

CSR COMPLIANCE TO REALISE ESG GOALS BY CORPORATE ENTITIES IN ASIA

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TABLE OF CONTENTS

<u>I. Introduction</u>	2
<u>II. Conceptual Framework: Corporate Social Responsibility and Environmental, Social, and Governance</u>	3
<u>A. Corporate Social Responsibility: Importance and Role</u>	3
<u>B. CSR as the precursor of ESG</u>	6
<u>C. Development of CSR and ESG in Asia</u>	7
<u>III. Statutory Analysis of Corporate Social Responsibility framework in India</u>	8
<u>A. Environmental law</u>	9
<u>B. MoEFCC and MCA Notifications, Guidelines and Circulars</u>	11
<u>C. Company law requirements</u>	12
<u>D. SEBI regulations and guidelines</u>	12
<u>IV. Limitations and aberrations in conforming to the CSR and ESG requirements</u>	14
<u>A. Regulatory overlaps and compliance hurdles</u>	15
<u>B. Analysis of the Draft EIA 2020</u>	17
<u>C. Reputation and Risk factor for Corporations</u>	21
<u>V. Recommendations for ensuring CSR measures to gravitate towards realizing ESG goals</u> 21	
<u>A. Changes in the statutory framework</u>	21
<u>B. Adopt an ESG Model specific to Asian companies</u>	22
<u>C. Whether Sustainable Development Goals are sufficient to improve ESG?</u>	24
<u>D. Assessing ESG metrics</u>	25
<u>VI. Climate change and corporate responsibility in the Indian Context</u>	26
<u>VII. Conclusion</u>	28

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I. INTRODUCTION

In recent years, our understanding of the social responsibility of business as being limited to merely increasing profits, as propounded by Milton Friedman,¹ has substantively changed. The 21st century, or the age of neoliberalism,² is reinforcing the idea of the morality of markets and the self-regulation of economic actors. This has led to a reevaluation of whether corporations should be perceived in the limited legal capacity of corporate citizens, or whether they should be obligated to accommodate larger stakeholder concerns in the course of how they conduct their business activities.³

In light of the ever-increasing global challenges due to environmental risks and climate change, corporations have been compelled to reconceive the part they play in society and move beyond the sole focus on generating wealth for their shareholders. One of the instances, when this transition was visible, was at the Business Roundtable ('BRT'), an influential association of Chief Executive Officers of the biggest companies in the USA. The statement issued by BRT in 2019 with 181 signatories reimaged the goals of a corporation and asserted the commitment of their businesses to all stakeholders and not just shareholders.⁴ However, this was not an isolated incident. The World Economic Forum released the 'Davos Manifesto: The Universal Purpose of a Company in the Fourth Industrial Revolution' in 2020. This statement emphasised the move towards stakeholder capitalism and measuring the performance of a corporation on how it achieves its environmental, social, and good governance objectives.⁵ Thus, it is evident that there is an increasing acknowledgment of the importance of the stakeholder model of corporate governance across the globe.

Any account of corporate social and environmental responsibility should focus on two factors: *first*, addressing the environmental and ecological issues caused due to business decisions by modifying the business policy and *second*, modifying the business policy in a manner such that

¹ Milton Friedman, *A Friedman Doctrine – The Social Responsibility of Business is to Increase its Profit*, THE NEW YORK TIMES MAGAZINE, September 13, 1970.

² PETER BLOOM, *THE ETHICS OF NEOLIBERALISM: THE BUSINESS OF MAKING CAPITALISM MORAL* Preface (Routledge: NY and London, 2017).

³ Donald Siegel and Abigail McWilliams, *Corporate Social Responsibility: A Theory of the Firm Perspective*, 26(1) ACADEMY OF MANAGEMENT REVIEW 117 (2001).

⁴ Paul Kearns, *Business Roundtable Statement: Context dictates what CEOs and their management consultants can do* MATURITY INSTITUTE (December 13, 2019), <http://www.hrmaturity.com/business-roundtable-statement-context-dictates-what-ceos-and-their-management-consultants-can-do/>.

⁵ Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution* WORLD ECONOMIC FORUM (December 02, 2019), <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/>.

it is *practically* capable of reducing and reversing the damage caused. The issue in revising the business policy arises when corporations fail to focus on the first factor whereas the environmental conservationists fail to focus on the second.⁶ In this paper, we suggest how both factors can be incorporated into the business policies by moving away from relying solely on UN Sustainable Development Goals to improve corporate social and environmental responsibility. Our analysis of the current statutory framework to meet Corporate Social Responsibility ('CSR') obligations suggests that an Environmental, Social, and Governance ('ESG') Model specific to Asian companies should be adopted, instead of blindly copying the Western Model.

This paper is structured as follows. Section I introduced the paper. Section II analyses the conceptual frameworks of CSR and ESG and examines whether the former is a precursor to the latter. Further, it focuses specifically on the evolution of these concepts in the Asian context. Section III traces the statutory framework of CSR in India. It examines the laws, notifications, regulations, and circulars issued by a wide range of bodies, including SEBI, MoEFCC, MCA, as well as the judicial principles that have contributed to this regulatory framework. This examination leads us to comprehend and appreciate the contemporary form of CSR in India. Given this statutory framework, Section IV discusses the limitations and aberrations that the corporations face while complying with their CSR obligations. While some limitations exist due to regulatory hurdles, others exist because of the perspective from which companies view their CSR and ESG obligations. Section V proposes recommendations which the corporations can adopt to assess and comply with their CSR and ESG goals. Section VI discusses the scope and extent of fixing corporate liability in the specific context of climate change in the Indian context, given its contemporary relevance. Section VII concludes by reinforcing the claim that an ESG Model specific to Asian companies should be adopted.

II. CONCEPTUAL FRAMEWORK: CORPORATE SOCIAL RESPONSIBILITY AND ENVIRONMENTAL, SOCIAL, AND GOVERNANCE

A. Corporate Social Responsibility: Importance and Role

While there is no uniform definition of CSR, it is generally understood as the responsibility of a corporation to align its social and environmental activities with its business purpose and

⁶ Joe DesJardins, *Corporate Environmental Responsibility*, 17 JOURNAL OF BUSINESS ETHICS 825, 830 (1998).

values to ensure accountability towards all its stakeholders.⁷ There are three core reasons which show the reality of why there needs to be an integration between how corporations operate and their impact on society. *First*, a significant percentage of the population lives below the minimum level of subsistence required. To meet even the basic needs of the current population, it is estimated that economic activity needs to increase by at least five-fold.⁸ *Second*, additionally, the population itself is also estimated to double in the next fifty years.⁹ *Third*, however, the only source of economic activity available to us are the finite natural resources.

In focusing only on profitability and financial sustainability, corporations do not keep a check on the negative impact they have on the environment. These three realities indicate the dilemma that we face: while significant commercial and economic activity is required to meet society's basic needs, it is the same economic growth that is responsible for most of the environmental degradation that jeopardizes the possibility of meeting even the present needs.¹⁰ This is where we realise the importance of corporate social and environmental responsibility. Companies can ensure sustainable development and growth only if they also consider the well-being of the other stakeholders involved, including but not limited to employees, shareholders, government, creditors, suppliers, unions, and the society, from which the business draws its resources.

Most companies have historically practiced some form of corporate social and environmental responsibility by contributing to the welfare of society.¹¹ However, the importance of CSR has grown phenomenally over the last few decades because of the specific and different elements it encompasses. It gained international appeal during the 1990s due to the growing international focus on sustainable development with the simultaneous increase in globalisation.¹²

The role of CSR can be best understood from the Pyramid of Corporate Social Responsibility as developed by Archie Carroll. It is employed as a tool to balance a corporation's commitments to its shareholders with its commitment to other stakeholders, including the government and society.¹³

⁷ V. Kasturi Rangan, Lisa Chase, and Sohel Karim, *The Truth About CSR*, HARV. BUS. REVIEW (2015), <https://hbr.org/2015/01/the-truth-about-csr>; Corporate Social Responsibility & Responsible Business Conduct, EUROPEAN COMMISSION, https://ec.europa.eu/growth/industry/sustainability/corporate-social-responsibility_en.

⁸ Joe DesJardins, *supra* note 6, at 825.

⁹ *Id.*

¹⁰ Joe DesJardins, *supra* note 6, at 826.

¹¹ Latapí Agudelo et. al., *A Literature Review of the History and Evolution of Corporate Social Responsibility* 7 INTERNATIONAL JOURNAL OF CORPORATE SOCIAL RESPONSIBILITY 4, 1 (2019).

¹² *Id.*

¹³ Archie Carroll, *Corporate Social Responsibility: The Centrepiece of Competing and Complementary Frameworks*, 44(2) ORGANIZATIONAL DYNAMICS 87, 96 (2015).

