure obligations for which sanctions are provided for by law or the rules. (See discussion in Section F below)

6. *Gross Negligence in Directing the Affairs of the Corporation.* – Proof of negligence by itself does not constitute a breach of the duty of diligence since Section 30 of the Revised Corporation Code requires a higher quantum of “gross negligence,” which has been construed as “*the want of even slight care, acting or omitting to act in a situation where there is duty to act, not inadvertently but willfully and intentionally, with a conscious indifference to consequences insofar as other persons may be affected. It evinces a thoughtless disregard of consequences without exerting any effort to avoid them; the want or absence of or failure to exercise slight care or diligence, or the entire absence of care.*”²²⁸ In other words, a high threshold of negligence as amounting to entire absence of care is placed on the shoulders of shareholders and other stakeholders to make directors personally liable for the damages caused in the pursuit of the corporation’s business affairs.

6.1 When it comes to climate change, since physical and economic transition risks fall within the foreseeable material commercial risks that all *for-profit* corporations are exposed to, the same high threshold is presented to the shareholders when seeking to impose personal (civil) liability on directors.

6.2 Under Philippine corporate governance framework as it applies to publicly-held companies, the fiduciary duties of obedience and diligence impose upon directors of publicly-held companies the responsibility to promote the long-term value of the company for the benefit of both shareholders and other stakeholders which could be harmed by the failure to manage the risks of climate change, fall within the directors’ collective exercise of business judgment. Consequently, directors may be held personally liable for failing to identify, monitor and manage climate change risks only when it can be shown that such nonfeasance or malfeasance fall within any of exceptions to the business judgment under Section 30 of the Revised Corporation Code.

7. *Bad Faith in Directing the Affairs of the Corporation.* – The term “*bad faith*” in Section 30 of the Revised Corporation Code has been construed by the Philippine Supreme Court as misfeasance or acts amounting to fraud, thus:

²²⁸ *Sanchez v. Republic*, G.R. No. 172885, 09 October 2009; 603 SCRA 229, 237.

“Rightfully had it been said that bad faith does not simply connote bad judgment or negligence; it imports a dishonest purpose or some moral obliquity and conscious doing of wrong; it means breach of a known duty through some motive or interest or ill will; it partakes of the nature of fraud. Applying this precept to the given facts herein, we find that there was no ‘dishonest purpose,’ or ‘some moral obliquity,’ or ‘conscious doing of wrong,’ or ‘breach of a known duty,’ or ‘some motive or interest or ill will,’ that ‘partakes of the nature of fraud.’”²²⁹

7.1 Fraud or bad faith in the area of climate change would primarily delve into disclosure obligations on material risk for publicly-listed companies, or misrepresentation of ‘green credentials’ when it comes to green financing available in the Philippines, as well as other forms of greenwashing under consumer protection regulations.

c. Directors’ Liability in Shareholders’ Suits

8. Even when shareholders prove that the directors’ failure to identify, monitor and manage climate change risks constitutes a breach of their fiduciary duties as to make such erring directors personally liable, the action that may be brought against the erring directors would only be a derivative suit filed on behalf of the company and the damages and reliefs recoverable pertain to the corporation itself. Under Philippine Corporation Law, under the ‘primary attribute separate juridical personality’²³⁰ all assets and the business enterprise of the corporation pertains to it as a separate juridical person, and shareholders have no proprietary claims of co-ownership or tenancy-in-common to any of the corporation’s property and assets.²³¹

8.1 The Philippine Supreme Court has ruled that shareholders have no legal standing to make any claims from the contracts, transactions and properties

²²⁹ *Board of Liquidators v. Kalaw*, G.R. No. L-18805; 20 SCRA 986, 1006-1007.

²³⁰ Sec. 2, Revised Corporation Code: “A corporation is an artificial being created by operation of law, having the right of succession and the powers, attributes, and properties expressly authorized by law or incidental to its existence.”

²³¹ *Pascual v. Del Sanz Orozco*, G.R. No. L-5174, 17 March 1911, 19 Phil. 82; *Stockholders of F. Guanzon and Sons, Inc. v. Register of Deeds of Manila*, G.R. No. L-18216, 30 October 1962, 6 SCRA 373.

of the corporation, much less to recover for themselves the damages suffered by the corporation's business enterprise.²³²

8.2 Even when it comes to publicly-listed companies, the Philippine Supreme Court held that a claim by the shareholders for damages pertaining to the value that their shares could have been sold at the market had it not been for the drop in their stock market value by reason of the board's actuations, would be speculative damages and cannot be recovered.²³³

d. Directors' Liability in Corporations Vested with Public Interest

9. When it involves the climate change-related obligations of directors to stakeholders other than shareholders, the measure of their personal liabilities for breach of such duty is based not only on the constitutional obligation imposed on the company not to harm the environment, but more importantly, the directors are subjected a higher 'duty to exercise extraordinary diligence' in promoting the long-term value of the company as it is addressed to the interests of stakeholders, which could be harmed by failure to manage the risks of climate change. Since stakeholders other than shareholders do not base their claims against the directors on equity claims against the corporation, the civil damages that may be assessed against erring directors would pertain to the claiming stakeholders, with the exception that when the directors' default pertains to a violation of the provisions of environmental laws, damages recovered against the directors shall be disposed in the manner dictated by the climate-related environmental laws.

10. Anecdotal evidence indicates that with the promulgation by the Philippine SEC of corporate governance reforms in the sector of publicly-held companies, which introduced the concepts of "corporate governance" and "stakeholders", and the jurisprudential adoption of the doctrine of 'corporate social responsibility',²³⁴ the Supreme Court began to cement the foundation of the 'stewardship doctrine' that in the exercise of their fiduciary duties of obedience and diligence, directors of publicly-held companies and other corporations vested

²³² *Magsaysay-Labrador v. Court of Appeals*, G.R. No. 58168, 19 December 1989, 180 SCRA 266; *Saw v. Court of Appeals*, G.R. No. 90580, 08 April 1991, 195 SCRA 740; *Asset Privatization Trust v. Court of Appeals*, G.R. No. 121171, 29 December 1998, 300 SCRA 579; *Stronghold Insurance Co. v. Cuenca*, G.R. No. 173297, 06 March 2013, 692 SCRA 473.

²³³ *Batong Buhay Gold Mines v. Court of Appeals*, G.R. No. L-45048, 07 January 1987; 147 SCRA 4.

²³⁴ *Professional Services, Inc. v. Court of Appeals*, G.R. Nos. 126297, 1264667 & 127590, 02 February 2010; 611 SCRA 282.

with public interest must be more circumspect and should make an independent evaluation of the risk involved in the transactions for which their approval is sought, thus: “*The board of directors is expected to be more than mere rubber stamps of the corporation and its subordinate departments. It wields all corporate powers bestowed by the Corporation Code, including the control over its properties and the conduct of its business. **Being stewards of the company, the board is primarily charged with protecting the assets of the corporation in behalf of its stakeholders.***”²³⁵

10.1 In *Virata v. Ng Wee*,²³⁶ the Supreme Court denied the defense of the directors of an investment house that they approved the corporate transactions that led to the losses sustained by an investor based on the findings and recommendations of the executive and screening committees that such transactions were above board and that they were not privy to the fraudulent and unauthorized acts committed by the officers that led to the losses sustained by the investor, holding that “*they would nevertheless be liable for gross negligence in managing the affairs of the company, to the prejudice of its clients and stakeholders.*”²³⁷ When it comes to corporations vested with public interest, carelessness itself would be a violation of the duty of extraordinary diligence, and is equated to ‘gross negligence’ under Section 30 of the Revised Corporation Code.

10.2 The ‘stewardship doctrine’ provides that directors, especially those in corporations vested with public interest, owe fiduciary duty of extraordinary diligence to stakeholders (other than the shareholders), such that even if it cannot be proven that such directors approved a patently unlawful act, or acted with fraud or bad faith, their failure to prove that they have exercised extraordinary diligence in preventing the harm caused to the stakeholder injured by the company’s operations would already amount to ‘gross negligence’ as to make them personally liable. In other words, the term ‘gross negligence’ under Section 30 of the Revised Corporation Code has a different connotation when used in terms of addressing the relief claims of stakeholders.

²³⁵ *Virata v. Ng Wee*, G.R. Nos. 220926, 221058, 221109, 221135 & 221218, 21 March 2018; 830 SCRA 271, 364-365; *emphasis supplied*.

²³⁶ G.R. Nos. 220926, 221058, 221109, 221135 & 221218, 21 March 2018; 830 SCRA 271.

²³⁷ *Id.*, at pp. 366-367.

e. Directors' Criminal Liability for Corporate Acts—in General

11. There are no 'common law crimes' in Philippine jurisdiction — courts of law are without authority to impose any criminal penalty upon any act or transaction, no matter how reprehensive it may be, unless the statute itself defines it as being criminally punishable.²³⁸

12. **Unless the criminal statute declares that there can be a corporate offender of a clearly defined criminal offense**, then criminal offenses committed in pursuit of the corporate affairs and business enterprise are deemed to be the personal criminal acts of the directors, officers, shareholders or employees who directly participated in the criminal acts.²³⁹ The doctrine of separate juridical personality does not apply to shield directors, officers, shareholders or employees from personal criminal liability for any criminal offense committed in pursuit of the corporation's business enterprise.²⁴⁰

13. **Unless the criminal statute expressly provides**, being a director of an offending corporation *per se* does not make one criminally liable for criminal offenses done in pursuit of corporate business, and that only corporate officers and employees shown to have directly participated in or directed the commission of the offense may be held criminally liable.²⁴¹ Unlike in the area of potential civil liability where the directors may be held personally liable on the grounds of gross negligence for failure to properly oversee the corporate affairs, the 'stewardship doctrine' does not apply in the realm of criminal liability of directors.

14. The Philippine Supreme Court has held that when the statutory criminal sanction enumerates the officers who can be held liable for a specified corporate criminal offense, then unless directors are shown to have participated directly in the illegal act, their mere position as directors do not warrant being held criminally liable for the offense. The Court held that even if the Corporation Code vested corporate powers in the board of directors, "*it is of common knowledge*

²³⁸ *Id.*

²³⁹ *West Coast Life Ins. Co. v. Hurd*, G.R. No. 8527, 30 March 1914, 27 Phil. 40; *Time, Inc. v. Reyes*, G.R. No. L-28882, 31 May 1971, 39 SCRA 303,; *Ching v. Secretary of Justice*, G.R. No. 164317, 06 February 2006, 481 SCRA 609.

²⁴⁰ *People v. Concepcion*, G.R. No. 18535, 15 August 1922, 43 Phil. 653; *People v. Tan Boon Kong*, G.R. No. 32652, 15 March 1930, 54 Phil. 607; *People v. Chowdury*, G.R. No. 129577-80, 15 February 2000, 325 SCRA 572.

²⁴¹ *Cruzvale, Inc. v. Eduque*, G.R. Nos. 172785-86, 589 SCRA 534.

and practice that the board of directors is not directly engaged or charged with the running of the recurring business affairs of the corporation.”²⁴²

g. Directors’ Potential Civil and/or Criminal Liabilities under the Environmental Laws

15. Although the private corporate sector plays an indispensable role in contributing solutions to complex global challenges, including the protection of the environment, nonetheless, the duty and responsibilities to protect the environment and to promote the citizen’s right to a healthful ecology pertains primarily to the State, acting through its governmental instrumentalities. A *for-profit* corporation, acting through its board of directors, has no constitutional or statutory obligation to protect the environment, in general, or to reduce its carbon footprint, in particular, **beyond the dictates of the State’s instrumentalities**. If a corporation, acting through its board of directors, pursues climate change activism, this is a matter of volunteerism or “*good corporate citizenship*,” and falls within the realm of “*sustainable development*,” which means that “*the company not only complies with existing regulations, but also voluntarily employs value chain processes that take into consideration economic, environmental, social and governance issues and concerns ... like ... climate change.*”²⁴³

16. Since *for-profit* corporations are bounded by the constitutionally-mandated social function not to harm the environment, directors are similarly bounded under their fiduciary duty of obedience to comply with environmental laws and ensure that the pursuit of corporate affairs do not venture into what the environmental laws define and punish as ‘prohibited acts’. When directors breach climate change-related environmental laws, not only may they be held liable for the sanctions provided in those laws, but they would have breach their duty of obedience for “*willfully and knowingly vot[ing] for or assent[ing] to patently unlawful acts of the corporation.*”²⁴⁴

17. The *Climate Change Act* does not provide for any ‘prohibited acts,’ much less does it provide for any criminal penalty for violation of its provisions. Its gravamen is essentially to empower the Climate Change Commission (CCC)

²⁴² *Ty v. NBI Supervising Agent De Jemil*, G.R. No. 182147, 15 December 2010, 638 SCRA 671, 698-699; *Federated Dealers Association v. Del Rosario*, G.R. No. 202639, 09 November 2016, 808 SCRA 272; *ABS-CBN Corp. v. Gozon*, G.R. No. 195956, 11 March 2015, 753 SCRA 1.

²⁴³ Explanation to Principle 16, CG Code for PLCs.

²⁴⁴ Sec. 30, Revised Corporation Code.

as the primary lead policy-making body in the formulation of the National Strategic Framework on Climate Change and the National Climate Change Action Plan. The potential criminal and/or civil liabilities that may be incurred by directors in relation to climate change would be found in the various environmental laws enacted by the Philippine Government.

18. Our review of the leading climate change-related environmental laws indicates that their criminal sanction provisions recognize that the prohibited acts may be committed by corporations and other juridical entities, and generally the criminal sanctions are imposed on **officers** who are directly responsible for the corporate acts done in pursuit of the corporate business enterprise. It is very rare to find directors being included in the enumerated officers on whom the criminal sanction may be imposed when it comes to a corporate criminal offender.

