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From Boardrooms to Ecosystems: A Study of Directors' Duty under Section 166(2) and Environmental Concerns With Reference to UK and Indian Laws

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ABSTRACT

In 2013, the Companies Act incorporated a major change whereby the duties of Director were codified. The codification led to a significant rise in the share of Directors' duties in balancing wealth maximization approach and stakeholders' interests. While the fiefdom of companies in India constantly strives to strike this balance, 'environment' remains a neglected and silent stakeholder. Relying heavily on the principles of short-term profitability, directors fail to consider the stakeholders' theory and consciously disregard their role in identifying climate risks. This research article primarily attempts to examine the significance of the Director's duties under Section 166 of the Companies Act, 2013 and analyse the interpretation of the phrase 'protection of environment' in Section 166(2) of the Companies Act, 2013. Further, the researchers explore the need for stringent penalties for Directors who, prima facie, ignore the climate risks in pursuit of profit maximization, despite their mandatory duty under the Act. In order to establish climate change as a substantial financial risk, the research article puts forward the argument in three categories: physical, transition, and litigation risks. Subsequently, it delves into the Directors' statutory duty to act in the best interest of the environment and to identify warning signs pertaining to climate change. From a comparative lens, the continuously evolving environmental jurisprudence in the UK and USA, involving a conflict between shareholder theory and stakeholder theory, is explored.

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Furthermore, the research article emphasizes upon the gap that exists between the legislative intent to protect all the stakeholders under Section 166 of the Companies Act, 2013 and the lack of procedural enforcement of the same in India. Finally, the research article shapes the conclusions that have been derived regarding the environmental concern and discusses methods for active enforcement of climate-based litigation against the carbon majors.

Keywords: *Director's Duty, Companies Act, protection of environment, profit maximization, financial risk, climate-based litigation.*

1. INTRODUCTION

An independent legal opinion published on March 11 2024, titled 'Nature-related risks and directors' duties under the law of England and Wales' by *Pollination and Commonwealth Climate and Law Initiative*, has raised critical questions regarding directors' duties towards the environment. The legal opinion emphasises that the directors are legally obligated to consider the impact of their business on the environment, including climate-related risks, biodiversity loss, and pollution.[1] Failure to comply with these responsibilities could expose directors to significant personal repercussions, including potential claims for damages, even in cases where financial losses are challenging to quantify.

The legal opinion gains significance against two recent failed attempts in English courts to challenge corporate decisions related to climate change risks.[2] These developments raise pertinent questions about the duty of directors in other jurisdictions, including India, and the evolving landscape of environmental litigation.[3]

Corporate governance has undergone significant transformations in India under the Companies Act 2013 ("the Act"). Section 166(2) of the Act states that "*a director of a company shall act in good faith...in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment.*"[4] The duties

1 Sebastian Hartford Dav, Joe Bush, *Nature related risks and directors' duties under the law of England and Wales*, (2023), https://commonwealthclimatelaw.org/wp-content/uploads/2024/03/Nature-related-risks-and-directors-duties-under-the-law-of-England-and-Wales.pdf.

2 Shepwedd, Director's Duties and Climate Change – Round One to the Directors? | Shepherd and Wedderburn (last visited March 12, 2025).

3 Commonwealth Climate and Law Initiative, The legal battles changing the course of climate change, (last visited March 24, 2025).

4 The Companies Act 2013, §166(2), No. 18, Acts of Parliament, 2013 (India).

bestowed upon the directors by this provision subsume their scrutiny and responsibility vis-à-vis environmental protection.[5] It further strengthens the globally augmenting nexus between corporate governance and climate change by imposing the director's duty to recognise relevant risks, curate strategies to counter them, and make necessary disclosures to the concerned stakeholders.[6]

The ideal modus operandi also requires the evaluation and subsequent sacrifice of the short-term beneficial projects that the board envisaged in exchange for the long-term sustainability of the environment and the company.[7] Such prudence expected to be carried out by the directors receives its duty of competence from Section 166(3), which stipulates the requirement of "due and reasonable care, skill and diligence" of the director in fulfilling its various duties.[8]

Hence, the cognisance of environmental concerns contributes to a detailed determination of directors' duties under substantive law, especially when awareness of such matters holds predominant importance. However, substantiating climate change as a material finance risk without effective mechanisms that assure conformity to duty standards would lead to a hollow promise of corporate governance.[9] The remaining lacuna is based on the disparity between statutory and on-field law. Unless there is a push by a significant number of shareholders whose petition carries the potential to incur litigation costs, the "protection of the environment" duty remains difficult to enforce with oversight. Nevertheless, the primary step remains to uniformly label climate change as a material finance risk in the corporate realm.