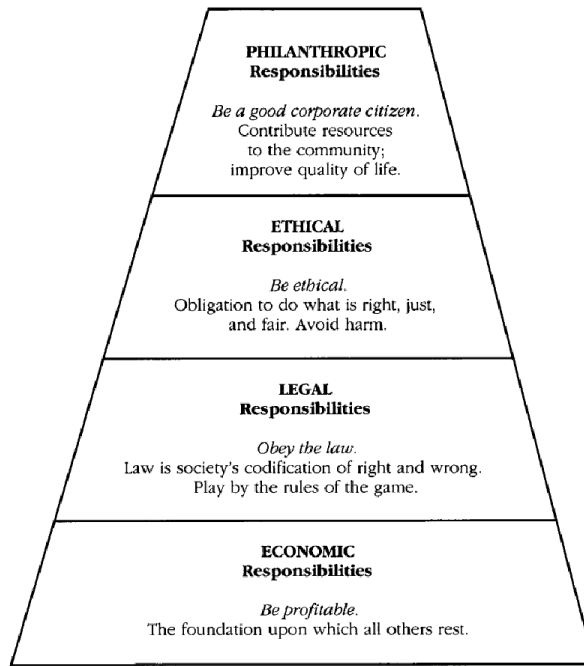


Figure 1: Pyramid of Corporate Social Responsibility¹⁴

This four-part framework comprises the four responsibilities that any business must follow. Economic responsibility is placed at the pyramid's foundation since it is a fundamental requirement to survive in the market.¹⁵ Legal responsibility is with respect to the business complying with the minimum laws and rules that have been framed. Ethical responsibility is not just limited to performing consistently in accordance with the society's expectations but also implies that businesses use standards and practices that may not necessarily be in written form, but are still expected of them.¹⁶ Philanthropic responsibility refers to the business's responsibility to contribute to the society. In this pyramid, the philanthropic responsibility of a business is its discretion and its practice varies from each business.¹⁷ This pyramid continues to be relevant as it provides a sustainable and dynamic stakeholder framework.¹⁸

Thus, it is clear that CSR is an important tool to improve a company's profitability and value, not just in terms of its reputational benefits, but also in terms of increasing efficiency by reducing costs and waste.¹⁹ However, CSR is slowly turning into a mere marketing tool by

¹⁴ Archie Carroll, *The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders* 34(4) BUSINESS HORIZONS, 39, 48 (1991).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Archie Carroll, *Carroll's pyramid of CSR: taking another look*, 3, INTERNATIONAL JOURNAL OF CORPORATE SOCIAL RESPONSIBILITY 1,1 (2016).

¹⁹ Kezia Farnham, *Corporate Social Responsibility (CSR): A One-Stop Guide*, DILIGENT INSIGHTS (March 25, 2021) <https://insights.diligent.com/esg/corporate-social-responsibility-csr/>.

allowing companies to claim that it complies with its obligations without any proof backing this claim. This concern of greenwashing, combined with the emergence of technology, has led to the emergence of ESR metrix.

B. CSR as the precursor of ESG

While CSR is a form of voluntary self-regulation by the company on its impact on the employees, environment, consumers, communities, and society, ESG builds on this by moving the responsibility away from being merely philanthropic. ESG refers to the three business measures used to identify and quantify a company's sustainability and societal impact: Environmental, Social, and Governance.²⁰ Metrics under the environmental pillar include the company's contribution to greenhouse gas emissions, electronic or packaging waste generated by it, and how it intends to reduce them. The social metrics include the diversity and inclusivity of the company's employees, concern about their health and safety, and interaction with and benefit of the local communities. Lastly, the governance metrics include whether the company has mechanisms in place to manage risks and opportunities related to business ethics, corruption, regulatory risk and data protection, to name a few.

While ESG originated from CSR, the two are not interchangeable or replaceable concepts.²¹ CSR aims at making a company more accountable for its impact on the environment and society, whereas ESG provides a framework to make the company's CSR efforts measurable.²² ESG provides a clear and comparable metric of performance and reporting, which is missing for CSR.

ESG metrics can be used to understand a company's philanthropic, social, environmental, and internal corporate governance practices. ESG is also increasingly being used as a means of ensuring long-term financial performance as investors are demanding it as a pre-requisite for any investment.²³ Thus, investors are no longer purely concerned with the company's financial

²⁰ Indarawati Tarmuji, Ruhanita Maelah, and Nor Habibah Tarmuji, *The Impact of Environmental, Social and Governance Practices (ESG) on Economic Performance: Evidence from ESG Score*, 7(3), INTERNATIONAL JOURNAL OF TRADE, ECONOMICS AND FINANCE, (2016).

²¹ *What's the difference between CSR and ESG?*, ALVA (Oct. 27, 2020) <https://www.alva-group.com/blog/whats-the-difference-between-csr-and-esg/>.

²² RHTLaw Asia LLP, *The Evolution of ESG from CSR*, LEXOLOGY (March 25, 2021) https://www.lexology.com/library/detail.aspx?g=80bbe258-a1df-4d4c-88f0-6b7a2d2cbd6a_.

²³ Michael O'Leary and Warren Valdmanis, *An ESG Reckoning Is Coming*, HARVARD BUSINESS REVIEW (March 2021) <https://hbr.org/2021/03/an-esg-reckoning-is-coming>; Dilshad Billimoria, *All you need to know about ESG investing and why it is important*, ECONOMIC TIMES (July 05, 2021) <https://economictimes.indiatimes.com/mf/analysis/all-you-need-to-know-about-esg-investing-and-why-it-is-important/articleshow/84133427.cms>.

obligation, but also assess how it operates, serves society, and impacts the environment. Similarly, consumers are increasingly supporting businesses that share positive ESG performance, and are even willing to pay a premium for such products. A study found that customers were willing to pay an additional 10% for products made by companies they deemed to be socially responsible.²⁴ Thus, these emerging trends highlight the rising importance of ESG disclosures. However, the ESG metrics are not uniform across the globe. Its development in Asia is unique to the region, as discussed in the next sub-section.

C. Development of CSR and ESG in Asia

While the common notion is that the concepts of CSR and ESG have originated in the West, studies suggest that Asian companies have been increasingly creating their own social responsibility standards.²⁵ They are not just limited to the Western interests and have evolved to include the indigenous changes within Asia concerning the local and cultural traditions and values.²⁶ This difference also stems from the difference in the forms of company in Asia and the West.

Three factors make Asian forms of companies and ESG disclosures unique.²⁷ *First*, comparatively more companies in Asia are family-owned and follow an ‘insider’ model. In this model, the owners have controlling shareholder interest in most of the companies, and thereby exercise dominant control over their affairs.²⁸ This implies that owners bring in their own values and priorities on the company’s social and environmental performance, and have no one challenging it. *Second*, the role of governments in Asian countries is not just limited to providing social welfare for employees and communities. They are also involved directly in the management of the companies, due to the magnitude of state-owned enterprises in Asia. State ownership leads to greater accountability from companies since they are under greater public scrutiny. For instance, China has made corporate responsibility reports mandatory only for all state-owned enterprises.²⁹ *Third*, regulatory developments have been instrumental in bolstering ESG reporting. For instance, Japan’s Ministry of Economy, Trade and Industry has

²⁴ Gielissen, R., *How consumers make a difference: An inquiry into the nature and causes of buying socially responsible products*, TILBURG UNIVERSITY (2010).

²⁵ Wendy Chapple and Jeremy Moon, *Corporate Social Responsibility (CSR) in Asia*, 44 BUSINESS AND SOCIETY, 415, 415 (2005).

²⁶ Jem Bendell & Chew Ng, *Characteristics of Asian CSR*, 1 LIEN CENTRE FOR SOCIAL INNOVATION 56, 57 (2009).

²⁷ *Id.*

²⁸ R. KRAAKMAN et al., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 22 (Oxford University Press, 2004).

²⁹ He Shan, *More firms pay attention to social responsibility*, CHINA.ORG.CN (Dec. 10, 2008) http://www.china.org.cn/business/news/2008-12/10/content_16928942.htm.

created a mechanism to identify companies that are reporting on their ESG performance.³⁰ Similarly, Thailand's Securities and Exchange Commission publishes an annual list of companies that meet their ESG performance criteria.³¹ Smaller countries like South Korea are also pushing towards sustainable business practices by making ESG reports mandatory from 2025 onwards.³² China will also implement mandatory environmental reporting by companies in 2021,³³ while the Hong Kong Stock Exchange has already implemented mandatory disclosure rules regarding climate change and ESG reporting.³⁴

Further, the green-labelled instruments have played an instrumental role in funding renewable energy projects in Asia. For instance, the Renewable Energy Country Attractiveness Index has ranked China, India, and Japan the highest in Asia for investment in the renewable energy sector.³⁵ Asian countries have been increasingly striving towards sustainability and reducing reliance on fossil fuels. South Korea, Japan, and Hong Kong have pledged to become carbon neutral by 2050, and China by 2060.³⁶ These instances indicate the rising need to analyse how companies will achieve this aim. However, before understanding the path to achieving this aim, and how the CSR and ESG framework can be improved, we must examine India's existing statutory framework.

