



ESG: A RENEWED SUSTAINABLE LEGAL ORDER

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Abstract

Environmental, social and corporate governance- These three words are governing the discussions of sustainability of new legal order both at international and national levels. The governance mechanism at each level demands sustainability for survival and for growth of civilizations. The future of current digital civilization is being measured in terms of externalities that organizations are contributing towards environment, society and business world. The environmental criteria address the initiatives taken by each and every stakeholder in global business environment towards climate change and other adverse environmental impacts. Investors are increasingly applying these non-financial factors as part of their analysis process to identify material risks and growth opportunities globally².

In the light of this emerging reality, the author of the present paper has initially attempted to understand the emergence and development of the concept of "ESG". The multiverse of ESG is then analyzed through various angles to comprehend the existing legal framework revolving around it in India. The response of Indian legal society to this emergence of ESG is also captured to have a holistic view of this sustainable solution.

Based upon this evaluative analysis, the author has attempted to conclude that the concept of ESG is not a new one; However, it is reshaping the Indian legal order in responses to contemporary challenges of climate change and other adversative environmental impacts. To counter this challenge, the author has endeavored to provide pragmatic solutions which will substantiate the usage of ESG as a transformed but sustainable legal order.

Hope the journey of this paper will help the reader to have a brief but useful insight into the role of ESG as a renewed sustainable legal order.

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Introduction

"Sustainability is not a constraint on innovation and growth - it is a driver of it." - Mark Carney

Generations of civilizations survive on the concept of sustainability. The legacy passed on from one generation to another paves way for growth and development of human beings in all walks of life. These natural transitions are well captured in three words- ESG. ESG demands transformation of theory into action. The businesses that sustain economy and ultimately the welfare and wellbeing of human life are accountable to society for environmental and social impact of their operations. Nature nurtures every human activity and hence, it is duty of every human being to give back to nature. With this thought, the international and national legal communities are taking immense efforts to contextualize the concept of ESG in broad legal frameworks. Once the compliance with ESG comes under the purview of legal obligations, every entity will automatically follow the principles of ESG in their overall mechanisms.

Definition and Meaning of ESG

Environmental, social and governance (ESG) refers to a collection of corporate performance evaluation criteria that assess the robustness of a company's governance mechanisms and its ability to effectively manage its environmental and social impacts¹. Examples of ESG data include the quantification of a company's carbon emissions, water consumption or customer privacy breaches. Institutional investors, stock exchanges and boards increasingly use sustainability and social responsibility disclosure information to explore the relationship between a company's management of ESG risk factors and its business performance¹.

The threat of climate change and its adverse impact on the very existence on human civilizations have triggered the adoption and implementation of ESG evaluation criterion.

¹Environmental, Social and Governance (ESG), Gartner Glossary, available at [https://www.gartner.com/en/finance/glossary/environmental-social-and-governance-esg#:~:text=Environmental%20and%20social%20and%20governance%20\(ESG\)%20refers%20to%20a%20collection,its%20environmental%20and%20social%20impacts](https://www.gartner.com/en/finance/glossary/environmental-social-and-governance-esg#:~:text=Environmental%20and%20social%20and%20governance%20(ESG)%20refers%20to%20a%20collection,its%20environmental%20and%20social%20impacts), last seen on 02/03/2023

¹ibid



Law acts as a binding force and hence, the global legal order is assimilating and executing these corporate performance evaluation criteria in its fabric of compliance structure.

Indian Legal Landscape dealing with ESG

The regulatory framework related to environmental, social and governance (ESG) is not found in any one piece of legislation but comes under various pieces of legislation, including the Factories Act, 1948, Environment Protection Act, 1986, Air (Prevention and Control of Pollution) Act, 1981, Water (Prevention and Control of Pollution) Act, 1974, Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2016, Companies Act, 2013 (Companies Act), Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (Listing Regulations), Prevention of Money Laundering Act, 2002, Prevention of Corruption Act, 1988, and laws with respect to the payment of minimum wage, bonus, gratuity, welfare activities, health and safety, etc. Various aspects of ESG are covered under these pieces of legislation in a fragmented manner³.

