

**Environmental Disclosures: evaluating the ‘E’ in
environmental social and governance (ESG) as a
response to strengthening environmental
accountability**

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Dedication

I dedicate this work to my children, Tshiamo and Tshenolo. Always remember that dreams delayed are never denied. Keep chasing your dreams!

The information used and presented in this mini-dissertation was correct and up to date on 31 October when research for this study was concluded. Any later political, social and/or legal developments have not been considered.

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Abstract

Considering the immense levels of environmental degradation induced by business and development activities, could the 'E' in environmental social and governance be a sufficient response to bolstering environmental accountability? The answer is not straightforward. One would need to explore what ESG is, its place in environmental governance (if any) and whether there are obligatory or voluntary measures to ensure that ESG is operationalised. Proceeding from the premise that corporations have an identifiable footprint on the environment, and that corporate citizenship would require corporations (especially those in the energy sector) to respond to and address such footprint, this discussion seeks to determine if environmental disclosures could be used to improve environmental accountability.

Keywords: ESG, environmental disclosures; voluntary standards, pollution prevention, environmental management, environmental accountability.

List of abbreviations and acronyms

CDP	Carbon Disclosure Protocol
CER	Centre for Environmental Rights
CDSB	Climate Disclosure Standards Board
CSR	Corporate Social Responsibility
EMP	Environmental Management Programme/Plan
ESG	Environmental, Social and Governance
EMI	Environmental Management Inspector
GRI	Global Reporting Initiative
IIRF	International Integrated Reporting Council
IR	Integrated Reporting
SDG	Sustainable Development Goals
TCFD	Task Force on Climate-related Financial Disclosures

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1. Introduction

1.1 Background

Historically, corporate citizenship¹ and the impact of companies on communities, has been executed through corporate social responsibility programs.² The King III Report for corporate governance in Southern Africa, defined corporate social responsibility as,

[t]he responsibility of the company for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that: contributes to sustainable development, including health and the welfare of society; takes into account the legitimate interests and expectations of stakeholders; is in compliance with applicable law and consistent with international norms of behaviour; and is integrated throughout the company and practiced in its relationships.³

The King Reports are not legally binding to all companies, but the latest King IV Report makes it obligatory for companies listed on the Johannesburg Stock Exchange and for all new companies (intending to list) to report on social and environmental issues and on compliance with the King IV itself.⁴ To this end, although the King IV Report is principally concerned with corporate governance, it has a crucial focus on sustainability.⁵ Specifically, (and in a way that goes beyond altruistic actions) the governance of business now involves the reporting, accountability, good practice and ethics of business vis-à-vis the impact of the business on society and the environment.⁶ While corporate social responsibility was the main stay of measuring the impacts of companies on the broader society, it has since been substituted, both as a theoretical and practical framework, by environmental, social and governance (ESG).

¹ Corporate citizenship involves the ideas of businesses being sensitive to and responsive to their operating space. de Silva Lokuwaduge and de Silva 2020 *Australasian Accounting, Business and Finance Journal* 41; He and Chen 2009 *Journal of Agricultural and Environmental Ethics* 328.

² Kirby 2014 <https://www.werksmans.com/legal-updates-and-opinions/whats-really-right-corporate-social-responsibility-as-a-legal-obligation-in-south-africa/>.

³ IoDSA *King III Report on Corporate Governance* 117.

⁴ IoDSA *King IV Report on Corporate Governance* 5; Mans-Kemp, Erasmus and Viviers 2016 *Southern African Business Review* 72; Davids and Kitcat "South Africa" 182.

⁵ Davids and Kitcat "South Africa" 182; Mans-Kemp, Erasmus and Viviers 2016 *Southern African Business Review* 76.

⁶ PwC 2016 <https://www.pwc.co.za/en/publications/king4.html>. Principles 3, 4 and 5 of the King IV Report IoDSA *King IV Report on Corporate Governance* 40.

1.1.1 ESG in context

ESG is a generic term that translates to the determination of a companies' responsiveness towards social, environmental and governance issues.⁷ In part, ESG measures non-financial factors which are material to investors' assessment of the responsibility patterns of a corporation in an effort to predict its future financial performance.⁸ The 'E' in ESG considers environmental concerns that a business considers in, for example, the sourcing of natural resources during production or the direct impact of its operations and supply chain on the environment.⁹ Reporting on these environmental activities and their impact on, for example, the reduction of carbon emissions, could create reputational (and even legal) risks or opportunities for companies.¹⁰ Principle 4 of the King IV Code for example, specifically notes that a company's commitment to sustainable development assists in the 'value' concept of a company. For Soyapi, this reference to "sustainable development and its inseparability to other aspects of a corporation's activities symbolises a governance move that is sensitive to the changing times – as sustainability is the language of the future".¹¹ As such, the impact of environmental factors on a company and the company effects on the environment can be summarised as follows: where, for example, the company's operations are contingent on the availability of water and energy resources, its operations' impact on the environment through greenhouse gas emissions; waste and pollution, would be governed by the *National Environmental Management Act* 107 of 1998 (NEMA) principles.¹² Sustainability as an outcome, would thus require targeted and planned management of the interaction between business and the environment, along

⁷ Taplin and Killian 2021 *Interdisciplinary Journal of Economics and Business Law* 2; Johnson 2020 *Journal of Economic and Financial Sciences* 3.

⁸ Johnson 2020 *Journal of Economic and Financial Sciences* 3.

