NUS Law Working Paper No 2022/006

Climate Risk: Enforcement Of Corporate And Securities Law In Common Law Asia

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[May 2022]

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CLIMATE RISK: ENFORCEMENT OF CORPORATE AND SECURITIES LAW IN COMMON LAW ASIA

Ernest Lim* and Umakanth Varottil**

Abstract

The extensive literature on strategic climate litigation focuses mainly on lawsuits brought against private litigants or the state based on breaches of environmental law, tort law, human rights law or public law. Relatively far less has been written about corporate and securities litigation against companies or their directors, let alone in relation to Asia. This paper fills these gaps. It critically examines whether and how the enforcement of corporate law and securities law can be used as a tool to address climate-related risks in three leading common law jurisdictions in Asia – India, Singapore, and Hong Kong. The central argument of this paper is that because of the limitations of *private* and *public* enforcement of corporate law, *public* enforcement of securities law and listing rules is a more effective mechanism in addressing climate risks in the three jurisdictions.

Key words: Climate change; climate risk; corporate law; securities regulation; directors' duties; disclosure; enforcement; derivative action; oppression; unfair prejudice

INTRODUCTION

There is extensive literature on strategic climate litigation to combat environmental degradation and to address climate-related violations more broadly.[1] However, the focus is mainly on lawsuits brought against private litigants or the state based on breaches of environmental law, tort law or human rights law in North America, the United Kingdom and Europe, and to a lesser extent in the Global South.[2] Relatively far less has been written about corporate and securities litigation against companies or their directors, let alone in relation to Asia.[3] This paper fills

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The authors would like to thank Charis Chan and Ian Cheng for research assistance. Errors or omissions remain our own.

[1] See eg, Joana Setzer and Catherine Higham, *Global Trends in Climate Change Litigation: 2021 Snapshot* (London: Grantham Research Institute on Climate Change and the Environment and Center for Climate Change Economics and Policy, 2021); Jacqueline Peel and Jolene Lin, "Transnational Climate Litigation: The Contribution of the Global South" (2019) 113 *American Journal of International Law* 679; Jolene Lin and Douglas A Kysar (eds), *Climate Change Litigation in the Asia Pacific* (CUP, 2020); Jacqueline Peel and Hari M Osofsky, "A Rights Turn in Climate Change Litigation?" (2018) 7 *Transnational Environmental Law* 37.

[2] Ibid.

[3] For exceptions, see Umakanth Varottil, *Directors' Liability and Climate Risk: White Paper on India* (Commonwealth Climate and Law Initiative, 2021); Ernest Lim, *Directors' Liability and Climate Risk: White Paper on Singapore* (Commonwealth Climate and Law Initiative, 2021); Ernest Lim, *Directors' Liability and Climate Risk: White Paper on Hong Kong* (Commonwealth Climate and Law Initiative, 2022).

these gaps. It critically examines whether and how the enforcement of corporate law and securities law can be used as a tool to address climate-related risks in three leading common law jurisdictions in Asia – India, Singapore, and Hong Kong. These three jurisdictions are chosen because of not only their similarities (they are common law jurisdictions, they are leading market economies, and the regulators there have taken concerted measures to address climate risks), but also their differences (these jurisdictions exhibit varying competence and independence in their rule-making and adjudicatory institutions which have a bearing on the effective enforcement of laws).

The central argument of this paper is that because of the limitations of *private* and *public* enforcement of corporate law, *public* enforcement of securities law is a more effective mechanism in addressing climate risks in the three jurisdictions. This argument has important implications for the development of strategies and the distribution of resources. A key consequence is that the state, activists, and stakeholders should focus their efforts in ensuring that regulatory agencies have the necessary resources and take the appropriate actions to hold companies and directors accountable for their actions and omissions in relation to addressing climate-related risks under securities law and regulations. The argument does not imply that securities law enforcement is necessarily superior in all circumstances; nor does it suggest that shareholders or activists should entirely abandon corporate lawsuits. The enforcement of both corporate and securities law can and should be considered as strategic options. However, corporate lawsuits brought by shareholders may not make a material difference in the transition to a net zero economy in Singapore, Hong Kong, and India.

The structure of this paper is this. The first major section critically examines directorial duties under corporate law (the duty to act in good faith in the company's best interests and to exercise reasonable care, skill, and diligence), followed by an analysis of the private and public enforcement of directors' duties. The second major section analyses the disclosure obligations under the securities law and stock exchange regulations, followed by the enforcement tools available to the public regulators. The third major section compares the effectiveness of private and public enforcement of corporate and securities law. The last section concludes.

I. CORPORATE LAW AND ITS ENFORCEMENT

This section examines the doctrinal and enforcement aspects of corporate law in Singapore, Hong Kong and India in order to understand whether directors have a legal duty to take into account climate-related risks and, if so, the scope of the duty, and how such a duty can, and is likely to, be enforced. It is argued that directors do have such a duty under the corporate laws of those jurisdictions, but there are considerable difficulties and uncertainties in enforcing it.

To begin with, it is a trite fact that climate change poses three types of risks: physical, transition and liability, all of which have a material and foreseeable impact on the financial performance

of companies.[4] The governments and regulators in Singapore, Hong Kong and India have not only acknowledged the physical and transition risks of climate change, but they have also proposed or implemented various measures to address them. For example, the regulators in Singapore[5] and Hong Kong[6] have either urged or required the relevant sectors to disclose climate-related risks based on TCFD recommendations. Moreover, financial institutions are required to disclose the extent to which their intermediary activities and investments are aligned with the goals of the Paris Agreement.[7] The Reserve Bank of India has said that it would integrate climate-related risks into financial stability monitoring.[8]

Regarding liability risks, other than lawsuits brought against governments for breaches of tort law, public law and human rights law, there are two main categories of lawsuits brought against companies, one relating to companies' contribution to climate change,[9] and the other pertaining to companies' failure to disclose climate-related risks[10]. There appears to be no lawsuit brought against directors for breach of duties, save for one pending case.[11]

While no lawsuits seem to have been brought against directors in companies in the three Asian jurisdictions yet, directors must be very mindful of such litigation risks in light of the increased litigation in other parts of the world. The threat of litigation can also result in reputational

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[4] See for e.g., TCFD, 'Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures' (June 2017), pp. 26- 7, available at: https://www.fsb-tcfd.org/publications/final-recommendations-report.

[5] In 2020, the Monetary Authority of Singapore ("MAS") urged financial institutions to report the impact of material climate-related risks on their business and operations in accordance with international guidelines, including the TCFD recommendations: MAS, "Guidelines on Environmental Risk Management (Banks)" (December 2020); MAS, "Guidelines on Environmental Risk Management (Insurers)" (December 2020); MAS, "Guidelines on Environmental Risk Management (Asset Managers)" (December 2020).

[6] The Hong Kong Monetary Authority ("HKMA") has confirmed that the TCFD recommendations on climate disclosures will be mandatory for all relevant sectors by 2025, and has issued draft guidance for consultation on these disclosures, and management of these risks, for Authorized Institutions: "Cross-Agency Steering Group Launches its Strategic Plan to Strengthen Hong Kong's Financial Ecosystem to Support a Greener and More Sustainable Future" (HKMA, Press Release, 17 Dec 2020); HKMA, "GS-1 Climate Risk Management" (for consultation) (20 July 2021).

[7] Ibid.

[8] Reserve Bank of India, "Statement of Commitment to Support Greening India's Financial System-NGFS" (3 November 2021): https://rbidocs.rbi.org.in/rdocs/content/pdfs/NGFS03112021_EN.pdf.

[9] For eg, NGOs have sued companies – based on a tortious cause of action (comprising negligence and nuisance) – that these companies have caused environmental degradation which resulted in material and adverse harm to certain groups of community: see *Pacific Coast Federation of Fishermen's Associations, Inc. v Chevron Corp* 3:18-cv-07477 (2018). Minority shareholders have also sued the company by successfully invalidating the resolution passed by majority shareholders: *ClientEarth v Enea* (2019) http://climatecasechart.com/climate-change-litigation/non-us-case/clientearth-v-enea/; https://www.clientearth.org/latest/latest-updates/news/major-court-win-shows-power-of-corporate-law-to-fight-climate- change/.

[10] See eg, *Mark McVeigh v Retail Employees Superannuation Pty Ltd* ACN 001 987 739; "Rest Reaches Settlement with Mark McVeigh" (2 Nov 2020), https://rest.com.au/why-rest/about-rest/news/rest-reaches-settlement-with-mark-mcveigh; see also *The People of the State of New York v Exxon Mobil Corporation*, Index No. 452044/2018.

[11] The UK academics of a university superannuation scheme brought a derivative lawsuit on behalf of the scheme against the scheme's directors for allegedly breaching their duty to act in the scheme' best interests as their failure to create a credible plan for disinvestment from fossil fuel investments harmed the scheme's success. This case is pending before the High Court. See Josephine Cumbo and Bethan Staton, "UK Academics Begin Legal Action to Halt Proposed Cuts to Pensions" *Financial Times* (1 November 2021): https://www.ft.com/content/f1cbed5f-bd44-48ca-9016-fd14ae462f98.

damage to the companies and directors. But before even considering whether lawsuits can be brought – the question of enforcement – the issue is whether the existing directorial duties under corporate laws of the three Asian jurisdictions require directors to take into account climate-related risks. The answer, as examined below, is in the affirmative.

While there are differences in how those directors' duties are expressed in the case law and legislation in the three jurisdictions, it is correct to state that directors of private and listed companies in the three Asian jurisdictions are generally subject to fiduciary duties comprising the duty to act in good faith in the company's best interests well as the non-fiduciary duty of care, skill and diligence.[12]

A. Duty to act in good faith in the company's best interests

1. Good faith

Under s 166(3) of the Indian Companies Act, directors are required to act in good faith: (a) in order to promote the objects of the company for the benefit of its members as a whole, and (b) in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment. Indian case law has stated that good faith means that a subjective test will be applied: as long as directors subjectively believed that they acted in good faith in the company's best interests, they will not be in breach of their duty even if their secondary motive is to benefit themselves.[13]

Under Hong Kong law, the best interest duty is not enshrined in the statute (unlike Indian law). Courts will apply a subjective test to good faith, but courts will not blindly accept the directors' assertions if they are contradicted by the evidence before it.[14] For example, if the directors asserted that they honestly believed that their decision not to address the company's stranded assets was in the company's best interests, despite the evidence of climate-related risks impacting on the company's financial interests, the directors are unlikely to have met the subjective test. To be clear, under Hong Kong law, courts will not assess the directors' assertions based on objective grounds; they will only do so if the directors have not even considered the company's best interests in the first place.[15]

The best interest duty is also not codified in the Singapore statute. Under Singapore law, courts adopt a combination of subjective and objective tests,[16] unlike Indian law and Hong Kong law.

[12] The other duties are the avoidance of unauthorised conflict of interest and avoidance of unauthorised receipt of profits.

[13] *Needle Industries (India) Ltd v Needle Industries Newey (India) Holding Ltd* (1981) 3 SCC 333 at [111]; *Tea Brokers (P) Ltd v Hemendra Prasad Barooah* (1998) 5 Comp LJ 463 (Cal) at [48].

[14] *Regentcrest plc v Cohen* [2001] 2 BCLC 80, 105; *Extrasure Travel Insurance Ltd v Scattergood* [2003] 1 BCLC 598 at [90], [97].

[15] *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62 at 74; *Akai Holdings Ltd v Kasikorn Bank plc* [2010] 3 HKC 153 at [64].

[16] *Goh Chan Peng v Beyonics Technology Ltd* [2017] SGCA 40 at [35]-[36].

