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Umakanth Varottil

v.umakanth@nus.edu.sg

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The Legal and Regulatory Impetus towards ESG in India: Developments and Challenges

Umakanth Varottil[*]

ABSTRACT

The goal of this paper is to build upon the transition outlined in the scholarly debates from corporate social responsibility (CSR) to environmental, social and governance (ESG) matters. Although ESG is well-understood to be market-driven, this paper focuses instead on the legal and regulatory measures governing ESG factors in India. It, therefore, examines the developments and challenges surrounding ESG in India along three fronts. First, the paper explores the roles and responsibilities of corporate boards in accounting for ESG factors in their decision-making process. Second, and relatedly, it analyses the obligations of companies to engage in disclosure and reporting on ESG matters. Finally, viewed from the investor perspective, it examines ESG considerations that underpin the shareholder stewardship regime in India. On each of these aspects, the paper first outlines the key developments, and then highlights possible challenges in realising the regulatory goals on the ESG front.

Key words: Corporate social responsibility; environmental, social and governance factors; shareholder stewardship; directors' duties; corporate disclosures

1. Introduction: The Transition from CSR to ESG

The concept of corporate social responsibility (CSR) has had a pivotal status in the debates surrounding corporate law and governance at the turn of the century.[1] Although CSR was ensconced in the idea of voluntarism by which companies and their boards are invited to pay attention to the interests of various constituencies affected by a company's activities, in some

[*] Associate Professor, Faculty of Law, National University of Singapore. I thank Shubhra Wadhawan for excellent research assistance. Errors or omissions are mine.

[1] Iain MacNeil & Irene-Marié Esser, *From a Financial to an Entity Model of ESG*, 23 EUR. BUS. ORG. L. REV. 9, 10 (2022).

jurisdictions it has also acquired the status of a legal obligation.[2] However, a recent strain of literature has identified that the broader sustainability concerns surrounding corporate governance have focused more on ESG, and away from CSR as traditionally understood.

For instance, Professors MacNeil and Esser point to the fact that investors have begun to incorporate ESG factors into their decision-making to mitigate environmental, social and governance risks.[3] Termed as the 'financial model of ESG investing',[4] they argue that it is the role of capital and investors that drives sustainability efforts than the intention or obligation of corporate boards to cater to broader stakeholder interests. The authors contrast the financial model of ESG with what they term the 'entity model' where the focus is on board decision-making and the impact of corporate activities on the real world, regardless of the financial implications on the investors.[5] Here, the attention shifts from ESG investing to the interests of stakeholders more broadly (and directly).[6]

While ESG is generally considered to be market-driven, corporate and securities regulators around the world are beginning to modulate the ESG-orientation through legal or regulatory instruments, especially when it comes to ESG reporting. Such a phenomenon has also played out in India, the jurisdiction of study in this paper.[7] The developments in India merit greater analysis for a number of reasons: at around 1.4 billion, it is one of the most populous countries in the world; it not only attracts significant foreign investment, but several Indian companies compete in the global product (and services) and capital markets; its experiments with the role of stakeholders in corporate have has garnered attention on the global stage.[8] While both CSR and ESG continue to coexist in India, due to certain peculiar connotations of CSR in that jurisdiction, the regulatory focus has shifted more towards ESG in recent years. First, it is clear that nowhere has CSR acquired a more prescriptive status than in India where the basic corporate statute, the Companies Act 2013 is rather elaborate about the obligations of companies to act in a manner that benefits the broader society, apart from shareholders.[9]

Second, India is one of only a handful of jurisdictions to require large companies to spend a stipulated amount—at least two per cent of average net profits made during the three immediately preceding financial years—in pursuance of their CSR policy towards specified

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[2] Umakanth Varottil, *Analysing the CSR Spending Requirements Under Indian Company Law*, *in* GLOBALISATION OF CORPORATE SOCIAL RESPONSIBILITY AND ITS IMPACT ON CORPORATE GOVERNANCE 231 (Jean J. Du Plessis, Umakanth Varottil & Jeroen Veldman eds., 2018).

[3] MacNeil & Esser, *supra* note 1, at 10.

[4] *Id*.

[5] *Id.*, at 15, 19. The entity model of ESG shares similarities with the conventional understanding of CSR. *Id.*, at 42.

[6] *Id.*, at 32.

[7] Some commentators have highlighted the transition towards the financial model of ESG in India. *See*, Rudresh Mandal & Ashwin Murthy, *CSR in the Post Pandemic Era: The Dual Promise of ESG Investment and Investor Stewardship*, 5 IND. L. REV. 229 (2021); Anik Bhaduri, *Fostering Socially Responsible Stewards: CSR and Investment Funds in India* (working draft on file with the author).

[8] Afra Afsharipour, *Redefining Corporate Purpose: An International Perspective*, 40 SEATTLE U. L. REV. 465, 467 (2017).

[9] Varottil, *supra* note 2, at 231.

activities.[10] While the Companies Act 2013 initially stipulated that the obligation was to be implemented on a 'comply-or-explain' basis, amendments to the legislation in 2019 have altered its status into one of a legal mandate.[11] To that extent, 'CSR in India is largely concerned with companies contributing a minimum amount of money towards social activities, thereby equating CSR with corporate philanthropy'.[12]

Third, and owing to its largely philanthropic tilt, the CSR regime in India fails to focus on the negative externalities generated by the regular business operations of companies, which has conventionally been captured within the domain of CSR elsewhere.[13] Given the conceptual dissatisfaction surrounding CSR in India,[14] the emerging trend of ESG takes on great importance.

Against this background, the goal of this paper is to build upon the transition outlined in the scholarly debates from CSR to ESG. Although ESG is well-understood to be market-driven, this paper focuses instead on the legal and regulatory measures governing ESG factors in India. It, therefore, examines the developments and challenges surrounding ESG in India along three fronts. First, the paper explores the roles and responsibilities of corporate boards in accounting for ESG factors in their decision-making process. Second, and relatedly, it analyses the obligations of companies to engage in disclosure and reporting on ESG matters. Finally, viewed from the investor perspective, it examines ESG considerations that underpin the shareholder stewardship regime in India. On each of these aspects, the paper first outlines the key developments, and then highlights possible challenges in realising the regulatory goals on the ESG front. For the sake of brevity, Figure 1 outlines the relationship between CSR and ESG in India from a legal and regulatory perspective, together with the specific components of ESG being discussed herein.

[10] The Companies Act, No. 18 of 2013, INDIA CODE (2013) [hereinafter 'Companies Act 2013'], § 135(5). The list of specified activities that count for CSR spending is contained in schedule VII of the Act.