⁹ Johnson 2020 *Journal of Economic and Financial Sciences* 3. This is equally applicable from an activity's lifecycle, with mining companies for example, needing to have measures for rehabilitation. The other letters in ESG represent social and governance indicators, all of which are not the focus of the study.

¹⁰ Principle 5 of the King IV Report specifically requires companies to issue reports that could "enable stakeholders to make informed assessments of the organisation's performance, and its short, medium and long-term prospects", *IoDSA King IV Report on Corporate Governance* 40.

¹¹ Soyapi "The 'environmental need' in environmental, social and corporate governance (ESG) and its applicability in the South African corporate governance setting" 377; Joseph and Marnewick 2016 *Southern African Business Review* 535.

¹² Section 2 of the *National Environmental Management Act* 107 of 1998. Some of these principles include sustainable development in terms of section 2(3) of NEMA, pollution prevention principle in terms of section 2(4)(a)(iii) of NEMA and the polluter pays principle in terms of section 2(4)(p) of NEMA etc.

with the reporting of the impacts of such interaction.¹³ Failure to do so could warrant legal consequences and this discussion will address in part aspects related to whether a corporation could be sued on the basis of its reported ESG commitments or statements.

1.1.2 The focus of the study

There is a case to be made that businesses in general, as juristic persons,¹⁴ have environmental responsibilities which go beyond legal and regulatory requirements. In fact, by making commitments to reduce environmental impacts and to strive for environmental performance as a critical part of their business strategy and operating methods, businesses become conscientious corporate citizens.¹⁵ Viewed within this light, businesses that include environmental disclosures as part of a culture of pollution prevention and waste minimisation in the corporate world would then contribute to the pursuit of a sustainable future for the environment.¹⁶ This is so because in contemporary times, financial investors appreciate that a broader risk analyses approach is required when assessing assets in order to have a long-term view on the impacts on sustainability.¹⁷ ESG is the tool that has recently emerged as an integrated approach to considering the environment, social and governance matters when assessing the feasibility of, for example, extending debt finance to assets.¹⁸ As such, the environmental issues covered by the 'E' in ESG include, amongst others, climate change, energy efficiency, waste management, pollution, water scarcity and carbon emissions and also information on past environmental performance, including any cases (lawsuits) against a

¹³ Soyapi "The 'environmental need' in environmental, social and corporate governance (ESG) and its applicability in the South African corporate governance setting" forthcoming, 2022; Davids and Kitcat "South Africa" 186.

¹⁴ Section 1 of the *Companies Act* 71 of 2008.

¹⁵ IoDSA *King IV Report on Corporate Governance* 11. Principle 3 of the King IV Report notes, for example, that governing body of a corporation must "oversee and monitor, on an ongoing basis, how the consequences of the organisation's activities and outputs affects its status as a responsible corporate citizen."

¹⁶ Davids and Kitcat "South Africa" 184; Yoga and Sastri 2020 *Jurnal Ekonomi & Bisnis JAGADITHA* 129.

¹⁷ Soyapi "The 'environmental need' in environmental, social and corporate governance (ESG) and its applicability in the South African corporate governance setting" forthcoming, 2022. Also see Yoga and Sastri 2020 *Jurnal Ekonomi & Bisnis JAGADITHA* 129 and principles 4 and 4 of the King IV Report.

¹⁸ Johnson 2020 *Journal of Economic and Financial Sciences* 5; Bernardi and Stark 2018 *The British accounting review* 17.

firm and how the firm handled such.¹⁹ The legal and policy framework which enables some of these aspects to be addressed will be succinctly investigated in Chapter 4.

It is however accepted that pressing as these environmental concerns are, not all businesses are the same, because some businesses have a larger imprint on the environment than others. Consequently, and for the sake of focus, the energy sector will be used for illustrative purposes.²⁰ The pertinence of the energy sector for illustration is borne out of the increasing number of environmental challenges, such as climate change with its extreme weather patterns; the depletion of natural resources and the overall negative impacts of energy production and use on the environment.²¹ To this end, whether industry voluntarism²² is fitting in the face of these concerns is an issue to be addressed in the ensuing discussion.

1.2 Motivation

From a regulatory viewpoint, in recent years South Africa has promulgated the *Carbon Tax Act*²³ and is in the process of promulgating the *Climate Change Bill*²⁴ as part of its international climate change commitments. Addressing climate change and preventing pollution cannot be solely ascribed to government alone as businesses, both state and private, have a substantial role to play.²⁵ A further compelling point is that South Africa is making inroads on ESG, on the backing of initiatives such as the King IV Report and the

¹⁹ Johnson notes that 3 of the 5 global risks in 2019 were ESG related. These included climate change, water and energy security as well as waste management, Johnson 2020 *Journal of Economic and Financial Sciences* 1.

²⁰ The South African economy is energy intensive, driven by businesses that depend on a coal generated electricity source and a transport system that runs through the energy of synthetic fuels. Finance and the ability to attract avenues for debt finance are a critical part of such businesses.

²¹ Benjamin "The responsibilities of corporations: new directions in environmental litigation" 234; <https://www.ipcc.ch/report/sixth-assessment-report-cycle/>.

²² Voluntarism "is based on the individual firm undertaking to do the right thing unilaterally, without any basis in coercion," Gunningham and Sinclair "Regulatory pluralism: Designing policy mixes for environmental protection" 54.