The subjective test is similar to Indian and Hong Kong law. As for the objective test, courts will evaluate:

> whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company … Thus, "where the transaction is not objectively in the company's interests, a judge may very well draw an inference that the directors were not acting honestly…"[17]

Thus, unlike Hong Kong law, Singapore law requires judges to objectively assess the directors' subjective assertions if and when they claimed they have considered the company's best interests. Accordingly, where directors have been alleged to have breached their duty for failing to consider or address climate-related risks, but directors made contrary subjective assertions, courts will evaluate these assertions from the standpoint of an intelligent and honest individual.

The analysis of how courts in the three jurisdictions have interpreted the good faith requirement in the best interest duty is important in determining the extent to which courts will assess the directors' subjective assertion that they have acted in the company's best interests. Indian law appears to be most deferential to directors' judgment as compared to Hong Kong law and Singapore law. And the latter appears to be the least deferential. Nevertheless, because the Indian Companies Act explicitly requires directors to act in good faith to protect the environment – a provision which is absent in the Singapore and Hong companies legislation – allegations of directors failing to consider and address climate-related risks will attract greater judicial scrutiny in India than Singapore and Hong Kong. This observation is supported by Indian judicial dicta that decisions that are financially beneficially to the company but which are detrimental to the environment – defined broadly as the "inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organisms and property"[18] – is likely to render the directors in breach of s 166(2) of the Indian Companies Act.[19]

2. Interests of company

The issue here is whether the acting in the interests of company requires directors to take into account climate-related risks. Under Hong Kong law, corporate interest is equated with shareholders' financial interests.[20] Under Singapore law, it can be argued that corporate interest is equated with shareholders' financial interests or the interests of the corporate entity, the latter of which is separate and distinct from, but can overlap with, shareholders' financial interests.[21]

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[17] Ibid.

[18] *M.K. Ranjitsinh v. Union of India* 2021 SCC OnLine SC 326 at [14].

[19] *Tata Consultancy Services Limited v. Cyrus Investments Pvt. Ltd*., 2021 SCC OnLine SC 272 at [218]; Shyam Divan, Sugandha Yadav and Ria Singh Sawhney, *Legal Opinion: Directors' obligations to consider climate change-related risk in India* (7 September 2021) ('Divan et al Legal Opinion') at [21].

[20] Stefan HC Lo and Charles Z Qu, *Law of Companies in Hong Kong* (Sweet & Maxwell, 3rd edn, 2018) at [8.030].

[21] *Raffles Town Club Pte Ltd v Lim Eng Hock Peter* [2010] SGHC 163 [162]; Hans Tjio et al, *Corporate Law* (Academy Publishing, 2015) at [09.045].

As for Indian law, s 166(2) already requires directors to protect the environment. In other words, directors under Indian law have an independent duty to protect the environment, even if doing so is not necessarily linked to the interests of the company, shareholders or stakeholders. Thus, the case for taking into account climate-related risks does not depend on judicial interpretation of corporate interest.

In any event, given that climate-related risks have a material and foreseeable impact on the financial and operating performance of the company, which will affect the interests of the corporate entity and shareholders, acting in the company's best interests requires directors in all three Asian jurisdictions to take into account these risks. For example, in Hong Kong, tropical cyclones have inflicted not only physical but also financial damage to companies and the economy. The financial losses caused by the damage resulting from Typhoon Hato in 2017, which included flight cancellations, business closures and stock market suspension, amounted to HK$8 billion.[22] Climate change has also resulted in extreme weather events in India such as heatwaves, floods and irregular monsoons.[23] Because heat-exposed work constitutes about 50% of India's GDP, and employs nearly 380 million people, representing about 75% of the workforce, the heatwaves caused by climate change will reduce 5.8% of working hours especially in sectors such as agriculture and construction, thereby adversely impacting on the financial and operating performance of companies.[24] These are just illustrations. Policymakers and regulators in all three jurisdictions have said that climate change presents financial risks to companies and the economy. It is thus incumbent on directors to take into account climate-related risks in their decision-making process, particularly if the companies belong to certain sectors (such as oil, gas and energy) where divestments from fossil fuel is especially urgent or are major contributors to GHG emissions.

3. Applying the best interest duty to a climate context

A key question is what it means to take into account climate-related risks as part of the duty to act in the company's best interests. Although no courts in Asia have articulated a test or approach for the best interest duty in the climate context (as no such cases have arisen yet), it is suggested that guidance can be drawn from the climate-risk disclosure and management guidelines issued by the MAS[25] and HKMA[26] that apply to financial institutions, including banks, insurance companies and asset managers. Drawing on these guidelines, it is suggested that in order to discharge their duty to act in good faith in the company's best interests, directors should (1) set up appropriate frameworks, policies or systems to assess and manage climate-related risks, which should include but are not limited to the allocation and supervision of adequate responsibilities, resources and expertise to address the risks; and (2) ensure that these

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[22] Nikki Sun, "Typhoon Hato could cause HK$8 billion in losses after No 10 signal storm brought Hong Kong to standstill", *South China Morning Post* (23 August 2017).

[23] David Eckstein, Vera Kunzel, Laura Schafer and Maik Winges, 'Global Climate Risk Index 2020', German Watch (2019) at 12, 19.

[24] Jonathan Woetzel, et al, 'Climate Risk and Response: Physical Hazards and Socioeconomic Impacts', McKinsey Global Institute (January 2020) at 16.

[25] n 5.

[26] n 6.

risks are being addressed in a timely and appropriate fashion. It is thus necessary but insufficient that directors consider these risks without taking appropriate and adequate follow-up steps such as seeking and acting on external advice or devoting resources to addressing the risks.

Another key question is whether directors will be in breach of the best interest duty if, by addressing climate-related risks, costs will be incurred which result in the reduction of profitability and hence short-term shareholder value. For example, companies may incur substantial expense in switching to renewable sources of energy or upgrading existing equipment. After all, one study found that three of Asia's leading economies (China, Japan and South Korea) will spend approximately US$12.4 trillion to achieve net-zero carbon emissions in their transport industries alone.[27] According to the laws of three jurisdictions, corporate interest refers to the long-term interests of the company, not short-term.[28] Thus, insofar as directors subjectively believe that addressing these risks will promote the company's long-term interests, but in doing so, short-term shareholder value will be sacrificed, they should not be in breach of the duty. It is therefore important to ensure that compensation (and other incentive mechanisms) should be aligned with the long-term interests of the company which should include addressing climate-related risks.

To conclude, in light of the emphatic pronouncements from the regulators in the three Asian jurisdictions concerning climate-related risks and the proposed or issued measures relating to how financial institutions should address these risks, directors will breach their duty to act in good faith in the company's best interests if they fail to take into account these risks in their decision-making process. Further, to the extent that climate-related risks have a foreseeable and material impact on the interests of shareholders (under the laws of the three Asian jurisdictions), stakeholders (under Indian corporate law), or the corporate entity (under Singapore law), the failure of directors to incorporate these risks in their decision-making process is likely to render them in violation of the best interest duty, despite their subjective belief that their actions (or omissions) are in the company's best interests. Their decisions may also be voidable by courts as they amount to the failure to include a relevant factor in their decision-making process.

[27] Rob Carnell and Iris Pang, "Asia's Race to Net Zero Carbon: 12.4 trillion dollars and counting: The Cost of Greening Asia's Transport and Generation Capacity" (ING, 6 September 2021) at 5: https://think.ing.com/uploads/reports/H_Asias_race_to_net_zero_carbon_060921_h.pdf.

[28] *Sangramsinh P. Gaekwad v Shantadevi P. Gaekwad* (2005) 11 SCC 314 at [42]; Vikramaditya S. Khanna, "Global Asset Managers and the Rise of Long Term Sustainable Value", NSE Quarterly Briefing (October 2018); Umakanth Varottil, "Environmental and Social Reporting by Indian Companies", NSE Quarterly Briefing (January 2019); Principle 1, Singapore Code of Corporate Governance (6 August 2018); Stefan HC Lo and Charles Z Qu, *Law of Companies in Hong Kong* (Sweet & Maxwell, 3rd edn, 2018) at [8.030].

C. Duty to exercise reasonable care, skill and diligence

The duty to exercise reasonable care, skill and diligence has been statutorily enshrined in the companies' legislation of the three Asian jurisdictions. It is the law in Singapore[29] and Hong Kong[30] that this duty is not purely subjective in nature, but encompasses a minimum objective requirement which will take into account the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director of the company. Should the director possess special knowledge, skill or experience, the standard will be raised to take that into account.

As for India, while courts have not explicitly endorsed a minimum objective approach, judicial dicta and commentaries support this approach.[31] In a case involving fraud committed by a company's employees, the court said that the director "cannot shut his eyes to what must be obvious to everyone who examines the affairs of the Company even superficially"[32], which indicates a minimum objective approach. The court also held that because the managing director was conducting the every day affairs of the company, he must be subject to greater responsibility for the losses suffered by the company due to the misappropriation. This implies that the director was subject to a higher standard as a result of the director's experience. Further, in light of the specific obligations that the Indian Companies Act impose on independent directors such as by requiring them to 'regularly update and refresh their skills, knowledge and familiarity with the company'[33], and 'take and follow appropriate professional advice and opinion of outside experts'[34], it would be odd if the duty of due care is applied in a purely subjective fashion.

In short, in all three jurisdictions, a minimum objective standard applies to the duty to exercise reasonable care, skill and diligence. It should also be noted that the minimum standard of care varies with the precise functions assumed by the director as well as the size and nature of the company and the industry to which it belongs. Thus, the pronouncements, guidelines and measures set out by the government and regulators as well as international standards and best practices will be relevant in determining the standard of care to which the director should be subject. For example, the HKMA states that "boards and senior management should have sufficient knowledge and understanding of global, regional and local developments to consider the impact on the [authorised institutions]."[35] Similarly, the MAS states that when boards and senior management take into account environmental considerations, the latter should include the objectives set out under international agreements such as the Paris Agreement and national

[29] Section 157(1) Singapore Companies Act 1967 (Revised edition 2020); *Lim Weng Kee v Public Prosecutor* [2002] SGHC 193 at [28].

[30] Section 465(1) of the Hong Kong Companies Ordinance (Cap 622); *Securities and Futures Commission v Yin Yingneng Richard* (unrep HCMP 2502/2012, [2015] HKEC 86) at [45].

[31] *Official Liquidator v P.A. Tendolkar* (1973) 1 SCC 602; Varottil, n 3 at 28-9.

[32] Official Liquidator v P.A. Tendolkar, ibid, at [45].

[33] Companies Act, 2013, Schedule IV, clause III(1).

[34] Companies Act, 2013, Schedule IV, clause III(2).

[35] Hong Kong Monetary Authority, GS-1 Climate Risk Management (for consultation) (20 July 2021) at [3.1.2].

policies.[36] To consider how this duty should be interpreted and applied in the climate context, it is useful to distinguish three situations: risk management; supervision of delegated responsibilities; and disclosures.

