

**REASSESSING COMMERCIAL REGULATION THROUGH  
ESG AND SUSTAINABLE GOVERNANCE PRINCIPLES**

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**Abstract**

*One of the most significant trends in the current regulation of commercial activities is the rise of Environmental, Social and Governance (ESG) considerations with which companies must comply. This paper makes a critical examination of how ESG-led governance has emerged, what values it rests on, its structure and what it means for the traditional conception of the shareholder-primacy in commercial law, the changing role of corporate directors and the legal obligations of investors and institutional mechanisms. The paper provides an overview of the international standard-setting process and TCFD and IFRS Sustainability Standards, the European Union's CSRD, SFDR and CS3D before engaging with the experience of Indian regulation. It looks critically at the on-going issue of green washing practices, split standards of disclosure, lack of enforcement and the conflict between compulsory and voluntary practices. The authors conclude that comprehensively rethinking the regulation of commerce according to ESG principles would have to be guided by a paradigm change from communication to substantive obligations, which*

*would be legally binding – accompanied by an internal framework of law that harmonizes the ESG regulations across company law, securities law, competition law and environmental law.*

**Keywords:** *ESG, sustainable governance, corporate social responsibility, commercial regulation, BRSR, CSRD, stakeholder theory, green washing, company law, sustainable finance.*

## **I. INTRODUCTION**

Under the classical concept of commercial regulation based on the theory of 'shareholder primacy' the aim of a company was only to maximize profit for its shareholders. This orthodoxy, forcefully proclaimed in 1970 by Milton Friedman, was heard for decades in debates on corporate governance and had an influence on the design of company law, securities law and financial supervision in common law countries.<sup>1</sup>

But as the new millennium began, a growing intellectual and institutional dissent arose in opposition to this perspective. Building on this, R. Edward Freeman extended the sphere of obligations beyond the shareholders to various groups and individuals that are central to a landscape of stakeholder theory.<sup>2</sup>

This cognitive background is what has led the development of the ESG as a structuring principle of commercial regulation of the modern period. Regulators, institutional investors, rating agencies and stock exchanges around the globe have embraced ESG environmental criteria (climate risk, resource use, biodiversity), social criteria (labour standards, human rights, community impact), governance (board structure, transparency, anti-corruption) as a basis for disclosure, due diligence, and, increasingly, actual legal obligation.

In this paper we briefly present the normative and regulatory aspects of ESG-based commercial governance. It continues as follows: Part II explores the theoretical underpinnings and links between ESG and corporate purpose. Part III provides an overview of the international regulatory environment. Part IV gives a review of Indian legal system. Part V looks critically at important structural issues such as 'greenwashing', capturing standard fragmentation and enforcement gaps. Part VI looks at the interaction between ESG, competition law, financial regulation and supply chain law. Part VII ends with a reform the agenda for India's commercial regulatory architecture.

## **II. THEORETICAL FOUNDATIONS: FROM SHAREHOLDER PRIMACY TO SUSTAINABLE GOVERNANCE**

### **A. The Friedman Doctrine and its Discontents**

Friedman's 1970 contrast between CSR and profit maximization was neither exclusively economic, but involved a claim about the 'right or wrong' in CSR and the limits of commerce.

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<sup>1</sup>Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits' The New York Times Magazine, 13 September 1970.

<sup>2</sup>R. Edward Freeman, Strategic Management: A Stakeholder Approach 46 (Pitman Publishing, Boston, 1984).

This view prevailed over the law for many years. Stakeholder interests were viewed as instrumental, that is, as being of value only insofar as they furthered the interests of long-term shareholders. This paved the way for a narrow, coherent form of 'commercial regulation' that failed to consider the broader systemic impacts of extensive commercial activities on the environment and social issues.