Against this backdrop, this paper seeks to analyse the evolving legal duties of the corporate directors arising from environmental risks. The paper encounters the research gap pertaining to the mechanism of effectively enforcing directors' duty vis-à-vis environment in India given the disparity between statutory requirement and practical compliance. Part I of this paper examines the recent increase in cases concerning directors' duties towards the environment in United Kingdom. Part II explains how climate change constitutes a material financial risk that can significantly impact a company's operations. Furthermore, Part III explores how the identification of red flags is a core duty of the directors and they may be

5 Sarah E. Light, *The Law of the Corporation as Environmenistal Law,* 71 SLR 137, 140 (2019).

6 *Id.*

7 U. Varottil, *Directors' Liability and Climate Risk: White Paper on India* 1 CCLI 24 (2021).

8 The Companies Act 2013, §166(3), No. 18, Acts of Parliament, 2013 (India).

9 Lisa Benjamin, *The Road to Paris Runs Through Delaware: Climate Litigation and Directors' Duties* 2020 (2) ULR 313, 325 (2020).

held legally liable for failing to fulfil this responsibility. Building on this, Part IV considers how jurisdictions such as United Kingdom and United States are addressing similar issues and conducts a comparative analysis of these jurisdictions with the Indian legal regime. Part V focuses on litigation-based mechanism available in India that can be pursued to hold directors accountable for breaching their environmental duties. On the basis of this, the paper finally concludes by evaluating how directors should balance a company's short-term profit-making interests with its long-term obligations relating to climate risk.

2. LEGAL AND JUDICIAL PERSPECTIVE ON DIRECTORS ENVIRONMENTAL DUTIES IN THE UK

2.1 Pollination and Commonwealth Climate and Law Initiative's Opinion

In this opinion it was stated that nature-related risks are not legally distinct from other corporate risks. While they may receive specific regulatory attention (e.g., disclosure obligations or environmental licensing), directors must approach them with the same diligence as other business risks. These risks can cause direct and indirect harm, affecting supply chains, operations, financing, reputation, and market stability. Directors are advised to assess such risks thoroughly, including seeking expert advice where necessary. Companies generally face no restrictions on voluntary disclosures if they are clear, comprehensive, and well-supported. Large public companies and those significantly exposed to climate-related risks will most likely have mandatory reporting obligations and will have repercussions if these risks are not identified.[10]

2.2 Analysis of ClientEarth v. Shell's Board of Directors

The climate-related litigation was initiated in 2023 by minority shareholder ClientEarth against Shell's board.[11] They contended that directors of the company must be held accountable for inadequate preparation for the energy transition, which was the probable outcome of ongoing climate change. They challenged that lack of preparation for the energy transaction violated the rights of the shareholders under the Companies Act, 2006 of the United Kingdom. The case was dismissed by the High Court of England Wales, stating that Client Earth, an environmental NGO, was not acting in the best interest of the company and, therefore, did not fulfil the procedural requirement of claiming the action against the directors.

10 VAROTILL, *supra* note 7.

11 ClientEarth v. Shells's Board of Directors, (2023) EWHC 1137 (Ch).

Further, the Court stated that it should refrain from challenging the decisions made by the directors in good faith unless such decisions were outside the scope of what they could reasonably do in light of the dangers faced by the company. The court clarified that the purpose of derivative claims was to address extraordinary situations rather than to allow shareholders to keep tabs on directors' activities.

2.3 Analysis of Mc Caughey v. Universities Superannuation Scheme Ltd.

Another instance of climate litigation was observed, whereby the applicants filed multiple derivative claims, alleging that the directors' decisions to invest in fossil fuels and the absence of a divestment plan breached their duties. The Court held that there was no direct relation between the loss incurred by the company and the actions of directors towards their environmental duties.[12] It further ruled that the applicant was not acting in good faith. It stated that the applicant held only 0.17% of the shares, with assistance from other shareholders, thereby not fulfilling the procedural requirement. The Court came to the conclusion that the applicants were not operating in good faith and that they wanted the directors to act on their agenda rather than the shareholders' interest.