On risk management, the standard of care expected of directors of financial institutions is likely to be evaluated against the extent to which the applicable guidelines and policies on climate-related risks issued or endorsed by the regulators have been complied with. Consider for example the environmental risk management guidelines for banks, insurance companies and asset managers issued by the MAS[37] and the climate risk management guidelines issued by the HKMA[38]. Although both documents are stated as "guidelines" and as such, they do not have the binding force of law, the regulators have made it clear that they expect the addressees of these guidelines to comply with them and that the boards of these addressees bear the primacy responsibility for the oversight of their organisation's approach to managing climate risks.[39] Specifically, the regulators have stated that directors should take into account climate considerations in their risk management framework that includes the identification, monitoring, reporting, and mitigation of climate risks. A comprehensive assessment of the different types of risk – credit risk; market risk; liquidity risk; operational and legal risk; reputational risk; and strategic risk – at both portfolio and client level, has been recommended. Part of the risk management framework and process should include building or enhancing capabilities to collect and process data on climate related risks (such as by engaging with clients to understand the impact of climate risks on their businesses and by seeking the advice of external consultants). The risk management framework should also include climate scenario analysis, including stress testing, that covers multiple scenarios involving physical, transition and liability risks from a short-term and long-term perspective. Accordingly, the failure of the board to put in place an effective risk management framework to assess and address climate risks will render them in breach of the duty to exercise reasonable care, skill and diligence.

On supervision of delegated responsibilities, it is trite law that directors are permitted to delegate but must adequately supervise the persons or committees to whom they have delegated the tasks; they are not permitted to blindly rely on the advice or opinions given.[40] Thus, the board is allowed to delegate the tasks of identifying, monitoring and mitigating climate risks to a committee, the management or even external parties, but must exercise appropriate supervision over them. The level of supervision will depend on the degree of knowledge and expertise possessed by the supervisor and supervisee and the nature of the task that has been delegated. It would also depend on whether there are matters that put the board on inquiry.

[36] See eg, MAS, "Guidelines on Environmental Risk Management (Banks)" (December 2020) at [3.1].

[37] n 5.

[38] n 6.

[39] MAS, "Guidelines on Environmental Risk Management (Banks)" (December 2020) at [3.2]; MAS, "Guidelines on Environmental Risk Management (Insurers)" (December 2020) at [3.2]; MAS, "Guidelines on Environmental Risk Management (Asset Managers)" (December 2020) at [3.3]; Hong Kong Monetary Authority, GS-1 Climate Risk Management (for consultation) (20 July 2021) at [3.2.2].

[40] *Secretary of State for Trade and Industry v Baker (No. 5)* [1999] 1 BCLC 433 at 436; *Re Barings plc (No 5)* [1999] 1 BCLC 433 at 489.

On disclosures, insofar as the company is required (whether on a mandatory or comply-or-explain basis) to disclose climate-related risks under ESG, sustainability reporting or other reporting rules issued by the stock exchange or other regulatory authorities, and fails to do so, the directors may be held liable for breaching the duty to exercise reasonable care, skill and diligence, in addition to any liability for violating applicable legislation or listing rules. To the extent that the regulators in the Asian jurisdictions have also urged but not (yet required) companies to make disclosures aligned with TCFD recommendations (related to governance, strategy, risk management, and metrics and targets) and if directors have failed to comply with these guidelines, whether directors will be held liable would depend on the reasons for not making such a disclosure. If this is because the disclosure has been, or making the disclosure will overlap to a material extent with the disclosures, made elsewhere pursuant to another legislation or listing rules, the director should not be in breach of the duty of care. However, if the disclosure has not been or does not materially overlap with the disclosure made elsewhere, whether the director will be in breach of the duty will depend on prevailing market practice and the expectations of the shareholders and stakeholders. Finally, should directors or their companies make greenwashing statements – whether statements of fact, opinion or aspirations concerning lower carbon or net zero emissions which have no reasonable basis – directors may be held liable for breaching the duty.

In sum, it has been argued that the duty to act in good faith in the company's best interests and duty to exercise reasonable care, skill and diligence require directors in all three Asian jurisdictions to take into account climate-related risks in their decision-making process. The failure to do so could result in their being held liable for breaching the duties.[41]

D. Enforcement

It is necessary but insufficient that corporate law requires or ought to require directors to take into account climate-related risks. There must be proper mechanisms in place to enforce these duties. Otherwise, the law remains simply on the books and their deterrent effects are non-existent. The main problem in all three jurisdictions is that there are considerable difficulties in enforcing the corporate law duties by private litigants. And there remains significant uncertainty as to whether the state will enforce these duties. This leads to an assessment of private and public enforcement of corporate law duties.

1. Private enforcement

There are two main types of private enforcement actions: derivative action and unfair prejudice/oppression actions. Essentially, derivative action is usually brought by aggrieved

[41] None of the three jurisdictions has the busines judgment rule of the type prevalent in the US (i.e. courts will not review the business decisions of directors if they have acted in good faith, with due care, and in the corporate interest). But in all three jurisdictions, courts will relieve the director from liability for breaches of duties if the director has acted honestly and reasonably, and having regard to all the circumstances of the case, that person ought fairly to be excused: see Section 391, Singapore Companies Act; section 463, Indian Companies Act; section 903 Hong Kong Companies Ordinance.

minority shareholders on the company's behalf in order to address wrongs done to the company. Unfair prejudice or oppression actions are brought by minority shareholders in order to address harms done to them personally rather than the company, although, as seen below, harms done to the company can constitute harms done to shareholders.

Derivative action

Singapore[42] and Hong Kong[43] have both common law and statutory derivative actions. India only has the common law action.[44] In order for the common law derivative action to succeed in all three jurisdictions, the claimant has to prove that the delinquent director has committed a fraud on the minority.[45] This requires two elements to be satisfied. First, the wrongdoer has obtained some sort of benefit at the expense of the company. Second, the wrongdoer used his controlling power to prevent an action from being brought against him by the company. Should directors be alleged to have breach the duty to exercise reasonable care, skill and diligence or the best interest duty such as by failing to take into account climate-related risks, but have not obtained benefits at the company's expense, then the first element will not be satisfied and the claimant will fail in her derivative action. By contrast, neither the first nor the second element are required for the statutory derivative action in Hong Kong and Singapore.

While the statutory derivative action is an improvement over the common law derivative action, there are restrictions to the former. The complainant bringing the statutory action must apply to the court for leave to commence the action in Hong Kong and Singapore. Under Singapore law, the requirements are that (a) the complainant has given 14 days' notice to the directors of the company of her intention to apply to the court for the derivative action if the directors themselves do not bring the action; (b) the complainant is acting in good faith and (c) it appears to be prima facie in the company's interests that the action be brought.[46] In Hong Kong, the requirements are similar, except that there is no good faith requirement and there is the requirement that there is serious question to be tried.[47] By contrast, under the common law derivative action, the aggrieved shareholder can proceed to sue without asking the court for permission. Under Singapore law, the problem with the good faith requirement is that case law shows that it substantially overlaps with the requirement that the derivative action is prima

[42] Section 216A Companies Act.

[43] Section 732 Companies Ordinance.

[44] Vikramaditya Khanna and Umakanth Varottil, "The rarity of derivative actions in India: reasons and consequences", in Dan W. Puchniak, Harald Baum, and Michael Ewing-Chow (eds.), *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge: Cambridge University Press, 2012) at 380.

[45] *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1; Tan Cheng Han, *Walter Woon on Company Law* (Sweet & Maxwell, Revised 3rd edn, 2009) at 372; Margaret Chew, *Minority Shareholders' Rights And Remedies* (Lexis Nexis, 3rd ed, 2017); *BSN (UK) Ltd. v. Janardan Mohandas Rajan Pillai* [1996] 3 Comp. Cas. 371 (Bom); *Spectrum Technologies USA Inc. v. Spectrum Power Generation Company Ltd*. MANU/DE/1147/2001; *Waddington Ltd v Chan Chun Hoo* (2008) 11 HKCFAR 370, 380; *Tam Lai King v Incorporated Owners of Malahon Apartments* [2010] 5 HKLRD 63 at [59].

[46] Section 216A(3) Companies Act.

[47] Section 733(1) Companies Ordinance.

facie in the company's interests.[48] As for the requirement concerning the company's interests, there is uncertainty regarding the standard for determining the company's interests. For example, in Singapore, there is case law that states that the complainant has to show that the action has objective legal merits (i.e. not frivolous or vexatious), which is a low standard of proof.[49] But there is also case law that distinguishes legal merits and commercial merits, and subjects the complainant to the latter higher standard.[50] In Hong Kong, while case law states that the court should not decide on the merits of the claims at the stage of leave, the courts have not articulated a clear and workable test.[51]

These doctrinal uncertainties are heightened when applied to the climate risk context. Suppose an NGO acquires shares in the company for the purpose of bringing a derivative action against the directors for failing to monitor or mitigate climate-related risks. Under Singapore and Hong Kong law, there is no stipulation on the minimum amount of shares or the minimum period the shares that must be held by a member of the company before the person can bring a statutory (or common law) derivative action. What the shareholders must satisfy are the requirements stated above. Under Singapore law, the NGO has to show that it honestly believes that there is a good cause of action and that the derivative action is prima facie in the company's interests, i.e. while the NGO does not need to prove the allegations on a balance of probabilities, it does need to show that there is a reasonable chance the action will succeed if brought. Should Singapore courts interpret the company's interests requirement using a higher standard – commercial merits as opposed to legal merits – then it is not clear that the requirement will be satisfied. After all, an NGO that has recently acquired shares (in a listed company) may not have sufficient facts concerning the board's actions or omissions (because, for example, it is unable to access board minutes)[52] to show that there is a reasonable chance that the derivative action will succeed. Allegations of failure to take into account climate related risks require pleading of facts. Under Singapore and Hong Kong law, although the court need not adjudicate on the merits of the disputed facts, the more broad brushed or highly generic the alleged facts stated by the complainant are, the more difficult it is for the judge to be persuaded that the case is an arguable one.

In all three jurisdictions, the greatest disincentive for minority shareholders in bringing a common law or statutory derivative action is that any compensation that the court will award goes to the company and not to the shareholders themselves. This, coupled with the prohibition of contingency fee arrangements, and the loser pays all rule, often disincentivise derivative actions from being brought.[53] Further, class action law suits are prohibited for derivative law

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[48] *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 at [9], [13]; *Pang Yong Hock v PKS Contracts Services Pte Ltd* [2004 3 SLR(R) 1 at [20]. Hans Tjio, Pearlie Koh and Pey Woan Lee, *Corporate Law* (Academy Publishing 2015) at [10.063].

[49] *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 at [55–56].

[50] *Pang Yong Hock v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 at [21].

[51] *Re Lucky Money Ltd* (unreported HCMP 05/2006, [2006] HKEC 1379) (CFI); Lo & Qu, n 20 at [10.056].

[52] Related to this is the fact that shareholders have restricted inspection rights in Singapore: Dan W. Puchniak and Samantha Tang, "Limited Shareholder Inspection Rights in Singapore: Worrying Legal Gap or Unnecessary for Rankings?" *European Corporate Governance Institute - Law Working Paper No. 608/2021* (7 September 2021), available at https://ssrn.com/abstract=3918900.

[53] Puchniak, Baum & Ewing-Chow, n 44 at 42.

suits in all three jurisdictions (although India has class action suits for actions prejudicial to the company and shareholders which will be discussed below). Unsurprisingly, derivative actions are uncommon in private companies and exceedingly rare in listed companies in all three jurisdictions.

Oppression/unfair prejudice – private enforcement

Unlike a derivative action which has to be brought on behalf of the company to address wrongs done to the company, shareholders are able to bring direct claims based on oppression, prejudice or mismanagement to address harms caused to them under Indian law. Under Singapore law, shareholders can bring oppression actions,[54] and under Hong Kong law, unfair prejudice actions,[55] to address harms done to themselves. While these actions have similar rationales, the specific elements required for these actions are distinct which will be examined below. A key issue here is whether breaches of directors' duties – which are owed to the company (and not shareholders or stakeholders) and hence constitute harm done to the company – can amount to harms done to the shareholders thereby entitling them to bring oppression or unfair prejudice actions. The short answer is in the affirmative in all three jurisdictions, but the procedural and substantive requirements and the doctrinal uncertainties related to the oppression and unfair prejudice actions call into question their effectiveness or desirability as mechanisms to enforce directors' duties or to address harms done to shareholders.