²³ *The Carbon Tax Act* 15 of 2019. The preamble to this act notes that government seeks to price carbon emissions as well as to provide incentives for efficient energy use.

²⁴ *The Climate Change Bill* B9-2022. The Bill requires, for example, that there be "integrated management, in the context of climate change, which requires climate change considerations to be integrated into the making of decisions which may have a significant effect on the Republic's ability to mitigate or which exacerbate its vulnerability to climate change", section 3(e) of the *The Climate Change Bill*.

²⁵ PRI Date Unknown <https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment>; Bradley *ESG Investing for Dummies* 16; Fink 2022 <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>.

JSE listing requirements.²⁶ Thus, the need for more responsiveness to the pressing environmental concerns of our times is no longer a subject of speculation or debate, but one of measurement. This is where ESG becomes crucial. Where corporations have failed in upholding environmental principles, for example, liability must ensue as a form of environmental accountability.

From a consumer perspective, the power of brand awareness and reputation management means that the general public as stakeholders of a business, also have a general expectation that the cultural commitment of the organisation, is 'to do right' with the environment and to make a positive impact in addressing environmental concerns like pollution and climate change.²⁷ Such anticipation also bodes well with environmental management principles like the 'polluter pays' and 'duty of care principle' which place a responsibility obligation on directors of businesses to consider environmental impacts when performing their fiduciary duties.²⁸ These principles are etched in NEMA.²⁹

On a general level, this mini-dissertation notes that as the global need for clean and renewable energy sources surges, some investors now have an interest in those companies that have a sustainability focus in the production of energy.³⁰ ESG can therefore be regarded as an endless balancing act between people, environment and profit through a tangible plan that diminishes climate change issues while building a resilient future. The reporting of previous incidents and how corporations take a turn for the better would, in some way, also contribute to the improvement of environmental accountability, even from just a stakeholder perspective.³¹

For the reasons cited above, the point of departure for the study is that although ESG is not legislation and therefore not binding, the "E" arguably incorporates the same

²⁶ Davids and Kitcat "South Africa" 185.

²⁷ Van Zyl and Mans-Kemp 2020 *Southern African Business Review* 6; Taplin and Killian 2021 *Interdisciplinary Journal of Economics and Business Law* 23; Soyapi "The 'environmental need' in environmental, social and corporate governance (ESG) and its applicability in the South African corporate governance setting" forthcoming, 2022.

²⁸ Van der Merwe *The carbon tax as a market-based enforcement mechanism to ensure compliance with environmental law and address pollution* 38; Taplin and Killian 2021 *Interdisciplinary Journal of Economics and Business Law* 29.

²⁹ Section 2 of the *National Environmental Management Act*. These will be unpacked and linked to ESG in chapter 4.

³⁰ Johnson 2020 *Journal of Economic and Financial Sciences* 10; ESGenterprise Date Unknown <https://www.esgenterprise.com/environment/esg-energy-industry>.

³¹ See discussion on stakeholder approaches to accountability in chapter 2 below.

objectives as existing legislation (for example, pollution prevention, polluter pays, duty of care etc.) and therefore, when companies are committed to disclosing environmental information and taking measures to address environmental concerns, such companies could ultimately contribute to the pursuit for sustainability in general and sustainable business practices in particular, while operating as environmentally accountable entities. Essentially, the regulatory framework for such collaborations and possibilities could either be voluntary or mandatory. Concerning the former, this inquiry will consider a few global and South African initiatives as well as possible (concerning the latter) binding legislative requirements which can be found in the NEMA, the *National Water Act*,³² *National Environmental Management: Air Quality Act* (Air Quality Act)³³ and *National Environmental Management: Waste Act* (Waste Act).³⁴

1.3 Research Question

How and to what extent could the 'E' in environmental, social and governance be an adequate response to strengthening environmental accountability for businesses?

1.4 Research aims and objectives

The main aim of the study is to assess how the "E" in ESG could be employed to strengthen environmental accountability as part of the overall environmental accountability obligations of businesses. The objectives, which further inform the structure of the study's chapters, include the following:

- briefly illustrating the emerging value of ESG within contemporary discourse;
- exploring the need for environmental disclosures and illustrating the global attempts at creating mechanisms for disclosures;
- reviewing the current South African regulatory framework in so far as it relates to environmental disclosures vis-à-vis environmental protection; and
- providing some conclusive thoughts on how the "E" in ESG could be used to strengthen environmental accountability.

³² *National Water Act* 36 of 1998.

³³ *National Environmental Management: Air Quality Act* 39 of 2004.

³⁴ *National Environmental Management: Waste Act* 59 of 2008.

1.5 Research methodology

This research was conducted through a desktop-based study, making use of document analysis and existing laws and policies. The study also investigates existing jurisprudence where the principles of ESG are of concern. In addition, the study also employs diverse secondary sources such as books, credible website sources, and articles to strengthen and ground the study.

1.6 Chapter outline

The study takes the following structure:

1. Introduction
2. A brief theoretical overview of ESG
3. Environmental disclosures as a mechanism for strengthening accountability
4. The South African environmental disclosure legal and policy framework: a viability analysis
5. Findings, recommendations, and conclusion

2. A brief theoretical overview of ESG

2.1 Introduction

Within the narrow scope of the overall study, this chapter provides a basic theoretical synopsis on ESG thinking and practice. The main question to guide the discussion is: What are the essential justifications for the rise in ESG and does it have practical value? This question will be answered through a discussion which:

- establishes corporations as role players in environmental and social issues;
- describes the limits of corporate social responsibility (CSR);
- contextualises the rise of ESG while laying the theoretical underpinnings of it;
- affirming that certain industries like the energy sector must have ESG as a guiding framework.