III. STATUTORY ANALYSIS OF CORPORATE SOCIAL RESPONSIBILITY FRAMEWORK IN INDIA

In this section, we trace the provisions pertaining to environmental legislations, corporate law requirements and trace the CSR history leading to the most recent guidelines by Securities and Exchange Board of India ('SEBI'), the Business Responsibility and Sustainability Reporting

³⁰ Vibeka Mair, *Japan's METI creates ESG disclosure label, publishes investor engagement guidelines*, RESPONSIBLE INVESTOR, (May 28, 2018) <https://www.responsible-investor.com/articles/japans-meti-creates-esg-disclosure-label-publishes-investor-engagement-guid#:~:text=Japan's%20Ministry%20of%20Economy%2C%20Trade,the%20long%2Dterm%20investing%20alandscape.&text=The%20fourth%20action%20will%20be,%2D%20and%20mid%2Dcap%20companies>.

³¹ Piotr Zembrowski, *Thailand Leads the Region in ESG Disclosures*, MARKET INTEGRITY INSIGHTS (June 12, 2019) <https://blogs.cfainstitute.org/marketintegrity/2019/06/12/thailand-leads-the-region-in-esg-disclosures/>.

³² Hyeong-Ju Oh and Eun-Seo Koo, *Korea requires major companies to disclose ESG activities from 2025*, THE KOREAN ECONOMIC DAILY (Jan. 14, 2021) <https://www.kedglobal.com/newsView/ked202101140014>.

³³ Syntao, *Top 10 CSR Trends in China 2021*, CWR (March 26, 2021) <https://www.chinawaterrisk.org/opinions/top-10-csr-trends-in-china-2021/>.

³⁴ Pedro Gonçalves, *Hong Kong tightens ESG disclosure rules to attract investors*, INTERNATIONAL INVESTMENT (March 12, 2020) available at <https://www.internationalinvestment.net/news/4012355/hong-kong-tightens-esg-disclosure-rules-attract-investors>.

³⁵ Renewable Energy Country Attractiveness Index (RECAI), https://www.ey.com/en_gl/recai (last visited July 6, 2021).

³⁶ Rupa Burman Roy, *Increasing ESG regulations in Asia as sustainable investing takes off*, ASIA FUND MANAGERS (May 20, 2021) <https://www.asiafundmanagers.com/int/increasing-esg-regulations-in-asia/>.

guidelines ('SEBI BRSR'). Additionally, this section will analyse the framework of Corporate Environmental Responsibility ('CER') in India, specifically the guidelines issued by the Ministry of Environment, Forest and Climate Change ('MoEFCC') and judicial developments on lifting the corporate veil to determine accountability for environmental violations.

A. Environmental law

Environmental law is often categorised as administrative law. However, in practice, the whole body of environmental law is, to a large extent, also criminal law. The usual way in which environmental law is structured consists industry specific administrative requirements, specifying the permissible amounts and quality of polluting emissions, and the punishment for violations of these environmental crimes.³⁷ Many legislations cater to the need for environmental protection of our country relating to water, air, coastal region, forest, wildlife, hazardous wastes, and various miscellaneous schemes and acts.³⁸ These legislations do have provisions for penalising companies who are responsible for causing pollution upon complaint or discovery.

It is pertinent to note that the provision for 'corporate offences' is identical under all the environmental legislations. For instance, under Air Act, 1981 the provision for offences by companies is as follows:

“Offences by Companies³⁹ – Section 40(1) Where an offence under this Act has been *committed by a company*, every person who, at the time the offence was committed, was directly in charge of, and *was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence* and shall be liable to be proceeded against and punished accordingly:

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

(2) Notwithstanding anything contained in sub-section (1), where an *offence* under this Act has been *committed with the consent or connivance of*, or is attributable to any neglect on the part of any *director, manager, secretary or other officer of the company*, such director, manager, secretary or other officer

³⁷ Faure, Michael G. and Marjolein Visser, Law and Economics of Environmental Crime: A Survey, CRIMINAL LAW AND ECONOMICS (November 2, 2009).

³⁸ Examples include Eco-Marks Scheme, Biodiversity Bill, Taj Trapezium Pollution (Prevent and Control) Authority Order.

³⁹ The Air (Prevention and Control of Pollution) Act, 1981, Section 40.

shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation: For the purposes of this Section –

- a. ‘company’ means anybody corporate, and includes a firm or other association of individuals; and
- b. ‘director’, in relation to a firm, means a partner in the firm. (*Emphasis Added*).”

Identical provisions can be found under Section 47 of Water Act, 1974 and Section 16 of Environment Act, 1986. These apply to corporations as well as government departments. The content of the Section demonstrates an ad-hoc approach in legislating criminal liability on a corporation. The provision on ‘offences by companies’ provides for corporate liability as well as individual liability for ‘officer in default’. The aforesaid liability is qualified with the requirement of knowledge or lack of due diligence, consent or connivance. However, it would be incorrect to assume that environmental legislation in India has not evolved. There is a marked difference between the provisions of penalties in the The Water (Prevention and Control of Pollution) Act of 1974, The Air (Prevention and Control of Pollution) Act of 1981 and The Environment (Protection) Act of 1986 and the provisions for a penalty in the National Environment Tribunal Act of 1995.⁴⁰

Principles have also been developed by the Indian judiciary to determine when lifting of the corporate veil is required to impose liability on the person who was “responsible for” and “in charge” of the actions. The Supreme Court of India in *UPPCB v. Modi Distillery* held the officers in charge liable and while holding that error apparent does not vitiate proceedings. This was held to not let go of the people responsible, in this case the officers, due to a minor lapse in the proceedings.⁴¹ In *Haryana PCB v. Bharat Carpets*, besides holding the company liable, the Security and Production officers were involved in proceedings but not held liable as they were neither in charge of nor acquainted with the day to day business of the company. However, the court in its obiter did not shy away from mentioning that the director and chairman of the company who were in overall control of the day-to-day business could have been held liable. This goes on to show that courts do not hesitate to lift the corporate veil and hold the actual officers in charge responsible.

⁴⁰ There is specific fine prescribed in the former acts (Air, Water & Protection of Environment Act) whereas in the later Act (National Environment Tribunal Act) there is no such prescription rather the different heads have been mentioned.

⁴¹ *UPPCB v. Modi Distillery* 1988 AIR 1128.

However, there have also been contrary judgments passed such as those in *NA Palkhiwala v. MP Pradushan Niwaran Mandal*.⁴² In this case, the Madhya Pradesh High Court held that the Chairman and Deputy Chairman of the company cannot be prosecuted for an offence committed by the company, simply by virtue of the office held by them, as they are not the person directly “in charge of” and “responsible” to the company for the conduct of business under Section 40 of Air Act, 1981.

These laws and judgments leave some ambiguity in situations where imprisonment is the only punishment for corporate offences. The Malimath Committee of 2000 and the Madhava Menon Committee of 2007 have advocated for the introduction of sentencing guidelines for environmental crimes.⁴³ These guidelines would be in addition to the current superior court observations which merely state the purport and object for which punishment is imposed on the offender. However, what would be the effect of sentencing on society is a question that has been left unanswered and can only be answered by the Parliament. Environmental laws in India were an offshoot of an international compliance regime⁴⁴, the Stockholm Conference on Human Environment of June 1972. While the Indian legislature was prompt in enacting laws based on these conferences, the domestic laws were devoid of actual spirit to provide for prevention, control or abatement of environmental damage.

B. MoEFCC and MCA Notifications, Guidelines and Circulars

Legislation of Corporate Environmental Responsibility into Indian laws was majorly done through periodic Ministry of Environment and Forests and Climate Change (earlier ‘MoEF’ now ‘MoEFCC’) and Ministry of Corporate Affairs (‘MCA’) notifications, guidelines and circulars. In 2003, India sought to regulate dozens of most-polluting industries through Corporate Responsibility for Environment Protection (‘CREP’).⁴⁵ MCA introduced the Corporate Social Responsibility Voluntary Guidelines in 2009 which pushed for the adoption of technology that was environment-friendly, in addition to other environmentally conscious

⁴² *NA Palkhiwala v. MP Pradushan Niwaran Mandal* 1990 CriLJ 1856.

⁴³ *State of Punjab vs. Prem Sagar and Others*, (2008)7 SCC 550, 552.

⁴⁴ There are various legislations which India enacted just to comply its international treaty obligations, for e.g., Information Technology Act, 2000 – UNCITRAL Agreement; Arbitration and Conciliation Act – UNCITRAL Model Law on International Commercial Arbitration in 1985.

⁴⁵ Central Pollution Control Board, Ministry of Environment, Forest and Climate Change, *Corporate Responsibility for Environmental Protection*, (2003) <https://www.indiansugar.com/PDFS/CREP-2003-FullText.pdf>; Radhika Krishnan, *CREP: A Review*, DOWN TO EARTH, (June 7, 2015) <[11](https://www.downtoearth.org.in/blog/environment/crep-a-review-9538#:~:text=In%202003%2C%20the%20Union%20ministry,polluting%20industrial%20sectors%20in%20India.>>.</p></div><div data-bbox=)

approaches for promotion of efficient use of resources.⁴⁶ Recognising that companies were paying mere lip service to CSR, the Government of India introduced guidelines for CSR for Central Public Sector Units in March 2010, which for the first time spoke of a recommended spending based on net profit.⁴⁷ In 2011, MCA introduced National Voluntary Guidelines on Environmentally Responsible Business Practices which recognized that corporate activities may cause harm to the environment and required accountability from corporate for their direct and indirect involvement in perpetrating environmental damage.⁴⁸ In 2013, there was a further move towards a more mandatory approach with the advent of Section 135, Companies Act, 2013.⁴⁹ This is analysed in the next sub-section.