These actions depict how Courts have favoured directors' decisions in climate-related decisions. However, they must identify red flags that can lead to financial, transitional, and litigation risks. Further, all these actions by NGOs depict increasing climate-related actions that can hinder business and impose liabilities on directors for breaching their duties.[13]

3. DETERMINING CLIMATE CHANGE AS A MATERIAL FINANCIAL RISK

The contention that climate change brings a material financial risk has evolved into an undebatable stance.[14] Though companies and directors essentially care to focus on the benefit of shareholders, sustainable solutions for protecting stakeholders are equally and relatively necessary.[15] The involvement of stakeholders, from the finance regulation sector to the investment domain, in voicing out the risks emerging from climate change has facilitated the efforts of companies to bring mitigation actions.[16] These actions must be prepared to counter risks of various magnitudes, potentially affecting the business in

12 McGaughey & Davies v. Universities Superannuation Scheme Limited, (2023) EWCA Civ 873.

13 *Id.*

14 DSHE Holdings Ltd v. Abboud (2021) 155 ACSR 1.

15 Cassimatis v. ASIC (2020) 275 FCR 533.

16 ASIC v. Maxwell (2006) 59 ACSR 373, 399.

different capacities. Fortunately, corporate behaviour has witnessed significant changes, with some companies aiming for net zero carbon policy commitments.[17] This will also attract ramifications in the global field as the policy responses shall impact auditing and regulatory standards under corporate reporting.[18] Companies and directors would prevent liability exposure by assessing the risks, incorporating advice duly, and forming strategic plans to counter them. Following risks exist for the company:

3.1 Physical Risk

Any phenomenon that can impact the environment and the health of the masses finds itself under this ambit. The product of adverse climate change, including high sea levels, loss of mountain glaciers, increased quantum of extreme weather conditions, floods, droughts, and a sharp decline in polar ice shelves, contribute to the pool of physical risks.[19] Due to its low environmental literacy standard, India has seen adverse climate change results. For instance, the rise in average temperature by around 0.7°C from 1901 to 2018 is mainly due to greenhouse gas emissions.[20] Considering the lack of sustainable measures, it is expected to worsen in the 21st century. The aberrations in climate conditions are not likely to limit their damage to financial gains; they can also cause material economic losses.

The issue spirals down in the corporate industry, negatively impacting supply chains, human capital, and property preservation. The level of readiness to deal with the problems that the climate brings to the table shall prove to be the point of differentiation in countering or submitting to its strong waves.

3.2 Transitional Risk

The regulations, policies and statutory orders that promote sustainability in the industrial sector generate the need for economic transition.[21] This push for a lower carbon economy

17 Jack Graham, *Net-zero emissions targets adopted by one-fifth of world's largest companies,* Reuters (24 March, 2025), https://www.reuters.com/article/us-global-climate-carbon-business-trfn-idUSKBN2BF2ZX.

18 Huw Jones, *UK proposes requiring businesses to disclose climate risks by 2022,* Reuters (24 March, 2025), https://www.reuters.com/world/uk/uk-proposes-requiring-businesses-disclose-climate-risks-by-2022-2021-03-24/.

19 David Eckstein, Vera Künzel, Laura Schäfer, Maik Winges, *Global Climate Risk Index 2020,* German Watch 4 (2019).

20 R. Krishnan Et. Al., Assessment of Climate Change Over The Indian Region: A Report of The Ministry of Earth Sciences (Moes) 44 (Springer Open 2020).

21 *Final Report: Recommendations of the Task Force on Climate Related Financial Disclosures,* Bloomberg (Mar. 29, 2025), https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf.

by governmental documents translates into a mandate for the companies. Though the legislative intent is to bring about a greener approach and produce renewable energy models, this transition impacts corporations by increasing stranded assets.[22] These assets turn defunct or stranded as they do not find eligibility per the newly introduced norms to reduce GHG emissions.[23]

India is spearheading its mission to reduce emissions via policy implementation, adhering to its goals under the Paris Agreement.[24] The Apex Committee's formation to implement the Paris Agreement by the Government of India signifies a sincere step in achieving these goals.[25] Analysing these active steps, it is predictable that companies are bound to suffer significant losses in carbon-based holdings.