Under Singapore law, the claimant has to satisfy a two-part test to show that it is not abusing the process when it brings an oppression action.[56] The first part concerns injury and the second remedies. On the first part, the claimant has to address the questions of what the real injury sought to be vindicated is, whether the injury is distinct from that suffered by the company, and whether there is commercial unfairness to the claimant. On the second part, the claimant has to address the questions of the essential remedy being sought and whether it vindicates the claimant's injury. The court has said that if the essential remedy is a restitutionary order in favour of the company, then there is a presumption that the appropriate action should be derivative action. But if the essential remedy is a share buyout, then the presumptive action is oppression.[57]

For our purposes, the Singapore court has said obita dictum that, in listed or widely-held companies, it is unlikely that the real injury to be vindicated and the essential remedy sought will satisfy the two-part test and, thus, derivative action will be the appropriate course of action.[58] There are two reasons for this. First, the first part of the test requires that there be commercial unfairness to the claimant. Commercial unfairness arises when there is a breach of a written agreement such as the corporate constitution or shareholders' agreement, or where

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[54] S 216 Companies Act.
[55] S 724(1) Companies Ordinance.
[56] *Ho Yew Kong v Sakae Holdings Ltd* [2018] SGCA 33.
[57] Ibid at [119].
[58] Ibid at [121].

has been a breach of legitimate expectations arising from informal or implied understandings.[59] Questions of commercial unfairness usually arise in quasi-partnerships (small, private companies) and not in listed companies where there is a multitude of shareholders. For example, it would be surprising if the NGO which has acquired shares in the company can show that it has a written or informal agreement with the company with regards to the management of climate-risks which has been breached. Nor would it be usual for there to be enforceable provisions in the corporate constitution or shareholders' agreement concerning climate-related risks. The second reason is that there are only very few reported oppression cases of claimants seeking a buyout of their shares from listed companies.[60] The cases to date are concerned with private companies. In the context of climate risks, it is unlikely for a claimant to seek a share buyout from a listed company. Rather the remedy the claimant is likely to seek is compensation from the directors for the losses caused to the company as a result of their breach or injunctions preventing the board from taking certain actions. If that is the case, the appropriate course of action should be a derivative action and not oppression. However, as discussed above, there are serious disincentives to bringing a derivative action.

The Singapore court also said obita dictum that a breach of the duty to exercise reasonable diligence will not be evidence of oppression unless the breach was sufficiently serious to amount to commercial unfairness.[61] Given that it would be difficult to prove commercial unfairness in listed or widely held companies, it is unlikely for claimants to succeed in arguing that they have been oppressed by directors who have been negligent.

Under Hong Kong law, breaches of applicable laws such as the companies statute, listing rules, and directors' fiduciary duties could amount to unfair prejudice.[62] There was a first instance decision in which the company breached the listing rules by failing to amend the corporate constitution.[63] The listing rules stipulated that removal of directors only required an ordinary resolution, but the corporate constitution required a special resolution. The Hong Kong Stock Exchange suspended trading of the company's shares because the directors refused to amend the corporate constitution to conform to the listing rules. The minority shareholders sued for unfair prejudice and won. The court said that there was no need to establish a personal relationship between the shareholders and the company and that the shareholders acquired the shares on the expectation that the company would comply with the listing rules. It may be argued that insofar as the listing rules or rules issued by the regulators impose a requirement on companies to address or disclose climate-related risks, this decision can be used to support the minority shareholders' claim that they have suffered oppression, as their expectations that companies will comply with listing rules and any applicable regulations issued by the authorities have been breached. Nevertheless, there are two concerns with relying on this

[59] *Over & Over Ltd v Bonvests Holdings Ltd* [2010] SGCA 7.

[60] *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776; *Ezion Holding Ltd v Teras Cargo Transport Pte Ltd* [2016] SGHC 175; *The Wellness Group v OSIM* [2016] SGHC 64.

[61] *Ho Yew Kong v Sakae Holdings Ltd* [2018] SGCA 33 at [152].

[62] *Re Bondwood Development Ltd* [1990] 1 HKLR 200; *Luck Continent Ltd v Cheng Chee Tock Theodore* [2013] 4 HKLRD 181; *Re Playmates Investments Ltd* [1996] 4 HKC 577; *Re Tai Lap Investment Co Ltd* [1999] 1 HKLRD 384.

[63] *Luck Continent Ltd v Cheng Chee Tock Theodore* [2013] 4 HKLRD 181.

decision. First, courts are likely to be cautious in treating this first instance decision as authority for the broad proposition that any breaches of listing rules or applicable legislation amount to oppression. This is because this will erode the fundamental distinction between (a) harms done to the company (which warrant a derivative action) due to breaches of directors' duties which are owed to the company only and (b) harms done to shareholders personally (which warrant an unfair prejudice/oppression action) due to breaches of legitimate expectations. The second concern is that future courts may distinguish this decision on the basis of this important fact: the stock exchange suspended trading of the company's shares to sanction the company thereby causing massive losses to the shareholders. Where the allegation concerns directors' failure to take into account climate related risks but no financial losses (or material financial losses) could be shown to have been suffered by shareholders, it is unclear if this first instance decision has any persuasive effect.

Under Indian law, shareholders are able to initiate actions based on oppression, prejudice or mismanagement to address the personal injury caused to them.[64] These are three separate grounds. On oppression, courts have held that illegality per se on the part of the directors or controlling shareholders would not amount to oppression,[65] and the conduct needs to be 'harsh, burdensome and wrong'.[66] Thus, the fact that directors have breached their duties in itself would not amount to oppression. On prejudice, it is sufficient if the conduct of the delinquent directors is prejudicial to either shareholders or the company.[67] The standard is lower than that of oppression. But there is no clear or definitive test on prejudice that has been established by the courts. On mismanagement, the claimant is required to show that as a result of a material change in the management or control of the company, the affairs of the company are conducted in a manner that is prejudicial to its interests. The mismanagement remedy is broader than the oppression remedy.[68]

However, although in a climate risk context, minority shareholders may bring an action for prejudice or mismanagement, there is a significant obstacle in enforcing such a claim. This is because to succeed in such an action, the statute requires that the court be satisfied that the facts of the case warrant winding up the company on just and equitable grounds but that to wind up the company will unfairly prejudice the shareholders.[69] And in interpreting this statutory requirement, the court has made it clear that it applies only to quasi-partnership – small or closely held companies where there is mutual trust and confidence, but not in listed or professionally managed companies.[70] This does not mean that listed or widely-held companies are exempt from the requirement. Rather, it means that because courts are not able to apply the

[64] Sections 241-2, Indian Companies Act.
[65] *Mohanlal Ganpatram v Shri Sayaji Jubilee Cotton and Jute Mills Co Ltd*. 1964 SCC OnLine Guj 66 at [25].
[66] *VS Krishnan v Westfort Hi-tech Hospital Ltd* (2008) 3 SCC 363 at [14].
[67] *Tata Consultancy Services Limited v. Cyrus Investments Pvt. Ltd* 2021 SCC OnLine SC 272.
[68] *Mohanlal Ganpatram v Shri Sayaji Jubilee Cotton and Jute Mills Co Ltd*, 1964 SCC OnLine Guj 66 at [24].
[69] Section 242(1)(b) Companies Act.
[70] *Hind Overseas Private Limited v Raghunath Prasad Jhunjhunwala* (1976) 3 SCC 259 at [31]; *MSDC Radharamanan v MSD Chandrasekhara Raja* (2008) 6 SCC 750 at [30].

statutory requirement to non-quasi-partnerships, the requirement will not be satisfied and, thus, claimants in listed or widely held companies cannot succeed in a claim based on oppression, prejudice or mismanagement. Moreover, unlike the derivative action where there are no threshold requirements on the amount of shares held before the claimant can bring the action, a claimant who sues on the basis of oppression, prejudice or mismanagement is subject to threshold requirements. Either the claimant must own at least 10% of the issued share capital or the action is brought by at least 100 claimants or at least 10% of the total number of members.[71] While the threshold requirements may be waived by the court, there is no guarantee that it will do so. Much depends on the specific facts of each case.

The above requirements demonstrate that a claimant wishing to bring an action on the basis of oppression, prejudice or mismanagement because directors have failed to take into account climate-related risks will face significant and possibly insuperable obstacles. To begin with, it is very unlikely for cases involving climate risks to rise to the level that warrant winding up the company. For example, if we consider the climate related cases in other jurisdictions in which companies or funds have been sued under tort law, corporate law or other legislation, and assuming if the same facts were to be litigated before the Indian courts, the facts would not justify winding up the company. Further, the corporate cases concerning climate risks to date mostly relate to companies that are listed or widely held. Finally, given the threshold requirements of 10% shares or 10% membership, a shareholder who does not meet such requirements must incur costs in coordinating with other shareholders.

It may be argued however that because India (unlike Singapore and Hong) permits a member to bring a class action lawsuit if the company's affairs are conducted in manner prejudicial to the interests of the company and members[72] and because courts have taken a wider interpretation of prejudice than oppression, this mechanism can and should be used by claimants seeking to hold directors accountable for failing to consider climate risks. Another benefit of this class action lawsuit is that it is not subject to the winding up requirement. However, the class action lawsuit is subject to procedural requirements that cannot be waived: the member bringing the lawsuit must own at least 5% of the shares (if the company is unlisted) or 2% (if the company is listed).[73] Alternatively, there must be at least 100 members bringing the lawsuit or the members account for at least 5% of the total shareholders, whichever is less.[74]

In sum, the oppression and unfair prejudice actions in the three jurisdictions are not likely to be the mechanism of choice for addressing directorial failure to take into account climate risks, given the procedural and substantive requirements as well as the doctrinal uncertainties. Nevertheless, under Indian law, the option of bringing class action lawsuit may be a promising tool. As for the common law derivative action in the three jurisdictions, it is arguably less likely to be deployed (than the oppression/unfair prejudice action) not least because of the requirement that the director has obtained a benefit at the company's expense. While the

[71] Section 244 Companies Act.
[72] Section 245 Companies Act.
[73] The National Company Law Tribunal Rules, 2016, r 84(3)(ii).
[74] Section 245(3) Companies Act.

statutory derivative action (in Singapore and Hong Kong) is more facilitative of bringing of claims, shareholders face considerable disincentives as discussed above.

Nevertheless, given the problems with private enforcement of directors' duties, another means of holding directors accountable is through public enforcement but it is not without disadvantages.

2. Public enforcement

Corporate legislation in Hong Kong and India permits public enforcement of corporate law. Hong Kong law permits the Securities and Futures Commission to bring enforcement action where the company has caused oppression or unfair prejudice to its members or has engaged in misconduct towards the members or has not given members all the information on the company that they reasonably expect.[75] Indian company law provides that if the government is of the view that the company's affairs are being conducted in a manner that is prejudicial to the public interest, the government can apply for remedies.[76] The remedies available under Hong Kong and Indian law are wide-ranging.