[11] Mandal & Murthy, *supra* note 7, at 231–232.

[12] Varottil, *supra* note 2, at 232.

[13] *Id.*, at 238 (noting that "activities undertaken in pursuance of the normal course of business of a company are excluded from CSR").

[14] Afra Afsharipour & Shruti Rana, *The Emergence of New Corporate Social Responsibility Regimes in China and India*, 14 U.C. DAVIS BUS. L.J. 175, 223–227 (2014); Rudresh Mandal, *Directors' Duties, CSR and the Tragedy of the Commons in India: Mutual Coercion Mutually Agreed Upon*, 23 ENVIRON. L. REV.144 (2021).

Fig. 1: The Relationship Between CSR and ESG (and its Components) in India[15]

The remainder of the paper proceeds as follows. Part 2 focuses on directors' duties under Indian corporate law and ESG considerations. Part 3 narrows on the specific obligations of Indian companies to engage in ESG disclosures and reporting. Part 4 considers the role of stewardship codes in India engendering the ESG orientation of institutional investors. Part 5 concludes.

2. Duties of Corporate Directors and ESG Considerations

Prevalent corporate governance debates shine the light on the need for greater emphasis on long-term sustainable value as opposed to the pursuit of profits solely for the benefit of shareholders.[16] Such ESG considerations have also received extensive support from the investor community on the basis that the longer-term interests of shareholders as well as other stakeholders enjoy a great deal of alignment.[17] Under such a dispensation, companies and their directors bear a duty to act to protect the long-term sustainable value for a broader range of constituencies beyond shareholders.[18]

Such an approach has been deep-rooted in Indian corporate policy making for over half a century. Consistent with the socialistic policies prevalent in India in the 1960, the role of corporate law went beyond a mere consideration of shareholder interests, and recognised the need to ensure protection of other constituencies such as employees, creditors, consumers and

[15] *See also*, MacNeil & Esser, *supra* note 1, at 11, for a depiction of the trilemma among the concepts of sustainability, CSR and ESG.
[16] *See*, Vikramaditya S. Khanna, *Global Asset Managers and the Rise of Long Term Sustainable Value,* NSE Q. BRIEFING, Oct. 2018, https://archives.nseindia.com/research/content/QB_October_2018.pdf.
[17] *See, e.g.*, Barnali Choudhury, *Aligning Corporate and Community Interests: From Abominable to Symbiotic*, 2 BYU L. REV. 257, 269 (2014).
[18] Peter Atkins, *Stockholders Versus Stakeholders—Cutting the Gordian Knot*, HARVARD LAW SCH. FORUM ON CORP. GOVERNANCE (Aug. 24, 2020), https://corpgov.law.harvard.edu/2020/08/24/stockholders-versus-stakeholders-cutting-the-gordian-knot/.

society.[19] Moreover, the idea of 'public interest' found a place in the then prevalent Companies Act 1956, which signifies the expansion of corporate law from merely considering private interests to one that broadens the horizons to incorporate the societal impact of a company's activities.[20] The outlook of the Indian judiciary adopted a similar turn.[21] After some interim vacillation, the enactment of the Companies Act 2013 witnesses a resurgence of the public orientation of corporate law in India, although in a more nuanced fashion. One finds the best reflection of this approach in the codification of directors' duties in the 2013 legislation. Section 166(2) of the Companies Act 2013 provides:

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

Here, this paper makes two assertions: that (i) section 166(2) resonates with the financial model of shareholder-driven ESG in that it requires directors to consider the long-term interests of the company rather than the short-term interests; and (ii) the provision also requires directors to specifically account for the interests of non-shareholder constituencies, which comports with the entity model of ESG.

2.1 Best Interests of the Company; Duties of Competence

Section 166(2) of the Companies Act 2013 treats the interests of the company as separate and distinct from that of the shareholders, or any of the other specified stakeholders. Although the text of the legislation does not offer any obvious interpretation, there is sufficient authority to indicate that, from a temporal standpoint, directors must favour the long-term sustainable interests of the company over any short-term interests that largely encapsulate shareholder considerations.[22] Directors must discharge their duty to act for the company's wellbeing and interest.[23] It is clear that the best interests test is not synonymous with the short-term interests of the current shareholders. Rather, the long-term vision for the company that directors are statutorily required to employ has to align with the interests of shareholders as well as other stakeholders, and is entirely consistent with the stakeholder-oriented approach to corporate law.

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[19] Umakanth Varottil, *The Stakeholder Approach to Corporate Law: A Historical Perspective from India*, *in* RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW 381, 386–387 (Harwell Wells ed., 2018).

[20] *Id.*, at 387.

[21] *See e.g.*, National Textile Workers v. P.R. Ramakrishnan, (1983) 1 S.C.R. 9, ¶4 (enunciating that "a company is now looked upon as a socio-economic institution wielding economic power and influence the life of the people").

[22] Mihir Naniwadekar & Umakanth Varottil, *The Stakeholder Approach towards Directors' Duties under Indian Company Law: A Comparative Perspective*, *in* THE INDIAN YEARBOOK OF COMPARATIVE LAW 110 (Mahendra Pal Singh, ed., 2016). *See also*, Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad, (2005) 11 SCC 314, ¶42 (India).

[23] Ferrucio Sias v. Shri Jai Manga Ram Mukhi, (1994) 28 DRJ 143 (Delhi), ¶72.

The above analysis suggests that directors of Indian companies would be required to identify and address ESG risks, such as climate change, and implement strategies to address them. This aligns itself with the financial model of ESG because risks such as climate change could bring about direct financial impact on companies, especially those in industries that are particularly vulnerable to climate effects.[24] Moreover, a company's indifferent attitude towards ESG risks could also invite adverse reputational repercussions, with the shareholders ultimately facing the financial consequences.[25] For example, directors could be exposed to liability if they display conscious disregard or willful neglect towards the ESG risks emanating from the operations of a company, such as environmental impact.[26] This could also arise when the directors measure the success of the company (and their own) by deploying short-term yardsticks rather than alternative strategies that would have accounted for long-term sustainable value.[27]

While scholarly literature on stakeholder responsibility of corporate boards in India focuses largely on section 166(2), it is also necessary to supplement the analysis by examining the directors' duties of competence, which emanate from two sources. The first is section 166(3) of the Companies Act, which stipulates that the directors of a company shall exercise their 'duties with due and reasonable care, skill and diligence and shall exercise independent judgment'. Although this statutory provision is yet to receive significant judicial attention, it is clear that directors must inform themselves sufficiently about the business of the company and its associated risks, which include ESG risks that are increasingly acquiring significant importance in the governance discourse.[28] Moreover, the interpretation of the statutory provision is a dynamic process: the more prominence ESG receives in the corporate governance discourse, the more directors would be required to pay attention to it in the discharge of their duties. As Lord Sales observed in a more global context, an 'assessment of the practical implications of those duties has to take account of the general environment of expectation crated by initiatives by regulators and in civil society.'[29] Directors could be found legally wanting if they either fail to consider these risks altogether, or if they consider them inadequately.