3.3 Litigation Risks

In cases where corporations and their boards are not successful in taking control of physical and transitional risks, liability is attracted through the channels of climate change mitigation, which functions as the key tool. Whenever a company breaches compliance with climate risk, the claims are litigated under private law.[26] It is not difficult to notice a global trend of piled awareness being kept by ventures and finances that find themselves relatively more vulnerable to climate change's impact.

The interference of India's domestic legislation in this relation seems somewhat limited. However, environmental legislative instruments, international law principles, and pieces from the public policy archives dealing with the prevention of activities that deal with ecological hazards add to the legal weight below which the defendant corporation is expected to be burdened.[27] The emergence of the above, unsurprisingly, has been seen in the Indian Judiciary for using climate change as a ground for a claim in the cases of *Ridhima Pandey*

22 Janis Sarra, *The Anthropocene in the Time of Trump, Financial Markets, Climate Change Risk and Vulnerability,* 51 ULR 479, 482 (2018).

23 Laura Hurst, *Stranded Assets' Risk Rising With Climate Action and $40 Oil,* The Washington Post, (Mar. 20, 2025), https://www.washingtonpost.com/business/energy/stranded-assets-risk-rising-with-climate-action-and-40-oil/2020/09/18/89f90d3a-f963-11ea-85f7-5941188a98cd_story.html.

24 Paris Agreement to the United Nations Framework Convention on Climate Change art. 2(1)(a), Dec. 12, 2015, T.I.A.S. No. 16-1104.

25 Ministry of Env't, Forest & Climate Change, Notification, Nov. 27, 2020, Gazette of India, Extraordinary, Part II, Sec. 3(ii).

26 Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, *If at First You Don't Succeed: Suing Corporations for Climate Change,* 38 OJLS 841, 842 (2018).

27 Jacqueline Peel and Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South,* 113 AJIL 679, 706 (2019).

v Union of India[28] as well as *Himachal Pradesh Bus Stand Management and Development Authority v The Central Empowered Committee*.[29]

Hence, the duties and liabilities ultimately bestowed upon the directors in a company become crucial when the corporate governance rests under the subsisting threat of climate risk regime. The fiduciary duty of environment protection stated in Section 166(2) of the Act explicitly grants a social and legal responsibility and calls for scrutiny to the directors. They are expected to balance the extremes of adherence to policies, conversion to sustainable settings, and managing the company's essential assets, all while avoiding the ramifications of the risks. Therefore, it suggests that, after the amendment of the Act in 2013, climate change has mutated into a typical material financial risk.

4. FIDUCIARY DUTIES OF DIRECTORS TO IDENTIFY RED FLAGS

Section 166 of the Act mandates that a director must act in good faith to advance the company's objectives while considering its best interests and environmental protection. In the case of *Official Liquidator v. P.A. Tendolkar*,[30] the Hon'ble Supreme Court clarified that directors could not be oblivious to risks that should be observable to a rational man having commercial wisdom. Therefore, the 2013 Act obligates directors to be conscious of red flags, including matters that could negatively affect the company's business. Identifying a red flag implies being diligent and careful about the potential risks that could arise and impose potential liability on the company. In the context of the director's duty towards protecting the environment, a red flag would mean identifying potential risks related to stranded assets or implementing a fresh climate-related regulation that affects the company's operations.

Given that climate change is one of the biggest risks that businesses face, directors' failure to recognise and address the issue would be a violation of their responsibility to the company.[31] The Courts, in various cases, have held directors liable for failing to take

28 Ridhima Pandey v Union of India, (2019) NGT O.A. No. 187/2017 (India).

29 Himachal Pradesh Bus Stand Management and Development Authority v The Central Empowered Committee, (2021) SCCOnline SC 15 (India).

30 Official Liquidator v. P.A. Tendolkar, (1973) AIR 1973 SC 1104 (India).

31 ASIC v. Mariner Corporation Ltd., (2015) 241 FCR 502.

note of red flags,[32] which can be in the form of regulatory action and stranded assets.[33] Directors are responsible for safeguarding long-term sustainable value for stakeholders, which necessitates a thorough evaluation of climate risks, seeking relevant advice, and formulating and executing appropriate strategies. Neglecting financial risks associated with climate change could result in potential liability for both companies and their directors.

If climate change is not adequately addressed, it could endanger the company's operations.[34] The Delaware Supreme Court, in the case of *City of Birmingham Retirement and Relief System v. Good*, established a standard to consider these red flags. The Court stated that the directors can only be made accountable for failing to act in the face of red flags if the inactivity indicates "not only inattention but actual scienter."[35] The director's conduct must indicate that they are acting wilfully for objectives besides the company's best interests.[36] Therefore, identifying a red flag remains an important subjective criterion when the director's duty must be assessed in protecting the environment.