While this public enforcement mechanism has been available to the SFC for over twenty years, it appears that it has only used it 14 times.[77] Further, in the majority of cases in which the SFC has used it (and mainly for the purpose of disqualifying delinquent directors), the companies had already been suspended from trading, were insolvent or were facing other lawsuits.[78] Thus, it seems that this mechanism has only been used in egregious cases. In India, case law has not provided any clear definition or guidelines of "public interest". It has been said that this term varies with time, the state of society and its needs.[79] It refers to the general welfare of the community, whose interests extend beyond those of shareholders to include other constituencies such as employees, consumers and the public in general.[80] The public enforcement mechanism has been used at least three times in high-profile cases which involved breaches of directors' duties, misappropriation of funds, falsification of financial information and other types of fraudulent action.[81] Thus, unless there are serious cases such as directors' persistent failure to take into account climate-related risks which have led to serious losses to the company and shareholders, it does not seem likely for the state and the regulator to incur public expense in bringing enforcement actions. Thus, to what extent these two public enforcement mechanisms will be deployed and how effective they are in deterring directorial wrongdoing remain to be seen in the climate change context. This, then, leads to an examination

[75] Section 214 Securities and Futures Ordinance (Cap 571).

[76] Section 241(1) Companies Act.

[77] David C Donald, Jiangyu Wang and Jefferson P VanderWolk, *A Financial Center for Two Empires: Hong Kong's Corporate, Securities and Tax Law in its Transition from Britain to China* (Cambridge University Press 2014) at 128.

[78] Ibid at 128-9.

[79] Arvind P Datar and S Balasubramanian, *A Ramaiya Guide to the Companies Act* (18th edn, Lexis Nexis 2014) at 4020.

[80] *Bhalchandra Dharmajee v Alcock Ashdown and Co Ltd* 1972 (42) CC 190.

[81] Jayshree P Upadhyay, 'Govt Moves to Take over Unitech as NCLT Dismisses Company Board' LiveMint (9 Dec 2017).

of whether the enforcement of securities law is likely to yield different (and possibly more effective) results in addressing climate risks that corporations face.

II. SECURITIES LAW AND ITS ENFORCEMENT

Disclosure under securities law forms an important tool by which companies are increasingly compelled to address climate risk. Not only are regulations in individual jurisdictions requiring companies to report on climate risk and how they plan to address it, but there has been a growing trend of lawsuits filed against companies for misreporting on climate matters.[82] The most noteworthy litigation relates to the allegation that the directors and officers of ExxonMobil failed to accurately disclose the climate risk the company faces. In *Ramirez v. ExxonMobil*,[83] a Texan court refused to dismiss a law suit and found that the plaintiff has sufficiently alleged securities fraud for the suit to proceed.[84] Even though no such suits for climate-related mis-disclosures have yet succeeded, they draw attention to the issue of climate reporting, and provide a clear indication that the use of securities law to incentivise companies and their directors to address climate risk is only expected to intensify in the near future.[85] Although the authors are not aware of any climate disclosure-related enforcement proceedings in Hong Kong, India or Singapore, the mounting regulatory attention that companies are facing due to climate-risk suggests that securities law actions may be round the corner.

Supplementing individual legal actions are global developments to modernise and standardise climate risk disclosures. The most notable effort in this regard is the release in 2017 of the recommendations by the Taskforce on Climate-Related Financial Disclosures (TCFD) on financial risk disclosure of climate-related matters.[86] Apart from several companies having voluntarily adopted the TCFD recommendations, a host of jurisdictions around the world is contemplating requiring companies they regulate to report climate-related matters using TCFD standards. Similarly, the IFRS Foundation has proposed measures on sustainability reporting, which recognises a 'climate-first' approach, as climate change 'is a financial risk of growing importance to investors and prudential regulators, mostly because of public policy initiatives by major jurisdictions globally.'[87] All of these measures elevate climate-related

[82] Geetanjali Ganguly, Joanna Setzer & Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corrosporations for Climate Change' (2018) 38 *Oxford Journal of Legal Studies* 841, 859; Lisa Benjamin, 'The Road to Paris Runs Through Delaware: Climate Litigation and Directors' Duties' [2020(2)] *Utah Law Review* 313, 353-355; Caitlin M. Ajax & Dianne Strauss, 'Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere "Puffery"?' (2018) 45 *Ecology Law Quarterly* 703, 703.

[83] 334 F. Supp. 3d 832 (N.D. Tex. 2018).

[84] Congressional Research Service, 'Climate Change Risk Disclosures and the Securities and Exchange Commission' (20 April 2021), at 9.

[85] Sarah E. Light, 'The Law of the Corporation as Environmental Law', (2019) 71 *Stanford Law Review* 137, 163; Roshaan Wasim, 'Corporate (Non)Disclosure of Climate Change Information' (2019) 119 *Columbia Law Review* 1311, 1311.

[86] Task Force on Climate-Related Financial Disclosures, "Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosures" (June 2017), available at https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf.

[87] IFRS Foundation, 'Consultation Paper on Sustainability Reporting', September 2020, at p. 12.

disclosures to the level of a key reporting measure by companies.[88] These international efforts, coupled with pressure from the investor community, have already triggered more robust and standardised disclosures regarding climate risk.[89] As elaborated in this section, this is true of the legal position and market trend in Hong Kong, India and Singapore as well.[90]

In this background, the paper proceeds to discuss how climate risk constitutes 'material' information from a financial perspective, requiring appropriate disclosure under conventional corporate reporting requirements. Moreover, climate risk is an integral part of the increasingly prominent sustainability disclosure phenomenon, which is transitioning from an arguably marginal status (i.e., a voluntary, soft-law based approach) to acquiring mainstream eminence in corporate reporting regimes. Finally, it explores how the three common law jurisdictions in Asia enforce climate-risk disclosure obligations and the sanctions they could impose for breaches thereof.

A. Climate Risk as 'Material' Financial Information

It is argued here that climate risk constitutes material financial information that companies are obligated to disclose under applicable financial reporting regulations, including, in the case of listed companies, under the relevant listing rules. The concept of 'materiality' emanated through jurisprudence from the U.S. Supreme Court. In determining whether a company bears an obligation to disclose specific information, the Court held in *TSC Industries, Inc v. Northway, Inc.*,[91] that:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. … What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.[92]

[88] Jacqueline Peel, Anita Foerster, Brett McDonnell & Hari M. Osofsky, 'Governing the Energy Transition: The Role of Corporate Law Tools' (2019), available at https://ssrn.com/abstract=3439212 at 10.

[89] Ibid at 12.

[90] See also, Fullerton Fund Management, 'Materiality of Asia: Investing away from climate risk' (22 March 2021), available at https://eiuperspectives.economist.com/sites/default/files/materiality_of_asia_investing_away_from_climate_risk.pdf, at 6 (indicating similar trends generally in Asia).

[91] 426 U.S. 438 (1976).

[92] Ibid at 449. See also, *Basic, Inc v. Levinson*, 485 U.S. 224 (1988).

Although the test of materiality is an objective one,[93] concerns arise where climate risk could constitute a contingent or speculative event.[94] However, it is argued that emerging developments in law and science relating to climate change would help address such concerns. First, climate disclosure is not necessarily forward-looking in nature, as what is required is disclosure of currently available information regarding the impact of climate change in the future.[95] Second, and relatedly, there is mounting evidence that is able to predict the future impact that climate change may bring about on the business and operations of a company, and that too with some degree of accuracy.[96] Moreover, new scientific developments enable the quantification of impact of climate change on corporations and their businesses on the one hand and the ecology on the other.[97] In that sense, the principle of 'double materiality' is gaining traction, by which each company ought to report not only on the impact of climate risk on its own business and operations, but the effect of its activities on the broader environment (particularly for companies in carbon-intensive sectors).[98]

Furthermore, the concept of materiality generally bears reference to a 'reasonable' investor.[99] Although there is considerable homogeneity among the investment community, ample evidence exists to suggest that investors are increasingly factoring in climate risk as an important piece of information in making investment, divestment and governance decisions.[100] The growth of ESG investing, greater investor engagement with management on climate risk-related matters, and the proliferation of global efforts and standards for dissemination of climate information, all have the effect of moving the needle of 'reasonableness' of investors while determining the 'materiality' of the information they expect from companies.[101] These developments suggest that climate-related information acquires a greater sense of materiality, particularly for companies that impact, or are affected by, climate risk to a greater extent. Given the salience of climate disclosures to the financial risk borne by investors, this section now investigates the regime in the three Asian jurisdictions of study.

The securities laws in Hong Kong, India and Singapore carry elaborate continuous disclosure requirements.[102] In Hong Kong, chapter 13 of the Consolidated Mainboard Listing Rules of

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[93] Congressional Research Service, n 84 at 7.

[94] Here, *Basic*, n 92 at 238, has stipulated the need for 'balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity'. See also, Wasim, n 85, at 1328.

[95] Wasim, n 85, at 1330; Ajax & Strauss, n 82 at 118.

[96] Ibid, at 1348.

[97] Benjamin, n 82, at 317-18.

[98] IFRS Foundation, n 87 at 13; Benjamin, n 82 at 325.

[99] Congressional Research Service, n 84, at 7.

[100] Wasim, n 85 at 1330; Benjamin, n 82 at 325; Hana V. Vizcarra, 'The Reasonable Investor and Climate-Related Information: Changing Expectations for Financial Disclosures' (2020) 50 *Environmental Law Reporter* 10106.

[101] Vizcarra, n 100 at 10109-10111; K&L Gates, 'Some Liability Considerations Relating to ESG Disclosures' (1 May 2017), available at https://www.klgates.com/Some-Liability-Considerations-Relating-to-ESG-Disclosures-05-01-2017.

[102] These jurisdictions also have detailed disclosure requirements in case of offerings of shares in the primary markets, such as initial public offerings, rights offerings and private placement but this paper focuses on

the Hong Kong Stock Exchange (HKEX) sets out the circumstances in which companies are required to make public disclosures of information.[103] Although the chapter does not specifically require materiality-based reporting of climate-related information, certain matters requiring disclosures have a bearing on climate-related risks, namely material matters which impact on profit forecasts. Specifically, a company has the obligation during a forecast period to announce the occurrence of an 'event' which, had it been known when the profit forecast was made, would have caused material differences to the assumption on which such forecast was made in the first place.[104] Moreover, if there are 'activities' outside the issuer's ordinary course of business that materially contribute to or reduce the profit stated in the profit forecast, the issuer must announce such information.[105]

Economic transition risks during the shift to a next zero emissions regime may amount to such 'event' or 'activities' under Hong Kong's listing rules. This is because the economic transition risks can be the result of policy or regulatory changes that seek to reduce climate-related risks such as carbon pricing or emissions restrictions measures, or technological developments such as those related to renewable energy, electric vehicles, and battery storage.[106]

In India, the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (the 'LODR Regulations') require listed companies to make disclosures of events or information that are, in the opinion of the board, material in nature.[107] Such disclosures must be made as soon as reasonably possible, and no later than 24 hours after the occurrence of the event or awareness of any information.[108] The LODR Regulations divide the disclosure requirements into two categories. The first relates to events that are deemed to be material, and must therefore be disclosed.[109] These relate mainly to capital structuring (or restructuring), mergers and acquisitions, corporate governance, and insolvency, and do not deal with matters pertaining to climate risk. The second category is where disclosure is to be made only if the event or information satisfies the 'materiality' test.[110] This includes climate events such as disruptions to the 'operations of any one or more units or division of the listed entity due to natural calamity (earthquake, flood, fire, etc.)'.[111] Another aspect relates to litigation arising from climate risk that is likely to have an impact on the financial status of the company.[112]

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continuous disclosures requirements for companies that are already listed on the stock exchange, whether or not they propose to make further securities offerings.

[103] See also, Gill North, 'National Company Disclosure Regulatory Frameworks: Superficially Similar but Substantively Different' (2015) *John Marshall Global Markets Law Journal* 187, 211.

[104] LR 13.24B(1), HKEX Mainboard Listing Rules.

[105] LR 13.24B(2), HKEX Mainboard Listing Rules.

[106] Lim, *White Paper on Hong Kong*, n 3 at 18.