The SEBI LODR mandate the top 1,000 listed entities (based on market capitalisation) to disclose a BRSR (replacing the erstwhile BRR) in their annual report. The annual report is shared with the shareholders, submitted to the stock exchange, and published on the company's website⁴.

The BRSR seeks disclosure from listed entities of their performance against the nine principles of the 'National Guidelines on Responsible Business Conduct' (NGRBC), which were issued by the Government of India's Ministry of Corporate Affairs (MCA) in the background of emerging global concerns, the Sustainable Development Goals (SDGs), and the United Nations Guiding Principles on Business and Human Rights⁵. These principles require that businesses should⁶:

³ Environmental, Social & Governance Law 2023, Practical cross-border insights into ESG law, International Comparative Legal Guides, Third Edition, available at <https://iclg.com/practice-areas/environmental-social-and-governance-law/india>, last seen on 04/03/2023

⁴ Ibid

⁵ Ibid

⁶ Ibid



- i) conduct and govern themselves with integrity, and in a manner that is ethical, transparent and accountable;
- ii) provide goods and services in a manner that is sustainable and safe;
- iii) respect and promote the well-being of all employees, including those in their value chains;
- iv) respect the interests of and be responsive to all stakeholders;
- v) respect and promote human rights;
- vi) respect and make efforts to protect and restore the environment;
- vii) when engaging in influencing public and regulatory policy, do so in a manner that is responsible and transparent;
- viii) promote inclusive growth and equitable development; and
- ix) engage with and provide value to their consumers in a responsible manner.

Beyond what is described above, ESG reporting largely remains voluntary in India, depending on the initiative of a business (except for the top 1,000 listed entities). Generally, disclosures are based on well-accepted global sustainability frameworks and standards, such as the GRI, SASB, TCFD, IIRC, etc.⁹. Moreover, SEBI's BRSR Circular also permits interoperability of reporting¹⁰. In 2018, the Bombay Stock Exchange published a guidance document for all corporates listed on it, to provide a comprehensive set of voluntary ESG reporting recommendations along with 33 key performance indicators. Separately, under SEBI's new BRSR, leadership indicators are to be disclosed on a voluntary basis. Investors holding a significant stake in an Indian company may also require such company to disclose ESG matters (as part of information rights contractually negotiated between the investor and the company under a shareholders' or investment agreement)¹¹.

During the year 2022, the Indian Government accelerated the incorporation of ESG principles in its legal structures, considering the numbers of environmental legislation introduced or modified or proposed for changes, as given in the table below.