The second element of competence duties comprises the detailed risk management framework prescribed by Indian corporate and securities law regimes that directors are

[24] Umakanth Varottil, *Commonwealth Climate & Law Initiative, Directors' Liability and Climate Risk: White Paper on India* (Oct. 24, 2021), https://ssrn.com/abstract=3936428.

[25] *Id.*

[26] For a broader discussion of these considerations in the international arena, *see* Ellie Mulholland, Sarah Barker, Cynthia Williams & Robert G. Eccles, *Climate Change and Directors' Duties: Closing the Gap between Legal Obligation and Enforcement Practice*, *in* THE HANDBOOK OF BOARD GOVERNANCE 335, 346–349 (Richard Leblanc ed., 2d ed. 2020).

[27]Varottil, *supra* note 24, at 25.

[28] *Id.*, at 29.

[29] Lord Sales, Justice, Supreme Court of the U.K., Directors' Duties and Climate Change: Keeping Pace with Environmental Challenges, Speech to the Anglo-Australasian Law Society (Aug. 27, 2019), at 10, https://www.supremecourt.uk/docs/speech-190827.pdf.

required to adopt and implement. Such a framework is contained in the Companies Act 2013, which applies to all companies, and in the SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 (hereinafter the 'SEBI LODR Regulations') issued by India's securities regulator, the Securities and Exchange Board of India (hereinafter 'SEBI'), which apply only to publicly listed companies. The Companies Act requires the board of directors to include in its annual report a statement indicating the development and implementation of a risk management policy.[30] Given that ESG risks on matters such as climate change could be significant, boards would need to incorporate them in their risk analysis. Moreover, independent directors are called upon to bring to bear their 'independent judgment' on matters relating to risk management.[31] Similarly, under the LODR Regulations, board responsibilities include reviewing and guiding the company's risk policy, and ensuring that appropriate mitigating mechanisms for addressing risks are in place.[32] Moreover, large companies are also required to establish risk committees comprising directors.[33]

Given the increasing importance of ESG factors in corporate law, directors of Indian companies would bear the responsibility to keep up with developments in the field and address possible ESG risks through appropriate mitigating mechanisms. Similarly, where there are risk committees, their members would bear specific (and arguably greater) responsibility in this regard, particularly for companies operating in sectors that are more vulnerable to ESG risks.

2.2 Best Interests of Various Stakeholders

Apart from acting in the interests of the company, under section 166(2) of the Companies Act 2013, directors are also required to specifically consider the interests of various constituencies identified therein. This goes to the heart of the corporate purpose debate that has reoccupied space in the legal academy lately.[34] The statutory enactment process as well as the express language of the provision in India indicate that there is a positive duty (and not merely an option) on the part of the directors requiring them to consider various stakeholder interests. In that sense, it is an obligatory provision rather than merely a permissive one. It is also noteworthy that the Companies Act also imposes obligations specifically on independent

[30] Companies Act 2013, *supra* note 10, § 134(3)(n).

[31] Companies Act 2013, *supra* note 10, Schedule IV, clause II(1).

[32] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, Gazette of India, pt. III sec. 4 (Sept. 2, 2015), as amended through Jul. 25, 2022 [hereinafter 'SEBI LODR Regulations'], § 4(2)(f)(ii)(7).

[33] *Id.*, § 21(5).

[34] *See*, *e.g.*, Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309 (2021); Edward B. Rock, *For Whom is the Corporation Managed in 2020? The Debate over Corporate Purpose*, 76 BUS. LAW. 363 (2020). For a discussion on the topic in the context on India, *see*, Afsharipour, *supra* note 8.

directors to 'safeguard the interests of all stakeholders'[35] and to 'balance the conflicting interest of the stakeholders',[36] apart from the requirement to 'assist in protecting the legitimate interests of the company, shareholders and its employees'.[37] Clearly, the legislation requires independent directors on Indian corporate boards to take into account the interests of non-shareholder constituencies.

As I have argued elsewhere,[38] while the broad theme of section 166(2) may appear ostensibly similar to section 172 of the UK Companies Act 2006, there are fundamental distinctions between the two legislative provisions. The Indian statute adheres to the 'pluralist' approach which requires directors to treat the interests of various specified stakeholders on an equal footing without any stated hierarchy.[39] Contrast this with the enlightened shareholder-value model exhibited by section 172 of the UK legislation under which the protection of the interests of various stakeholders doubles up as the optimal means to generate enhanced shareholder value.[40]

Section 166(2) and its stakeholder orientation have lately been receiving attention from the Indian Supreme Court. In *M.K. Ranjitsinh v. Union of India*,[41] the Court was concerned with the specific duty of the directors to consider 'the protection of the environment' and treated it to be on par with duties to other stakeholders, including shareholders. Since the expression 'environment' does not find a definition in the Companies Act, the Court readily imported the meaning ascribed to the term under section 2(a) of the Environment (Protection) Act 1986, which defines the word to include the 'inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organisms and property.'[42] The width of this definition is adequately capable of accommodating several ESG risks. Legal counsel in India have opined that a 'decision taken seemingly in the financial interest of the company and its shareholders, but which is detrimental to the environment, may transgress section 166.'[43] Hence, ESG considerations are not merely optional for directors to consider on a voluntary basis, but they carry more onerous legal obligations.

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[35] Companies Act 2013, *supra* note 10, Schedule IV, ¶ II(5).

[36] Companies Act 2013, *supra* note 10, Schedule IV, ¶ II(6).

[37] Companies Act 2013, *supra* note 10, Schedule IV, ¶ III(12).

[38] Naniwadekar & Varottil, *supra* note 22.

[39] *See*, Amir N. Licht, *Stakeholder Impartiality: A New Classic Approach for the Objectives of the Corporation* 13 (European Corp. Governance Inst., Law Working Paper No. 476/2019 13), https://ssrn.com/abstract=3459450 (observing that 'India's Companies Act, 2013 presents the most dedicated attempt to date to implement a formal pluralistic, stakeholder-oriented duty', which is to 'put the interests of all stakeholder constituencies on the same level as constitutive elements of the interest of the company').