[107] Reg. 30(1), LODR Regulations.

[108] Reg. 30(6), LODR Regulations.

[109] These are listed in Schedule III, Part A, paragraph A, SEBI LODR Regulations.

[110] These are listed in the Schedule III, Part A, paragraph B, SEBI LODR Regulations. The definition of 'materiality' set out in regulation 30(4), wherein a listed entity shall consider various criteria while deciding whether to disclose the relevant information.

[111] Schedule III, Part A, paragraph B(6), LODR Regulations.

[112] Schedule III, Part A, paragraph B(8), LODR Regulations.

More generally, the 'concept of what is material has been interpreted liberally in securities regulation' in India, and 'what is material depends upon the facts and circumstances of each case'.[113] At a minimum, it includes information that 'if concealed, would have a devastating effect on the decision making process of the investors, and without which the investors could not have formed a rational and fair business decision of investment'.[114] The expansive interpretation rendered by the Indian regulatory authorities to the concept of materiality is evident in the observations of the Securities Appellate Tribunal as follows:

> Therefore, the letter and spirit … of the disclosure requirement is the need for disclosing all material events in clear terms with very little discretion for judging the degree of materiality. The emphasis is on disclosure; not otherwise, which means disclose even when the issuer doubts whether there is any materiality. …[115]

Although cast in the context of primary market transactions, such a broad interpretation has the effect of expanding the disclosure obligations in the secondary markets as well. Hence, any requirement to disclose climate-related information based on the principle of materiality must be viewed in this context.

In Singapore, rule 703 of the Listing Manual of the Singapore Exchange (SGX) imposes a continuous disclosure requirement to (i) avoid the establishment of a false market in the securities of the issuer, or (ii) reveal information that would likely have a material effect on the price or value of the securities concerned. As for the first part, since 'climate change can pose material physical, transition and even legal risks to the company, the failure to disclose material climate-related risks or the deliberate under-disclosure of such risks can … lead to an establishment of false market in its securities'.[116] For the second part, 'material information includes information, known to the issuer, concerning the issuer's property, assets, business, financial condition and prospects; … and any developments that affect materially the present or potential rights or interests of the issuer's shareholders.'[117] Although rule 703 does not specifically refer to climate change, there is a suggestion that developments surrounding the topic would be captured within the last category of the preceding sentence.[118] These include legislative changes, damage caused by extreme weather events, actual or potential climate litigation against the company, increases in financing or insurance costs and exposure of counterparties, in each case arising from climate change.[119] Moreover, a failure of the issuer to account for climate-related risks would make an issuer's disclosures

[113] Divan et al Legal Opinion, n 19 at 24. See also, Anik Bhaduri, 'Taking the Heat: (Non)Disclosure of Climate Change Risks in India' (2021) 42 *Business Law Review* 152.

[114] *DLF Limited v. Securities and Exchange Board of India*, MANU/SB/0006/2015 at [81].

[115] *Electrosteel Steels Limited v. Securities and Exchange Board of India*, 2019 SCC OnLine SAT 244 at [16].

[116] Lim, *White Paper on Singapore*, n 3 at 17.

[117] Appendix 7.1, Corporate Disclosure Policy, SGX Listing Rules.

[118] Jeffrey W.T. Chan, SC, et al, 'Legal Opinion on Directors' Responsibilities and Climate Change under Singapore Law' (14 April 2021), available at https://www.tcfdhub.org/wp-content/uploads/2021/04/Legal-Opinion-on-Directors-Responsibilities-and-Climate-Change-under-Singapore-Law-2021.04.pdf; Lim, n 3 at 17.

[119] Chan, et al, n 118 at 29.

misleading 'in relation to over-valuation of its assets, under-valuation of its liabilities (by under-provisioning for bad debts) or inaccurate disclosure or risk management.'[120]

In all, it is seen that in Hong Kong, India and Singapore, even in the absence of any reference to climate-related information as part of continuous disclosure of financial matters, the concept of materiality in each of the jurisdictions would encompass climate risk, thereby imposing an obligation on companies to make appropriate disclosures on the topic. This is especially so given the changing frame of reference to 'materiality' due to the developments in law and science, as well as the shifting focus of the investors towards incorporation of ESG factors in their decision-making process. Apart from the disclosure of material information as part of the financial reporting process, these jurisdictions have also more recently embraced more specific reporting requirements on ESG matters and, more particularly, climate change.

B. Climate Change and Sustainability Reporting

Apart from being a material risk associated with the financial performance of the company, climate change also forms part of sustainability disclosures, which are increasingly acquiring an integral position in corporate reporting in several jurisdictions. In such a case, climate-related disclosure 'applies more broadly, covering environmental issues for their own sake, even if unrelated to financial performance.'[121] This is on the understanding that environmental and social risks are crucial to investors even if they may not have a direct impact on financial performance.[122] While jurisdictions such as the US have been slow in adopting such an approach,[123] the three common law Asian jurisdictions examined herein have taken giant strides in incorporating sustainability disclosure as an integral part of their continuous disclosure regimes. More importantly, the three jurisdictions have demonstrated their intent to expand on the nature and extent of climate-related disclosures as part of sustainability disclosure.

In Hong Kong, the Listing Rules of the HKEX require companies to report on ESG matters at two levels: (i) certain mandatory disclosure requirements; and (ii) other 'comply-or-explain' provisions.[124] Under the mandatory disclosures, companies' statements must contain the board's oversight of ESG issues, the board's management approach and strategy, and the board's review of progress made against ESG-related issues.[125] Furthermore, the 'comply-or-explain' approach requires issuers to address environmental matters such as 'air and greenhouse gas emissions, discharges into water and land, and generation of hazardous and

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[120] Lim, n 3 at 17.

[121] Light, n 85 at 169. See also, Cynthia Williams, 'The Securities and Exchange Commission and Corporate Social Transparency' (1997) 112 *Harvard Law Review* 1197.

[122] Light, n 85 at 169.

[123] Ibid; Ajax & Strauss, n 82 at 105; Jill E Fisch, 'Making Sustainability Disclosure Sustainable' (2019) 107 *Georgetown Law Journal* 923, 927.

[124] LR 13.91, HKEX Mainboard Listing Rules.

[125] Appendix 27, Part B, para. 13, HKEX Mainboard Listing Rules.

non-hazardous waste'.[126] More specifically, the climate change disclosure provides for 'policies on identification and mitigation of significant climate-related issues' impacting the issuer' and a discussion on 'the significant climate-related issues which have impacted, and those which may impact the issuer, and the actions taken to manage them.'[127]

While ESG disclosures have already gained a sufficient grip in Hong Kong, more recent reforms have sought to strengthen them further, especially on the climate front. HKEX's consultation in April 2021 aimed to establish a greater linkage between ESG considerations and corporate governance more generally, thereby signifying a greater weight for ESG disclosures.[128] In these proposals, climate-related risks received utmost priority, as they 'are increasingly cited as a major priority on the global agenda'.[129] Following such consultation, HKEX has, with effect from 1 January 2022, required companies to make ESG disclosures (including on climate change-related information) available to stakeholders at the same time as the publication of the annual reports.[130] These changes also drew inspiration from the Green and Sustainable Cross-Agency Steering Group's announcement seeking to make progress towards mandatory climate-relate disclosures that are aligned with the TCFD recommendations, and supporting the efforts of the IFRS Foundation to develop a new standard built upon the TCFD recommendations.[131] Following this, the HKEX in November 2021 issued a 'Guidance on Climate Disclosures', which offers 'practical guidance to facilitate listed companies in complying with the TCFD recommendations'.[132] These measures not only have the effect of converting climate-related disclosures from 'comply-or-explain' to a legal mandate over time, but they also result in standardisation of the reporting requirements thereby making cross-company comparisons more meaningful.

As for India, the initiatives toward sustainability reporting emerged more than a decade ago.[133] In 2012, SEBI made it mandatory for the top 100 companies based on market capitalisation to include a business responsibility report (BRR) as part of their annual reports.[134] With the issuance of the LODR Regulations in 2015, the BRR requirements were expanded to encompass the top 500 listed companies by market capitalisation,[135] and then in 2019 to the top 1000 listed companies.[136] Separately, the Government introduced the

[126] Appendix 27, Part C, Aspect A1, HKEX Mainboard Listing Rules.
[127] Appendix 27, Part C, Aspect A4, HKEX Mainboard Listing Rules.
[128] HKEX, 'Consultation Paper: Review of Corporate Governance Code and Related Listing Rules' (April 2021), at 8.
[129] Ibid at 26.
[130] HKEX, 'Consultation Conclusion: Review of Corporate Governance Code & Related Listing Rules, and Housekeeping Rule Amendments (December 2021), at 24.
[131] Hong Kong Monetary Authority, 'Cross-Agency Steering Group announces next steps to advance Hong Kong's green and sustainable finance strategy' (15 July 2021).
[132] HKEX, 'Reporting on TCFD recommendations: Guidance on Climate Disclosures' (November 2021).
[133] Ministry of Corporate Affairs, Government of India, Corporate Social Responsibility Voluntary Guidelines, 2009; Ministry of Corporate Affairs, Government of India, National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business, 2011.
[134] Securities and Exchange Board of India, Circular on Business Responsibility Reports (13 August 2012).
[135] Reg. 34(2)(f), SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.
[136] SEBI (Listing Obligations and Disclosure Requirements) (Fifth Amendment) Regulations, 2019.

National Guidelines for Responsible Business Conduct (NGRBCs),[137] and SEBI has required the publication of a business responsibility and sustainability report (BRSR) in line with the NGRBCs.[138] Two principles from the NGRBCs are relevant from a climate disclosure perspective. One states that 'businesses should provide goods and services in a manner that is sustainable and safe'.[139] Another states that 'business should respect and make efforts to protect and restore the environment'.[140] The format also stipulates specific informational requirements regarding climate change:

> For instance, risk arising from climate change can include impact on operations, worker health, demand for products or services etc. Climate change opportunities can include cost savings through resource efficiency, development of new products and services, access to new markets etc.[141]

The regulatory developments have brought about considerable increase in awareness regarding sustainability issues among Indian companies.[142]

Similar trends are visible in Singapore as well. In 2016, the SGX introduced sustainability reporting requirements, requiring companies to disclose their practices on material environmental, social and governance factors.[143] An accompanying Sustainability Reporting Guide sets out the expectations by stating that 'financial reports increasingly need to be supplemented by descriptive and quantitative information on how business is conducted and the sustainability of the current business into the future'.[144] In terms of format, issuers are 'to give priority to using globally-recognised frameworks and disclosures practices'.[145] Thus far, sustainability reporting in Singapore operates only on a 'comply-or-explain' basis,[146] and does not specify any particular reporting framework for adherence.

Even though the Sustainability Reporting Guide touches on some aspects of climate reporting, more recently there is recognition of the urgent need to 'enhance the quality and consistency of climate-related disclosures'.[147] Towards this end, the SGX issued a consultation paper in August 2021 by which it proposed to introduce mandatory climate-related disclosures consistent with TCFD recommendations.[148] Following the consultation,

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[137] Ministry of Corporate Affairs, Government of India, National Guidelines for Responsible Business Conduct (2019).

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

[139] BRSR Circular, n 138, Annexure 1, Principle 2.

[140] Ibid, Principle 6.

[141] BRSR Circular, n 138, Annexure 2, paragraph 24(2).

[142] Divan et al Legal Opinion, n 19.

[143] Rules 711A and 711B, SGX Listing Rules.

[144] Paragraph 2.2., Practice Note 7.6, SGX Listing Rules.

[145] Ibid, paragraph 3.6.

[146] Ibid, paragraph 1.1.