But some scholars like Bebchuk and Tallarita have doubted whether they are in fact expressions of a true change in norms or of a rhetorical reorientation: by failing to accompany the commitments with commensurate changes in the duties of directors and how they are enforced, they say, stakeholders have failed to move beyond mere rhetoric.<sup>3</sup>

### **B. Reconstructing Corporate Purpose through ESG**

A more radical reconstruction has been suggested by Colin Mayer: that profit is a means, not an end, and that the corporation's purpose should be set by the issues of people and planet.<sup>4</sup>

The purposeful preconception of the Corporation has important consequences for commercial regulation. Where corporate purpose is legally defined, the effect of these ESG goals on the function of directors, board accountability frameworks, disclosure requirements and investor stewardship-functionality should be all adequately rethought.<sup>5</sup>

“The UN Guiding Principles on Business and Human Rights” the Ruggie Principles supply a foundational normative architecture for the social dimension of this reconception, establishing a tripartite framework of the State duty to protect, the corporate responsibility to respect, and the need for access to remedy.<sup>6</sup>

“The OECD Guidelines for Multinational Enterprises”, updated in 2023, extend this framework to encompass environmental due diligence, anti-corruption obligations, and responsible financing, establishing a soft-law benchmark for responsible business conduct that increasingly informs hard-law regulatory developments.<sup>7</sup>

Eccles, Ioannou and Serafeim's empirical research has contributed importantly to this debate by demonstrating that companies with high sustainability standards outperform their counterparts on long-run financial measures, thereby beginning to dissolve the perceived tension between ESG compliance and shareholder value maximisation.<sup>8</sup>

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<sup>3</sup>Lucian A. Bebchuk and Roberto Tallarita, 'The Illusory Promise of Stakeholder Governance' 106 Cornell Law Review 91, 94 (2020).

<sup>4</sup>Colin Mayer, *Prosperity: Better Business Makes the Greater Good* 33 (Oxford University Press, Oxford, 2018).

<sup>5</sup>Jill E. Fisch and Steven Davidoff Solomon, 'Should Corporations Have a Purpose?' 99 Texas Law Review 1309, 1322 (2021).

<sup>6</sup>United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (UN, New York and Geneva, 2011) (Ruggie Principles).

<sup>7</sup>Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD Publishing, Paris, 2023).

<sup>8</sup>Robert G. Eccles, Ioannis Ioannou and George Serafeim, 'The Impact of Corporate Sustainability on Organizational Processes and Performance' 60 *Management Science* 2835, 2848 (2014).

### **III. THE INTERNATIONAL REGULATORY LANDSCAPE**

The regulatory response to ESG has been most advanced in the domain of climate-related disclosure.<sup>9</sup> The TCFD framework proved enormously influential, being adopted or referenced by regulators in the United Kingdom, New Zealand, Japan, Switzerland, Singapore, and India. Its conceptual architecture particularly its emphasis on scenario analysis, physical and transition risk, and the alignment of disclosures with financial materiality has shaped subsequent mandatory frameworks.

These standards, built substantially on TCFD architecture, are designed to provide a common international language for ESG disclosure capable of facilitating cross-border comparability and investor decision-making.<sup>10</sup>

However, the US rules have faced significant legal challenges and political opposition, illustrating the contested nature of ESG regulation in shareholder-primacy jurisdictions. Partnoy has argued that the information asymmetry at the heart of ESG markets whereby companies know far more about their environmental and social performance than investors — justifies disclosure regulation as a public good, analogous to financial accounting standards.<sup>11</sup>

In Asia, Singapore, Japan, and Hong Kong have progressively tightened ESG disclosure requirements for listed companies, with Singapore mandating climate disclosures aligned with TCFD for listed companies from 2022 and the Tokyo Stock Exchange pressing companies to demonstrate serious consideration of climate risk in governance processes.

