THE APPLICATION OF CORPORATION AND SECURITIES LAW IN COMMON LAW ASIA CONCERNING CLIMATE RISK, WITH SPECIAL REFERENCES TO SINGAPORE, HONG KONG, AND INDIA

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ABSTRACT

A strategic climate litigation study focuses mainly on litigation filed against individual litigants or the state for violations of environmental law, tort law, human rights law, or public law. Less has been written on corporate and securities cases against companies and directors in general, and Asia in particular, than in any other region. These omissions are addressed in this report. Using three major common-law countries in Asia as a case study, this essay investigates whether corporation law and securities law enforcement may be utilized to mitigate climate-related risks. In particular, the emphasis is on whether or not this is feasible and how it may be accomplished. To address climate risk, this paper argues that public enforcement of securities law and listing requirements is better options than private enforcement since both public and private enforcement of corporate law have their drawbacks.

Keywords: litigation; human rights; securities law; climate risk; corporate law

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Introduction:

There has been researching on climate litigation as a strategic tool to halt environmental degradation and address climate-related transgressions. This article investigates whether and how corporate law and securities enforcement might be utilized to solve climate challenges in different countries. The primary defense is that the constraints of corporate law make public enforcement of securities law a more effective tool for combating climate problems.

Objectives of the study:

1) To analyze the significance of corporate disclosure under securities law for creating climate change-related risks and then examine how corporate disclosure obligations can be enforced.
2) To identify the overall trend in prosecuting climate-related crimes across Asian jurisdictions.
3) To highlight divergences and trends, if any, concerning each jurisdiction.
4) To identify gaps that may affect enforcement and prosecution efforts.
5) To find out the ongoing debate regarding whether the publication of corporate climate-related risk information is required by securities laws and regulations in East Asia.
6) To study how firms and countries can deal with increasing disclosures of climate-related risks.
7) To find out how climate change can affect the financial performance of firms.

Research methodology:

This paper is a comparative study of the role of the law in China, India, and South Korea in inducing companies to disclose climate-related risks and opportunities. Several pieces of information are collected from the media and databases on how relevant laws are used to protect investors and regulate listed companies. The case studies and textual analysis of the listed companies' annual reports in these three Asian countries show that, for the most part, there is no incentive provided by relevant laws in these three

countries to elicit climate-related information from companies. It is a descriptive research and aims to provide an overview of the role of the law in inducing companies to disclose climate-related risks and opportunities.

(i) Corporate Law and Its Application:

In this series installment, the Task Force on Climate-Related Financial Disclosures (TCFD) looks at whether or not directors in Singapore, Hong Kong, and India are obliged by law to consider risks related to climate change. Certain schools of thought contend that some nations' business laws impose this responsibility on directors. It requires substantial complexity and unpredictability at every stage of implementation.

(a) The virtue of sincerity:

Directors of Indian corporations are required to advance the goals of the company. They wouldn't violate their commitments if they thought they had behaved in the company's best interests, even if their primary goal was to enhance their personal interests. "Good faith" in Indian law refers to making a decision based on personal judgment while following a set of rules. The courts will use a subjective threshold to determine whether someone acted in good faith.

Under Indian law, the need to behave in a person's or a party's best interests is not expressly stated. Judges in Singapore base their judgments on both subjective and objective criteria. It is critical to consider how courts in India (Ramachandran, 2018), Hong Kong, and Singapore have construed the "best interest requirement" and "reasonable criteria."

(b) Organizational interests:

Section 166(2) of the Indian Penal Code states that directors are in charge of preserving the environment. Climate change-related heatwaves will shorten workdays by 5.8%, particularly in the construction and agriculture industries. According to reports, Typhoon Hato cost Hong Kong's economy $8 billion in losses. In these three nations, authorities and policymakers worry that climate change might cost the economy and business sector money.

(c) Applying the best interest obligation to the climate:

Directors have to act in the company's best interests, and they should carry

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out their responsibilities accordingly(SFC Reminds Listed Companies of Duties on Corporate Acquisitions and Disposals, 2019). For instance, moving to renewable energy sources or updating outdated equipment might result in enormous business costs. Consider a situation where the board of directors believes that lowering these risks would help the business achieve its long-term goals while limiting the value provided to shareholders in the near term.