[147] Monetary Authority of Singapore, "Being the Change We Want to See: A Sustainable Future" - Speech by Mr Ravi Menon, Managing Director, Monetary Authority of Singapore, at Launch of Inaugural MAS Sustainability Report via Video Conference on 9 June 2021.

[148] SGX, Consultation Paper: Climate and Diversity: The Way Forward' (26 August 2021), at 5-6.

the SGX on 15 December 2021 announced a roadmap for SGX-listed companies to transition their climate-related disclosures towards the TCFD framework.[149] Climate reporting would initially be on a 'comply-or-explain' basis for the financial year (FY) commencing 2022. Thereafter, it would be made mandatory sequentially for issuers in the (i) financial, (ii) agriculture, food and forest products, and (iii) energy industries from FY 2023. The (iv) materials and buildings, and (v) transportation industries must comply with such disclosure norms from FY 2024.[150] The recent round of SGX reforms indicate that climate-related disclosures have received greater attention, with the introduction of a legal mandate as well as greater standardisation in line with the TCFD recommendations.

In all, sustainability reporting has gained prominence in Hong Kong, India and Singapore, of which climate-related disclosures are an integral part. Although there are concerns about the lack of a legal mandate and heterogeneity in reporting standards due to the lack of standardisation, the regulatory proposals are directed towards addressing these shortcomings. While sustainability reporting is mandatory in India, the 'comply-or-explain' nature of climate-related disclosures in Hong Kong and Singapore are indeed transitioning towards some form of mandate over time. Moreover, Hong Kong and Singapore have signalled a clear indication to embrace the TCFD recommendations, thereby standardising the reporting frameworks. Hence, within a short span of time, sustainability disclosures have acquired nearly the same status as financial disclosures.

C. Enforcement Measures for Breach of Disclosure Obligations

The climate-related disclosure requirements in all three jurisdictions in this paper draw their legal source from statute.[151] Hence, apart from the relevant stock exchanges, the enforcement measures pertaining to the disclosures are within the purview of the respective securities regulators.[152] It is clear that breaches of mandatory disclosures are enforceable under law. For example, in Hong Kong, the Securities and Futures Commission (SFC) pursues violators of securities law under the Securities and Futures Ordinance (SFO), as it is empowered to institute enforcement proceedings.[153] The SFC is also entitled to bring criminal enforcement actions before the courts, in some cases with the intervention of the Department of Justice.[154]

In Singapore, section 203 of the SFA stipulates that a listed entity 'must not intentionally, recklessly or negligently fail to notify the approved exchange' of information required to be

[149] SGX, 'SGX mandates climate and board diversity disclosures' (15 December 2021).
[150] Ibid.
[151] Securities and Futures Ordinance (Hong Kong), Securities and Exchange Board of India Act, 1992 (India) and Securities and Futures Act (Singapore).
[152] Securities and Futures Commission (SFC) (Hong Kong), SEBI (India) and Monetary Authority of Singapore (MAS) (Singapore).
[153] See Securities and Futures Ordinance (Hong Kong), s. 5.
[154] Wai Yee Wan, Christopher C.H. Chen & Say Goo, 'Public and private enforcement of corporate and securities laws: An empirical comparison of Hong Kong and Singapore' (2019) 20 *European Business Organization Law Review* 319, 330-331.

disclosed under the listing rules.[155] Such a legislative command is clear in so far as mandatory disclosures are concerned, as its violations attract both civil and criminal liability.[156] The Monetary Authority of Singapore may initiate civil enforcement actions, while criminal investigations come within the domain of the Commercial Affairs Department, with criminal proceedings being initiated by the Attorney General's Chambers.[157] As for disclosure requirements applicable on a 'comply-or-explain' basis (such as sustainability disclosures in Singapore), 'the company can be liable under the common law for fraudulent or negligent misrepresentations (provided that the elements of causation and losses are also proven).'[158] Similarly, directors of such companies could also face civil, and possibly criminal, liabilities for breach of the climate-related reporting standards.

In India, if a company fails to comply with listing requirements, it could become liable to payment of a civil penalty of up to 250 million rupees (approx. USD 3.4 million).[159] Moreover, SEBI has been conferred very wide powers to take 'measures as it thinks fit'.[160] Using this, SEBI may exercise a wide range of enforcement measures, including restraining persons from accessing the securities markets for a defined time, impounding the proceeds of sale of shares affected by the violation, attaching property such as bank accounts, and ordering a disgorgement of profits.[161]

In addition, the stock exchanges in all three jurisdictions too are empowered to take action for violation of the disclosure norms. In Hong Kong, the HKEX may issue a private reprimand, a public statement involving criticism or a public censure, pronounce the unsuitability of a director or member of the senior management to continue in their position, or to even suspend the listing of shares.[162] The SGX has the power to impose administrative fines and to enter into composition offers.[163] While the stock exchanges in India do possess the power to delist errant companies, most disclosure-related enforcement measures are instead undertaken by SEBI.

To be sure, individual shareholders are entitled to initiate private enforcement actions for breach of disclosure obligations related to climate risk. For example, investors are entitled to initiate claims against companies and their directors under common law for fraudulent or negligent misrepresentation or against directors for breaches of duties.[164] However, given the limitations of shareholder actions discussed earlier, it is argued that public enforcement efforts by regulators are more meaningful and will likely be more prominent. Although there

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[155] See also Chan, et al, n 118 at 31; Hans Tjio, Wai Yee Wan & Kwok Hon Yee, *Principles and Practice of Securities Regulation in Singapore* (Singapore: LexisNexis, 2017), at [5.08].

[156] Ibid.

[157] Wan, et al, n 154 at 331.

[158] Lim, n 116 at 18.

[159] Section 23E, Securities Contracts (Regulation) Act, 1956).

[160] Securities and Exchange Board of India Act, 1992, s. 11(1).

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

[162] HKEX Mainboard Listing Rules, r. 2A.10.

[163] Chapter 14 of the SGX Listing Manual. See also, Wan, et al, n 154 at 331.

[164] Lim, n 116 at 18.

is no evidence yet of enforcement actions related to climate-related disclosures in the three jurisdictions under analysis, available evidence suggests that public enforcement actions tend to be the norm for securities law violations, in particular for disclosure norms. An empirical study that compares the relevant laws in Hong Kong and Singapore finds that 'public enforcement of corporate disclosure laws is more prevalent than private enforcement in both countries.'[165] Similarly, claims relating to investor protection in India, including those regarding violation of securities disclosures norms, are generally brought by way of public enforcement actions.[166]

After having examined the private enforcement mechanism available under corporate law and the public enforcement mechanism under securities law, both in relation to matters of climate risk, this paper proceeds to engage in a comparison between the two and set out its findings.

III. COMPARING PRIVATE AND PUBLIC ENFORCEMENT FOR CLIMATE RISK

As the discussion in the previous sections indicates, climate risk bears significance under both corporate and securities laws in the three Asian jurisdictions of study. Under corporate law, the focus is on directors' duties, while under securities law it is on disclosures. Private enforcement constitutes the primary mode in relation to corporate law, while public enforcement forms only a small part. Conversely, public enforcement is at the forefront of securities law, with only a minimal role played by private enforcement. Despite the availability of these mechanisms in Hong Kong, India, and Singapore, their use is either scant or nonexistent in the context of climate risk. There is no evidence yet of any significant action being brought either by shareholders, other stakeholders, or the government or regulatory bodies using the current enforcement mechanisms to assuage concerns relating to climate risk. Nevertheless, due to the increasing importance and awareness of the risks arising from climate change, the expansion of directors' duties, investor interest in matters of ESG, it is only a matter of time before the three Asian jurisdictions begin witnessing climate-related enforcement actions. Hence, a comparative analysis of private and public enforcement actions in the context of climate change merits consideration.

The remainder of this section begins with a broader theoretical analysis of private and public enforcement of corporate and securities law in general, then proceeds to examine these actions in the light of climate change issues in the three Asian jurisdictions, and finally concludes with some observations regarding the way forward.

A. Public versus Private Enforcement: A Theoretical Construct

[165] Wan, et al, n 154 at 323.

[166] Umakanth Varottil, 'India: The Efficacy of India's Legal System as a Tool for Investor Protection', in Pierre-Henri Conac & Martin Gelter (eds.), *Global Securities Litigation and Enforcement* (Cambridge: Cambridge University Press, 2019), at 816.

Legal academics have previously carried out the task of exploring the relationship between corporate and securities laws, including in light of their respective enforcement mechanisms. For example, Licht argues that although the effort to draw strict distinctions between the two realms would be fraught with difficulty, as there is indeed a considerable overlap between the two, they can nonetheless bear functional differences.[167] An effort in arriving at a classification between the two fields would indicate that corporate law tends to be enforced through private means before the courts in a given jurisdiction, whereas securities law relies upon specialized regulators or administrative agencies for its administration.[168] Such a classification resonates with the analysis of climate related issues, where in corporate law is generally enforced through private means, and securities law through public means.

A wider academic discourse has sought to tackle the more qualitative question of whether public or private enforcement tends to be more effective and efficient in engendering greater protection of investors. The initial strand of this literature adopted the view that public enforcement matters little to the development of the stock markets, and that private enforcement demonstrates a greater correlation with market development.[169] Such a stance quickly came under attack from other scholars. Jackson and Roe cautioned that both enforcement modes have benefits and disadvantages, and that it would be imprudent to declare an 'a priori winner'.[170] They evaluated the enforcement mechanisms in several markets around the world by examining the extent of resources that states and their regulators deployed towards securities market enforcement. Their results display skepticism over the predominance of private enforcement.[171] Instead, they argue that public enforcement by well-resourced regulators plays a significant role in the development of the capital markets in a given economy.

Such an approach has received greater traction due to its acceptance by other scholars. For example, Coffee notes that the United States may be an outlier in creating a system that enables the pursuit of rigorous private enforcement, owing largely to the entrepreneurial framework (i.e., a plaintiff bar) that is largely absent in most other jurisdictions.[172] Public enforcement not only offers greater flexibility to the regulators to mould their actions, but it is not constrained by economic considerations that limit the effectiveness of private enforcement.[173] Armour and his co-authors find that private enforcement has a limited

[167] Amir N. Licht, 'International Diversity in Securities Regulation: Roadblocks on the Way to Convergence' (1998) 20 Cardozo L Rev 227, 248, 251.
[168] Ibid at 257.
[169] Rafael La Porta, Florencio Lopez de Silanes and Andrei Shleifer, 'What Works in Securities Laws?' (2006) 61 Journal of Finance 1.
[170] Howell E. Jackson and Mark J. Roe, 'Public and Private Enforcement of Securities Laws: Resource-based Evidence'(2009) 93 Journal of Financial Economics 207, 208.
[171] Ibid at 209.
[172] John C. Coffee Jr., 'Law and the Market: The Impact of Enforcement' (2007) 156 U Pa L Rev 229, 267.
[173] Michelle Welsh & Vince Morabito, 'Public V Private Enforcement of Securities Laws: An Australian Empirical Study', (2014) 14 Journal of Corporate Law Studies 39, 47.

bearing on the vitality of the stock markets than had originally been envisaged.[174] After undertaking a comparison of the US and the UK, they find that the extent of private enforcement is subject to a number of legal and institutional factors in a given jurisdiction, which explains why private enforcement is likely to be more important in the US than in the UK.[175]

To be clear, private and public enforcement are not mutually exclusive strategies.[176] For example, public enforcement may offer additional support to extract the full advantages of private enforcement by filling in the necessary gaps.[177] This could arise when parties seeking private enforcement can rely upon the state or regulatory actions in a different proceeding initiated by shareholders or other stakeholders relating to the same matter. Conversely, regulatory actions or settlements may result in compensating affected investors, by which the end result of a public enforcement measure can offer the same benefit that a private action would have. To that extent, the choice between private and public enforcement is not a binary one. Accordingly, those affected by violations of corporate or securities law could seek to adopt either or both options in assuaging their concerns.