[40] Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59 (2010).

[41] 2021 SCC OnLine SC 326, ¶14.

[42] *Id*.

[43] SHYAM DIVAN, SUGANDHA YADAV & RIA SINGH SAWHNEY, LEGAL OPINION: DIRECTORS' OBLIGATIONS TO CONSIDER CLIMATE CHANGE-RELATED RISK IN INDIA 13 (Sept. 7, 2021), https://ccli.ubc.ca/wp-content/uploads/2021/09/CCLI_Legal_Opinion_India_Directors_Duties.pdf.

Separately, in *Tata Consultancy Services v. Cyrus Investments Private Limited*,[44] in the context of section 166(2) the Supreme Court observed that 'the history of evolution of the corporate world shows that it has moved from the (i) familial to (ii) contractual and managerial to (iii) *a regime of social accountability and responsibility*.'[45] It then went on to note that '[w]hat is ordained under Section 166(2) is a combination of private interest and public interest.'[46]

While the duty to act in the interests of the company, and more specifically the long-term interests, retains within itself the idea of ESG as financial risk, the additional elements in section 166(2) that impose duties to consider the interests of specific constituencies such as those affected by the environment has the effect of extending beyond merely treating ESG from a financial risk perspective. This requires directors to consider ESG matters regardless of their associated financial implications. Returning to the terminology used by MacNeil and Esser, the Indian statutory regime, as supplemented by judicial exposition, moves the needle beyond the 'financial model of ESG' and extends it to encompass even an 'entity model of ESG', which brings it closer to the conventional understanding of CSR that seeks to address negative externalities caused by firms.

At the same time, it is clear that such a stakeholder-oriented duty may complicate board decision-making, in particular, due to the pluralistic approach adopted in section 166(2). In case of conflicts between various groups of stakeholders, directors may have to consider what is fair among them *inter se*. As I have illustrated elsewhere, 'the transition towards a low carbon economy could adversely affect the interests of stakeholders such as employees, whose interests have to be balanced against those of the environment.'[47] Moreover, the somewhat extensive discretion conferred upon directors to consider varying interests may have the effect of limiting any restraints on the exercise of that discretion.[48] This is particularly challenging given the intangibility and immeasurability surrounding the varied stakeholder interests.[49]

2.3 The Enforcement Conundrum

While the Indian legislature has taken steps to incorporate stakeholder- and ESG-related considerations into board decision-making, several questions have been raised on whether this amounts to mere rhetoric or whether the relevant duties of directors envisaged in section 166(2) of the Companies Act 2013 are enforceable.[50] At the outset, the Indian corporate

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[44] (2021) 9 SCC 449.
[45] *Id.*, ¶218.
[46] *Id.*, ¶224.
[47] Varottil, *supra* note 24, at 26.
[48] Naniwadekar & Varottil, *supra* note 22, at 112.
[49] *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003).
[50] *See, e.g.*, Devarshi Mukhopadhyay & Rudresh Mandal, *The End of Shareholder Primacy in Indian Corporate Governance? Says Who?!*, 46 COMMONW. LAW BULL. 595, 605 (2020).

statute does not specifically clarify whether directors owe their duties to the company or directly to the shareholders or other stakeholders. Nevertheless, it is generally understood under Indian corporate jurisprudence that the duties of directors are owed only to the company, which is also the accepted position in common law.[51] Hence, it is generally only the company that can initiate legal action for breach of directors' duties. However, if the board fails to bring an action, shareholders can initiate a derivative action, with the benefit of such action flowing to the company and not directly to the shareholders.

Derivative actions pose a number of challenges under Indian law. First, there is no statutory derivative action provided under the Companies Act, and parties must rely on common law to bring them. This necessitates invocation of the jurisprudence surrounding the age-old decision in *Foss v. Harbottle*,[52] and requires plaintiffs to establish the satisfaction of various pre-conditions such as 'fraud on the minority' and compliance with the 'clean hands' doctrine.[53] Second, derivative actions in India are extremely rare given the costs and delays involved in instituting them successfully, thereby depriving such actions of their efficacy.[54] Third, and most importantly, the law recognises that only shareholders can initiate derivative actions. Indian corporate law has not, at least as yet, recognised the ability of non-shareholder constituencies to bring derivative actions for breach of directors' duties to account for stakeholder interests. A related question is whether a shareholder can initiate a derivative action to assuage the interests of other stakeholders even when the shareholder's own rights are not affected.[55] This, too, is hard to justify given the current state of Indian law on derivative actions, although any form of expansion of the locus standi for claims cannot be ruled out.

Breaches of directors' duties could potentially attract two other types of claims under Indian law. The first relates to actions for oppression, prejudice and mismanagement ('OPM'). An OPM action may be brought if, among other things, the affairs of the company 'are being conducted in a manner prejudicial to public interest'.[56] This provision is rather wide because it can be invoked even on matters that go beyond the interests of the company and its shareholders. In that sense, if directors fail to account for ESG risks, it is reasonable to argue that this could attract the OPM remedy, at least insofar as broad societal concerns are affected by corporate action. However, this remedy can be invoked only by shareholders who hold a prescribed minimum number of shares in the company,[57] and is not available to other stakeholders.

[51] *Sangramsinh P. Gaekwad*, *supra* note 22, ¶42. *See also*, *Tristar Consultants v Vcustomer Services India Pvt. Ltd.*, 2007 SCC OnLine Del 359 (Delhi), ¶¶20–23.

[52] (1843) 2 Hare 461 (Eng.).

[53] Vikramaditya Khanna & Umakanth Varottil, *The Rarity of Derivative Actions in India: Reasons and Consequences*, *in* THE DERIVATE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH 369 (Dan W. Puchniak, Harald Baum & Michael Ewing-Chow eds., 2012).

[54] *Id.*, at 378–380.

[55] Naniwadekar & Varottil, *supra* note 22, at 112.

[56] Companies Act 2013, *supra* note 10, § 241(1).

[57] For the thresholds, *see* Companies Act 2013, *supra* note 10, § 244. Under this provision, and its accompanying rules, a petition needs to be supported by at least 100 shareholders or not less than one-tenth of

The second claim relates to class actions. Under section 245 of the Companies Act 2013, if shareholders are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its shareholders, they can initiate a class action. Here too, only shareholders holding a minimum number of shares are allowed to bring class action.[58] It is clear that the class action mechanism is oriented towards shareholders and does not explicitly recognise the interests of other stakeholders. It is, therefore, an open question whether the class action mechanism is intended to agitate any interests (such as that of non-shareholder constituencies) apart from the class of shareholders bringing the suit.