Despite their subjective view that their actions (or inactions) would be in the best interests of shareholders, stakeholders, or the corporate entity, directors are likely to violate the best-interest duty if they fail to take climate-related risks into account when making decisions. Courts may declare judgments invalid if it can be shown that an important aspect was ignored throughout the decision-making process–(Lim, Ernest, 2022). Finally, if directors do not consider these risks while making decisions, they will breach their duty to act in good faith.

(d) Obligation to use reasonable care, skill, and diligence:

The need to perform with a certain level of competence, care, and attention has been codified in legislation in each of the three Asian nations. The legal systems of Singapore and Hong Kong stipulate that this responsibility must satisfy several objective standards and is not entirely up to interpretation. A minimal variable level of care depends on the director's specific duties, the size and type of the firm, and the industry the business works in. When assessing the degree of care expected of directors of financial institutions, it is likely to consider to what extent the moral laws and policies on risks connected to the climate have been implemented. Look at the recommendations the HKMA has made for financial firms regarding environmental risk management–(Lim, Ernest, 2022). The risk management framework should include climate scenario analysis, which should also include stress testing. The board of directors may be held accountable for failing to fulfill their obligations with reasonable skill, care, and attention. Depending on why such disclosure was not provided, it would be decided whether or not to hold directors responsible for a company's disregard for the suggestions. Market conventions, stakeholder expectations, and shareholder expectations will affect the director's capacity to delegate responsibilities if the disclosure has not yet been made.

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(ii)Enforcement:

Whether the state will apply corporate law to enforce obligations under corporate law remains in great dispute. The main problem in all three nations is that private litigants encounter enormous obstacles when attempting to execute corporate law legislation. Effective mechanisms for carrying out these commitments are necessary but insufficient. Directors should consider climate-related issues even if corporate law does not require them(Cyril Shroff, 2021).

(a)Private policing:

Derivative actions and actions claiming unfair discrimination or oppression are the two main types of private enforcement proceedings. Disgruntled minority shareholders acting on behalf of the company are often the plaintiffs in a derivative action. Instead of seeking compensation for damages done to the company, minority shareholders often bring lawsuits claiming injustice, prejudice, or oppression(Dr.Das, 2020). A corporation's injuries may be seen as an insult to its shareholders.

The activity of derivation:

Under the common law derivative action doctrine, an unhappy shareholder may sue a corporation without a judge's consent. According to Singaporean law, the complainant who wants to initiate a statutory derivative action must get permission from the court to do so in both Singapore and Hong Kong. There is a need for good faith, which states that her interests must be aligned with both the complainant and the corporation's interests.

A company member does not have to hold a certain number of shares or to have been a business member for a specific amount of time under Singapore or Hong Kong regulations. When considered in light of the threat posed by climate change, these ideological inconsistencies become more relevant. Consider a scenario where a non-governmental organization (NGO) purchases share of a company to bring a derivative action against the company's board of directors for failing to monitor or manage risks associated with climate change.

The fact that the court will award compensation to the company rather than to the shareholders themselves is, across all three jurisdictions, the most

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significant disincentive for minority shareholders to bring a common law or statutory derivative action. This is the case because the compensation will go to the company. This, in conjunction with the ban on contingent fee agreements and the laws that stipulate the loser is responsible for all costs, often discourages people from bringing derivative proceedings(Chauhan & Kumar, 2018). It should be no surprise that derivative proceedings are rare in private corporations and almost nonexistent in publicly traded companies across all three jurisdictions.

Intolerance, discrimination, and the use of private law enforcement:

On discrimination, prejudice, or bad management, shareholders may bring direct claims against a company. The claimant must satisfy a two-part test based on Singaporean law to get an oppression action and demonstrate that they are not misusing the system. It is assumed that a derivative action is appropriate if the necessary remedy is a resting order in the corporation's favour. However, the accepted movement was undoubtedly strong if buying out the investors was the wisest course of action. Commercial injustice results when a written agreement, such as a company's bylaws or shareholder agreement, is broken. In quasi-partnerships, concerns about commercial injustice often surface (small, private businesses). A Singaporean court found it difficult to establish commercial unfairness in publicly traded or widely owned companies. Indian law allows shareholders to sue if they feel they have suffered from unfair management, oppression, or discrimination. It is claimed that directors neglected to take climate-related risks into account. However, it is uncertain whether or not this issue will be taken seriously–(Apfelroth et al., 2019). An alternative method of preserving director accountability is by public enforcement of their duties. Before bringing oppression, discrimination, or nasty management charges against an organization, a claimant must satisfy several precondition conditions. It seems unlikely that a climate-related disaster would worsen, forcing an organization to close.