These aspects are thematically discussed below.

2.2 Corporations as role players in environmental issues

The ever burgeoning population and the augmented need for resources to meet the needs of such population has yielded the exploitation of resources at an even greater level.³⁵ Along with this need comes the potential for over-exploitation at the expense of the environment and natural resources, to the point where in recent years, a number of environmental disasters have been associated with corporate activities.³⁶ Thus considered, it stands to reason that there is a moral case to be made that corporations have environmental obligations. Applying a moral argument lens, Mabaquiao compares corporations to human beings, noting that a moral responsibility comes from three functional capacities:

- The ability to act with intention;
- Rationality in the manner in which one acts to pursue their interests; and

³⁵ Mabaquiao 2002 *Eubios Journal of Asian and International Bioethics* 11.

³⁶ There are unfortunately way too many corporate related environmental disasters to mention. Examples include the Nigerian Delta oil spills, the Bhopal cyanide disaster in India, the Chernobyl nuclear disaster in Ukraine etc. many such incidents can be found on a time line here, Timeline 2022 <https://www.cfr.org/timeline/ecological-disasters>.

- The ability to make necessary changes when one's interest/behaviours pose harm to others.³⁷

To this end, the environmental commitments of corporations as juristic persons with functional capacities also stem from the stewardship or trusteeship role, they wield. Stewardship in this regard "embodies the responsible planning and management of resources".³⁸ This stewardship role is borne out of the need to protect the environment and the duty of care when impacting the environment.³⁹ In other words, considering that there is no second planet or planet B to think of at this moment, the result is that stewardship is a prerequisite as a long-term goal.

Environmental considerations in the management of corporations also fit within the fiduciary duty of a manager.⁴⁰ Such fiduciary duties require of managers to take into account all relevant factors and considerations in the running of a corporation's activities. For this reason, it is now established that "companies perform better when they are conscious about their role in society and act in the interests of their employees, customers, communities, and their shareholders."⁴¹ In view of this extended role, 2015 signalled a turning point in relation to international agreement and cooperation in relation to sustainability goals for both states and corporations. This was the year when the Sustainable Development Goals (SDGs)⁴² as well as the Paris Agreement⁴³ were signed and endorsed. These agreements are distinctively configured to be executed by both states and juristic persons like corporations. This (the need for corporations to have a role in sustainability goals), was borne out of the recognition that corporations have a scientifically computable footprint on the natural environment.⁴⁴ In the South African context, for example, the recently decided *Trustees for the time being of Groundwork*

³⁷ Mabaquiao 2002 *Eubios Journal of Asian and International Bioethics* 12.

³⁸ Bradley *ESG Investing for Dummies* 60; He and Chen 2009 *Journal of Agricultural and Environmental Ethics* 330.

³⁹ Bradley *ESG Investing for Dummies* 46.

⁴⁰ PRI Date Unknown <https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment>; Bradley *ESG Investing for Dummies* 16.

⁴¹ Fink 2022 <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>.

⁴² <https://www.undp.org/sustainable-development-goals>.

⁴³ *Conference of the Parties, Adoption of the Paris Agreement* Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015).

⁴⁴ Levy 1995 *Transnational corporations* 45; He and Chen 2009 *Journal of Agricultural and Environmental Ethics* 324; Benjamin "The responsibilities of corporations: new directions in environmental litigation" 234.

*Trust and Another v Minister of Environmental Affairs and Others*⁴⁵ (colloquially known as the Deadly Air case) indicated that over 10 000 people die yearly because of deadly air pollution released as a result of Eskom and Sasol's activities.⁴⁶ Moreso, recent studies do indicate that we are now at a tipping point wherein a new geological epoch is being considered as certain, the Anthropocene.⁴⁷ Accordingly, human, corporate and government actions must align with this reality, especially if global threats like climate change are to be met with the resolve with which they deserve.⁴⁸

2.3 Corporate social responsibility and its limits

Corporations are governed through the idea of corporate governance, which generally involves systems through which corporations are directed and controlled.⁴⁹ Within these systems, and considering their role within societies in general, corporations adopt practices that are meant to depict the positive role they play, outside of their business. In the past, this was captured primarily through CSR, which is a tailored management concept through which corporate management prove how they incorporate stakeholder concerns in the running of their business.⁵⁰ For example, where a community might worry about job creation, a corporation might build a school or hospital around a manufacturing plant in the vicinity of or local government area where the business is situated. CSR was also a result of the self-interest of the company (self-consciousness of the role and impact the corporation has) and such 'enlightened self-interest'⁵¹ existed because in most cases, CSR was never obligatory. Thus, with CSR, corporations had the choice of determining which societal aspects to address; how they would do so and when they would do so, all

⁴⁵ *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* (39724/2019) [2022] ZAGPPHC 208 (18 March 2022).

⁴⁶ *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others*, para 155.

⁴⁷ See for example works like Crutzen "The "anthropocene"" and Lewis and Maslin 2015 *Nature*, where the Anthropocene as a turning point is discussed.

⁴⁸ Some scholars clearly note the linkage required between states and corporations in meeting the SDG goals: "traditional development assistance and other government funds will be insufficient to the task [SDG targets and Paris Agreement] — and thus ... private capital will be essential for expanded sustainability efforts in general and to the global response to climate change in particular." Esty and Cort "Sustainable Investing at a Turning Point" 5.