C. Company law requirements

Under Section 135, Companies Act, 2013, companies are required to constitute a Corporate Social Responsibility Committee ('CSR Committee') which is responsible for formulating a CSR policy for the company. This is mandatory for companies having a net worth of INR 500 crore or more, a turnover of INR 1000 crore or more, or having a net profit of INR 5 crore or more. Under Section 135(5), Companies Act, 2013, they are required to spend 2% of the average net profit of the three immediately preceding financial years. Schedule VII, Companies Act, 2013 lays down the list of activities that can be included by companies in their Corporate Social Responsibility activities.

The CSR regime was amended by the Companies (Amendment) Act, 2019 and the Companies (Amendment) Act, 2020. Further, the Companies (CSR Policy) Amendment Rules, 2021 have also made some fundamental changes to the CSR Rules, 2014. Prior to the amendments, Section 135, Companies Act, 2013 was based on the 'comply or explain' principle. This meant that a company could either spend the minimum CSR amount or disclose the reasons for failing to do so. However, the new regime departs from this and makes CSR spending a mandatory obligation. It has also imposed onerous obligations on the CSR Committee and the Board, failure to comply with which will attract stringent monetary penalties.

D. SEBI regulations and guidelines

⁴⁶ Ministry of Corporate Affairs, Corporate Social Responsibility Voluntary Guidelines, (2009).

⁴⁷ Ministry of Heavy Industries and Public Enterprises, Guidelines on Corporate Social Responsibility for Central Public Sector Enterprises, (2011).

⁴⁸ Ministry of Corporate Affairs, National Volant Godliness on Social, Environmental and Economical Responsibilities of Business, (2011).

⁴⁹ *Id.*

In 2012, SEBI mandated the top 100 listed companies as per the disclosure requirement emanating from the 'National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business' ('NVGs').⁵⁰ The requirement for filing BRRs was extended to the top 500 entities companies by market capitalisation from the financial year 2015-16. In December 2019, SEBI extended the BRR requirement to the top 1000 listed entities by market capitalisation, from the financial year 2019-20.

In November 2018, the Ministry of Corporate Affairs constituted a Committee on Business Responsibility Reporting ('Committee') for finalising Business Responsibility Reporting formats for listed and unlisted companies, based on the framework of the NGRBCs.⁵¹ SEBI was also part of this Committee and worked on the report. The report of the Committee was released on August 11, 2020.⁵² The committee recommended that the Business Responsibility Report be called the Business Responsibility and Sustainability Report ('BRSR'). In order to give time to companies to adapt to the new requirements, SEBI stated that the reporting would be on a voluntary basis for the 2021-22 Financial Year and on a mandatory basis from the 2022-23 Financial Year.

These disclosures that have been recommended in the BRSR, which are from an Environmental, Social and Governance perspective, are intended to enable businesses to engage more meaningfully with their stakeholders, and encourage them to go beyond regulatory financial compliance and report on their social and environmental impacts. In addition, sustainability-related goals and targets and performance against the same need to be mentioned in the report.⁵³

However, the focus of BRSR seems to be on the investors. SEBI has stated that access to relevant and comparable information will enable investors to identify and assess sustainability-related risks and opportunities of companies and make better investment decisions.⁵⁴ Higher

⁵⁰ These guidelines contain comprehensive principles to be adapted by companies as part of their business practices and a structured business responsibility reporting format requiring certain specified disclosures, demonstrating the steps taken by the companies to implement the said principles.

⁵¹ In order to align the NVGs with the emerging global concerns, the Sustainable and Development Goals (SDGs), the United Nations Guiding Principles on Business & Human Rights (UNGPs), the National Voluntary Guidelines were revised and released as the National Guidelines on Responsible Business Conduct (NGRBCs) in March 2019.

⁵² Ministry Of Corporate Affairs, Report of the Committee on Business Responsibility Reporting, (2020).

⁵³ SEBI comes out with disclosure requirements under Business Responsibility and Sustainability Report, THE ECONOMIC TIMES (May 11 2021) <https://economictimes.indiatimes.com/markets/stocks/news/sebi-comes-out-with-disclosure-requirements-under-business-responsibility-and-sustainability-report/articleshow/82533681.cms?from=mdr>.

⁵⁴ Securities and Exchange Board of India, Business responsibility and sustainability reporting by listed entities, Circular No.: SEBI/HO/CFD/CMD-2/P/CIR/2021/562, (May 10, 2021).

standards of ESG disclosures and transparency will help in attracting greater capital and investment.⁵⁵ The investor-centric rationale for introducing the changes in these guidelines is problematic and goes on to show that the main reason for introducing these changes is not to improve the environment or sustainability.

In addition to the BRSR framework mentioned above, SEBI Listing Obligations and Disclosure Requirements (LODR) Regulations, 2015 require listed companies to specify a risk management framework and large listed companies to also establish a risk management committee. The current standard of risk management will also include climate risk management.⁵⁶

Further, Indian companies may be required to make climate risk disclosures both in relation to securities issuances and their ongoing disclosure obligations. The SEBI Issue of Capital and Disclosure Requirements (ICDR) Regulations, 2018 also mandate disclosure of several types of corporate information which are likely to relate to climate risk. For example, these regulations require a description of the company's strategy and the environmental issues faced by it.⁵⁷ Moreover, the SEBI ICDR Regulations require that a company's prospectus contain the company's material internal and external risk factors,⁵⁸ with climate risk likely being a foreseeable factor for many companies. With respect to continuous disclosure obligations, companies in India have to ensure that the market is properly informed with respect to material information, which expressly includes information arising from the impacts of climatic events, such as flooding and fires.⁵⁹

Having understood the statutory framework surrounding CSR and ESG in India, the next section analyses the extent to which these statutory provisions allow companies to fulfil the CSR and ESG goals.

IV. LIMITATIONS AND ABERRATIONS IN CONFORMING TO THE CSR AND ESG REQUIREMENTS

⁵⁵ *Supra* note 53.

⁵⁶ Securities and Exchange Board of India, Listing Obligations and Disclosure Requirement Regulations (2015), Regulation 4(1)(f)(ii).

⁵⁷ Securities and Exchange Board of India, Issue of Capital and Disclosure Requirement Regulations (2018), Schedule VIII, Item (VIII)(D)(1)(d).

⁵⁸ Securities and Exchange Board of India, Issue of Capital and Disclosure Requirement Regulations (2018), Schedule VIII, Item (IV)(B)-(C).

⁵⁹ Securities and Exchange Board of India, Listing Obligations and Disclosure Requirement Regulations (2015), Schedule III, Part A, paragraph B(6).

The costs involved in terms of time and money in fulfilling CSR requirements are the biggest hurdle to its implementation. Further, the ability to deliver clear and transparent reporting on CSR compliance is another challenge. This is partly due to the lack of objective criteria to measure the company's contribution, and partly due to the lack of any clear and uniform goals of CSR. It could also be because companies are sceptical about inviting inspection and potential criticism of their approach. They may face potential reputational damage from negative publicity about CSR.

This section analyses these limitations mentioned above through three categories. While the first two limitations are a result of the overlapping, unclear and loose regulatory framework, the third limitation arises due to the company's perception of fulfilling CSR as a means to avoid reputational damage.

A. Regulatory overlaps and compliance hurdles

The CSR regulatory landscape is filled with frameworks, standards and reporting requirements that differ and are constantly evolving. The MoEFCC guidelines reveal that they are not effective for four reasons: *one*, they only apply to limited industries; *two*, MoEFCC has been unsuccessful in ensuring their implementation; *three*, they provide no guidance on how to use the funds and *four*, even the funds that are collected are not spent for the designated purposes.

Further, the SEBI BRSR guidelines show that the format and aim of the disclosures seem to be to primarily attract investment and make it simple for the investor. However, this overlooks the fact that sustainability issues are complex and a single metric for all might not be the way forward. In light of this, recommendations which were given to SEBI to not keep the same standard for all industries, and to decide on the basis of the impact of the corporation and not market capitalization seem to not have been considered by SEBI in its final version of the regulations.⁶⁰ These guidelines, while mandating disclosure requirements for the top 1000 listed company also leave out the SME sector. Most SMEs have lesser resources and are less driven to make advances in a sustainable and responsible business and run the risk of being left behind. This could curtail potential business prospects, as customers and clients are likely to minimise engagement with SMEs that cannot meet their CSR needs and expectations.

Further, the corporate law framework lacks in defining CSR. Section 135, Companies Act and the CSR Rules 2014 do not define CSR and instead provide an inclusive definition of the term.