(1) Revised Forestry Code

19. The Revised Forestry Code of the Philippines,²⁴⁵ which seeks, among others, the protection, development and rehabilitation of forest lands to ensure their continuity in productive condition and protection of public welfare.²⁴⁶

19.1 Chapter IV of the Code defines several prohibited acts and imposes various levels of criminal penalties, none of which contain any recognition that of a corporate offender, except under Section 78 on the “*Payment, Collection and Remittance of Forest Charges,*” which provides that “*If the offender is a **corporation, partnership or association, the officers and directors thereof shall be liable.***”²⁴⁷

19.2 Section 78 of the Revised Forestry Code presents a rare example where the criminal penalty is imposed upon the directors (and officers) by reason of their position, and not upon showing that they were directly responsible for the corporate act that resulted in the corporate criminal offense. It also means that in all the other prohibited acts defined under Chapter IV of the Code which do not formally recognize the corporation as a criminal offender, that directors can only be held criminally liable when they direct or participate in the commission of the prohibited acts. Unless the courts declares the criminal offense under Section 78

²⁴⁵ Pres. Decree No. 705 (19 May 1975).

²⁴⁶ Sec. 2, P.D. 705.

²⁴⁷ Sec. 78, P.D. 705; *emphasis supplied*.

of the Revised Forestry Code to be *malum prohibitum*, the directors who had no participation in the corporate criminal act could still raise the defense of “*lack of personal criminal culpability*.”

19.3 In terms of civil liability, and depending on the facts proven in the case, the directors of the offending corporation could be held personally liable for breach of their duty of obedience for “*willfully and knowingly voting for or assenting to patently unlawful act*” or the duty of diligence for “*gross negligence or bad faith in directing the affairs of the corporation*.”

(2) Environmental Impact Statement System

20. Presidential Decree No. 1586²⁴⁸ established the environmental impact statement system whereby the exigencies of socio-economic undertakings can be reconciled with the requirements of environmental quality.

20.1 It provides that “*No person, partnership or corporation shall undertake or operate any such declared environmentally critical project or area without first securing an Environmental Compliance Certificate;*”²⁴⁹ and that “[*a*]ny person, corporation or partnership found in violating ... the terms and conditions in the issuance of the Environmental Compliance Certificate, or of the standards, rules and regulations ... shall be punished by the suspension or cancellation of his/its certificate and/or a fine in an amount not to exceed Fifty Thousand Pesos (P50,000.00) for every violation thereof. ...”²⁵⁰

20.2 The penalty clause of P.D. 1586 recognizes the corporation as the criminal offender on which the fine may be imposed, and does not make directors personally liable for the criminal offense.

20.3 If it can be shown that directors formally approved the corporate actions that led to the corporation’s violation of P.D. 1586, such directors may be held civilly liable for breach of duty for willfully and knowingly voting for or assenting to patently unlawful corporate acts under Section 30 of the Revised Corporation. On the other hand, when there was no direct participation in the corporate act, and the effects of the violation was not only egregious and

²⁴⁸ Promulgated on 11 June 1978.

²⁴⁹ Sec. 4, P.D. 1586; *emphasis supplied*.

²⁵⁰ Sec. 9, P.D. 1586; *emphasis supplied*.

constituted a damage of the environment, the entire board may be held personally liable for “*gross negligence ... in directing the affairs of the corporation.*”²⁵¹

(3) Philippine Mining Act of 1995

21. Chapter XIX of the *Philippine Mining Act of 1995*²⁵² provides for several penal provisions which do not recognize formally a corporate offender, except that in Section 103 on “*Theft of Minerals*” in addition to the penalties of imprisonment (6 months to 6 years) and fines (PhP10,000 to PhP20,000), it provides that in “*the case of associations, partnerships, or corporations, the president and each of the directors thereof shall be responsible for the acts committed by such association, corporation, or partnership.*”²⁵³

21.1 Section 103 recognizes a corporate offender of the criminal offense defined therein, and imposes the penal sanctions on all the directors (and the president) of the offending corporation by reason of their office *per se*. Unlike the penal provisions under Section 78 of the Revised Forestry Code, there is a clear legislative intent to impose the criminal liability on president and directors making the criminal offense *malum prohibitum*.

21.2 In the event the corporation itself suffers any civil damages for the commission of the offense, directors can be held liable to the corporation based, at the very least, on “*gross negligence ... in directing the affairs of the corporation.*”²⁵⁴

22. Section 108 defines the criminal offense of “*Violation of the Terms and Conditions of the Environmental Compliance Certificate,*” by imposing the criminal penalties of imprisonment (6 months to 6 years) and/or fine (PhP50,000 to PhP200,000) on “[a]ny person who willfully violates or grossly neglects to abide by the terms and conditions of the environmental compliance certificate issued to said person and which causes environmental damage through pollution.”

22.1 Since Section 108 does refer or recognize a corporate offender, it means that directors as such do not become liable for the criminal offense committed in pursuit of the corporation’s business enterprise. It is only the

²⁵¹ Sec. 30, Revised Corporation Code.

²⁵² Republic Act No. 7942 (03 March 1995).

²⁵³ Sec. 103, Philippine Mining Act (R.A. 7942); *emphasis supplied*.

²⁵⁴ Sec. 30, Revised Corporation Code.

corporate officers who directly acted in behalf of the corporation that can be held liable for the offense defined under Section 108 of the *Philippine Mining Act*.

22.2 On the damages suffered by the corporation from the cancellation of the environmental compliance certificate, and depending on the circumstances prevailing, such as when the directors take direct part in the criminal act or when the violation of the terms and conditions of the ECC are egregious, that directors may be held personally liable under Section 30 of the Revised Corporation Code.

(4) *Toxic Substances and Hazardous and Nuclear Wastes Control Act*

23. The *Toxic Substances and Hazardous and Nuclear Wastes Control Act*²⁵⁵ provides the legal framework to regulate, restrict or prohibit the importation, manufacture, processing, sale, distribution, use and disposal of chemical substances and mixtures that present unreasonable risk and/or injury to health or the environment, as well as prohibit the entry, even in transit, of hazardous and nuclear wastes and their disposal into the Philippine territory for whatever purpose.²⁵⁶

24. Section 14(a) of the Act provides for relatively lighter sets of penalties of fines (P600 to P4,000) and imprisonment (6 months and one day to 6 years and one day) for violation of the first three enumerated prohibited acts under Section 13 (a), (b) and (c), thus:

- a) Knowingly use a chemical substance or mixture which is imported, manufactured, processed or distributed in violation of this Act or implementing rules and regulations or orders;
- b) Failure or refusal to submit reports, notices or other information, access to records as required by this Act, or permit inspection of establishment where chemicals are manufactured, processed, stored or otherwise held;
- c) Failure or refusal to comply with the pre-manufacture and pre-importation requirements; and

²⁵⁵ Republic Act No. 6969, 26 October 1990.

²⁵⁶ Sec. 2 and 3, Toxic Substances and Hazardous and Nuclear Wastes Control Act.

24.1 Section 14(a) specifically provides that “In case any violation of this act is committed by a partnership, **corporation**, association or any juridical person, the partner, **president, director or manager who shall consent to or shall knowingly tolerate such violation shall be directly liable and responsible for the act of the employees and shall be criminally liable as co-principal.**”

24.2 Aside from the directors, officers and/or employees who directly participated in the corporate acts that constitute a prohibited act, and for which they are both personally civilly and criminally liable, Section 14(a) imposes criminal liability on the president, manager, and every director who “*consented or knowingly tolerated*” any of such prohibited acts being committed in the corporate operations. The clear legislative intent is to criminally punish as co-principals even directors and officers who had no direct participation in the commission of the prohibited acts, but only when it can be shown that they knowingly tolerated the criminal acts committed by their employees. When such prohibited acts are done in the most egregious manner in the operations of the corporation, implied knowledge may be ascribed to the members of the board under the doctrine held in *Republic Gas Corp. v. Petron Corp.*,²⁵⁷ that since the board of directors have direct control and supervision in the management and conduct of the affairs of the corporation, they can be presumed to be aware that the corporation is engaged in the act imputed as a criminal offense.

24.3 Since Section 14(a) of the acts expressly makes it criminally punishable for directors to consent or knowingly tolerate the commission of prohibited acts in the company affairs, then such directors may also be held personally liable under Section 30 of the Revised Corporation Code for willfully and knowingly “*assenting to patently unlawful acts of the corporation,*” or at very least for “*gross negligence in directing the affairs of the corporation.*”

25. Section 14(b) of the Act impose a much heavier range of imprisonment (12 years and one day to 20 years), for the violation of the more serious offense under Section 13(d) of the Act, thus: “*d) Cause, aid or facilitate, directly or indirectly, in the storage, importation, or bringing into Philippine territory, including its maritime economic zones, even in transit, either by means*

²⁵⁷ G.R. No. 194062, 17 June 2013; 698 SCRA 666.

of land, air or sea transportation or otherwise keeping in storage any amount of hazardous and nuclear wastes in any part of the Philippines.”

25.1 Section 14(b) specifically provides that “*In the case of corporations or other associations, the above-penalty shall be imposed upon the managing partner, **president or chief executive in addition to an exemplary damage of at least Five hundred thousand pesos (P500,000.00).***” Not only does Section 14(b) not include “*directors*” in the corporate officers who can be held criminally liable, it really leaves little room to impose a criminal sanction on directors when the offending party is the corporation. Under the doctrine laid down in *Ty v. NBI Supervising Agent De Jemil*,²⁵⁸ since the criminal penalty clause enumerates only specified corporate officers, unless members of the board are shown to have directly participated in or directed the illegal acts, then their mere position as directors cannot warrant being held criminally liable for any of the prohibited acts covered.

25.2 Even when directors cannot be held criminally liable for consenting to or knowingly tolerating the criminal offense covered under Section 13(d), directors may still be held personally and solidarily liable with the corporation under Section 30 of the Revised Corporation Code for “*gross negligence or bad faith in directing the affairs of the corporation.*”

(5) Philippine Clean Air Act of 1999

26. Another major environmental law that includes “*directors*” in its penal sanction clause is the *Philippine Clean Air Act of 1999*.²⁵⁹

26.1 Sections 47 and 48 of the *Clean Air Act* provides for the criminal penalties for specific and other violations of the Act, and that in the event the offender is a corporation, “*the **president, manager, directors, trustees, the pollution control officer or the officials directly in charge of the operations shall suffer the penalty herein provided.***” It means that when the prohibited act is committed in the pursuit of corporate enterprise, then under the principle of “*criminal command responsibility*” the penalty shall be imposed not only on the directors, officers and employees who directly commits the criminal offense, but

²⁵⁸ G.R. No. 182147, 15 December 2010; 638 SCRA 671, 698-699.

²⁵⁹ Republic Act No. 8749, 23 June 1999, hereinafter referred to as “Philippine Clean Air Act”.

also on the president, manager pollution control officer by reason of the offices the occupy as directly in charge of the operations.

26.2 In the same manner, since Section 47 and 48 impose the criminal liability on directors who directly participate in the management of the corporation, then apart from the criminal penalty, such directors may also be held civilly liable with the corporation for the damage caused under Section 30 of the Revised Corporation Code for “*willfully and knowingly assenting to patently unlawful acts of the corporation,*” or at least for “*gross negligence or bad faith in directing the affairs of the corporation.*” Even for directors who do not directly participate in the operations of the corporation, when the commission of the prohibited acts are so egregious, such directors may still be held personally and solidarily liable with the corporation for “*gross negligence in directing the affairs of the corporation.*”

(6) Ecological Solid Waste Management Act

27. Section 48 of the *Ecological Solid Waste Management Act of 2000*²⁶⁰ declares it the policy of the State “*to adopt a systematic, comprehensive and ecological solid waste management program which shall ... Ensure the protection of public health and environment;*” and places on the local government units (LGUs) the “*primary enforcement and responsibility of solid waste management with local government units while establishing a cooperative effort among the national government, other local government units, non-government organization, and the private sector.*”²⁶¹

27.1 The Act provides a long list of ‘prohibited act’ which are subject to the criminal penalties under Section 49 which provides that “***If the offense is committed by a corporation, partnership, or other juridical entity duly organized in accordance with law, the chief executive officer, president, general manager, managing partner or such other officer-in-charge shall be liable for the commission of the offense penalized under this Act.***”

27.2 When the offense is committed in official pursuit of the business of the corporation, the penalty clause provides criminal command responsibility to the officers enumerated therein (CEO, president, general manager) by reason of

²⁶⁰ Republic Act No. 9003 (26 January 2001), hereinafter referred to as “Ecological Solid Waste Management Act.”

²⁶¹ Sec. 2 (a) and (g), Ecological Solid Waste Management Act.

their position and not on the basis of having directly committed the criminal acts. The final catch-all phrase of “*officer-in-charge*” would legally mean that the members of the board of directors of the offending corporation cannot be held liable for the penalty imposed on the basis alone of the ‘doctrine of centralized management’.

28.3 When the operations of the company is such that the commission of the prohibited acts inundate corporate operations as to be so egregious, it would be possible to seek personal civil liable on the members of the board of directors under Section 30 of the Revised Corporation Code for “*willfully and knowingly assenting to patently unlawful acts of the corporation,*” or at the very least for “*gross negligence or bad faith in directing the affairs of the corporation.*”

(7) Philippine Clean Water Act

29. Section 21 of the *Philippine Clean Water Act of 2004*²⁶² declares it as State principles to “*protect and advance the right of the people to a balance and healthful ecology in accord with the rhythm and harmony of nature ... [and to] promote and protect the global environment to attain sustainable development while recognizing the primary responsibility of local government units to deal with environmental problems.*”²⁶³

29.1 Section 28 of the Act provides that when the offense consists of a *failure to undertake clean-up operations, “[i]f the offender is a juridical person, the president, manager and the pollution control officer or the official in charge of the operation shall suffer the penalty herein provided.*” The use of the conjunction “and” implies that when the corporation has been shown to be the offending person, then whoever its president, manager **and** pollution officer (or whoever is in charge of the operation) shall suffer the penalty imposed under the Act, without need of showing personal involvement or responsibility for the prohibited act so done. Likewise, the use of the qualifier “*whoever is in charge of the operations*” means that unless they have directed or participated in the commission of the prohibited acts, then members of the board of directors of the offending corporation cannot be held liable for the criminal penalty imposed, on the basis of the ‘doctrine of centralized management’.

²⁶² Republic Act No. 9275 (22 March 2004), hereinafter referred to as “Clean Water Act”.