5. COMPARATIVE ANALYSIS OF FIDUCIARY DUTIES IN THE UK AND USA VIS-À-VIS ENFORCEMENT MECHANISM IN INDIA

The fiduciary nature of the relationship between the director and an Indian company stands with certainty, having the objective to "act for the paramount interest of the company." In this context, the trustee, representative, and agent label has often been associated with the director.[37] Without proper authorisation, directors are not permitted to bind the company with third parties on a contractual basis. As a deduction, such a relationship of agency or fiduciary must be understood in a broader sense wherein the director is responsible for guiding their actions to benefit the company and not derive personal advantages that are ideally made for the company itself.

These trust-like obligations are relevant in other legislations, such as *Rajeev Saumitra v Neetu Singh*.[38] Here, the Delhi High Court held that Section 88 of the Indian Trusts Act,

32 Marchand v. Barnhill, (2019) 212 A.3d 805.

33 Jeremy S. Piccini, *Director Liability, the Duty of Oversight, and the Need to Investigate,* American Bar Association (Mar. 30, 2025), https://www.americanbar.org/content/dam/aba/publications/blt/2011/02/full-issue-201102.pdf.

34 Sarah E. Light, *The Law of the Corporation as Environmental Law,* 71 SLR. 137, 140 (2019).

35 City of Birmingham Retirement and Relief System v. Good, 177 A.3d 47 (2017).

36 Okla Firefighters Pension Ret. Sys. v. Corbat, 2017 Civil Action No. 12151-VCG.

37 M Conaglen, *Interaction Between Statutory and General Law Duties Concerning Company Director Conflicts,* 31 CSLJ 403, 404-405 (2013).

38 Rajeev Saumitra v Neetu Singh, (2016) SCC OnLine Del 512.

1882[39] runs parallel to the fiduciary role in Section 166 of the Companies Act[40] and the latter's violation shall mean the non-compliance of the former.

In the United Kingdom, such characterisation in the box of 'fiduciary relationship' began developing in the earlier phase of the UK law. The landmark UK decision in *Charitable Corp v Sutton* (1742) brought the reasoning of Lord Hardwicke LC that "by accepting a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence."[41] Similarly, the inclination to include the duties of care and loyalty[42] was laid down by the Delaware Court of Chancery in *Bodell v General Gas and Electric Corp* (1926).[43]

Equity and Common Law produce, as sources of general law, various duties that concomitate the core directorial powers in Australia and the United Kingdom. However, contradictions in approach are well-found in the Delaware law in multiple forms.

Firstly, the modern Anglo-Australian Law contradicts the Delaware law in its interpretation of the nuanced term of 'fiduciary duties', subscribing to the view that these duties are intrinsic and essential solely to the fiduciaries so discussed, i.e., directors, and not extend to any other actors in the corporation.[44] Moreover, an interrelation between fiduciary and non-fiduciary duties (duty of care and good faith) exists in UK corporate law, which distinctly deals with 'positive behavioural obligations'.[45]

The second striking difference between the UK and USA systems of dealing with directors' duties is how they avoid breaches. The modern UK and Australian legal systems have attempted to grow from their earlier standard of breach of duty based on gross negligence.[46] Yet, as in the United States, it comes no close to the sanitising mechanism of scrutinising a board decision's merits from the lens of fairness. A statutory and conceptual favour towards shareholders prevents Anglo-Australian corporate law from initiating jurisprudential incorporations.

39 Indian Trusts Act, 1882, § 88, No. 2, Acts of Parliament, 1882 (India).

40 The Companies Act 2013, § 166, No. 18, Acts of Parliament, 2013 (India).

41 Charitable Corporation v Sutton, (1742) 2 Atk 400, 406; 26 ER 642.

42 P. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty,* 11 UPJBL 675, 678-9 (2009).

43 Bodell v General Gas and Electric Corp, (1926) 132 A. 442 (Del. Ch. 1926).

44 M Conaglen, *Interaction Between Statutory and General Law Duties Concerning Company Director Conflicts,* 31 CSLJ 403, 405 (2013); Permanent Building Society v Wheeler [1994] 11 WAR 187.

