

Directors' Duties & Responsibilities and Disclosure Obligations Under Philippine Laws on Climate Change Risks

Cesar L. Villanueva^{*}

Lily K. Gruba^{**}

Angelo Patrick F. Advincula^{***}

Joyce Anne C. Wong^{****}

* '05 D.J.S., San Beda College of Law; '89 LL.M., Harvard University; '81, *valedictorian*, Ateneo de Manila University School of Law. The Author is a Senior Founding Partner of Villanueva Gabionza & Dy (VGD) Law Offices. He served as the Chairman of the Governance Commission for GOCCs. The Author is a former Dean of the Ateneo de Manila University School of Law (2004-2011), and a former Editor-in-Chief of the *Ateneo Law Journal*. Some of the books he authored previously are COMMERCIAL LAW REVIEW (2015); NON-CORPORATE MEDIA OF DOING BUSINESS: AGENCY & TRUSTS, PARTNERSHIPS & JOINT VENTURES (2015); PHILIPPINE CORPORATE LAW (2013); LAW ON SALES (2009); & LAW AND PRACTICE ON: PHILIPPINE CORPORATE GOVERNANCE (2009), which garnered the National Book Award on Professions given by the National Book Development Board and the Manila Critics Circle. The Author likewise wrote previously *A Glimpse of the Man: Father Joaquin G. Bemas, S.J.*, 66 ATENEO L.J. 1 (2022); *The Revised Code of Corporate Governance: A Reactionary Approach*, 54 ATENEO L.J. 453 (2009); *The Law and Practice on Philippine Corporate Governance*, 53 ATENEO L.J. 706 (2008); *The Evolution of the Philippine Commercial System*, 50 ATENEO L.J. 691 (2005); *Defining the Gravamen: The Bar Reform Movement*, 48 ATENEO L.J. 624 (2004); *Revisiting the Philosophical Underpinnings of Philippine Commercial Laws*, 46 ATENEO L.J. 707 (2001); *Revisiting the Philippine "Laws" on Corporate Rehabilitation*, 43 ATENEO L.J. 183 (1999); *The Law on Contratos Innominados*, 42 ATENEO L.J. 242 (1998); *Corporate Contract Law: Unifying Theme on Theories Relating to Promoter's Contracts, De Facto Corporations, Corporations by Estoppel, Articles of Incorporation, By-Laws, and Ultra-Vires Acts*, 38 ATENEO L.J. 1 (1994); *Restatement of the Doctrine of Piercing the Veil of Corporate Fiction*, 37 ATENEO L.J. 19 (1993); *The Fiduciary Duties of Directors and Officers Representing the Creditor Pursuant to a Loan Workout Arrangement: Parameters Under Philippine Corporate Setting*, 35 ATENEO L.J. 11 (1991); *Philippine Close Corporations*, 32 ATENEO L.J. 30 (1988); *The Trust Fund Doctrine Under Philippine Corporate Setting*, 31 ATENEO L.J. 40 (1987); *Tax Inquiries, Surveillance, Warrantless Searches and Seizures: Their Constitutional Limitations*, 25 ATENEO L.J. 41 (1981); & *The Conscientious Objector Under the New Labor Code*, 25 ATENEO L.J. 27 (1980). He co-wrote *Philippine Corporate Law Practice: Defining the Mandates of the Securities and Exchange Commission (SEC) Through the Resolution of the Jurisdictional Conflicts with the Regional Trial Courts (RTC) over Corporate and Securities Cases*, 60 ATENEO L.J. 652 (2016) with Teresa Villanueva-Tiansay; *Ecclesiastics in Local*

I. INTRODUCTION.....	575
II. CLIMATE CHANGE AND ITS EFFECTS ON THE PHILIPPINES.....	581
A. <i>Meaning and Coverage of the Term Climate Change</i>	
B. <i>Physical Climate Risks in the Philippines</i>	
C. <i>Transitional Climate Risks in the Philippines</i>	
III. PHILIPPINES' RESPONSES AND COMMITMENTS TO INTERNATIONAL ACTIONS ON CLIMATE CHANGE	591
A. <i>1992 Rio Declaration on Environment and Development</i>	
B. <i>1992 United Nations Framework Convention on Climate Change</i>	

Politics: Pamil v. Teleron, 25 ATENEO L.J. 76 (1980) with Andres Soriano; & *Recent Legislations*, 23 ATENEO L.J. 61 (1978) with Ma. Rosario Manalang.

★★ '81 LL.M., Georgetown University Law Center; '76 LL.B., Ateneo de Manila University School of Law. The Author is a Senior Partner at Zambrano Gruba Caganda & Advincola, a Director at the Asia United Bank (AUB), and an Executive Director at the Fr. Joaquin Bernas, S.J. Center for Continuing Legal Education – Ateneo Law School. Some of the books she authored previously are: *A SURVEY OF AMENDMENTS INTRODUCED BY TRAIN LAW (R.A. 10963) TO THE NATIONAL INTERNAL REVENUE CODE OF 1997* (2019); *GUIDE NOTES AND CASES ON TAX REMEDIES* (2018); & *GUIDE NOTES AND CASES ON THE GENERAL PRINCIPLES OF TAXATION AND THE ORGANIZATION OF THE BIR* (2016). She co-wrote *Compulsory Judicial Disqualification in the Court of Tax Appeals*, 55 ATENEO L.J. 502 (2010) with Angelo Patrick F. Advincola and Samantha Paula G. Dy.

★★★ '96 LL.B., University of the Philippines College of Law. The Author is a Senior Partner at Zambrano Gruba Caganda & Advincola, and a Chairman of the Trust Committee at the Asia United Bank (AUB), where he previously served as the Former Director. He was a Corporate Secretary for various banking institutions, as well as a former Lecturer in Taxation at the Ateneo de Manila University School of Law. He co-wrote *Compulsory Judicial Disqualification in the Court of Tax Appeals*, 55 ATENEO L.J. 502 (2010) with Lily K. Gruba and Samantha Paula G. Dy.

★★★★ '08 LL.M., Columbia Law School; '12 J.D., *with honors*, Ateneo de Manila University School of Law. The Author is a Senior Associate at Romulo Mabanta Buenaventura Sayoc & de los Angeles and is also the Director of the Columbia Alumni Association of the Philippines. She is admitted to both the Philippine and New York Bar. The Author was a former legal intern at the Philippine Green Building Council and was chosen to participate in Columbia Law's United Nations (UN) Externship Program with the Marshall Islands Permanent Mission to the UN in New York.

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C.	<i>1997 Kyoto Protocol</i>	
D.	<i>Philippines' Climate Change Act of 2009</i>	
E.	<i>2015 Paris Agreement</i>	
F.	<i>2030 Agenda for Sustainable Development</i>	
G.	<i>Sendai Framework for Disaster Risk Reduction</i>	
H.	<i>G20's Financial Stability Board — Task Force on Climate-Related Financial Disclosures</i>	
I.	<i>2017 Network of Central Banks and Supervisors for Greening the Financial System</i>	
IV.	DIRECTORS' DUTIES AND RESPONSIBILITIES IN RELATION TO CLIMATE CHANGE.....	604
A.	<i>Constitutional Underpinning of Directors' Duties and Responsibilities in Relation to Climate Change</i>	
B.	<i>Role of the Private Business Under the Climate Change Act</i>	
C.	<i>Directors' Fiduciary Duties — In General</i>	
D.	<i>Directors' Duties and Responsibilities to Shareholders in Relation to Climate Change</i>	
E.	<i>Directors' Duties and Responsibilities to Other Stakeholders in Relation to Climate Change</i>	
V.	DIRECTORS' POTENTIAL LIABILITIES IN RELATION TO CLIMATE CHANGE	628
A.	<i>Directors' Personal (Civil) Liability for Corporate Acts — In General</i>	
B.	<i>Directors' Personal (Civil) Liability to Shareholders and Other Stakeholders in Relation to Climate Change</i>	
C.	<i>Directors' Liability in Corporations Vested with Public Interest</i>	
D.	<i>Directors' Criminal Liability for Corporate Acts — In General</i>	
E.	<i>Directors' Potential Civil and/or Criminal Liabilities Under the Environmental Laws</i>	
VI.	DIRECTORS' DISCLOSURE OBLIGATIONS IN RELATION TO CLIMATE CHANGE RISKS.....	650
A.	<i>SEC's Sustainability Reporting Guidelines for Publicly-Listed Companies</i>	
B.	<i>Philippine Stock Exchange (PSE)'s Disclosure Rules</i>	
C.	<i>Insurance Commission's Revised Code of Corporate Governance</i>	
D.	<i>SEC Guidelines on the Issuance of Green Bonds Under the ASEAN Green Bonds Standards in the Philippines</i>	
E.	<i>Bangko Sentral ng Pilipinas' (BSP's) Sustainable Finance Framework</i>	
VII.	LITIGATION RISKS IN RELATION TO CLIMATE CHANGE.....	674
A.	<i>Precautionary Principle</i>	
B.	<i>Citizen Suits</i>	

C. *Strategic Lawsuit Against Public Participation (SLAPP)*

D. *Writ of Kalikasan ("Writ of Nature")*

VIII. CONCLUSIONS AND ADVICE 684

I. INTRODUCTION

Climate change means “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”¹ Climate change refers to the variations in the climate resulting from increase in global average temperatures caused by the accumulation of excess heat-trapping greenhouse gases (GHGs).² The *physical risks* — those arising from climate change impacts and climate-related hazards³ and the *transition risks* — those arising from the transition to a net-zero or low-carbon economy⁴ — of climate change threaten national and regional economies, and pose foreseeable financial risks to corporations and other commercial endeavors across the world.⁵

The Philippines is already experiencing a range of climate change impacts, including a rise in average temperatures, a decrease in monsoon precipitation, a rise in extreme temperature and rainfall events, droughts, sea levels, and an increase in the intensity of severe tropical storms.⁶ Physical risks from rapid-onset events like cyclones, hurricanes, or floods, and from slow-onset events like sea-level rise or droughts have caused both direct and indirect impacts on the Philippine economy and its underlying financial and commercial

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1. United Nations Framework Convention on Climate Change art. 1, ¶ 2, *adopted* May 9, 1992, 1771 U.N.T.S 107, (entered into force Mar. 21, 1994) [hereinafter UNFCCC].
 2. Michael Oppenheimer & Jesse K. Anttila-Hughes, *The Science of Climate Change*, 26 *FUTURE CHILD* 11, 12-13 (2016).
 3. Andy Reisinger, et al., *The Concept of Risk in the IPCC Sixth Assessment Report: A Summary of Cross-Working Group Discussions* (Intergovernmental Panel on Climate Change, Geneva, Switzerland, 4 Sept. 2020), at 13, *available at* https://www.ipcc.ch/site/assets/uploads/2021/02/Risk-guidance-FINAL_15Feb2021.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/WK39-MEKT>].
 4. *Id.*
 5. *See id.* at 13-14.
 6. Juyoung Hong, et al., *Changes of Extreme Precipitation in the Philippines, Projected from the CMIP6 Multi-Model Ensemble*, *WEATHER CLIM. EXTREMES*, 2022, at 1.

enterprises.⁷ Direct impacts include material damage to assets, infrastructure, or facilities, while indirect impacts include disruptions to supply chains, water and raw material availability, food security, transport, and employee safety.⁸ The economic transition risks relating to the Philippines' commitment to a low carbon regime have had a business impact on certain key industries, such as oil and power, automobiles, logging, and even construction.⁹ These economic transition impacts already have, and will continue to have, profound effects on key industries' business models, revenues and costs, as well as financing and investment profiles.¹⁰

As an archipelagic nation located in the Tropical Cyclone Belt and the Pacific Ring of Fire, the Philippines is extremely vulnerable to the physical impacts of climate change.¹¹ The 2022 World Risk Report found the

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7. See International Organization for Migration, Framing the Human Narrative of Migration in the Context of Climate Change: A Preliminary Review of Existing Evidence in the Philippines, at 2, available at https://philippines.iom.int/sites/g/files/tmzbdl1651/files/documents/framing-the-human-narrative-of-migration-in-the-context-of-climate-change_o.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/2DVG-LZRL>].
 8. Task Force on Climate-Related Financial Disclosures, Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosures (June 2017), at 6, available at <https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/4FKA-QXXZ>] [hereinafter Task Force Final Report].
 9. See Cesar L. Villanueva, et al., Directors' Duties & Responsibilities And Disclosure Obligations Under Philippine Law On Climate Change Risks, available at <https://commonwealthclimatelaw.org/wp-content/uploads/2022/10/CCLI-Legal-Opinion-on-Directors-Duties-Disclosure-Obligations-under-Philippines-Law-in-the-context-of-Climate-Risks-18-Oct-2022.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/GZT6-YDC8>].
 10. *Id.*
 11. Statement by Enrique A. Manalo, Permanent Representative of the Philippines to the United Nations, 54th Session of the Commission on Population and Development (Apr. 23, 2021) (on file with the Permanent Mission of the Republic of the Philippines to the United Nations). The Philippine Climate Change Commission — National Panel of Technical Experts (NPTE) has identified top 10 climate-related risks in the country: (1) the rising sea levels, (2) coastal erosion, (3) flooding, (4) increasing frequency and severity of tropical cyclones, (5) extreme drought, (6) temperature increase and rising urban heat index, (7) extreme rainfall, (8) climate-influenced diseases, (9) wind patterns, and (10) biodiversity loss. Department of Finance, CCC Experts Panel Lists 10 PHL Hazards Requiring

Philippines to have the highest disaster risk from natural hazards among 193 countries.¹² Previously, the 2021 Global Climate Risk Index placed the Philippines as the fourth most impacted country by extreme weather events between 2000 and 2019, with a total of 317 weather-related events, the highest among the most affected countries.¹³ The Philippines is also one of the most cyclone-prone countries in the world, with an estimated 20 tropical cyclones annually and the damage from which costs the country an average of 0.5% of its gross domestic product (GDP).¹⁴ The loss and damage alone from Typhoon Haiyan (locally known as Super Typhoon Yolanda) in 2013 equated to 4% of Philippine GDP, and the successive typhoons in October and November 2020 (i.e., Typhoons Molave, Goni, and Vamco) resulted in \$852 million worth of damage to agriculture, industries, and infrastructure.¹⁵

The 2020 McKinsey Report on the physical risks of climate change impacting livability and workability, food systems, physical assets, infrastructure assets, and natural capital, identified the Philippines as one of the countries that had high risks for changes in outdoor working hours affected by extreme heat and humidity, and at high risk of flood damage.¹⁶ Further, the rate of sea-level rise in the Philippines is also one of the fastest in the world,

Urgent Climate Action, *available at* <https://www.dof.gov.ph/cc-experts-panel-lists-10-phl-hazards-requiring-urgent-climate-action> (last accessed Jan. 31, 2023) [<https://perma.cc/Y9A7-7C73>].

12. FRANZISKA ATWIL, ET AL., *WORLDRISKREPORT 2022 — FOCUS: DIGITALIZATION 6* (Lisa Cohen trans., 2022). “The countries with the highest disaster risk worldwide are the Philippines (WRI 46.82), India (WRI 42.31), and Indonesia (WRI 41.46).” *Id.*
13. DAVID ECKSTEIN, ET AL., *GLOBAL CLIMATE RISK INDEX 2021: WHO SUFFERS MOST FROM EXTREME WEATHER EVENTS? WEATHER-RELATED LOSS EVENTS IN 2019 AND 2000-2019*, at 13, tbl. 2 (2021).
14. Republic of the Philippines, *Nationally Determined Contribution Communicated to the Secretariat of the United Nations Framework Convention on Climate Change* (Apr. 15, 2021), at 3, *available at* <https://unfccc.int/sites/default/files/NDC/2022-06/Philippines%20-%20NDC.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/EVQ2-WNT9>] [hereinafter Philippine NDC Communication].
15. *Id.*
16. JONATHAN WOETZEL, ET AL., *CLIMATE RISK AND RESPONSE: PHYSICAL HAZARDS AND SOCIOECONOMIC IMPACTS 106* (2020).

with twice the highest global average rate observed from 1993–2010,¹⁷ threatening not only the country’s food security and water resources, but also the displacement of small island communities.¹⁸ It is estimated that “[t]he [Philippines] had lost about 68[%] and 82[%] corals and seagrass cover, respectively, from 2009–2016, which was exacerbated by climate change impacts, such as coral bleaching and ocean acidification.”¹⁹

The Philippines’ Nationally Determined Contribution (NDC)²⁰ submitted to the United Nations Framework Convention on Climate Change (UNFCCC)²¹ does not mandate a net-zero emissions goal for the country.²² The Philippine Government, however, has committed to reduce and avoid national greenhouse gas emissions by 75% by 2030 against the business-as-usual scenario for 2020–2030, of which 72.29% is conditional on multilateral support²³ under the Paris Agreement.²⁴ The Philippines’ NDC is based on the

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17. PHILIPPINE ATMOSPHERIC, GEOPHYSICAL, AND ASTRONOMICAL SERVICES ADMINISTRATION (PAGASA), OBSERVED CLIMATE TRENDS AND PROJECTED CLIMATE CHANGE IN THE PHILIPPINES 10 (2018).
 18. Press Release by Department of Finance, *CCC Meets New Experts’ Panel on Strategies to Deal with PH Top Climate-Induced Risks* (Oct. 27, 2021) (on file with Philippine Information Agency).
 19. Department of Finance, *Climate-Related Hazards Led to US\$10-B Losses for Low-Carbon Emission PHL over 10-Year Period*, available at https://www.dof.gov.ph/climate-related-hazards-led-to-us10-b-losses-for-low-carbon-emission-phl-over-10-year-period/?utm_source=rss&utm_medium=rss&utm_campaign=climate-related-hazards-led-to-us10-b-losses-for-low-carbon-emission-phl-over-10-year-period (last accessed Jan. 31, 2023) [<https://perma.cc/Y5U4-63HT>].
 20. Philippine NDC Communication, *supra* note 14.
 21. United Nations Framework Convention on Climate Change, *opened for signature* May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994). *See also* United Nations Framework Convention on Climate Change, *What Is the United Nations Framework Convention on Climate Change?*, available at <https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change> (last accessed Jan. 31, 2023) [<https://perma.cc/WGD7-2YBJ>].
 22. Philippine NDC Communication, *supra* note 14.
 23. *Id.*
 24. Paris Agreement, *opened for signature* Apr. 22, 2016, T.I.A.S. No. 16-1104.

Climate Change Act of 2009²⁵ and two key policy documents issued by the Climate Change Commission, namely:

- (1) The National Framework Strategy on Climate Change 2010-2022,²⁶ which recognizes that “[c]limate change is the most serious and pervasive threat facing humanity today”²⁷ and sets out the Philippines’ principles of climate change mitigation and adaptation, the risks arising from climate change, and overarching strategies for mitigation and adaptation, including developments and growth in sustainable infrastructure, clean energy, and sustainable transport;²⁸ and
- (2) The National Climate Change Action Plan 2011-2028,²⁹ which outlines the Philippine Government’s comprehensive commitments to respond to climate risks that involves both the public and the private sectors, centered around seven key policy areas: food security, water sufficiency, ecological and environmental sustainability, human security, climate-friendly industries and services, sustainable energy, and knowledge and capacity development.³⁰

The Climate Change Act of 2009³¹ was amended in 2012 to establish the People’s Survival Fund,³² which provides the mechanism for long-term

25. An Act Mainstreaming Climate Change into Government Policy Formulations, Establishing the Framework Strategy and Program on Climate Change, Creating for This Purpose the Climate Change Commission, and for Other Purposes [Climate Change Act of 2009], Republic Act No. 9729 (2009) (as amended).

26. Office of the President & Climate Change Commission, National Framework Strategy on Climate Change 2010-2022, *available at* <https://climate.gov.ph/files/NFSCC.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/H8FC-53TF>].

27. *Id.* at 3.

28. *See id.* at 19 & 23-25.

29. Climate Change Commission, National Climate Change Action Plan 2011-2028, *available at* https://policy.asiapacificenergy.org/sites/default/files/NCCAP_Tech_Doc.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/NA8J-SD7G>].

30. *Id.* at 6.

31. *See generally* Climate Change Act of 2009.

32. An Act Establishing the People’s Survival Fund to Provide Long-Term Finance Streams to Enable the Government to Effectively Address the Problem of Climate Change, Amending for the Purpose Republic Act No. 9729, Otherwise Known

finance streams to enable the Philippine Government to effectively address climate change, support adaptation activities, and prevent and mitigate disasters.³³ The amendatory law explicitly recognizes the Philippines' vulnerability "to potential dangerous consequences of climate change ... such as increasing temperatures, rising seas, changing landscapes, increasing frequency and/or severity of droughts, fire, floods and storms, climate-related illnesses and diseases, damage to ecosystems, and biodiversity loss that affect the country's environment, culture, and economy[.]"³⁴

Even prior to the 1992 formulation of the UNFCCC,³⁵ the Philippine Government, in coordination with the business and civil society sectors, had enacted numerous laws and regulations that provided for industry standards and practices to protect the environment, and prescribed penalties for prohibited acts that undermine the environment.³⁶

The enactment of the various environmental laws that preceded the UNFCCC could be attributed to the fact that the Philippines' 1987 Constitution recognizes the citizens' "right to health"³⁷ and "right to a balanced and healthful ecology,"³⁸ with corresponding obligations of the State to "protect and promote the right to health of the people,"³⁹ and to "protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."⁴⁰ The Philippine Supreme Court has affirmed "the right [of Filipinos] to a balanced and healthful ecology,"⁴¹ and "the correlative duty to refrain from impairing the environment."⁴² It also held that even without the constitutional provisions on the rights to health and to a balanced and healthful ecology, the same would be part of the law of the land because the Philippines is a signatory to the

as the "Climate Change Act of 2009," and for Other Purposes, Republic Act No. 10174 (2012).

33. *See id.* § 13.

34. *Id.* § 1.

35. UNFCCC, *supra* note 1.

36. *See, e.g.*, Philippine Environmental Code [ENVIRON. CODE], Presidential Decree No. 1152 (1977).

37. PHIL. CONST. art. II, § 15.

38. PHIL. CONST. art. II, § 16.

39. PHIL. CONST. art. II, § 15.

40. PHIL. CONST. art. II, § 16.

41. *Oposa v. Factoran, Jr.*, G.R. No. 101083, 224 SCRA 792, 805 (1993).

42. *Id.*

Universal Declaration of Human Rights, which recognizes health as a fundamental human right.⁴³

II. CLIMATE CHANGE AND ITS EFFECTS ON THE PHILIPPINES

A. Meaning and Coverage of the Term Climate Change

A globally accepted definition of *climate change* — which has been adopted by 197 countries, including the Philippines,⁴⁴ as signatory to the UNFCCC is “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”⁴⁵ Essentially, climate change refers to the variations in the climate resulting from increase in global average temperatures caused by the accumulation of excess heat-trapping GHGs.⁴⁶

The overwhelming scientific consensus is that human-induced climate change has caused widespread adverse impacts and related losses and damages to the environment and people, beyond natural climate variability.⁴⁷ The Intergovernmental Panel on Climate Change (IPCC), the United Nations (UN) body for assessing the science related to climate, has reported that emissions of greenhouse gases from human activities are responsible for approximately 1.1°C of warming since the pre-industrial period (1850–1900), and when averaged over the near-term 20 years (2021–2040), global

43. *Laguna Lake Development Authority v. Court of Appeals*, G.R. No. 110120, 231 SCRA 292, 307–08 (1994) (citing 3 RECORD OF THE CONSTITUTIONAL COMMISSION, NO. 32, at 119 (1986)).

44. The Philippines signed the United Nations Framework Convention on Climate Change (UNFCCC) on 12 June 1992 and ratified it on 2 August 1994. United Nations Treaty Collection, United Nations Framework Convention on Climate Change, available at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en (last accessed Jan. 31, 2023) [<https://perma.cc/M25K-CYYW>].

45. UNFCCC, *supra* note 1, art. 1, ¶ 2.

46. Oppenheimer & Anttila-Hughes, *supra* note 2, at 12–13.

47. See Paola A. Arias, et al., *Technical Summary*, in CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS; CONTRIBUTION OF WORKING GROUP I TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 50–52 (Valerie Masson-Delmotte, et al. eds., 2021).

temperature is expected to reach or exceed 1.5°C of warming.⁴⁸ The IPCC has stated that it is unequivocal that human influence has warmed the Earth's atmosphere, ocean, and that every additional 0.5°C increment of global warming causes clearly discernible increases in the intensity of hot extremes, including heatwaves, and heavy precipitation, as well as agricultural, and ecological droughts.⁴⁹

The IPCC's October 2018 Special Report on Global Warming of 1.5°C⁵⁰ set out the deep and widespread impacts of even 1.5°C warming, such as the loss of 70%–90% of the world's coral reefs,⁵¹ and highlighted the significant differential in impacts between 1.5°C and 2°C of global average warming.⁵² Limiting global warming to 1.5°C is still technically feasible, but requires “rapid[,] far-reaching[,] [and unprecedented]” changes in all aspects of society and the economy and deep reductions in CO₂ and other greenhouse gas emissions occur in the coming decades.⁵³ Under IPCC's high-, medium-, and low-emissions scenarios, warming of 1.5°C is more than likely in the near term (between 2021–2040).⁵⁴ Reaching 1.5°C of warming in the near term

48. Hans-Otto Pörtner, et al., *Technical Summary, in CLIMATE CHANGE 2022: IMPACTS, ADAPTATION, AND VULNERABILITY; CONTRIBUTION OF WORKING GROUP II TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE* 44 (Hans-Otto Pörtner, et al. eds., 2022).

49. Sonia I. Seneviratne, et al., *Weather and Climate Extreme Events in a Changing Climate, in CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS; CONTRIBUTION OF WORKING GROUP I TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE* 1513, 1513 (Valerie Masson-Delmotte, et al. eds., 2021).

50. Intergovernmental Panel on Climate Change, *Summary for Policymakers, in GLOBAL WARMING OF 1.5°C: AN IPCC SPECIAL REPORT ON THE IMPACTS OF GLOBAL WARMING OF 1.5°C ABOVE PRE-INDUSTRIAL LEVELS AND RELATED GLOBAL GREENHOUSE GAS EMISSION PATHWAYS, IN THE CONTEXT OF STRENGTHENING THE GLOBAL RESPONSE TO THE THREAT OF CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND EFFORTS TO ERADICATE POVERTY* (Valerie Masson-Delmotte, et al. eds., 2018).

51. *Id.* at 8.

52. *Id.*

53. *Id.* at 15.

54. *Id.*

“would cause unavoidable increases in multiple climate hazards and present multiple risks to ecosystems and humans[.]”⁵⁵

At this time, we should already be preparing for the likely scenario that the increase in global average temperature would be beyond 1.5°C. In September 2021, the UNFCCC published a report on the efficacy of the NDCs of parties to the Paris Agreement to date, and found that, if adhered to, the NDCs would use up to 89% of the remaining carbon budget, consistent with a 50% likelihood of limiting global average temperature rise to 1.5°C by 2030.⁵⁶ Research by NGO Climate Action Tracker in November 2021 predicts that while current policies are projected to result in approximately 2.9°C warming, recent increases in ambition on climate policy, if implemented, has put the world on track to limit global average temperature rise to 2.1°C by 2100.⁵⁷ During the 2021 UN Climate Change Conference (COP26),⁵⁸ the International Energy Agency (IEA) updated its October 2021 analysis on the projected temperature rise if pledges are fully implemented to show that policies and commitments following COP26 may limit global average temperature rise to 1.8°C — an improvement over its earlier estimate of 2.1°C of warming.⁵⁹ Given the likely effects of climate change in a 1.5°C-

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55. Hans-Otto Pörtner, et al., *Summary for Policymakers*, in CLIMATE CHANGE 2022: IMPACTS, ADAPTATION, AND VULNERABILITY; CONTRIBUTION OF WORKING GROUP II TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 13 (Hans-Otto Pörtner, et al. eds., 2022).
56. U.N. Framework Convention on Climate Change, *Nationally Determined Contributions Under the Paris Agreement: Synthesis Report by the Secretariat*, ¶ 14, U.N. Doc. FCCC/PA/CMA/2021/8 (Sept. 17, 2021).
57. Climate Analytics & NewClimate Institute, Climate Action Tracker: Warming Projections Global Update (November 2021), at 12, available at https://climateactiontracker.org/documents/997/CAT_2021-11-09_Briefing_Global-Update_Glasgow2030CredibilityGap.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/F7H8-28YF>].
58. The said Conference was held in Glasgow with over 40,000 registered participants, 22,274 party delegates, 14,124 observers, and 3,886 media representatives. United Nations, COP26: Together for Our Planet, available at <https://www.un.org/en/climatechange/cop26> (last accessed Jan. 31, 2023) [<https://perma.cc/AR8E-BBLQ>].
59. International Energy Agency, World Energy Outlook 2021: Technical Note on the Emissions and Temperature Implications of COP26 Pledges, at 6 & 9, available at <https://iea.blob.core.windows.net/assets/4ed140c1-c3f3-4fd9-acae-789a4e14a23c/WorldEnergyOutlook2021.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/4LMB-9FX4>]. See also Fatih Birol, COP26 Climate Pledges

warmer world, the shortfall in the current NDC targets may indicate that businesses may face increased transition risks in the short to medium term, as governments may introduce additional policies, or may face increased physical risks in the medium to long term as effects of climate change materialize.

There is international consensus, both scientific and governmental, of the significant adverse risks brought about by climate change.⁶⁰ Climate change risks that organizations face are generally classified into two categories: (1) *physical risks*, which are closely related to risks arising from climate change impacts and climate-related hazards, and (2) *transition risks*, referring to risks arising from the transition to a low carbon economy.⁶¹

B. Physical Climate Risks in the Philippines

Physical risks resulting from climate change can either be (a) acute or event-driven such as severity of extreme weather events like cyclones, hurricanes, or floods; or (b) chronic or longer-term shifts in climate patterns causing sea-level rise or heat waves.⁶² Physical risks may have financial implications on organizations, such as causing direct damage to assets, infrastructure or facilities, and indirect impacts to supply chains such as disruption, water and raw materials availability and sourcing, food security, transport needs, and employee safety.⁶³

As an archipelagic nation located in the Tropical Cyclone Belt and the Pacific Ring of Fire, the Philippines is extremely vulnerable to the physical impacts of climate change.⁶⁴ The 2021 Global Climate Risk Index placed the Philippines as the fourth-most impacted country by extreme weather events

Could Help Limit Global Warming to 1.8°C, but Implementing Them Will Be the Key, *available at* <https://www.iea.org/commentaries/cop26-climate-pledges-could-help-limit-global-warming-to-1-8-c-but-implementing-them-will-be-the-key> (last accessed Jan. 31, 2023) [<https://perma.cc/K56A-ACP6>].