²⁶³ Sec. 2, Clean Air Act.

29.2 When it comes to *violations under Section 4 of P.D. 979 (Marine Pollution Decree)*, Section 28 of the Act provides that “*If the offender is a juridical entity, then its officers, directors, agents or any person primarily responsible shall be held liable*”. The clause not only expressly includes “*directors*” on whom the criminal penalty may be imposed, but also is imposable only on “*any person primarily responsible*” for such criminal act done on behalf of the corporation.

29.3 Even in those instances where directors cannot be held criminally liable under the Act, when the operations of the company is such that the commission of the prohibited acts are so egregious, it would be possible to seek personal civil liability on the members of the board of directors under Section 30 of the Revised Corporation Code for “*willfully and knowingly assenting to patently unlawful acts of the corporation,*” or at the very least for “*gross negligence or bad faith in directing the affairs of the corporation.*”

(8) Biofuels Act of 2006

30. The *Biofuels Act*²⁶⁴ declares it a policy to “*reduce dependence on imported fuels with due regard to the protection of public health, the environment, and natural ecosystems consistent with the country’s sustainable economic growth that would expand opportunities for livelihood by mandating the use of biofuels as a measure to ... develop and utilize indigenous renewable and sustainable-sourced clean energy sources to reduce dependence on imported oil; ... mitigate toxic and greenhouse gas (GHG) emissions; ... ensure the availability of alternative and renewable clean energy without any detriment to the natural econ system, biodiversity and food reserves of the country.*”²⁶⁵

30.1 After enumerating the prohibited acts, Section 12 of the *Biofuels Act* provides that “*In the case of associations, partnerships or **corporations, the penalty shall be imposed on the partner, president, chief operating officer, chief executive officer, directors or officers, responsible for the violation.***”²⁶⁶ It is clear from this provision that directors can be meted the criminal sanction imposable on the corporation only when it is shown that they directed or directly participated in the commission of the prohibited acts.

²⁶⁴ Republic Act No. 9367 (12 January 2007), hereinafter referred to as “Biofuel Act”.

²⁶⁵ Sec. 2, Biofuel Act.

²⁶⁶ *Id.*

30.1 Nonetheless, even when none of the directors have participated directly in the commission of the prohibited acts, when the operations of the company is such that the commission of the prohibited acts are so egregious, it would be possible to seek personal civil liability on the members of the board of directors under Section 30 of the Revised Corporation Code for “*willfully and knowingly assenting to patently unlawful acts of the corporation,*” or at the very least for “*gross negligence or bad faith in directing the affairs of the corporation.*”

(9) Renewable Energy Act

31. The *Renewable Energy Act*²⁶⁷ provides for the establishment of the framework for the accelerated development and advancement of renewable energy resources like biomass energy, geothermal energy, hydroelectric power, solar energy, and wind energy, and the development of a strategic program to increase its utilization, provides under Section 15 for incentives for renewable energy projects and activities: income tax holiday, duty-free importation of renewable energy machinery, equipment and materials, special realty tax rates on equipment and machinery, net operating loss carry-over, lower corporate tax rate, accelerated depreciation, zero percent VAT, cash incentive of renewable energy developers for missionary electrification, tax exemption of carbon credits, and tax credit on domestic capital equipment and services.

31.1 Section 35 of the *Renewable Energy Act* enumerates the “*Prohibited Acts*” with Section 36 providing for the criminal penalties imposable, and that “*in case of associations, partnership or **corporation**, the penalty shall be imposed on the partner, president, chief operating officers, chief executive officer, directors or officers **responsible for the violation.***” It is clear from said provision that directors can be meted the penalty only when it is shown that they directed or participated in the commission of the prohibited acts.

31.2 Nonetheless, even when none of the directors have participated directly in the commission of the prohibited acts, when the operations of the company are such that the commission of the prohibited acts is so egregious, it would be possible to seek personal civil liable on the members of the board of directors under Section 30 of the Revised Corporation Code for “*willfully and knowingly assenting to patently unlawful acts of the corporation,*” or at the very lease for “*gross negligence or bad faith in directing the affairs of the corporation.*”

²⁶⁷ Republic Act No. 9513 (16 December 2008), hereinafter referred to as “Renewable Energy Act”.

(10) Philippines' Disaster Risk Reduction Program

32. The Philippine Disaster Risk Reduction and Management Act²⁶⁸ provides “for the development of policies and plans and the implementation of actions and measures pertaining to all aspects of disaster risk reduction and management, **including good governance**, risk assessment and early warning, knowledge building and awareness raising, reducing underlying risk factors, and preparedness for effective response and early recovery.”²⁶⁹

32.1 Section 19 of the *Philippine Disaster Risk Reduction and Management Act* prefaces its long list of ‘prohibited acts’ with the clause: “Any person, group or corporation who commits any of the following prohibited acts shall be held liable and be subjected to the penalties as prescribed in Section 20 of this Act.” In turn, Section 20, after providing the particular range of fines and imprisonment penalties for prohibited acts, provides in particular that “If the offender is a corporation, partnership or association, or other juridical entity, the penalty shall be imposed upon the officer or officers of the corporation, partnership, association or entity responsible for the violation without prejudice to the cancellation or revocation of these entities’ license or accreditation issued to them by any licensing or accredited body of the government.”

32.2 The limitation under Section 20 to the “officer or officers of the corporation ... responsible for the violation,” excludes the directors who cannot be held criminally liable on the basis alone that they are members of the board of directors. In other words, unless members of the board are shown to have directed or participated in the illegal act directly, then their mere position as such do not warrant being held criminally liable for the offense.

32.3 Nonetheless, even when none of the directors have participated directly in the commission of the prohibited acts, when the operations of the company is such that the commission of the prohibited acts are so egregious, it would be possible to seek personal civil liability on the members of the board of directors under Section 30 of the Revised Corporation Code for “willfully and knowingly assenting to patently unlawful acts of the corporation,” or at the very least for “gross negligence or bad faith in directing the affairs of the corporation.”

²⁶⁸ Republic Act No. 10121 (2010), hereinafter referred to as “Philippine Disaster Risk Reduction and Management Act.”

²⁶⁹ Sec. 4, Philippine Disaster Risk Reduction and Management Act; *emphasis supplied*.

F. DIRECTORS' DISCLOSURE OBLIGATIONS IN RELATION TO CLIMATE CHANGE RISKS

1. The '*doctrine of centralized management*' under Philippine Corporation Law that vests directly in the board of directors, in the exercise of their business judgment, control over the pursuit of the corporate business enterprise, imposes on directors of *for-profit* corporations a common law 'duty to inform or disclose' to the shareholders material or relevant information relating to company transactions. Directors' obligation to disclose corporate matters arises from statutory requirements, especially in areas where shareholders' ratification vote is required for certain corporate acts, such as when it comes to self-dealings and related-party transactions.²⁷⁰

1.1 In cases where the law does not impose on directors the obligation to disclose corporate matters, the shareholders' right to be informed of corporate affairs flows from their right of inspection and/or reproduction of corporate records recognized under Section 73 of the Revised Corporation Code, which also imposes a correlative *duty to maintain* specified corporate records, such the "*records of all business transactions,*" resolutions adopted by the board of directors, and copies of the latest reportorial requirements submitted to the SEC.

1.2 In addition, Section 177 of the Revised Corporation Code requires all corporations doing business in the Philippines to submit to the SEC annual audited financial statements and a general information sheet. Pursuant to corporate governance best practices, corporations vested with public interest, such as publicly-held companies, are also required to annually submit to the SEC a directors' compensation report and their appraisal or performance report and the standards or criteria used to assess each director, which does not include sustainability reporting in relation to directors.

1.3 Section 161 of the Revised Corporation Code imposes criminal penalty of fines on the "*unjustified failure or refusal by the corporation, or by those responsible for keeping the maintain corporate records, to comply with Sections*

²⁷⁰ Sec. 31 of the Revised Corporation Code.

... 73, ... and 177 and other pertinent rules and provisions of this Code on inspection and reproduction of records.”

2. Under the Philippine corporate governance framework, directors of publicly-held companies have no directly imposed disclosure obligations on climate change risk. Under the ‘comply or explain’ approach of SEC’s CG Codes for Publicly-held Companies, Philippine publicly-held companies “*should ensure that the material and reportable non-financial and sustainability issues are disclosed,*” with the recommendation that the boards of directors “*should have a clear and focused policy on the disclosure of non-financial information, with emphasis on the management of economic, environmental, social and governance (EESG) issues of its business, which underpin sustainability. ... [and] should adopt a globally recognized standard/framework in reporting sustainability and non-financial issues.*”²⁷¹

3. While the disclosure regime for climate change-related risks set by the Philippines’ SEC currently follows the ‘comply or explain’ approach, the general disclosure rules by the Philippine Stock Exchange (PSE), and specific disclosure rules by relevant industry regulators, all need to be considered when determining the materiality threshold of disclosures relating to climate change risks and opportunities which may affect the company.

3.1 Based on a review of SEC’s Sustainability Reporting Guidelines for Publicly-listed Companies, the obligation to disclose and submit the sustainability report, including material climate-change disclosures, is primarily a corporate responsibility, as it is the publicly-listed company itself which faces the administrative penalties of reprimand, fine, delisting or revocation of license for failure to do so; and that directors are not directly and personally liable for corporate disclosures, unless they make false or misleading statements of material fact which are tantamount to “*market manipulation,*”²⁷² or “*fraudulent*”

²⁷¹ Principle 10 and Recommendation, CG Codes for Publicly-held Companies

²⁷² Sec. 24 (d), Securities Regulation Code: “(d) To make false or misleading statement with respect to any material fact, which he knew or had reasonable ground to believe was so false or misleading, for the purpose of inducing the purchase or sale of any security listed or traded in an Exchange.”

transactions,²⁷³ as defined and penalized under the Securities and Regulation Code.

3.2 **On the other hand, the Philippine Stock Exchange (PSE) Disclosure Rules** provide for a ‘broad materiality threshold’ which requires publicly-listed companies to disclose “*any material fact or event that occurs which would reasonably be expected to affect investors’ decisions in relation to trading the securities*”²⁷⁴ and “*such information [which] may reasonably be expected to materially affect market activity and the price of its securities,*”²⁷⁵ generally include the disclosure of climate-related risks particularly when such impact trading and price of company shares. Non-compliance with PSE’s ‘broad materiality threshold’ rule may subject the offending publicly-listed company and its responsible officers to criminal prosecution for offenses involving fraud of the market manipulation, concealment, and other offenses specified in the Securities Regulation Code.²⁷⁶

3.3 This is consistent with the policy of the Philippine government and its regulators allowing company discretion in determining and disclosing its corporate climate policy. Such discretion and leeway would cease once sustainability reporting becomes mandatory and the regulatory rule that will apply would state that climate change risks pose foreseeable material financial risks for publicly-listed companies, and therefore subject to the same materiality threshold under the PSE disclosure rules. **In the event that SEC makes sustainability reporting mandatory for publicly-listed companies, it will constitute a regulatory recognition that climate change poses material financial risk for publicly-listed companies that would take away the leeway afforded to their directors in determining what may constitute material climate-related risks**

²⁷³ “SEC. 26, *Fraudulent Transactions*. – It shall be unlawful for any person, directly or indirectly, in connection with the purchase or sale of any securities to:

“26.1. *Employ any device, scheme, or artifice to defraud;*

“26.2. *Obtain money or property by means of any untrue statement of a material fact of any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or*

“26.3. *Engage in any act, transaction, practice or course of business which operates or would operate as a fraud or deceit upon any person.*”

²⁷⁴ Sec. 4, Art. VII, PSE Disclosure Rules.

²⁷⁵ Sec. 4.3(c), Art VII, PSE Disclosure Rules.

²⁷⁶ Sec. 2, Art. VIII – Scale of Fines for Non-Compliance with Unstructured Disclosure Requirements

that arise in the pursuit of the companies' business operations, plans and strategies.

a. SEC's Sustainability Reporting Guidelines for Publicly-listed Companies²⁷⁷

(1) Submission of Sustainability Report with Annual Report

5. To provide greater disclosure and transparency not only on financial matters, but on non-financial and sustainability issues, the Philippines SEC has issued Sustainability Reporting Guidelines for Philippine Publicly-listed Companies (PLCs) which provide a reporting template and topic guide for the Sustainability Report to be submitted with their Annual Report (SEC Form 17-A),²⁷⁸ under the following legal parameters:

- (a) Non-attachment of the Sustainability Report to the Annual Report shall be subject to penalty of fines for the administrative offense of "*incomplete annual report*" penalized under SEC Memorandum Circular No. 6, series of 2005;
- (b) For the first three years of the Sustainability Reporting Guidelines' implementation from 2019-2022, the SEC has adopted a 'comply or explain' approach, meaning companies would be required to attach the template to their Annual Reports, but they can provide explanations for items on which they have no available data;²⁷⁹ however, by 2023 onwards, it is expected that the SEC will make sustainability reporting mandatory for PLCs.

5.1 The Sustainability Report focuses on Economic, Environmental, and Social (EES) disclosures, since governance disclosures are already made in the Integrated Annual Corporate Governance Report (I-ACGR) submitted separately to the SEC.²⁸⁰ While the SEC encourages companies to use the Sustainability Reporting Guidelines, particularly for climate-related disclosures,

²⁷⁷ SEC Memorandum Circular No. 2019-04 (15 February 2019).

²⁷⁸ Para. 3 and Introduction, SEC Memorandum Circular No. 4-2019 (15 February 2019), hereinafter referred to as "Sustainability Reporting Guidelines for PLCs".

²⁷⁹ Para. 6, Sustainability Reporting Guidelines for Publicly-listed Companies.

²⁸⁰ Page 9, Sustainability Reporting Guidelines for Publicly-listed Companies.

the SEC notes that companies are not required to disclose on all topics provided in the reporting template, but rather, disclosure should only be on topics determined by companies as material after an assessment of materiality.²⁸¹

5.2 While the duty of diligence of directors of publicly-listed companies includes the obligation to assess the materiality of commercial transactions, including the climate change risks arising therefrom in order to comply with their obligation to act on an “*informed basis*,” the ‘comply or explain’ approach under SEC’s sustainable reporting, which includes the determination on the disclosure on matters, indicates that currently, public-listed companies and their directors do not have a legal obligation to disclose to shareholders and other stakeholders climate change risks besetting their companies’ business enterprise.