⁴⁹ Cadbury Code *Report of the committee on the financial aspects of corporate governance: The code of best practice* para 2.5.

⁵⁰ Bradley *ESG Investing for Dummies* 9.

⁵¹ He and Chen 2009 *Journal of Agricultural and Environmental Ethics* 327.

in an effort to stay a step ahead of government interventions or regulations.⁵² This, at times would however come at a cost.

There have been a number of instances which have revealed the extent to which some businesses fabricate their CSR efforts. For example, Volkswagen had an emissions scandal where the vehicle manufacturing corporation engineered its diesel engine emissions by installing 'defeat devices' so as to paint a picture implying less emissions.⁵³ This would have, in some way, implied that the corporation had been investing in more environmentally friendly technologies so as to lessen their environmental impacts. Unfortunately, this fiddling was discovered, only after Volkswagen had been presenting itself as environmentally friendly: "[m]arketed as environmentally friendly, VW's vehicles were emitting up to 40 times more nitrous oxide than advertised; the firm's promotion of its products can be considered "greenwashing"—misrepresenting them as environmentally sound".⁵⁴

Essentially, as the Volkswagen example demonstrates, what CSR sought to do was, through communication and action, a corporation would seek to show its stakeholders (and even non-stakeholders) that it has managed its activities in socially and environmentally sensible ways.⁵⁵ This, it is believed is a branding and marketing process as well. Consequently, some corporations would in the past, pride themselves in corporate sustainability practices, which would essentially focus on creating stakeholder value through efforts to manage risks which resulted from economic, social, and environmental considerations.⁵⁶ This had obvious implications, one of which was the deceptive nature of the benefits brought by CSR as against the real harm which could be experienced (while profits were maintained). To this end, Fink poignantly notes that,

a company cannot achieve long-term profits without embracing purpose and considering the needs of a broad range of stakeholders. A pharmaceutical company that hikes prices ruthlessly, a mining company that short changes safety, a bank that fails to respect its clients – these companies may maximize returns in the short term. But, as we have seen again and again, these actions that damage society will catch up with a company and destroy shareholder value. By contrast, a strong sense of purpose and a commitment to

⁵² Soyapi "The 'environmental need' in environmental, social and corporate governance (ESG) and its applicability in the South African corporate governance setting" 357.

⁵³ Jung and Sharon 2019 *Global business and organizational excellence* 6.

⁵⁴ Jung and Sharon 2019 *Global business and organizational excellence* 10.

⁵⁵ Joshi and Gao 2009 *International Journal of Commerce and Management* 28.

⁵⁶ Bradley *ESG Investing for Dummies* 9.

stakeholders helps a company connect more deeply to its customers and adjust to the changing demands of society. Ultimately, purpose is the engine of long-term profitability.⁵⁷

Furthermore, Soyapi commented that "language of CSR proved inadequate to capture exactly what was at stake concerning corporate activity. It became apparent that profits and a few social activities, like building a clinic or school, are not all there is to companies."⁵⁸ This is why CSR has been fading away, and why ESG has been on the increase. A primary reason for this is that stakeholders are now assuming a greater and at times forceful role which corporations can no longer disregard. Stakeholders are now going as far as demanding socially responsible investment, which is why disclosure of such information is becoming increasingly sought after.⁵⁹

2.4 The rise for ESG

It is now factual that carrying on business in this modern-day carries risks which are beyond financial. The implication is that the business environment within which a business operates, and the influence which the business has on such environment is a risk factor which investors and other stakeholders are now concerned with. This is where ESG data becomes critical. Broadly described, ESG simply entails the "analysis of a company's environmental, social, and governance practices".⁶⁰ ESG seems to have evolved around 2005 when the United Nations Global Compact Report noted that sustainability reporting had an aggregate positive impact on markets and on society as stakeholders.⁶¹ Yet, it cannot be assumed that corporations can simply furnish such information/reportage. In fact, there are some theories that suggest why corporations are starting to pay attention to stakeholder voices and the specific need for ESG.

2.4.1 Theories on the need for ESG

While there could be numerous theories, the literature surveyed reveals about three leading theories which justify the necessity for corporate citizenship through ESG: the

⁵⁷ Fink 2020 <https://www.blackrock.com/us/individual/larry-fink-ceo-letter>.

⁵⁸ Soyapi "The 'environmental need' in environmental, social and corporate governance (ESG) and its applicability in the South African corporate governance setting" 357; He and Chen 2009 *Journal of Agricultural and Environmental Ethics* 328.

⁵⁹ Strauss and Saad "Can Investors Rely on Corporate Sustainability Commitments?" 196.

⁶⁰ Bradley *ESG Investing for Dummies* 8.

⁶¹ Bradley *ESG Investing for Dummies* 8.

legitimacy theory, the stakeholder theory, and the accountability theory. These will be briefly reviewed below.