60. *See, e.g.*, U.S. Office of Management and Budget, Climate Risk Exposure: An Assessment of the Federal Government's Financial Risks to Climate Change, at 1 & 4, *available at* https://www.whitehouse.gov/wp-content/uploads/2022/04/OMB_Climate_Risk_Exposure_2022.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/Q3PP-W68C>].

61. Reisinger, et al., *supra* note 3, at 13.

62. TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES: 2019 STATUS REPORT 36 (2019) [hereinafter 2019 STATUS REPORT].

63. Reisinger, et al., *supra* note 3, at 13.

64. Manalo, *supra* note 11.

between 2000–2019, with a total of 317 weather-related events — the highest among the most affected countries.⁶⁵ The Philippines is also one of the most cyclone-prone countries in the world, with an estimated 20 tropical cyclones annually, the damage of which costs the country an average of 0.5% of its gross domestic product (GDP).⁶⁶ The loss and damage alone from Typhoon Haiyan in 2013 equated to 4% of the Philippine GDP, and the successive typhoons in October and November 2020 (e.g., Typhoons Molave, Goni, and Vamco) resulted in a net loss of \$852 million worth of damage to agriculture, industries, and infrastructure.⁶⁷

The 2020 McKinsey Report on the physical risks of climate change impacting livability and workability, food systems, physical assets, infrastructure assets, and natural capital, identified the Philippines as one of the countries that have high risks for changes in outdoor working hours affected by extreme heat and humidity, and at high risk of flood damage.⁶⁸ Further, the rise of sea level in the Philippines is also one of the fastest in the world, with twice the highest global average rate observed from 1993–2010,⁶⁹ threatening not only the country's food security and water resources, but also the displacement of small island communities.⁷⁰ It is estimated that “[t]he [Philippines] had lost about 68[%] and 82[%] corals and seagrass cover, respectively, from 2009–2016, which was exacerbated by climate change impacts, such as coral bleaching and ocean acidification.”⁷¹

C. Transitional Climate Risks in the Philippines

The transition risks of climate change arise from the transition towards a low carbon or net-zero emissions economy, which entail extensive policy, legal, technology, and market changes, and pose varying levels of financial and reputational risks to organizations.⁷² Transition risks can result in “stranded

65. ECKSTEIN, ET AL., *supra* note 13, at 13, tbl. 2.

66. Philippine NDC Communication, *supra* note 14, at 3.

67. *Id.*

68. WOETZEL, ET AL., *supra* note 16, at 106.

69. PHILIPPINE ATMOSPHERIC, GEOPHYSICAL, AND ASTRONOMICAL SERVICES ADMINISTRATION (PAGASA), *supra* note 17.

70. Department of Finance, *supra* note 18.

71. *Id.*

72. Task Force Final Report, *supra* note 8, at 5.

assets, loss of markets, reduced returns on investment[,] and financial penalties.”⁷³

Transition climate risks include: (a) *policy risks* — which either constrain actions contributing to adverse effects or promote adaptation to climate change like carbon-pricing mechanisms, shifting to energy and water-efficient solutions, and sustainable land-use practices; and also litigation or legal risks from failure to mitigate impact and insufficiency of disclosure;⁷⁴ (b) *technology risks* — which are “innovations that support lower-carbon, energy-efficient [] system[s]” and the creative destruction of old technologies;⁷⁵ (c) *market risks* — which shift supply and demand for certain commodities, products, and services;⁷⁶ and (d) *reputation risks* — which result in “changing customer or community perceptions of an organization’s contribution.”⁷⁷

In the Philippines, transition risks of climate change are an emerging consideration.⁷⁸ While the Philippines does not have a legally mandated net-zero emissions goal, the government has set a national target to reduce greenhouse gas emissions. There has also been an active and growing support by both public and private sectors in the Philippines to encourage the transition into a lower carbon economy.

A technical note by the World Bank states that “the Philippines is one of the most vulnerable countries in the world [against] natural catastrophes and climate change[.]” with over 60% of the Philippine land area and 74% of the population exposed to multiple hazards, which renders the country’s financial sector highly vulnerable to climate risk.⁷⁹ The technical note also states that

73. Reisinger, et al., *supra* note 3, at 14.

74. Task Force Final Report, *supra* note 8, at 5.

75. *Id.* at 6.

76. *Id.*

77. *Id.*

78. See Zeno Ronald R. Abenoja, et al., Climate Change and Monetary Policy: Some Preliminary Thoughts (Bangko Sentral ng Pilipinas Economic Newsletter No. 22- 03, June 2022), available at https://www.bsp.gov.ph/Media_And_Research/Publications/EN22-03.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/DK7R-V2ZW>].

79. Martijn G.J. Regelink, Philippines: Financial Sector Assessment Program — Technical Note on Climate Change and Environmental Risks and Opportunities (June 2019), at 10– 11, available at <https://documents1.worldbank.org/curated/en/244321629266625579/pdf/Philippines-Financial-Sector-Assessment-Program-Climate-Change-and-Environmental-Risks-and-Opportunities-Technical-Note.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/JCB3-S28A>].

“[i]n addition to physical risks, Philippine banks [can] [] be exposed to transition [risks] that emerge during the transition towards a more sustainable and carbon-neutral economy[.]”⁸⁰ noting that

Philippine supervisory authorities should build capacity to better understand and manage climate risks and foster transparency.

...

At the same time, there is opportunity for deepening financial markets for green growth, by addressing several market and institutional barriers. With limits in public spending, there is great need, but also a significant opportunity for the private sector to contribute to green inclusive growth, including finance for climate resilience and mitigation efforts.⁸¹

A good example of transition risks faced by Philippine companies would be in the power generation sector.⁸² Despite the enactment of the Renewable Energy Act of 2008,⁸³ the proportion of energy generated from renewable sources has steadily decreased, while that from coal has steadily increased.⁸⁴ In 2020, coal-based energy constituted over 57.2% of the country's energy mix, while renewable energy constituted 21.3% of the country's energy mix, edging out natural gas which provided 19.2% of the country's energy requirements.⁸⁵

In October 2020, the Philippine Department of Energy announced a moratorium on greenfield coal-based power projects to encourage investment in natural gas and renewables,⁸⁶ which effectively cancelled over 10 gigawatts (GWs) of planned coal power projects.⁸⁷ In March 2021, the Philippine

80. *Id.* at 4.

81. *Id.* at 5 (emphases omitted).

82. *See, e.g.*, DEPARTMENT OF ENERGY, 2020 PHILIPPINE ENERGY SITUATIONER & KEY ENERGY STATISTICS 14-15 (2021).

83. An Act Promoting the Development, Utilization and Commercialization of Renewable Energy Resources and for Other Purposes [Renewable Energy Act of 2008], Republic Act No. 9513 (2008).

84. DEPARTMENT OF ENERGY, *supra* note 82, at 15.

85. *Id.* at 14.

86. Department of Energy, Advisory on the Moratorium of Endorsements for Greenfield Coal-Fired Power Projects in Line with Improving Sustainability of the Philippines' Electric Power Industry, Memorandum, Series of 2020, at 1 (Dec. 20, 2020).

87. World Resources Institute, Indonesia and the Philippines Take Action to Accelerate Clean Energy Transition, *available at* <https://www.wri.org/outcomes>

Government held a virtual public consultation on the proposed National Renewable Program 2020–2040, which includes a national target of 35% renewable energy by 2030, a commitment which will require approximately 20 GW of additional renewable capacity.⁸⁸ Under the new administration of President Ferdinand R. Marcos, Jr., the Philippine Department of Energy confirmed the continuation on the moratorium on building new coal-fired plants.⁸⁹

Despite its current heavy reliance on coal as an energy source, the Philippines is seeing a movement away from coal financing. In December 2020, one of the Philippines' largest banks, the Rizal Commercial Banking Corporation (RCBC) announced that it would no longer finance greenfield coal-fired power projects in the Philippines.⁹⁰ In April 2021, the Bank of Philippine Islands announced its plans to reduce its coal financing in half by 2026 and to finance no coal projects by 2037.⁹¹ In May 2021, the Mandaluyong-based Asian Development Bank (ADB) made the same commitment, and in November 2021, announced the development of the Energy Transition Mechanism (ETM) by which it intends to channel public and private investments to retire coal plants on an earlier schedule than if they

/indonesia-and-philippines-take-action-accelerate-clean-energy-transition (last accessed Jan. 31, 2023) [<https://perma.cc/7ZQX-GYJ3>].

88. *New RE Plan Targets 35% Share of Power Generation by 2030*, PHIL. NEWS AGENCY, Nov. 13, 2021, available at <https://www.pna.gov.ph/articles/1159659> (last accessed Jan. 31, 2023) [<https://perma.cc/DUT8-8S59>].

89. Myrna M. Velasco, *Coal Moratorium to Stay Under Marcos Admin — DOE*, MANILA BULL., Aug. 9, 2022, available at <https://mb.com.ph/2022/08/09/coal-moratorium-to-stay-under-marcos-admin-doe> (last accessed Jan. 31, 2023) [<https://perma.cc/EXR7-HK6Z>] & Paige Javier, *Local Sources, Nuclear Regulatory Framework, Coal Moratorium — DOE Bares Plans on Power Supply*, CNN PHIL., Aug. 9, 2022, available at <https://www.cnnphilippines.com/news/2022/8/9/DOE-bares-plans-on-power-supply.html> (last accessed Jan. 31, 2023) [<https://perma.cc/48R4-NAYC>].

90. Sam Reynolds, *IEEFA: In the Philippines, Coal's Demise Makes Way for a Renewable Energy Boom*, available at <https://ieefa.org/resources/ieefa-philippines-coals-demise-makes-way-renewable-energy-boom> (last accessed Jan. 31, 2023) [<https://perma.cc/S6B7-DVD8>].

91. *Id.*

remained with their current owners.⁹² The Philippines is one of the pilot countries for the ETM.⁹³

Another transition risk faced by Philippine companies is in the construction and housing sectors. In 2019, the Philippine Government enacted the Energy Efficiency and Conservation Act,⁹⁴ mandating that all new buildings and renovations comply with minimum requirements contained in the Guidelines on Energy Conserving Design of Buildings.⁹⁵ As a part of the broader Philippine Energy Plan 2018–2040, the Department of Energy has also developed the Energy Efficiency & Conservation Roadmap 2017–2040 to improve energy usage across the transport, industrial, residential, and commercial sectors.⁹⁶

A further transition risk that the Philippines would be facing is the use of trade mechanisms, such as carbon border tax adjustments, tariffs, and even importation bans, to “incentivize” progress on emissions reduction by laggard countries. For example, the European Union (EU) has proposed legislation linked to its European Green Deal which includes a Carbon Border Adjustment Mechanism (CBAM),⁹⁷ which will require non-EU producers to show that they have paid a price for the carbon used in the production of goods which are being imported into the EU.⁹⁸ The United States is currently

92. Asian Development Bank, Energy Transition Mechanism Explainer: How ETM Will Support Climate Action in Southeast Asia, *available at* <https://www.adb.org/news/features/energy-transition-mechanism-explainer-support-climate-action-southeast-asia> (last accessed Jan. 31, 2023) [<https://perma.cc/9KGG-B4JW>].

93. *Id.*

94. An Act Institutionalizing Energy Efficiency and Conservation, Enhancing the Efficient Use of Energy, and Granting Incentives to Energy Efficiency and Conservation Projects [Energy Efficiency and Conservation Act], Republic Act No. 11285 (2019).

95. *Id.* § 18.

96. MARK LISTER, ET AL., THE PHILIPPINES: ENERGY EFFICIENCY AND CONSERVATION ROADMAP: PHILIPPINES (2017–2040) 9 (2017).

97. Press Release by European Commission, *European Green Deal: Agreement Reached on the Carbon Border Adjustment Mechanism (CBAM)* (Dec. 13, 2022) (on file with the European Commission).

98. European Commission, “Fit for 55:” Delivering the EU’s 2030 Climate Target on the Way to Climate Neutrality (Communication from the Commission to the European Economic and Social Committee and the Committee of the Regions, Brussels, 14.7.2021 COM (2021) 550 final), at 12, *available at* <https://eur->

considering implementing a similar scheme with effect from 2024.⁹⁹ The potential for an operational global carbon market has been strengthened by the COP26 agreement¹⁰⁰ on the operation of Article 6 of the Paris Agreement,¹⁰¹ which relates to carbon markets, and also provides for the establishment of a supervisory body, which will be responsible for the development of methodologies and other processes required to facilitate the market mechanism.¹⁰²

The Philippines does not currently have an ETS. In 2019, however, House Bill No. 2184 or the proposed Low Carbon Economy Act, which included provisions for a domestic cap-and-trade system, was referred to the Committee on Climate Change of the Philippine House of Representatives.¹⁰³ The Department of Finance has expressed a preference for an ETS, as opposed to a general carbon tax.¹⁰⁴

A more recent response to transition risks arising from technology trends, such as the “creative destruction of old technologies”¹⁰⁵ and developments in renewable energy generation, electric vehicles, battery storage for the stationary energy and transport sectors, energy efficiency and carbon capture usage and storage, would be the passage of the Electric Vehicle Industry

lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0550&from=EN (last accessed Jan. 31, 2023) [<https://perma.cc/KFH4-M6SE>].

99. Lisa Friedman, *Democrats Propose a Border Tax Based on Countries' Greenhouse Gas Emissions*, N.Y. TIMES, July 19, 2021, available at <https://www.nytimes.com/2021/07/19/climate/democrats-border-carbon-tax.html> (last accessed Jan. 31, 2023) [<https://perma.cc/L72G-T5CW>].

100. United Nations, *supra* note 58.

101. Paris Agreement, *supra* note 24, art. 6.

102. U.N. Framework Convention on Climate Change, *Rules, Modalities and Procedures for the Mechanism Established by Article 6, Paragraph 4, of the Paris Agreement*, ¶ 5, U.N. Doc. FCCC/PA/CMA/2021/L.19 (Nov. 13, 2021).

103. An Act to Promote a Low Carbon Economy Establishing for This Purpose the Emission Cap-and-Trade System in the Industry Sector to Reduce Greenhouse Gas Emissions and Protect the Climate, H.B. No. 2184, § 5, 18th Cong., 1st Reg. Sess. (2019).

104. Beatrice M. Laforga, *Finance Department Prefers Emissions Trading Scheme over Carbon Tax*, BUSINESSWORLD, June 18, 2021, available at <https://www.bworldonline.com/topstories/2021/06/18/376630/finance-department-prefers-emissions-trading-scheme-over-carbon-tax> (last accessed Jan. 31, 2023) [<https://perma.cc/MGP2-V3MJ>].

105. *Id.* at 6.

Development Act,¹⁰⁶ that seeks *inter alia* to “[e]nsure the country’s energy security and independence by reducing reliance on imported fuel for the transportation sector[.]” and to “[p]rovide an enabling environment for the development of electric vehicles [(EVs),] including options for micromobility as an attractive and feasible mode of transportation to reduce dependence on fossil fuels[.]”¹⁰⁷ The Act provides for the Comprehensive Roadmap for the Electric Vehicle Industry (CREVI),¹⁰⁸ a development plan designed to serve as a guideline for relevant stakeholders, and includes standards and specifications of EVs, as well as charging stations, setting up of the local EV manufacturing industry and supply chain infrastructure, strengthening research and development for EV-related technologies, and training the workforce to deal with EVs.¹⁰⁹

Climate change is a clear and present risk that is within the consciousness of Philippine society. Seventy-five percent of Filipinos stated they are “alarmed” and “concerned” about climate change, with 78% acknowledging that the issue is of personal importance and that they would likely participate in a campaign to pressure their leaders to take action.¹¹⁰ There should be no denying the legal truism that consideration of climate change risks would form part of directors’ exercise of business judgment in seeking the long-term interests of their companies.

III. PHILIPPINES’ RESPONSES AND COMMITMENTS TO INTERNATIONAL ACTIONS ON CLIMATE CHANGE

The international participation and commitment of the Philippines to address climate change is embodied in numerous international treaties, conventions, and protocols which the country has adopted, signed, or ratified.¹¹¹

106. An Act Providing for the Development of the Electric Vehicle Industry [Electric Vehicle Industry Act], Republic Act No. 11697 (2022).

107. *Id.* § 2 (a)-(b).

108. *Id.* § 6.

109. *Id.*

110. Ludwig Federigan, *75% of Filipino Are ‘Alarmed’ and ‘Concerned’ About Climate Change*, MANILA TIMES, July 3, 2021, available at <https://www.manilatimes.net/2021/07/03/business/green-industries/75-of-filipinos-are-alarmed-and-concerned-about-climate-change/1805565> (last accessed Jan. 31, 2023) [<https://perma.cc/ZY34-X9V7>].

111. *See, e.g.*, U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I) (Aug. 12, 1992) [hereinafter *Rio Declaration on Environment and Development*].

Pursuant to Section 2, Article II of the 1987 Constitution, the Philippines “adopts the generally accepted principles of international law as part of the law of the land.”¹¹² Under this doctrine of incorporation, customary international law becomes part of the laws of the Philippines, despite the lack of an actual domestic legislation.¹¹³ It bears stressing that certain international environmental law principles are evolving as part of customary law, and can be applicable in the Philippines even without specific local enabling laws.

The Philippines, as a participant or signatory to various international environmental treaties, agreement, and covenants, and under customary international law, has an international obligation to address climate change and promote sustainable development.¹¹⁴ Beyond State commitments, regulators and even private stakeholders in the Philippines have voluntarily adopted international disclosure standards and frameworks relating to climate change risks and international principles and guidelines on sustainable financing and investment.

The Court has ruled that apart from the constitutional right of citizens to a healthful ecology which imposes a duty on both the public and private sectors to refrain from harming the environment, the Philippines is bound by the Universal Declaration of Human Rights which recognizes “health as a fundamental human right.”¹¹⁵

A. 1992 Rio Declaration on Environment and Development

In June 1992, “[t]he [UN] Conference on Environment and Development (UNCED), also known as the ‘Earth Summit[,]’ was held in Rio de Janeiro, Brazil,”¹¹⁶ and concluded with the Rio Declaration on Environment and Development (the Rio Declaration),¹¹⁷ enumerating 27 principles for States

112. PHIL. CONST. art. II, § 2.

113. See, e.g., Secretary of Justice v. Lantion, G.R. No. 139465, 322 SCRA 160, 196-97 (2000) (citing JOVITO R. SALONGA & PEDRO L. YAP, PUBLIC INTERNATIONAL LAW 12 (5th ed. 1992)).

114. Climate Change Act of 2009, § 2.

115. *Laguna Lake Development Authority*, 231 SCRA at 307-08 (citing 3 RECORD, PHIL. CONST., NO. 52, at 119).

116. United Nations, United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992: A New Blueprint for International Action on the Environment, available at <https://www.un.org/en/conferences/environment/rio1992> (last accessed Jan. 31, 2023) [<https://perma.cc/7M7Z-G895>].

117. *Rio Declaration on Environment and Development*, *supra* note 111.

to follow to promote sustainable development and the obligation for environmental protection.¹¹⁸

The 1992 Rio Declaration mandates States to enact effective environmental legislation¹¹⁹ and had introduced the *precautionary principle*, providing that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”¹²⁰ The Declaration also required a national environmental impact assessment for “activities that are likely to have a significant adverse impact on the environment[.]”¹²¹

While there were no signatories or convention bodies attached to the 1992 Rio Declaration,¹²² its principles have become the foundation of international environmental laws and have been adopted in national laws by various States, including the Philippines.¹²³ More importantly, the 1992 Rio Earth Summit gave impetus to three conventions, namely: (1) the UNFCCC;¹²⁴ (2) the Convention on Biological Diversity (CBD);¹²⁵ and the UN Convention to Combat Desertification (UNCCD).¹²⁶

B. 1992 United Nations Framework Convention on Climate Change

Entered into force on 21 March 1994, the UNFCCC¹²⁷ was adopted with the objective of “stabilization of greenhouse gas concentrations in the

118. United Nations, *supra* note 116.

119. *Rio Declaration on Environment and Development*, *supra* note 111, princ. 11.

120. *Id.* princ. 15.

121. *Id.* princ. 17.

122. *Rio Declaration on Environment and Development*, *supra* note 111.

123. Office of the President, Directing the Philippine Council for Sustainable Development (PCSD) to Make Necessary preparations for and Effective Participation in the Ten-Year Review of the 1992 United Nations Conference on Environment and Development (UNCED) Commitments, Memorandum Order No. 110, Series of 2000 [Memo. Circ. 110, s. 2000], whereas cl. para. 1 (Aug. 19, 2000).

124. UNFCCC, *supra* note 1.

125. Convention on Biological Diversity, *opened for signature* June 5, 1992, 1760 U.N.T.S. 79.

126. United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, *adopted* June 17, 1994, 1954 U.N.T.S. 3.

127. UNFCCC, *supra* note 1.

atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”¹²⁸ The UNFCCC outlines a framework of principles and commitments by State Parties to reduce the impact of climate change and commit to limiting carbon dioxide and GHG emissions.¹²⁹

The UNFCCC distinguishes between *Annex I Parties* — comprising of developed countries with specific targets to mitigate climate change,¹³⁰ and *Non-Annex I Parties* — which are mostly developing countries,¹³¹ including the Philippines, which are given special consideration due to their limited capacity and resources, and consistent with the principle of common but differentiated responsibilities.¹³²

The UNFCCC provides the guidelines for the formation of protocols, decisions, and rules to be adopted by the Conference of the Parties (COP),¹³³ composed of all the State Parties to the UNFCCC, and the highest decision-making body under the Convention.¹³⁴ The Philippines is a State Party to the UNFCCC and actively participates in the COP, including the adoption of the 1997 Kyoto Protocol¹³⁵ and 2015 Paris Agreement.¹³⁶

C. 1997 Kyoto Protocol

The Kyoto Protocol,¹³⁷ which was adopted at the third session of the UNFCCC COP (COP3) in 1997 and entered into force in 2005, took effect as an international legally binding agreement to reduce greenhouse gas emissions to an average of five percent (5%) against 1990 levels over the five

128. *Id.* art. 2.

129. *Id.* art. 4 (2) (a).

130. *Id.* art. 4 (2).

131. *Id.* art. 4 (3).

132. *Id.* arts. 3 & 4 (1).

133. UNFCCC, *supra* note 1, art. 7.

134. United Nations Framework Convention on Climate Change, Conference of the Parties (COP), *available at* <https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop> (last accessed Jan. 31, 2023) [<https://perma.cc/GZ9V-QZGW>].

135. Kyoto Protocol to the United Nations Framework Convention on Climate Change, *adopted* Dec. 11, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

136. Paris Agreement, *supra* note 24.

137. Kyoto Protocol, *supra* note 135.

year period between 2008–2012.¹³⁸ There are 192 parties to the Kyoto Protocol, including the Philippines, which signed the agreement on 15 April 1998 and ratified it on 20 November 2003.¹³⁹

Only Annex I countries¹⁴⁰ have binding targets under the Kyoto Protocol.¹⁴¹ Since the Philippines is a non-Annex I party,¹⁴² there is no mandatory obligation to reduce its greenhouse gas emissions under the Kyoto Protocol. Despite this, in 2009, the Philippine government enacted the Climate Change Act of 2009,¹⁴³ which sets the country's national policy on climate change — consistent with international objectives to stabilize levels of greenhouse gases affecting the Philippine climate system.¹⁴⁴

D. Philippines' Climate Change Act of 2009

Under the Philippines' original Intended NDC (INDC) communicated in advance of COP21 in 2015 (ahead of the Paris Agreement being finalized and adopted),¹⁴⁵ the country committed to reduce its emissions by 70% by 2030 against a business-as-usual trajectory over the 2000–2030 period conditional on the receipt of financial, capacity building, and technological support.¹⁴⁶

138. United Nations Framework Convention on Climate Change, What is the Kyoto Protocol?, available at https://unfccc.int/kyoto_protocol (last accessed Jan. 31, 2023) [<https://perma.cc/KQ6S-FMVT>].

139. East Asia & Pacific Region World Bank, The Philippines: Country Environmental Analysis (October 2009), at 99, available at <https://documents1.worldbank.org/curated/en/714621468295536219/pdf/516830ESW0WHIT1EAofinalLS029Oct09.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/M8DC-MUUQ>].

140. Kyoto Protocol, *supra* note 135, art. 1, ¶ 7.

141. See, e.g., Kyoto Protocol, *supra* note 135, art. 2.

142. United Nations Framework Convention on Climate Change, Philippines, available at <https://unfccc.int/node/61143> (last accessed Jan. 31, 2023) [<https://perma.cc/MVZ4-QD6B>].

143. Climate Change Act of 2009.

144. *Id.* §§ 11–12.

145. Republic of the Philippines, Intended Nationally Determined Contribution communicated to the Secretariat of the United Nations Framework Convention on Climate Change (Oct. 1, 2015), available at <https://www4.unfccc.int/sites/submissions/INDC/Published%20Documents/Philippines/1/Philippines%20-%20Final%20INDC%20submission.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/7FNH-W9HR>].

146. *Id.* at 3–4.

Under the UNFCCC process,¹⁴⁷ a country's INDC could be converted into its first NDC by submitting its instrument of ratification, accession, or approval to join the Paris Agreement, unless it decides otherwise.¹⁴⁸ The Philippines did not convert its INDC into an NDC.¹⁴⁹

Instead, in April 2021, the Philippines formally communicated its first NDC to the UNFCCC.¹⁵⁰ Here, the Philippine Government shall endeavor to peak its emissions by 2030 and commit to reduce its emissions by 75% against a business-as-usual trajectory by 2030 — 79.29% of this, however, is conditional.¹⁵¹ This means that enacting the policies underlying these reductions will require support under the Paris Agreement.¹⁵²

The Philippines' NDC is based on the Climate Change Act of 2009¹⁵³ and two key policy documents issued by the Climate Change Commission:

- (1) The National Framework Strategy on Climate Change 2010–2022,¹⁵⁴ which recognizes that climate change is “*the most serious and pervasive threat facing humanity today*”¹⁵⁵ and sets out the Philippines' principles of climate change mitigation and adaptation, the risks arising from climate change, and overarching strategies for mitigation and adaptation, including developments and growth in sustainable infrastructure, clean energy, and sustainable transport;¹⁵⁶ and
- (2) The National Climate Change Action Plan 2011–2028,¹⁵⁷ which outlines the Philippine Government's comprehensive commitments to respond to climate risks that involves both the public and the private sectors, centered around seven key policy

147. UNFCCC, *supra* note 1.

148. See World Resources Institute, What is an INDC?, available at <https://www.wri.org/indc-definition> (last accessed Jan. 31, 2023) [<https://perma.cc/3KPU-5D4N>].

149. See generally Philippine NDC Communication, *supra* note 14.

150. *Id.* at 4.

151. *Id.*

152. *Id.*

153. Climate Change Act of 2009.

154. Office of the President & Climate Change Commission, *supra* note 26.

155. *Id.* at 3.

156. *Id.* at 5–6.

157. Climate Change Commission, *supra* note 29.

areas: food security, water sufficiency, ecological and environmental sustainability, human security, climate-friendly industries and services, sustainable energy, and knowledge and capacity development.¹⁵⁸

The Climate Change Act of 2009¹⁵⁹ was amended in 2012 to establish a People's Survival Fund,¹⁶⁰ which provided the mechanism for long-term finance streams to enable the Philippine Government to effectively address climate change, support adaptation activities, and prevent and mitigate disasters.¹⁶¹ The amendatory act explicitly recognized the Philippines' vulnerability "to potential dangerous consequences of climate change ... such as increasing temperatures, rising seas, changing landscapes, increasing frequency and/or severity of droughts, fire, floods and storms, climate-related illnesses and diseases, damage to ecosystems, and biodiversity loss that affect the country's environment, culture, and economy[.]"¹⁶² The economic transition risks relating to the Philippines' commitment to a low-carbon regime has had a business impact on certain key industries, such as oil and power companies, the automotive industry, the logging industry, and the construction industry. These economic transition impacts have, and will continue to have, profound effect on key industries' business model, revenues and costs, and financing and investment profiles.

E. 2015 Paris Agreement

The Philippines, together with 174 countries, signed the Paris Agreement,¹⁶³ which was adopted at the 2015 United Nations Climate Change Conference (COP21) on 12 December 2015 and entered into force on 4 November 2016.¹⁶⁴ Currently, there are 195 signatories to the Paris Agreement.¹⁶⁵

158. *Id.* at 6.

159. Climate Change Act of 2009.

160. Republic Act No. 10174.

161. *See id.* § 13.

162. *Id.* § 1.

163. Paris Agreement, *supra* note 24.

164. ASIAN DEVELOPMENT BANK, ARTICLE 6 OF THE PARIS AGREEMENT: PILOTING FOR ENHANCED READINESS 1-2 (2018).

165. Estefanía Jiménez, The Paris Agreement: The Brand-New Experiment, at 1, available at http://www.oas.org/en/sedi/dsd/IWRM/Documentspot/the_paris_agreement.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/28WE-JVNY>]. "Today, it has 195 signatories." *Id.*

The Paris Agreement sets the goal of: (a) limiting the “increase in the global average temperature to well below 2°C above pre-industrial levels” and to pursue “efforts to limit the temperature increase to 1.5°C above pre-industrial levels,” to be achieved through countries’ NDCs;¹⁶⁶ and (b) achieving a balance between emissions and removals of human-caused GHGs in the second half of the century.¹⁶⁷

In 2015, the Philippines originally committed to reduce its GHG emissions by 70% by 2030 against a business-as-usual trajectory over the 2000–2030 period, and conditional on the receipt of financial, technological, and capacity-building support.¹⁶⁸ In terms of greenhouse gas emissions, the Philippines emits an average of 1.98 metric tons of carbon dioxide equivalent per capita in 2020, or way below the global average of four metric tons per capita.¹⁶⁹

In 2021, the Philippines updated its NDC.¹⁷⁰ While this does not mandate a net-zero emissions goal for the country, the NDC states that the Philippines commits to peak its emissions by 2030, and to reduce its greenhouse gas emissions by 75% against the business-as-usual scenario for 2020–2030 by 2030.¹⁷¹ This commitment is 2.71% unconditional and 72.29% conditional, meaning that enacting the policies underlying these committed reductions will require support under the Paris Agreement.¹⁷²

F. 2030 Agenda for Sustainable Development

The 2030 Agenda and its 17 Sustainable Development Goals (SDGs)¹⁷³ were adopted in 2015 by all member countries of the UN, including the Philippines.¹⁷⁴ The SDGs are a comprehensive set of goals recognizing the

166. Paris Agreement, *supra* note 24, art. 2, ¶ 1 (a).

167. *Id.* art. 4, ¶ 1.