5.3 The discussion on SEC’s Sustainable Reporting that immediately follows have two objectives, namely: (a) to inform directors of publicly-listed companies (and other publicly-held companies in the event that the SEC expands the coverage) of the nature and extent of their companies’ disclosure obligations in pursuit of sustainable development in particular, and acting on an informed basis when assessing the materiality of climate change risks, once the SEC makes sustainable reporting mandatory; and (b) the sustainability reports submitted with the Annual Reports to the SEC become part of the public records of publicly-listed companies by which the shareholders and other stakeholders may judge whether such publicly-listed companies have in fact complied with their duty of diligence in pursuing the long-term interests of their companies, which includes “*activities as the identification, sourcing, measurement, evaluation, mitigation and monitoring of risk.*”²⁸²

(2) Sustainability and Sustainability Reporting

6. The SEC has adopted the definition of the Brundtland Report²⁸³ of “*sustainability*” as “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*”²⁸⁴ For companies, this translates to managing non-financial performance across

²⁸¹ Page 9, Sustainability Reporting Guidelines for Publicly-listed Companies.

²⁸² Explanation under Principle 12, CG Codes for Publicly-held Companies.

²⁸³ Brundtland G. “Our Common Future”, Report of the World Commission on Environment and Development (1987) (or the “Brundtland Report”)

²⁸⁴ Brundtland Report, as cited in Par. 1, Sustainability and Sustainability Reporting, Sustainability Reporting Guidelines for Publicly-listed Companies.

environment, economic and social aspects of their organizations to optimize business operations, improve competitiveness, and long-term success.²⁸⁵

6.1 Under the SEC guidelines, sustainability reporting is “an organization’s practice of reporting publicly on its significant economic, environmental and social impacts in accordance with globally accepted standards.”²⁸⁶ The sustainability reporting framework adopted by the SEC follows four (4) globally accepted frameworks, which companies use to report on sustainability and non-financial information:²⁸⁷

- Global Reporting Initiative’s (GRI) Sustainability Reporting Standards,
- International Integrated Reporting Council (IIRC) Integrating Reporting (IR) Framework,
- Sustainability Accounting Standards Board’s (SASB) Sustainability Accounting Standards, and
- Task Force on Climate-related Financial Disclosure (TCFD) Recommendations.

6.2 The benefits of sustainability reporting for companies include (i) internal benefits such as: effective management of sustainability risks and opportunities, sustainable vision, strategy or business plans, improved management systems and motivated workforce; and (ii) external benefits such as improved company reputation and brand value, investor attractiveness, stakeholder engagement, and competitive advantage.²⁸⁸

(3) Materiality Assessment

7. In sustainability reporting, materiality is the principle that determines which relevant topics are sufficiently important that it is essential to report on them.²⁸⁹ A disclosure is considered material if it reflects the significant economic, environmental, and social impacts of the organization on the stakeholders, and

²⁸⁵ Page 9, Sustainability Reporting Guidelines for Publicly-listed Companies.

²⁸⁶ Page 2, Sustainability Reporting Guidelines for Publicly-listed Companies.

²⁸⁷ Page 3, Sustainability Reporting Guidelines for Publicly-listed Companies.

²⁸⁸ Page 6, Sustainability Reporting Guidelines for Publicly-listed Companies.

²⁸⁹ Page 14, Sustainability Reporting Guidelines for Publicly-listed Companies.

the capacity of the stakeholders to influence the economic, environmental, and social impacts or activities of the organization.²⁹⁰

7.1 Under the SEC guidelines, and as defined under GRI standards, “*impact shall refer to the effect an organization has on the economy, the environment, and/or society, which in turn can indicate its contribution (positive or negative) to sustainable development.*”²⁹¹ Reporting organizations are expected to report on their impacts that are directly linked to their activities, products, or services through a business relationship, and it should be noted that “*impact*” does not refer to the effect upon an organization, such as a change to its reputation.²⁹²

7.2 Disclosures should also be accompanied by a management approach which describes the management of the sustainability issues, including explaining how the organization (1) avoids, mitigates or remedies negative impacts to the economy, environment, and society, and enhances positive ones, and (2) addresses its climate-related issues.²⁹³

7.3 The PLC should report on the management approach for each material issue with the following information: (1) an explanation on the materiality of the topic; (2) the boundary for the material topic, which includes a description of where the impacts occur, and the PLC involvement with the impacts; and (3) an explanation of how the PLC manages the topic and the objectives.²⁹⁴

7.4 If the PLC is a holding company, it has the option of whether to report on the holding company alone, or to include its subsidiaries, subject to the principle of materiality in defining the report boundary. In addition to providing the description of the PLC’s and/or its subsidiaries’ business model, including primary activities, brands, products and services, the name of the highest-ranking person responsible for the report is required to be disclosed.

²⁹⁰ Page 16, Sustainability Reporting Guidelines for Publicly-listed Companies.

²⁹¹ Page 8, Sustainability Reporting Guidelines for Publicly-listed Companies.

²⁹² Page 8, Sustainability Reporting Guidelines for Publicly-listed Companies.

²⁹³ Page 16, Sustainability Reporting Guidelines for Publicly-listed Companies.

²⁹⁴ Page 17, Sustainability Reporting Guidelines for Publicly-listed Companies.

(5) Disclosure Topics

8. Disclosures in the Sustainability Report should reflect the organization's significant economic, environmental and social impacts,²⁹⁵ including climate-related risks and opportunities, and should consider the reasonable expectations and interests of key shareholders.²⁹⁶ Further, such disclosures should be quantifiable and measurable, effectively providing a snapshot of an organization's non-financial performance for the reporting period, whenever applicable. The Sustainability Report template and guidelines include disclosures relating to EES impacts and UN sustainability goals.

(i) Economic Disclosures²⁹⁷

8.1 Disclosure on economic topics refers to how the company directly increases the pool of economic resources that flow in the local and national economy, including the risks and opportunities due to climate change, procurement practices with respect to local suppliers and anti-corruption.²⁹⁸ In particular, the disclosures relating to economic performance and climate-related risks and opportunities are as follows:

- (a) *Economic Performance* – This measures the direct economic value generated (revenue) and distributed (*i.e.* operating costs, employee wages, dividends, taxes, community donations, *etc.*).²⁹⁹ Figures for this disclosure can be derived using the audited financial statement for the relevant reporting period.³⁰⁰
- (b) *Climate-related Risks and Opportunities* – These disclosures were adopted from the TCFD recommendations and require the disclosure of the organization's climate governance which covers describing the actual and potential impacts of climate-

²⁹⁵ "Impact" as defined under GRI Standards, "refer[s] to the effect an organization has on the economy, the environment, and/or society, which in turn can indicate its contribution (positive or negative) to sustainable development. Reporting organizations are expected to report on their impacts that are directly linked to their activities, products, or services through a business relationship. It should be noted that "impact" does not refer to the effect upon an organization, such as a change to its reputation". See Page 8, Sustainability Reporting Guidelines for Publicly-listed Companies.

²⁹⁶ See GRI Standards 101: Foundation 2016 as cited in Page 10, Sustainability Reporting Guidelines for Publicly-listed Companies.

²⁹⁷ "Economic" as defined under GRI Standards, refers to "an organization's impact on the economic conditions of its stakeholders and on economic systems at local, national, and global levels. It does not focus only on the financial condition of the organization."

²⁹⁸ Page 11, Sustainability Reporting Guidelines for Publicly-listed Companies.

²⁹⁹ Page 19, Sustainability Reporting Guidelines for Publicly-listed Companies.

³⁰⁰ Page 44: Annex B, Sustainability Reporting Guidelines for Publicly-listed Companies.

related risks and opportunities on the organization's business, strategy, and financial planning, where such information is material.³⁰¹

Under recommended disclosures is the description of the board's oversight of climate-related risks and opportunities, including the disclosure of the processes and metrics used to identify and assess climate-related issues over the short, medium and long term, in line with the organization's strategy and risk management process.³⁰²

Another recommended disclosure is the description of management's role in assessing and managing climate-related issues, and describing the resilience of the organization's strategy, taking into consideration different climate-related scenarios including a 2°C or lower scenario.³⁰³

Disclosure of an organization's climate-related issues helps stakeholders make sound and reasonable assessments of the impact climate change may have on the organization.³⁰⁴

8.2 It is interesting to note that the disclosures for climate-related risks and opportunities fall under the category of economic disclosures for sustainability reporting, and are limited to material topics solely determined by the company. This is a recognition by the SEC of climate change as a material financial risk for publicly-listed companies, which are nevertheless afforded leeway in determining what may constitute material climate-related risks that arise in the pursuit of the companies' business operations, plans and strategies. This is consistent with the policy of the Philippine government and its regulators allowing company discretion in determining and disclosing its corporate climate policy. Such discretion and leeway would cease once sustainability reporting becomes mandatory and the regulatory rule that will apply would state that climate change risks pose foreseeable material financial risks for publicly-listed companies, and are therefore subject to the same materiality threshold under the PSE disclosure rules. *(See discussion below on PSE Disclosure Rules)*

³⁰¹ Page 20, Sustainability Reporting Guidelines for Publicly-listed Companies.

³⁰² Page 20, Sustainability Reporting Guidelines for Publicly-listed Companies.

³⁰³ Page 20, Sustainability Reporting Guidelines for Publicly-listed Companies.

³⁰⁴ Page 44: Annex B, Sustainability Reporting Guidelines for Publicly-listed Companies.

(ii) Environment Disclosures³⁰⁵

8.3 Environmental disclosures relate to how the company manages the natural resources it needs for its business, as well as how it minimizes its negative impacts to the environment including biodiversity, and ability to access materials needed for its operations.³⁰⁶

- (a) *Resource Management* – Disclosures on resource management such as energy consumption (*i.e.* renewable sources, gasoline, LPG, diesel and electricity), water consumption, and materials use (*i.e.* renewable or non-renewable) show how efficiently an organization uses scarce natural resources, which has implications on reduction of environmental impacts from extraction and processing of these resources.³⁰⁷ The efficiency of managing resources relate to the profitability of the organization.³⁰⁸
- (b) *Ecosystems and Biodiversity* – PLCs need to identify all operational sites, owned, leased, managed, in or adjacent to protected areas, and areas of high biodiversity such as upland/watershed or coastal/marine, provide information on habitats protected or restored, and list all International Union for Conservation of Nature (IUCN) Red List species and national conservation list species with habitats in areas affected by operations.³⁰⁹ Companies have the responsibility and clear business case for ensuring ecosystems and biodiversity around its sites are protected and restored.³¹⁰
- (c) *Environmental Impact Management* – PLCs need to disclose quantities of air emissions (*i.e.* greenhouse and ozone-depleting substances), air pollutants (*i.e.* persistent organic and hazardous air pollutants, volatile organic compounds, particulate matter, etc.), solid waste generated (*i.e.* reusable, recyclable, composted, incinerated, and residuals/landfilled), hazardous

³⁰⁵ “Environment” as defined under GRI Standards, is in relation to “an organization’s impact on living and non-living natural systems, including land, air, water and ecosystems.”

³⁰⁶ Page 12, Sustainability Reporting Guidelines for Publicly-listed Companies.

³⁰⁷ Pages 24-25, Sustainability Reporting Guidelines for Publicly-listed Companies.

³⁰⁸ Page 45: Annex B, Sustainability Reporting Guidelines for Publicly-listed Companies.

³⁰⁹ Page 26, Sustainability Reporting Guidelines for Publicly-listed Companies.

³¹⁰ Page 45: Annex B, Sustainability Reporting Guidelines for Publicly-listed Companies.

waste generated and transported, water discharges and wastewater recycled.³¹¹ Reporting on an organization's impact on air, soil, and water through emissions, pollutants, wastes and effluents provides the basis for companies to manage these impacts.³¹² Companies should disclose on their performance on these topics including how well the organization mitigates, reduces and/or prevents these impacts to the environment in compliance with Philippine environmental laws or on efforts beyond compliance.³¹³

- (d) *Environmental Compliance* – PLCs need to disclose total amount of monetary fines, number of non-monetary sanctions, and cases resolved in relation to non-compliance with environmental laws and/or regulations.³¹⁴ Disclosure of an organization's environmental compliance shows an organizations' ability to conform to certain performance parameters.³¹⁵

8.4 These environmental disclosures specifically set quantitative measurement and reporting of corporate consumption and impact on natural resources and the environment, and are consistent with necessary corporate compliance under relevant environmental laws in the Philippines.

(iii) Social Disclosures³¹⁶

8.5 Social disclosures refer to how the organization manages its relationship with its stakeholders such as employees, customers, suppliers, communities and the government, including disclosures on issues related to human rights, access to and quality of products and services, responsible business practices in marketing, customer privacy, and data security.³¹⁷

(iv) UN Sustainable Development Goals

8.6 Disclosures are required relating to how companies are able to contribute to the United Nations Sustainable Development Goals (SDGs) through

³¹¹ Pages 27-31: Sustainability Reporting Guidelines for Publicly-listed Companies.

³¹² Page 45: Annex B, Sustainability Reporting Guidelines for Publicly-listed Companies.

³¹³ Page 45: Annex B, Sustainability Reporting Guidelines for Publicly-listed Companies.

³¹⁴ Page 31: Annex B, Sustainability Reporting Guidelines for Publicly-listed Companies.

³¹⁵ Page 45: Annex B, Sustainability Reporting Guidelines for Publicly-listed Companies.

³¹⁶ "Social" as defined under GRI Standards, is in relation to "an organization's internal and external impacts/s on the social systems within which it operates".

