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ENVIRONMENT, SOCIAL AND GOVERNANCE (ESG) **FRAMEWORK IN INDIA: REGULATORY** **FRAMEWORK, DISCLOSURE AND ACCOUNTABILITY** **BY CORPORATIONS**

AUTHORED BY - SRIJA VELLANKI

CHRIST (Deemed to be University) Pune Lavasa Campus

Abstract

In India, the adoption of the ESG framework as part of the country's regulatory system has been a progressive process, moving from being a voluntary corporate practice to being more institutionalized. This paper seeks to assess the legal regime concerning ESG in India, paying attention to key sources of law, namely, the Companies Act of 2013, SEBI's Business Responsibility and Sustainability Reporting framework, and the Ministry of Corporate Affairs' National Guidelines on Responsible Business Conduct. In particular, it is shown that disclosure requirements have come to be considered integral to the governance process in companies, necessitating internal systems for the collection of information, determination of material issues, and oversight by company boards, with an increasing emphasis on transparency and external assurances. The constitutional and judicial underpinning of ESG is also assessed in the context of some landmark cases in the area of environmental law in India, with specific mention made of the concepts of sustainable development, precautionary principle, and the polluter pays principle that were adopted in some court decisions. Finally, major challenges to implementing ESG in India are identified, among them being regulatory fragmentation, lack of coherence of compliance mechanisms, and increased risks of greenwashing due to undefined terms and lack of mandatory verification requirements. The concept of corporate liability in connection with climate change is touched upon, especially the role of disclosure regimes and public interest litigation in the development of new forms of corporate accountability. Despite the gaps, particularly those in terms of enforcement and causation, it is expected that ESG will play an ever-increasing role in governance frameworks in India.

Introduction

Corporations are no longer able to choose whether to report on environmental, social and governance (ESG). ESG is now part of how investors do due diligence on their investments and hold companies accountable for their actions. With pressure coming from both global investors and national policies aimed at aligning corporate practices with sustainable development goals, ESG will therefore have transitioned from being reported voluntarily by a company to being reported formally in a formally mandated environment in India¹.

This paper will examine the legal and regulatory framework, policy guidance, ratings systems and case law that govern how listed companies in India manage, disclose and are held accountable for their performance with respect to environmental and social issues.

The Regulatory Framework

The ESG framework in India is based on a set of overlapping instruments that work at different levels, namely company law, capital market regulation, national guidance documents, and sectoral environmental/Statutory controls. It is critical to understand how these instruments interact with each other in order to determine where the corporate responsibilities are mandatory and where they are voluntary.

At the statutory level, the Companies Act brought in a highly prescriptive form of corporate social responsibility. Section 135 of the Companies Act, 2013² states that companies above certain thresholds of net worth, turnover, or profit are required to form a CSR committee and spend, at least, two percent of their average net profits on activities specified in Schedule VII. This section brought about a paradigm shift in what was hitherto a philanthropic activity and made it a statutory corporate governance requirement for medium and large-scale companies, with the board of directors and the CSR committee having the legal mandate to make policies and ensure compliance with spending and reporting requirements. The text of Section 135 of the Companies Act and the statutory schedule clearly indicates that corporate social responsibility in India is not optional but a mandatory corporate responsibility with board-level In the area of capital markets, the securities regulator has taken a decisive step to harmonize ESG disclosure for listed companies. The Securities and Exchange Board of India has issued a landmark circular in May 2021 that replaced its previous Business Responsibility Report (BRR) system with the Business Responsibility and Sustainability Report (BRSR) framework.

¹ Securities and Exchange Board of India, Business Responsibility and Sustainability Reporting circular (May 10, 2021) and BRSR Annexure.

² Section 135, Companies Act, 2013 (Corporate Social Responsibility).

The BRSR is important in three ways. First, it broadens the disclosure spectrum – from governance and traditional responsibility metrics to a vastly more detailed set of quantitative environment and social data, such as emissions, water use, waste, human capital metrics, and supply chain practices. Second, the SEBI system is gradual, where the BRSR was optional for an initial phase and then mandatory for the largest listed companies by market capitalization, which is an indication of the likely pathway towards making ESG disclosure mandatory for all. Third, the BRSR template is designed to enable third-party verification and comparison, which is an indication of the regulatory requirement for ESG data verification. The SEBI circular and the Annexure outlining the BRSR template provide the operational framework that listed companies are required to comply with.