⁶⁰ Securities and Exchange Board of India, Consultation Paper on the Format for Business Responsibility and Sustainability Reporting (August 18, 2020).

Companies attempt to fulfil their CSR obligations by disbursing the CSR allocated funds to NGOs and organisations that fit within the list of activities allowed under Schedule VII.⁶¹ This is done without auditing or monitoring of the utilisation of these funds and determining whether these funds have actually been used for the benefit of the community. However, the ambiguity in the law is also partly responsible as it permits companies to spend their money on CSR-related activities through NGOs, but does not mandate any particular impact assessment or overseeing requirements. In addition to this is the ‘donation-based’ approach adopted by companies.⁶² Generally, a greater number of private companies strive to meet their CSR requirements by donating funds earmarked for CSR to international partners and implementing agencies such as NGOs or through Company Foundations (‘CFs’) itself. Such measures ensure that the funds effectively go back to the company. This becomes a means to circumvent the law and make profits from it also. Such opportunity is afforded arise due to the law itself which does not mandate any records, hence, there is no accountability.⁶³

On an analysis of the CSR spending requirements under the Company law of India, a study by Professor Varottil has revealed that over the two-year time frame of Financial Year 2014 to Financial Year 2016, while the overall spending by Indian companies on CSR activities has risen, fewer companies individually meet the statutory spending requirements. Further, the reasons given by the companies for not meeting the spending requirements are often vague and boiler-plate.⁶⁴

There have been studies that have revealed a strong relationship between CSR and the economic, political and social context in a country which is reflective of a country’s development and institutional capacity to promote and support CSR activities.⁶⁵ Firms are placed in different contexts in different countries which have varied institutional capacity and

⁶¹ Companies Act 2013, Schedule VII.

⁶² For example, one Central Public Sector Enterprise after a need-based survey of all primary schools in the vicinity of its operations, ‘donated’ chairs, desks and water coolers, geysers and scholarships to needy children as part of its CSR activities for ‘promoting-education’ one of the approved activities under Item (ii) of Schedule VII.

⁶³ Akanksha Jumde & Jean du Plessis, Legislated Corporate Social Responsibility in India: The Law and Practicalities of its Compliance, *STATUTE LAW REVIEW* (2020).

⁶⁴ Umakanth Varottil, Analysing the CSR spending requirements under Indian company law, in J. DU PLESSIS, UMAKANTH VAROTTIL AND JEROEN VELDMAN (EDS.), *GLOBALISATION OF CORPORATE SOCIAL RESPONSIBILITY AND ITS IMPACT ON CORPORATE GOVERNANCE* (May 23, 2018).

⁶⁵ C. Christopher Baughn, Nancy L. Bodie and John C. McIntosh, Corporate Social and Environmental Responsibility in Asian Countries and other Geographical Regions, 14(4) *CORPORATE SOCIAL RESPONSIBILITY AND ENVIRONMENT MANAGEMENT* 189, 198 (2007).

this becomes crucial in the case of multinational companies which have to fulfil CSR goals and responsibilities.⁶⁶

B. Analysis of the Draft EIA 2020

This sub-section assesses the most recent and important notification, the Draft Environment Impact Assessment 2020 ('Draft EIA 2020') on the normative touchstone of international standards, the Equator Principles, in order to analyse the extent to which it enables corporates to fulfil their CSR and ESG mandate.

The Equator Principles are voluntary, globally-recognised, baseline, risk management guidelines.⁶⁷ It is binding on financial (banking and lending) institutions that adopt them. The most recent version of Equator Principles was most recently released in October of 2020 ('EP4'). The new EP4 now enumerates countries as 'designated countries' and 'undesignated countries.'⁶⁸

India is presently an undesignated country as per EP4 and since June 2013 to date, there has only been one financial institution that has signed up for these voluntary guidelines (Infrastructure Development Finance Company).⁶⁹ However, this does not undermine the relevance and cruciality of EP4 principles while analysing the Indian environmental law regime with respect to corporations. This statement gains further importance after the release of the Environment Impact Assessment Notification (2020).⁷⁰

For some time now, the trajectory of political dispensation has been to give the green light to mega-construction, highway, mining and industrial projects without fulfilling the regulatory requirements.⁷¹ Instances include Coal India, Limited's mining of Assam's Dehing Patkai Elephant Reserve without clearance⁷², the affirmative for a train line through Telangana's, or

⁶⁶ Id.

⁶⁷ Equator Principles Association, The Equator Principles 4 (4 July 2020).

⁶⁸ Equator Principles Association, The Equator Principles 4 (4 July 2020), Designated Countries.

⁶⁹ FPJ Bureau, *IDFC Becomes the First Indian Financial Institution to Join the Equator Principles Association*, THE FREE PRESS JOURNAL (June 12, 2013) <https://www.freepressjournal.in/business-wire-india-section/idfc-becomes-the-first-indian-financial-institution-to-join-the-equator-principles-association>.

⁷⁰ Ministry of Environment, Forest and Climate Change, Environment Impact Assessment Notification, (2020).

⁷¹ Ministry of Environment, Forest and Climate Change (Wildlife Division), Minutes of 57th Meeting of the Standing Committee of National Board for Wild Life, (April 20, 2020).

⁷² Jayashree Nandi, *Large parts of Assam's Elephant Reserve mined without wildlife nod*, HINDUSTAN TIMES (July 18, 2020) [https://www.hindustantimes.com/india-news/large-parts-of-assam-s-elephant-reserve-mined-without-wildlife-nod/story-NFh0yNncJ3PiUePriUGJ7J.html#:~:text=Coal%20India%20Limited%20\(CIL\)%20had,Wildlife%20\(NBWL\)%20have%20revealed.&text=%E2%80%9CYes%2C%20they%20\(CIL\),more%20areas%20than%20earlier%20k](https://www.hindustantimes.com/india-news/large-parts-of-assam-s-elephant-reserve-mined-without-wildlife-nod/story-NFh0yNncJ3PiUePriUGJ7J.html#:~:text=Coal%20India%20Limited%20(CIL)%20had,Wildlife%20(NBWL)%20have%20revealed.&text=%E2%80%9CYes%2C%20they%20(CIL),more%20areas%20than%20earlier%20k)

noun.>; *Environmentalists opposed coal mining in Saleki of Dehing Patkai Elephant Reserve*, ASSAM SENTINEL,

even the go-ahead for the expanded plan for a highway *via* Goa's Mollem wildlife sanctuary.⁷³ Additionally, over the last five decades, India has seen the displacement of around fifty million people due to various development projects.⁷⁴ This has led to an awakening among the Indian populace who have called for the need to revise the Draft EIA 2020 to ensure India's green recovery. Accordingly, this sub-section evaluates the Draft EIA 2020 on the normative crucible of EP4 on three points: obscuring lines of categorization, ineffective stakeholder engagement and reduced compliance as a result of the former two points.

1. *Obscure lines of categorization and compliance*

EP4 Principle 1 classifies projects into 3 categorizations: A (significant adverse irreversible risk projects), B (limited adverse reversible risk projects) and C (minimal adverse risk projects) based on the International Finance Corporation's ('IFC') nomenclature. IFC's Performance Standards require the international financial institutions to meet the national laws of the host country, along with the IFC standards.⁷⁵ They also take note of any perceivable deviation in compliance standards between the regulations prevalent in the host country vis-à-vis the IFC's Performance Standards. In the case of different standards, the expectation is that the more stringent levels or measures be adopted and applied.⁷⁶

The Draft EIA 2020 has moved many category A projects to B1 or B2, which require more lenient EIA compliance and have lesser oversight.⁷⁷ B2 industries are exempt from public consultation or Expert Appraisal Committee reports. This implies that the public is not privy to information about several category A projects such as, chemical manufacturing and petroleum products, buildings, construction and area development, offshore projects located beyond 12 nautical miles (onshore or offshore oil) and highways expansion.⁷⁸ Thus, in India the classification of these projects into categories has been done in a very subjective manner.⁷⁹ They have been classified on their capacity and size rather than their social or environmental

(May 18, 2020) <https://www.sentinelassam.com/topheadlines/environmentalists-opposed-coal-mining-in-saleki-of-dehing-patkai-elephant-reserve-477385>.

⁷³ V Nilesh, National wildlife board nod for rail line in Telangana's Kawal tiger corridor, THE NEW INDIAN EXPRESS (April 10, 2020) <https://www.newindianexpress.com/states/teelangana/2020/apr/10/national-wildlife-board-nod-for-rail-line-in-telanganas-kawal-tiger-corridor-2128165.html>.

⁷⁴ Lok Sabha Secretariat, Reference Note: Displacement and Rehabilitation of People Due to Developmental Projects (No.30/RN/Ref./December/2013), Introduction. The report notes that twenty one million alone have been a victim of industrial development projects-related displacement.

⁷⁵ International Finance Corporation, *Assessment and Management of Environmental and Social Risks and Impacts* (Jan. 01, 2012), at (ii) para 5.

⁷⁶ *Id.*, at para 7.