³¹⁷ Page 13, Sustainability Reporting Guidelines for Publicly-listed Companies.

their products and services.³¹⁸ There are 17 SDGs including, among others, no poverty, good health and well-being, clean water and sanitation, affordable and clean energy, sustainable cities and communities, climate action, life below water and on land (please see Section C, paragraph 9 above).³¹⁹

8.7 PLCs need to disclose, for each of their key products and services, its corresponding societal value/contribution to the SDGs, potential negative impact of contribution and management approach to the said negative impact.³²⁰ For holding companies, the services and products of its subsidiaries may be disclosed, since the SEC will not accept none/not applicable as an answer for this section.³²¹

8.8 The SDG Compass can also be used as guidance for companies on how they align their strategies as well as measure and manage their contribution to the realization of the UN SDGs.³²²

8.9. The Sustainability Report requires disclosures on economic, environment, and social factors, which are critical in determining and evaluating overall climate change risks and opportunities impacting publicly-listed companies in the Philippines. Specifically, the local climate-related disclosures in the Philippines follow international best practices, and are consistent with global standards on the disclosure of a company's climate governance.

(6) *Penalty for Non-attachment of the Sustainability Report to the Annual Report*

8.10. Non-attachment of the Sustainability Report to the Annual Report is subject to the same penalty for an Incomplete Annual Report,³²³ with corresponding scales of fines:³²⁴

- *First Offense: Reprimand/Warning.*

³¹⁸ Page 14, Sustainability Reporting Guidelines for Publicly-listed Companies.

³¹⁹ The UN SDGs can be accessed at <https://sdgs.un.org/goals>

³²⁰ Page 43, Sustainability Reporting Guidelines for Publicly-listed Companies.

³²¹ Page 43, Sustainability Reporting Guidelines for Publicly-listed Companies.

³²² Page 46: Annex B, Sustainability Reporting Guidelines for Publicly-listed Companies. The SDG Compass can be accessed at <https://sdgcompass.org/>

³²³ Para. 7, Sustainability Reporting Guidelines for Publicly-listed Companies.

³²⁴ Sec. 17.1 Rule 17 of the Securities and Regulations Code (SRC), as cited in SEC Memorandum Circular No. 6, Series of 2005 (Consolidated Fines)

- *Second Offense:* PhP30,000 (approximately US\$600) plus PHP500 (approximately US\$10) per day of delay of filing the amended report.
- *Third Offense:* PhP60,000 (approximately US\$1,200) plus PHP1,000 (approximately US\$20) per day of delay of filing the amended report.
- *Fourth Offense:* Ground for the suspension/ revocation of the erring company's registration or secondary license which shall be made after notice and hearing, in accordance with the above-mentioned procedures. Erring companies which are primarily regulated by other government agencies shall be endorsed accordingly.³²⁵

8.11 Continued non-payment of the assessed fine and/or failure to comply with the requirement, despite notice and hearing for a period of fifteen (15) days, shall be a sufficient ground for the SEC to take other appropriate action or remedies available under the Securities Regulation Code and other related laws.³²⁶ Further, the imposition of the said penalties shall be without prejudice to the imposition of other administrative sanctions or to the filing of criminal charges against the person/s responsible.³²⁷

c. Philippine Stock Exchange (PSE)'s Disclosure Rules

9. Corporate disclosures for PLCs in the Philippines are classified into two types of disclosures: (1) the structured reports, which are submitted within specific time frames as annual, quarterly and monthly reports; and (2) unstructured continuing disclosures, which are communications of corporate development as they occur and are intended to update the investing public on the activities, operations and business of the PLC.³²⁸

10. The basic disclosure principle of the PSE is "to ensure full, fair, timely, and accurate disclosure of material information from all listed companies".³²⁹

³²⁵ SEC Memorandum Circular No. 6, Series of 2005 (Consolidated Fines)

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ Sec. 2, Art. VII, PSE Disclosure Rules.

³²⁹ Sec. 1, Art. VII, PSE Disclosure Rules.

PLCs are required to “promptly make available all information, through the submission of structured and unstructured disclosures, that would enable a reasonable investor to determine whether to buy, sell or hold securities, or in connection with the exercise of related voting rights.”³³⁰

11. The broad materiality threshold provided under the PSE disclosure rules, which require publicly-listed companies to disclose “any material fact or event that occurs which would reasonably be expected to affect investors’ decisions in relation to trading the securities”³³¹ and “such information [which] may reasonably be expected to materially affect market activity and the price of its securities,”³³² would generally include the disclosure of climate-related risks particularly when such impacts trading and price of company shares.

(1) Structured Corporate Disclosures

12. In accordance with the requirement to attach the Sustainability Report to the Annual Report (SEC Form 17-A), PLCs must submit this annual structured report within one hundred five (105) calendar days after the end of the fiscal year of the company.³³³

12.1 The Annual Report is required to be signed by the company’s principal executive officer, its principal operating officer, its principal financial officer, its comptroller, its principal accounting officer, its corporate secretary or persons performing similar functions.³³⁴ This is an exhaustive listing of signatories which does not include the board of directors of the company.

12.2 Should the PLC fail to submit the Annual Report or any other required structured report, the PSE will impose a basic fine between PhP5,000 to P50,000 (approximately US\$100 to \$1,000) depending on the total assets of the PLC, based on its latest financial statements.³³⁵ In addition, the PSE will commence imposing the daily fine of PhP500 to P5,000 (approximately US\$10

³³⁰ Sec. 2, Art. VII, PSE Disclosure Rules.

³³¹ Sec. 4, Art. VII, PSE Disclosure Rules.

³³² Sec. 4.3(c), Art VII, PSE Disclosure Rules.

³³³ Sec. 17.8, Art. VII, PSE Disclosure Rules.

³³⁴ SEC Form 17-A Template accessed at <https://www.sec.gov.ph/investment-companies/reportorial-requirements/>.

³³⁵ Sec. 1, Art. VIII – Scale of Fines for Non-compliance with Structured Continuing Disclosure Requirements, PSE Consolidated Listing and Disclosure Rules.

to \$100) for each day of delay or non-compliance.³³⁶ The PSE has set the maximum fine per year/per violation between PhP50,000 to P500,000 (approximately US\$1,000 to \$10,000).³³⁷

12.3 After the lapse of fifteen (15) calendar days period of non-compliance, and with due notice, the PSE will automatically suspend trading of the company's shares for a maximum period of three (3) months.³³⁸ After the lapse of the suspension period and the PLC still failed to comply with the reportorial requirement, the PSE will initiate delisting procedures.³³⁹

(2) Unstructured Corporate Disclosures

13. The purpose for requiring unstructured disclosures is for the PLC "to update the investing public with any material fact or event that occurs which would reasonably be expected to affect investors' decision in relation to the trading of its securities".³⁴⁰

13.1 The PSE defines a "material fact or event" as "one which would reasonably be expected to affect investors' decisions in relation to those securities. This includes, but is not limited to, any significant and relevant information relating to the business and operations of the issuer that, if and when disclosed, would result in or would reasonably be expected to cause a significant change in the trading and/or market value of the PLC's securities."³⁴¹

13.2 Further, the PSE sets the standard and test to be followed by PLCs in determining whether disclosure is necessary, and requires that a disclosure must be made promptly by the PLC if it meets any of the following standards:

- Where the information is necessary to enable the PLC and the public to appraise their position or standing, such as, but not limited to, those relating to the PLC's financial condition, prospects, development projects, contracts entered into in the ordinary course of business or otherwise, mergers and acquisitions, dealings with employees, suppliers, customers

³³⁶ Sec. 17.8(2), Art. VII, PSE Disclosure Rules.

³³⁷ *Id.*

³³⁸ Sec. 17.8(2), Art. VII, PSE Disclosure Rules.

³³⁹ Sec. 17.8(3), Art. VII, PSE Disclosure Rules.

³⁴⁰ Sec. 4, Art. VII, PSE Disclosure Rules.

³⁴¹ *Id.*

and others, as well as information concerning a significant change in ownership of the issuer's securities owned by insiders or those representing control of the PLC; or

- Where such information is necessary to avoid the creation of a false market for its securities; or
- Where such information may reasonably be expected to materially affect market activity and the price of its securities.³⁴²

13.3 PLCs are required to disclose to the PSE once they become aware of any material information or corporate act, development or event, within ten (10) minutes from the receipt of such information or the happening or occurrence of said act, development or event, and such disclosure must be made to the PSE prior to its release to the news media.³⁴³

13.4 The penalty for non-compliance with unstructured disclosure requirements, including the violation of the terms and conditions of the PSE listing agreement and of any other provisions of the PSE rules and regulations committed within a twelve-month period, is as follows:³⁴⁴

- *First Violation:* PHP50,000 (approximately US\$1,000)
- *Second Violation of a similar nature:* PHP75,000 (approximately US\$1,500)
- *Third Violation:* Suspension of trading for a period of one (1) month
- *Fourth Violation:* Ground for delisting

13.5 An additional fine of PHP1,000 (approximately US\$20) will be imposed for each trading day during which the offense continues until and including the day on which the violation is rectified.³⁴⁵ Failure to pay within one (1) month from the imposition of the penalty and any additional fine imposed will result in the suspension of trading of the PLC.³⁴⁶

³⁴² Sec. 4.3, Art. VII, PSE Disclosure Rules.

³⁴³ Sec. 4.1, Art. VII, PSE Disclosure Rules.

³⁴⁴ Sec. 2, Art. VIII – Scale of Fines for Non-Compliance with Unstructured Disclosure Requirements, PSE Consolidated Listing and Disclosure Rules (PSE Scale of Fines).

³⁴⁵ Sec. 2, Art. VIII – Scale of Fines for Non-Compliance with Unstructured Disclosure Requirements.

³⁴⁶ *Id.*

13.6 Offenses involving fraud of the market manipulation, concealment, and other offenses specified in the Securities Regulation Code (SRC) will be referred to the PSE Board for its appropriate action.³⁴⁷

d. Insurance Commission’s Revised Code of Corporate Governance³⁴⁸

14. The Revised Code of Corporate Governance (IC Code) for Insurance Commission Regulated Companies (ICRCs) is intended to raise the corporate governance standards of ICRCs to a level at par with their regional and global counterparts.³⁴⁹ The IC Code also adopts the ‘comply or explain’ approach, which means that if the ICRC cannot comply, then it must identify any areas of non-compliance, explain the reasons, and provide an action plan to address non-compliant areas in the annual corporate governance report.³⁵⁰

14.1 Similar to the SEC’s Corporate Governance for PLCs, the relevant sustainability related sections of the IC Code include Principle 10 on “*Increasing Focus on Non-Financial and Sustainability Reporting*” and Principle 16 on “*Encouraging Sustainability and Social Responsibility*”.

14.2 Principle 10 of the IC Code states that the ICRC should ensure that the material and reportable non-financial and sustainability issues are disclosed.³⁵¹ The Board should have a clear and focused policy on the disclosure of non-financial information, with emphasis on the management of economic, environmental, social, and governance (EESG) issues of its business which underpin sustainability.³⁵² This includes disclosure to all shareholders and stakeholders of the company’s strategic (long-term goals) and operational objectives (short-term goals), as well as the impact of a wide range of sustainability issues.³⁵³ Insurance companies should adopt a globally recognized standard/framework in reporting sustainability and non-financial issues, such as the GRI, IIRC and SASB.³⁵⁴

³⁴⁷ Sec. 2, Art. VIII – Scale of Fines for Non-Compliance with Unstructured Disclosure Requirements.

³⁴⁸ IC Circular No. 2020-71.

³⁴⁹ Sec. I (1), Page 1, Insurance Commission Circular Letter No. 2020-71 or originally denominated as “Code of Corporate Governance for Insurance Commission Regulated Companies”.

³⁵⁰ Sec. I (2), Page 1, Code of Corporate Governance for Insurance Commission Regulated Companies.

³⁵¹ Page 36, Code of Corporate Governance for Insurance Commission Regulated Companies.

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

14.3 Further, Principle 16 of the IC Code provides that the ICRC should be socially responsible in all its dealings with the communities where it operates.³⁵⁵ In particular, the ICRC should ensure that its interactions serve the environment and stakeholders in a positive and progressive manner that is fully supportive of its comprehensive and balanced development.³⁵⁶ The IC Code emphasizes that sustainable development means that the company not only complies with existing regulations, but also voluntarily employs value chain processes that takes into consideration EESG issues and concerns.³⁵⁷ In considering sustainability concerns, the ICRC plays an indispensable role alongside the government and civil society in contributing solutions to complex global challenges like poverty, inequality, unemployment and climate change.³⁵⁸

e. SEC Guidelines on the Issuance of Green Bonds under the ASEAN Green Bonds Standards in the Philippines

15. In April 2019, the SEC has promulgated³⁵⁹ the *Guidelines on the Issuance of Sustainability Bonds under the ASEAN Sustainability Bonds Standards*, primarily governing the issuance of ASEAN Green Bonds in the Philippines, following the ASEAN Green Bonds Standards which are aligned with the International Capital Market Association (ICMA) Green Bond Principles.³⁶⁰

15.1 ASEAN Green Bonds are specific purpose bonds where proceeds will be exclusively applied to finance or refinance, in part or in full, new and/or existing eligible Green Projects.³⁶¹ The non-exhaustive list of eligible green project categories include, but are not limited to: (a) renewable energy; (b) energy efficiency; (c) pollution prevention and control; environmentally sustainable management of living natural resources and land use; (e) terrestrial and aquatic biodiversity conservation; (f) clean transportation; (g) sustainable water and waste water management; (h) climate change adaptation; (i) eco-efficient and/or circular economy adapted, production technologies and processes and (j) green

³⁵⁵ Page 47, Code of Corporate Governance for Insurance Commission Regulated Companies.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ SEC Memorandum Circular No. 08-2019: Guidelines on the Issuance of Sustainability Bonds under the ASEAN Sustainability Bonds Standards in the Philippines (25 April 2019).

³⁶⁰ Sec. 4, Article I, SEC ASEAN Green Bonds Guidelines.