In addition to the legal framework, the Government of India introduced a principle-based set of expectations for responsible business conduct. The Ministry of Corporate Affairs introduced the National Guidelines on Responsible Business Conduct (NGRBC)³, an evolution of the previous voluntary national guidelines, to harmonize domestic expectations with international frameworks such as the UN Guiding Principles on Business and Human Rights and OECD guidelines. The NGRBC is clearly non-statutory, but it has a nine-principle framework that includes purpose and governance, human rights, labor practices, environment, fair competition, and consumer protection. Its utility is in providing a common yardstick for boards and compliance officers to align policies and due diligence even when the law is silent or sector-specific.

Disclosure Regime in ensuring assurance and corporate governance

SEBI's BRSR is at the forefront of disclosure in India. The BRSR makes a clear distinction between general disclosures and specific performance indicators on environment and social issues. Under the environment, the disclosures include GHG emissions (scope 1 and scope 2, if applicable), energy use, water withdrawal and recycling, hazardous and non-hazardous waste generated and managed, and climate change risk governance. On the social front, the BRSR seeks information on the composition of the workforce, diversity, health and safety performance of workers, human rights due diligence, community investments, and supply chain practices. Notably, the BRSR framework ensures that disclosures are material: firms are required to identify ESG topics that are material to their business and provide rationale for exclusions and boundaries in data. The BRSR Annexure is the technical document that outlines

³ National Guidelines on Responsible Business Conduct (NGRBC), Ministry of Corporate Affairs (2019).

these disclosures.

In India, disclosure is more than just completing templates: it is about setting up systems. Doing BRSR reporting correctly means having data aggregation systems in place, ownership of data points in functional teams (operations, HR, procurement, finance), and board-level oversight that is attested to by audit and risk committees. The biggest operational hurdle in this regard is often the integration of these systems for companies that have been doing compliance in a siloed manner. To increase disclosure credibility, there is a growing demand from regulators and investors for third-party assurance. The BRSR is designed to be assurance-friendly – it has common definitions and boundaries of reporting that make it easier to verify. While mandatory assurance is not the norm yet, the trend is clearly towards that – standards and market capacity are being developed by audit firms and sustainability assurance firms, and exchanges and investors are indicating they will require assured reports.

Finally, the disclosure frameworks in India are becoming more sensitive to international convergence. The international harmonization of reporting frameworks (the emergence of the International Sustainability Standards Board and IFRS-compliant efforts) means that Indian companies that compete in the global capital market are now synchronizing their BRSR storytelling with international frameworks such as TCFD/ISSB and GRI. This is both a practical requirement and a strategic need for export-oriented or globally funded companies.

Constitutional Applicability of ESG

Vellore Citizens Welfare Forum v. Union of India (1996)⁴: In this landmark case, the Supreme Court held that the principles of sustainable development, precautionary principle, and polluter pays principle are also applicable in India. The Court held that in cases where environmental damage has been caused, the polluters must pay for the clean-up costs; in addition, actions must be taken to prevent environmental damage even in the absence of scientific certainty. For business, Vellore is a doctrinal basis: it creates a duty to factor in environmental costs, to take preventive action when business activities pose a threat to the balance of nature, and to bear the cost of remediation when environmental contamination occurs. These principles have been regularly applied in subsequent orders requiring businesses to carry out environmental audits, pay for clean-ups, and take preventive measures against pollution. The reasoning of the judgment is fully set out in the authoritative text and has been regularly cited in environmental enforcement cases.

⁴ Vellore Citizens Welfare Forum v. Union of India, Supreme Court (1996) — precautionary principle, polluter-pays and sustainable development.

Indian Council for Enviro-Legal Action v. Union of India (1996)⁵, In the application of the polluter pays principle, the Supreme Court in this case went further and ordered the shutting down of the polluting chemical units, as well as the remedying of the situation and the attachment of assets to pay for the restoration of the environment. The Supreme Court's remedial approach in this case has set the pace for courts in India to hold multiple companies liable for pollution and to determine the cost of remedying the situation to be paid by the polluters. This case shows that courts in India not only make declarations on environmental principles but also make remedial orders that can be enforced.

T.N. Godavarman Thirumulpad v. Union of India (forest conservation)⁶. While appearing to deal with forest categorization and the Forest Conservation Act, the Godavarman doctrine broadened the public trust doctrine and raised the level of review for commercial projects impacting forests and biodiversity. Those companies planning projects on or impacting forested lands must now expect very difficult approvals and the possibility of judicial intervention to stay or condition such projects. The Godavarman decision reaffirmed that natural resources are assets held in trust for the public and not simply resource inputs for commercial projects.

Collectively, these examples give rise to numerous actionable imperatives; First, the principles of the polluter pays and Absolute Liability doctrine mean that risk management for companies cannot treat compliance with environmental regulations as merely a marginal cost to business but rather as a key legal obligation. Secondly, the Courts' approach to remedy means that the potential liability for Corporations goes beyond fines and also includes payment to rectify the harm done, compensation for damages, and sometimes the confiscation of the Corporation's assets. Finally, the Courts' active use of public law principles has created a mechanism by which groups and individuals can use the Courts to seek redress and enforcement, thereby facilitating Corporate reform.