### **IV. THE INDIAN LEGAL FRAMEWORK FOR ESG GOVERNANCE**

#### **A. The Companies Act, 2013 and Mandatory CSR**

Companies with a net worth, turnover or net profit exceeding prescribed limits (specified under Section 135) shall incur expenses of not less than two per cent of the average of its net profit of the preceding three financial years for carrying out CSR activities defined under Schedule VII, which includes specified activities such as environmental sustainability, gender equality, health, poverty alleviation, education and rural development among other things.<sup>12</sup>

A quick rundown of the system indicates that, even though the intent behind CSR is ambitious in India, the system's opportune implementation as a spending requirement, and not a duty of integration weakens its potential impact on reshaping corporate governance; the current system allows for CSR compliance while companies' primary influencing business activities and supply chain operations remain largely unchanged.<sup>13</sup>

Afsharipour has embedded the evolution of corporate governance in India in a general trend of transplantation and adaptation and has highlighted the conflict between

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<sup>9</sup>Task Force on Climate-related Financial Disclosures (TCFD), Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures (TCFD, Basel, 2017).

<sup>10</sup>International Sustainability Standards Board, IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information and IFRS S2 Climate-related Disclosures (IFRS Foundation, London, 2023).

<sup>11</sup>Frank Partnoy, 'ESG Disclosure as a Public Good' 19 Berkeley Business Law Journal 1, 18 (2022).

<sup>12</sup>Companies Act, 2013 (Act 18 of 2013), s. 135(5) read with Schedule VII.

<sup>13</sup>P.M. Vasudev, "Corporate Law and Sustainability: Exploring India's Mandatory CSR Framework" 19 Journal of Corporate Law Studies 127, 138 (2019).

transplanted Anglo-American models of corporate governance, and the unique ownership structure of Indian listed companies, which are predominantly promoter controlled.<sup>14</sup>

According to Umakanth Varottil, governance frameworks and norms adopted by companies for their overseas listing is likely to function differently in the Indian context, in which case there is a need for a more holistic framework that takes into account the unique governance issues of contributing sectors in India such as concentrated ownership, family business groups and SOEs.<sup>15</sup>

### **B. SEBI's BRSR Framework and ESG Disclosure**

“The Securities and Exchange Board of India's Business Responsibility and Sustainability Report” (BRSR) framework, introduced by the SEBI Circular of May 2021, represents the most significant development in India's ESG disclosure architecture.<sup>16</sup>

The BRSR replaced the earlier Business Responsibility Report (BRR) and is structured around the nine principles of the National Guidelines on Responsible Business Conduct (NGRBC), covering economic, environmental, and social responsibilities.<sup>17</sup>

From financial year 2022-23, BRSR disclosure was made mandatory for the top 1,000 listed companies by market capitalization. SEBI has further introduced a 'BRSR Core' comprising Key Performance Indicators (KPIs) subject to reasonable assurance from independent agencies, extending verifiability requirements to sustainability disclosures.<sup>18</sup>

The earlier National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business, issued by SEBI in 2012, and the MCA's NGRBC of 2019, provided the normative lineage for the BRSR, progressively elevating the sophistication of India's sustainability reporting architecture.<sup>19</sup>

SEBI has also introduced a regulatory framework for ESG Rating Providers (ERPs), bringing rating agencies that assess companies' ESG performance under regulatory oversight to address concerns about conflicts of interest, methodology opacity, and greenwashing in the ESG ratings market.<sup>20</sup>

### **C. Green Finance, Banking Regulation and Climate Risk**

The Reserve Bank of India's framework for the acceptance of green deposits, notified in April 2023, establishes requirements for banks offering green deposit products, including allocation to specified green activities, third-party verification, and disclosure obligations.<sup>21</sup>

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<sup>14</sup>Afra Afsharipour, “Corporate Governance Convergence: Lessons from the Indian Experience” 29 *Northwestern Journal of International Law and Business* 335, 344 (2009).

<sup>15</sup>Umakanth Varottil, “The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony” 31 *American University International Law Review* 253, 261 (2016).

<sup>16</sup>Securities and Exchange Board of India, Business Responsibility and Sustainability Report (BRSR), Circular No. SEBI/HO/CFD/CMD-2/P/CIR/2021/562 (10 May 2021).