168. Regelink, *supra* note 79, at 56.

169. Philippine NDC Communication, *supra* note 14, at 4.

170. *See id.*

171. *Id.* at 2 & 4.

172. *Id.* at 4.

173. Transforming Our World: The 2030 Agenda for Sustainable Development, G.A. Res. 70/1, U.N. Doc. A/RES/70/1 (Sept. 25, 2015).

174. Cristina Eloisa Baclig, *PH Halfway Through in Achieving SDGs as 2030 Deadline Looms*, PHIL. DAILY INQ., Jan. 3, 2023, available at <https://newsinfo.inquirer.net/1712047/ph-halfway-through-in-achieving-sdgs->

connections between the people and the planet, comprising 169 targets, integrated and indivisible to balance the three dimensions of sustainable development: the economic, social, and environmental.¹⁷⁵

The 17 SDGs can be summarized as follows:

- (1) No Poverty;
- (2) Zero Hunger;
- (3) Good Health and Well-Being;
- (4) Quality Education;
- (5) Gender Equality;
- (6) Clean Water and Sanitation;
- (7) Affordable and Clean Energy;
- (8) Decent Work and Economic Growth;
- (9) Industry, Innovation, and Infrastructure;
- (10) Reduced Inequality;
- (11) Sustainable Cities and Communities;
- (12) Responsible Consumption and Production;
- (13) Climate Action;
- (14) Life Below Water;
- (15) Life On Land;
- (16) Peace, Justice, and Strong Institutions; and
- (17) Partnerships for the Goals.¹⁷⁶

as-2030-deadline-looms (last accessed Jan. 31, 2023) [<https://perma.cc/8AS4-GLCW>].

175. Transforming Our World: The 2030 Agenda for Sustainable Development, *supra* note 173, ¶¶ 17-18.

176. United Nations, Take Action for the Sustainable Development Goals, *available at* <https://www.un.org/sustainabledevelopment/sustainable-development-goals> (last accessed Jan. 31, 2023) [<https://perma.cc/C8GY-APVX>].

While the SDGs may “not be legally binding, governments are expected to ... establish national frameworks for the achievement of [these] 17 goals.”¹⁷⁷ The Philippines has integrated the SDGs in its overall national development plan, as well as in various sectoral development plans in the country.¹⁷⁸ Even publicly-listed companies in the Philippines need to report on their contributions to the SDGs under the latest sustainability reporting guidelines.¹⁷⁹

G. Sendai Framework for Disaster Risk Reduction

At the conclusion of the Third UN World Conference on Disaster Risk Reduction, on 18 March 2015, the Sendai Framework for Disaster Risk Reduction (the Sendai Framework)¹⁸⁰ was signed by 187 countries, including the Philippines.¹⁸¹ The Sendai Framework is the successor to the Hyogo Framework¹⁸² and observes that disaster risk reduction is a cross-cutting issue in the context of sustainable development, which is a critical element to achieving the SDGs.¹⁸³

The Sendai Framework focuses on the adoption of measures which address the three dimensions of disaster risk (exposure to hazards, vulnerability and capacity, and hazard’s characteristics) to prevent the creation of new risk,

177. United Nations, The Sustainable Development Agenda, *available at* <https://www.un.org/sustainabledevelopment/development-agenda-retired> (last accessed Jan. 31, 2023) [<https://perma.cc/2V3P-6DBG>].

178. See National Economic and Development Authority, About Sustainable Development Goals, *available at* <https://sdg.neda.gov.ph> (last accessed Jan. 31, 2023) [<https://perma.cc/MRC9-P92W>].

179. See Securities and Exchange Commission, Sustainability Reporting Guidelines for Publicly-Listed Companies, Memorandum Circular No. 4, Series of 2019 [SEC Memo. Circ. No. 4, s. 2019] (Feb. 15, 2019).

180. Sendai Framework for Disaster Risk Reduction 2015-2030, G.A. Res. 69/283, annex II, U.N. Doc. A/RES/69/283 (June 23, 2015).

181. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), COMMON GROUND BETWEEN THE PARIS AGREEMENT AND THE SENDAI FRAMEWORK: CLIMATE CHANGE ADAPTATION AND DISASTER RISK REDUCTION 531 (2020).

182. United Nations Office for Disaster Risk Reduction (UNDRR), et al., Resilience Learning Module I: Fundamentals of Resilient Governance & Development, at 14, *available at* <https://www.undrr.org/media/48228/download> (last accessed Jan. 31, 2023) [<https://perma.cc/L9EN-BL7H>].

183. *Id.* at 52.

reduce existing risk, and increase resilience.¹⁸⁴ The Sendai Framework also outlines seven global targets to measure progress made by countries in disaster risk reduction by 2030, including reducing mortality rate, number of people affected, direct economic loss in relation to GDP, damage to critical infrastructure and disruption of basic services.¹⁸⁵

The Sendai Framework and its goals are not mandatory and legally binding,¹⁸⁶ but serve as a guide to assess reduction of disaster risks, including those resulting from climate change.¹⁸⁷ The Philippines has enacted the Philippine Disaster Risk Reduction and Management Act,¹⁸⁸ institutionalized the Sendai Framework reporting and monitoring for the national and local governments, and adopted strategic goals to build national and local resilience to climate change-related disasters.¹⁸⁹

H. G20's Financial Stability Board — Task Force on Climate-Related Financial Disclosures

In June 2017, the G20 Financial Stability Board (FSB) Task Force on Climate-Related Financial Disclosures (TCFD)¹⁹⁰ issued its final recommendations on governance and management of climate-related risks, impact on strategy and financial planning, and use of climate-related metrics and targets, to be applied to non-financial companies and financial-sector organizations.¹⁹¹ The TCFD

184. Sendai Framework for Disaster Risk Reduction 2015–2030, annex II, ¶ 27 (b).

185. *Id.* annex II, ¶ 18.

186. Sabrina Stein & Colin Walch, The Sendai Framework for Disaster Risk Reduction as a Tool for Conflict Prevention (Conflict Prevention and Peace Forum (CPPF), July 2017), at 1 & 7, *available at* https://www.preventionweb.net/files/54222_54222cppfpaperthesendaiframeworkasa.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/PKU3-UL5V>].

187. *Id.* at 7.

188. An Act Strengthening the Philippine Disaster Risk Reduction and Management System, Providing for the National Disaster Risk Reduction and Management Framework and Institutionalizing the National Disaster Risk Reduction and Management Plan, Appropriating Funds Therefor and for Other Purposes [Philippine Disaster Risk Reduction and Management Act of 2010], Republic Act No. 10121 (2010).

189. *Id.* § 2 (c).

190. Task Force on Climate-Related Financial Disclosures, About: The Challenge We're Addressing, *available at* <https://www.fsb-tcf.org/about> (last accessed Jan. 31, 2023) [<https://perma.cc/RU9T-AKK7>].

191. *See generally* Task Force Final Report, *supra* note 8.

recommended that climate-related financial disclosures be: (1) adoptable by all organizations; (2) included in financial filings; (3) designed to solicit decision-useful, forward looking information on financial impacts; and (4) encourage a strong focus on risks and opportunities related to the transition to a lower-carbon economy.¹⁹²

The TCFD recommendations are globally recognized as the leading standard on disclosure of financially material climate-related information. As of October 2022, the TCFD had the support of over 3,900 public and private institutions located in 101 jurisdictions, including the Philippines' Securities and Exchange Commission (SEC), which adopted the TCFD recommendations in its sustainability reporting guidelines, and 19 other companies headquartered in the Philippines: Aboitiz Equity Ventures, Inc, AC Energy Corporation, AREIT, Inc., Asian Development Bank, Ayala Corporation, Ayala Land, Inc., Bank of the Philippine Islands, Converge Information and Communications Technology Solutions, Inc., Globe Telecom, Inc., Integrated Micro-Electronics, Inc., Manila Electric Company, Manila Water Company, Metro Pacific Investments Corporation, NEO, Pilipinas Shell Petroleum Corporation, PLDT, Inc., SM Investments Corporation, SM Prime Holdings, Inc., and Universal Robina Corporation.¹⁹³

The Philippine SEC's Sustainability Reporting Guidelines for Publicly-Listed Companies¹⁹⁴ are based on, and refer to, the TCFD, as well as other global reporting standards.¹⁹⁵ Public companies in the Philippines must report in accordance with these guidelines on a comply-or-explain basis.¹⁹⁶ The Philippine SEC is reportedly planning to make sustainability reporting mandatory for publicly-listed companies by 2023.¹⁹⁷

192. *Id.* at iii, fig.1.

193. *See generally* Task Force on Climate-Related Financial Disclosures, Supporters, available at <https://www.fsb-tcf.org/supporters> (last accessed Jan. 31, 2023) [<https://perma.cc/3K7H-SZYK>].

194. SEC Memo. Circ. No. 4, s. 2019.

195. *Id.* at 3 & 9-10.

196. *See id.* at 16.

197. Anne Ruth dela Cruz, *SEC to Make Sustainability Reporting Mandatory by 2023*, BUSINESSMIRROR, Aug. 30, 2021, available at <https://businessmirror.com.ph/2021/08/30/sec-to-make-sustainability-reporting-mandatory-by-2023> (last accessed Jan. 31, 2023) [<https://perma.cc/7QKP-FNFZ>].

I. 2017 Network of Central Banks and Supervisors for Greening the Financial System

The Network of Central Banks and Supervisors for Greening the Financial System (NGFS), which launched on 12 December 2017 at the Paris One Planet Summit, is an international group of central banks and supervisors with 126 members and 19 observers as of March 2023.¹⁹⁸ The NGFS guidance on climate-related disclosures for central banks highlights the areas of: (a) *Governance* — “[disclosing] [] high-level approach to climate-related risks ... and governance structures around monetary policy;” (b) *Strategy* — “[disclosing] [] strategies for identifying, assessing, and describing climate-related risks; and (c) *Risk Management* — “[disclosing] [] the current state of climate-related risk management[.]”¹⁹⁹

The Philippines’ Central Bank, the *Bangko Sentral ng Pilipinas* (BSP), joined the NGFS in August 2020,²⁰⁰ and has also adopted a sustainable finance framework for banks in the Philippines.²⁰¹ The BSP recognizes that the physical (loss or damage to tangible assets) and transitional (economic adjustment cost) risks of climate change could significantly affect banks and stakeholders, and expects that by 2023 all banks in the Philippines, including branches of foreign banks, will have embedded sustainability principles in their corporate governance framework, risk management systems, and strategic objectives.²⁰²

198. Network of Central Banks and Supervisors for Greening the Financial System, Membership, available at <https://www.ngfs.net/en/about-us/membership> (last accessed Jan. 31, 2023) [<https://perma.cc/8UXL-RNHF>].

199. NETWORK OF CENTRAL BANKS AND SUPERVISORS FOR GREENING THE FINANCIAL SYSTEM, GUIDE ON CLIMATE-RELATED DISCLOSURE FOR CENTRAL BANKS 4 (2021).

200. Regulation Asia, BSP Joins Network for Greening the Financial System, available at <https://www.esginvestor.net/bsp-joins-network-for-greening-the-financial-system/> (last accessed Jan. 31, 2023) [<https://perma.cc/AS98-FNH6>].

201. Bangko Sentral ng Pilipinas, Sustainable Finance Framework, Circular No. 1085, Series of 2020 [BSP Circ. 1085, s. 2020] (Apr. 29, 2020).

202. See *id.* § 1. Section 1 of BSP Circ. 1085, s. 2020, amended Section 153 of the Manual of Regulations for Banks (MORB) on Sustainable Finance Framework. *Id.*

IV. DIRECTORS' DUTIES AND RESPONSIBILITIES IN RELATION TO CLIMATE CHANGE

In the Philippine legal jurisdiction, the duties and responsibilities of directors of for-profit corporations in relation to climate change, which constitute the bases for the potential liabilities that directors are exposed to, are circumscribed within the following legal framework: (a) the constitutional recognition of the citizens' "right to health" and "right to a balanced and healthful ecology," coupled with characterization of the "social functions of private corporations;"²⁰³ (b) the characterization of the "role of private corporations in addressing climate change" under the Climate Change Act of 2009;²⁰⁴ and (c) the corporate governance framework that incorporates sustainable development in general, and consideration of climate change risks, in particular, in defining the directors' duties of obedience and diligence in the collective exercise of their business judgment.

A. Constitutional Underpinning of Directors' Duties and Responsibilities in Relation to Climate Change

1. Constitutional Rights to Health and to a Balanced and Healthful Ecology

The 1987 Constitution of the Philippines recognizes the citizens' rights to health and a balanced and healthful ecology, with corresponding obligations of the State to "protect and promote the right to health of the people,"²⁰⁵ as well as to "protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."²⁰⁶ These constitutional principles were engrafted into the Philippine constitution as a manifestation of "a clear desire to make environmental protection and ecological balance conscious objects of police power" of the State.²⁰⁷

In its landmark decision in *Oposa v. Factoran*,²⁰⁸ the Court ruled that the constitutional provisions on the right to health and right to a balanced and

203. PHIL. CONST. art. II, §§ 15-16.

204. Climate Change Act of 2009.

205. PHIL. CONST. art. II, § 15 ("The State shall protect and promote the right to health of the people and instill health consciousness among them.").

206. PHIL. CONST. art. II, § 16 ("The State shall protect and advance the right of the people to a balance and healthful ecology in accord with the rhythm and harmony of nature.").

207. JOAQUIN G. BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 90 (2009).

208. See *Oposa*, 224 SCRA.

healthful ecology are self-executing fundamental rights of Filipino citizens which do not need enabling statutes and would constitute the requisite “*standing to sue*” by any Filipino citizen, and necessarily impose “the correlative duty to refrain from impairing the environment.”²⁰⁹ *Oposa* further held —

While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation ... the advancement of which may even be said to predate all governments and constitutions.²¹⁰

Subsequently, in *Laguna Lake Development Authority v. Court of Appeals*,²¹¹ the Court relied on the same constitutional provisions to hold —

As a constitutionally guaranteed right of every person, it carries the correlative duty of non-impairment. This is but in consonance with the declared policy of the [S]tate ‘to protect and promote the right to health of the people and instill health consciousness among them.’ It is to be borne in mind that the Philippines is party to the Universal Declaration of Human Rights and the Alma Conference Declaration of 1978 which recognize health as a fundamental human right.²¹²

209. *Id.* at 817. The main decision did not actually expressly state that these rights are “self-executing” but it can be inferred from the discussion thereof that they were indeed self-executing fundamental rights. Notably, this “self-executing” nature is only recognized in the concurring opinion of Justice Feliciano. *Id.*

210. *Id.* at 804-05. The Court went further to state —

As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as [S]tate policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the [S]tate a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come[]—[]generations which stand to inherit nothing but parched earth incapable of sustaining life.

Id. at 805 (emphasis supplied).

211. See *Laguna Lake Development Authority*, 231 SCRA.

212. *Id.* at 307-08 (citing PHIL. CONST. art. II, § 15 & 3 RECORD OF THE CONSTITUTIONAL COMMISSION, NO. 52, at 119 (1986)).

In *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*,²¹³ the Court held that the protection of the environment, as embodied in Section 16 of Article XII of the 1987 Constitution,²¹⁴ is essentially a duty directed to the government, and that the public has a right to seek through a writ of *mandamus* from appropriate government agencies to perform statutory-mandated measures to protect the environment.²¹⁵

In May 2022, the Commission on Human Rights (CHR) of the Philippines concluded an investigation into climate change and human rights.²¹⁶ While non-binding, the Commission's findings and recommendations include: climate change poses a threat to individual's human rights; international treaties and resolutions, including the Universal Declaration on Human Rights, form part of Philippine law; and that therefore entities incorporated or doing business in the Philippines in the value chain of high-emission companies could be compelled to undertake human rights due diligence.²¹⁷

In essence, Sections 15 and 16, Article XII of the 1987 Constitution²¹⁸ are the legal bases by which the State can use its police power to impose on the private sector measures provided for in various environmental laws to promote a healthful ecology for the Filipino citizenry, and to define the role and responsibilities of private corporations on environmental concerns confronting Philippine society.

2. Social Function of Economic Enterprises

Although the 1987 Constitution²¹⁹ “recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to

213. *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*, G.R. No. 171947, 574 SCRA 661 (2008).

214. PHIL. CONST. art. II, § 15.

215. *Metropolitan Manila Development Authority*, 574 SCRA at 671.

216. Keely Boom, et al., *A Mandate to Investigate the Carbon Majors and the Climate Crisis: The Philippines Commission on Human Rights Investigation*, 23 AUSTL. J. ASIAN L. 57, 73 (2022).

217. *Id.* at 70-72.

218. PHIL. CONST. art. II, §§ 15-16.

219. PHIL. CONST.

needed investments,”²²⁰ guarantees the principles of private ownership,²²¹ as well as the free-market system,²²² it has, in unmistakable terms, decreed the “social function of private property and economic enterprises,” even when held or pursued through the medium of the corporation.²²³ The Philippine Court has held that the constitutional principle of the “social function of property” trumps the constitutional policy recognizing the indispensable role of the private sector and encouragement of private enterprise.²²⁴

3. Public Trust Doctrine

In the field of environment protection, the Court formally adopted in *Maynilad Water Services, Inc. v. Secretary of Department of Environment and Natural Resources*,²²⁵ the *public trust doctrine*, which proceeds from the constitutional principle of *jura regalia* that reserves to the State ownership of all natural resources.²²⁶ The Public Trust doctrine

220. PHIL. CONST. art. II, § 20 (“The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments.”). *Id.*

221. *See* PHIL. CONST. art. III, § 1 (“No person shall be deprived of ... property without due process of law.”) & PHIL. CONST. art. III, § 9 (“Private property shall not be taken for public use without just compensation.”). *Id.*

222. PHIL. CONST. art. II, § 20.

223. PHIL. CONST. art. XII, § 6.

The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands.

Id.

224. *Marine Radio Communications Association of the Philippines, Inc. v. Reyes*, G.R. No. 86953, 191 SCRA 205, 209 (1990).

225. *Maynilad Water Services, Inc. v. Secretary of the Department of Environment and Natural Resources*, G.R. No. 202897, 912 SCRA 136 (2019).

226. PHIL. CONST. art. XII, § 2

All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or

reaffirms the superiority of public rights over private rights for critical resources. It impresses upon [S]tates the affirmative duties of a trustee *to manage these natural resources for the benefit of present and future generations and embodies key principles of environmental protection: stewardship, communal responsibility, and sustainability.*

...

*The public is regarded as the beneficial owner of trust resources, and courts can enforce the public trust doctrine even against the government itself.*²²⁷

4. Summation

When it comes to climate change, the constitutional rights to health and to a balanced and healthful ecology,²²⁸ coupled with the constitutionally-mandated “social function to contribute to the common good” of all private economic enterprise — which would include the obligation to refrain from harming the environment — would mean that the entire citizenry could potentially fall within the coverage of ‘stakeholders’ of all for-profit corporations insofar as their operations may adversely affect the environment. Additionally, the application of the public trust doctrine²²⁹ means that private economic enterprises — including private corporations — operate under the police power of the State in pursuit of its climate change agenda, as expressed in statutory and administrative issuances relating to the protection of the environment. As discussed more in-depth below, this would mean that directors of for-profit corporations assume the functions of their office with the understanding that their fiduciary duties of obedience and diligence is owed not just to the shareholders but other stakeholders, as well, which duties

timber, wildlife, flora and fauna, and other natural resources are owned by the State. ... The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State.

Id.

227. *Maynilad Water Services, Inc.*, 912 SCRA at 187-89 (emphasis supplied) (citing Alexandra Klass & Ling-Yee Huang, Restoring the Trust: Water Resources and the Public Trust Doctrine, A Manual for Advocates (CPR White Paper #908, Minnesota Legal Studies Research Paper No. 09-41 2009), at 1, available at http://progressivereform.net/articles/CPR_Public_Trust_Doctrine_Manual.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/8JQ5-CLD3>]).

228. PHIL. CONST. art. II, §§ 15-16.

229. *Maynilad Water Services, Inc.*, 912 SCRA at 187-89 (citing Klass & Huang, *supra* note 227, at 1).

include within their scope of responsibility a stewardship role to ensure that company operations do not degrade the environment or contravene environmental laws.

B. Role of the Private Business Under the Climate Change Act

The understanding of the Philippines' national policy on climate change as expressed in Section 2 of the Climate Change Act of 2009,²³⁰ is to the effect that the obligation to afford full protection and advance the right of the people to a healthful ecology, the achievement of the Philippine Agenda 21 Framework that espouses sustainable development and the UNFCCC on the stabilization of greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, among others, are the primary responsibility of the State and its various instrumentalities.²³¹

The operative provisions of the Climate Change Act of 2009 are essentially to constitute the Climate Change Commission (and its advisory board), “an independent and autonomous body ... [having] the same status as that of a national government agency”²³² — chaired by the President²³³ — and which “*shall be the [lead] policy-making body of the government[,] which shall be tasked to coordinate, monitor[,] and evaluate the programs and action plans of the government*”²³⁴ in order to “[e]nsure the mainstreaming of climate change ... into the national, sectoral[,] and local development plans and programs”²³⁵ pursuant to the provisions of this Act.” In particular, the Climate Change Commission is mandated to evolve the components of the Framework Strategy and Program on Climate Change,²³⁶ and formulate a National Climate Change Action Plan in accordance with the Framework.²³⁷ It provides for the role of local government units (LGUs) in adopting local climate change action plans,²³⁸ and for the roles of designated government agencies.²³⁹

230. Climate Change Act of 2009, § 2.

231. *Id.*

232. *Id.* § 4.

233. *Id.* § 5.

234. *Id.* § 4 (emphasis supplied).

235. *Id.* § 9 (a) (emphasis supplied).

236. Climate Change Act of 2009, § 12.

237. *Id.* § 13.

238. *Id.* § 14.

239. *Id.* § 15.

Apart from the mandate that the Climate Change Commission shall “coordinate with nongovernment organizations (NGOs), civic organizations, academe, people’s organization, *the private and corporate sectors*[,] and other concerned stakeholder groups,”²⁴⁰ in the development and implementation of the National Climate Change Action Plan, the Climate Change Act does not define any institutional obligation on the part of the private sector, much less of the private corporate sector, to pursue climate change activism.²⁴¹ The implementing rules enjoin the participation of “*businesses*, nongovernmental organizations, the academe, local and indigenous communities[,] and the general public to prevent and reduce the adverse impacts of climate change, and at the same time, maximize the benefits of climate change.”²⁴² In addition, the amendment of the Climate Change Act allows and encourages counterpart funding arrangements with private sector for the People’s Survival Fund that will be used to support adaptation activities of local governments and communities.²⁴³

In essence, the Climate Change Act provides the opportunities that the private corporate sector may take advantage of in fulfilling their social responsibilities towards meeting climate change risks, but it does not define, much less impose an institutional responsibility on the private corporate sector to address climate change beyond the legal parameters set out by the State in its environmental laws.²⁴⁴ How the directors perceive their companies’ social responsibilities towards climate change risk as it affects the long-term viability of their business enterprise, and how they take advantage of the incentives and other business opportunities offered under the Climate Change Act²⁴⁵ and its implementing regulations,²⁴⁶ are addressed to the directors’ collective exercise of business judgment.

The Authors’ review of the Philippines’ environmental laws that are related directly to climate change indicates that there is no attempt by the Government to define a legally binding “role of the business sector,” when it

240. *Id.* § 16 (emphasis supplied).

241. *See id.*

242. Climate Change Commission, Revised Rules and Regulations Implementing the Climate Change Act of 2009, Republic Act No. 9729, rule II, § 1 (f) (2015) (emphasis supplied).

243. Republic Act No. 10174, § 13.

244. *See generally* Climate Change Act of 2009.

245. *Id.*

246. *See generally* Revised Rules and Regulations Implementing the Climate Change Act of 2009.

comes to protecting the environment. This is in line with the constitutional provisions that imposes *primarily upon the State* the obligation to “protect and promote the right to health of the people and instill health consciousness among them.”²⁴⁷ What is extant from the Philippine legal environmental framework is that the State defines and penalizes *prohibited acts* which are essential for the protection of the environment, but does not impose on the private sector a duty or obligation “to promote environmental protection.” It is the Government that is primarily burdened to promote environmental consciousness and volunteerism in the private sector, through a system of education, consultations, rewards, and incentives.²⁴⁸

Since the Philippines’ Climate Change Act of 2009²⁴⁹ and the supporting environmental laws do not impose an institutional role on the private corporations towards climate change activism, much less provide for directors’ specific duties and responsibilities in relation to climate change, we look upon the provisions of the Revised Corporation Code²⁵⁰ and related administrative issuances of the Securities and Exchange Commission (SEC) to evolve the nature of the duties and responsibilities of directors of for-profit corporations in relation to climate change risks.

C. Directors’ Fiduciary Duties — In General

The discussion immediately below will analyze the directors’ duties and responsibilities in relation to climate change measured on two levels: (a) *with respect to the shareholders and other investors*, which shall be gauged on the basis of the corporate governance framework that incorporates within the directors’ duties and responsibilities the proper consideration of climate change risks in their exercise of business judgment and the fulfillment of their fiduciary duty to act in the best interest of the corporation and its shareholders; and (b) *with respect to other stakeholders*, which should be gauged on the following bases: (i) the companies’ obligations to comply with the directives of the State and avoidance of violating the prohibited acts found in various environmental laws; and (ii) the corporate governance framework that expands the directors’ fiduciary duties to the long-term success of the company that promotes the interests of other stakeholders as well in pursuit of sustainable development which includes climate change as among the primary concerns.

247. PHIL. CONST. art. II, § 16.

248. *See* PHIL. CONST. art. II, § 16.

249. *See generally* Climate Change Act of 2009.

250. An Act Providing for the Revised Corporation Code of the Philippines [REV. CORP. CODE], Republic Act No. 11232 (2019).

I. Attribute of Centralized Management

The legal bedrock upon which the Philippines' corporate governance framework is based upon is the "attribute of centralized management" expressed in Section 22 of the Revised Corporation Code of the Philippines, which directly vests in the board of directors the exercise of all corporate powers, the conduct of all its business, and the control of all properties of the corporation, save in those specifically enumerated instances where shareholders' ratification vote is required.²⁵¹ Although the day-to-day affairs of the corporation are in the hands of management, it is mandated that the executive officers shall manage the corporation and perform such duties as may be provided in the bylaws *and/or as resolved by the board of directors*.²⁵²

The "attribute of centralized management" embedded in the governance structure of private corporations is the basis under Philippine Corporation Law for the *fiduciary duties of obedience, diligence, and loyalty*,²⁵³ that every director assumes upon being qualified into his office. The Court has ruled that the fiduciary or trust relationship between directors and shareholders "is not a matter of statutory or technical law. It springs from the fact that directors have the control and guidance of corporate affairs and property and hence of the property interests of the stockholders."²⁵⁴

2. Duty of Obedience

Since the corporation remains defined in Philippine Corporation Law as a "creature of limited powers" — a corporation possesses or may exercise only the powers that are conferred by law, or articles of incorporation, and those

251. *Id.* § 22, para. 1. ("Unless otherwise provided in this Code, the board of directors or trustees shall exercise the corporate powers, conduct all business, and control all properties of the corporation."). *Id.*

252. *Id.* § 24, para. 2. ("The officers shall manage the corporation and perform such duties as may be provided in the bylaws and/or as resolved by the board of directors."). *Id.*

253. *Strategic Alliance Development Corp. v. Radstock Securities Ltd.*, G.R. No. 178158, 607 SCRA 413, 460 (2009) (citing *The Corporation Code of the Philippines [CORP. CODE]*, *Batas Pambansa Blg. 68*, § 31 (1980) (repealed in 2019)).

254. *Gokongwei, Jr. v. Securities and Exchange Commission*, G.R. No. L-45911, 89 SCRA 336, 367 (1979) (citing *Ashman v. Miller*, 101 F.2d 85, 91 (6th Cir. 1939) (U.S.)).

necessary or incidental to the exercise of the powers conferred²⁵⁵ — the duty of obedience imposes upon the directors the fiduciary responsibility to exercise corporate powers and pursue the corporate business enterprise in accordance with the purpose and powers granted to the corporation.²⁵⁶

Section 23 of the Revised Corporation Code provides for a more comprehensive coverage of directors' duty of obedience that formally incorporates compliance with *rules of good corporate governance*, thus: “[t]he directors or trustees elected shall perform their duties as prescribed by law, rules of good corporate governance, and bylaws of the corporation.”²⁵⁷ Further, Section 30 of the Revised Corporation Code provides one of the manners by which a director may breach his duty of obedience, i.e., when he “*willfully and knowingly vote for or assent to a patently unlawful act of the corporation ...* .”²⁵⁸

3. Duty of Diligence

The duty of diligence covers the common law obligation of directors to act with the diligence of a prudent man in pursuing the affairs of the corporation and in looking after the interests of shareholders, and other stakeholders.²⁵⁹ Section 30 of the Revised Corporation Code defines the manner by which the duty of diligence may be breached —

Directors or trustees who willfully and knowingly vote for or assent to patently unlawful acts of the corporation or who are guilty of gross negligence or bad faith in directing the affairs of the corporation ... shall be liable jointly and severally for all damages resulting therefrom suffered by the corporation, its stockholders or members[,] and other persons.²⁶⁰

255. REV. CORP. CODE, § 2. (“A corporation is an artificial being created by operation of law, having the right of succession and the powers, attributes, and properties expressly authorized by law or incidental to its existence.”).