In the context of ESG matters, the scenario relating to enforcement of directors' duties bears considerable uncertainty. Viewing ESG from a financial risk perspective, it is clear that shareholders can seek to bring any of the actions discussed above under Indian corporate law. Presumably, such actions may be brought on the ground that, by not considering ESG factors and acting with a view towards long-term sustainable value, shareholders may suffer a loss. In these circumstances, ESG-oriented shareholders could potentially initiate legal action in their capacity as shareholders and to preserve and enhance the value of their shareholding in the company. However, viewing ESG beyond mere financial risk, matters become compounded. ESG-oriented shareholders may have a daunting task in initiating legal action for breach of directors' duties by applying the entity model of ESG, to which the enforcement mechanisms in India appeal ill-suited, at least as yet.

Given the tenuousness of the various actions in the context of ESG (except when it shareholder-risk based), commentators have gone to the extent of arguing that '[t]he directorial duty and stakeholder remedy models towards stakeholder protection therefore lack any legal bite in the Indian corporate landscape'.[59] Hence, unless the enforcement measures receive more targeted support through legislative amendments or judicial innovation, the now well-commented verbiage of section 166(2) will remain 'law in the books' as compared to 'law in action'.

In all, despite certain doctrinal holdups in ensuring an effective enforcement regime, directors' duties in India in the context of ESG has taken on greater prominence given the debates surrounding section 166(2), which one can ill-afford to ignore. One such duty of directors pertains to ensuring effective disclosures and reporting on ESG matters in the interests of utmost transparency, to which the paper now turns.

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the total number of its shareholders, whichever is less. Alternatively, it can be supported by such shareholders holding at least one-tenth of the issued share capital of the company.

[58] Companies Act 2013, *supra* note 10, § 245(3). Where a company has share capital, the class action must be supported by 100 shareholders or five percent of the total shareholders, whichever is less. Alternatively, shareholders holding at least five percent of the total issued share capital in the case of an unlisted company (or two percent in the case of a listed company) may initiate a class action.

[59] Mukhopadhyay & Mandal, *supra* note 50, at 605.

3. ESG Disclosures and Reporting

Historically, Indian law lacked a consistent framework for ESG reporting, although some companies did undertake disclosures on a voluntary basis. Over time, though, more defined requirements emanated for reporting on ESG risks. ESG reporting in India can be categorised into two parts: (i) general 'materiality' related disclosures; and (ii) business responsibility and sustainability reporting ('BRSR'). Each of these is discussed in turn.

3.1 Materiality Based Disclosures

Section 134(3) of the Companies Act provides that a report of the board of directors of the company must be placed before each annual general meeting of the shareholders. Such an annual report is required to contain several disclosures that necessitate the board's consideration of ESG risks. For instance, the board's annual report must carry details of material changes affecting the financial position of the company that may have occurred during the period to which the financial statements relate.[60] It must also contain a discussion regarding, among other things, the conservation of energy,[61] as well as details of the company's risk management policy and the manner in which it identifies and deals with risks that pose it an existential threat.[62] These, generally standard and uncontroversial, requirements ensure that ESG matters are captured in annual reporting by Indian companies.

Under the SEBI LODR Regulations, listed companies are also required to make disclosures of events or information that are, in the opinion of the board, material in nature.[63] For example, on matters relating to the environment, disclosures are to be made on 'material' events such as disruptions to the 'operations of any one or more units or divisions of the listed entity due to natural calamity (earthquake, flood, fire, etc.)'.[64] Although these issues may arise from climate risk, these regulations are more general in nature and are devoid of any precise guidance on the manner in which the materiality reporting mechanisms can be implemented in the context of ESG risks.

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'.[65] 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'.[66] The expansive

[60] Companies Act 2013, *supra* note 10, § 134(3)(l).
[61] Companies Act 2013, *supra* note 10, § 134(3)(m).
[62] Companies Act 2013, *supra* note 10, § 134(3)(n).
[63] SEBI LODR Regulations, *supra* note 32, § 30(1).
[64] SEBI LODR Regulations, *supra* note 32, Schedule III, Part A, ¶ B(6).
[65] Divan, Yadav & Sawhney, *supra* note 43, at 24. *See also*, Anik Bhaduri, *Taking the Heat: (Non)Disclosure of Climate Change Risks in India*, 42 BUS. L. REV. 152 (2021).
[66] *DLF Limited v. Securities and Exchange Board of India*, MANU/SB/0006/2015, ¶81.

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. …[67]

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. Overall, such a materiality-based disclosure is premised on introducing transparency on ESG (and other) matters that affect the decision-making of the investors, thereby making it consistent with the financial model of ESG.

3.2 Business Responsibility and Sustainability Reporting

Over more than a decade, the Government of India attempted to establish an appropriate policy framework to undertake sustainability reporting on a wider basis, even beyond the typical annual reporting and material reporting discussed in the previous sub-part. In 2010, the Ministry of Corporate Affairs ('MCA') issued the National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business ('NVGs'), and they were revamped in 2011.[68] Through nine principles and related core elements, the NVGs represented the bedrock of pronouncements towards ESG in Indian companies. Among others, the NVGs required businesses to conduct themselves with ethics, transparency and accountability, promote the wellbeing of employees, respect and promote human rights, and make efforts to restore the environment.

Following this, the original version of the BRSR took shape in the form of business responsibility reporting ('BRR') when SEBI made it mandatory for the top 100 listed companies by market capitalization to include BRR as part of their annual reports.[69] The format of the BRR essentially tracked the nine principles outlined by the Central Government in the NVGs. In 2015, with the issuance of the SEBI LODR Regulations, the BRR was extended to the top 500 listed companies by market capitalization, thereby expanding the

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

[68] MINISTRY OF CORP. AFFAIRS, GOV'T OF INDIA, NATIONAL VOLUNTARY GUIDELINES ON SOCIAL, ENVIRONMENTAL & ECONOMIC RESPONSIBILITIES OF BUSINESS (July 2011), https://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf.