At the same time, there are some significant differences in the principal outcomes from the two types of enforcement mechanisms. The focus of private enforcement tends to be on the victims of wrongdoing, such as investors or other stakeholders, by remedying their grievances through orders of compensation or other forms of restitution granted by courts of law. In this paradigm, the judiciary tends to play a key role.[178] On the other hand, the focus of public enforcement tends to target companies, their directors, or their intermediaries, with a view to bringing about deterrence.[179] Here, the emphasis is on the perpetrator of the wrongdoing rather than on the victim. While regulators can, and do, order compensation for losses as part of public enforcement, that is an incidental task rather than a primary one.

After setting out the theoretical framework for a comparison between private and public enforcement of corporate and securities laws, this paper proceeds to rely upon that to examine the enforcement mechanisms and their utilization in Hong Kong, India, and Singapore, both generally and in the context of climate risk faced by companies.

B. Public versus Private Enforcement in Common Law Asia

Available evidence regarding the use of enforcement mechanisms under corporate and securities law in Hong Kong, Singapore and India suggests that their utility and outcomes are

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[174] John Armour, et al, 'Private Enforcement of Corporate Law: An Empirical Comparison of the UK and US', Robin Huang and Nicholas Calcina Howson (eds), *Enforcement of Corporate and Securities Law: China and the World* (Cambridge: Cambridge University Press, 2017) at 241.

[175] Ibid at 271.

[176] Martin Gelter, 'Global Securities Litigation and Enforcement' in Conac & Gelter, n 166 at 92.

[177] Ibid at 93.

[178] Bernard Black, 'The Core Institutions that Support Strong Securities Markets', (2000) 55 Business Lawyer 1565, 1577-78.

[179] Ibid at 1576–77.

consistent with the theoretical framework in that public enforcement has been more prevalent and effective than private enforcement. In their empirical analysis on Hong Kong and Singapore, Wan and her co-authors examine the enforcement mechanisms surrounding directors' duties under corporate law and disclosure rules under securities law.[180] They find scant evidence of private enforcement in the two jurisdictions, likely on account of 'procedural problems such as the costs, lack of an active plaintiffs' attorney bar, the difficulties of obtaining discovery and the free-rider problem'.[181] Hence, a possible transplantation of the US-style private enforcement is bound to fail.[182] Specifically on corporate disclosure violations, the study finds no reported judgments under common law, suggesting that public enforcement actions are the sole avenue.[183] Interestingly, the void created by the absence of private enforcement has been filled by a functional substitute, which is that in public enforcement actions the regulators tend to use their powers (either general or specific) to award compensation to investors who have suffered a loss in case of a corporate disclosure violation.[184]

In India too, private enforcement has not played a meaningful role in the development of its capital markets.[185] There is no known case of significance where courts have awarded compensation to investors in cases where companies or their directors have violated securities laws and, in particular, disclosure norms.[186] On the other hand, SEBI has extensively exercised its public enforcement measures by imposing sanctions such as suspending the trading of securities on the stock exchange, restraining certain persons from accessing the capital markets for a period of time, and impounding the proceeds of the sale of shares effected in violation of securities laws.[187] Here again, the focus is entirely on the wrongdoers than on the victims. When it comes to ordering compensation to investors via the private enforcement mechanisms, the substitutive effect of public enforcement in India is far milder than that witnessed in Hong Kong and Singapore. SEBI lacks powers to award compensation to investors for losses they suffer. Instead, it only possesses the power to disgorge profits from wrongdoers, which deprives them of any ill-gotten gains and prevents them from unjustly enriching themselves.[188] However, amounts that SEBI recovers through disgorgement must be deposited into the Investor Education and Protection Fund (IEPF),[189] whose proceeds can be utilised for the compensation of investors, among other purposes.[190] While this has some correlation between depriving wrongdoers of their ill-gotten gains and the objective of making good investor losses, it is unclear whether amounts recovered

[180] Wan, n at 154.
[181] Ibid at 323-324.
[182] Ibid at 324.
[183] Ibid at 333-334.
[184] Ibid at 323.
[185] Varottil, n 166 at 816.
[186] Ibid at 817.
[187] Ibid at 826.
[188] Ibid at 827.
[189] Securities and Exchange Board of India, s. 11(5).
[190] Securities and Exchange Board of India (Investor Protection and Education Fund) Regulations, 2009, reg. 5(3).

through disgorgement of profits in a given case can directly be applied to compensate investors.[191]

The general dispensation regarding enforcement mechanisms translates into corporate and directorial obligations to recognise and address climate risk. As section II of this paper indicates, while the substantive corporate law surrounding directors' duties to consider climate risk in Hong Kong, Singapore and India is robust, the accompanying enforcement mechanisms do not quite square up. There are several doctrinal uncertainties that curb the invocation of the shareholder derivative action for breach of directors' duties in the climate risk context, as the proceeds of such an action flow to the company and not to the shareholders or other stakeholders. The alternative remedy of oppression, unfair prejudice or mismanagement too is riddled with substantive and procedural hurdles that make it a suboptimal enforcement tool in addressing climate risk. The statutory class action mechanism (limited to India) has yet to demonstrate the legislatively promised vigour. In any event, the legal ecosystem in the three Asian jurisdictions is not conducive to private litigation due to the lack of economic incentives that motivate a strong private enforcement mechanism. The absence of private enforcement in securities law too is clearly visible. Prevalent studies in Hong Kong, Singapore and India do not evidence the existence of any significant investor claim for breaches of securities laws, such as corporate disclosure rules.

Given these findings, it is difficult to be sanguine about the use of private enforcement mechanisms to deal with climate risk. Take the hypothetical scenario of an NGO acquiring shares in a company with a view to initiating any of the private actions available in the three Asian jurisdictions. Such actions are likely to face both substantive and procedural hurdles that would make it difficult for the NGO to obtain a successful outcome. This is assuming that the NGO is willing to overcome the economic incentive problems and commit to the cost of litigation because, even if it were to succeed in a derivative action, it would not directly enjoy the result, i.e. court-awarded compensation (which would flow instead to the company). Similarly, in an oppression, unfair prejudice or mismanagement action, the remedy may involve providing an exit to the NGO by requiring the company or the controlling shareholders to purchase its shares, a result that would run counter to its achievement of climate-related goals. Although the NGO's litigation strategy might be to stay its course with an investment in the company with a view to bring about climate-related changes, such as a transition to a net zero carbon economy, the resulting exit from the investment makes the effort redundant. Due to its minimum shareholding threshold requirement, the class action in India is available only to shareholders holding a substantial stake in the company, and may rule out its utility as a tool for corporate climate activism. Finally, the lack of trend of private investor claims in the three Asian jurisdictions for wrongful disclosures rules that out as an effective enforcement mechanism in relation to climate risk.

[191] Varottil, n 166 at 828.

When it comes to public enforcement of corporate law through oppression or unfair prejudice actions, there is evidence of its use in Hong Kong and India, albeit in egregious cases that have a broader implications, such as on 'public interest'. Such an approach is not prevalent in Singapore. Even where possible, such measures of public enforcement of corporate law in the climate context may be limited to serious cases where directors have persistently failed to account for climate risk, or where breaches of directors' duties have wider ramifications on the physical and economic environment. Public enforcement of securities law, though, stands on an altogether different footing. Securities regulators in the three Asian jurisdictions are steadfast in their efforts to introduce specific climate-related disclosures. This would not only enhance the substantive law in the field, but equip the securities regulators to implement more targeted enforcement measures. For example, it would be less cumbersome for securities regulators to point to breaches of specific disclosure requirements on climate change than to rely on general principles of 'materiality' to pursue their actions. They can utilise the disclosure norms to alter conduct of corporate actors such as directors and managers of companies in dealing with the risks of climate change. This is particularly beneficial since one of the principal goals of public enforcement is deterrence. At the same time, emerging law and practice indicates that the increased use by securities regulators of compensation orders and disgorgement measures as part of enforcement strategies could either directly or indirectly provide recompense to victims of mis-disclosures on climate matters.

Returning to the illustration of an NGO seeking to initiate climate related action, under the current circumstances it may exercise the more effective option of reporting disclosure violations with the securities regulator of the relevant jurisdiction. The expectation is that the regulatory mechanism will then take over and the regulator may investigate any possible violations and, if found appropriate, dispense relevant enforcement measures, either in terms of actions against the violators or compensation towards victims of wrongdoing. Such a scenario is premised, however, on the existence of necessary resources in the hands of the regulator to pursue enforcement actions towards a satisfactory conclusion. Along with the proliferation of climate-related disclosure norms, securities regulators and the stock exchanges in Hong Kong, Singapore and India would do well to address any concerns regarding regulatory capacity to meet with the increasing focus on climate-related disclosure and other securities law considerations. This would require them to enhance their resource pool with adequate specialised personnel handling ESG issues more generally, and climate risk in particular. This may also necessitate legislative changes to enhance the enforcement powers of regulators. For example, given the inchoate nature of the powers of SEBI to pass compensation orders in favour of victims of securities law violations, such powers may be more explicit in the legislation under which it draws its enforcement powers.

In concluding this section, it is clear that public enforcement mechanisms seem more likely to be effective in pursuing climate-related action in relation to companies, particular for breaches of directors' duties and disclosure violations. Private enforcement mechanisms would be of limited utility in these circumstances. That said, private enforcement mechanisms are not altogether irrelevant. They could become useful in serious cases where

shareholders or other stakeholders may have the necessary incentives to bring such actions, and the egregious nature of such cases may help them overcome the substantive and procedural hurdles in assuaging climate-related concerns using corporate and securities law and their enforcement measures. While the pursuit of securities law-oriented public enforcement is expected to be the norm, forms of private enforcement would constitute exceptions.

CONCLUSION

This paper makes five arguments. First, under the laws of the three Asian jurisdictions, directors are, and should be, required to take into account climate-risks as part of their duty to act in good faith in the company's best interests and to exercise reasonable care, skill and diligence; failure to do so may render them in violation of these duties. Second, there are considerable doctrinal and practical difficulties in private enforcement of directors' duties with regards to climate change, particularly for derivative actions and, to a lesser extent, oppression actions. Third, while these difficulties do not occur in *public* enforcement of corporate law, a mechanism available in Hong Kong and India, it is questionable whether public enforcement will be a significantly more effective tool in addressing climate risks than private enforcement because, based on past cases, it is only used in circumstances involving insolvent companies, directorial disqualification, or serious impact on the community; failure to take into account climate-risks may not necessarily rise to such a level. Fourth, companies are and ought to be required to disclose climate-risks as part of their disclosure obligations under securities law, listing rules and reporting obligations; failure to do so may render companies and directors in breach of these regulations, which are enforceable by the securities regulators and stock exchanges. Fifth, given that *private* enforcement of corporate law in listed companies is negligible in the three Asian jurisdictions and because *public* enforcement of corporate law is seldom deployed, *public* enforcement of *securities law and listing rules* with regards to the disclosure of climate related risks is a more promising route, provided that the state and regulators have sufficient resources, they are competent and independent, and effective sanctions and remedies are issued where there are violations.

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Data Availability Statement: There is no data set associated with the paper.

Disclosure Statement: On the broader topic of directors' duties and climate risk, the authors were commissioned by the Commonwealth Climate and Law Initiative to author the white papers which have been mentioned in footnote 3 above