256. *Id.* § 44. (“No corporation shall possess or exercise corporate powers other than those conferred by this Code or by its articles of incorporation and except as necessary or incidental to the exercise of the powers conferred.”).

257. *Id.* § 23, para. 7 (emphasis supplied).

258. *Id.* § 30, para. 1 (emphasis supplied).

259. See Nicolas & De Vega Law Offices, *The Threefold Duties of a Director of a Corporation*, available at <https://ndvllaw.com/the-threefold-duties-of-a-director-of-a-corporation> (last accessed Jan. 31, 2023) [<https://perma.cc/S73U-R8JR>].

260. REV. CORP. CODE, § 30, para. 1 (emphasis supplied).

4. Duty of Loyalty

In Philippine Corporation Law, the directors' duty of loyalty has limited application, applying only to conflict-of-interest situations which disqualifies or prohibit directors from acquiring any personal or pecuniary interest in conflict with the best interests of the company.²⁶¹ Section 33 of the Revised Corporation Code provides that *disloyalty of a director* occurs —

Where a director, by virtue of such office, acquires a business opportunity which should belong to the corporation, thereby obtaining profits to the prejudice of such corporation, the director must account for and refund to the latter all such profits, unless act has been ratified by a vote of the stockholders owning or representing at least two-thirds (2/3) of the outstanding capital stock. This provision shall be applicable, notwithstanding the fact that the director risked one's own funds in the venture.²⁶²

On the other hand, under Philippines' corporate governance framework for publicly held companies, as it relates to the principle of establishing clear roles and responsibilities of the board of directors,²⁶³ the Corporate Governance Codes for Publicly-Held Companies explain that directors “should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and all shareholders[,]”²⁶⁴ with the directors' duty of loyalty explained to mean that “the board member should act in the interest of the company and all its shareholders, *and not those of the controlling company of the group or any other stakeholders.*”²⁶⁵

With such limited, if not peculiar, application of the directors' duty of loyalty, we shall be referring to the particular aspect of the duty of loyalty as referring to *acting in the best interest of the corporation and its shareholders*, which necessarily includes the duties of obedience and of diligence.

261. See *Strategic Alliance Development Corporation*, 607 SCRA at 460 (citing CORP. CODE, § 31).

262. REV. CORP. CODE, § 33.

263. Securities and Exchange Commission, Code of Corporate Governance for Publicly Listed Companies, Memorandum Circular No. 19, Series of 2016 [SEC Memo. Circ. No. 19, s. 2016], at 9, ¶ 2 (Nov. 22, 2016) [hereinafter CG Code for PLCs] & Securities and Exchange Commission, Code of Corporate Governance for Public Companies and Registered Issuers of Securities, Memorandum Circular No. 24, Series of 2019 [SEC Memo. Circ. No. 24, s. 2019], at 7, ¶ 2 (Dec. 19, 2019) [hereinafter CG Code for PCs and RIs].

264. CG Code for PLCs, *supra* note 263, at 9, ¶ 2.1.

265. *Id.* at 9–10, ¶ 2.1. (emphasis supplied).

D. Directors' Duties and Responsibilities to Shareholders in Relation to Climate Change

Directors' duties and responsibilities to shareholders in relation to climate change are essentially intramural in character as they pertain to the shareholders' equity interests in the corporate business enterprise. Insofar as shareholders are concerned, directors' duties to properly identify, assess, and manage the physical and transition (including liability and reputational) risks of climate change are geared towards preserving the long-term value or profitability of the corporate business enterprise, as distinguished from the damage to the environment that undermines other stakeholders' constitutional right to a balanced and healthful environment.²⁶⁶ *Under Philippine Corporation Law, the risks facing, and losses sustained by, the corporation relating to climate change fall within the same category as other foreseeable financial risk faced by directors of for-profit corporations, and are thus within scope of their duties to act in the best interest of the corporation and its shareholders, albeit under the aegis of the business judgment rule as discussed below.*

The Revised Corporation Code²⁶⁷ and the Securities Regulation Code²⁶⁸ do not have specific provisions on the manner by which directors shall comply with their duties and responsibilities relating to the protection of the environment, in general, or the management of climate change risks, in particular. The directors' governance responsibilities on climate change are located within SEC's Code of Corporate Governance for Publicly Listed Companies (PLCs),²⁶⁹ and the Code of Corporate Governance for Public Companies (PCs) and Registered-Issuers of Securities (RIs),²⁷⁰ which shall hereinafter be collectively referred to as *CG Codes for Publicly-Held Companies* or simply as *CG Codes*. *In essence, the specificity of how directors discharge their duties to act in the best interests of the corporation in relation to climate change risks fall are specified within Philippine corporate governance framework.*

The CG Codes for Publicly-Held Companies have similar provisions on ESG matters, and both are based on the comply-or-explain approach²⁷¹ which combines voluntary compliance with mandatory disclosure, thus:

266. PHIL. CONST. art. II, § 16.

267. *See generally* REV. CORP. CODE.

268. *See generally* The Securities Regulation Code [SEC. REG. CODE], Republic Act No. 8799 (2000) (as amended).

269. CG Code for PLCs, *supra* note 263.

270. CG Code for PCs and RIs, *supra* note 263.

271. CG Code for PLCs, *supra* note 263, at 1.

“[c]ompanies do not have to comply with the Code, but they must state in their annual corporate governance reports whether they comply with the Code provisions, identify any areas of non-compliance, and explain the reasons for non-compliance.”²⁷² No penalties are imposed on publicly held companies for non-compliance with the principles and recommended best practices under the Codes, and the expectation is that it is the market which will vote with their investment decisions on whether they believe in the publicly held companies’ explanation for non-compliance with the principles, recommendation, and best practices of the CG Codes.²⁷³

The CG Codes adopt the principle that a truly competent board of directors should “foster the long-term success of the corporation, and to sustain its competitiveness and profitability in a manner consistent with its corporate objectives and the long-term best interests of its shareholders and other stakeholders.”²⁷⁴

When it comes to establishing the roles and responsibilities of the board, the CG Codes adopt the principle that “[t]he fiduciary roles, responsibilities[,] and accountabilities ... as provided under the law, the company’s articles and by-laws, and other legal pronouncements and guidelines should be clearly made known to all directors”²⁷⁵ In line with such principle, the CG Codes recommend that directors “should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and all shareholders”²⁷⁶ and “should oversee the development of and approve the company’s business objectives and strategy, and monitor their implementation, in order to sustain the company’s long-term viability and strength.”²⁷⁷

When it comes to a directors’ duty to properly oversee the company’s Enterprise Risk Management (ERM) system, which would include climate change risks that would undermine the company enterprise value, the CG Codes adopt the principle that

272. *Id.* at 4, ¶ 2.

273. *See id.*

274. CG Code for PLCs, *supra* note 263 at 2, ¶ 1 & CG Code for PCs and RIs, *supra* note 263, at 4, ¶ 1.

275. CG Code for PLCs, *supra* note 263, at 2, ¶ 2 & CG Code for PCs and RIs, *supra* note 263, at 7, ¶ 2.

276. CG Code for PLCs, *supra* note 263, at 9, ¶ 2.1 & CG Code for PCs and RIs, *supra* note 263, at 8, ¶ 2.1.

277. CG Code for PLCs, *supra* note 263, at 10, ¶ 2.2 & CG Code for PCs and RIs, *supra* note 263, at 8, ¶ 2.2.

[t]he Board should oversee that a sound enterprise risk management (ERM) framework is in place to effectively identify, monitor, assess[,] and manage key business risks. The risk management framework should guide the Board in identifying units/business lines and enterprise-level risk exposures, as well as the effectiveness of risk management strategies.²⁷⁸

In addition, the CG Codes consider it best practice that every publicly held company “should have a strong and effective internal control system and enterprise risk management framework[,]” to ensure the integrity, transparency and proper governance in the conduct of its affairs.²⁷⁹ Accordingly, “an effective enterprise risk management framework typically includes such activities as the identification, sourcing, measurement, evaluation, mitigation[,] and monitoring of risk.”²⁸⁰

The term *enterprise risk management* is defined as

a process, effected by an entity’s Board of Directors, management and other personnel, applied in strategy setting and across the enterprise that is designed to identify potential events that may affect the entity, manage risks to be within its risk appetite, and provide reasonable assurance regarding the achievement of entity objectives.²⁸¹

The CG Codes explain the rationale behind the corporate governance best-practice of the board formally adopting a strong and effective ERM framework, thus: “[r]isk management policy is part and parcel of a corporation’s corporate strategy. The Board is responsible for defining the company’s level of risk tolerance and providing oversight over its risk management policies and procedures.”²⁸²

The CG Codes recommend that, “[s]ubject to its size, risk profile[,] and complexity of operations, [a publicly held company] should have a separate risk management function to identify, assess[,] and monitor key risk exposures[,]” and explain that the directors’ risk management function involve the following activities:

278. CG Code for PLCs, *supra* note 263, at 15, ¶ 2.11.

279. *Id.* at 3, ¶ 12 & CG Code for PCs and RIs, *supra* note 263, at 31, ¶ 12.

280. CG Code for PLCs, *supra* note 263, at 34, ¶ 12.

281. *Id.* at 5 & CG Code for PCs and RIs, *supra* note 263, at 2.

282. CG Code for PLCs, *supra* note 263, at 15, ¶ 2.11 & CG Code for PCs and RIs, *supra* note 263, at 13, ¶ 2.10.

- (1) Defining a risk management strategy;
- (2) Identifying and analyzing key risks exposure relating to economic, environmental, social[,] and governance (EESG) factors and the achievement of the organization's strategic objectives;
- (3) Evaluating and categorizing each identified risk using the company's predefined risk categories and parameters;
- (4) Establishing a risk register with clearly defined, prioritized[,] and residual risks;
- (5) Developing a risk mitigation plan for the most important risks to the company, as defined by the risk management strategy;
- (6) Communicating and reporting significant risk exposures including business risks (i.e., strategic, compliance, operational, financial[,] and reputational risks), control issues[,] and risk mitigation plan to the Board Risk Oversight Committee; and
- (7) Monitoring and evaluating the effectiveness of the organization's risk management processes.²⁸³

The CG Codes recommend that “[i]n managing the company's [ERM] system, the company should have a Chief Risk Officer (CRO),” who will ultimately “champion the [ERM] and [who should have] adequate authority, stature, resources[,] and support to fulfill his/her responsibilities,²⁸⁴ which includes communicating top risks and status of implementation of risk management strategies and actions plans to the Board Risk Oversight Committee (BROC).²⁸⁵

The CG Codes recommend that, “[s]ubject to its size, risk profile[,] and complexity of operations, the Board should establish a separate [BROC] that should be responsible for the oversight of [the ERM] system to ensure its functionality and effectiveness.”²⁸⁶ The CG Codes explain —

Enterprise risk management is integral to an effective corporate governance process and the achievement of a company's value creation objectives. Thus, the BROC has the responsibility to assist the Board in ensuring that there is an effective and integrated risk management process in place. With an

283. CG Code for PLCs, *supra* note 263, at 36, ¶ 12.4.

284. *Id.* at 36, ¶ 12.5.

285. *Id.* at 37, ¶ 12.5.

286. *Id.* at 19, ¶ 3.4.

integrated approach, the Board and top management will be in a confident position to make well-informed decisions, having taken into consideration risks related to significant business activities, plans[,] and opportunities.²⁸⁷

The CG Codes indicate the elements that may constitute a *strong and effective* ERM system, thus: “(a) common language or register of risks[;] (b) well-defined risk management goals, objectives[,] and oversight[;] (c) uniform processes of assessing risks and developing strategies to manage prioritized risks[;] (d) designing and implementing risk management strategies[;] and (e) continuing assessments to improve risk strategies, processes and measures[.]”²⁸⁸

The comply-or-explain approach²⁸⁹ under the CG Codes for Publicly-Held Companies means that the corporate governance framework does not dictate the manner and processes by which directors should consider and meet the challenges of climate change risks as they impinge upon the company’s business enterprise. Nonetheless, the climate change governance principles and best practices recommended and explained in the CG Codes constitute a robust benchmark by which the courts may gauge whether directors’ actuations with respect to meeting the climate change risks facing their company may have amounted to “*gross negligence or bad faith in directing the affairs of the corporation.*”²⁹⁰ In other words, *compliance by the board of directors with ERM best practice of identifying, sourcing, measuring, evaluating, mitigating, and monitoring of climate change risks would constitute the best defense in climate change litigations that directors have acted in the best interest of the company and its shareholders in facing up to the climate change risks besetting the company.*

Finally, despite the comply-or-explain approach under the CG Codes for Publicly-Held Companies,²⁹¹ Section 23 of the Revised Corporation Code now expressly provides that “*directors or trustees elected shall perform their duties as prescribed by law, rules of good corporate governance, and bylaws of the corporation.*”²⁹² There is no Supreme Court decision on the legal effect of this relatively new provision incorporating *rules of good corporate governance* promulgated by the SEC within the fiduciary duties of directors to act in the best interest of the corporation and its shareholders. Section 23 of the Revised Corporation Code provides legal basis to the position that directors’ management of climate

287. *Id.*

288. *Id.* at 20, ¶ 3.4. & CG Code for PCs and RIs, *supra* note 263, at 18, ¶ 3.4.

289. CG Code for PLCs, *supra* note 263, at 1.

290. REV. CORP. CODE, § 30.

291. CG Code for PLCs, *supra* note 263, at 1.

292. REV. CORP. CODE, § 23 (emphasis supplied).

change risks now fall within their fiduciary duties “to act in the best interest of the corporation and its shareholders” in promoting the long-term value of the company.²⁹³ The liability that directors may be exposed to in relation to climate change risks depends upon the surrounding facts by which they breach such fiduciary duties.

E. Directors’ Duties and Responsibilities to Other Stakeholders in relation to Climate Change

Directors’ duties and responsibilities to stakeholders (other than shareholders) in relation to climate change must be assessed in the following terms: (a) *on how the company’s operations affect the country’s ecological environment and thereby impinge upon the stakeholders’ rights health and to a balanced and healthful ecology;* and (b) *on how the company’s operations impinge upon the financial interests of such stakeholders.*

1. Filipino Citizens as Constitutional Stakeholders of All For-Profit Corporations

As a general proposition, when it comes to the enforcement of environmental laws in general, and claims that may be interposed against the company for exacerbating the effects of climate change, every Filipino citizen falls within the definition of *stakeholder* of every for-profit corporation, based on every Filipino’s constitutional rights to health and a balanced and healthful ecology,²⁹⁴ and the constitutional principle that every corporation bears a social function to contribute to the common good based on the directives of the State, expressed in its laws, rules, and regulations.²⁹⁵ The extent to which other stakeholders may hold the directors personally liable for breach of such obligations to refrain from harming the environment depends on the nature of sanction or damage that is imposed under particular language of the environmental law whose prohibited acts have been breached.

2. Stakeholder of Publicly-Held Companies Legal Standing on Sustainable Development

Even under the Old Corporation Code,²⁹⁶ the SEC had implemented for publicly held companies a corporate governance framework that recognizes the stakeholder theory whereby “[a] director assumes certain responsibilities to

293. *Id.*

294. PHIL. CONST. art. II, § 16.

295. PHIL. CONST. art. XII, § 6.

296. CORP. CODE (repealed in 2019).

different constituencies or stakeholders, who have a right to expect that the institution is being run in a prudent and sound manner."²⁹⁷

Eventually, the SEC evolved within such corporate governance framework both the 'environmental' and 'social' aspects of corporate governance, when in its CG Codes for Publicly-Held Companies, it provided specific sections on *duties to stakeholders*, defining the term *stakeholders* to mean "any individual, organization[,] or society at large who can either affect and/or be affected by the company's strategies, policies, business decisions[,] and operations, in general. This includes, among others, customers, creditors, employees, suppliers, investors, as well as the government[,] and community in which it operates."²⁹⁸ The CG Codes outline the corporate governance framework for publicly held companies insofar as their stakeholders are concerned, as follows: Directors are expected to respect "[t]he rights of stakeholders [that are] established by law, by contractual relations[,] and through voluntary commitments[.]" [w]here stakeholders' rights and/or interests [are adversely affected], stakeholders should have the opportunity to obtain prompt effective redress for the violation of their rights."²⁹⁹

There can be little argument that among the stakeholders' rights "established by law" would be the constitutional right of members of communities to a healthful ecology,³⁰⁰ as well as the company's obligation to operate within the country's environmental laws.

A publicly held company should have a strong and effective internal control system and enterprise risk management framework, to ensure the integrity, transparency and proper governance in the conduct of its affairs, which involves, among others,³⁰¹ "[i]dentifying and analyzing key risks exposure relating to economic, environmental, social[,] and governance (EESG) factors and the achievement of the organization's strategic

297. Securities and Exchange Commission, Code of Corporate Governance, Memorandum Circular No. 2, Series of 2002 [SEC Memo. Circ. No. 2, s. 2002], § 6 (a) (Apr. 5, 2002) (emphasis supplied). This is amended by Securities and Exchange Commission, Revised Code of Corporate Governance, Memorandum Circular No. 6, Series of 2009 [SEC Memo. Circ. No. 6, s. 2009] (June 22, 2009).

298. CG Code for PLCs, *supra* note 263, at 6 & CG Code for PCs and RIs, *supra* note 263, at 3 (emphases supplied).

299. CG Code for PLCs, *supra* note 263, at 3 & CG Code for PCs and RIs, *supra* note 263, at 35.

300. PHIL. CONST. art. II, § 16.

301. CG Code for PLCs, *supra* note 263, at 3, ¶ 12 & CG Code for PCs and RIs, *supra* note 263, at 31, ¶ 12.

objectives[.]”³⁰² See the previous discussion from the point of view of shareholders on the directors’ duty and functions in the managing the company’s ERM system, which apply in equal force from the point of view of stakeholders of the company.

Every publicly held company is encouraged to “be socially responsible in all its dealings with the communities where it operates. It should ensure that its interactions serve its environment and stakeholders in a positive and progressive manner that is fully supportive of its comprehensive and balanced development[.]”³⁰³ which it encapsulates into the term “sustainable development” that is defined as follows —

The company’s value chain consists of inputs to the production process, the production process itself and the resulting output. Sustainable development means that the company not only complies with existing regulations, but also voluntarily employs value chain processes that takes into consideration economic, environmental, social[,] and governance issues and concerns. In considering sustainability concerns, the company plays an indispensable role alongside the government and civil society in contributing solutions to complex global challenges like poverty, inequality, unemployment[,] and climate change.³⁰⁴

In essence, the Philippines’ corporate governance framework *encourages* that every publicly held company, acting through its board of directors, should not only comply with all existing regulations on environment protection, but should, in the exercise of business judgment, take into consideration the climate change risks that would affect the long-term interests of the corporation, as well as the society’s right to a healthful ecology, and always pursue disclosure to the State and other stakeholders of the risks relating to the environment.

The comply-or-explain approach³⁰⁵ under the CG Codes for Publicly-Held Companies,³⁰⁶ as well as the ‘voluntary’ nature by which sustainable development is recommended to be pursued, mean that the corporate governance framework does not dictate upon the directors the manner and processes by which to consider and meet the challenges of climate change risks as they impinge upon the company’s business enterprise. *Nonetheless*, the climate change governance principles and best-practices recommended and

302. CG Code for PLCs, *supra* note 263, at 36.

303. CG Code for PLCs, *supra* note 263, at 3, ¶ 16 & CG Code for PCs and RIs, *supra* note 263, at 37, ¶ 16.

304. CG Code for PLCs, *supra* note 263, at 42, ¶ 16.1.

305. *Id.*

306. *Id.* at 1.

explained in the CG Codes for Publicly-Held Companies constitute a robust benchmark by which the courts may gauge whether directors' actuations with respect to meeting the climate change risks to which the company is exposed amounted to "gross negligence or bad faith in directing the affairs of the corporation."³⁰⁷

As in the case of shareholders, the breach of the fiduciary duties to act in the best interests of the company in promoting its long-term value as they may encompass the interests of other stakeholders, by failing to manage climate change risks, is determined with reference to the directors' collective exercise of business judgment. The personal liability that directors may be exposed to in relation to climate change risks depends upon the surrounding facts by which they breach such fiduciary duties.

3. Other Stakeholders Entitled to Demand Extraordinary Diligence on Companies Vested with Public Interest

Even under the old Corporation Code³⁰⁸ which operated on the principle that the fiduciary duties of directors are owed to the shareholders — and not to other constituencies — with their primary duty being the maximization of shareholders' value in the pursuit of the corporate business enterprise,³⁰⁹ the Court evolved the doctrine of *corporate social responsibility* of private companies whose business enterprises are affected with public interest, such as common carriers,³¹⁰ electric power companies,³¹¹ banks³¹² and other financial institutions,³¹³ and hospitals. The doctrine of *corporate social responsibility* imposed the fiduciary duty of extraordinary diligence upon such companies and their directors to stakeholders other than the

307. REV. CORP. CODE, § 30 (emphasis supplied).

308. CORP. CODE (repealed in 2019).

309. *Prime White Cement Corp. v. Intermediate Appellate Court*, G.R. No. 68555, 220 SCRA 103, 110 (1993).

310. *See generally* *Delsan Transport Lines, Inc. v. Court of Appeals*, G.R. No. 127897, 369 SCRA 24 (2001).

311. *See generally* *Ridjo Tape & Chemical Corp. v. Court of Appeals*, G.R. No. 126074, 286 SCRA 544 (1998).

312. *See generally* *Simex International (Manila), Inc. v. Court of Appeals*, G.R. No. 88013, 183 SCRA 360 (1990) & *Philippine National Bank v. Pike*, G.R. No. 157845, 470 SCRA 328 (2005).

313. *Virata v. Ng Wee*, G.R. No. 220926, 830 SCRA 271 (2017) [hereinafter *Virata* 2017 Decision].

shareholders, such as the passengers of common carriers,³¹⁴ the consumers of power utility companies,³¹⁵ the depositors of banking institutions,³¹⁶ those who commercially invest with financial institutions,³¹⁷ and the patients of doctors who use the facilities of the hospital.³¹⁸

The term “*business affected with public interest*” also has a constitutional underpinning.³¹⁹ Section 17 of Article XII (*National Economy and Patrimony*) of the 1987 Constitution provides, “[I]n times of national emergency, when the public interest so requires, the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of *any privately owned public utility or business affected with public interest.*”³²⁰ The term *national emergency* encompasses among others “calamities, or natural disasters[.]”³²¹

Fr. Joaquin G. Bernas, S.J., a member of the 1986 Constitutional Commission that drafted the 1987 Constitution,³²² reports that the term *business affected with public interest* was adopted by the constitutional writers from the —

314. See generally *Nedlloyd Lijnen B.V. Rotterdam v. Glow Laks Enterprises, Ltd.*, 747 Phil. 170 (2014) & *KLM Royal Dutch Airlines v. Tiongco, G.R.* No. 212136, Oct. 4, 2021, available at <https://web.archive.org/web/20220514044025/https://sc.judiciary.gov.ph/22907> (last accessed Jan. 31, 2023).

315. See generally *Manila Electric Company v. Nordec Philippines*, 830 Phil. 61 (2018).

316. See generally *Philippine Commercial and International Bank v. Court of Appeals*, G.R. No. 121413, 350 SCRA 446 (2001) & *Metropolitan Bank and Trust Company v. Custodio*, 661 Phil. 324 (2011).

317. See generally *Virata v. Ng Wee*, 828 Phil. 710 (2018) [hereinafter *Virata 2018 Resolution*].

318. See generally *Professional Services, Inc. v. Court of Appeals*, G.R. No. 126297, 611 SCRA 282 (2010).

319. BERNAS, *supra* note 207, at 1229. See also PHIL. CONST.

320. PHIL. CONST. art. XII, § 17.

321. BERNAS, *supra* note 207, at 1229.

322. Resolution Honoring the Life of Father Joaquin G. Bernas, S. J., J. S. D., for His Immeasurable and Invaluable Contributions to the Legal Profession and Society as a Constitutionalist and a Dedicated Servant of God and Expressing the Profound Sympathy and Sincere Condolences of the Senate on the Untimely Demise of the Best Known Authority on the Constitution and One of the Framers of the 1987 Constitution, S. Res. Nos. 94, whereas cl. para. 3, 18th Cong., 2d Reg. Sess. (2021).

American [c]onstitutional jurisprudence ... and it had a special significance especially in the heyday of *laissez faire*. Even at the time of American constitutional history when governmental regulatory power was deemed drastically restricted by *laissez faire* in the extreme form, there was an area which was not allowed to escape the regulatory power of the [S]tate. This was the area of 'business affected with public interest.'³²³

He quoted from *Munn v. Illinois*³²⁴ on the expanded coverage of the term, thus —

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes [their] property to a use in which the public has an interest, [they], in effect, grant[] to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest [they have] thus created.³²⁵

When the Revised Corporation Code replaced in February 2019 the old Corporation Code,³²⁶ it recognized the special category of *corporations vested with public interest* — including within its enumerations are publicly held companies, banks, and other financial intermediaries — as being governed by corporate governance principles such requiring a specified number of independent directors being in their boards.³²⁷ The Revised Corporation

323. BERNAS, *supra* note 207, at 1229.

324. *See generally* *Munn v. Illinois*, 94 U.S. 113 (1877).

325. BERNAS, *supra* note 207, at 1230 (citing *Munn*, 94 U.S. at 126).

326. Ralf Rivas, *FAST FACTS: How the New Corporation Code Makes Business Easier*, RAPPLER, Feb. 21, 2019, available at <https://www.rappler.com/business/224058-things-to-know-about-new-corporation-code-makes-business-easier> (last accessed Jan. 31, 2023) [<https://perma.cc/76S9-TABU>].

327. REV. CORP. CODE, § 22. Section 22 provides —

SECTION 22. The Board of Directors or Trustees of a Corporation;
Qualification and Term. —

...

The board of the following corporations vested with public interest shall have independent directors constituting at least twenty percent (20%) of such board:

- (a) Corporations covered by Section 17.2 of Republic Act No. 8799, otherwise known as 'The Securities Regulation Code,' namely those whose securities are registered with the Commission, corporations listed with an exchange or with assets of at least Fifty million pesos (₱50,000,000.00) and having two hundred (200) or

Code's formal recognition of the specific classification of corporations vested with public interest³²⁸ mainstreams into Philippine Corporation Law the common law doctrine that directors of corporations vested with public interest owe a 'fiduciary duty of extraordinary care' to stakeholders other than shareholders when compared to the standard due diligence of a prudent man.

To compare with the business of common carriers (i.e., public transportation), which has also been declared as being imbued with public interest and the degree of diligence required being extraordinary diligence,³²⁹ the Court held established the doctrine that when the company is bounded to exercise extraordinary diligence in the pursuit of its business enterprise, and injury or damage is caused to its clients or customers, it is presumed *ipso jure* that the company was at fault or was negligent, "the court[s] need not [] make an express finding of fault or negligence," and the burden of proof is on the part of the company to prove that the injury or damaged was caused by force majeure.³³⁰ The Court defines *extraordinary diligence* to mean "that extreme measure of care and caution which persons of unusual prudence and

more holders of shares, each holding at least one hundred (100) share of any class of its equity shares;

- (b) Banks and quasi-banks, NSSLAs, pawnshops, corporations engaged in money service business, preneed, trust and insurance companies, and other financial intermediaries; and
- (c) Other corporations engaged in businesses vested with public interest similar to the above, as may be determined by the Commission, after taking into account relevant factors which are germane to the objective and purpose of requiring the election of an independent director, such as the extent of minority ownership, type of financial products or securities issued or offered to investors, public interest involved in the nature of business operations, and other analogous factors

Id.

328. *Id.*

329. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 1733 (1949) (as amended).

Common carriers, from the nature of their business and for reasons of public policy, are bound to observe extraordinary diligence in the vigilance over the goods and for the safety of the passengers transported by them, according to all the circumstance of each case.

Id.

330. Victory Liner, Inc. v. Gammad, G.R. No. 159636, 444 SCRA 355, 365 (2004) (emphasis omitted) (citing Baliwag Transit, Inc. v. Court of Appeals, G.R. No. 116110 256 SCRA 746, 751 (1996)).

circumspection observe for securing and preserving their own property or rights.”³³¹

Although no decision has been rendered by the Court on what the legal repercussions are under the doctrine of extraordinary diligence for corporations vested with public interest, it is the Authors’ well-considered opinion that it will have the same doctrinal application as that evolved under the Philippines’ Law on Transportation.

Since the whole of Philippine Government — the Executive on the country’s commitments to UNFCCC,³³² Congress on the promulgation of the Climate Change Act of 2009 and supporting environmental laws,³³³ and the Court which articulated the constitutional right to a balanced and healthful ecology in its *Oposa* and other decisions³³⁴ — has declared as both a national and global concern the serious effect of climate change on the environment, directors of publicly held companies and other corporations vested with public interest, *bound by the duty to exercise extraordinary diligence in the pursuit of the corporate business enterprise*, would be hard-pressed to use the exercise of business judgment as a legal defense when the stakeholders are able to prove the effects of the companies’ operations towards the degradation of the environment.

Unlike in the case of shareholders where the directors can rely initially on the business judgment rule to avoid personal liability and where the burden to prove that directors have acted in fraud, bad faith, or with gross negligence in failing to avoid or anticipate climate risks to which the company is exposed to,³³⁵ in the case of other stakeholders, they need only to show the damage to the environment that the companies’ operations had wrought, which then shifts the burden on the directors to prove that they have exercised extraordinary diligence to avoid such adverse consequences on the environment.

331. *Loadmasters Customs Services, Inc. v. Glodel Brokerage Corporation*, G.R. No. 179446, 639 SCRA 69, 81 (2011) (citing *Republic v. Lorenzo Shipping Corporation*, G.R. No. 153563, 450 SCRA 550, 556 (2005) (citing BLACK’S LAW DICTIONARY 411 (5th ed. 1979))).