2.4.1.1 Legitimacy theory

Suchman reasoned that "[l]egitimacy is a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions."⁶² This legitimacy can be further broken down into two types: institutional legitimacy which concerns how a corporations' structures have gained societal acceptance as well as strategic legitimacy which concerns how a corporation seeks approval from societal groups.⁶³ Viewed within this perspective, the legitimacy theory can be deemed a form of a social contract between the corporation and the society in which it operates:

there is an implied responsibility that an organisation will not operate in ways that are detrimental to the society in which it operates. Corporate citizenship would require that corporations be sensitive to their surroundings and how they act and respond to stimuli from such surroundings. It is naturally the responsible thing to do, given that resources are finite.⁶⁴

What this means is that corporations stand to gain more when their legitimacy is high within their operating environment.⁶⁵ An important factor, however, is that given changing times, corporations have to stay abreast with key societal and environmental developments, such that they do not lose legitimacy or face.⁶⁶ In other words, because aspects like climate change have gained eminence in the last few years, it would be, for example, to a corporation's best interests that it shows dedication to addressing climate considerations, especially if such corporation's activities have a direct or indirect impact on the environment.

⁶² Suchman 1995 *Academy of Management Review* 574.

⁶³ Joshi and Gao 2009 *International Journal of Commerce and Management* 30. For example, Woolworths South Africa is voted number one best brand supermarket. See details in Soyapi "The 'environmental need' in environmental, social and corporate governance (ESG) and its applicability in the South African corporate governance setting" 361

⁶⁴ Soyapi "The 'environmental need' in environmental, social and corporate governance (ESG) and its applicability in the South African corporate governance setting" 358-359; de Silva Lokuwaduge and de Silva 2020 *Australasian Accounting, Business and Finance Journal* 41; He and Chen 2009 *Journal of Agricultural and Environmental Ethics* 328.

⁶⁵ Joshi and Gao 2009 *International Journal of Commerce and Management* 30.

⁶⁶ He and Chen 2009 *Journal of Agricultural and Environmental Ethics* 327.

2.4.1.2 Stakeholder theory

For Joshi and Gao, the “[s]takeholder theory claims that whatever the ultimate aim of the corporation or other form of business activity, managers must take into account the legitimate interests of those groups and individuals who can affect (or be affected by) their activities.”⁶⁷ In other words, those who can affect the corporation could be shareholders as market stakeholders, while those who could be affected could be customers or consumers as external stakeholders.⁶⁸ These stakeholders are vital and essential to the longevity of the corporation, with the result that their voices are worth listening to. Stated otherwise, corporations must function within the constraints which could either be social or environmental, as failure to do this can prompt the attention of other external stakeholders who exert pressure (environmentalists or NGOs).⁶⁹

2.4.1.3 Accountability theory

The accountability theory combines the legitimacy and stakeholder theories in some way. To be sure, the accountability theory operates in form of a two-way stream, where the corporation owes society information on its activities.⁷⁰ In this way, the corporation has to account for its decisions and activities, which could build a relationship of trust between the corporation and stakeholders.⁷¹ This information flow or the anticipation of it would naturally differ in accordance with industry uniqueness. For example, it is accepted that for a corporation operating within a space where the environment or biodiversity will be put under stress, there is a need for reportage and accountability of such corporation’s activities as regards their environmental or biodiversity footprint.⁷² In this way, such

⁶⁷ Joshi and Gao 2009 *International Journal of Commerce and Management* 31.

⁶⁸ Weber 2014 *Business Strategy and the Environment* 304; Soyapi "The 'environmental need' in environmental, social and corporate governance (ESG) and its applicability in the South African corporate governance setting" 359; He and Chen 2009 *Journal of Agricultural and Environmental Ethics* 330.

⁶⁹ He and Chen 2009 *Journal of Agricultural and Environmental Ethics* 331.

⁷⁰ Joshi and Gao 2009 *International Journal of Commerce and Management* 32.

⁷¹ He and Chen 2009 *Journal of Agricultural and Environmental Ethics* 327. Phillips takes the accountability argument further, noting that “we are living in a world where green and sustainability rule—at least on paper—but how many of these efforts are paying off? And if it is so important, why aren’t more organizations doing something about it? There is a need for accountability, often up front, to ensure that investments are made in the projects with the greatest potential of working—for the environment and the organization.” Phillips *Green scorecard: measuring the return on investment in sustainability initiatives* viii.

⁷² Joshi and Gao 2009 *International Journal of Commerce and Management* 32.

corporations would naturally need to provide more environmental and biodiversity details as a form of accountability.

2.4.2 ESG data as currency

When corporations go green by focussing on ESG, there is a prospect of value creation coupled with an image or brand. This is the sustainability currency, which goes a long way in justifying why a corporation merits support and for how investors select a corporation to support. A study conducted by the Massachusetts Institute of Technology discovered that a number of drivers are connected to addressing sustainability in contemporary times. These include company or brand image, employee satisfaction or retention cost savings, shareholder relation, competitive advantage etc.⁷³ Consequently, and at the risk of repetition, ESG data is now a specific currency for investors in that they consider it vital in determining investment decisions.⁷⁴ Three key dimensions form the basis of considerations when ESG factors are considered:

- Which key industries have the greatest ESG risks or opportunities?⁷⁵
- Once this data is obtained, what execution strategies could be employed to arrest the risks or exploit the opportunities?⁷⁶
- Lastly, what material ESG components have an impact on the financial performance of a corporation.⁷⁷

⁷³ Phillips *Green scorecard: measuring the return on investment in sustainability initiatives* x. see also Bradley, where it is noted that "transparent measurement and disclosure of sustainability performance is now deemed to be an essential part of effective business practices, and a necessity for maintaining trust in business as a force for good." Bradley *ESG Investing for Dummies* 8.

⁷⁴ Strauss and Saad "Can Investors Rely on Corporate Sustainability Commitments?" 197.