45 Attorney-General v Blake, (1998) Ch 439, 455 (CA).

46 DA DeMott, *The Figure in the Landscape: A Comparative Sketch of Directors' Self-Interested Transactions,* 62 LCP 243 (2019).

Thirdly, the complicated interactions of general law and statutory duties in the UK lay a fundamental distinction with Delaware law. The statutory drafting of Section 170(4) of the UK Companies Act 2006[47] Requires the interpretation and application of the director's duties as the standard law rules and principles, which adds to this layer of complexity, dividing commentators, too. No such hurdles exist in interpreting Delaware corporate law.

Another point that calls for analysis relates to the practical process of private enforcement of the director's duties. It becomes more essential to understand liability vis-à-vis the protection of the environment. The dissimilarity between the UK and the USA regarding the judicial burden of legal actions concerning breach of duties can be easily understood by the litigation variations. Delaware allows for pursuing enforcement of fiduciary duties by various methods, and the legal environment in the process of such litigation is considered "uniquely hospitable."[48] Shareholders can file it via direct suits, class action suits, derivate litigation, or even by the company itself.[49]

Contrastingly, the United Kingdom has negligible suits against company directors for private enforcement of duties, promoting virtually no risk of damages on the breach. This aggravates the issue of imposing liability and claiming remedies for contravention of environmental norms as part of the director's duties. The absence of class actions and contingency fees in the UK's corporate law is a primary reason for poverty and disparity in litigation.[50] The inhibition of shareholder litigation for breach in the UK is owed to *Foss v Harbottle*. However, the case produced a degraded derivative suit before the statutory law, providing insignificant remedies to the plaintiff shareholders.[51]

In addition to this, the acoustic separation vis-à-vis fiduciary duties and the existence of legal safe harbours impact the enforceability and power of holding a director liable in cases of breach of obligations. The complex interactions between the statute and common law or general principles discussed above form a detachment between the law prescribed, and so practised and lead to the failure of liability regimes.[52]

47 Companies Act 2006, c. 46, § 170(4) (UK).

48 Cheffins and Black, *Outside Director Liability Across Countries,* 84 TLR 1385, 1393 (2006).

49 Thompson and Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions,* 57 VLR 133, 167-169 (2004).

50 Armour, et. al., *Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States,* 6 JELS 692 (2009).

51 Foss v Harbottle (1843) 2 Hare 461; 67 ER 189.

52 Coffee Jr, *Law and the Market: The Impact of Enforcement,* 156 UPLR 229, 243–5 (2007).

Thus, the analysis of the UK and the USA legal corporate structure on fiduciary duties shows the distinct path taken by the jurisdictions in dealing with the interpretation and enforcement of directors' obligations. A robust understanding of shareholders' and stakeholders' approaches further contributes to this context. Considering the environmental protection and liability of the directors concerning such a breach, the UK system presents a grim picture in seeking justice.

The challenge in determining a director's liability for breaching their duty under Section 166(2) of the Act, particularly in relation to environmental protection, lies in the lack of procedural considerations in Indian litigation. Section 166(2) outlines a stringent duty towards the environment's safety. Still, lack of procedural consideration from the end of the Environment (on whom the wrong has been committed), Victims, and Government makes the Section just another formality and promotes the director's approach towards profit and promotes negligence of the director towards the environment. The obvious question that is to be put forth is why would directors or shareholders of a company focus on protecting the environment by staking their profit without any liability vis-à-vis litigation.

The present situation is not that the Indian litigation is silent on climate-based litigation as cases like *M.C. Mehta v. Union of India*[53] and *Vellore Citizen Welfare Forum v. Union of India* exist. [54] However, the approach behind them is to redress the victims and bring them to their previous position before the harm was committed. These kinds of litigation are usually brought under Public Interest Litigation, or Special Leave Petitions. The jurisprudence is silent where the harm to the company or victims is due to the *malafide* intention of the director.

The Act does not contemplate such procedural limitations specific to protecting the environment. However, few enforcement mechanisms can be invoked if the directors' duty is breached. The procedural consideration regarding the litigation can be in two forms: Public Enforcement and Private Enforcement. Private enforcement allows the victims of wrongdoing to bring legal action against the directors, seek damages, or obtain injunctions.[55] The private enforcement under the Act can be a Derivative Action Suit, Class Action Suit and Oppression, Mismanagement and Prejudice. Public enforcement is brought by the government or the regulatory authority against the director through civil or criminal proceedings. The main aim of private enforcement is to redress the harm done to

53 M.C. Mehta v. Union of India, (1976) AIR 1976 SC 1086 (India).

54 Vellore Citizen Welfare Forum v. Union of India, (1996) AIR 1996 SC 2715 (India).

55 Vikramaditya Khanna and Umakanth Varottil, The Derivative Action in Asia: A Comparative and Functional Approach 372 (Cambridge University Press 2012).

the victim, and public enforcement revolves around punishing the negligent director for the harm.