³⁶¹ Sec. 1, Art. I, SEC Memorandum Circular No. 12-2018 (31 August 2018), officially designated as “Guidelines on the Issuance of Green Bonds under the ASEAN Green Bonds Standards in the Philippines.” and hereinafter referred to as “SEC ASEAN Green Bonds Guidelines”.

buildings which meet regional, national, or internationally-recognized standards or certifications.³⁶² Green projects may relate to more than one category,³⁶³ and other green projects can also be funded by ASEAN Green Bonds, except fossil fuel power generation projects.³⁶⁴

15.2 The issuer must be incorporated in any of the ASEAN countries; however, a non-ASEAN issuer may be allowed if the eligible Green Projects are located in any of the ASEAN countries.³⁶⁵ The issuances must also originate from any of the ASEAN countries.³⁶⁶

15.3 The issuer must also make the following information publicly available on the issuer-designated website by the issuer at the time of issuance and throughout the tenure of the ASEAN Green Bonds: (i) the process of project evaluation; (ii) the use of proceeds; and (iii) external review report on the process, if any.³⁶⁷

15.4 Disclosure on the project evaluation and selection process must be clearly communicated by the issuer to the investors in the documentation for the issuance of ASEAN Green Bonds, which provide for:

- the environmental sustainability objectives;
- the process for the issuer to determine if the project fits the identified green project category; and
- the related eligibility criteria including, if applicable, exclusion criteria or any other process to identify and manage potentially material environmental and social risks.³⁶⁸

15.5 Further, the required disclosures on the use of proceeds prior to the issuance of the ASEAN Green Bonds must include:

³⁶² Sec. 8, Art. III, SEC ASEAN Green Bonds Guidelines.

³⁶³ Sec. 9, Art. III, SEC ASEAN Green Bonds Guidelines.

³⁶⁴ Sec. 10, Art. III, SEC ASEAN Green Bonds Guidelines. See also ASEAN Green Bonds standards, 4.1.6 cited in Page 4, FAQs of SEC ASEAN Green Bonds Guidelines.

³⁶⁵ Sec. 1, Art. II, SEC ASEAN Green Bonds Guidelines.

³⁶⁶ Sec. 2, Art. II, SEC ASEAN Green Bonds Guidelines.

³⁶⁷ Sec. 17, Art. III, SEC ASEAN Green Bonds Guidelines. See also ASEAN Green Bonds standards, 4.2.5 cited in Page 6, FAQs of SEC ASEAN Green Bonds Guidelines.

³⁶⁸ Sec. 15, Art. III, SEC ASEAN Green Bonds Guidelines. See also ASEAN Green Bonds standards, 4.3.4 cited in Page 7, FAQs of SEC ASEAN Green Bonds Guidelines.

- the categories of eligible green projects to which the proceeds will be allocated;
- in case of a specific green project, the same must be identified,³⁶⁹ and
- the process for managing the net proceeds from the ASEAN green bonds.³⁷⁰

15.6 For the disclosures relating to the management of proceeds during the tenure of the ASEAN Green Bonds, the following are required:

- the intended types of temporary placement for the balance of unallocated proceeds,³⁷¹ and
- The auditor's or third party's report to verify the issuer's management of proceeds, if any.³⁷²

15.7 In the event that all or a portion of the proceeds is or may be used for refinancing, it is recommended that the issuer:

- provide an estimate of the share of financing and refinancing;
- clarify which investments or project portfolios may be refinanced, if appropriate; and
- state the expected look-back period for refinanced Green Projects, to the extent relevant.³⁷³

15.8 Meanwhile, the required disclosures on the use of proceeds at least annually and during the tenure of the ASEAN Bonds include the: (i) brief description of the projects; (ii) amounts allocated; and (iii) expected impact.³⁷⁴ The ASEAN recommends the use of qualitative performance indicators and

³⁶⁹ Sec. 11, Art. III, SEC ASEAN Green Bonds Guidelines. See also ASEAN Green Bonds standards, 4.1.2 cited in Page 4, FAQs of SEC ASEAN Green Bonds Guidelines.

³⁷⁰ ASEAN Green Bonds standards, 4.3.1 cited in Page 4, FAQs of SEC ASEAN Green Bonds Guidelines.

³⁷¹ Sec. 20, Art. III, SEC ASEAN Green Bonds Guidelines. See also ASEAN Green Bonds standards, 4.3.6 cited in Page 7, FAQs of SEC ASEAN Green Bonds Guidelines.

³⁷² ASEAN Green Bonds standards, 4.3.6 cited in Page 7, FAQs of SEC ASEAN Green Bonds Guidelines.

³⁷³ Sec. 20, Art. III, SEC ASEAN Green Bonds Guidelines. Art. III, Sec. 12, SEC ASEAN Green Bonds Guidelines. See also ASEAN Green Bonds standards, 4.1.4 cited in Page 6, FAQs of SEC ASEAN Green Bonds Guidelines.

³⁷⁴ Sec. 21, Art. III, SEC ASEAN Green Bonds Guidelines.

quantitative performance measures,³⁷⁵ if feasible, with disclosures of corresponding key underlying methodologies and/or assumptions.³⁷⁶

15.9 Where confidentiality agreements, competitive considerations, or a large number of underlying principles limit the amount of detail that can be made available, the issuer may present the information in generic terms or on an aggregated portfolio basis (*i.e.*, the percentage allocated to certain project categories).³⁷⁷

15.10 The disclosure provisions of *ASEAN Sustainability Bonds Standard* provide the framework by which “greenwashing” charges against issuing companies may be brought, giving rise to litigation risks. The term “greenwashing” refers to the actions of companies that give the impression of acting in an environmentally aware and sustainable manner, when in fact the evidence shows that such acts are merely a marketing effort.³⁷⁸ Thus, when it is shown that issuers of green bonds have not used the proceeds to finance or refinance eligible green projects, or when project evaluation and selection process employed by the issuer do not follow the criteria provided under the guidelines, such as the related eligibility and exclusion criteria to identify and manage potentially material environmental and social risks, there would be basis by the proper regulatory agencies, like the SEC, to pursue greenwashing charges against erring issuers and their conspiring investors. (*See further discussion on the subject in Section G below*)

e. *Bangko Sentral ng Pilipinas’ (BSP’s) Sustainable Finance Framework*³⁷⁹

16. The Philippines’ central bank, *Bangko Sentral ng Pilipinas* (BSP), has approved the sustainable finance policy framework and integration of sustainability principles, including those covering environmental and social (E&S)

³⁷⁵ Quantitative performance measures as provided by ICMA GBP include: (a) energy capacity; (b) electricity generation; (c) greenhouse gas emission reduced/avoided; (d) number of people provided with access to clean power; (e) decrease in water use, reduction in the number of cars required; and/or (f) other reasonable performance measures. This is a non-exclusive list. See Sec. 23, Art. III, SEC ASEAN Green Bonds Guidelines.

³⁷⁶ Sec. 21, Art. III, SEC ASEAN Green Bonds Guidelines. See also ASEAN Green Bonds standards, 4.4.3 cited in Page 5, FAQs of SEC ASEAN Green Bonds Guidelines.

³⁷⁷ Sec. 22, Art. III, SEC ASEAN Green Bonds Guidelines. See also Page 5, FAQs of SEC ASEAN Green Bonds Guidelines.

³⁷⁸ Tarrant, Deborah, “*Beware the Rising Risk of Greenwashing*”, Company Directors of the Australian Institute of Company Directors (AICD), June 2022, Volume 58/Issue 05.

³⁷⁹ BSP Circular No. 1085, series of 2020.

risk areas, in the corporate governance and risk management frameworks, as well as in the strategic objectives and operations of banks in the Philippines.³⁸⁰ Philippine banks are expected to fully comply by 2023.³⁸¹

16.1. The BSP defines “*Sustainable Finance*” as referring to “*any form of financial product or service which integrates environmental, social and governance criteria into business decisions that supports economic growth and provides lasting benefit for both clients and society while reducing pressures on the environment.*”³⁸²

16.2. The BSP framework also provides for the definition of “*Environmental and Social (E&S) Risk*” which “*refers to potential financial, legal, and/or reputational negative effect of environmental and social issues on the bank. E&S issues include environmental pollution, climate risk (both physical and transition risks), hazards to human health, safety and security, and threats to community, biodiversity and cultural heritage, among others.*”³⁸³

16.3. Unlike SEC’s ‘comply or explain’ approach in sustainable reporting for publicly-held companies, BSP’s *Sustainable Finance Framework* impose the board of directors of banking institutions sustainable development obligations, thus: The board of directors (or equivalent management committee in the case of foreign bank branches) have the following duties and responsibilities relating to sustainable finance:

- Institutionalize the adoption of sustainability principles, including those covering E&S risk areas in the bank, by incorporating such in the corporate governance and risk management frameworks, as well as in the bank’s strategic objectives and operations taking into account the bank’s risk appetite and ability to manage risk;
- Promote a culture that fosters environmentally and socially responsible business decisions. The board of directors shall

³⁸⁰ Para. 1, BSP Circular No. 1085, series of 2020 (29 April 2020), as approved in BSP Monetary Board Resolution No. 415 dated 19 March 2020, and originally denominated as “Sustainable Finance Framework”.

³⁸¹ Para. 1, BSP Circular No. 1085, series of 2020 (29 April 2020), as approved in BSP Monetary Board Resolution No. 415 dated 19 March 2020, and originally denominated as “Sustainable Finance Framework”.

³⁸² Sec. 1(a), BSP Sustainable Finance Framework, amending Sec. 153 of MORB.

³⁸³ Sec. 1(b), BSP Sustainable Finance Framework, amending Sec. 153 of the MORB.

ensure that sustainability implications are considered in the overall decision-making process;

- Approve the bank's Environmental and Social Risk Management System (ESRMS) that is commensurate with the bank's size, nature, and complexity of operations and oversee its implementation. The board of directors shall ensure that the ESRMS is aligned with internationally recognized principles, standards and global practices and forms part of the enterprise-wide risk management (ERM system);
- Ensure that sustainability objectives and policies are clearly communicated across the institution, and to its investors, clients, and other stakeholders;
- Adopt an effective organizational structure to ensure attainment and continuing relevance of the bank's sustainability objectives. The board of directors shall monitor the bank's progress in attaining sustainability objectives;
- Ensure that adequate resources are available to attain the bank's sustainability objectives. The board of directors shall ensure that the members of the board, senior management, and personnel are regularly apprised of the developments on sustainability standards and practices; and
- Ensure that the sustainability agenda is integrated in the bank's performance appraisal system.³⁸⁴

The senior management of the bank are responsible for the overall implementation of the board-approved strategies and policies in relation to the sustainability objectives of the bank.³⁸⁵

16.4. In addition, Philippine banks are required to disclose the following information in their Annual Reports:

- Sustainability strategic objectives and risk appetite;
- Overview of E&S risk management system;

³⁸⁴ Page 2, BSP Sustainable Finance Framework, amending Sec. 153 of the MORB.

³⁸⁵ Page 3, BSP Sustainable Finance Framework, amending Sec. 153 of the MORB.

- Products/services aligned with internationally recognized sustainability standards and practices, which include the issuance of green, social or sustainability bonds;
- Information on existing and emerging E&S risks and their impact on the bank; and
- Other initiatives to promote adherence to internationally recognized sustainability standards and practices.³⁸⁶

16.5 Furthermore, banks are also required to disclose in their annual report the progress of implementation of initiatives undertaken to integrate sustainability principles in their governance framework, risk management system, business strategy and operations.³⁸⁷ If these BSP-required disclosure requirements are captured in the Sustainability Report submitted by publicly-listed banks to the SEC, then the Sustainability Report may be submitted together with the bank's annual report to the BSP, in compliance with the BSP's sustainability disclosure requirement.³⁸⁸

16.6 In terms of climate change risks, BSP's *Sustainable Finance Framework* provides the bases for litigation risks faced by Philippine banks. Non-compliance with the terms thereof would subject the bank and its directors to BSP's administrative sanctions (including removal and blacklisting for bank directors), as well as subject the erring bank to charges of greenwashing, such as when it is shown that the bank has not used the ESG metrics to analyze companies across its investment platform. *(See further discussion on the subject in Section G below)*

³⁸⁶ Page 4, BSP Sustainable Finance Framework, amending Sec. 153 of the MORB.

³⁸⁷ Page 5, BSP Sustainable Finance Framework, amending Sec. 153 of the MORB.

³⁸⁸ Page 5, BSP Sustainable Finance Framework, amending Sec. 153 of the MORB.

G. LITIGATION RISKS IN RELATION TO CLIMATE CHANGE

1. Based on international climate change literature that has been given to us to consider, litigation risks arise from private or regulatory legal actions relating to the physical impacts or economic transition risks associated with climate change, which may arise in a number of broad circumstances, including: (a) failure to mitigate/reduce emissions, (b) failure to adapt to the foreseeable impacts associated with climate change; (c) failure to disclose the risks associated with climate change where an obligation exists to do so (e.g., under corporate reporting and securities laws); and (d) failure to comply with climate-specific regulatory obligations such as emissions intensity standards.³⁸⁹

1.1 Considering that the Philippines' hybrid legal system — common law-based corporate and commercial laws operating within a primary civil law system — provides for citizens' constitutional rights to health and to healthful ecology, includes a constitutional obligation on the State and corporations to refrain from harming the environment, and promotes a 'comply or explain' approach to pursuing sustainable development, it would be prudent to state that climate change litigation risks for *for-profit* corporations and their directors arise from the following areas:

- (a) Citizen suits for failure to mitigate/reduce emissions in industries that are perceived to contribute to degradation of the environment, in violation of the constitutional rights to health and healthful ecology;
- (b) Shareholders' suits for failure to adapt to the foreseeable impacts associated with climate change that have had a

³⁸⁹ Ellie Mulholland, *Climate Change Litigation*, Thomson Reuters Practical Law, (2020) (updated resource); see also Grantham Research Institute, *Global Trends in Climate Change Litigation: 2021 Snapshot* (July 2021) <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf>; Minter Ellison and 2DII, *The Carbon Boomerang: Litigation as a Driver and Consequence of Transition to a Low-Carbon Economy* (September 2017) <https://2degrees-investing.org/wp-content/uploads/2018/01/me_2ii_carbonboomerang_v0.pdf>; UNEP FI and Minter Ellison, *The Forgotten Climate-Related Financial Risk: Liability Impacts on Adaptation and Adaptation Finance* (26 April 2021) <<https://www.unepfi.org/climate-change/adaptation/litigation-risks-in-adaptation-paper/>>; Clyde & Co, *Climate Change: Liability Risks for Businesses, Directors and Officers: The Coming Wave of Litigation* (2019) <<https://online.flippingbook.com/view/648937/>>; Clyde & Co, *Climate Change: A Burning Issue for Businesses and Boardrooms* (2019) <<https://online.flippingbook.com/view/6686/>>.

material financial impact on the company's business, in violation of the directors' fiduciary duty to act in the best interest of the corporation and its shareholders, as part of the fiduciary duty of diligence, and its shareholders in the face of undeniable climate risk besetting the company;

- (c) Failure of publicly-listed companies to disclose the material risks associated with climate change in instances when the disclosure obligation is statutorily mandated (*See discussion in Section F above*);
- (d) Suits from regulatory agencies for failure to comply with climate-specific regulatory obligations, such as emissions intensity standards, greenwashing in issuance of green bonds, sustainable financing, etc. (*See discussion in Section F above*)

2. The international climate change literature shows that climate litigation against companies and their directors continues to increase globally, with dozens of cases filed across the US and EU by regulators, bondholders, shareholders and municipalities, and causes of action range from tort and consumer law to breach of duty and securities fraud. Considering that we are not competent to make assessments on the merits of foreign climate litigations that operate within the peculiar legal systems of these foreign jurisdictions, we do not include in this opinion an assessment of the application or effects of such foreign climate litigations on potential litigation risks in the Philippines.