Table 1: New or Modified Environmental Legislation in India, 2022

⁹Supra 4

¹⁰Ibid

¹¹Ibid



No.	Order Title	Date Issued by Govt. of India
1	G.S.R. 811(E) dated 30th November, 2022 – Environment (Protection) (Amendment) Rules, 2022 – Environmental Standard for Common Effluent treatment Plant (CETP)	16-11-2022
2	G.S.R. 801(E) dated 2nd November, 2022 – E-Waste (Management) Rules, 2022	15-11-2022
3	G.S.R. 805(E) Date [08-11-2022]-Draft Notification for Environment (Protection) Amendment Rules, 2022 on Environmental Standards for Hot Mix Plant.	11-11-2022
4	G.S.R. 804(E) Date [03-11-2022]-Draft Notification for Environment (Protection) Third Amendment Rules, 2022 for Revised Emission Standards for New Generator Set (Genset).	11-11-2022
6	Amendment Notification on Environmental Standards for Thermal Power Plants	06-09-2022
6	G.S.R. 593(E) Date 21st July, 2022- Hazardous and Other Wastes (Management and Transboundary Movement) Amendment Rules, 2022	01-09-2022
7	Battery Waste Management Rules Notification, 2022	26-08-2022
8	Plastic Waste Management Second Amendment Rules 2022	12-07-2022
9	Notice for Public Consultation for Amendment in the Indian Forest Act, 1927 for decriminalization of certain section of IFA, 1927	09-07-2022
10	Proposal for revision of emission standards for particulate matter for industrial boilers	04-07-2022
11	Seeking Comments on the Proposed Amendment of Environment (Protection) Act, 1986.	01-07-2022
12	Notice for Public Consultation for Amendment in the Water (Prevention & Control of Pollution) Act, 1974	30-06-2022
13	Notice for Public Consultation for Amendment in the Air (Prevention & Control of Pollution) Act, 1987	30-06-2022
14	Notice for Public Consultation on Proposal for amendment in the Public Liability Insurance (PLI) Act, 1991	30-06-2022
15	Draft - Environment (Protection) Amendment Rules, 2022 (Environmental Standards for New Caked Petroleum Coke (CPC) units).	02-06-2022
16	S.O.360(E) Date [19-05-2022]-Draft E-Waste Management Rules Notification for seeking public comments	23-05-2022
17	G.S.R. 149(E)-Date [22-02-2022] - Amendment Notification of Environment standards for Brick kiln.	22-02-2022
18	G.S.R. 138 (E) Date:[18-02-2022]-Draft Notification for Revised Emission Standards for New Generator Set (Genset)	18-02-2022
19	Plastic Waste Management (Amendment) Rules, 2022.	16-02-2022
20	G.S.R. 27(E)-Date [18-01-2022] - Plastic Waste Management Rules, 2022.	18-01-2022
21	S.O. 5497(E) Date [31-12-2021]-Draft Notification for seeking public comments on Regulation on Extended Producer Responsibility for Waste Tyres.	31-12-2021
22	S.O.4979(E) [02-12-2021] Final Notification declaring Eco Sensitive Zone around Ashok Wildlife Sanctuary, Uttarakhand.	11-08-2021

Some of the key changes are the introduction of an EPR (Extended Producers Responsibility) Concept and decriminalization of environmental acts. OECD defines Extended Producer Responsibility (EPR) as an environmental policy approach



in which a producer's responsibility for a product is extended to the post-consumer stage of a product's life cycle¹². An EPR policy is characterised by:

1. The shifting of responsibility (physically and/or economically; fully or partially) upstream toward the producer and away from municipalities; and
2. The provision of incentives to producers to take into account environmental considerations while designing their products¹³.

While other policy instruments tend to target a single point in the chain, EPR seeks to integrate signals related to the environmental characteristics of products and production processes throughout the product chain¹⁴. EPR concepts ultimately encourage the circular economy. However, there is a criticism that a number of substantial changes in the statutory provisions are being introduced through OMs as they are meant to be internal documents of the government used for inter and intra departmental communication of decisions. Since they are not mandatorily required to be in the public domain, they should not be used as instruments for issuing important environmental decisions. Instead, any such decision should be widely published as a notification in the official Gazette of India, as per Vidhi Report Analysis.

Besides environmental laws, there are number of other regulatory changes that are being undertaken in India as per National Action Plan on Climate Change (NAPCC)¹⁵ outlining eight National Missions on climate change. These include: National Solar Mission¹⁶; National Mission for Enhanced Energy Efficiency¹⁷, National Mission on Sustainable Habitat¹⁸, National Water Mission¹⁹, National Mission for Sustaining the Himalayan Eco-system²⁰.