Based on this, the following mechanisms for enforcement of the duties of a director are available in India:

5.1 Private Enforcement (Shareholder-led Action)

This part deals with the enforcement options available to the shareholders, stakeholders, and the company itself when they are of the opinion that directors have not used their commercial wisdom to protect their rights from risks existing due to climate change. For instance, a director of an oil company does not foresee the risk of stranded assets merely because such risk would arise later on can be brought under stakeholder action. The following enforcement methods can be used to sue the director:

Derivative Action Suit

A derivative action suit ('DAS') is a common law remedy not codified in India.[56] DAS is a representative form of action filed by the shareholder who seeks relief in favour of the company where directors have breached their duties.[57] The Indian Courts have accepted the principle laid down in the case of *Foss v. Harbottle,*[58] which allows the suit as an exception to the general rule of locus, where there is 'fraud on minority', and the company is in the control of the wrongdoer.[59] This legal remedy can be used when the director has not acted in the best interest of the company and the risk of stranded assets or regulatory actions is imposed on the company due to the director's lack of due diligence.[60] DAS is not explicitly codified under the Act but falls within the legal framework of a Representative Suit under Order I Rule 8 of the Code of Civil Procedure, 1908. Its application in climate-related litigation is limited, as a director may only be held liable in cases involving a breach of duty related to trust, disclosure, or undue gain.

Class Action Suit

Class Action Suits are typically available to shareholders, allowing them to sue on behalf of an entire class with common interests whose rights have been infringed. In contrast,

56 Francis Beaufort Palmer and Clive Maxmillan, Palmer's Company Law 338 (24th ed., Stevens & Sons 1987).

57 BSN (UK) Ltd. & Ors. v. Janardan Mohandas Rajan Pillai & Ors., (1996) AIR 1996 Bom 371 (India).

58 Foss v. Harbottle, (1843) 2 Hare 461 (UK).

59 Nagappa Chettiar v. The Madras Race Club, (1949) AIR 1949 MLJ 662 (India).

60 Onyx Musicabsolute.com Pvt. Ltd. v. Yash Raj Films Pvt. Ltd., (2008) AIR 2008 Bom CR 418 (India).

DAS does not require a distinct class with a common interest; even a single shareholder can initiate a DAS. Under Section 245 of the Act, the interests of a similarly situated class are represented, and any relief granted benefits the group as a whole.[61] However, the company is the only party whose interests are affected in a DAS.[62] Therefore, the shareholders' actions are 'sine qua non' on behalf of the company, where the directors act against the company's interests.[63] Further, under Section 245 of the Act, a precondition must be fulfilled to file the suit. Regarding the directors' duties under Section 166 towards protecting the environment, a class action suit under might develop as a remedy for climate-based litigation.

Oppression and Mismanagement

Section 241 of the Act deals with cases of Oppression and Mismanagement; the remedy under Section 241 of the Act is available not only when objectionable conduct is aimed at shareholders but also when the company's affairs are "conducted in a manner prejudicial to the company itself."[64] In Section 244 of the 2013 Act, the said application needs to be supported by at least 100 shareholders or not less than one-tenth of the total number of its shareholders, whichever is less.[65] The remedy under Section 241 is used in commercial disputes, and its applicability to climate-based litigation is rare. The remedies under this Section are of a limited nature as they are focused on "bringing to an end the matters complained of" instead of punishing or preventing the errant director from making negligence towards their duty regarding protecting the Environment.

5.2 Public Enforcement

Public enforcement is more common in India than shareholder-led action. In India, public enforcement prevails through public interest litigation, NGT enforcement, government-led, and SEBI actions.