332. UNFCCC, *supra* note 1.

333. *See, e.g.*, Climate Change Act of 2009.

334. *See, e.g.*, *Oposa*, 224 SCRA at 813.

335. *See* REV. CORP. CODE, § 30.

V. DIRECTORS' POTENTIAL LIABILITIES IN RELATION TO CLIMATE CHANGE

A. Directors' Personal (Civil) Liability for Corporate Acts — In General

1. The Business Judgment Rule

Pursuant to the primary attribute that a corporation has a juridical personality separate and distinct from the directors and officers that represent it,³³⁶ the rule under Philippine Corporation Law is that directors are not personally liable for their official acts in pursuing the business of the corporation,³³⁷ unless: (a) the law expressly makes them personally liable for their official actions; (b) they have expressly bound themselves personally;³³⁸ (c) it is shown that they have exceeded their authority;³³⁹ or (d) it is shown by sufficient evidence that they have acted with fraud,³⁴⁰ bad faith,³⁴¹ or gross negligence.³⁴²

The general rule on non-liability of directors acting in their official capacity for corporate debts and liabilities also finds basis in the provisions of the Law on Agency under the Civil Code of the Philippines, which holds that an agent cannot be personally made liable for the contracts and transactions he enters into on behalf of the principal,³⁴³ except when he acts without or in

336. See CIVIL CODE, art. 44.

337. *Lanuza, Jr. v. BF Corporation*, G.R. No. 174938, 737 SCRA 275, 295-97 (2014).

338. See *De Asis & Co., Inc. v. Court of Appeals*, G.R. No. L-61549, 136 SCRA 599, 603-04 (1985).

339. *Cf. Rustan Pulp & Paper Mills, Inc. v. IAC*, G.R. No. 70789, 214 SCRA 665, 672 (1992) (citing *Banque Generale Belge v. Walter Bull & Co., Inc.* 84 Phil. 164 (1949)).

340. *Palay, Inc. v. Clave*, G.R. No. L-56076, 124 SCRA 638, 648-49 (1983).

341. See *Benguet Electric Cooperative, Inc. v. NLRC*, G.R. No. 89070, 209 SCRA 55, 66 (1992).

342. *Sanchez v. Republic*, G.R. No. 172885, 603 SCRA 229, 237 (2009) (citing *Fernando v. Sandiganbayan*, G.R. No. 96182, 212 SCRA 680, 691 (1992) (citing *BALLENTINE'S LAW DICTIONARY* 537 (3d ed.))).

343. CIVIL CODE, art. 1897 ("The agent who acts as such is not personally liable to the party with whom he contracts, unless he expressly binds himself or exceeds the limits of his authority without giving such party sufficient notice of his powers.") & art. 1910 ("The principal must comply with all the obligations which the agent may have contracted within the scope of his authority."). *Id.*

excess of authority,³⁴⁴ or acts with negligence, in fraud or in bad faith,³⁴⁵ or in clear conflict of interests.³⁴⁶

The Civil Law principles find their expression in Philippine Corporate Law under the 'business judgment rule' that holds that directors who act on behalf of the corporation, keep within the lawful scope of their authority, and act in good faith, do not become personally liable for the consequences of the corporate acts.³⁴⁷

B. Directors' Personal (Civil) Liability to Shareholders and Other Stakeholders in Relation to Climate Change

1. Limited Instances When Directors May Be Held Personally Liable

During most of the nearly 40-year effectivity of the old Corporation Code, the provisions of its Section 31, now Section 30 of the Revised Corporation Code,³⁴⁸ have been strictly interpreted in favor of upholding the general rule, and as providing the rare exceptions to the primary rule, that directors and officers are not personally liable for the losses or damages sustained by a corporation and the parties it deals with.³⁴⁹ When it comes to climate change,

344. *Price v. Innodata Phils., Inc.*, G.R. No. 178505, 567 SCRA 269, 289 (2008).

345. CIVIL CODE, art. 1909 ("The agent is responsible not only for fraud, but also for negligence, which shall be judged with more or less rigor by the courts, according to whether the agency was or was not for a compensation."). *Id.*

346. *Id.* art. 1889 ("The agent shall be liable for damages if, there being a conflict between his interests and those of the principal, he should prefer his own."). *Id.*

347. *See Urban Bank, Inc. v. Peña*, G.R. No. 145817, 659 SCRA 418, 487 (2011) & *Olivarez Realty Corporation v. Castillo*, G.R. No. 196251, 729 SCRA 544, 575 (2014).

348. REV. CORP. CODE, § 30.

349. *Tramat Mercantile, Inc. v. Court of Appeals*, G.R. No. 111018, 238 SCRA 14, 19 (1994); *Santos v. National Labor Relations Commission*, G.R. No. 101699, 254 SCRA 673, 682 (1996); *Uichico v. National Labor Relations Commission*, G.R. No. 121434, 273 SCRA 35 (1997); *Atrium Management Corporation v. Court of Appeals*, G.R. No. 109491, 353 SCRA 23, 31 (2001); *Malayang Samahan ng mga Manggagawa sa M. Greenfield v. Ramos*, G.R. No. 119307, 357 SCRA 77, 93 (2001); *Powton Conglomerate, Inc. v. Agcolicol*, G.R. No. 150978, 400 SCRA 523, 532 (2003); *H.L. Carlos Construction, Inc. v. Marina Properties Corporation*, G.R. No. 147614, 442 SCRA 428 (2004); *McLeod v. National Labor Relations Commission*, G.R. No. 146667, 512 SCRA 222, 253 (2007); *Garcia v. Social Security Commission Legal and Collection*, G.R. No.

Section 30 of the Revised Corporation Code³⁵⁰ provides for the specified statutory exceptions to the business judgment rule that exempts personal (civil) liability to directors, thus —

SEC. 30. *Liability of Directors, Trustees[,] or Officers.* — Directors or trustees who [(a)] willfully and knowingly vote for or assent to patently unlawful acts of the corporation[;] or [(b)] who are guilty of gross negligence or bad faith in directing the affairs of the corporation[;] or [(c)] acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees shall be liable jointly and severally for all damages resulting therefrom suffered by the corporation, its stockholders[,] or members and other persons.

A director, trustee[,] or officer shall not attempt to acquire, or acquire any interest adverse to the corporation[,] in respect of any matter which has been reposed in them in confidence, and upon which, equity imposes a disability upon themselves to deal in their own behalf; otherwise, the said director, trustee or officer shall be liable as a trustee for the corporation and must account for the profits which otherwise would have accrued to the corporation.³⁵¹

2. Voting for or Assenting to Patently Unlawful Acts of the Corporation

The term *patently unlawful acts of the corporation* under Section 30 of the Revised Corporation Code³⁵² has been interpreted by the Court to cover “those *declared unlawful by law* which imposes penalties for commission of such unlawful acts. There must be a law declaring the act unlawful and penalizing the act.”³⁵³ In effect, the civil liability arising from willfully and knowingly voting for or assenting to a patently unlawful act amounts to a pursuit by the corporation of acts or transactions that have been expressly declared unlawful (i.e., prohibited acts), and for which a penalty is imposed upon the corporation by express provision of law.

170735, 540 SCRA 456, 474-75 (2007); *Magaling v. Ong*, G.R. No. 173333, 562 SCRA 152, 169 (2008); *Queensland-Tokyo Commodities, Inc. v. George*, G.R. No. 172727, 630 SCRA 304, 315 (2010); *SPI Technologies, Inc. v. Mapua*, G.R. No. 191154, 720 SCRA 743, 762 (2014); *Lanuza, Jr.*, 737 SCRA at 300-01; *Montallana v. La Consolacion College Manila*, G.R. No. 208890, 744 SCRA 163, 176-77 (2014); & *Fernandez v. Smart Communications, Inc.*, G.R. No. 212885, 909 SCRA 293 (2019).

350. REV. CORP. CODE, § 30.

351. *Id.*

352. *Id.*

353. *Carag v. National Labor Relations Commission*, G.R. No. 147590, 520 SCRA 28, 50 (2007) (emphasis supplied).

In relation to climate change, in the absence of gross negligence or bad faith as discussed, directors may be held personally (civilly) liable only when they have willfully and knowingly voted for or assented to violations of climate-related environmental laws. Strictly speaking, it is the directors' direct participation in the corporation's commission of 'prohibited acts' under the climate-related environmental laws that makes them criminally liable, that would also give rise to personal (civil) liability to the corporation for the damage sustained by corporation arising from such violations.

Depending on the circumstances prevailing in each case, directors of publicly-listed companies may be held personally (civilly) liable for violation of the disclosure obligations for which sanctions are provided for by law or the rules.

3. Gross Negligence in Directing the Affairs of the Corporation

Proof of negligence by itself does not constitute a breach of the duty of diligence since Section 30 of the Revised Corporation Code³⁵⁴ requires a higher quantum of *gross negligence*, which has been construed as —

[T]he want of even slight care, acting[,] or omitting to act in a situation where there is duty to act, not inadvertently but willfully and intentionally, with a conscious indifference to consequences insofar as other persons may be affected. It evinces a thoughtless disregard of consequences without exerting any effort to avoid them; the want or absence of or failure to exercise slight care or diligence, or the entire absence of care.³⁵⁵

In other words, a high threshold of negligence as amounting to an entire absence of care is placed on the shoulders of shareholders and other stakeholders to make directors personally liable for the damages caused in the pursuit of the corporation's business affairs.³⁵⁶

When it comes to climate change, since physical and economic transition risks fall within the foreseeable material commercial risks that all *for-profit corporations* are exposed to, the same high threshold is presented to the shareholders when seeking to impose personal (civil) liability on directors.

354. REV. CORP. CODE, § 30.

355. *Sanchez*, 603 SCRA at 237 (citing *Fernando*, 212 SCRA at 691 (citing BALLENTINE'S LAW DICTIONARY 537 (3d ed.); *Citibank, N.A. v. Gatchalian*, G.R. No. 111222, 240 SCRA 212 (1995); & *National Bookstore, Inc. v. Court of Appeals*, G.R. No. 146741, 378 SCRA 194, 202 (2002))).

356. *See Sanchez*, 603 SCRA at 237.

Under Philippine corporate governance framework as it applies to publicly held companies, the fiduciary duties of obedience and diligence impose upon directors of publicly held companies the responsibility to promote the long-term value of the company for the benefit of both shareholders and other stakeholders which could be harmed by the failure to manage the risks of climate change, fall within the directors' collective exercise of business judgment. Consequently, directors may be held personally liable for failing to identify, monitor, and manage climate change risks only when it can be shown that such nonfeasance or malfeasance fall within any of exceptions to the business judgment under Section 30 of the Revised Corporation Code.³⁵⁷

The term “*bad faith*” in Section 30 of the Revised Corporation Code³⁵⁸ has been construed by the Court as misfeasance or acts amounting to fraud, thus —

Rightfully had it been said that bad faith does not simply connote bad judgment or negligence; it imports a dishonest purpose or some moral obliquity and conscious doing of wrong; it means breach of a known duty [through] some motive or interest or ill will; it partakes of the nature of fraud. Applying this precept to the given facts herein, we find that there was no ‘dishonest purpose,’ or ‘some moral obliquity,’ or ‘conscious doing of wrong,’ or ‘breach of a known duty,’ or ‘some motive or interest or ill will,’ that ‘partakes of the nature of fraud.’³⁵⁹

Fraud or bad faith in the area of climate change would primarily delve into disclosure obligations on material risk for publicly-listed companies, or misrepresentation of ‘green credentials’ when it comes to green financing available in the Philippines, as well as other forms of greenwashing under consumer protection regulations.

4. Directors’ Liability in Shareholders’ Suits

Even when shareholders prove that the directors’ failure to identify, monitor and manage climate change risks constitutes a breach of their fiduciary duties as to make such erring directors personally liable, the action that may be brought against the erring directors would only be a derivative suit filed on behalf of the company and the damages and reliefs recoverable pertain to the corporation itself. Under Philippine Corporation Law, under the *primary*

357. REV. CORP. CODE, § 30.

358. *Id.*

359. Board of Liquidators v. Kalaw, G.R. No. L-18805, 20 SCRA 987, 1006-07 (1967) (citing Spiegel v. Beacon Participations, 8 N.E.2d 895, 907 (Mass. 1937) (U.S.)).

attribute separate juridical personality,³⁶⁰ all assets and the business enterprise of the corporation pertains to it as a separate juridical person, and shareholders have no proprietary claims of co-ownership or tenancy-in-common to any of the corporation's property and assets.³⁶¹

The Court has ruled that shareholders have no legal standing to make any claims from the contracts, transactions, and properties of the corporation, much less to recover for themselves the damages suffered by the corporation's business enterprise.³⁶²

Even when it comes to publicly-listed companies, the Court held that a claim by the shareholders for damages pertaining to the value that their shares could have been sold at the market had it not been for the drop in their stock market value by reason of the board's actuations, would be speculative damages and cannot be recovered.³⁶³

C. Directors' Liability in Corporations Vested with Public Interest

When it involves the climate change-related obligations of directors to stakeholders other than shareholders, the measure of their personal liabilities for breach of such duty is based not only on the constitutional obligation imposed on the company not to harm the environment,³⁶⁴ but more importantly, the directors are subjected a higher 'duty to exercise extraordinary diligence' in promoting the long-term value of the company as it is addressed to the interests of stakeholders, which could be harmed by failure to manage the risks of climate change. Since stakeholders other than shareholders do not base their claims against the directors on equity claims against the corporation, the civil damages that may be assessed against erring directors would pertain to the claiming stakeholders, with the exception that

360. REV. CORP. CODE, § 2 ("A corporation is an artificial being created by operation of law, having the right of succession and the powers, attributes, and properties expressly authorized by law or incidental to its existence."). *Id.*

361. *Stockholders of F. Guanzon and Sons, Inc. v. Register of Deeds of Manila*, G.R. No. L-18216, 6 SCRA 373, 375 (1962).

362. *Magsaysay-Labrador v. Court of Appeals*, G.R. No. 58168, 180 SCRA 266, 270 (1989); *Saw v. Court of Appeals*, G.R. No. 90580, 195 SCRA 740, 744-45 (1991); *Asset Privatization Trust v. Court of Appeals*, G.R. No. 121171, 300 SCRA 579, 614-15 (1998); & *Stronghold Insurance Co. v. Cuenca*, G.R. No. 173297, 692 SCRA 473, 488 (2013).

363. *Batong Buhay Gold Mines v. Court of Appeals*, G.R. No. L-45048, 147 SCRA 4, 8 (1987).

364. PHIL. CONST. art. II, § 16.

when the directors' default pertains to a violation of the provisions of environmental laws, damages recovered against the directors shall be disposed in the manner dictated by the climate-related environmental laws.

Anecdotal evidence indicates that with the promulgation by the Philippine SEC of corporate governance reforms in the sector of publicly held companies, which introduced the concepts of *corporate governance* and *stakeholders*, and the jurisprudential adoption of the doctrine of "*corporate social responsibility*,"³⁶⁵ the Court began to cement the foundation of the *stewardship doctrine* that in the exercise of their fiduciary duties of obedience and diligence, directors of publicly held companies and other corporations vested with public interest must be more circumspect and should make an independent evaluation of the risk involved in the transactions for which their approval is sought,³⁶⁶ thus —

The board of directors is expected to be more than mere rubber stamps of the corporation and its subordinate departments. It wields all corporate powers bestowed by the Corporation Code, including the control over its properties and the conduct of its business. *Being stewards of the company, the board is primarily charged with protecting the assets of the corporation [o]n behalf of its stakeholders.*³⁶⁷

In *Virata*, the Court denied the defense of the directors of an investment house that they approved the corporate transactions that led to the losses sustained by an investor based on the findings and recommendations of the executive and screening committees that such transactions were above board and that they were not privy to the fraudulent and unauthorized acts committed by the officers that led to the losses sustained by the investor, holding that "*they would nevertheless be liable for gross negligence in managing the affairs of the company, to the prejudice of its clients and stakeholders.*"³⁶⁸ When it comes to corporations vested with public interest, carelessness itself would be a violation of the duty of extraordinary diligence, and is equated to gross negligence under Section 30 of the Revised Corporation Code.³⁶⁹

The *stewardship doctrine* provides that directors, especially those in corporations vested with public interest, owe the fiduciary duty of extraordinary diligence to stakeholders (other than the shareholders), such that

365. *Professional Services*, 611 SCRA at 282, 298.

366. See *Virata* 2018 Resolution, 830 SCRA at 61.

367. *Id.* at 60 (emphasis supplied).

368. See *id.* at 60.

369. REV. CORP. CODE, § 30.

even if it cannot be proven that such directors approved a patently unlawful act, or acted with fraud or bad faith, their failure to prove that they have exercised extraordinary diligence in preventing the harm caused to the stakeholder injured by the company's operations would already amount to gross negligence as to make them personally liable.³⁷⁰ In other words, the term "gross negligence" under Section 30 of the Revised Corporation Code³⁷¹ has a different connotation when used in terms of addressing the relief claims of stakeholders.

D. Directors' Criminal Liability for Corporate Acts — In General

There are no "common law crimes" in Philippine jurisdiction — courts of law are without authority to impose any criminal penalty upon any act or transaction, no matter how reprehensive it may be, unless the statute itself defines it as being criminally punishable.³⁷²

Unless the criminal statute declares that there can be a corporate offender of a clearly defined criminal offense, then criminal offenses committed in pursuit of the corporate affairs and business enterprise are deemed to be the personal criminal acts of the directors, officers, shareholders, or employees who directly participated in the criminal acts.³⁷³ The doctrine of separate juridical personality does not apply to shield directors, officers, shareholders, or employees from personal criminal liability for any criminal offense committed in pursuit of the corporation's business enterprise.³⁷⁴

Unless the criminal statute expressly provides, being a director of an offending corporation *per se* does not make one criminally liable for criminal offenses done in pursuit of corporate business, and that only corporate officers and employees shown to have directly participated in or directed the commission of the offense may be held criminally liable.³⁷⁵ Unlike in the area of potential civil liability where the directors may be held personally liable on the grounds

370. *Id.* at 61 (emphasis supplied).

371. REV. CORP. CODE, § 30.

372. *Velunta v. Chief, Philippine Constabulary*, G.R. No. L-71855, 157 SCRA 147, 150 (1988).

373. *West Coast Life Ins. Co. v. Hurd*, 27 Phil. 401, 407-08 (1914); *Time, Inc. v. Reyes*, G.R. No. L-28882, 39 SCRA 303, 313 (1971); & *Ching v. Secretary of Justice*, G.R. No. 164317, 481 SCRA 609, 636 (2006).

374. *People v. Concepcion*, 43 Phil. 653, 674 (1922); *People v. Tan Boon Kong*, 54 Phil. 607, 609 (1930); & *People v. Chowdury*, G.R. No. 129577, 325 SCRA 572, 583 (2000).

375. *See Cruzvale, Inc. v. Eduque*, G.R. No. 172785, 589 SCRA 534, 545-46 (2009).

of gross negligence for failure to properly oversee the corporate affairs, the stewardship doctrine does not apply in the realm of criminal liability of directors.

The Court has held that when the statutory criminal sanction enumerates the officers who can be held liable for a specified corporate criminal offense, then unless directors are shown to have participated directly in the illegal act, their mere position as directors do not warrant being held criminally liable for the offense.³⁷⁶ The Court held that even if the Corporation Code vested corporate powers in the board of directors, “it is of common knowledge and practice that the board of directors is not directly engaged or charged with the running of the recurring business affairs of the corporation.”³⁷⁷

E. Directors’ Potential Civil and/or Criminal Liabilities Under the Environmental Laws

Although the private corporate sector plays an indispensable role in contributing solutions to complex global challenges, including the protection of the environment,³⁷⁸ nonetheless, the duty and responsibilities to protect the environment and to promote the citizen’s right to a healthful ecology pertains primarily to the State, acting through its governmental instrumentalities.³⁷⁹ A *for-profit* corporation, acting through its board of directors, has no constitutional or statutory obligation to protect the environment, in general, or to reduce its carbon footprint, in particular, *beyond the dictates of the State’s instrumentalities*. If a corporation, acting through its board of directors, pursues climate change activism, this is a matter of volunteerism or *good corporate citizenship*, and falls within the realm of “sustainable development,” which means that “the company not only complies with existing regulations, *but also voluntarily employs value chain processes* that take into consideration economic, *environmental*, social[,] and governance issues and concerns[] ... like ... climate change.”³⁸⁰

376. See, e.g., *West Coast Life Ins. Co.*, 27 Phil. at 407-08.

377. *Ty v. De Jemil*, G.R. No. 182147, 638 SCRA 671, 675 (2010). See also *Federated LPG Dealers Association v. Del Rosario*, G.R. No. 202639, 808 SCRA 272, 287 (2016).

378. CG Code for PLCs, *supra* note 263, at 42, ¶ 16 & CG Code for PCs and RIs, *supra* note 263, at 38, ¶ 16.

379. See PHIL. CONST. art. II, § 16.

380. CG Code for PLCs, *supra* note 263, at 42, ¶ 16 & CG Code for PCs and RIs, *supra* note 263, at 38, ¶ 16 (emphases supplied).

Since *for-profit* corporations are bounded by the constitutionally mandated social function not to harm the environment, directors are similarly bounded under their fiduciary duty of obedience to comply with environmental laws and ensure that the pursuit of corporate affairs do not venture into what the environmental laws define and punish as “prohibited acts.” When directors breach climate change-related environmental laws, not only may they be held liable for the sanctions provided in those laws, but they would have breached their duty of obedience for “*willfully and knowingly vot[ing] for or assent[ing] to patently unlawful acts of the corporation.*”³⁸¹

The Climate Change Act of 2009³⁸² does not provide for any “prohibited acts,” much less does it provide for any criminal penalty for violation of its provisions. Its gravamen is essentially to empower the Climate Change Commission (CCC) as the primary lead policy-making body in the formulation of the National Strategic Framework on Climate Change and the National Climate Change Action Plan.³⁸³ The potential criminal and/or civil liabilities that may be incurred by directors in relation to climate change would be found in the various environmental laws enacted by the Philippine Government.

The Authors’ review of the leading climate change-related environmental laws indicates that their criminal sanction provisions recognize that the prohibited acts may be committed by corporations and other juridical entities, and generally the criminal sanctions are imposed on *officers* who are directly responsible for the corporate acts done in pursuit of the corporate business enterprise. It is very rare to find directors being included in the enumerated officers on whom the criminal sanction may be imposed when it comes to a corporate criminal offender.

I. Revised Forestry Code

The Revised Forestry Code of the Philippines,³⁸⁴ which seeks, among others, the “protection, development[,] and rehabilitation of forest lands ... to ensure their continuity in productive condition” and protection of public welfare.³⁸⁵

381. REV. CORP. CODE, § 30 (emphasis supplied).

382. *See* Climate Change Act of 2009.

383. *Id.* §§ 4 & 13.

384. Revising Presidential Decree No. 389, Otherwise Known as the Forestry Reform Code of the Philippines [REV. FORESTRY CODE], Presidential Decree No. 705 (1975).

385. *Id.* § 2.

Chapter IV of the Code³⁸⁶ defines several prohibited acts and imposes various levels of criminal penalties, none of which contain any recognition that of a corporate offender, except under Section 78 on the payment, collection, and remittance of forest charges, which provides that, “[i]f the offender is a *corporation, partnership[,] or association, the officers and directors thereof shall be liable.*”³⁸⁷

Section 78 of the Revised Forestry Code³⁸⁸ presents a rare example where the criminal penalty is imposed upon the directors (and officers) by reason of their position, and not upon showing that they were directly responsible for the corporate act that resulted in the corporate criminal offense. It also means that in all the other prohibited acts defined under Chapter IV of the Code³⁸⁹ which do not formally recognize the corporation as a criminal offender, that directors can only be held criminally liable when they direct or participate in the commission of the prohibited acts. Unless the courts declare the criminal offense under Section 78 of the Revised Forestry Code to be *malum prohibitum*, the directors who had no participation in the corporate criminal act could still raise the defense of *lack of personal criminal culpability*.

In terms of civil liability, and depending on the facts proven in the case, the directors of the offending corporation could be held personally liable for breach of their duty of obedience for “willfully and knowingly voting for or assenting to patently unlawful act” or the duty of diligence for “gross negligence or bad faith in directing the affairs of the corporation.”³⁹⁰

2. Environmental Impact Statement System

Presidential Decree No. 1586³⁹¹ established the environmental impact statement system whereby the exigencies of socio-economic undertakings can be reconciled with the requirements of environmental quality.³⁹²

It provides that, “[n]o person, partnership[,] or corporation shall undertake or operate any such declared environmentally critical project or area without

386. *Id.* §§ 68–80.

387. *Id.* § 78 (emphasis supplied).

388. *Id.*

389. *Id.* §§ 68–80.

390. REV. CORP. CODE, § 31, para. 1.

391. Establishing an Environmental Impact Statement System, Including Other Environmental Management Related Measures and for Other Purposes, Presidential Decree No. 1586 (1978).

392. *Id.* whereas cl., ¶ 1.

first securing an Environmental Compliance Certificate;”³⁹³ and that “[a]ny person, corporation[,] or partnership found violating ... the terms and conditions in the issuance of the Environmental Compliance Certificate, or of the standards, rules[,] and regulations ... shall be punished by the suspension or cancellation of his/its certificate and/or a fine in an amount not to exceed Fifty Thousand Pesos (₱50,000.00) for every violation thereof[.]”³⁹⁴ The penalty clause of P.D. 1586 recognizes the corporation as the criminal offender on which the fine may be imposed, and does not make directors personally liable for the criminal offense.³⁹⁵

If it can be shown that directors formally approved the corporate actions that led to the corporation’s violation of P.D. 1586, such directors may be held civilly liable for breach of duty for willfully and knowingly voting for or assenting to patently unlawful corporate acts under Section 30 of the Revised Corporation.³⁹⁶ On the other hand, when there was no direct participation in the corporate act, and the effects of the violation was not only egregious and constituted a damage of the environment, the entire board may be held personally liable for “gross negligence ... in directing the affairs of the corporation.”³⁹⁷

3. Philippine Mining Act of 1995

Chapter XIX of the Philippine Mining Act of 1995³⁹⁸ provides for several penal provisions which do not recognize formally a corporate offender, except that in Section 103 on *theft of minerals*, in addition to the penalties of imprisonment (6 months to 6 years) and fines (₱10,000 to ₱20,000), it provides that in “*the case of associations, partnerships, or corporations, the president and each of the directors thereof shall be responsible for the acts committed by such association, corporation, or partnership.*”³⁹⁹

Section 103 recognizes a corporate offender of the criminal offense defined therein and imposes the penal sanctions on all the directors (and the president)

393. *Id.* § 4.

394. *Id.* § 9.

395. *See id.*

396. REV. CORP. CODE, § 30.

397. *Id.*

398. An Act Instituting New System of Mineral Resources Exploration, Development, Utilization, and Conservation [Philippine Mining Act of 1995], Republic Act No. 7942, §§ 101-11 (1995).

399. *Id.* § 103 (emphases supplied).

of the offending corporation by reason of their office *per se*.⁴⁰⁰ Unlike the penal provisions under Section 78 of the Revised Forestry Code,⁴⁰¹ there is a clear legislative intent to impose the criminal liability on president and directors making the criminal offense *malum prohibitum*.

In the event the corporation itself suffers any civil damages for the commission of the offense, directors can be held liable to the corporation based, at the very least, on “gross negligence ... in directing the affairs of the corporation.”⁴⁰²

Section 108 defines the criminal offense of *violation of the terms and conditions of the environmental compliance certificate*, by imposing the criminal penalties of imprisonment (6 months to 6 years) and/or fine (₱50,000 to ₱200,000) on “[a]ny person who willfully violates or grossly neglects to abide by the terms and conditions of the environmental compliance certificate issued to said person and which causes environmental damage through pollution[.]”⁴⁰³

Since Section 108 does refer or recognize a corporate offender,⁴⁰⁴ it means that directors as such do not become liable for the criminal offense committed in pursuit of the corporation’s business enterprise. It is only the corporate officers who directly acted on behalf of the corporation that can be held liable for the offense defined under Section 108 of the Philippine Mining Act.⁴⁰⁵

On the damages suffered by the corporation from the cancellation of the environmental compliance certificate, and depending on the circumstances prevailing, such as when the directors take direct part in the criminal act or when the violation of the terms and conditions of the ECC are egregious, that directors may be held personally liable under Section 30 of the Revised Corporation Code.⁴⁰⁶

400. *Id.*

401. REV. FORESTRY CODE, § 78.

402. REV. CORP. CODE, § 30.

403. Philippine Mining Act of 1995, § 108.

404. *Id.*

405. *Id.*

406. REV. CORP. CODE, § 30.

4. Toxic Substances and Hazardous and Nuclear Wastes Control Act

The Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990⁴⁰⁷ provides the legal framework to —

[R]egulate, restrict[,] or prohibit the importation, manufacture, processing, sale, distribution, use and disposal of chemical substances[,] and mixtures that present unreasonable risk and/or injury to health or the environment[,] [as well as] to prohibit the entry, even in transit, of hazardous and nuclear wastes and their disposal into the Philippine [territory] for whatever purpose[.]⁴⁰⁸

Section 14 (a) of the Act provides for relatively lighter sets of penalties of fines (₱600 to ₱4,000) and imprisonment (6 months and 1 day to 6 years and 1 day)⁴⁰⁹ for violation of the first three enumerated prohibited acts under Section 13 (a), (b), and (c), thus:⁴¹⁰

- (a) Knowingly use a chemical substance or mixture which is imported, manufactured, processed[,] or distributed in violation of this Act or implementing rules and regulations or orders;
- (b) Failure or refusal to submit reports, notices or other information, access to records as required by this Act, or permit inspection of establishment where chemicals are manufactured, processed, stored[,] or otherwise held;
- (c) Failure or refusal to comply with the pre-manufacture and pre-importation requirements[.]⁴¹¹

Section 14 (a) specifically provides that “[i]n case any violation of this act is committed by a partnership, *corporation*, association or any juridical person, the partner, *president*, *director*[,] or *manager who shall consent to or shall knowingly tolerate such violation shall be directly liable and responsible for the act of the employees and shall be criminally liable as co-principal.*”⁴¹²

407. An Act to Control Toxic Substances and Hazardous and Nuclear Wastes Providing Penalties for Violations Thereof, and for Other Purposes [Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990], Republic Act No. 6969 (1990).