In addition to environmental cases, securities and corporate governance decisions (i.e., cases requiring refunds to investors and requiring accurate fundraising) highlight the governance aspect of ESG⁷. Regulators and Courts have demonstrated a willingness to sanction misconduct involving unauthorized disclosures and have taken a proactive stance in protecting investors in high-profile cases, which is a critical complement to Environmental Law, particularly given the fact that many investors rely on proper disclosure to make informed choices regarding ESG

⁵ M.C. Mehta v. Union of India (Oleum Gas Leak), Supreme Court — absolute liability for hazardous industries.

⁶ T.N. Godavarman Thirumulpad v. Union of India — forest conservation and public trust

⁷ INDIA CONST. art. 21.

risk.

Enforcement Mechanisms

In India the regulatory and judicial structure relating to the enforcement of ESG (Environmental, Social and Governance) issues is extensive. Important gaps and practical challenges exist nonetheless. There are currently three interdependent themes in determining the enforcement picture in India: Regulatory Fragmentation; Measurement and Assurance; the risk of Greenwashing versus Meaningful Compliance. Taken together, these themes will influence how well companies implement their ESG obligations.

Regulatory fragmentation is an issue in India. Several agencies (including ministries, Pollution Control Boards, National Green Tribunal, Securities and Exchange Board of India (SEBI) and Courts) have jurisdiction either alone or jointly to enforce different aspects of ESG regulation. While the benefits of specialisation exist, the overlap in responsibilities creates potential for confusion and inconsistent enforcement, particularly for companies with multistate or multisector operations⁸. For instance, depending on the operation, a company could require different approvals for environmental clearances, forest approvals and local labour regulations; if one of those approvals is not obtained, a legal proceeding could be initiated against that company for the failure and provided they have complied with all other approvals. Improving the co-ordination between different agencies, and establishing the ability to share information for reporting purposes will create a more consistent framework within which regulatory enforcement will occur and will enable companies to meet their regulatory obligations without duplicating their own reporting activities.

Greenwashing in India: Legal Gaps and the Need for Regulatory Accountability

Greenwashing has emerged as a growing problem in India as many businesses are promoting their activities as being eco-friendly despite not living up to the standards. Since ESG has become a crucial aspect for investors and consumers, businesses are now making such claims to improve their reputations in the market. Nevertheless, not all such claims are valid or verifiable.

India does not have a comprehensive law regulating greenwashing; rather, the activity is

⁸ Securities and Exchange Board of India, Circular No. SEBI/HO/CFD/CFD-SEC-2/P/CIR/2021/562 (May 10, 2021) (Business Responsibility and Sustainability Report).

indirectly controlled by various legislations. SEBI has developed the BRSR for companies, which should include material environmental and social information for listed companies. This is a substantial move by the regulator; however, the legislation relies heavily on voluntary reporting. The firm will be responsible for determining the materiality and reporting.

Another piece of regulation is found in the Consumer Protection Act, 2019. Section 2(1)(r) provides that a business cannot engage in unfair trade practices, which include misleading customers. If a company makes false claims regarding its products as being "eco-friendly" or "sustainable," it will be an unfair trade practice⁹.

Apart from the BRSR Framework Guidelines, the Advertising Standards Council of India (ASCI) too has put forward guidelines to curb misleading claims. However, being a self-regulatory council, ASCI cannot enforce regulations to ensure complete compliance as its guidelines have no statutory value. Thus, the effectiveness of ASCI may be undermined owing to the nature of its regulatory approach.

Perhaps, the most challenging aspect of curbing greenwashing lies in the difficulty of defining the terms used in relation to environment protection. Words like 'green', 'sustainability', and 'carbon neutral' may hold different meanings in different situations, which can be interpreted by the concerned companies as per their convenience without any fear of facing penalties as there are no legally binding definitions available in India.

The lack of mandatory third-party audit is another problem. Under the BRSR guidelines, disclosure of information is meant to allow for assurance; however, the need for the same has been left to the discretion of the disclosing companies, resulting in uncertainty regarding the accuracy of the provided data.

It is worth noting that other countries such as the European Union have already started developing legislation mandating companies to present scientifically validated data on sustainability matters to support their statements.