<sup>17</sup>National Guidelines on Responsible Business Conduct (NGRBC), Ministry of Corporate Affairs, Government of India (2019).

<sup>18</sup>Madhabi Puri Buch, 'ESG: Challenges and Opportunities for India's Capital Markets' address at the National Stock Exchange ESG Symposium, Mumbai, 14 March 2023.

<sup>19</sup>Securities and Exchange Board of India, National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business, Circular (13 August 2012).

<sup>20</sup>SEBI, Master Circular for ESG Rating Providers (ERPs), Circular No. SEBI/HO/DDHS/DDHS-RAC-1/P/CIR/2023/058 (19 April 2023).

<sup>21</sup>Reserve Bank of India, Framework for Acceptance of Green Deposits, RBI/2022-23/181 DOR.STR.REC.83/21.07.001/2022-23 (11 April 2023).

The Ministry of Corporate Affairs' Committee on Business Responsibility Reporting identified significant gaps in the capacity of Indian companies particularly mid-cap and small-cap enterprises to compile and report sustainability data at the granularity required by international standards.<sup>22</sup>

## **V. CRITICAL ANALYSIS: CHALLENGES AND STRUCTURAL TENSIONS**

### **A. The Greenwashing Problem**

The most acute challenge facing ESG regulation is the systematic gap between disclosed ESG commitments and actual corporate conduct a phenomenon broadly described as greenwashing. Tariq Fancy, a former Chief Investment Officer for Sustainable Investing at BlackRock, argued in a widely-discussed intervention that ESG investing functions as a 'dangerous placebo', allowing capital market actors to project sustainability credentials while continuing to finance environmentally destructive activities.<sup>23</sup>

Greenwashing operates at multiple levels: at the level of investment products (mischaracterising the sustainability of portfolios), at the level of corporate disclosure (selective or misleading reporting of ESG performance), and at the level of ratings (inconsistent and opaque ESG assessments from competing rating agencies). The EU's Taxonomy Regulation and SFDR were partly designed to address product-level greenwashing through definitional discipline.

Surya Deva has raised analogous concerns about 'due diligence washing' in the context of mandatory human rights due diligence laws, arguing that procedural compliance with documentation and reporting requirements may become a substitute for genuine identification and remediation of adverse impacts in supply chains.<sup>24</sup>

### **B. Fragmentation of Disclosure Standards**

A second structural challenge is the fragmentation of ESG disclosure standards. Prior to the establishment of the ISSB, companies faced a bewildering proliferation of voluntary frameworks GRI, SASB, CDP, TCFD, IIRC each with different scope, materiality definitions, and reporting requirements.<sup>25</sup>

The ISSB's consolidation exercise, and the endorsement of IFRS S1 and S2 by a growing number of jurisdictions, offers the prospect of baseline standardisation.

However, significant tensions remain between the financial materiality orientation of the ISSB standards (focusing on sustainability information material to investors) and the double materiality approach of the EU's ESRS (which also requires disclosure of the company's own impacts on people and planet regardless of investor materiality). India's BRSR sits closer to the double materiality approach in principle but lacks the prescriptive granularity of either international framework.

### **C. The Voluntary-Mandatory Tension**

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<sup>22</sup>Ministry of Corporate Affairs, Government of India, Report of the Committee on Business Responsibility Reporting (MCA, New Delhi, 2020).

<sup>23</sup>Tariq Fancy, "The Secret Diary of a Sustainable Investor' Medium" (August 2021), available at <<https://medium.com/@sosofancy/the-secret-diary-of-a-sustainable-investor-part-1-70b6987fa139>> (last visited 10 May 2025).

<sup>24</sup>Surya Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' 23 *European Law Journal* 38, 41 (2023).

<sup>25</sup>Global Reporting Initiative, GRI Universal Standards 2021 (GRI, Amsterdam, 2021).