408. *Id.* § 2.

409. *Id.* § 14 (a) (i).

410. *Id.* § 13 (a)-(c).

411. *Id.*

412. Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990, § 14 (a) (ii) (emphasis supplied).

Aside from the directors, officers, and/or employees who directly participated in the corporate acts that constitute a prohibited act, and for which they are both personally civilly and criminally liable, Section 14 (a) imposes criminal liability on the president, manager, and every director who “*consented or knowingly tolerated*” any of such prohibited acts being committed in the corporate operations.⁴¹³ The clear legislative intent is to criminally punish as co-principals even directors and officers who had no direct participation in the commission of the prohibited acts, but only when it can be shown that they knowingly tolerated the criminal acts committed by their employees. When such prohibited acts are done in the most egregious manner in the operations of the corporation, implied knowledge may be ascribed to the members of the board under the doctrine held in *Republic Gas Corporation v. Petron Corporation*,⁴¹⁴ that since the board of directors have direct control and supervision in the management and conduct of the affairs of the corporation, they can be presumed to be aware that the corporation is engaged in the act imputed as a criminal offense.⁴¹⁵

Since Section 14 (a) of the acts expressly makes it criminally punishable for directors to consent or knowingly tolerate the commission of prohibited acts in the company affairs,⁴¹⁶ then such directors may also be held personally liable under Section 30 of the Revised Corporation Code for willfully and knowingly “assenting to patently unlawful acts of the corporation,” or at very least for “gross negligence in directing the affairs of the corporation.”⁴¹⁷

Section 14 (b) of the Act impose a much heavier range of imprisonment (12 years and 1 day to 20 years), for the violation of the more serious offense under Section 13 (d) of the Act, thus —

- (d) Cause, aid[,] or facilitate, directly or indirectly, in the storage, importation, or bringing into Philippine territory, including its maritime economic zones, even in transit, either by means of land, air[,] or sea

413. *Id.* § 14 (a) (ii) (emphasis supplied).

414. *Republic Gas Corporation v. Petron Corporation*, G.R. No. 194062, 698 SCRA 666 (2013).

415. *Id.* at 681.

416. Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990, § 14 (a) (ii) (emphasis supplied).

417. REV. CORP. CODE, § 30.

transportation or otherwise keeping in storage any amount of hazardous and nuclear wastes in any part of the Philippines.⁴¹⁸

Section 14 (b) specifically provides that “[i]n the case of corporations or other associations, the above penalty shall be imposed upon the managing partner, president or chief executive in addition to an exemplary damage of at least Five hundred thousand pesos (₱500,000.00).”⁴¹⁹ Not only does Section 14 (b) not include “*directors*” in the corporate officers who can be held criminally liable, it really leaves little room to impose a criminal sanction on directors when the offending party is the corporation.⁴²⁰ Under the doctrine laid down in *Ty v. De Jemil*,⁴²¹ since the criminal penalty clause enumerates only specified corporate officers, unless members of the board are shown to have directly participated in or directed the illegal acts, then their mere position as directors cannot warrant being held criminally liable for any of the prohibited acts covered.

Even when directors cannot be held criminally liable for consenting to or knowingly tolerating the criminal offense covered under Section 13 (d),⁴²² directors may still be held personally and solidarily liable with the corporation under Section 30 of the Revised Corporation Code for “*gross negligence or bad faith in directing the affairs of the corporation.*”⁴²³

5. Philippine Clean Air Act of 1999

Another major environmental law that includes “*directors*” in its penal sanction clause is the Philippine Clean Air Act of 1999.⁴²⁴

Section 2 of the Philippine Clean Air Act of 1999 declares it as State principles to “protect and advance the right of the people to a balance and healthful ecology in accord with the rhythm and harmony of nature ... [and to] promote and protect the global environment to attain sustainable

418. Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990, §§ 14 (b) & 13 (d).

419. *Id.* § 14 (b) (ii).

420. *Id.*

421. *Ty*, 638 SCRA at 698–99.

422. Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990, § 13 (d).

423. REV. CORP. CODE, § 30 (emphasis supplied).

424. An Act Providing for a Comprehensive Air Pollution Control Policy and for Other Purposes [Philippine Clean Air Act of 1999], Republic Act No. 8749 (1999).

development while recognizing the primary responsibility of local government units to deal with environmental problems.”⁴²⁵

Sections 47 and 48 of the Clean Air Act of 1999⁴²⁶ provide for the criminal penalties for specific and other violations of the Act, and that in the event the offender is a corporation, “the president, manager, directors, trustees, the pollution control officer[,], or the officials directly in charge of the operations shall suffer the penalty herein provided.”⁴²⁷ It means that when the prohibited act is committed in the pursuit of corporate enterprise, then under the principle of *criminal command responsibility*, the penalty shall be imposed not only on the directors, officers, and employees who directly commits the criminal offense, but also on the president and manager pollution control officer by reason of the offices they occupy as directly in charge of the operations.⁴²⁸

In the same manner, since Sections 47 and 48 impose the criminal liability on directors who directly participate in the management of the corporation, then apart from the criminal penalty, such directors may also be held civilly liable with the corporation for the damage caused⁴²⁹ under Section 30 of the Revised Corporation Code for “willfully and knowingly assenting to patently unlawful acts of the corporation,” or at least for “gross negligence or bad faith in directing the affairs of the corporation.”⁴³⁰ Even for directors who do not directly participate in the operations of the corporation, when the commission of the prohibited acts are so egregious, such directors may still be held personally and solidarily liable with the corporation for “gross negligence ... in directing the affairs of the corporation.”⁴³¹

6. Ecological Solid Waste Management Act

Section 2 of the Ecological Solid Waste Management Act of 2000⁴³² declares it the policy of the State “to adopt a systematic, comprehensive[,] and

425. *Id.* § 2.

426. *Id.* §§ 47-48.

427. *Id.*

428. *See id.*

429. *Id.*

430. REV. CORP. CODE, § 30, para. 1.

431. *Id.*

432. An Act Providing for an Ecological Solid Waste Management Program, Creating the Necessary Institutional Mechanisms and Incentives, Declaring Certain Acts

ecological solid waste management program which shall[] ... [e]nsure the protection of public health and environment[,]⁴³³ and place[] on the local government units (LGUs) the “primary enforcement and responsibility of solid waste management ... while establishing a cooperative effort among the national government, other local government units, non-government organizations, and the private sector.”⁴³⁴

The Act provides a long list of prohibited acts which are subject to the criminal penalties under Section 49 which provides that “[i]f the offense is committed by a corporation, partnership, or other juridical entity duly organized in accordance with law, the chief executive officer, president, general manager, managing partner[,] or such other officer-in-charge shall be liable for the commission of the offense penalized under this Act.”⁴³⁵

When the offense is committed in official pursuit of the business of the corporation, the penalty clause provides criminal command responsibility to the officers enumerated therein (CEO, president, general manager) by reason of their position and not on the basis of having directly committed the criminal acts.⁴³⁶ The final catch-all phrase of *officer-in-charge* would legally mean that the members of the board of directors of the offending corporation cannot be held liable for the penalty imposed on the basis alone of the doctrine of centralized management.⁴³⁷

When the operations of the company is such that the commission of the prohibited acts inundate corporate operations as to be so egregious, it would be possible to seek personal civil liability on the members of the board of directors under Section 30 of the Revised Corporation Code for “willfully and knowingly assenting to patently unlawful acts of the corporation,” or at the very least for “gross negligence or bad faith in directing the affairs of the corporation.”⁴³⁸

Prohibited and Providing Penalties, Appropriating Funds Therefor, and for Other Purposes [Ecological Solid Waste Management Act of 2000], Republic Act No. 9003, § 2 (2001).

433. *Id.* § 2 (a).

434. *Id.* § 2 (g).

435. *Id.* § 49 (emphasis supplied).

436. *See id.*

437. *See* REV. CORP. CODE, § 22, para. 1.

438. *Id.* § 30.

7. Philippine Clean Water Act of 2004

Section 2 of the Philippine Clean Water Act of 2004⁴³⁹ declares that the State shall pursue a policy of economic growth in a manner consistent with the protection, preservation and revival of the quality of our fresh, brackish and marine waters [and to] achieve this end, the framework for sustainable development shall be pursued”, which among others includes encouraging “civil society and other sectors, particularly labor, the academe and *business undertaking environment-related activities* in their efforts to organize, educate and motivate the people in addressing pertinent environmental issues and problems at the local and national levels.⁴⁴⁰ Section 3 provides for the Act’s coverage to “apply to water quality management in all water bodies ... shall primarily apply to the abatement and control of pollution from land based sources ... [and that] the water quality standards and regulations and the civil liability and penal provisions under this Act shall be enforced irrespective of sources of pollution.”⁴⁴¹

Section 28 of the Act provides that when the offense consists of a failure to undertake clean-up operations, “[i]f the offender is a juridical person, the president, manager[,] and the pollution control officer or the official in charge of the operation shall suffer the penalty herein provided.”⁴⁴² The use of the conjunction “and” implies that when the corporation has been shown to be the offending person, then whoever its president, manager, and pollution officer (or whoever is in charge of the operation) shall suffer the penalty imposed under the Act, without need of showing personal involvement or responsibility for the prohibited act so done. Likewise, the use of the qualifier “*whoever is in charge of the operations*” means that unless they have directed or participated in the commission of the prohibited acts, then members of the board of directors of the offending corporation cannot be held liable for the criminal penalty imposed on the basis of the doctrine of Centralized Management.⁴⁴³

439. An Act Providing for a Comprehensive Water Quality Management and for Other Purposes [Philippine Clean Water Act of 2004], Republic Act No. 9275, § 21 (2005).

440. *Id.* § 2 (emphasis supplied).

441. *Id.* § 3.

442. *Id.* § 28.

443. *See* REV. CORP. CODE, § 22, para. 1.

When it comes to violations of Section 4 of the Marine Pollution Decree of 1976,⁴⁴⁴ Section 28 of the Philippine Clean Water Act of 2004 provides that “[i]f the offender is a juridical entity, then its officers, directors, agents[,] or any person primarily responsible shall be held liable[.]”⁴⁴⁵ The clause not only expressly includes *directors* on whom the criminal penalty may be imposed, but also is imposable only on *any person primarily responsible* for such criminal act done on behalf of the corporation.⁴⁴⁶

Even in those instances where directors cannot be held criminally liable under the Act, when the operations of the company is such that the commission of the prohibited acts are so egregious, it would be possible to seek personal civil liability on the members of the board of directors under Section 30 of the Revised Corporation Code for “*willfully and knowingly assenting to patently unlawful acts of the corporation,*” or at the very least for “*gross negligence or bad faith in directing the affairs of the corporation.*”⁴⁴⁷

8. Biofuels Act of 2006

The Biofuels Act of 2006⁴⁴⁸ declares it a policy to

reduce dependence on imported fuels with due regard to the protection of public health, the environment, and natural ecosystems consistent with the country’s sustainable economic growth that would expand opportunities for livelihood by mandating the use of biofuels as a measure to [] ... [] develop and utilize indigenous renewable and sustainably-sourced clean energy sources to reduce dependence on imported oil; [] mitigate toxic and [GHG] emissions; ... and [] ensure the availability of alternative and renewable clean energy without any detriment to the natural ecosystem, biodiversity[,] and food reserves of the country.⁴⁴⁹

After enumerating the prohibited acts, Section 12 of the Biofuels Act⁴⁵⁰ provides that “[i]n the case of association[s], partnership[s,] or corporations, the

444. Providing for the Revision of Presidential Decree No. 600 Governing Marine Pollution [Marine Pollution Decree of 1976], Presidential Decree No. 979, § 28 (1976).

445. Philippine Clean Water Act of 2004, § 28.

446. *See id.*

447. REV. CORP. CODE, § 30 (emphasis supplied).

448. An Act to Direct the Use of Biofuels, Establishing for This Purpose the Biofuel Program, Appropriating Funds Therefor, and for Other Purposes [Biofuels Act of 2006], Republic Act No. 9367 (2007).

449. *Id.* § 2.

450. *Id.* § 12.

penalty shall be imposed on the partner, president, chief operating officer, chief executive officer, directors[,] or officers, responsible for the violation."⁴⁵¹ It is clear from this provision that directors can be meted the criminal sanction imposed on the corporation only when it is shown that they directed or directly participated in the commission of the prohibited acts.

Nonetheless, even when none of the directors have participated directly in the commission of the prohibited acts, when the operations of the company is such that the commission of the prohibited acts are so egregious, it would be possible to seek personal civil liability on the members of the board of directors under Section 30 of the Revised Corporation Code for "*willfully and knowingly assenting to patently unlawful acts of the corporation,*" or at the very least for "*gross negligence or bad faith in directing the affairs of the corporation.*"⁴⁵²

9. Renewable Energy Act

The Renewable Energy Act⁴⁵³ provides for the establishment of the framework for the "accelerated development and advancement of renewable energy resources"⁴⁵⁴ like biomass energy,⁴⁵⁵ geothermal energy,⁴⁵⁶ hydroelectric power,⁴⁵⁷ solar energy,⁴⁵⁸ and wind energy,⁴⁵⁹ "and the development of a strategic program to increase its utilization."⁴⁶⁰ It provides under Section 15 the following incentives for renewable energy projects and activities: income tax holiday, duty-free importation of renewable energy machinery, equipment and materials, special realty tax rates on equipment and machinery, net operating loss carry-over, lower corporate tax rate, accelerated depreciation, zero percent VAT, cash incentive of renewable energy

451. *Id.* § 13 (emphasis supplied).

452. REV. CORP. CODE, § 30 (emphasis supplied).

453. An Act Promoting the Development, Utilization and Commercialization of Renewable Energy Resources and for Other Purposes [Renewable Energy Act of 2008], Republic Act No. 9513 (2008).

454. *Id.* § 3.

455. *See id.* § 4 (a).

456. *See id.* § 4 (q).

457. *See id.* §§ 4 (x)-(z).

458. *See id.* § 4 (xx).

459. Renewable Energy Act of 2008, § 4 (ccc).

460. *Id.* § 3.

developers for missionary electrification, tax exemption of carbon credits, and tax credit on domestic capital equipment and services.⁴⁶¹

Section 35 of the Renewable Energy Act enumerates the prohibited acts,⁴⁶² with Section 36 providing for the criminal penalties imposable,⁴⁶³ and that “in [] case of association, partnership[,] or *corporations*, the penalty shall be imposed on the partner, president, chief operating officers, chief executive officer, directors[,] or officers responsible for the violation.”⁴⁶⁴ It is clear from said provision that directors can be meted the penalty only when it is shown that they directed or participated in the commission of the prohibited acts.

Nonetheless, even when none of the directors have participated directly in the commission of the prohibited acts, when the operations of the company are such that the commission of the prohibited acts is so egregious, it would be possible to seek personal civil liability on the members of the board of directors under Section 30 of the Revised Corporation Code for “*willfully and knowingly assenting to patently unlawful acts of the corporation,*” or at the very least for “*gross negligence or bad faith in directing the affairs of the corporation.*”⁴⁶⁵

10. Philippines' Disaster Risk Reduction Program

The Philippine Disaster Risk Reduction and Management Act⁴⁶⁶ provides for the “development of policies and plans and the implementation of actions and measures pertaining to all aspects of disaster risk reduction and management, *including good governance*, risk assessment and early warning, knowledge building and awareness raising, reducing underlying risk factors, and preparedness for effective response and early recovery.”⁴⁶⁷

Section 19 of the same prefaces its long list of “prohibited acts” with the clause: “*any person, group[,] or corporation who commits any of the following prohibited acts shall be held liable and be subjected to the penalties as prescribed in Section 20 of this Act.*”⁴⁶⁸ In turn, Section 20, after providing

461. *Id.* § 15.

462. *Id.* § 35.

463. *Id.* § 36.

464. *Id.* § 36 (emphasis supplied).

465. REV. CORP. CODE, § 30 (emphasis supplied).

466. Philippine Disaster Risk Reduction and Management Act of 2010.

467. *Id.* § 4 (emphasis supplied).

468. *Id.* § 19 (emphasis supplied).

the particular range of fines and imprisonment penalties for prohibited acts, provides in particular that

[i]f the offender is a corporation, partnership[,] or association, or other juridical entity, the penalty shall be imposed upon the officer or officers of the corporation, partnership, association[,] or entity responsible for the violation without prejudice to the cancellation or revocation of these entities['] license or accreditation issued to them by any licensing or accredited body of the government⁴⁶⁹

The limitation under Section 20 to the “officer or officers of the corporation ... responsible for the violation,” excludes the directors who cannot be held criminally liable on the basis alone that they are members of the board of directors.⁴⁷⁰ In other words, unless members of the board are shown to have directed or participated in the illegal act directly, then their mere position as such do not warrant being held criminally liable for the offense.⁴⁷¹

Nonetheless, even when none of the directors have participated directly in the commission of the prohibited acts, when the operations of the company is such that the commission of the prohibited acts are so egregious, it would be possible to seek personal civil liability on the members of the board of directors under Section 30 of the Revised Corporation Code for “*willfully and knowingly assenting to patently unlawful acts of the corporation,*” or at the very least for “*gross negligence or bad faith in directing the affairs of the corporation.*”⁴⁷²

VI. DIRECTORS’ DISCLOSURE OBLIGATIONS IN RELATION TO CLIMATE CHANGE RISKS

The doctrine of centralized management⁴⁷³ under Philippine Corporation Law that vests directly in the board of directors, in the exercise of their business judgment, control over the pursuit of the corporate business enterprise, does impose on directors of for-profit corporations a common law “duty to inform or disclose” to the shareholders material or relevant information relating to company transactions. Directors’ obligation to disclose corporate matters arises from statutory requirements, especially in areas where shareholders’ ratification

469. *Id.* § 20.

470. *Id.*

471. *See id.*

472. REV. CORP. CODE, § 30 (emphasis supplied).

473. *Id.* § 22, para. 1.

vote is required for certain corporate acts, such as when it comes to self-dealings and related-party transactions.⁴⁷⁴

In cases where the law does not impose on directors the obligation to disclose corporate matters, the shareholders' right to be informed of corporate affairs flows from their right of inspection and/or reproduction of corporate records recognized under Section 73 of the Revised Corporation Code, which also imposes a correlative duty to maintain specified corporate records, such the "records of all business transactions," resolutions adopted by the board of directors, and copies of the latest reportorial requirements submitted to the SEC.⁴⁷⁵

In addition, Section 177 of the Revised Corporation Code requires all corporations doing business in the Philippines to submit to the SEC annual audited financial statements and a general information sheet.⁴⁷⁶ Pursuant to corporate governance best practices, corporations vested with public interest, such as publicly held companies, are also required to annually submit to the SEC a directors' compensation report and their appraisal or performance report and the standards or criteria used to assess each director, which does not include sustainability reporting in relation to directors.

Section 161 of the Revised Corporation Code imposes criminal penalty of fines on the "unjustified failure or refusal by the corporation, or by those responsible for keeping the maintain corporate records, to comply with Sections ... 73 [] ... and 177 and other pertinent rules and provisions of this Code on inspection and reproduction of records."⁴⁷⁷

Under the Philippine corporate governance framework, directors of publicly held companies have no directly imposed disclosure obligations on climate change risk.⁴⁷⁸ Under the comply-or-explain approach of SEC's CG Codes for publicly held companies, Philippine publicly held companies "should ensure that the material and reportable non-financial and sustainability issues are disclosed,"⁴⁷⁹ with the recommendation that the boards of directors "should have a clear and focused policy on the disclosure of non-financial

474. *Id.*

475. *Id.* § 73.

476. *Id.* § 177.

477. *Id.* § 161.

478. CG Code for PLCs, *supra* note 263, at 4 & CG Code for PCs and RIs, *supra* note 263, at 1.

479. CG Code for PLCs, *supra* note 263, at 3 & CG Code for PCs and RIs, *supra* note 263, at 30.

information, with emphasis on the management of economic, environmental, social[,] and governance (EESG) issues of its business, which underpin sustainability ... [and] should adopt a globally recognized standard/framework in reporting sustainability and non-financial issues.”⁴⁸⁰

While the disclosure regime for climate change-related risks set by the Philippines’ SEC currently follows a comply-or-explain approach, the general disclosure rules by the Philippine Stock Exchange (PSE), and specific disclosure rules by relevant industry regulators, all need to be considered when determining the materiality threshold of disclosures relating to climate change risks and opportunities which may affect the company.

Based on a review of SEC’s Sustainability Reporting Guidelines for publicly-listed companies,⁴⁸¹ the obligation to disclose and submit the sustainability report, including material climate-change disclosures, is primarily a corporate responsibility, as it is the publicly-listed corporation itself which faces the administrative penalties of reprimand, fine, delisting or revocation of license for failure to do so; and that directors are not directly and personally liable for corporate disclosures, unless they make false or misleading statements of material fact in required SEC filings which are tantamount to “market manipulation,”⁴⁸² or “fraudulent transactions,”⁴⁸³ as defined and penalized under the Securities and Regulation Code.

480. CG Code for PLCs, *supra* note 263, at 33, ¶ 10.1 & CG Code for PCs and RIs, *supra* note 263, at 30, ¶ 10.1.

481. *See* CG Code for PLCs, *supra* note 263. *See also* CG Code for PCs and RIs, *supra* note 263.

482. The Securities Regulation Code makes it unlawful for one “[t]o make false or misleading statement with respect to any material fact, which [they] knew or had reasonable ground to believe was so false or misleading, for the purpose of inducing the purchase or sale of any security listed or traded in an Exchange.” SEC. REG. CODE, § 24.1 (d).

483. *Id.* § 26. Section 26 provides —

SECTION 26. *Fraudulent Transactions.* — It shall be unlawful for any person, directly or indirectly, in connection with the purchase or sale of any securities to:

26.1. Employ any device, scheme, or artifice to defraud;

26.2. Obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

On the other hand, the Philippine Stock Exchange (PSE) Consolidated Listing and Disclosure Rules⁴⁸⁴ provide for a *broad materiality threshold* which requires publicly-listed companies to disclose “any material fact or event that occurs which would reasonably be expected to affect investors’ decisions in relation to trading the securities”⁴⁸⁵ and “such information [which] may reasonably be expected to materially affect market activity and the price of its securities[,]”⁴⁸⁶ generally include the disclosure of climate-related risks particularly when such impact trading and price of company shares. Non-compliance with PSE’s *broad materiality threshold* rule may subject the offending publicly-listed company and its responsible officers to criminal prosecution for offenses involving fraud of the market manipulation, concealment, and other offenses specified in the Securities Regulation Code.⁴⁸⁷

This is consistent with the policy of the Philippine government and its regulators allowing company discretion in determining and disclosing its corporate climate policy. Such discretion and leeway would cease once sustainability reporting becomes mandatory and the regulatory rule that will apply would state that climate change risks pose foreseeable material financial risks for publicly-listed companies, and therefore subject to the same materiality threshold under the PSE disclosure rules. In the event that SEC makes sustainability reporting mandatory for publicly-listed companies, it will constitute a regulatory recognition that climate change poses material financial risk for publicly-listed companies that would take away the leeway afforded to their directors in determining what may constitute material climate-related risks that arise in the pursuit of the companies’ business operations, plans, and strategies.

26.3. Engage in any act, transaction, practice or course of business which operates or would operate as a fraud or deceit upon any person.

Id.

484. PHILIPPINE STOCK EXCHANGE, CONSOLIDATED LISTING AND DISCLOSURE RULES, art. VII, § 4 (2022) [hereinafter PSE CONSOLIDATED LISTING AND DISCLOSURE RULES].

485. *Id.* art. VII, § 4.

486. *Id.* art. VII, § 4.3 (c).

487. *Id.* art. VIII, §§ 1–2. Section 1 provides for a scale of fines for non-compliance with structured continuing disclosure requirements, while Section 2 provides for non-compliance with unstructured continuing disclosure requirements. *Id.*

A. SEC's Sustainability Reporting Guidelines for Publicly-Listed Companies⁴⁸⁸

I. Submission of Sustainability Report with Annual Report

To provide greater disclosure and transparency not only on financial matters, but on non-financial and sustainability issues, the Philippines SEC has issued Sustainability Reporting Guidelines for Philippine Publicly-Listed Companies (PLCs),⁴⁸⁹ which provide a reporting template and topic guide for the Sustainability Report *to be submitted with their Annual Report* (SEC Form 17-A),⁴⁹⁰ under the following legal parameters:

- (1) Non-attachment of the Sustainability Report to the Annual Report shall be subject to penalty of fines for the administrative offense of “*incomplete annual report*,” penalized under SEC Memorandum Circular No. 6, Series of 2005;
- (2) For the first three years of the Sustainability Reporting Guidelines’ implementation from 2019-2022, the SEC has adopted a comply-or-explain approach, meaning companies would be required to attach the template to their Annual Reports, but they can provide explanations for items on which they have no available data; however, by 2023 onwards, it is expected that the SEC will make sustainability reporting mandatory for PLCs.⁴⁹¹

The Sustainability Report focuses on Economic, Environmental, and Social (EES) disclosures, since governance disclosures are already made in the Integrated Annual Corporate Governance Report (I-ACGR) submitted separately to the SEC.⁴⁹² While the SEC encourages companies to use the Sustainability Reporting Guidelines, particularly for climate-related disclosures, the SEC notes that companies are not required to disclose on all topics provided in the reporting template, but rather, disclosure should only

488. Securities and Exchange Commission, Sustainability Reporting Guidelines for Publicly Listed Companies, Memorandum Circular No. 4, Series of 2019 [SEC Memo. Circ. No. 4, s. 2019] (Feb. 15, 2019) [hereinafter Sustainability Reporting Guidelines for PLCs].

489. See CG Code for PLCs, *supra* note 263. See also CG Code for PCs and RIs, *supra* note 263.

490. Sustainability Reporting Guidelines for PLCs, *supra* note 488.

491. *Id.*

492. *Id.* at 9.

be on topics determined by companies as material after an assessment of materiality.⁴⁹³

While the duty of diligence of directors of publicly-listed companies includes the obligation to assess the materiality of commercial transactions, including the climate change risks arising therefrom in order to comply with their obligation to act on an *informed basis*, the comply-or-explain approach under SEC's sustainable reporting, which includes the determination on the disclosure on matters, indicates that currently, publicly-listed companies and their directors do not have a legal obligation to disclose to shareholders and other stakeholders climate change risks besetting their companies' business enterprise.⁴⁹⁴

The discussion on SEC's Sustainable Reporting that immediately follows have two objectives, namely: (a) to inform directors of publicly-listed companies — and other publicly held companies in the event that the SEC expands the coverage — of the nature and extent of their companies' disclosure obligations in pursuit of sustainable development in particular, and acting on an informed basis when assessing the materiality of climate change risks, once the SEC makes sustainable reporting mandatory; and (b) the sustainability reports submitted with the Annual Reports to the SEC become part of the public records of publicly-listed companies by which the shareholders and other stakeholders may judge whether such publicly-listed companies have in fact complied with their duty of diligence in pursuing the long-term interests of their companies, which includes “activities as the identification, sourcing, measurement, evaluation, mitigation[,] and monitoring of risk.”⁴⁹⁵

2. Sustainability and Sustainability Reporting

The SEC has adopted the definition of the Brundtland Report⁴⁹⁶ of “sustainability” as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁴⁹⁷ For companies, this translates to managing non-financial performance across

493. *Id.* at 2.

494. CG Code for PLCs, *supra* note 263, at 3 & CG Code for PCs and RIs, *supra* note 263, at 30.

495. CG Code for PLCs, *supra* note 263, at 34, ¶ 12.1 & CG Code for PCs and RIs, *supra* note 263, at 31, ¶ 12.1.

496. World Commission on Environment and Development, *Our Common Future*, U.N. Doc. A/42/427 (Aug. 4, 1987).

497. *Id.* annex ch. 2, ¶ 1.

environment, economic, and social aspects of their organizations to optimize business operations, improve competitiveness, and long-term success.⁴⁹⁸

Under the SEC guidelines, sustainability reporting is “an organization’s practice of reporting publicly on its significant economic, environmental and social impacts in accordance with globally accepted standards.”⁴⁹⁹ The sustainability reporting framework adopted by the SEC follows four globally accepted frameworks, which companies use to report on sustainability and non-financial information:

- (1) Global Reporting Initiative’s (GRI) Sustainability Reporting Standards;
- (2) International Integrated Reporting Council (IIRC) Integrating Reporting (IR) Framework;
- (3) Sustainability Accounting Standards Board’s (SASB) Sustainability Accounting Standards; and
- (4) Task Force on Climate-related Financial Disclosure (TCFD) Recommendations.⁵⁰⁰

The benefits of sustainability reporting for companies include (i) internal benefits such as: effective management of sustainability risks and opportunities, sustainable vision, strategy or business plans, improved management systems, and motivated workforce; and (ii) external benefits such as improved company reputation and brand value, investor attractiveness, stakeholder engagement, and competitive advantage.⁵⁰¹

3. Materiality Assessment

In sustainability reporting, materiality is the principle that determines which relevant topics are sufficiently important that it is essential to report on them.⁵⁰² A disclosure is considered material if it reflects the significant economic, environmental, and social impacts of the organization on the stakeholders, and the capacity of the stakeholders to influence the economic, environmental, and social impacts or activities of the organization.⁵⁰³

498. Sustainability Reporting Guidelines for PLCs, *supra* note 488, at 9.

499. *Id.* at 2.

500. *Id.* at 3.

501. *Id.* at 6.

502. *Id.* at 14.

503. *Id.* at 16.