(b)Public policing:

Hong Kong and India both have legal systems that allow for the public enforcement of corporate law. The Securities and Futures Commission is permitted to file a lawsuit against a company under Hong Kong law. The government may pursue legal action if it believes that an Indian company is

managing its operations in a manner that is harmful to the interests of the general public under the regulations that apply to Indian firms.

(iii) Security legislation and its application:

The court in Ramirez v. ExxonMobil, a case held in Texas, decided not to dismiss the plaintiff's lawsuit against the multinational oil company. Due to advances in Singapore, Hong Kong, and India, climate risk disclosures have expanded and become more standardized. Many governments throughout the world are thinking about requiring businesses to reveal issues with the environment.

(a)The "Material" Risk of Climate Change Financial Information:

Despite the impartiality of the materiality test, there are several areas of concern where climate risk may be seen as dependent or speculative. Climate risk is pertinent financial data that firms must disclose under applicable financial reporting rules. Since what is required is currently available knowledge on the effects of climate change in the future, climate change information does not have forward-looking nature(Calvello, 2009).The implications of climate change on businesses and their operations can now be quantified. Nevertheless, these effects will also influence the environment. The circumstances under which firms are obligated to publicize information are described in Chapter 13 of the Consolidated Mainboard Listing Rules of the HKEX in Hong Kong. The framework in the three Asian countries is currently being examined in this section due to the importance of climate disclosures to investors' financial risk.The hazards associated with the economic transition to the next zero-emissions regime could include "events" or "activities." This is due to the possibility that changes in law or policy intended to lower hazards related to climate change could have an impact on the risks associated with economic growth'(Bolland, 2012). A few examples are a carbon tax, emission limits, and technological advancements in renewable energy, electric vehicles, and battery storage.

According to the Listing Obligations and Disclosure Requirements, 2015, listed companies are required to disclose any events or information that, in the board's opinion, is of material nature. The LODR Regulations categorize disclosure responsibilities into two groups. The first issue relates to incidents

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important enough to merit reporting, as the law requires. The second is that information may only be relevant if it satisfies the "materiality" criteria before sharing it.More specific reporting requirements on environmental, social, and governance (ESG) concerns, with an emphasis on climate change, have recently been established in Hong Kong, India, and Singapore. If an issuer fails to evaluate climate-related risks, the disclosures given by the issuer may be seen as misleading. This might include actions like "risk management," "under-provisioning for bad debts," "overvaluation of its assets," or "false disclosure"———(Armour et al., 2009).

(b) Reporting on Environmental Sustainability and Climate Change:

Businesses must report on environmental, social, and governance (ESG) concerns on two levels under the Listing Rules of the HKEX in Hong Kong. Specific mandatory disclosure requirements make up the first level, while different "comply-or-explain" standards make up the second. By addressing environmental problems for their own sake, even if unrelated to financial success, disclosure of knowledge concerning climate change "applies more universally."The top 100 companies by market capitalization were required by SEBI in 2012 to publish a business responsibility report (BRR) as part of their annual reports. In connection with the release of the LODR Regulations in 2015, the BRR requirements were expanded to encompass the top 500 listed enterprises. These patterns are also evident in Singapore. SGX is considering the potential implementation of mandated climate-related disclosures under the suggestions of TCFD(Wan et al., 2019).

(c) Disclosure Commitments: Legal Remedies for Noncompliance:

The failure to report the approved exchange of information that must be disclosed under the listing requirements is prohibited for listed firms in Singapore. The Singapore Monetary Authority may start taking civil enforcement action. Anyone who violates the securities laws is pursued by Hong Kong's Securities and Futures Commission (SFC)(Gillis, 2012). The SFC also has the power to bring legal action against criminal enforcement.

In Hong Kong, the HKEX has the power to publicly criticize or publicly condemn a director or senior management member and admonish them privately. It can also be declared that a person cannot hold their post. The Singapore Exchange has the authority to impose administrative fines and submit proposals for composition. In India, investor protection claims,

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especially those addressing violations of securities disclosure regulations, are often pursued in open enforcement actions.