The impacts of rampant greenwashing can be quite severe. They not only undermine the sustainability movement, but they also deceive investors and distort competition within the markets. This is particularly problematic since companies that actually make an effort towards becoming sustainable will be put at a disadvantage by firms that only engage in greenwashing. In order to tackle these problems, it is necessary for India to adopt a more systematic method. The first step would involve developing legal definitions for important terms used in connection with ESG. The second step would be to introduce compulsory third-party auditing

⁹ Consumer Protection Act, 2019, No. 35 of 2019, § 2(1)(r) (India).

of ESG information disclosures, at least for larger firms. Thirdly, SEBI must cooperate with consumer protection organizations in implementing an effective enforcement system.

Corporate Liability for Climate Change in India: Evolving Judicial Trends and Future Risks

The corporate liability for environmental damage has always existed in India. However, the concept of corporate responsibility for the adverse impacts of climate change is emerging. The Indian judiciary has made considerable contributions towards the development of environmental law in the country. Its judicial practice helps predict how the climate liability of corporations will look like in the future.

The corporate liability for environmental damage in India is based on such principles as the "polluter pays" principle, the precautionary principle, and the principle of absolute liability. All these principles were confirmed in landmark cases and are now applied by courts when adjudicating environmental cases. It means that corporations should not only prevent environmental damage but also make compensation payments to the victims¹⁰.

For example, in the case of Vellore Citizens Welfare Forum v. Union of India¹¹, the Supreme Court defined sustainable development as a legal principle and required industries to cover all costs associated with pollution. In Indian Council for Enviro-Legal Action v. Union of India¹², the Court also adopted an uncompromising stance requiring polluting industries to cover all expenses connected with environmental damage and rehabilitation.

While not involving climate change itself, these rulings provide a way of interpreting liability in the event of an injury arising from such an issue. The basic tenet of climate change is environmental harm, which has been committed either by corporations or other groups. With the ever-stronger evidence linking emissions with climate changes, this matter could easily end up before the court.

Another relevant development is the increase in the level of disclosure. In the case of SEBI's BRSR, this would involve a disclosure of the extent of emissions, energy usage, and other climate risks. This would create the basis for any future legal action since false claims by companies regarding their operations can be legally proven in the court¹³.

A third area of legal activity that can contribute to climate litigation involves public interest

¹⁰ Securities and Exchange Board of India, Circular on Business Responsibility and Sustainability Reporting by Listed Entities, SEBI/HO/CFD/CMD-2/P/CIR/2021/562 (May 10, 2021).

¹¹ Vellore Citizens Welfare Forum v. Union of India, (1996) 5 S.C.C. 647 (India).

¹² Indian Council for Enviro-Legal Action v. Union of India, (1996) 3 S.C.C. 212 (India).

¹³ Sahara India Real Estate Corp. Ltd. v. Sec. & Exch. Bd. of India, (2013) 1 S.C.C. 1 (India).

litigation. This type of legal action has been prevalent in India because its court system is traditionally favorable towards such cases. This can serve as another avenue through which corporations may find themselves involved in litigation related to climate change.

Nonetheless, the implementation of the doctrine of corporate liability with regards to climate change poses some obstacles. First, it will be challenging to establish liability based on causation. Unlike other instances of environmental damage involving pollution from a particular company, climate change will require contributions from various firms. Hence, a new strategy will be needed in order to establish causation.

Second, there is no existing statute that provides guidance regarding climate change. Although statutes such as the Environment Protection Act can serve as reference for addressing climate change issues, they will fall short in terms of specificity. Thus, there is a need to come up with an independent framework that would address climate liability¹⁴.

In spite of such problems, there is hope insofar as the current legal regime in India is concerned. Indeed, it is notable that courts have always placed emphasis on environmental protection, even at the expense of imposing strict liability on firms. As the need to deal with climate change grows stronger, there is an expectation that such trends will continue.

Conclusion

The Corporate Social Responsibility (CSR) regime established by the Companies Act, in conjunction with the Business Responsibility and Sustainability Reporting (BRSR) requirements established by the Securities and Exchange Board of India (SEBI), and the framework provided by the National Guidelines on Responsible Business Conduct (NGRBC), all contribute to India's layered and evolving system of environmental, social and governance (ESG) obligations. The courts' interpretations of the OECD's principles of polluter-pays, preventive and absolute liability, along with the state's regulatory enforcement of CSR policies, further embed these norms into corporations' operations and create obligations to implement them. However, implementation remains a challenge; nevertheless, the direction of travel is towards increased compliance: boards will need to develop plans and strategies that will meet shareholders' expectations for transparency and provide assurance that all harm caused by the corporation will be included in the corporation's overall operations. Consequently, for corporations, ESG compliance is an essential part of long-term planning.

¹⁴ Organization for Economic Co-operation and Development (OECD), OECD Guidelines for Multinational Enterprises (2011).