⁷⁵ These can be variable, for instance, the health sector, transport sector or the non-renewable resource sector. See Bradley *ESG Investing for Dummies* 12.

⁷⁶ This can include shareholder activism to influence decisions or even constant engagement as a functional component of the management process in the corporation. See Bradley *ESG Investing for Dummies* 13. Larry Fink, CEO of the World's largest asset management has clearly stated that as investors, they will vote against management and board of directors when corporate decisions do not disclose enough in the way of sustainability disclosures. See Fink 2020 <https://www.blackrock.com/us/individual/larry-fink-ceo-letter>.

⁷⁷ These could include environmental aspects like greenhouse gas emissions, which are highly material to sustainability, and which are also highly emitted by the energy sector, a focal point for this discussion. See discussion in Bradley *ESG Investing for Dummies* 13. Materiality will be discussed in the next chapter.

These considerations, in fact, tell us that ESG data could be the deciding factor when investors have a choice between multiple corporations. To this end, ESG then becomes a critical component of running a corporation, a continuously targeted and goal setting process which diverges from singular projects like building schools. Associated with such targets and goals would be the disclosure of how such targets and goals have been met.

2.4.3 Examples of some emerging frameworks for ESG reporting/disclosures

Evidently, there are various ways through which a corporation can convey its ESG commitments. Many such are couched in aspirational terms, including assertions like 'we aspire to', 'we intend to', 'we commit to' etc.⁷⁸ This clearly reveals the problematic voluntary nature of such pledges. This notwithstanding, there are a number of budding frameworks which speak to processes and procedures as to how a corporation should handle ESG data.⁷⁹ Two such frameworks are illuminated below.

2.4.3.1 UN Principles for Responsible Investment, 2006

Described as "developed by investors for investors" with the support of the United Nations, the UN Principles for Responsible Investment are a set of six principles which provide guidance on how ESG can be incorporated into investment practices.⁸⁰ The main purpose is to try and use capital in a way that is more environmentally responsible, inclusive, and equitable. To this end, the mission statement for the UN Principles for Responsible Investment is as follows:

As institutional investors, we have a duty to act in the best long-term interests of our beneficiaries. In this fiduciary role, we believe that environmental, social, and corporate governance (ESG) issues can affect the performance of investment portfolios (to varying degrees across companies, sectors, regions, asset classes and through time).⁸¹

The principles are as follows:

Principle 1: We will incorporate ESG issues into investment analysis and decision-making processes.

⁷⁸ Strauss and Saad "Can Investors Rely on Corporate Sustainability Commitments?" 196.
⁷⁹ There are obviously many of such voluntary frameworks, for which a discussion of each would be beyond the scope of this limited chapter. The examples given below are only illustrative in nature and are discussed chronologically, as opposed to order of importance.
⁸⁰ PRI Date Unknown <https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment>.
⁸¹ PRI Date Unknown <https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment>.

Principle 2: We will be active owners and incorporate ESG issues into our ownership policies and practices.

Principle 3: We will seek appropriate disclosure on ESG issues by the entities in which we invest.

Principle 4: We will promote acceptance and implementation of the principles within the investment industry.

Principle 5: We will work together to enhance our effectiveness in implementing the principles.

Principle 6: We will each report on our activities and progress towards implementing the principles.

There is evidence that these UN Principles for Responsible Investments have global support. For example, in 2020 just before COVID-19, statistics affirmed that over \$90 trillion capital worth of investors had signed up to the UN Principles for Responsible Investment, with commitments from the investors that they would try and use their voting power to enhance corporate ESG strategies.⁸² Ultimately, it remains for investors to spearhead the triumph of these principles through their efforts to be intentional in the investment opportunities they pursue. Corporations could in turn be compelled to align with investor priorities.

2.4.3.2 The Global Impact Investing Network, 2009

Spearheaded by the Global Impact Investing Network, impact investing involves “investments made with the intention to generate positive, measurable social and environmental impact alongside a financial return.”⁸³ In other words, there is an deliberate move to consider investing in corporations for the purposes of both producing profit and also measurable positive social and environmental impacts.⁸⁴ The main difference between, for example, the UN Principles for Responsible Investment and Impact Investing, is that the latter is specifically geared to investments in renewables, water, clean technology, agriculture etc.⁸⁵ This could be the kind of investment that might

⁸² Hill *Environmental, Social, and Governance (ESG) investing: A balanced analysis of the theory and practice of a sustainable portfolio* 6; Janse 2020 <https://www.esm.europa.eu/blog/out-box-investing-better-tomorrow>.

⁸³ GIIN Date Unknown <https://thegiin.org/impact-investing/need-to-know/#what-is-impact-investing>.

⁸⁴ Bradley *ESG Investing for Dummies* 15.

⁸⁵ GIIN Date Unknown <https://thegiin.org/impact-investing/need-to-know/#what-is-impact-investing>; Bradley *ESG Investing for Dummies* 15.

prove meaningful for the South African Energy Sector, which is presently in a predicament.⁸⁶

An added benefit of impact investing is that there are benchmarks for impact measurement. According to the Global Impact Investing Network, impact investing follows four steps:

- establishing and communicating of social and environmental objectives to the relevant stakeholders;
- setting up targets which can be measured by standardised metrics;
- monitoring, evaluating, and measuring performance as against these targets and importantly,
- reporting back to stakeholders on the social and environmental performance as measured against the initial objectives.⁸⁷

This process signifies a complete cycle which could speak to, for example, a whole corporations' financial year cycle, or a long-term performance cycle. Key and essential is the fact that targets are set, and, in the end, there is reflection on performance. In line with the legitimacy, stakeholder and accountability theories for ESG, a reasonable conclusion is that where targets are set and performance fails, then investments could likely dry out.