(iv) Governmental And Non - governmental enforcement for climate risk:

Climate risk is given considerable weight by the rules regulating businesses and securities in the three Asian nations that were the subject of this study. Although Hong Kong, India, and Singapore have access to these tools, their use concerning the danger presented by climate change is either negligible or nonexistent. In the context of climate change, it is crucial to consider the potential of conducting a comparative study of private and governmental enforcement methods.

(a)Theoretical Considerations Regarding the Comparison of Public and Private Enforcement:

One could conclude that corporate law is often implemented by private means before the courts in a given nation after studying corporate and securities law. In contrast, it is more probable that administrative or specialized regulatory entities will be in charge of securities legislation. It would be reckless to choose "a priori winner," according to Jackson and Roe, who assert that each method of enforcement has benefits. Coffee observes that the United States may be an anomaly in creating a system that prioritizes strict private enforcement. This is due mainly to the lack of an entrepreneurial framework in most other countries (also known as a plaintiff bar). Findings by Armour and his co-authors show that private enforcement has far less impact on the viability of the stock markets than was previously thought.Public authorities often focus on businesses, the directors of such enterprises, or the intermediaries between the two when it comes to deterrence(Hu, 2017). However, harmed investors could be compensated for their losses due to regulatory proceedings or settlements. This paper examines the employment of enforcement mechanisms in Hong Kong, India, and Singapore and is concerned about the risk that firms face from climate change.

(b)Public Enforcement vs. Private Enforcement in Asia's Common Law:

Evidence on the effectiveness and outcomes of enforcement procedures

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under corporate and securities law in Hong Kong, Singapore, and India shows that they are consistent with the theoretical paradigm. The private enforcement sector has not considerably aided the expansion of the nation's financial markets in India. Investor compensation for potential losses is not something that SEBI is permitted to undertake(Calvello, 2009).The underlying corporate law in Hong Kong, Singapore, and India on directors' responsibilities to manage climate risk is strong, but the enforcement methods are not entirely aligned. In any case, the lack of economic incentives that would encourage a robust enforcement mechanism renders the legal systems in the three Asian nations unsuitable for private litigation. This is the situation even if personal litigation is motivated by the legal environment (Emma Nan, Jessica, 2019).

Singapore's public enforcement of security laws is conducted substantially differently from other nations. The regulatory body's capacity to provide enough resources is a prerequisite for successfully concluding enforcement proceedings. To address ESG problems, most notably climate risk, they would need to improve their resource pool with sufficient numbers of skilled professionals(Astaka Holdings Limited Independent Fact-Finding Report, 2020).

Conclusion:

This paper presents five different lines of thought. First, under the laws of the three Asian jurisdictions, directors must consider climate risks as part of their duty to act in good faith in the company's best interests and exercise reasonable care, skill, and diligence. If they fail, they may violate these duties, which could place them in legal jeopardy. Taking into account climate risks is also a best practice that should be required of directors. Second, the private enforcement of directors' obligations for climate change is fraught with significant doctrinal and practical challenges, notably for derivative actions and, to a lesser degree, oppressive measures. This is especially true for derivative proceedings. Third, although these challenges do not arise in the public enforcement of corporate law, a mechanism available in Hong Kong and India, it is questionable whether public enforcement will be significantly more effective in addressing climate risks than private enforcement. This is because, based on previous cases, public enforcement is only used in the circumstances involving insolvent

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companies, directorial disqualification, or severe impact on the community; failure to take into account climate-rising risks. Fourth, companies are required to disclose climate risks as part of their disclosure obligations under securities law, listing rules, and reporting obligations; failure to do so may render companies and directors in breach of these regulations, which are enforceable by the securities regulators and stock exchanges. Disclosure of climate risks should also be required as part of companies' disclosure obligations under securities law. Fifth, because public enforcement of corporate law is rarely used in the three Asian jurisdictions, private enforcement of corporate law in listed companies is almost nonexistent there. As a result, public enforcement of securities law and listing rules regarding the disclosure of climate-related risks is a more promising route, provided that the state and regulators have sufficient resources, they are competent and independent, and effective sanctions and remedies are issued where they are warranted.

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