One major point of conflict with ESG regulations is whether to be voluntary or mandatory. The arguments in favour of voluntary frameworks rely on flexibility and innovation, and the danger that regulation might freeze out genuine sustainability goal setting. This points to the need for mandatory disclosures; where voluntary disclosures have not lead to consistent, comparable and reliable information, there is a market failure built on the information asymmetries found by Partnoy.

But with the EU making a journey from voluntary action to compulsory reporting and finally to legally binding action, where there is a will to do, it seems that this is the road the country's most significant for the coffee sector are going to take," Coffee has said.

The switch from NVGs to NGRBC and now mandatory BRSR disclosures for India is a similar evolution, with the leap from a disclosure to an enforceable duty – simulated by CS3D – still to be completed.

#### **D. Enforcement Architecture and Institutional Capacity**

Prospective ESG regulation that is not properly enforced could result in a complex disclosure regime, which serves investors but adds further costs for the companies involved without providing adequate pressure for non-compliant companies. The enforcement regime in the area of commercial regulation in India is dispersed among multiple agencies including the Ministry of Corporate Affairs, SEBI, RBI, the National Green Tribunal and state pollution control boards, whose jurisdictions are overlapping and sometimes even conflicting.

In more developed regulatory frameworks, Williams and Conley have noted that the process of transforming ESG suggestions into binding legal rules demands considerable regulatory resources to be invested in regulatory capabilities, judicial skills and evidentiary mechanisms.<sup>26</sup>

In Indian company law, one of the biggest problems, Tripathi has observed, is the enforcement, as the deterrence effect of statutory provisions is much dulled by the dearth of resources, cumbersome procedures, appeal avenues etc.<sup>27</sup>

### **VI. ESG AT THE INTERSECTIONS: COMPETITION LAW, FINANCIAL REGULATION, AND SUPPLY CHAIN LAW**

#### **A. ESG and Competition Law**

The interaction between ESG coordination and competition law is novel with regard to regulatory challenges. The industry-wide ESG commitments, such as those on emissions reduction, supply chain standards, or sustainability certification, may be problematic in terms of collective action (because involving other participants) and anti-competitive coordination under the C-Law regime as such a regime has been in vogue for a long time.<sup>28</sup>

The Europol has recently provided guidance on horizontal cooperation agreements in the context of sustainability, where environmental agreements can produce real economies which may need to be weighed against competition. Meanwhile, the Indian

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<sup>26</sup>Cynthia A. Williams and John M. Conley, 'An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct' 38 Cornell International Law Journal 493, 497 (2005).

<sup>27</sup>S.C. Tripathi, *Company Law and Corporate Governance* 234 (Central Law Publications, Allahabad, 2019).

<sup>28</sup>Competition Commission of India, *Report on Market Study on E-Commerce in India: Key Findings and Observations* (CCI, New Delhi, 2020).

Competition Commission has offered no similar guidance and the contours of the ESG 'quorum' remain unclear.

### **B. ESG in Financial Regulation and Investor Stewardship**

Together, the Sustainable Finance Disclosure Regulation and the Taxonomy Regulation have shifted ESG from a factor to take into account in investment making to a system of regulatory classification with consequences for investment product labelling and marketing and fiduciary obligation.

The IFC Sustainability Framework (ISF), which informed and underpinned the development of IFC's Performance Standards on environmental and social sustainability, has been widely adopted as a model to use by development finance institutions (DFIs) around the world, and has set a template for ways in which ESG can be integrated into financing conditions.<sup>29</sup>

Stiglitz has stated that the process of financialising ESG (that is, creating a set of investment categories from social and environmental goals) has implications for both the allocation of capital and policy making, as capital allocation and decision making could end up distorting the public endorsement of environmental standards and social preferences.<sup>30</sup>

### **C. Supply Chain Due Diligence and Extraterritorial Reach**

The largest horizon for ESG regulation is a requirement for companies to conduct due diligence, with the EU's CS3D being a good illustration. CS3D obligations are contractually cascaded along supply chains and apply to Indian export and supply to companies in the EU that are subject to the Directive, which imposes compliance obligations on Indian companies in the absence of a legislative framework in domestic law.