Under the SEC guidelines, and as defined under GRI standards, “impact shall refer to the effect an organization has on the economy, the environment, and/or society, which in turn can indicate its contribution (positive or negative) to sustainable development.”⁵⁰⁴ Reporting organizations are expected to report on their impacts that are directly linked to their activities, products, or services through a business relationship, and it should be noted that “impact” does not refer to the effect upon an organization, such as a change to its reputation.⁵⁰⁵

Disclosures should also be accompanied by a management approach which describes the management of the sustainability issues, including explaining how the organization (1) avoids, mitigates or remedies negative impacts to the economy, environment, and society, and enhances positive ones and (2) addresses its climate-related issues.⁵⁰⁶

The PLC should report on the management approach for each material issue with the following information: (1) an explanation on the materiality of the topic; (2) the boundary for the material topic, which includes a description of where the impacts occur, and the PLC involvement with the impacts; and (3) an explanation of how the PLC manages the topic and the objectives.⁵⁰⁷

If the PLC is a holding company, it has the option of whether to report on the holding company alone, or to include its subsidiaries, subject to the principle of materiality in defining the report boundary. In addition to providing the description of the PLC’s and/or its subsidiaries’ business model, including primary activities, brands, products and services, the name of the highest-ranking person responsible for the report is required to be disclosed.

4. Disclosure Topics

Disclosures in the Sustainability Report should reflect the organization’s significant economic, environmental, and social impacts,⁵⁰⁸ including climate-

504. Sustainability Reporting Guidelines for PLCs, *supra* note 488, at 8.

505. *Id.*

506. *Id.* at 16.

507. *Id.* at 17.

508. *Impact*, as defined under GRI (Global Reporting Initiative) Standards:

[R]efer[s] to the effect an organization has on the economy, the environment, and/or society, which in turn can indicate its contribution (positive or negative) to sustainable development. Reporting organizations are expected to report on their impacts that are directly linked to their activities, products, or services

related risks and opportunities, and should consider the reasonable expectations and interests of key shareholders.⁵⁰⁹ Further, such disclosures should be quantifiable and measurable, effectively providing a snapshot of an organization's non-financial performance for the reporting period, whenever applicable. The Sustainability Report template and guidelines include disclosures relating to EES impacts and UN sustainability goals.

a. Economic Disclosures

Disclosure on economic topics refers to how the company directly increases the pool of economic resources that flow in the local and national economy, including the risks and opportunities due to climate change, procurement practices with respect to local suppliers and anti-corruption.⁵¹⁰ In particular, the disclosures relating to economic performance and climate-related risks and opportunities are as follows:

- (1) *Economic Performance* — This measures the direct economic value generated (revenue) and distributed (i.e., operating costs, employee wages, dividends, taxes, community donations, etc.). Figures for this disclosure can be derived using the audited financial statement for the relevant reporting period.
- (2) *Climate-related Risks and Opportunities* — These disclosures were adopted from the TCFD recommendations and require the disclosure of the organization's climate governance which covers describing the actual and potential impacts of climate-related risks and opportunities on the organization's business, strategy, and financial planning, where such information is material.⁵¹¹

through a business relationship. It should be noted that 'impact' does not refer to the effect upon an organization, such as a change to its reputation.

Id. at 8. See also GLOBAL SUSTAINABILITY STANDARDS BOARD (GSSB), GRI 101: FOUNDATION: 2016 27 (2016) [hereinafter GSSB GRI 2016].

509. See GSSB GRI 2016, *supra* note 508, at 8 & 10. See also Sustainability Reporting Guidelines for PLCs, *supra* note 488, at 10.

510. Sustainability Reporting Guidelines for PLCs, *supra* note 488, at 11. The *economic* aspect of sustainability, as has been defined under GRI Standards, refers to "an organization's impact on the economic conditions of its stakeholders and on economic systems at local, national, and global levels, not focus[ing] [only] on the financial condition of the organization." *Id.* at 10 & GSSB GRI 2016, *supra* note 508, at 62 (2013).

511. Sustainability Reporting Guidelines for PLCs, *supra* note 488, at 19-20 & 24.

Under recommended disclosures is the description of the board's oversight of climate-related risks and opportunities, including the disclosure of the processes and metrics used to identify and assess climate-related issues over the short, medium, and long term, in line with the organization's strategy and risk management process.⁵¹²

Another recommended disclosure is the description of management's role in assessing and managing climate-related issues, and describing the resilience of the organization's strategy, taking into consideration different climate-related scenarios including a 2°C or lower scenario.⁵¹³

Disclosure of an organization's climate-related issues helps stakeholders make sound and reasonable assessments of the impact climate change may have on the organization.⁵¹⁴

It is interesting to note that the disclosures for climate-related risks and opportunities fall under the category of economic disclosures for sustainability reporting and are limited to material topics solely determined by the company. This is a recognition by the SEC of climate change as a material financial risk for publicly-listed companies, which are nevertheless afforded leeway in determining what may constitute material climate-related risks that arise in the pursuit of the companies' business operations, plans, and strategies. This is consistent with the policy of the Philippine government and its regulators allowing company discretion in determining and disclosing its corporate climate policy. Such discretion and leeway would cease once sustainability reporting becomes mandatory and the regulatory rule that will apply would state that climate change risks pose foreseeable material financial risks for publicly-listed companies and are therefore subject to the same materiality threshold under the PSE disclosure rules.

b. Environment Disclosures

Environmental disclosures⁵¹⁵ relate to how the company manages the natural resources it needs for its business, as well as how it minimizes its negative

⁵¹². *Id.*

⁵¹³. *Id.*

⁵¹⁴. *Id.* at 44.

⁵¹⁵. The *environmental* aspect of sustainability, as also defined under GRI Standards, pertains to "an organization's impact on living and non-living natural systems, including land, air, water and ecosystems." GSSB GRI 2016, *supra* note 508, at 84 & Sustainability Reporting Guidelines for PLCs, *supra* note 488, at 10.

impacts to the environment including biodiversity, and ability to access materials needed for its operations.⁵¹⁶

- (1) *Resource Management* — Disclosures on resource management such as energy consumption (i.e., renewable sources, gasoline, LPG, diesel, and electricity), water consumption, and materials use (i.e., renewable or non-renewable) show how efficiently an organization uses scarce natural resources, which has implications on reduction of environmental impacts from extraction and processing of these resources. The efficiency of managing resources relate to the profitability of the organization.
- (2) *Ecosystems and Biodiversity* — PLCs need to identify all operational sites, owned, leased, managed, in or adjacent to protected areas, and areas of high biodiversity such as upland/watershed or coastal/marine, provide information on habitats protected or restored, and list all International Union for Conservation of Nature (IUCN) Red List species and national conservation list species with habitats in areas affected by operations.⁵¹⁷ Companies have the responsibility and clear business case for ensuring ecosystems and biodiversity around its sites are protected and restored.⁵¹⁸
- (3) *Environmental Impact Management* — PLCs need to disclose quantities of air emissions (i.e., greenhouse and ozone-depleting substances), air pollutants (i.e., persistent organic and hazardous air pollutants, volatile organic compounds, particulate matter, etc.), solid waste generated (i.e., reusable, recyclable, composted, incinerated, and residuals/landfilled), hazardous waste generated and transported, water discharges and wastewater recycled.⁵¹⁹ Reporting on an organization's impact on air, soil, and water through emissions, pollutants, wastes, and effluents provides the basis for companies to manage these impacts.⁵²⁰ Companies should disclose on their performance on these topics including how well the organization mitigates, reduces, and/or prevents

⁵¹⁶ Sustainability Reporting Guidelines for PLCs, *supra* note 488, at 12.

⁵¹⁷ *Id.* at 26.

⁵¹⁸ *Id.* at 45.

⁵¹⁹ *Id.* at 27-31.

⁵²⁰ *Id.* at 45.

these impacts to the environment in compliance with Philippine environmental laws or on efforts beyond compliance.

- (4) *Environmental Compliance* — PLCs need to disclose total amount of monetary fines, number of non-monetary sanctions, and cases resolved in relation to non-compliance with environmental laws and/or regulations. Disclosure of an organization's environmental compliance shows an organizations' ability to conform to certain performance parameters.⁵²¹

These environmental disclosures specifically set quantitative measurement and reporting of corporate consumption and impact on natural resources and the environment, and are consistent with necessary corporate compliance under relevant environmental laws in the Philippines.

c. Social Disclosures

Social disclosures⁵²² refer to how the organization manages its relationship with its stakeholders such as employees, customers, suppliers, communities, and the government, including disclosures on issues related to human rights, access to and quality of products and services, responsible business practices in marketing, customer privacy, and data security.⁵²³

d. UN Sustainable Development Goals

Disclosures are required relating to how companies are able to contribute to the United Nations Sustainable Development Goals (SDGs) through their products and services.⁵²⁴ There are 17 SDGs including, among others, no poverty, good health and well-being, clean water and sanitation, affordable and clean energy, sustainable cities and communities, climate action, and life below water and on land (as noted in Section C, paragraph 9 above).

PLCs need to disclose, for each of their key products and services, its corresponding societal value/contribution to the SDGs, potential negative impact of contribution and management approach to the said negative

521. *Id.* at 24–31 & 45.

522. The *social* aspect of sustainability, under GRI standards, concerns “an organization’s internal and external impacts on the social systems within which it operates.” GSSB GRI 2016, *supra* note 506, at 142 & Sustainability Reporting Guidelines for PLCs, *supra* note 486, at 10.

523. Sustainability Reporting Guidelines for PLCs, *supra* note 488, at 13.

524. *Id.* at 14.

impact.⁵²⁵ For holding companies, the services and products of its subsidiaries may be disclosed, since the SEC will not accept *none/not applicable* as an answer for this section.⁵²⁶

The SDG Compass can also be used as guidance for companies on how they align their strategies as well as measure and manage their contribution to the realization of the UN SDGs.⁵²⁷

The Sustainability Report requires disclosures on economic, environment, and social factors, which are critical in determining and evaluating overall climate change risks and opportunities impacting publicly-listed companies in the Philippines. Specifically, the local climate-related disclosures in the Philippines follow international best practices and are consistent with global standards on the disclosure of a company's climate governance.

5. Penalty for Non-Attachment of the Sustainability Report to the Annual Report

Non-attachment of the Sustainability Report to the Annual Report is subject to the same penalty for an Incomplete Annual Report,⁵²⁸ with corresponding scales of fines:⁵²⁹

- (1) *First Offense*: Reprimand/Warning;
- (2) *Second Offense*: ₱30,000 (approximately \$600) plus ₱500 (approximately \$10) per day of delay of filing the amended report;
- (3) *Third Offense*: ₱60,000 (approximately \$1,200) plus ₱1,000 (approximately \$20) per day of delay of filing the amended report; and
- (4) *Fourth Offense*: Ground for the suspension/ revocation of the erring company's registration or secondary license which shall be

525. *Id.* at 43.

526. *Id.*

527. *Id.* at 46 & SDG Compass, available at <https://sdgcompass.org> (last accessed Jan. 31, 2023) [<https://perma.cc/58S9-XVK8>].

528. Sustainability Reporting Guidelines for PLCs, *supra* note 488, at 1 & Securities and Exchange Commission, Consolidated Scale of Fines, Memorandum Circular No. 6, Series of 2005 [Memo. Circ. No. 6, s. 2005] (Sept. 22, 2005) [hereinafter Consolidated Scale of Fines].

529. Consolidated Scale of Fines, *supra* note 528, at 3 (citing SEC. REG. CODE, § 17.1).

made after notice and hearing, in accordance with the above-mentioned procedures. Erring companies which are primarily regulated by other government agencies shall be endorsed accordingly.⁵³⁰

Continued non-payment of the assessed fine and/or failure to comply with the requirement, despite notice and hearing for a period of 15 days, shall be a sufficient ground for the SEC to take other appropriate action or remedies available under the Securities Regulation Code and other related laws.⁵³¹ Further, the imposition of the said penalties shall be without prejudice to the imposition of other administrative sanctions or to the filing of criminal charges against the person/s responsible.⁵³²

B. Philippine Stock Exchange (PSE)'s Disclosure Rules

Corporate disclosures for PLCs in the Philippines are classified into two types of disclosures: (1) the structured reports, which are submitted within specific time frames as annual, quarterly and monthly reports; and (2) unstructured continuing disclosures, which are communications of corporate development as they occur and are intended to update the investing public on the activities, operations, and business of the PLC.⁵³³

The basic disclosure principle of the PSE is “to ensure full, fair, timely, and accurate disclosure of material information from all listed companies.”⁵³⁴ PLCs are required to “promptly make available all information, through the submission of structured and unstructured disclosures, that would enable a reasonable investor to determine whether to buy, sell or hold securities, or in connection with the exercise of related voting rights.”⁵³⁵

The broad materiality threshold provided under the PSE disclosure rules, which require publicly-listed companies to disclose “any material fact or event that occurs which would reasonably be expected to affect investors’ decisions in relation to trading the securities”⁵³⁶ and “such information [which] may reasonably be expected to materially affect market activity and the price of its

530. *Id.*

531. Consolidated Scale of Fines, *supra* note 528, at 28.

532. *Id.*

533. PSE CONSOLIDATED LISTING AND DISCLOSURE RULES, *supra* note 482, art. VII, § 2.

534. *Id.* art. VII, § 1.

535. *Id.* art. VII, § 2.

536. *Id.* art. VII, § 4.

securities,”⁵³⁷ would generally include the disclosure of climate-related risks particularly when such impacts trading and price of company shares.

I. Structured Corporate Disclosures

In accordance with the requirement to attach the Sustainability Report to the Annual Report (SEC Form 17-A), PLCs must submit this annual structured report within 105 calendar days after the end of the fiscal year of the company.⁵³⁸

The Annual Report is required to be signed by the company’s principal executive officer, its principal operating officer, its principal financial officer, its comptroller, its principal accounting officer, its corporate secretary or persons performing similar functions.⁵³⁹ This is an exhaustive listing of signatories which does not include the board of directors of the company.

Should the PLC fail to submit the Annual Report or any other required structured report, the PSE will impose a basic fine between ₱5,000 to ₱50,000 (approximately \$100 to \$1,000) depending on the total assets of the PLC, based on its latest financial statements.⁵⁴⁰ In addition, the PSE will commence imposing the daily fine of ₱500 to ₱5,000 (approximately \$10 to \$100) for each day of delay or non-compliance.⁵⁴¹ The PSE has set the maximum fine per year/per violation between ₱50,000 to ₱500,000 (approximately \$1,000 to \$10,000).⁵⁴²

After the lapse of 15 calendar days period of non-compliance, and with due notice, the PSE will automatically suspend trading of the company’s shares for a maximum period of three months.⁵⁴³ After the lapse of the suspension

537. *Id.* art. VII, § 4.3 (c).

538. *Id.* art. VII, § 17.8.

539. *See* Securities and Exchange Commission, Reportorial Requirements, available at <https://www.sec.gov.ph/investment-companies/reportorial-requirements/#gsc.tab=0> (last accessed Jan. 31, 2023) [<https://perma.cc/2M5G-LKBE>]. SEC Form 17-A Template may be accessed through the link provided.

540. PSE CONSOLIDATED LISTING AND DISCLOSURE RULES, *supra* note 484, art. VIII, § 1.

541. *Id.* art. VII, § 17.8 (2).

542. *Id.*

543. *Id.*

period and the PLC still failed to comply with the reportorial requirement, the PSE will initiate delisting procedures.⁵⁴⁴

2. Unstructured Corporate Disclosures

The purpose for requiring unstructured disclosures is for the PLC “to update the investing public with any material fact or event that occurs which would reasonably be expected to affect investors’ decision in relation to the trading of its securities.”⁵⁴⁵

The PSE defines a *material fact or event* as

one which would reasonably be expected to affect investors’ decisions in relation to those securities. This includes, but is not limited to, any significant and relevant information relating to the business and operations of the issuer that, if and when disclosed, would result in or would reasonably be expected to cause a significant change in the trading and/or market value of the PLC’s securities.⁵⁴⁶

Further, the PSE sets the standard and test to be followed by PLCs in determining whether disclosure is necessary, and requires that a disclosure must be made promptly by the PLC if it meets any of the following standards:

- (1) Where the information is necessary to enable the PLC and the public to appraise their position or standing, such as, but not limited to, those relating to the PLC’s financial condition, prospects, development projects, contracts entered into in the ordinary course of business or otherwise, mergers and acquisitions, dealings with employees, suppliers, customers and others, as well as information concerning a significant change in ownership of the issuer’s securities owned by insiders or those representing control of the PLC; or
- (2) Where such information is necessary to avoid the creation of a false market for its securities; or
- (3) Where such information may reasonably be expected to materially affect market activity and the price of its securities.⁵⁴⁷

⁵⁴⁴. *Id.* art. VII, § 17.8 (3).

⁵⁴⁵. *Id.* art. VII, § 4.

⁵⁴⁶. PSE CONSOLIDATED LISTING AND DISCLOSURE RULES, *supra* note 482, art. VIII, § 4.

⁵⁴⁷. *Id.* art. VII, § 4.3.

PLCs are required to disclose to the PSE once they become aware of any material information or corporate act, development, or event, within ten (10) minutes from the receipt of such information or the happening or occurrence of said act, development or event, and such disclosure must be made to the PSE prior to its release to the news media.⁵⁴⁸

The penalty for non-compliance with unstructured disclosure requirements, including the violation of the terms and conditions of the PSE listing agreement and of any other provisions of the PSE rules and regulations committed within a twelve-month period, is as follows:⁵⁴⁹

- (1) *First Violation*: ₱50,000 (approximately \$1,000)
- (2) *Second Violation of a Similar Nature*: ₱75,000 (approximately \$1,500)
- (3) *Third Violation*: Suspension of trading for a period of one (1) month
- (4) *Fourth Violation*: Ground for delisting

An additional fine of ₱1,000 (approximately \$20) will be imposed for each trading day during which the offense continues until and including the day on which the violation is rectified.⁵⁵⁰ Failure to pay within one (1) month from the imposition of the penalty and any additional fine imposed will result in the suspension of trading of the PLC.⁵⁵¹

Offenses involving fraud of the market manipulation, concealment, and other offenses specified in the Securities Regulation Code (SRC) will be referred to the PSE Board for its appropriate action.⁵⁵²

*C. Insurance Commission's Revised Code of Corporate Governance*⁵⁵³

The Revised Code of Corporate Governance (IC Code) for Insurance Commission Regulated Companies (ICRCs) is intended to raise the corporate

⁵⁴⁸ *Id.* art. VII, § 4.1.

⁵⁴⁹ *Id.* art. VIII, § 2.

⁵⁵⁰ *Id.*

⁵⁵¹ *Id.*

⁵⁵² PSE CONSOLIDATED LISTING AND DISCLOSURE RULES, *supra* note 484, art. VIII, § 2.

⁵⁵³ Insurance Commission, Revised Code of Corporate Governance for Insurance Commission Regulated Companies, Circular Letter 2020-71 [IC Circ. Letter No. 2020-71] (June 13, 2020).

governance standards of ICRCs to a level at par with their regional and global counterparts.⁵⁵⁴ The IC Code also adopts the comply-or-explain approach, which means that if the ICRC cannot comply, then it must identify any areas of non-compliance, explain the reasons, and provide an action plan to address non-compliant areas in the annual corporate governance report.⁵⁵⁵

Similar to the SEC's Corporate Governance for PLCs, the relevant sustainability related sections of the IC Code include Principle 10 on "Increasing Focus on Non-Financial and Sustainability Reporting" and Principle 16 on "Encouraging Sustainability and Social Responsibility."

Principle 10 of the IC Code states that the ICRC should ensure that the material and reportable non-financial and sustainability issues are disclosed.⁵⁵⁶ The Board should have a clear and focused policy on the disclosure of non-financial information, with emphasis on the management of economic, environmental, social, and governance (EESG) issues of its business which underpin sustainability.⁵⁵⁷ This includes disclosure to all shareholders and stakeholders of the company's strategic (long-term goals) and operational objectives (short-term goals), as well as the impact of a wide range of sustainability issues.⁵⁵⁸ Insurance companies should adopt a globally recognized standard/framework in reporting sustainability and non-financial issues, such as the GRI, IIRC, and SASB.⁵⁵⁹

Further, Principle 16 of the IC Code provides that the ICRC should be socially responsible in all its dealings with the communities where it operates.⁵⁶⁰ In particular, the ICRC should ensure that its interactions serve the environment and stakeholders in a positive and progressive manner that is fully supportive of its comprehensive and balanced development.⁵⁶¹ The IC Code emphasizes that sustainable development means that the company not only complies with existing regulations, but also voluntarily employs value chain processes that takes into consideration EESG issues and concerns.⁵⁶² In considering sustainability concerns, the ICRC plays an indispensable role

⁵⁵⁴. *Id.*

⁵⁵⁵. *Id.* § 1 (2).

⁵⁵⁶. *Id.* ¶ 10.

⁵⁵⁷. *Id.*

⁵⁵⁸. *Id.*

⁵⁵⁹. IC Circ. Letter No. 2020-071, at ¶ 10.

⁵⁶⁰. *Id.* at 47.

⁵⁶¹. *Id.*

⁵⁶². *Id.*

alongside the government and civil society in contributing solutions to complex global challenges like poverty, inequality, unemployment, and climate change.⁵⁶³

D. SEC Guidelines on the Issuance of Green Bonds Under the ASEAN Green Bonds Standards in the Philippines

In April 2019, the SEC has promulgated⁵⁶⁴ the Guidelines on the Issuance of Green Bonds Under the ASEAN Green Bonds Standards in the Philippines, primarily governing the issuance of ASEAN Green Bonds in the Philippines, following the ASEAN Green Bonds Standards, which are aligned with the International Capital Market Association (ICMA) Green Bond Principles.⁵⁶⁵

ASEAN Green Bonds are specific purpose bonds where proceeds will be exclusively applied to finance or refinance, in part or in full, new and/or existing eligible Green Projects.⁵⁶⁶ The non-exhaustive list of eligible green project categories include, but are not limited to: (a) renewable energy; (b) energy efficiency; (c) pollution prevention and control; environmentally sustainable management of living natural resources and land use; (e) terrestrial and aquatic biodiversity conservation; (f) clean transportation; (g) sustainable water and waste water management; (h) climate change adaptation; (i) eco-efficient and/or circular economy adapted, production technologies, and processes; and (j) green buildings which meet regional, national, or internationally-recognized standards or certifications.⁵⁶⁷ Green projects may relate to more than one category,⁵⁶⁸ and other green projects can also be funded by ASEAN Green Bonds, except fossil fuel power generation projects.⁵⁶⁹

⁵⁶³. *Id.*

⁵⁶⁴. Securities and Exchange Commission, Guidelines on the Issuance of Sustainability Bonds under the ASEAN Sustainability Bonds Standards in the Philippines, Memorandum Circular No. 8, Series of 2019 [SEC Memo. Circ. No. 8, s. 2019] (Apr. 25, 2019).

⁵⁶⁵. Securities and Exchange Commission, Guidelines on the Issuance of Green Bonds Under the ASEAN Green Bonds Standards in the Philippines, Memorandum Circular No. 12, Series of 2018 [SEC Memo. Circ. No. 12, s. 2018], § 4 (Aug. 31, 2018).

⁵⁶⁶. *Id.* § 1.

⁵⁶⁷. *Id.* § 8.

⁵⁶⁸. *Id.* § 9.

⁵⁶⁹. *Id.* § 10. See also ASEAN CAPITAL MARKETS FORUM, ASEAN GREEN BOND STANDARDS § 4.1.6 (2018) & SEC Memo. Circ. No. 12, s. 2018, at 4.

The issuer must be incorporated in any of the ASEAN countries; however, a non-ASEAN issuer may be allowed if the eligible Green Projects are located in any of the ASEAN countries.⁵⁷⁰ The issuances must also originate from any of the ASEAN countries.⁵⁷¹

The issuer must also make the following information publicly available on the issuer-designated website by the issuer at the time of issuance and throughout the tenure of the ASEAN Green Bonds: (i) the process of project evaluation; (ii) the use of proceeds; and (iii) external review report on the process, if any.⁵⁷²

Disclosure on the project evaluation and selection process must be clearly communicated by the issuer to the investors in the documentation for the issuance of ASEAN Green Bonds, which provide for:

- (1) the environmental sustainability objectives;
- (2) the process for the issuer to determine if the project fits the identified green project category; and
- (3) the related eligibility criteria including, if applicable, exclusion criteria or any other process to identify and manage potentially material environmental and social risks.⁵⁷³

Further, the required disclosures on the use of proceeds prior to the issuance of the ASEAN Green Bonds must include:

- (1) the categories of eligible green projects to which the proceeds will be allocated;
- (2) in case of a specific green project, the same must be identified,⁵⁷⁴ and

570. SEC Memo. Circ. No. 12, s. 2018, § 1.

571. *Id.* § 2.

572. *Id.* § 17. See also ASEAN CAPITAL MARKETS FORUM, *supra* note 569, § 4.2.5. See also SEC Memo. Circ. No. 12, s. 2018, at 6.

573. SEC Memo. Circ. No. 12, s. 2018, § 15. See also ASEAN CAPITAL MARKETS FORUM, *supra* note 567, § 4.3.4. See also SEC Memo. Circ. No. 12, s. 2018, at 7.

574. SEC Memo. Circ. No. 12, s. 2018, § 11. See also ASEAN CAPITAL MARKETS FORUM, *supra* note 569, § 4.1.2 & SEC Memo. Circ. No. 12, s. 2018, § 4.

- (3) the process for managing the net proceeds from the ASEAN green bonds.⁵⁷⁵

For the disclosures relating to the management of proceeds during the tenure of the ASEAN Green Bonds, the following are required:

- (1) the intended types of temporary placement for the balance of unallocated proceeds;⁵⁷⁶ and
- (2) the auditor's or third party's report to verify the issuer's management of proceeds, if any.⁵⁷⁷

In the event that all or a portion of the proceeds is or may be used for refinancing, it is recommended that the issuer:

- (1) provide an estimate of the share of financing and refinancing;
- (2) clarify which investments or project portfolios may be refinanced, if appropriate; and
- (3) state the expected look-back period for refinanced Green Projects, to the extent relevant.⁵⁷⁸

Meanwhile, the required disclosures on the use of proceeds at least annually and during the tenure of the ASEAN Bonds include the: (i) brief description of the projects; (ii) amounts limit the amount of detail that can be made available, the issuer may present the information in generic terms or on an aggregated portfolio basis (i.e., the percentage allocated to certain project categories).⁵⁷⁹

The disclosure provisions of the ASEAN Sustainability Bonds Standard provide the framework by which “greenwashing” charges against issuing companies may be brought, giving rise to litigation risks. The term *greenwashing* refers to the actions of companies that give the impression of acting in an environmentally aware and sustainable manner, when in fact the

575. ASEAN CAPITAL MARKETS FORUM, *supra* note 569, § 4.3.1. *See also* SEC Memo. Circ. No. 12, s. 2018, at 4.

576. SEC Memo. Circ. No. 12, s. 2018, § 20. *See also* ASEAN CAPITAL MARKETS FORUM, *supra* note 569, § 4.3.6. *See also* SEC Memo. Circ. No. 12, s. 2018, at 7.

577. ASEAN CAPITAL MARKETS FORUM, *supra* note 569, § 4.3.6. *See also* SEC Memo. Circ. No. 12, s. 2018, at 7.

578. SEC Memo. Circ. No. 12, s. 2018, §§ 12 & 20. *See also* ASEAN CAPITAL MARKETS FORUM, *supra* note 569, § 4.1.4.; & SEC Memo. Circ. No. 12, s. 2018, at 6.

579. SEC Memo. Circ. No. 12, s. 2018, § 22. *See id.* at 6.

evidence shows that such acts are merely a marketing effort.⁵⁸⁰ Thus, when it is shown that issuers of green bonds have not used the proceeds to finance or refinance eligible green projects, or when project evaluation and selection process employed by the issuer do not follow the criteria provided under the guidelines, such as the related eligibility and exclusion criteria to identify and manage potentially material environmental and social risks, there would be basis by the proper regulatory agencies, like the SEC, to pursue greenwashing charges against erring issuers and their conspiring investors.

E. Bangko Sentral ng Pilipinas' (BSP's) Sustainable Finance Framework

The Philippines' central bank, BSP, has approved the sustainable finance policy framework and integration of sustainability principles, including those covering environmental and social (E&S) risk areas, in the corporate governance and risk management frameworks, as well as in the strategic objectives and operations of banks in the Philippines.⁵⁸¹ Philippine banks are expected to fully comply by 2023.⁵⁸²

The BSP defines "Sustainable Finance" as referring to "any form of financial product or service which integrates environmental, social and governance criteria into business decisions that supports economic growth and provides lasting benefit for both clients and society, while reducing pressures on the environment."⁵⁸³

The BSP framework also provides for the definition of "Environmental and Social (E&S) Risk" which "refers to potential financial, legal, and/or reputational negative effect of environmental and social issues on the bank. E&S issues include environmental pollution, climate risk (both physical and transition risks), hazards to human health, safety and security, and threats to community, biodiversity, and cultural heritage, among others."⁵⁸⁴

Unlike SEC's comply-or-explain approach in sustainable reporting for publicly held companies, BSP's Sustainable Finance Framework impose the board of directors of banking institutions sustainable development obligations, thus: the board of directors (or equivalent management committee in the case

580. See Deborah Tarrant, *Beware the Rising Risk of Greenwashing*, COMPANY DIRECTOR, Volume No. 38, Issue No. 5, 16-23.

581. BSP Circ. 1085, s. 2020, para. 1.

582. *Id.*

583. BANGKO SENTRAL NG PILIPINAS, MANUAL OF REGULATIONS FOR BANKS 174 (2020 ed.).

584. *Id.*

of foreign bank branches) have the following duties and responsibilities relating to sustainable finance:

- (1) Institutionalize the adoption of sustainability principles, including those covering E&S risk areas in the bank, by incorporating such in the corporate governance and risk management frameworks, as well as in the bank's strategic objectives and operations taking into account the bank's risk appetite and ability to manage risk;
- (2) Promote a culture that fosters environmentally and socially responsible business decisions. The board of directors shall ensure that sustainability implications are considered in the overall decision-making process;
- (3) Approve the bank's Environmental and Social Risk Management System (ESRMS) that is commensurate with the bank's size, nature, and complexity of operations and oversee its implementation. The board of directors shall ensure that the ESRMS is aligned with internationally recognized principles, standards and global practices and forms part of the enterprise-wide risk management (ERM system);
- (4) Ensure that sustainability objectives and policies are clearly communicated across the institution, and to its investors, clients, and other stakeholders;
- (5) Adopt an effective organizational structure to ensure attainment and continuing relevance of the bank's sustainability objectives. The board of directors shall monitor the bank's progress in attaining sustainability objectives;
- (6) Ensure that adequate resources are available to attain the bank's sustainability objectives. The board of directors shall ensure that the members of the board, senior management, and personnel are regularly apprised of the developments on sustainability standards and practices; and
- (7) Ensure that the sustainability agenda is integrated in the bank's performance appraisal system.⁵⁸⁵

⁵⁸⁵*Id.* at 174-75

The senior management of the bank are responsible for the overall implementation of the board-approved strategies and policies in relation to the sustainability objectives of the bank.⁵⁸⁶

In addition, Philippine banks are required to disclose the following information in their Annual Reports:

- (1) Sustainability strategic objectives and risk appetite;
- (2) Overview of E&S risk management system;
- (3) Products/services aligned with internationally recognized sustainability standards and practices, which include the issuance of green, social or sustainability bonds;
- (4) Information on existing and emerging E&S risks and their impact on the bank; and
- (5) Other initiatives to promote adherence to internationally recognized sustainability standards and practices.⁵⁸⁷

Furthermore, banks are also required to disclose in their annual report the progress of implementation of initiatives undertaken to integrate sustainability principles in their governance framework, risk management system, business strategy and operations.⁵⁸⁸ If these BSP-required disclosure requirements are captured in the Sustainability Report submitted by publicly-listed banks to the SEC, then the Sustainability Report may be submitted together with the bank's annual report to the BSP, in compliance with the BSP's sustainability disclosure requirement.⁵⁸⁹

In terms of climate change risks, BSP's Sustainable Finance Framework provides the bases for litigation risks faced by Philippine banks. Non-compliance with the terms thereof would subject the bank and its directors to BSP's administrative sanctions (including removal and blacklisting for bank directors), as well as subject the erring bank to charges of greenwashing, such

⁵⁸⁶. *Id.* at 175.