Public Interest Litigation

The jurisprudence in India regarding climate-based litigation revolves mainly around Private Interest Litigation brought under Articles 32 and 226 for enforcement of Fundamental Rights breached by negligent companies. Under Private Interest Litigation, many principles have

61 Companies Act, 2013, § 245, No. 18, Acts of Parliament, 2013 (India).
62 Narendra Kumar Berlia v. Om Prakash Berlia, (2011) SCC OnLine Cal 923 (India).
63 B.B.N. (UK) Limited v. Janardan Mohandas Rajan Pillai, (1993) AIR 1993 Bom 228 (India).
64 Companies Act, 2013, § 241, No. 18, Acts of Parliament, 2013 (India).
65 Companies Act, 2013, § 244, No. 18, Acts of Parliament, 2013 (India).

been involved, i.e., Polluter Pay Principle, Absolute Liability, Precautionary Principle, Sustainable Development etc. These principles revolve around providing a remedy to the people against whom wrong has been committed or to protect the environment. This remedy does not invoke or punish the director for breaching their duty under Section 166 of the act. Therefore, in this context, Public Interest Litigation is not applicable.

Enforcement Actions by NGT

NGT was established in 2010 to give jurisdiction for climate change litigation. Although India does not have a dedicated statute explicitly addressing climate change, the Environment (Protection) Act of 1986 is a comprehensive legislation that empowers the Central Government to establish subordinate legislation about various environmental matters. The Environmental Protection Agency is listed in the National Green Tribunal (NGT) Act schedule. The NGT is granted authority over issues about climate change addressed by any subordinate legislation that may be established about this topic.

Furthermore, considering the expansive interpretation of the term "environment" within the Environmental Protection Act, the jurisdiction of the National Green Tribunal would extend to encompass matters about climate change. If the National Green Tribunal were to issue judicial directives to support climate change mitigation, companies and their directors would be obligated to adhere to them. The orders issued by the National Green Tribunal possess the legal enforceability akin to a decree rendered by a civil court. In case of a breach or non-compliance with NGT orders, the company and the respective director may be subject to financial penalties.[66]

Government-led Action

Shareholders and the government can invoke Section 241 of the Act, stating that the act of the director is against the public interest if the Central Government considers the company's affairs prejudicial to the public interest.

Actions by SEBI

The primary objective of the Securities and Exchange Board of India ("SEBI") is to safeguard the interests of investors in securities and facilitate the growth and regulation of the securities markets. By this, the entity has been granted extensive authority to implement "measures at its discretion." SEBI has the authority to restrict companies from issuing prospectus, offer documents, or advertisements that seek to solicit funds from the general

66 VAROTILL, *supra* note 7.

public to issue securities. The remedy for non-compliance with disclosure regulations in primary market transactions is inherently preventative in its approach.[67] SEBI has been given various powers under SEBI LODR Regulations, SEBI Act 1992, and other regulations, but the power of SEBI is restrictive in the context of climate risk because it only gets jurisdiction where the interests of the investors are involved.

6. CONCLUSION

The duties of directors have been codified in the 2013 Act. Before such codification, the directors used to get protection for their negligent acts in the Business judgment rule. The 2013 Act lays down the director's duties to act in the best interest of shareholders and all stakeholders. In an era where climate risks have continuously increased, company directors cannot make decisions only for profit. In circumstances where there is an element of mala fide intention on the part of directors in favour of short-term profit, they would fail to discharge the good faith obligation imposed by Section 166(2) to act in the company's interest.[68]

The director must balance the company's short-term interests in profit-making and the long-term interests related to climate risk. Such duties of directors and the statutory mandates require the director to recognise climate change as a material risk and, at the same time, work for the best interest of the company and its stakeholders. Though such duties have been codified, the vacuum between the theoretical and practical parts regarding enforcing such obligations does not remain in consonance. This exists due to a lack of enforcement mechanisms in India. Corporate governance regarding climate-based litigation lays down stringent duties for the director. Yet, a lack of enforcement mechanisms can cause the director to breach such duties without legal consequences. Therefore, Section 166(2), which underscores the director's duty towards the environment, lacks legal enforcement, and hence its applicability is limited.

67 Shyam Divan, Sugandha Yadav and Ria Singh Sawhney, *Legal Opinion: Directors' Obligations to Consider Climate Change-related Risk in India,* Canada Climate Law Initiative (April 7, 2025), https://ccli.ubc.ca/resource/legal-opinion-directors-obligations-to-consider-climate-change-related-risk-in-india/.

68 Tea Brokers (P) Ltd v. Hemendra Prasad Barooah, (1998) 5 Comp LJ 463 (India).