[69] SEC. & EXCH. BD. OF INDIA, CIRCULAR, BUSINESS RESPONSIBILITY REPORTS (Aug. 13, 2012), https://www.sebi.gov.in/legal/circulars/aug-2012/business-responsibility-reports_23245.html [hereinafter 'BRSR Circular'].

scope of its coverage. Thereafter, in 2019, the SEBI LODR Regulations were amended to further expanded the BRR to the top 1,000 listed companies.[70]

In parallel, the MCA in March 2019 overhauled and modernised the NVGs in the form of the National Guidelines for Responsible Business Conduct ('NGRBCs').[71] Furthermore, an MCA-constituted Committee on BRR issued its report in May 2020 recommending that the SEBI BRR framework be revised to bring it in line with the NGRBCs.[72] In response to these developments, and following further consultation, SEBI amended the LODR Regulations (specifically regulation 34(2)(f)) to prescribe updated requirements for BRSR (instead of the previous BRR) along the lines of the NGRBC.[73] The BRSR framework came into effect from the financial year 2022-2023. Disclosures are required to be made along the lines of various principles outlined in the NGBRC (as set out in Table 1).

Table 1: Format for BRSR According to the Principles Outlined in the NRRBC[74]

Principle 1	Businesses should conduct and govern themselves with integrity, and in a manner that is ethical, transparent, and accountable
Principle 2	Businesses should provide goods and services in a manner that is sustainable and safe
Principle 3	Businesses should respect and promote the well-being of all employees, including those in their value chains
Principle 4	Businesses should respect the interests of and be responsible to all its stakeholders
Principle 5	Businesses should respect and promote human rights
Principle 6	Businesses should respect and make efforts to protect and restore the environment

[70] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Fifth Amendment) Regulations 2019, Gazette of India, pt. III sec. 4 (Dec. 26, 2019).

[71] MINISTRY OF CORP. AFFAIRS, GOV'T OF INDIA, NATIONAL GUIDELINES FOR RESPONSIBLE BUSINESS CONDUCT (2019), https://www.mca.gov.in/Ministry/pdf/NationalGuildeline_15032019.pdf.

[72] MINISTRY OF CORP. AFFAIRS, GOV'T OF INDIA, REPORT OF THE COMMITTEE ON BUSINESS RESPONSIBILITY REPORTING (2020), https://www.mca.gov.in/Ministry/pdf/BRR_11082020.pdf.

[73] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations 2021, Gazette of India, pt. III sec. 4 (May 5, 2021). *See also*, SEC. & EXCH. BD. OF INDIA, CIRCULAR, BUSINESS RESPONSIBILITY AND SUSTAINABILITY REPORTING BY LISTED ENTITIES (May 10, 2021), https://www.sebi.gov.in/legal/circulars/may-2021/business-responsibility-and-sustainability-reporting-by-listed-entities_50096.html.

[74] *See* BRSR Circular, *supra* note 69, Annexures I & II.

Principle 7	Businesses, when engaging in influencing public and regulatory policy, should do so in a manner that is responsible and transparent
Principle 8	Businesses should promote inclusive growth and equitable development
Principle 9	Businesses should engage with and provide value to their consumers in a responsible manner

Such a principle-wise disclosure is categorised into "essential" indicators, which every company must disclose, and "leadership" indicators that may be 'voluntarily disclosed by entities which aspire to progress to a higher level in their quest to be socially, environmentally and ethically responsible'.[75] Practitioners have commented that 'the BRSR framework is indeed a step in the right direction' and that it offers 'a uniform framework for ESG disclosures which emphasising the granularity and quantifiable presentation of data'.[76] At the same time, it is clear that the BRSR framework is still work-in-progress. Overall, the BRSR approach is less focused on risk to investors, and is aimed at generating wider disclosures that may benefits shareholders as well as other stakeholders. If the materiality-based reporting discussed earlier connects more closely with the financial model of ESG, the BRSR is more overarching to encompass the entity model of ESG as well.

3.3. Trends and Challenges in ESG Reporting

There has been a considerable increase in the incidence and quality of ESG reporting by Indian companies in recent years. A process that largely began due to pressure from investors (particularly foreign institutions) receive further momentum through constantly revised regulatory mandates over the last decade. However, a number of challenges remain.

First, the global standards relating to ESG reporting are evolving at a rapid pace. Although the BRSR framework draws some inspiration from the GRI framework at the global level,[77] there is no clarity that Indian companies are complying with GRI on a uniform basis.[78]

[75] BRSR Circular, *supra* note 69, Annexure I, Section C.

[76] Arjun Goswami, Avinash Das & Anmol Jain, *An Introduction of ESG Disclosures in Indian Regulatory Space – Part 2*, CYRIL AMARCHAND BLOGS (Dec. 6, 2021), https://corporate.cyrilamarchandblogs.com/2021/12/an-introduction-of-esg-disclosures-in-indian-regulatory-space-part-2/.

[77] Sudipto Dey, *Sustainability in the Spotlight: Decoding India's ESG Regulatory Landscape*, THE ECONOMIC TIMES (May 26, 2022), https://economictimes.indiatimes.com/prime/corporate-governance/sustainability-in-the-spotlight-decoding-indias-esg-regulatory-landscape/primearticleshow/91796559.cms.

[78] GLOB. REPORTING INITIATIVE, 2020 SUSTAINABILITY REPORTING TRENDS IN SOUTH ASIA (BANGLADESH, INDIA, SRI LANKA), https://www.globalreporting.org/media/i4udupws/sa-trends-2019-publication.pdf.

Greater comparability of the GRI with prominent global reporting standards will enable comparison of Indian company reporting trends with those in other economies. For instance, as for climate change, the most notable global effort 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.[79] 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. However, the BRSR efforts do not, as yet, appear to benchmark against the TCFD framework on the ever-increasing disclosure requirements surrounding climate risk.

Second, the BRSR is stated to still lack comprehensiveness as compared to international standards, with the observation that the disclosure requirements are 'minimal, generic, and improperly structured when compared to the international frameworks such as that of the EU or [TCFD].'[80] More specifically, the BRSR framework is found to be 'generic, a boilerplate arrangement for disclosures, and is silent on specific sectoral requirements'.[81] Such a sector-specific approach merits consideration given that different industries are affected on varied lines on ESG matters. For instance, certain industries are more vulnerable to the transition risk emanating from climate change. More generally, unless company managements are compelled to outline the impact of ESG risks, the specific consequences on various stakeholders and the company's strategy for addressing them, such reporting carries the risk of primarily signifying rhetoric and magnify the possibilities for 'green washing'.

Third, there is a lack of clarity regarding the precise audience that the BRSR is intended to serve. Given that the reporting requirements are driven essentially by SEBI as the regulator of the securities markets, it is intuitive to consider shareholders as the beneficiaries of the disclosures. However, the details of the reporting requirements, such as materiality assessment of ESG risks points towards a diverse range of other stakeholders as well, including employees, environment, consumers and the community. This carries the risk that non-shareholder constituencies may rely upon what is targeted primarily at an investor audience.