¹²Extended Producer Responsibility, OECD, available at [https://www.oecd.org/environment/extended-producer-responsibility.htm#:~:text=Extended%20Producer%20Responsibility%20\(EPR\)%20is,disposal%20of%20post%20consumer%20products](https://www.oecd.org/environment/extended-producer-responsibility.htm#:~:text=Extended%20Producer%20Responsibility%20(EPR)%20is,disposal%20of%20post%20consumer%20products), last seen on 05/03/2023

¹³Ibid

¹⁴Ibid

¹⁵National Action Plan on Climate Change (NAPCC), available at <https://static.pib.gov.in/WritersReadData/specificdocs/documents/2021/doc/doc202112101.pdf>

¹⁶Ibid

¹⁷Ibid

¹⁸Ibid

¹⁹Ibid

²⁰Ibid



National Mission for a Green India²¹; National Mission for Sustainable Agriculture²²,
National Mission on Strategic Knowledge for Climate Change²³.

Contemporary Challenges

India has a large framework of environmental laws, regulations, and executive instruments that lay down an extensive set of obligations for businesses²⁴. However, the environmental laws in India are suffering from multiple lacunas such as inconsistent definitions, ambiguous legal liability, overlapping clearance processes, contradictory penalties and unclear guidance for business enterprises. These are hampering the effective application of ESG criterion in the business world.

On social front, procedural environmental rights, such as the right to access environmental information and the right to public participation in environmental decision making, find explicit protection in a limited number of environmental legal instruments – the Coastal Regulation Zone Notification, the EIA Notification and the Forest Rights Act²⁵. However, the implementation of these rights is weak, with several challenges to environmental clearances in the National Green Tribunal arguing that the public hearing process set out in the EIA Notification was not appropriately carried out. Additionally, since the right to participate in environmental decision-making does not find explicit statutory protection, it has been weakened through executive action²⁶.

A consensus has emerged in recent years that environmental, social, and governance (ESG) issues are crucially important for the corporate world. But what should companies do about investors who won't accept lower returns in order to further ESG goals?²⁷ In a recent PwC

²¹Ibid

²²Ibid

²³Ibid

²⁴Debadityo Sinha, Divyani Mehta & Mridula Vijayaraghavan, Environmental Laws: Application and efficacy in the context of business & human rights, VIDHI Report, Jan 2022, available at https://www.undp.org/sites/g/files/zskgk326/files/migration/in/vidhi-report_FINAL.pdf, last seen on 05/03/2023

²⁵Ibid

²⁶Ibid

²⁷Peter Gassmann and Will Jackson-Moore, The CEO's ESG dilemma, Strategy + Business, A PwC Publication, 06th December 2022, available at https://www.pwc.com/gc/en/strategy-and-business/assets/sbpwc-2022-12-06_CEO-ESG-dilemma_FINAL.pdf, last seen on 05/03/2023



survey, global investors placed ESG-related outcomes such as effective corporate governance and greenhouse-gas emissions reduction among their top five priorities for business to deliver²⁸. But 81% went on to say they would accept only a 1 percentage point or smaller reduction in returns to advance ESG objectives—both those that are relevant to the business and those that have a beneficial impact on society. And roughly half of that group were especially unyielding and would not accept any decline in returns at all²⁹.

Pragmatic Solutions

India's environmental laws are multiple, scattered, contradictory and issue-specific. Although they cover a wide range of environmental issues and impose fairly stringent legal obligations on business enterprises, they can be difficult to understand and require far more resources to implement than are currently made available³⁰. The environmental laws themselves require updating to transition from a command-and-control regime to one that is able to articulate a vision for the environment it desires and the manner in which business enterprises can become partners in achieving such a vision³¹.

Further the Ministry of Environment, Forest & Climate Change must create substantive guidance documents for business enterprises to facilitate adoption of environmental compliances. MoEFCC must review the composition of pollution control boards as well as the processes for granting licenses, permits and permissions under pollution control laws to create more explicit avenues for public participation³².

Apart from the abovementioned legal reforms, businesses must see ESG as a long-term goal to achieve and balance it with short term profits and successes. Then only the reforming legal order will transform the businesses to be compliant with sustainable solutions of ESG.

²⁸Ibid

²⁹Ibid

³⁰Supra 20

³¹Ibid

³²Supra 20