⁷⁷ See Ministry of Environment, Forest and Climate Change, EIA Notification 2020, Schedule.

⁷⁸ Ministry of Environment, Forest and Climate Change, EIA Notification 2020, Section 14.

⁷⁹ Ministry of Environment, Forest and Climate Change, EIA Notification 2020, Schedule.

impact. Since the capacity and size of the project and impact may not always be correctly correlated, this makes for an unsettling screening mechanism left to the discretion of the executive. For this reason, quite a few industries can now be given the go-ahead for commencing operations as close as zero to five kilometres from any protected area by the Central Government. A scientifically determined appropriate distancing of such projects is warranted.

2. *Ineffective Stakeholder Engagement*

The second issue concerns the manner in which the Draft EIA 2020 seeks to go about ‘stakeholder engagement.’ Principle 5 of EP4 requires all category A and B projects to engage in ‘effective’ stakeholder engagement with affected (usually vulnerable, disadvantaged, especially indigenous peoples) groups, environment and other stakeholders.⁸⁰ It calls for ‘informed consultation and participation processes’ commensurate with the project’s risks and impacts on an ongoing and continuous basis.⁸¹

However, in India, according to EIA 2006, an EIA is available to the public only on request and does not follow a free-public-access-for-all model. The Draft EIA 2020 inadequately addresses this. It reduces the timeline for the public to submit their comments and register their recommendations in public hearings seeking environmental clearance from an earlier timeframe of 40 days to 20-30 days.⁸² This reduced timeline severely limits the opportunity for critical engagement of the affected communities with the relevant client. This also goes against the established judicial precedents which state that if consultation timelines are not adequate the same may be seen as a violation of the Principles of Natural Justice.⁸³

The Draft EIA 2020 even seeks to introduce *post facto* grants of environmental approval simply by paying off a fine for late approval.⁸⁴ Fortunately, this was held as ‘unjust’ in the Supreme

⁸⁰ Equator Principles Association, *The Equator Principles 4* (Jul. 4, 2020), at 4, <https://equator-principles.com/wp-content/uploads/2020/05/The-Equator-Principles-July-2020-v2.pdf> (‘Equator Principles’).

⁸¹ International Finance Corporation, *Performance Standard 1 Assessment and Management of Environmental and Social Risks and Impacts* (Jan. 1 2012), at paras 30 to 32, https://www.ifc.org/wps/wcm/connect/8804e6fb-bd51-4822-92cf-3dfd8221be28/PS1_English_2012.pdf?MOD=AJPERES&CVID=jiVQIfe.

⁸² Ministry of Environment, Forest and Climate Change, *EIA Notification 2020*, s 18(3) r/w Procedure of Public Consultation 7.1(iii).

⁸³ *Centre for Social Justice v. Union of India*, AIR 2001 Guj 71, at para 17(iii); *Orissa Mining Corporation Ltd v. Ministry of Environment and Forest*, (2013) 6 SCC 476, at paras 60 and 61.

⁸⁴ Jay Mazoomdaar, *Explained: Reading the draft Environment Impact Assessment norms, and finding the red flags*, THE INDIAN EXPRESS (Aug. 10, 2020) <https://indianexpress.com/article/explained/draft-environment-impact-assessment-norms-explained-6482324/>; Ministry of Environment, Forest and Climate Change, *EIA Notification 2020*, Section 20.

Court judgement in *Alembic Pharmaceuticals Ltd v. Rohit Prajapati & Ors.*⁸⁵ as the very concept of retrospective environmental clearance goes against the environmental jurisprudence in India. This was a necessary move by the Supreme Court as an example of the forthcoming catastrophe of allowing *post facto* grants can be seen in *LG Polymers (India) (P) Ltd v State of Andhra Pradesh*,⁸⁶ where LG Polymers was found to be operating without environmental clearance.⁸⁷

3. *Reduced Compliance*

In addition to the above problems, industries can now get away by submitting only one annual compliance report.⁸⁸ Earlier there was a requirement for submitting a half-yearly report.⁸⁹ While EP4 does not mention the times in a year the clients or Equator Principles Financial Institution have to report and monitor the credited project. However, EP4 principle 5 read with principle 10 calls for an independent environmental and social consultation on ‘an ongoing basis.’⁹⁰ The intent of such Equator Principles provisions can be read from the Preamble which seeks to assess the potential and actual risks during the whole lifecycle of the development of the project.⁹¹

One year is a long period and this will further dilute intended environmental, health and social standards. Damages shall also be irreversible due to the long gaps between reporting. Keeping in mind that India has now increased the validity of environmental clearances for specific industries like mining projects⁹² from fifty to thirty years, and for river valley projects from ten to fifteen years,⁹³ the current situation now allows for a greater leash to such harmful effects remaining unnoticed.

Analysis of the Draft EIA 2020 shows that India seems to be going backward by relaxing the requirements for compliance and stakeholder engagement. This has also seen repercussions, as

⁸⁵ 2020 SCC OnLine SC 347.

⁸⁶ 2020 SCC Online SC 488.

⁸⁷ MR Subramani, *Vizag Gas Leak: LG Polymers India Operated Plant ‘Illegally’ As It Did Not Have ‘Valid Environmental Clearance’*, SWARAJYA (May 12, 2020) <https://swarajyamag.com/news-brief/vizag-gas-leak-lg-polymers-india-operated-plant-illegally-as-it-did-not-have-valid-environmental-clearance#:~:text=The%20Visakhapatnam%20plant%20of%20LG,leak%20which%20claimed%20many%20lives>.

⁸⁸ Ministry of Environment, Forest and Climate Change, EIA Notification 2020, Section 20(4).

⁸⁹ Ministry of Environment, Forest and Climate Change, EIA Notification 2006, Section 10(2).

⁹⁰ Equator Principles 4, Principles 5 and 10.

⁹¹ Equator Principles 4, Preamble.

⁹² Ministry of Environment, Forest and Climate Change, EIA Notification 2020, Section 19(1)(d).

⁹³ Ministry of Environment, Forest and Climate Change, EIA Notification 2020, Section 19(1)(e).

also witnessed by the recent demonstration by activists against SBI's grant of a \$1 billion loan to Adani's Carmichael operations in Australia.⁹⁴

C. Reputation and Risk factor for Corporations

Another decisive factor in prioritising which issue will be given priority for CSR compliance is the associated risk factor. A study about responsive businesses revealed that more responsive businesses tend to look at an issue or process from a risk perspective.⁹⁵ An instance of this can be seen when a business is looking at risks in its supply chain. If a company does business with a supplier who pays the minimum wage in a country like Bangladesh, but that minimum wage is not something with which people can sustain themselves then there is a social risk attached by continuing to engage with that supplier, which could harm the reputation of the company. From a social standpoint, wages below basic living wage have greater chances of increasing worker and social unrest and which will ultimately lead to an increase in the wages. From the company's business risk perspective, this translates to an increased possibility of supply chain interruption and probably diminishing the original, and probably short-term rationale to moving to a low-wage country.⁹⁶ Thus, fulfilling CSR obligations translates into asking questions of business, from a risk perspective, rather than sustainability or ethical perspective.⁹⁷

To avoid the concerns of greenwashing of CSR obligations, we propose that the focus should be on simplification of the CSR requirements and having a uniform ESG metric to assess its compliance, as discussed in the next section.

V. RECOMMENDATIONS FOR ENSURING CSR MEASURES TO GRAVITATE TOWARDS REALIZING ESG GOALS

A. Changes in the statutory framework

Section IV highlighted the regulatory and compliance hurdles which corporations face while fulfilling their CSR obligations. With respect to the SEBI BRSR guidelines, it was highlighted that these guidelines leave out the SME sector which forms an important part of the Indian economy. In order to make these guidelines and the disclosure requirements contained therein

⁹⁴ *The \$1 Billion Adani-SBI Loan*, FINSHOTS (Nov. 30, 2020), <https://finshots.in/archive/adani-sbi-1-billion-dollar-loan/>.

⁹⁵ ASIT BHATTACHARYYA, *CORPORATE SOCIAL AND ENVIRONMENTAL RESPONSIBILITY IN AN EMERGING ECONOMY: THROUGH THE LENS OF LEGITIMACY THEORY* (2015).

⁹⁶ *Id.*

⁹⁷ *ESG issues and business responses: an interview with Ian Woods, AMP Capital*, (July 14, 2013), <https://drcaroladams.net/esg-issues-and-business-responses-an-interview-with-ian-woods-amp-capital/>.

more inclusive, government intervention is required by providing the necessary instruments and mechanisms that would allow SMEs to become ‘CSR compliant.’ Given the scale at which these companies operate, the same should be rendered at a price that does not render their products or services uncompetitive. Such instruments might include a ‘tool kit’ and other training materials, provided by the relevant ministry or government agency responsible for SME development, possibly in conjunction with chambers of commerce and relevant business associations. A good example of this is the toolkit produced by the Vietnam Chamber of Commerce & Industry in Vietnam, as part of the Global Compact Network in Vietnam.⁹⁸

Further, despite making CSR mandatory, it continues to be non- tax-deductible under Section 37(1), Income Tax Act, 1961. The rationale behind this was the ‘comply or explain’ regime.⁹⁹ However, since this no longer exists, companies should be allowed to deduct this legitimate expenditure from their taxable income.¹⁰⁰ Thus, the amendments have made it financially more onerous for companies to comply with CSR obligations.