⁵⁸⁷. BSP Circ. 1085, s. 2020, at 4. The enumeration in the body refers to the enumeration of "Disclosure Requirements" as it amended of Section 153 BSP Circ. 1085, s. 2020.

⁵⁸⁸. BSP Circ. 1085, s. 2020, at 5. The enumeration in the body refers to the qualifications under "Disclosure Requirements" as it amended of Section 153 BSP Circ. 1085, s. 2020.

⁵⁸⁹. *Id.*

as when it is shown that the bank has not used the ESG metrics to analyze companies across its investment platform.

VII. LITIGATION RISKS IN RELATION TO CLIMATE CHANGE

Based on international climate change literature that has been given to us to consider, litigation risks arise from private or regulatory legal actions relating to the physical impacts or economic transition risks associated with climate change, which may arise in a number of broad circumstances, including: (a) failure to mitigate/reduce emissions; (b) failure to adapt to the foreseeable impacts associated with climate change; (c) failure to disclose the risks associated with climate change where an obligation exists to do so (e.g., under corporate reporting and securities laws); and (d) failure to comply with climate-specific regulatory obligations such as emissions intensity standards.⁵⁹⁰

Considering that the Philippines' hybrid legal system — common law-based corporate and commercial laws operating within a primary civil law system — provides for citizens' constitutional rights to health and to healthful ecology, includes a constitutional obligation on the State and corporations to refrain from harming the environment, and promotes a comply-or-explain approach to pursuing sustainable development, it would be prudent to state that climate change litigation risks for for-profit corporations and their directors arise from the following areas:

- (1) Citizen suits for failure to mitigate/reduce emissions in industries that are perceived to contribute to degradation of the environment, in violation of the constitutional rights to health and healthful ecology;
- (2) Shareholders' suits for failure to adapt to the foreseeable impacts associated with climate change that have had a material financial

590. Ellie Mulholland, *Climate Change Litigation*, Thomson Reuters Practical Law, available at [https://uk.practicallaw.thomsonreuters.com/w-024-0459?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-024-0459?transitionType=Default&contextData=(sc.Default)&firstPage=true) (last accessed Jan. 31, 2023) [<https://perma.cc/EA58-F9YT>]. See also JOANA SETZER & CATHERINE HIGHAM, *GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2021 SNAPSHOT* (2021); MINTERELLISON, 2^o INVESTING INITIATIVE, *THE CARBON BOOMERANG: LITIGATION AS A DRIVER AND CONSEQUENCE OF TRANSITION TO A LOW-CARBON ECONOMY* (2017); SARAH BARKER, ET AL., *LIABILITY RISK AND ADAPTATION FINANCE* (2021); CLYDE & CO. LLP, *CLIMATE CHANGE: LIABILITY RISKS FOR BUSINESSES, DIRECTORS AND OFFICERS* (2019); & CLYDE & CO. LLP, *CLIMATE CHANGE: A BURNING ISSUE FOR BUSINESSES AND BOARDROOMS* (2018).

impact on the company's business, in violation of the directors' fiduciary duty to act in the best interest of the corporation and its shareholders, as part of the fiduciary duty of diligence, and its shareholders in the face of undeniable climate risk besetting the company;

- (3) Failure of publicly-listed companies to disclose the material risks associated with climate change in instances when the disclosure obligation is statutorily mandated;
- (4) Suits from regulatory agencies for failure to comply with climate-specific regulatory obligations, such as emissions intensity standards, greenwashing in issuance of green bonds, sustainable financing, etc.

The international climate change literature also shows that climate litigation against companies and their directors continues to increase globally, with dozens of cases filed across the U.S. and EU by regulators, bondholders, shareholders and municipalities, and causes of action range from tort and consumer law to breach of duty and securities fraud. Considering that we are not competent to make assessments on the merits of foreign climate litigations that operate within the peculiar legal systems of these foreign jurisdictions, we will not be including in this opinion an assessment of the application or effects of such foreign climate litigations on potential litigation risks in the Philippines.

Since the ratification of the 1987 Constitution of the Philippines, there have been a good number of climate litigation that have been brought to courts, but mainly to enforce the State's constitutional obligation to promote the citizens' right to health and to a healthful ecology, such as seeking that the Department of the Environment and Natural Resources (DENR) cancel all existing timber licenses agreements in the country and to desist from issuing new ones;⁵⁹¹ the Laguna Lake Development Authority (LLDA) seeking to prevent the Caloocan City Government from using as a dumpsite an area around Laguna Lake;⁵⁹² the residents around Manila Bay seeking Metropolitan Manila Development Authority (MMDA) and other key government agency to clean up Manila Bay;⁵⁹³ and even seeking to compel the DENR to enforce from water utilities the preservation of water sources and improvement of

591. *Oposa*, 224 SCRA at 792.

592. *Laguna Lake Development Authority*, 231 SCRA at 292.

593. *Concerned Residents of Manila Bay*, 574 SCRA at 665.

sanitation facilities.⁵⁹⁴ Since both the constitutional and statutory frameworks place on the State and its instrumentalities the primary obligation to promote the citizens' right to health and to a healthful ecology, it would be reasonable to expect that the bulk of climate change suits would be against key government departments which are mandated by the *Climate Change Act* and climate-related environmental laws to respond to the climate change risks besetting the country.

In May 2022, the Philippines' CHR concluded a national inquiry commenced in 2015 on the impact of climate change on human rights of the Filipino people and the role therein of the 'carbon majors' pursuant to a claim that climate change was adversely impacting human rights and the top oil producers of the world were contributing, and knowingly continue to contribute, to this phenomenon.⁵⁹⁵ While non-binding, the Commission's findings and recommendations included that: (a) climate change poses a threat to individuals' human rights; (b) international treaties and resolutions, including the Universal Declaration on Human Rights, form part of Philippine law; and (c) that therefore entities incorporated or doing business in the Philippines in the value chain of high-emission companies could be compelled to undertake human rights due diligence.⁵⁹⁶ The first two findings of the CHR were merely in conformity with the Court's holding that the right to health and to a healthful ecology⁵⁹⁷ were part of the citizens' right even in the absence of any provision in the Philippine Constitution relating thereto because the Philippines is a signatory to the *Universal Declaration of Human Rights*⁵⁹⁸ which includes the right to health.⁵⁹⁹ It is the third "recommendation" of CHR that entities operating in the Philippines in the value chain of high-emission companies could be compelled to undertake human rights due diligence that poses litigation or legal risks upon companies operating in the value chain of high-emission network of the country because of the persuasive effect on the courts of the CHR's third recommendation.⁶⁰⁰

As the full impact of climate change on the Philippine environment and its economy are felt in the next few years, litigation risks may arise from the

594. *Maymilad*, 912 SCRA at 136.

595. See Boom, et al., *supra* note 216, at 73.

596. *Id.*

597. PHIL. CONST. art. II, § 16.

598. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 28, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

599. *Laguna Lake Development Authority*, 231 SCRA at 307-08.

600. See Boom, et al., *supra* note 216, at 73.

SEC, as the primary regulatory agency exercising supervision and jurisdiction over all corporations,⁶⁰¹ and empowered under the Revised Corporation Code to promote good corporate governance.⁶⁰² In addition to moving away from the comply-or-explain approach to sustainable development reporting, it may make it mandatory for publicly held companies and other corporations vested with public interest the obligation to formally include in their ERM system means to effectively identify, monitor, assess, and manage climate change risks, and report them in detail in the sustainability reports to be filed with the SEC, PSE and other industry regulators, and made available to the shareholders and other stakeholders.

In the exercise of its quasi-legislative power,⁶⁰³ the Philippine SEC may even go as far as supplementing its rules on sustainability reporting to include that the failure of the board of directors of publicly held companies and other corporations vested with public interest to include in their ERM report an effective identification, monitoring, assessment and management of climate change risks would constitute a presumption that the directors have not complied with their fiduciary duties to act in the best interest of the corporation which includes the pursuit of sustainable development in their oversight function over corporate affairs. Such a set-up would be consistent with the precautionary principle application in environmental cases, and has precedent in Section 166 of the Revised Corporation Code covering the offense of “*acting as intermediaries for graft and corrupt practices.*”⁶⁰⁴

In June 1999, the Philippine Clean Air Act of 1999 formally recognized certain environmental rights of the citizenry, which “*the State shall seek to guarantee their enjoyment,*” thus:

601. REV. CORP. CODE, § 179 (a).

602. *Id.* § 26.

603. *Id.* § 179 (o) (“Formulate and enforce standards, guidelines, policies, rules[,] and regulations to carry out the provisions of this Code[.]”). *Id.*

604. *Id.* § 166. Section 166 provides —

When there is a finding that any of its directors, officers, employees, or agents, or representatives are engaged in graft and corrupt practices, the corporation’s failure to install: (a) safeguards for the transparent and lawful delivery of services; and (b) policies, code of ethics, and procedures against graft and corruption *shall be prima facie evidence of corporate liability under this section.*

Id. (emphasis supplied).

- (1) The right to breathe clean air;
- (2) The right to utilize and enjoy all natural resources according to the principle of sustainable development;
- (3) The right to participate in the formulation, planning, implementation, and monitoring of environmental policies and programs and in the decision-making process;
- (4) The right to participate in the decision-making process concerning development policies, plans and programs, projects, or activities that may have adverse impact on the environment and public health;
- (5) The right to be informed of the nature and extent of the potential hazard of any activity, undertaking, or project and to be served timely notice of any significant rise in the level of pollution and the accidental or deliberate release into the atmosphere of harmful or hazardous substances;
- (6) The right of access to public records which a citizen may need to exercise his or her rights effectively under this Act;
- (7) The right to bring action in court or quasi-judicial bodies to enjoin all activities in violation of environmental laws and regulations, to compel the rehabilitation and cleanup of affected area, and to seek the imposition of penal sanctions against violators of environmental laws; and
- (8) The right to bring action in court for compensation of personal damages resulting from the adverse environmental and public health impact of a project or activity.⁶⁰⁵

Section 41 of the Act recognizes *citizen suits* that grant any citizen the standing to “file an appropriate civil, criminal[,] or administrative action in the proper courts against ... any person who violates or fails to comply with the provisions of this Act or its implementing rules and regulations.”⁶⁰⁶

The provisions of the Philippine Clean Air Act of 1999 on *citizens’ environmental rights* and *citizen suits* constitute the legal basis of the institutional obligation of the private sector in general, and boards of directors of private corporations in particular, to refrain from harming the environment. In conformity with their duties of obedience and diligence, it is within the

605. Philippine Clean Air Act of 1999, § 4.

606. *Id.* § 41 (a).

responsibilities of boards of directors of private corporations to exercise stewardship function over the operations of their corporations to ensure they abide by the country's environmental laws.

In January 2001, the Ecological Solid Waste Management Act provided for "citizen suits" that allows any citizen to file an appropriate civil, criminal, or administrative action against "any person who violates or fails to comply with the provisions of this Act or its implementing rules and regulations."⁶⁰⁷ The courts shall exempt citizen suits from the payment of filing fees and shall, likewise, upon prima facie showing of the non-enforcement or violation complained of, exempt the plaintiff from the filing of an injunction bond for the issuance of a preliminary injunction.⁶⁰⁸ In the event that the citizen should prevail, the courts shall award reasonable attorney's fees, moral damages and litigation costs as appropriate.⁶⁰⁹

In April 2010, the Court promulgated the Rules of Procedure for Environmental Cases, to "govern the procedure in civil, criminal[,] and special civil actions before [various trial courts] involving enforcement or violations of environmental and other related laws, rules[,] and regulations."⁶¹⁰

The Rules provided many unprecedented innovations in Philippine Remedial Law, which includes the formal recognition of the court to issue continuing mandamus⁶¹¹ recognized in *Metropolitan Manila Development Authority (MMDA) v. Residents of Manila Bay*;⁶¹² and formally granting the courts directly or through duly-appointed commissioners, the power to monitor and enforce compliance with judgment and orders in environmental cases,⁶¹³ thus settling the issue on whether courts of law in the Philippines would have such common law power under the country's predominantly civil law system.

The Court noted that the Rules of Procedure for Environmental Cases liberalized the requirements for standing, allowing the filing of citizen's suit

607. Ecological Solid Waste Management Act of 2000, § 52.

608. *Id.*

609. *Id.*

610. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, A.M. No. 09-6-8-SC, rule 1, § 2 (Apr. 29, 2010).

611. *Id.* rule 8, § 1.

612. *Concerned Residents of Manila Bay*, 574 SCRA at 665.

613. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 5, § 4.

for the enforcement of rights and obligations under environmental laws.⁶¹⁴ The provision on citizen suits in the Rules “*collapses the traditional rule on personal and direct interest, on the principle that humans are stewards of nature,*” and aims to “*further encourage the protection of the environment.*”⁶¹⁵

A. Precautionary Principle

The Rules formally adopt the precautionary principle as a rule of evidence in environmental cases,⁶¹⁶ under the expressed principle that “[t]he constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt.” The Rules provide that, “When there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it.”⁶¹⁷ In applying the precautionary principle, the Rules provide for the following factors, among others, to be considered: (1) threats to human life or health; (2) inequity to present or future generations; or (3) prejudice to the environment without legal consideration of the environmental rights of those affected.⁶¹⁸

B. Citizen Suits

The Rules of Procedure for Environmental Cases formally instituted in Philippine remedial law the *citizen suit* whereby “[a]ny Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environment laws.”⁶¹⁹ The Rules promote climate change activism, by making it convenient for environment activists to bring citizen suits, that would impinge upon the operations of the respondent companies during its pendency, thus —

614. *Segovia v. Climate Change Commission*, G.R. No. 211010, 819 SCRA 543 (2017) (citing RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 2, § 5).

615. *International Service for the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Southeast Asia (Philippines)*, G.R. No. 209271, 776 SCRA 434, 506 (2015), *set aside as moot*, 798 SCRA 250 (2016).

616. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 20.

617. *Id.* rule 20, § 1.

618. *Id.* rule 20, § 2.

619. *Id.* rule 2, § 5. (“Citizen suits filed under R.A. 8749 [Philippine Clean Air Act] and R.A. No. 9003 [Ecological Solid Waste Management Act] shall be governed by their respective provisions.”). *Id.*

- (1) Upon the filing of a citizen suit, the courts shall issue an order which shall contain a brief description of the cause of action and the reliefs prayed for, requiring all interested parties to manifest their interest to intervene in the case within 15 days from notice thereof, with the plaintiff being allowed to publish the order once in a newspaper of general circulation in the Philippines.⁶²⁰
- (2) The court shall defer the payment of filing and other legal fees that shall serve as first lien on the judgment award.⁶²¹
- (3) The trial court has the power to issue an environmental protection order (EPO) when prayed for in the verified complaint “*that the matter is of extreme urgency and the applicant will suffer grave injustice and irreparable injury,*”⁶²² which it can make permanent upon final judgment on the case.⁶²³
- (4) The reliefs in a citizen suit, when warranted, shall “*include the protection, preservation[,] or rehabilitation of the environment and the payment of attorney’s fees, costs of suit[,] and other litigation expenses; and may also require the violator to submit a program of rehabilitation or restoration of the environment, the costs of which shall be borne by the violator, or to contribute to a special trust fund for that purpose subject to the control of the court.*”⁶²⁴

C. Strategic Lawsuit Against Public Participation (SLAPP)

The Rules provide that “[a] legal action filed to harass, vex, exert undue pressure[,] or stifle any legal recourse that any person, institution[,] or the government has taken or may take in the enforcement of environmental law, protection of the environment[,] or assertion of environmental rights shall be treated as a SLAPP.”⁶²⁵ In a SLAPP filed against a person involved in the enforcement of environmental laws, protection of the environment or assertion of environmental rights, the defendant is allowed to file an answer interposing as a defense that the case is a SLAPP and by way of counterclaim, pray for damages, attorney’s fees, and costs.⁶²⁶ The defense of a SLAPP shall

620. *Id.*

621. *Id.* rule 2, § 12.

622. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 2, § 8.

623. *Id.* rule 5, § 3.

624. *Id.* rule 5, § 1.

625. *Id.* rule 6, § 1.

626. *Id.* rule 6, § 2.

be decided within 30 days from the holding of a summary hearing; and if the court dismisses the action, not only is the dismissal “with prejudice,” but the court may award damages, attorney’s fees, and costs of suit under a counterclaim if such has been filed.⁶²⁷

D. Writ of Kalikasan (“Writ of Nature”)

The Rules of Procedure for Environmental Cases formally recognize a special civil action, judiciable only by the Supreme Court or Court of Appeals, that would result in the issuance of a *writ of kalikasan* which it describes as a

remedy to a natural or juridical person, entity authorized by law, people’s organization, non-governmental organization, or any public interest group accredited by or registered with any government agency, on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with or by an unlawful act or omission of a public official or employee, or private individual or entity, involving environmental damage or such magnitude as to prejudice life, healthy or property of inhabitants in two or more cities or provinces.⁶²⁸

A petition for the issuance of a *writ of kalikasan* shall be acted upon within 60 days from the time the petition is submitted for decision,⁶²⁹ and when found meritorious the reliefs that may be granted are the following:

- (1) Directing respondent to permanently cease and desist from committing acts or neglecting the performance of a duty in violation of environmental laws resulting in environmental destruction or damage;
- (2) Directing the respondent public official, government agency, private person, or entity to protect, preserve, rehabilitate, or restore the environment;
- (3) Directing the respondent public official, government agency, private person, or entity to monitor strict compliance with the decision and orders of the court;
- (4) Directing the respondent public official, government agency, or private person, or entity to make periodic reports on the execution of the final judgment; and

627. *Id.* rule 6, §§ 3-4.

628. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 7, § 1.

629. *Id.* rule 7, § 15.

- (5) Such other reliefs which relate to the right of the people to a balanced and healthful ecology or to the protection, preservation, rehabilitation, or restoration of the environment, except the award of damages to individual petitioners.⁶³⁰

The Court has characterized the *writ of kalikasan* as providing a stronger protection of environment right in order to accord an effective and speedy remedy where the constitutional right to a healthful and balanced ecology is violated, and address any possible large-scale ecological threats.⁶³¹ It covers environmental damage of such magnitude that will prejudice the life, health, or property of inhabitants in two or more cities or provinces, and is available against an unlawful act or omission of a public official or employee, or private individual or entity.⁶³²

In Philippine jurisdiction, “greenwashing”⁶³³ presents a litigation risk to companies and their directors when the charges are based on violation of statutory-mandated sustainable frameworks, such as those covered by SEC’s Guidelines on ASEAN Green Bonds and BSP’s Sustainable Finance Framework. When they are not based on mandatory sustainable frameworks, greenwashing charges present a reputational risk associated with evolving stakeholder perceptions and expectations.

With the scientific data and international consensus indicating that the average world warming of 1.5°C is more than likely in the near term (between 2021–2040),⁶³⁴ the Philippine society has to anticipate and prepare for the likelihood that in the short and medium term there would be *unavoidable increases in multiple climate hazards and multiple risks to Philippine ecosystem, commercial and financial systems, and to the health and well-being of the Filipinos and other residents of the Philippine archipelago*. It should be expected that environmental cases will increase, especially with the Rules of Procedure for Environmental Cases providing very accommodating procedures and judicial powers to pursue climate activism, that would expose *for-profit* corporations and their directors to reputational risks associated with the public’s perception

630. *Id.*

631. Paje v. Casiño, G.R. No. 207257, 749 SCRA 39, 232 (2015) (J. Velasco, concurring opinion) & *Segovia*, 819 SCRA at 543.

632. LNL Archipelago Minerals, Inc. v. AGHAM Party List, G.R. No. 209165, 789 SCRA 271 (2016).

633. See Tarrant, *supra* note 580, at 16–23.

634. Intergovernmental Panel on Climate Change, *supra* note 50, at 15.

that directors and their companies have not acted in the best interest of the stakeholders — consumers, investors, regulators — and of society as a whole.

VIII. CONCLUSIONS AND ADVICE

With climate change being a grave concern of the country,⁶³⁵ and of the world community, presenting as it does an existential threat to mankind, and with the recognition that climate change presents physical, transition, and litigation risks to Philippine corporations, directors of *for-profit* corporations are bound to take into consideration climate change-related risks in the discharge of their fiduciary duties of obedience and diligence, and to abide by the “*rules of good corporate governance*”⁶³⁶ in fulfilling their companies’ long-term economic, moral, legal, and social obligations towards their shareholders and other stakeholders, pursuant to the mandate “*to maximize the organization’s long-term success, creating sustainable value for its stockholders, stakeholders[,] and the nation.*”⁶³⁷

Philippine Corporation Law recognizes that directors are stewards of the company charged with protecting the assets and business enterprise value of the corporation on behalf of shareholders, and other stakeholders as well.⁶³⁸ For corporations vested with public interest, like publicly held companies, banks and other financial intermediaries, the standards which their directors are required to meet to fulfill their fiduciary duty of diligence owed to other stakeholders is more than that of a prudent man: the highest degree of diligence with high standards of integrity and performance is required,⁶³⁹ which is breached when directors become mere ‘rubber stamps’ and approve without circumspection or the exercise of independent evaluation the proposals or recommendations of committees, there being ‘red flags’ in the circumstances present to the board.⁶⁴⁰

Although there is no Supreme Court decision directly on the matter, when it comes to shareholders’ interests what may constitute climate change ‘red flags’ is when company decisions are made and pursued that exposes the

635. See Nazrin Castro, et al., The Case for Climate in the Philippines’ Marcos Restoration Era, Blog, THE CLIMATE REALITY PROJECT, May 13, 2022, available at <https://www.climatealityproject.org/blog/case-climate-philippines-marcos-restoration-era> (last accessed Jan. 31, 2023) [<https://perma.cc/NF36-L78W>].

636. REV. CORP CODE, § 23, para. 7.

637. CG Code for PLCs, *supra* note 263, at ¶ 5 & CG Code for PCs and RIs, *supra* note 263, at ¶ 7.

638. *Virata* 2017 Decision, 830 SCRA at 364-65.

639. *Pike*, 470 SCRA at 347.

640. *Virata* 2017 Decision, 830 SCRA at 271, 65-68.

company to climate change risks with no “effective enterprise risk management framework” in place that would prove that the board have overseen company “activities as the identification, sourcing, measurement, evaluation, mitigation[,] and monitoring of risk.”⁶⁴¹

Examples of such red flag climate situations would include the company’s non-compliance with climate-related environmental laws and regulations by companies whose nature of operations have a direct impact on the environment, such as oil companies, where the risk of leaks from the transport and storage facilities would be detrimental to the environment. A further example could be mining and other extractive industries, whose operations not only affect the country’s forest cover, but for which the improper disposition of their tailings would have the effect of not only degrading the environment but would adversely affect the livelihood of farmers and fisherfolks.

When the nature of the corporate business poses risks to the environment that would likely in turn pose financial and reputational risks to the company, and when such risks arise independently of the company’s actions, it falls within the directors’ fiduciary duty to undertake activities to properly identify, measure, and evaluate these risks and include in the company’s ERM framework the manner by which the company shall mitigate such risks, and for directors to monitor such risk. For corporations whose business is affected with public interest, when their operations have a direct impact on the environment, the happening of any of the foreseeable risks would raise the legal presumption that directors have not been able to comply with their extraordinary duty of diligence to protect the company’s long-term interests, nor of the right of their stakeholders to a healthful ecology.⁶⁴²

The constitutional rights of Filipino citizens to health and to a healthful ecology,⁶⁴³ as well as the constitutional principle that private property and all economic enterprises bear a social function to contribute to the common good,⁶⁴⁴ impose on for-profit corporations, acting through their boards of directors, the institutional obligations to refrain from harming the environment by abiding with all government regulations that seek to protect the environment.

641. CG Code for PLCs, *supra* note 263, at ¶ 12 & CG Code for PCs and RIs, *supra* note 263, at ¶ 12.

642. PHIL. CONST. art. II, § 16.

643. *Id.*

644. *Id.* art. XII, § 6.

When read in relation to the foregoing constitutional backdrop, the Authors' review of the Climate Change Act⁶⁴⁵ and climate-related Philippine environmental laws shows that no institutional duty or responsibility is imposed upon the private sector in general, and on the private corporate sector in particular, to promote environmental activism, and a failure to pursue low-carbon economy beyond the targets set by the government does not *per se* lead to personal liabilities to directors of private corporations. The emerging "*role of directors in addressing climate change*" imposes a duty to refrain from harming the environment based on the standards and the "*prohibited acts*" laid down by the State in various environmental laws, the commission of which may lead to both criminal and civil liabilities, *as well as an obligation to include within directors' stewardship over the company's long-term success a due regard for climate change risks.*

The statutory language used in the "*prohibited acts*" clauses of the environmental laws provide that, as a general rule, when such prohibited acts are committed on behalf of the corporation, directors as such do not become criminally punishable, but only those directors, officers, and employees of the corporation who directly are responsible for the commission of the prohibited acts shall be penalized for the corporate criminal offense committed.

While the enumeration of "*prohibited acts*" under the various environmental laws provide for the limited areas whereby directors may be held criminally liable for acts pursued in the corporate affairs, the commission of the prohibited acts in the pursuit of the corporate business enterprise may provide the legal basis — especially when the commission of such prohibited acts is egregious — under Section 30 of the Revised Corporation Code to make directors personally and solidarily liable (civilly) with the corporation for "willfully and knowingly assenting to patently unlawful acts of the corporation," or at least for "gross negligence or bad faith in directing the affairs of the corporation."⁶⁴⁶

The obligation to disclose material climate-related risks and submit the sustainability report for publicly-listed companies remains primarily a corporate responsibility, as the administrative penalties of reprimand, fine, delisting, or revocation of license are imposed on the corporation itself.⁶⁴⁷ Absent a showing that the director of an erring company directly made a false or misleading statement of material fact resulting in market manipulation or

645. Climate Change Act of 2009.

646. REV. CORP. CODE, § 30.

647. See CG Code for PLCs, *supra* note 263. See also CG Code for PCs and RIs, *supra* note 263.

fraud, it would be difficult to hold a director personally liable for any corporate disclosures, including climate-related risks and opportunities.⁶⁴⁸

It is the Authors' opinion that once sustainability reporting is made mandatory by the Philippine SEC, especially as to all publicly held companies and other corporations vested with public interest, the failure to comply therewith, or the contents thereof, may constitute evidence in either shareholders' or public-interest litigation to prove "gross negligence or bad faith in directing the affairs of the corporation"⁶⁴⁹ in relation to climate change risks befalling the company's operations, or with regard to the company's obligation to refrain from harming the environment.

What may prove the more serious personal risk to directors would be a threat to their professional reputations as the stewards of the country's private corporate sector, which is mandated to pursue sustainable development. Although the State only expects that private corporations comply with environmental laws, rules, and regulations, nonetheless, the other stakeholders do have a right to demand that the board of directors not only comply with existing environmental regulations and disclose material climate-related risks, but also to actively employ a value chain process that takes into consideration, among others, environmental issues and concerns, with particular emphasis on the risks posed by climate change.

While the failure of directors to actively pursue environmental concerns may not necessarily expose them to personal, criminal, or administrative liabilities, nonetheless, the ardent pursuit by non-government organizations and public-interests groups for the private corporate sector to devote their resources to the protection of the environment, coupled with the very accommodating litigation rules to enforce environmental cases, and the current demand of local and international investors that companies have a clear and focused policy on ESG matters, may result in directors having to devote much of the corporation's resources to heading off citizen suits for knowingly refusing to channel their companies' resources to face up to the undeniable risks brought about by climate change.

Various studies support the prognosis that even if all NDCs are fully implemented, the temperature rise is likely to increase beyond 1.5°C by 2030,⁶⁵⁰ businesses will likely be facing increased transition risks — both in the short and the medium term — as the Philippine government would likely

648. See SEC. REG. CODE, § 24.1 (d).

649. *Id.*

650. Pörtner, et al., *supra* note 48, at 44.

introduce additional policies. Boards of directors of both public and private corporations should already prepare their organizations towards a movement away from the comply-or-explain approach⁶⁵¹ pursued in sustainable development and reporting, by re-orienting the meaning and coverage of “sustainable development” to mean that companies not only comply with existing regulations, but must ensure that they employ value chain processes that take into consideration ESG issues and concerns, in contributing solutions to complex global challenges like poverty, inequality, unemployment, and *climate change*.

651. CG Code for PLCs, *supra* note 263, at 1.