Finally, the BRSR framework does not require third party verification of ESG disclosures so as to ensure their completeness and enhance their credibility.[82] This would ensure that the government's and regulator's role of enforcing the ESG disclosure obligations is supplemented by gatekeeping obligations discharged by auditors or independent verifiers on ESG disclosures, especially of the non-financial variety.

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[79] TASK FORCE ON CLIMATE-RELATED DISCLOSURE, RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, FINAL REPORT (June 2017), https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf.

[80] Goswami, Das & Jain, *supra* note 76.

[81] *Id*.

[82] *Id.* (noting that the 'BRSR framework does not mandate external assurance and independent audit of the disclosures'). *See also*, IndusLaw, *ESG Reporting and its Framework in India*, THE LEGAL 500 (Feb. 2, 2022), https://www.legal500.com/developments/thought-leadership/esg-reporting-and-its-framework-in-india/.

Related to the above point, SEBI has recently noted that the BRSR framework and the increasing focus on ESG reporting will likely spawn a cottage industry of ESG ratings providers ('ERPs'), which is not currently within the regulatory domain or oversight of SEBI. Hence, it perceives a risk that opacity in the area of ESG ratings coupled with potential conflicts of interest involving ERPs could lead to greenwashing and misallocation of assets among investors. Hence, in January 2022, SEBI issued a consultation paper by which it has sought to consult various stakeholders on a proposed regulatory framework to regulate ERPs and to impose greater oversight on such intermediaries, including to ensure greater transparency regarding their roles and activities.[83] Depending on the conclusions of the consulting process, it is likely that intermediaries such as ERPs will be subject to some level of regulation by SEBI.

After considering the state of play on ESG reporting requirements, trends and challenges, this paper now moves to discuss the regulatory requirements imposed on a key consumer of these disclosures, being institutional investors, and the role they are expected to play on matters of ESG relating to the companies in which they invest.

4. Shareholder Stewardship and ESG[84]

Stewardship codes have proliferated around the world over the last decade or so, and the Indian regulators have jumped on the bandwagon as well. These codes focus on the role that institutional investors play as stewards of the companies in which they invest.[85] In some cases, the stewardship codes also expressly recognise the need for investors to go beyond merely considering shareholder interests and take into account ESG matters.[86] In devising stewardship codes for various types of institutional investors, the relevant regulators in India, as I have noted elsewhere,[87] looked to the UK as a model.

The story of regulatory efforts in shareholder stewardship in India is one of fragmentation, as regulators overseeing three different types of institutional investors have issued their own stewardship codes. In March 2017, the Insurance Regulatory and Development Authority of

[83] SEC. & EXCH. BD. OF INDIA, CONSULTATION PAPER ON ENVIRONMENT, SOCIAL AND GOVERNANCE (ESG) RATING PROVIDERS FOR SECURITIES MARKETS (Jan. 24, 2022), https://www.sebi.gov.in/reports-and-statistics/reports/jan-2022/consultation-paper-on-environmental-social-and-governance-esg-rating-providers-for-securities-markets_55516.html.

[84] Some of the material in this part is drawn from Umakanth Varottil, *Shareholder Stewardship in India: The Desiderata*, *in* GLOBAL SHAREHOLDER STEWARDSHIP 360 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022).

[85] *See*, Jennifer G Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497, 506–07 (2018).

[86] Dionysia Katelouzou, *Shareholder Stewardship: A Case of (Re)Embedding the Institutional Investors and the Corporation?*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 585 (Beate Sjåfjell & Christopher M. Bruner eds., 2019).

[87] Varottil, *supra* note 84.

India ('IRDAI') issued a set of guidelines on a stewardship code for insurers in India.[88] In 2018, the Pension Fund Regulatory and Development Authority ('PFRDA') issued guidelines on a stewardship code for pension funds.[89] Finally, in 2019, SEBI issued a stewardship code for mutual funds and alternative investment funds.[90] Following these regulatory efforts, the various types of institutional investors have adopted stewardship codes on the lines prescribed by their respective regulators.

Interestingly, the concept of ESG is inherent in the stewardship codes issued by all three regulators. First, principle 1 of the codes, which require that institutional investors devise a comprehensive policy on stewardship responsibilities, define such responsibilities to include ESG 'opportunities or risks.' Moreover, under principle 3 of the codes, whereby institutional investors are required to monitor their investee companies, it is clarified that the areas of such monitoring include ESG risks. While the emphasis on ESG in the stewardship codes cannot be underemphasised, it is altogether clear that the focus is on a financial and risk-based assessment of ESG by investors rather than on a broader entity-based understanding of ESG or stakeholder interests more generally. As I have argued separately,[91] such a financial model of ESG comports more closely with the UK understanding of enlightened shareholder-value (emanating from section 172 of the UK Companies Act 2006)[92] rather than the more pluralistic approach inherent under Indian corporate law. There is a number of grounds to support this argument.

First, despite the allusion to ESG, the three stewardship codes continue to remain adherent to the idea of shareholder primacy, wherein the mitigation of ESG risk is considered necessary primarily to generate enhanced shareholder value. The objectives of the stewardship codes explicate their shareholder orientation, which is for the institutional investors to best protect the interests of their investment constituencies and to generate the most optimal returns for them. For instance, the IRDAI stewardship guidelines are focused on insurance companies 'as custodians of policyholders', wherein stewardship is seen as a means to 'ultimately improve the return on investments of insurers'.[93] Similarly, the PFRDA views stewardship as being 'intended to protect the subscribers' pension wealth' and that corporate governance in

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[88] INS. REGULATORY & DEV. AUTH. OF INDIA, GUIDELINES ON STEWARDSHIP CODE FOR INSURERS IN INDIA (Mar. 22, 2017), https://www.irdai.gov.in/ADMINCMS/cms/frmGuidelines_Layout.aspx?page=PageNo3096&flag=1. These guidelines were revised in 2020. INS. REGULATORY & DEV. AUTH. OF INDIA, REVISED GUIDELINES ON STEWARDSHIP CODE FOR INSURERS IN INDIA (Feb. 7, 2020), https://www.irdai.gov.in/ADMINCMS/cms/whatsNew_Layout.aspx?page=PageNo4045&flag=1.