With respect to the EP4 principles, there is a need for realization by Indian corporations (especially financial institutions in this context) to not undertake potentially harmful and adverse projects and to adopt EP4. EP4 Principle 10 requires transparency in reporting based on the parameters of EP Principles 2 and 3. Again, EP4 principle 6 requires a ‘grievance mechanism’ for all categories of A and B projects. The same should be readily available by EPFI at no cost, with confidentiality guarantees on reporting. All of these if implemented would serve to supplement the Indian regime at present and help the industries work in tandem with the State or Central regulators. A good example of corporations taking their environmental responsibility seriously is Infosys,¹⁰¹ which has a sustainability policy.¹⁰²

B. Adopt an ESG Model specific to Asian companies

⁹⁸ BINDU SHARMA, *CONTEXTUALISING CSR IN ASIA: CORPORATE SOCIAL RESPONSIBILITY IN ASIAN ECONOMIES* (2013).

⁹⁹ Explanatory Notes to the provisions of the Finance Act, 2014, Central Board of Direct Taxes Circular No. 01/2015, issued on January 21, 2015.

¹⁰⁰ Bharat Vasani and Varun Kannan, *New CSR Regime – Is it a philanthropy or a tax levy?*, Cyril Amarchand Blogs (May 12, 2021), https://corporate.cyrilamarchandblogs.com/2021/05/new-csr-regime-is-it-a-philanthropy-or-a-tax-levy/#_ftn1.

¹⁰¹ Infosys, *About Us: Corporate Responsibility Environmental*, <https://www.infosys.com/about/corporate-responsibility/environmental.html> (last visited Jul. 01, 2021).

¹⁰² Infosys, *Infosys Sustainability Policy*, (2010), <https://www.infosys.com/sustainability/Documents/infosys-sustainability-policy.pdf>.

Companies in the West have adopted a natural linear progression to reach ESG, as seen in the figure below.¹⁰³ The focus is first on making profits and only then progressing towards protecting the environment.

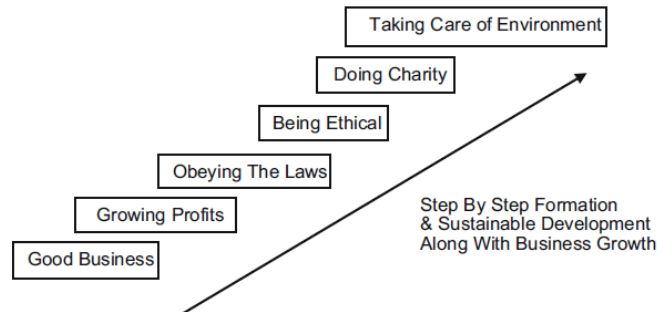


Figure 2: Natural Linear Progression

However, considering the damage that is caused in the process, a bicycle spoke model needs to be followed in Asia, where companies need to satisfy each stakeholder requirement at all levels.¹⁰⁴ Under this model, companies need to ensure compliance with all requirements and focus on all stakeholders. They must get customers and make profits and at the same time, build trust with them and improve the harmony within the society.

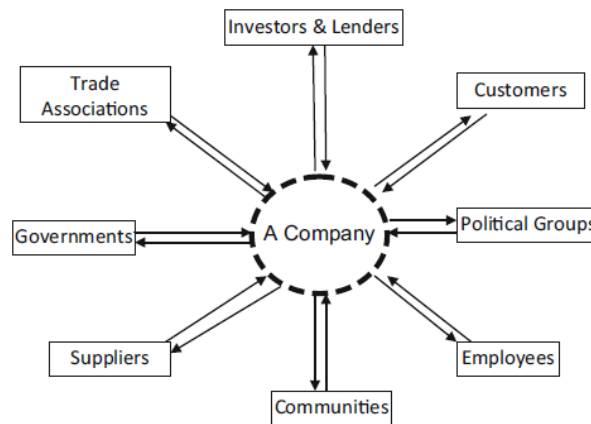


Figure 3: Bicycle-spoke model

¹⁰³ Mohammad Nabil Almunawar and Kim Cheng Patrick Low, *Corporate Social Responsibility and Sustainable Development: Trends in Asia* in *Corporate Social Responsibility in Asia* 173, 180 (Kim Cheng Patrick Low & Samuel O. Idowu & Sik Liang Ang eds. 2014).

¹⁰⁴ *Id.*

We need to move away from only assessing ESG contribution from the narrow lens of financial spending and also look at long-term value creation of organizations and society.¹⁰⁵ There is also a need to have a look at the impact (actual or potential and intended or unintended) that a company has on the economy, environment and people.

C. Whether Sustainable Development Goals are sufficient to improve ESG?

Sustainable Development ('SD') is commonly understood as "*development that fulfils the needs of the present generation without sacrificing the ability to fulfil the needs of future generation*".¹⁰⁶ This model integrates economic, social and environmental issues at the macro and micro levels. Corporate Sustainability ('CS') is a concept derived from SD for the corporate level. CS addresses the same dimensions based on the both short and long-term economic, social and environmental performance of companies.¹⁰⁷ It is wider than CSR because it includes needs of future stakeholders as well.¹⁰⁸

The Sustainable Development Goals ('SDGs') were introduced by the United Nations in 2015 as a blueprint and guide on how to achieve a more sustainable future by addressing and acting on the global challenges such as poverty, inequality, climate change, environmental degradation, peace and justice.¹⁰⁹ They provide a practical method and system to integrate SDGs into all business and investments decisions. Its approach is to involve stakeholders in decisions that impact them, thus increasing everyone's accountability.¹¹⁰

Sustainable development requires a systemic response including transformative changes in knowledge, policy and institutional systems from all stakeholders of the company. The International Framework provides a step-by-step process for companies to integrate SDGs into their strategy and reporting.¹¹¹ Further, there needs to be public pressure promoting CSR disclosure in general to increase company's involvement in SDGs.

¹⁰⁵ Carol Adams et. al, Sustainable Development Goal Disclosure (SDGD) Recommendations, ACCA, Chartered Accountants ANZ, ICAS, IFAC, IIRC and WBA (Jan. 2020), https://integratedreporting.org/wp-content/uploads/2020/01/Adams_Druckman_Picot_2020_Final_SDGD_Recommendations.pdf.

¹⁰⁶ WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987).

¹⁰⁷ Reinhard Steurer et. al., *Corporations, stakeholders and sustainable development: A theoretical exploration* 61 JOURNAL OF BUSINESS ETHICS 263, 270 (2005).

¹⁰⁸ *Id.*

¹⁰⁹ The 17 Goals, United Nations Department of Economic and Social Affairs, <https://sdgs.un.org/goals> (last visited Jul. 01, 2021).

¹¹⁰ Adams, *supra* note 107.

¹¹¹ Carol Adams, The Sustainable Development Goals, integrated thinking and the integrated report, IIRC and ICAS (2017), https://integratedreporting.org/wp-content/uploads/2017/09/SDGs-and-the-integrated-report_full17.pdf.

In 2020, 69% of the N100¹¹² and 72 % of the G250¹¹³ companies connected their business activities to the SDGs in the annual reporting. However, there is a disconnect between Sustainable Development and Corporate Sustainability. SD focuses on a macro level, and aims to resolve global challenges to achieve the SDGs. However, corporate sustainability is at the micro level, aimed at improving the business' efficiency and profitability.¹¹⁴ Thus, we need to focus on improving ESG metrics.

D. Assessing ESG metrics

ESG rating and scores have been developed, which allow ranking of companies based on ESG performances. The Global Reporting Initiative in 2019 revealed that 93% of the world's largest 250 companies by revenue do report on their ESG performance.¹¹⁵

This includes factors such as how companies manage the supply chain, respond to climate change, increase diversity, contribute to the society, provide systems to measure accountability etc. ESG policies also require an integration into the entire business, and were driven by participation from all employees.

This increased interest in ESG has led to investors seeking a simpler and uniform way of assessing the company's sustainable development plans.¹¹⁶ A new industry has also emerged, focusing only on providing ESG ratings and rankings.¹¹⁷ However, there are a number of sustainability reporting frameworks and standards, which are not comparable to each other. There is a plethora of reports that cater to specific shareholders. For instance, reports by Barker and Eccles, World Economic Forum, IFRS Foundation focus to serve investors whereas Business for Social Responsibility, Corporate Reporting Dialog aim at providing data to the

¹¹² The N100 refers to a worldwide sample of 5,200 companies. It comprises the top 100 companies by revenue in each of the 52 countries and jurisdictions researched in KPMG Survey of Sustainability Reporting 2020.

¹¹³ The G250 refers to the world's 250 largest companies by revenue as defined in the Fortune 500 ranking of 2019.