2.1 Since the ratification of the 1987 Constitution of the Philippines, there have been a good number of climate litigation that have been brought to courts, mainly to enforce the State's constitutional obligation to promote the citizens' right to health and to a healthful ecology, such as seeking that the Department of the Environment and Natural Resources (DENR) cancel all existing timber licenses agreements in the country and to desist from issuing new licenses;³⁹⁰ the Laguna Lake Development Authority (LLDA) seeking to prevent the Caloocan City Government from using as a dumpsite an area around Laguna

³⁹⁰ *Oposa v. Factoran, Jr.*, G.R. No. 101083, 30 July 1993; 224 SCRA 792 (1993).

Lake;³⁹¹ the residents around Manila Bay seeking Metropolitan Manila Development Authority (MMDA) and other key government agency to clean up Manila Bay;³⁹² and even seeking to compel the DENR to enforce from water utilities the preservation of water sources and improvement of sanitation facilities.³⁹³ Since both the constitutional and statutory frameworks place on the State and its instrumentalities the primary obligation to promote the citizens' right to health and to a healthful ecology, it would be reasonable to expect that the bulk of climate change suits would be against key government departments which are mandated by the *Climate Change Act* and climate-related environmental laws to respond to the climate change risks besetting the country.

2.2 In May 2022, the Philippines' Commission on Human Rights (CHR) concluded a national inquiry commenced in 2015 on the impact of climate change on human rights of the Filipino people and the role therein of the 'carbon majors' pursuant to a claim that climate change was adversely impacting human rights and the top oil producers of the world were contributing, and knowingly continue to contribute, to this phenomenon. While non-binding, the Commission's findings and recommendations included that: (a) climate change poses a threat to individuals' human rights; (b) international treaties and resolutions, including the Universal Declaration on Human Rights, form part of Philippine law; and (c) therefore entities incorporated or doing business in the Philippines in the value chain of high-emission companies could be compelled to undertake human rights due diligence.³⁹⁴ The first two findings of the CHR were in conformity with the Supreme Court's holding that the right to health and to a healthful ecology were part of the citizens' right even in the absence of any provision in the Philippine constitution relating thereto since the Philippines is a signatory to the Universal Declaration of Human Rights which includes the right to health.³⁹⁵ It is CHR's third recommendation — that entities operating in the Philippines in the value chain of high-emission companies can be compelled to undertake human rights due

³⁹¹ *Laguna Lake Development Authority v. Court of Appeals*, G.R. No. 110120, 16 March 1994; 231 SCRA 292 (1994).

³⁹² *Metropolitan Manila Development Authority v. Residents of Manila Bay*, G.R. No. 171947-48, 18 December 2008; 574 SCRA 661, 665 (2008).

³⁹³ *Maynila Water Services, Inc. v. Secretary of DENR*, G.R. Nos. 202897, 206823 & 207969, 06 August 2019; 912 SCRA 136.

³⁹⁴ Commission on Human Rights of the Philippines, National Inquiry on Climate Change (May 2022) <<https://chr.gov.ph/wp-content/uploads/2022/05/CHRP-NICC-Report-2022.pdf>>.

³⁹⁵ *Laguna Lake Development Authority v. Court of Appeals*, G.R. No. 110120, 16 March 1994; 231 SCRA 292, 307-308.

diligence — that poses litigation or legal risks upon companies operating in the value chain of high-emission network of the country because of the persuasive effect of CHR’s recommendations on the courts.

2.3 As the full impact of climate change on the Philippine environment and its economy are felt in the next few years, litigation risks may arise from the side of the SEC, as the primary regulatory agency exercising supervision and jurisdiction over all corporations,³⁹⁶ and empowered under the Revised Corporation Code to promote good corporate governance.³⁹⁷ In addition to moving away from the ‘comply or explain’ approach to sustainable development reporting, the SEC may make it mandatory for publicly-held companies and other corporations vested with public interest to formally include in their enterprise risk management (ERM) system means to effectively identify, monitor, assess and manage climate change risks, and report them in detail in the sustainability reports to be filed with the SEC, PSE and other industry regulators, and made available to the shareholders and other stakeholders.

2.4 In the exercise of its *quasi*-legislative power,³⁹⁸ the Philippine SEC may even go as far as supplementing its rules on sustainability reporting to include that the failure of the board of directors of publicly-held companies and other corporations vested with public interest to include in their ERM report an effective identification, monitoring, assessment and management of climate change risks would constitute a presumption that the directors have not complied with their fiduciary duties to act in the best interest of the corporation which includes the pursuit of sustainable development in their oversight function over corporate affairs. Such a set-up would be consistent with the precautionary principle application in environmental cases (*see discussions below*), and has precedent in Section 166 of the Revised Corporation Code covering the offense of “*acting as intermediaries for graft and corrupt practices*.”³⁹⁹

³⁹⁶ Sec. 179(a), Revised Corporation Code.

³⁹⁷ Sec. 26, Revised Corporation Code.

³⁹⁸ Sec. 179(o) of the Revised Corporation Code reads: “*Formulate and enforce standards, guidelines, policies, rules and regulations to carry out the provisions of this Code...*”

³⁹⁹ Sec. 166 of the Revised Corporation Code provides in part: “*When there is a finding that any of its directors, officers, employees, or agents, or representatives are engaged in graft and corrupt practices, the corporation’s failure to install: (a) safeguards for the transparent and lawful delivery of services; and (b) policies, code of ethics, and procedures against graft and corruption shall be prima facie evidence of corporate liability under this section.*”

3. In June 1999, the *Philippine Clean Air Act* formally recognized certain environmental rights of the citizenry, which “*the State shall seek to guarantee their enjoyment,*” thus:

- (a) The right to breathe clean air;
- (b) The right to utilize and enjoy all natural resources according to the principle of sustainable development;
- (c) The right to participate in the formulation, planning, implementation and monitoring of environmental policies and programs and in the decision-making process;
- (d) The right to participate in the decision-making process concerning development policies, plans and programs, projects or activities that may have adverse impact on the environment and public health;
- (e) The right to be informed of the nature and extent of the potential hazard of any activity, undertaking or project and to be served timely notice of any significant rise in the level of pollution and the accidental or deliberate release into the atmosphere of harmful or hazardous substances;
- (f) The right of access to public records which a citizen may need to exercise his or her rights effectively under this Act;
- (g) The right to bring action in court or quasi-judicial bodies to enjoin all activities in violation of environmental laws and regulations, to compel the rehabilitation and cleanup of affected area, and to seek the imposition of penal sanctions against violators of environmental laws; and
- (h) The right to bring action in court for compensation of personal damages resulting from the adverse environmental and public health impact of a project or activity.⁴⁰⁰

3.1 Section 41 of the Act recognizes “*citizen suits*” that grant any citizen the standing to “*file an appropriate civil, criminal or administrative action in the*

⁴⁰⁰ Sec. 4, Philippine Clean Air Act.

*proper courts against ... any person who violates or fails to comply with the provisions of this Act or its implementing rules and regulations.*⁴⁰¹

3.2 The provisions of the *Clean Air Act* on “*citizens’ environmental rights*” and “*citizen suits*” constitute the legal basis of the institutional obligation of the private sector in general, and boards of directors of private corporations in particular, to refrain from harming the environment. In conformity with their duties of obedience and diligence, it is within the responsibilities of boards of directors of private corporations to exercise stewardship function over the operations of their corporations to ensure they abide by the country’s environmental laws.

4. In January, 2001, the *Ecological Solid Waste Management Act* provided for “*citizen suits*” that allows any citizen to file an appropriate civil, criminal or administrative action against “*any person who violates or fails to comply with the provisions of this Act or its implementing rules and regulations.*”⁴⁰² The courts shall exempt citizen suits from the payment of filing fees and shall, likewise, upon *prima facie* showing of the non-enforcement or violation complained of, exempt the plaintiff from the filing of an injunction bond for the issuance of a preliminary injunction.⁴⁰³ In the event that the citizen should prevail, the courts shall award reasonable attorney’s fees, moral damages and litigation costs as appropriate.⁴⁰⁴

5. In April 2010, the Philippine Supreme Court promulgated the *Rules of Procedure for Environmental Cases*,⁴⁰⁵ to “*govern the procedure in civil, criminal and special civil actions before [various trial courts] involving enforcement or violations of environmental and other related laws, rules and regulations.*”⁴⁰⁶

5.1 The Rules provided many unprecedented innovations in Philippine Remedial Law, which includes the formal recognition of the court to issue *continuing mandamus*⁴⁰⁷ recognized in *Metropolitan Manila Development*

⁴⁰¹ Sec. 41(a), Philippine Clean Air Act.

⁴⁰² Sec. 52, Ecological Solid Waste Management Act.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ Administrative Matter No. 09-6-8-SC, 13 April 2010, hereinafter referred to as “Rules of Procedure for Environmental Cases.”

⁴⁰⁶ Sec. 2 (*Scope*), Rule 1, Part I, Rules of Procedure for Environmental Cases.

⁴⁰⁷ Sec. 1, Rule 8, Part III, Rules of Procedure for Environmental Cases.

Authority (MMDA) v. Residents of Manila Bay,⁴⁰⁸ and formally granting the courts directly or through duly-appointed commissioners, the power to monitor and enforce compliance with judgment and orders in environmental cases,⁴⁰⁹ thus settling the issue on whether courts of law in the Philippines would have such common law power under the country's predominantly civil law system.

5.2 The Supreme Court noted that the *Rules of Procedure for Environmental Cases* liberalized the requirements for standing, allowing the filing of citizen's suit for the enforcement of rights and obligations under environmental laws.⁴¹⁰ The provision on citizen suits in the Rules "collapses the traditional rule on personal and direct interest, on the principle that humans are stewards of nature," and aims to "further encourage the protection of the environment."⁴¹¹

5.3 *Precautionary Principle.* – The Rules formally adopt the "Precautionary Principle" as a rule of evidence in environmental cases,⁴¹² under the expressed principle that "[t]he constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt." The Rules provide that, "When there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it."⁴¹³ In applying the precautionary principle, the Rules provide for the following factors, among others, to be considered: (1) threats to human life or health; (2) inequity to present or future generations; or (3) prejudice to the environment without legal consideration of the environmental rights of those affected.⁴¹⁴

5.4 *Citizen Suits.* – The Rules of Procedure for Environmental Cases formally instituted in Philippine Remedial Law "Citizen Suit" whereby "Any Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environment laws."⁴¹⁵ The

⁴⁰⁸ G.R. No. 171947-48, 18 December 2008; 574 SCRA 661, 665 (2008).

⁴⁰⁹ Sec. 4, Rule 5, Part II, Rules of Procedure for Environmental Cases.

⁴¹⁰ *Segovia v. Climate Change Commission*, G.R. No. 211010, 07 March 2017, 819 SCRA 543; citing Section 5, Rule 2, Part II, SC Rules on Environmental Cases.

⁴¹¹ *International Service for the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Southeast Asia (Phils.)*, G.R. Nos. 209271, 209276, 209301 & 209430, 08 December 2015.; 776 SCRA 434.

⁴¹² Rule 20, Part V, Rules of Procedure for Environmental Cases.

⁴¹³ Sec. 1, Rule 20, Part V, Rules of Procedure for Environmental Cases.

⁴¹⁴ Sec. 2, Rule 20, Part V, Rules of Procedure for Environmental Cases.

⁴¹⁵ Sect.5, Rule 2, Part II, Rules of Procedure for Environmental Case, which expressly provided that "Citizen suits filed under R.A. 8749 (Philippine Clean Air Act) and R.A. No. 9003 (Ecological Solid Waste Management Act) shall be governed by their respective provisions."

Rules promote climate change activism, by making it convenient for environment activists to bring citizen suits, that would impinge upon the operations of the respondent companies during its pendency, thus:

- (a) Upon the filing of a citizen suit, the courts shall issue an order which shall contain a brief description of the cause of action and the reliefs prayed for, requiring all interested parties to manifest their interest to intervene in the case within fifteen (15) days from notice thereof, with the plaintiff being allowed to publish the order once in a newspaper of general circulation in the Philippines.⁴¹⁶
- (b) The court shall defer the payment of filing and other legal fees that shall serve as first lien on the judgment award.⁴¹⁷
- (c) The trial court has the power to issue an environmental protection order (EPO) when prayed for in the verified complaint “*that the matter is of extreme urgency and the applicant will suffer grave injustice and irreparable injury,*”⁴¹⁸ which it can make permanent upon final judgment on the case.⁴¹⁹
- (d) The reliefs in a citizen suit, when warranted, shall “*include the protection, preservation or rehabilitation of the environment and the payment of attorney’s fees, costs of suit and other litigation expenses; and may also require the violator to submit a program of rehabilitation or restoration of the environment, the costs of which shall be borne by the violator, or to contribute to a special trust fund for that purpose subject to the control of the court.*”⁴²⁰

5.5 *Strategic Lawsuit Against Public Participation (SLAPP)*. – The Rules provide that: “*A legal action filed to harass, vex, exert undue pressure or stifle any legal recourse that any person, institution or the government has taken or may take in the enforcement of environmental law, protection of the*

⁴¹⁶ *Id.*

⁴¹⁷ Sec. 12, Rule 2, Part II, Rules of Procedure for Environmental Cases.