This extraterritorial aspect of ESG regulation has potential implications for regulatory sovereignty, market access, and differences between the compliance costs imposed on the supplier and the costs accruing to the customer as a result of the compliance costs of the supplier in developing economies. Deva has proposed that this needs to be taken into consideration in the design of obligatory due diligence laws and that these will not lead to exclusion of smaller suppliers from global value chains.

## **VII. CONCLUSION: TOWARDS A COHERENT DOMESTIC ESG REGULATORY ARCHITECTURE**

This review has shown that the international ESG regulation is changing rapidly and significantly. Commercial regulation" is subject to a change in its "normative foundations" from the voluntary principles to mandatory disclosure, and ultimately, to enforceable substantive obligation, best developed in the European Union. Legislative, judicial and market forces continue to test and challenge the classical shareholder-primacy paradigm, effectively adaptionism with greater awareness of stakeholders' responsibilities and orientating companies towards a long-term approach. Legislative, judicial and market

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<sup>29</sup>International Finance Corporation, Sustainability Framework: Policy and Performance Standards on Environmental and Social Sustainability (IFC, Washington D.C., 2012).

<sup>30</sup>Joseph E. Stiglitz, People, Power, and Profits: Progressive Capitalism for an Age of Discontent 89 (W.W. Norton, New York, 2019).

pressures are constantly putting the classical shareholder-primacy paradigm to the test, increasingly towards redefining the corporate purpose in stakeholder responsibilities and long-term sustainability.

While India demonstrates a genuine spirit of regulation via the making of CSR Mandatory, BRSR framework and the NGRBC, there are also tremendous gaps with respect to implementation, enforcement and an inter-agency institutional framework. The paper suggests a reform agenda for India's commercial regulatory structure in five points.

First, India needs to have its own Sustainable Business Conduct legislation that merges the ESG mandates that are spread across the Companies Act, SEBI regulations, and environmental laws to give a single legislation the force of law in terms of mandatory disclosure, due diligence, and accountabilities at the board level. This law would add the needed coherence and legibility that more and more international investors and actors in the supply chain demand.

Second, BRSR framework must also be incrementally converged to the IFRS framework S1 and S2; both for comparability with international standards and to become a jurisdiction of choice for sustainable finance in India. This alignment is built upon a solid foundation of SEBI's phased implementation of BRS.

Third, India should establish dedicated ESG enforcement capacity within the Ministry of Corporate Affairs and SEBI, modelled on the specialised enforcement units that have proven effective in securities regulation, and invest in the judicial and regulatory expertise required to adjudicate complex sustainability claims.

Fourth, the Competition Commission of India should issue guidance on the treatment of ESG coordination agreements under the Competition Act, 2002, providing regulatory clarity for industry sustainability initiatives while safeguarding against anti-competitive conduct.

Fifth, in view of the extraterritorial reach of the EU's CS3D and analogous legislation, the Government of India should engage diplomatically to ensure that supply chain due diligence obligations are designed and implemented in ways that support rather than marginalise Indian suppliers, and should provide domestic support mechanisms including technical assistance and financial facilitation to enable Indian MSMEs to meet rising global ESG standards.

Mazzucato's insight that value creation in the modern economy is deeply social and institutional dependent on public investment in infrastructure, knowledge, and rule-of-law applies with particular force to ESG: the capacity of law to drive sustainable commercial governance depends not only on the design of regulatory rules but on the quality of the public institutions that produce, interpret, and enforce them.<sup>31</sup>

The reassessment of commercial regulation through ESG principles is, ultimately, a project of institutional transformation. Law is its necessary instrument; sustainable development is its animating purpose; and equitable, inclusive economic growth is its measure of success.

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<sup>31</sup>Mariana Mazzucato, *The Value of Everything: Making and Taking in the Global Economy* 211 (Allen Lane, London, 2018).