¹¹⁴ Waris Ali et. al., *Determinants of Corporate Social Responsibility (CSR) Disclosure in Developed and Developing Countries: A Literature Review*, 24(4) CORPORATE SOCIAL RESPONSIBILITY AND ENVIRONMENTAL MANAGEMENT 273, 277 (2017).

¹¹⁵ Dr. Kevin Spellman & David Nicholas, ESG Matters, Institutional Shareholder Services (2019), https://www.issgovernance.com/file/publications/ISS_EVA_ESG_Matters.pdf.

¹¹⁶ Leslie Norton, *How to Parse All the Metrics of Sustainability*, BARRONS (Jun, 21, 2019), https://www.barrons.com/articles/the-abcs-of-esg-how-to-parse-all-the-metrics-for-measuring-sustainability-51561159677?mod=article_inline.

¹¹⁷ Richard Boffo and Robert Patalano, 'ESG Investing: Practices, Progress and Challenges' OECD Paris (2020), www.oecd.org/finance/ESG-Investing-Practices-Progress-and-Challenges.pdf.

report preparers. This calls for harmonisation, in order to move away from a multi-stakeholder process to one led by an accounting standard-setter established to serve investors' needs.¹¹⁸

Since every appraiser of ESG performance has its own process for assessment, a company's value will differ depending on who evaluates it and how. To avoid this, it is necessary to have a common framework for the assessment of any companies' contribution to sustainable development.¹¹⁹

The previous sections traced the statutory framework, limitations in realising the objective of the law and potential recommendation with respect to the realisation of CSR and ESG goals by companies. The next section focuses on a particular area, the climate change regime in the Indian context, in understanding the scope for and the extent of fixing corporate responsibility.

VI. CLIMATE CHANGE AND CORPORATE RESPONSIBILITY IN THE INDIAN CONTEXT

Climate change was chosen as it presents foreseeable and, in some instances, even material, financial and systemic risks that affect corporations and their investors. This evolution in our understanding of climate change from a purely ethical issue or environmental externality has implications for fixing corporate responsibility. According to the 2017 recommendations of the Task Force on Climate-related Financial Disclosures ('TCFD'), climate change is one of the most significant and complex risks facing organisations. These recommendations have received widespread attention and support, showcasing the growing global consensus among the business, financial and regulatory communities of the financial and systemic risks presented by climate change and of the necessity of embedding climate change in financial risk management, disclosure and supervisory practices. In 2021, even in light of the pandemic, the World Economic Forum Global Risks Report identified climate change and related environmental issues as one of the major risks to the global economy. Investors too are becoming increasingly concerned about these climate change related concerns and are openly expressing the same.¹²⁰

¹¹⁸ Carol A Adams and Subhash Abhayawansa, *Connecting the COVID-19 pandemic, environmental, social and governance (ESG) investing and calls for 'harmonisation' of sustainability reporting*, TOWARDS SUSTAINABLE BUSINESS, at 5, (Apr. 18, 2021), <https://drcaroladams.net/connecting-the-covid-19-pandemic-esg-investing-and-calls-for-harmonisation-of-sustainability-reporting/>.

¹¹⁹ María Jesús Muñoz-Torres et. al., *Can environmental, social, and governance rating agencies favor business models that promote a more sustainable development?*, 26(2) CORPORATE SOCIAL RESPONSIBILITY AND ENVIRONMENTAL MANAGEMENT 439, 446 (2018).

¹²⁰ BlackRock, Larry Fink's 2021 Letter to CEOs (Jan. 2021), <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>.

In the Indian context, various regulators (mostly financial) are becoming more aware and cautious about climate change associated financial risks. In addition to SEBI requiring disclosures under the BRSR as described above, the Reserve Bank of India¹²¹ and Insurance Regulatory and Development Authority have also highlighted the risks posed by climate change.¹²²

The role of directors of corporations becomes crucial here as they act as fiduciaries of the company in fulfilling their responsibilities.¹²³ While the specific duties of directors vary across jurisdictions, one of the core and important duties of the director is the duty of care and diligence which finds mention in one form or the other in almost every jurisdiction. The duty of ensuring proper disclosures necessary flows from the duty of care and diligence. In most jurisdictions, including India, company and securities law reporting framework requires disclosure of information that is material to the financial performance of the corporation. This also includes effects of climate related matters on financial statements which have also been held by IFRS Foundation under IAS standards.¹²⁴ Thus, it becomes essential that directors weave into their governance roles climate risks and opportunities. Directors will have to ensure to approve or attest to the accuracy and completeness of disclosures made in the filings. Similar duties will also be cast upon the directors on audit committees to ensure the robustness of the climate scenario assumptions which form a crucial part of the audit process.¹²⁵ Section 166, Companies Act, 2013 is notable here as it requires directors to act “for the protection of the environment.”¹²⁶ Avoiding the implications of ignoring this obligation can be ensured if directors take on a detailed assessment of climate risk challenging their company, consider expert advice where suitable, decide strategies to address the risks, execute those strategies, and continuously review the efficiencies and pitfalls of these strategies.

¹²¹ Reserve Bank of India, 2018-2019 Report on Trend and Progress of Banking in India (2019), at 17, <https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/0RTP241219FL760D9F69321B47988DE44D68D9217A7E.PDF>.

¹²² ADBI Institute, OECD-ADBI-IRDAI Roundtable on Insurance and Retirement Saving in Asia (2020), <https://www.adb.org/news/events/insurance-and-retirement-saving-asia>.

¹²³ Companies Act 2013, Section 166.

¹²⁴ IFRS, Effects of climate-related matters on financial statements (Nov. 20, 2020), at 1, <https://cdn.ifrs.org/-/media/feature/supporting-implementation/documents/effects-of-climate-related-matters-on-financial-statements.pdf?la=en>.

¹²⁵ Janis Sarra, *Audit Committees and Effective Climate Governance, A Guide for Boards of Directors*, CANADA CLIMATE LAW INITIATIVE (Dec. 2020), <https://ccli.ubc.ca/wp-content/uploads/2021/04/Guide-for-Audit-Committees-on-Effective-Climate-Governance.pdf>.

¹²⁶ Companies Act 2013, Section 166(2): “A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.”

Corporations have to ensure that climate risk identification and assessment is delegated to a specialised team for this purpose which should potentially consist of experts and academicians in this field. There is also a need to lay down a clear roadmap with transparent and practically achievable targets for carbon neutrality. Updating the plan with the relevant contemporary changes and continuous reporting to the board is essential to ensure visible results.

VII. CONCLUSION

This paper sought to trace the law, analyse the limitations and suggest solutions for corporations to fulfil their CSR obligations. While CSR and ESG were introduced with laudable objectives, they have not worked out to the full extent that one would have expected.

There is no doubt that regulatory and compliance hurdles have a role to play in this. However, the use of CSR by companies to greenwash their image and cover up a negative incident by contributing to CSR is also a significant contributing factor to the way CSR has played out. Due to these reasons, CSR is not seen as challenging the corporate power and seems to provide only limited assistance in creating a social change.

However, this critical view of CSR should not lose sight of the significant progress which has been made. For example, HSBC, the financial services specialist, in a study by Oxfam and CSR Asia was credited for measures cutting down its carbon emissions.¹²⁷ Further, ITC has collaborated with International Union for Conservation of Nature (IUCN) in Bihar's Munger region to develop 'sustainable agriscape for future.'¹²⁸ Actions include generating a source for fuelwood and fodder inside the villages itself by planting suitable native tree species, hyacinth-based composting to reduce its growth in lakes and planting multi-tiered native trees on fields near the Ganga to curtail destruction caused by floods.

It must also be remembered that for tangible results the cooperation and contribution of government and its associated entities along with corporations is required. While the legislature has been extremely swift in enacting laws regulating most aspects of industrial and developmental activity, but guarded in sanctioning enforcement budgets that are required for efficient implementation. Across the country, government agencies yield expansive power to regulate the law flouting corporations but are reluctant to use their power to discipline violators.

¹²⁷ *Asian Companies have mixed record on CSR*, WARC, (April 26, 2010)

<https://www.warc.com/newsandopinion/news/asian-companies-have-mixed-record-on-csr/26617>.

¹²⁸ Kasmin Fernandes, *The ultimate report on CSR of ITC Limited*, THE CSR JOURNAL, (May 4, 2021) <https://thecsrjournal.in/itc-csr-report-india/>.

This is something that needs to be amended in attitude as well as the statutory framework to ensure meaningful results for all stakeholders involved.

In addition to the above, the efficacy of CSR or ESG goals should not be viewed solely through the lens of empirical implementation data. The fact that they have brought about corporate liability, responsibility and need for effective stakeholder engagement into the environmental justice discourse should also be given due merit. The US Securities Exchange Commission's Public Statement issued in March of 2021 on climate change disclosures and soft law instruments such as the Second edition of Enterprise Obligations are empirical evidences of the same. Corporations today require all three: regulatory license, economic license and social license to operate. This discourse can be further evolved by not seeing social license and economic license as something opposing each other. Social license, which essentially translates into the stakeholder model of governance is essential for a good economic return for investors and is not in opposition to it.