[89] PENSION FUND REGULATORY & DEV. AUTH., CIRCULAR, COMMON STEWARDSHIP CODE (May 4, 2018), https://www.pfrda.org.in//MyAuth/Admin/showimg.cshtml?ID=1329.

[90] SEC. & EXCH. BD. OF INDIA, CIRCULAR, STEWARDSHIP CODE FOR ALL MUTUAL FUNDS AND ALL CATEGORIES OF AIFS, IN RELATION TO THEIR INVESTMENT IN LISTED EQUITIES, (Dec. 24, 2019), https://www.sebi.gov.in/legal/circulars/dec-2019/stewardship-code-for-all-mutual-funds-and-all-categories-of-aifs-in-relation-to-their-investment-in-listed-equities_45451.html.

[91] Varottil, *supra* note 84, at 373-374.

[92] *See*, text accompanying *supra* note 40.

[93] INS. REGULATORY & DEV. AUTH. OF INDIA, GUIDELINES ON STEWARDSHIP CODE FOR INSURERS IN INDIA, *supra* note 88 (introductory letter accompanying the Guidelines).

the investee companies must give a ‘greater fillip to the protection of the interests of the subscribers in such companies’.[94] Even SEBI envisages that institutional investors will engage in stewardship ‘to protect their clients’ wealth’ and ‘as an important step towards improved corporate governance’.[95] The objectives of stewardship are to protect the interests of the respective beneficiaries of the institutional investors, being insurance policyholders, pension subscribers and mutual fund (or AIF) unitholders.

Second, as seen earlier, section 166(2) of the Companies Act 2013 extends beyond the financial model of ESG and well into the entity model, in that boards and managements of companies bear stakeholder responsibility. On the other hand, the stewardship codes emanating from the three regulators in India expressly seem to be driven by the need to protect the long-term interests of the beneficiaries of the various types of institutional investors. While it might generally be the case that the long-term interests of the beneficiaries (even applying a financial, risk-based approach) would be consistent with the entity-oriented model of ESG that focuses on sustainable activities of the company, the current stewardship model does not provide ample guidance towards the resolution of potential conflicts between shareholder interests and other stakeholder concerns, were they to arise.

Third, a well-designed stewardship regime could help address some of the concerns emerging from the structure of the stakeholder approach in Indian corporate law and governance. As seen earlier,[96] one of the primary criticisms of the stakeholder approach towards directors’ duties under Indian corporate law is that there is a lack of clarity on whether non-shareholder constituencies can exercise any legal remedies or enforcement mechanisms in case of breaches of directors’ duties to consider stakeholder interests. An appropriate stewardship regime that enables shareholders (who bear remedies such as shareholder derivative actions and shareholder class actions) could potentially use those tools to benefit broader stakeholder interests. It can thereby fill the gap in enforcement that the stakeholder regime in India presently suffers from.

In all, while the somewhat novel shareholder stewardship regime in India does recognise ESG risks and opportunities, it does so from a pure financial and shareholder-oriented perspective. This militates against the entity model that encompasses broader stakeholder interests as envisaged for board duties under the Companies Act. Hence, the IRDAI, PFRDA and SEBI would do well to bridge the conceptual gap between the stewardship codes and company law when it comes to dealing with ESG matters.

Even if the stewardship codes issued by the Indian regulators were to be finetuned to address ESG matters more fully in a manner that is consistent with the Indian stakeholder model, significant questions remain about the effective implementation of the stewardship codes. It

[94] PENSION FUND REGULATORY & DEV. AUTH., *supra* note 89 (introductory letter accompanying the Common Stewardship Code).

[95] SEC. & EXCH. BD. OF INDIA, *supra* note 90 (introductory letter accompanying the Stewardship Code, para. 1).

[96] *Supra* part 2.3.

is not entirely clear whether the Indian stewardship codes are operable on a 'comply-or-explain' basis or if they are mandatory. Even if they are mandatory, it remains open what the enforcement mechanisms are. At the outset, India has displayed a dependence on government regulation of the corporate sector rather than reliance on voluntary codes. Unlike the UK, where the influence of institutional investors played a part in arriving at a code-based approach to stewardship, the institutional investors in Indian companies tend to play less of a direct role in the governance of investee companies. For these reasons, a mandatory stewardship regime in the form of hard law is more suitable for India rather than a code-based soft law approach. Even though the Indian stewardship codes superficially appear mandatory in nature, it is not clear how the regulators would address instances of non-compliance, and what the accompanying sanctions might be. To that extent, the implementation of the stewardship codes generates considerable doubt.

In all, there has been a significant move in recent years towards ESG investing in India.[97] The regulators have followed suit to establish a stewardship regime, albeit a fragmented one. Although ESG is explicitly incorporated as part of the considerations for stewardship engagement by institutional investors with their investee companies, it only takes into account the financial risk-based approach towards ESG and not the more entity-oriented formulation that is more consistent with the stakeholder responsibility of corporate boards in India. This area necessitates a regulatory reevaluation.

5. Conclusion

Th concept of CSR has commanded considerable attention in India in recent years, although the discourse surrounding ESG has been catching up more lately. While existing literature has categorised ESG into the financial model (i.e., risk-based ESG investing) and the entity model (stakeholder-oriented approach that is akin to the conventional understanding of CSR), both versions are evident in the Indian legal and regulatory push towards offering greater recognition to ESG. At the same time, the concept of CSR has been caught in an intellectual quagmire due to the excessive focus on a tax-like corporate spending mechanism, rather than wider stakeholder responsibility of corporations.

As the findings in this paper demonstrate, India's focus on directors' duties to consider shareholders as well as other constituencies lay a strong statutory foundation for the legal recognition of ESG, both on a financial basis and an entity approach. Coupled with this are strong regulatory moves by the Indian financial regulators (including SEBI) to develop ESG reporting and to encapsulate ESG concerns as part of shareholder stewardship initiatives.

[97] *See*, Gopal K. Sarangi, *Resurgence of ESG Investments in India: Toward a Sustainable Economy*, (Asian Dev. Bank Inst., Working Paper No. 1284 (Aug. 2021), https://www.adb.org/sites/default/files/publication/736786/adbi-wp1284.pdf; Ria Sinha, *Despite Challenges, ESG Investing is Gaining Momentum in India*, MONEYCONTROL (Sep. 28, 2021, 03:51 PM IST), https://www.moneycontrol.com/news/opinion/despite-challenges-esg-investing-is-gaining-momentum-in-india-7518081.html.

Although there have been significant legislative and regulatory measures towards ESG in India, several challenges remain, and the efforts thus far can only be considered to be work-in-progress.

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