⁴¹⁸ Sec. 8, Rule 2, Part II, Rules of Procedure for Environmental Cases.

⁴¹⁹ Sec. 3, Rule 5, Part II, Rules of Procedure for Environmental Cases.

⁴²⁰ Sec. 1, Rule 5, Part II, Rules of Procedure for Environmental Cases.

*environment or assertion of environmental rights shall be treated as a SLAPP.*⁴²¹ In a SLAPP filed against a person involved in the enforcement of environmental laws, protection of the environment or assertion of environmental rights, the defendant is allowed to file an answer interposing as a defense that the case is a SLAPP and by way of counterclaim, pray for damages, attorney's fees and costs.⁴²² The defense of a SLAPP shall be decided within thirty (30) days from the holding of a summary hearing; and if the court dismisses the action, not only is the dismissal "*with prejudice*," but the court may award damages, attorney's fees and costs of suit under a counterclaims if such has been filed.⁴²³

5.6 ***Writ of Kalikasan*** ("*Writ of Nature*"). – The Rules of Procedure for Environmental Cases formally recognize a special civil action, judiciable only by the Supreme Court or Court of Appeals, that would result in the issuance of a *writ of kalikasan* which it describes as a "*remedy to a natural or juridical person, entity authorized by law, people's organization, non-governmental organization, or any public interest group accredited by or registered with any government agency, on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with or by an unlawful act or omission of a public official or employee, or private individual or entity, involving environmental damage or such magnitude as to prejudice life, healthy or property of inhabitants in two or more cities or provinces.*"⁴²⁴

5.6.1 A petition for the issuance of a *writ of kalikasan* shall be acted upon within sixty (60) days from the time the petition is submitted for decision,⁴²⁵ and when found meritorious the reliefs that may be granted are the following:

- (a) Directing respondent to permanently cease and desist from committing acts or neglecting the performance of a duty in violation of environmental laws resulting in environmental destruction or damage;

⁴²¹ Sec. 1, Rule 6, Part II, Rules of Procedure for Environmental Cases.

⁴²² Sec. 2, Rule 6, Part II, Rules of Procedure for Environmental Cases.

⁴²³ Secs. 3 and 4, Rule 6, Part II, Rules of Procedure for Environmental Cases.

⁴²⁴ Sec. 1, Rule 7, Part III, Rules of Procedure for Environmental Cases.

⁴²⁵ Sec. 15, Rule 7, Part III, Rules of Procedure for Environmental Cases.

- (b) Directing the respondent public official, government agency, private person or entity to protect, preserve, rehabilitate or restore the environment;
- (c) Directing the respondent public official, government agency, private person or entity to monitor strict compliance with the decision and orders of the court;
- (d) Directing the respondent public official, government agency, or private person or entity to make periodic reports on the execution of the final judgment; and
- (e) Such other reliefs which relate to the right of the people to a balanced and healthful ecology or to the protection, preservation, rehabilitation or restoration of the environment, except the award of damages to individual petitioners.⁴²⁶

5.6.2 The Supreme Court has characterized the *writ of kalikasan* as providing a stronger protection of environment right in order to accord an effective and speedy remedy where the constitutional right to a healthful and balanced ecology is violated, and address any possible large-scale ecological threats.⁴²⁷ It covers environmental damage of such magnitude that will prejudice the life, health, or property of inhabitants in two or more cities or provinces, and is available against an unlawful act or omission of a public official or employee, or private individual or entity.⁴²⁸

6. In Philippine legal jurisdiction, “greenwashing” presents a litigation risk to companies and their directors when the charges are based on violation of statutory-mandated sustainable frameworks, such as those covered by SEC’s Guidelines on ASEAN Green Bonds and BSP’s Sustainable Finance Framework (See *discussion in Section F above*). When they are not based on mandatory sustainable frameworks, greenwashing charges present a reputational risk associated with evolving stakeholder perceptions and expectations.

⁴²⁶ *Id.*

⁴²⁷ *Paje v. Casiño*, G.R. Nos. 207257, 207276, 207282 & 207366, 03 February 2015, 749 SCRA 39; *Segovia v. Climate Change Commission*, G.R. No. 211010, 07 March 2017; 819 SCRA 543.

⁴²⁸ *LNL Archipelago Minerals, Inc. v. AGHAM Party List*, G.R. No. 209165, 12 April 2016; 789 SCRA 271.

7. With the scientific data and international consensus indicating that the average world warming of 1.5°C is more than likely in the near term (between 2021-2040), the Philippine society has to anticipate and prepare for the likelihood that in the short and medium term there would be **unavoidable increases in multiple climate hazards and multiple risks to Philippine ecosystem, commercial and financial systems, and to the health and well-being of the Filipinos and other residents of the Philippine archipelago**. It should be expected that environmental cases will increase, especially with the Rules of Procedure for Environmental Cases providing very accommodating procedures and judicial powers to pursue climate activism, that would expose *for-profit* corporations and their directors to reputational risks associated with the public's perception that directors and their companies have not acted in the best interest of the stakeholders — consumers, investors, regulators — and of society as a whole.

H. CONCLUSIONS AND ADVICE

1. With climate change being a grave concern of the country, and of the world community, presenting as it does an existential threat to mankind, and with the recognition that climate change presents physical, transition and litigation risks to Philippine corporations, directors of *for-profit* corporations are fiduciary bound to take into consideration climate change-related risks in the discharge of their duties of obedience and diligence and to abide by the “*rules of good corporate governance*”⁴²⁹ in fulfilling their companies’ long-term economic, moral, legal and social obligations towards their shareholders and other stakeholders, pursuant to the mandate “*to maximize the organization’s long-term success, creating sustainable value for its stockholders, stakeholders and the nation.*”⁴³⁰

2 Philippine Corporation Law recognizes that directors are stewards of the company charged with protecting the assets and business enterprise value on behalf of shareholders, and other stakeholders as well.⁴³¹ For corporations vested with public interest, like publicly-held companies, banks and other financial intermediaries, the standards which their directors are required to meet to fulfill their fiduciary duty of diligence owed to other stakeholders is more than that of a prudent man: the highest degree of diligence with high standards of integrity and performance is required,⁴³² which is breached when directors become mere ‘rubber stamps’ and approve without circumspection or the exercise of independent evaluation the proposals or recommendations of committees, there being ‘red flags’ in the circumstances present to the board.⁴³³

3. Although there is not yet a Supreme Court decision directly on the matter, when it comes to shareholders’ interests what may constitute climate change ‘red flags’ is when company decisions are made and pursued that exposes the company to climate change risks with no “*effective enterprise risk management framework*” in place that would prove that the board have overseen

⁴²⁹ Sec. 23, last paragraph, Revised Corporation Code.

⁴³⁰ Para. 7 on the definition of “Corporate Governance”, under the INTRODUCTION, CG Code for PLCs.

⁴³¹ *Virata v. Ng. Wee*, G.R. No. 220926, 05 July 2017; 830 SCRA 271, 364-365.

⁴³² *Philippine National Bank v. Pike*, G.R. No. 157845, 20 September 2005; 470 SCRA 328, 347.

⁴³³ *Virata v. Ng. Wee*, G.R. No. 220926, 05 July 2017; 830 SCRA 271, 65-68.

company “*activities as the identification, sourcing, measurement, evaluation, mitigation and monitoring of risk.*”⁴³⁴

3.1 Examples of such red flag climate situations include the company’s non-compliance with climate-related environmental laws and regulations by companies whose nature of operations have a direct impact on the environment; such as oil companies, where the risk of leaks from the transport and storage facilities would be detrimental to the environment. A further example are mining and other extractive industries, whose operations not only affect the country’s forest cover, but for which the improper disposition of their tailings would have the effect of not only degrading the environment, but would adversely affect the livelihood of farmers and fisherfolks.

3.2 When the nature of the corporate business poses risks to the environment that pose financial and reputational risks to the company, and when such risks arise independently of the company’s actions, it falls within the directors’ fiduciary duty to undertake activities to properly identify, measure, and evaluate these risks and include in the company’s enterprise risk management (ERM) framework the manner by which the company shall mitigate such risks, and for directors to monitor such risk. For corporations whose business is affected with public interest, when their operations have a direct impact on the environment, the happening of any of the foreseeable risks would raise the legal presumption that directors have not complied with their extraordinary duty of diligence to protect the company’s long-term interests, nor of the right of their stakeholders to a healthful ecology.

4. The constitutional rights of Filipino citizens to health and to a healthful ecology, as well as the constitutional principle that private property and all economic enterprises bear a social function to contribute to the common good, impose on *for-profit* corporations, acting through their boards of directors, the institutional obligations to refrain from harming the environment by abiding with all government regulations that seek to protect the environment.

4.1 When read in relation to the foregoing constitutional backdrop, our review of the *Climate Change Act* and climate-related Philippine environmental laws shows that no institutional duty or responsibility is imposed upon the private

⁴³⁴ Explanation under Principle 12, CG Codes for Publicly-held Companies.

sector in general, and on the private corporate sector in particular, to promote environmental activism, and a failure to pursue low carbon economy beyond the targets set by the government does not *per se* lead to personal liabilities to directors of private corporations. The emerging “*role of directors in addressing climate change*” imposes a duty to refrain from harming the environment based on the standards and the “*prohibited acts*” laid down by the State in various environmental laws, the commission of which may lead to both criminal and civil liabilities, **as well as an obligation to include within directors’ stewardship over the company’s long-term success a due regard for climate change risks.**

4.2 The statutory language used in the “*prohibited acts*” clauses of the environmental laws provides that, as a general rule, when such prohibited acts are committed on behalf of the corporation, directors as such do not become criminally punishable, but only those directors, officers and employees of the corporation who directly are responsible for the commission of the prohibited acts shall be penalized for the corporate criminal offense committed.

4.3 While the enumeration of “*prohibited acts*” under the various environmental laws provides for the limited areas whereby directors may be held criminally liable for acts pursued in the corporate affairs, the commission of the prohibited acts in the pursuit of the corporate business enterprise may provide the legal basis — especially when the commission of such prohibited acts is egregious — under Section 30 of the Revised Corporation Code to make directors personally and solidarily liable (civil) with the corporation for “*willfully and knowingly assenting to patently unlawful acts of the corporation,*” or at least for “*gross negligence or bad faith in directing the affairs of the corporation.*”

5. The obligation to disclose material climate-related risks and submit the sustainability report for publicly-listed companies remains primarily a corporate responsibility, as the administrative penalties of reprimand, fine, delisting or revocation of license are imposed on the corporation itself. Absent a showing that the director of an erring company directly made a false or misleading statement of material fact resulting in market manipulation or fraud, it would be difficult to hold a director personally liable for any corporate disclosures, including climate-related risks and opportunities.

5.1 It is our opinion that once sustainability reporting is made mandatory by the Philippine SEC, especially to all publicly-held companies and other corporations vested with public interest, the failure to comply therewith, or the contents thereof, may constitute evidence in either shareholders' or public-interest litigation to prove "*gross negligence or bad faith in directing the affairs of the corporation*" in relation to climate change risks befalling the company's operations, or in regard to the company's obligation to refrain from harming the environment.

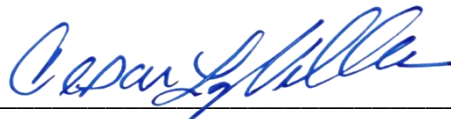
6. What may prove the more serious personal risk to directors would be a threat to their professional reputations as the stewards of the country's private corporate sector, which is mandated to pursue of sustainable development. Although the State only expects that private corporations comply with environmental laws, rules and regulations, nonetheless, the other stakeholders do have a right to demand that the board of directors not only comply with existing environmental regulations and disclose material climate-related risks, but also to actively employ a value chain process that takes into consideration, among others, environmental issues and concerns, with particular emphasis on the risks posed by climate change.

6.1 While the failure of directors to actively pursue environmental concerns may not necessarily expose them to personal, criminal or administrative liabilities, nonetheless, the ardent pursuit by non-government organizations and public-interests groups for the private corporate sector to devote their resources to the protection of the environment, coupled with the very accommodating litigation rules to enforce environmental cases, and the current demand of local and international investors that companies have a clear and focused policy on ESG matters, may result in directors having to devote much of the corporation's resources to heading off citizen suits for knowingly refusing to channel their companies' resources to face up to the undeniable risks brought about by climate change.

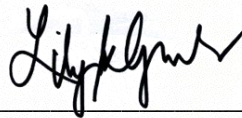
7. Various studies support the prognosis that even if all NDCs are fully implemented, the temperature rise is likely to increase beyond 1.5°C by 2030, businesses will likely be facing increased transition risks, both in the short and the medium term, as the Philippine government would likely introduce additional policies. Boards of directors of both public and private corporations should

already prepare their organizations towards a movement away from the ‘comply or explain’ approach pursued in sustainable development and reporting, by re-orienting the meaning and coverage of “sustainable development” to mean that companies not only comply with existing regulations, but must ensure that they employ value chain processes that take into consideration ESG issues and concerns, in contributing solutions to complex global challenges like poverty, inequality, unemployment *and climate change*.

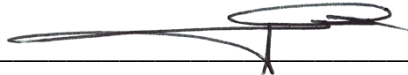
Dated this 18th day of October 2022, Makati, Metro-Manila, Philippines.



CESAR L. VILLANUEVA
Senior Founding Partner
VILLANUEVA GABIONZA & DY



LILY K. GRUBA
Senior Partner
ZAMBRANO GRUBA CAGANDA & ADVINCULA



ANGELO PATRICK F. ADVINCULA
Senior Partner
ZAMBRANO GRUBA CAGANDA & ADVINCULA



JOYCE ANNE C. WONG
Senior Associate
ROMULO MABANTA BUENAVENTURA SAYOC
& DE LOS ANGELES