2.5 ESG and the energy sector

There are number of facts which provide the foundation for the need for ESG within the energy sector. To start with, statistics reveal that the majority of GHG emissions between 1854 and 2010 were largely from fossil fuel extraction and use through corporations.⁸⁸ In 2019, Oxford named the phrase 'Climate Emergency' as the word of the year.⁸⁹

⁸⁶ Businesstech 2022 <https://businesstech.co.za/news/energy/611432/south-african-energy-crisis-the-practical-implications-of-the-governments-proposed-interventions/>.; Mkhize 2022 <https://www.bbc.com/news/world-africa-62053991>.

⁸⁷ GIIN Date Unknown <https://thegiin.org/impact-investing/need-to-know/#what-is-impact-investing>. One measurement generally used is termed Impact Reporting and Investment Standards, Bradley *ESG Investing for Dummies* 15.

⁸⁸ Benjamin "The responsibilities of corporations: new directions in environmental litigation" 234.

⁸⁹ OxfordLanguages 2019 <https://languages.oup.com/word-of-the-year/2019/>.

Furthermore, the United Nations is fronting global efforts to have net-zero emissions by 2050.⁹⁰ Recently too, the CEO of Black-Rock (the world's largest investment asset management company) commented that there is a need for coherent and analogous climate data from CEOs of corporations, considering that climate risk is investment risk. This is more so, from an energy investment perspective. In line with this, and in a letter to CEOs, he asked the following: "[w]hat are you doing to disrupt your business? How are you preparing for and participating in the net zero transition? As your industry gets transformed by the energy transition, will you go the way of the dodo, or will you be a phoenix?".⁹¹ Evidently, there is a need for ESG within the energy sector, given how it impacts on the environment specifically. To this end, ESG and the energy sector can be linked generally by noting the following:

The idea of ESG can be linked to the obvious fact that in many instances corporations operate in spaces almost always composed of communities and the environment which they occupy. This is particularly true of African states, which rely heavily on natural resources and the extractive industry; one which has contributed to untold environmental degradation. It is also an industry that proves controversial (blood diamonds, for example) as some extractive corporations –often transnational corporations (TNCs) – operate in states with either weak human rights and rule of law records or weak governance practices, where regulation is poor and opportunities to avoid costly compliance measures are the order of the day. Such operating spaces are usually described as 'pollution havens'⁸ and, in the African context, many states potentially fit this description. Consequently, ESG will be particularly important in many developing countries which are in need of development.⁹²

Indeed, the challenges which developing countries will face in seeking to have ESG as a priority for corporations is the fact of having to deal with the socio-economic realities of their people, especially energy realities. Jung and Sharon describe it this way:

Reducing pollution and improving air quality is a complex challenge. Many countries prioritize economic development over environmental protection. Enforcing higher compliance rates will impose an additional cost on businesses; for a developing country, this option may not be realistic.⁹³

Subsequently, while ESG does have a role to play in the energy transition, one cannot be blind to socio-economic realities which cannot be wished away but have to be confronted. Nevertheless, it is also a well-known fact that Africa is replete with renewable energy sources, and also that ESG and impact investing are not without profit. As Fink clearly

⁹⁰ UN 2022 <https://www.un.org/en/climatechange/net-zero-coalition>.

⁹¹ Fink 2022 <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>.

⁹² Soyapi "The 'environmental need' in environmental, social and corporate governance (ESG) and its applicability in the South African corporate governance setting" 355.

⁹³ Jung and Sharon 2019 *Global business and organizational excellence* 13.

states, “[w]e focus on sustainability not because we’re environmentalists, but because we are capitalists and fiduciaries to our clients.”⁹⁴ In some ways, this is a clear signal that there is in fact money to be made from pursuing sustainability within the energy sector and that such undertaking would also expand client interests.

Finally, one might rightly ask how a corporation can precisely compute its environmental impacts. There are two possibilities: through looking into the corporation’s direct impacts on the environment or considering its supply chain. With the former, it would be, for example, a mining company considering the direct impact of its activities on air pollution or on waste management. With the latter, an electricity corporation could consider where it sources its energy: from coal or from renewables. Eventually, it is possible that both these aspects can be considered with some degree of precision, at least enough to allow an investor or regulators to track the environmental performance of a corporation. Stated in a different way, corporations can work towards directing their operations in such a way that emissions are reduced while sustainability is advocated or they can make active efforts to collaborate with others to create environmental solutions to the impact they have on the environment.⁹⁵ Some of these efforts, and how environmental disclosures could be pursued will be examined in the next chapter.

2.6 Conclusion

CSR was the mainstay on how corporations presented their efforts to contribute to the society and environment within which they operate. CSR, however, resulted in a lot of cherry-picking on how corporations addressed societal needs, with the worst cases being those of greenwashing. The Volkswagen case is a recent example. ESG thus rose out of the failings of CSR, but with more emphasis on the necessity to consider stakeholder needs in so far as service and investment is concerned. Such stakeholders can, in this day, have an impact on the overall sustainability of a corporation. They could in fact dictate how a corporation is managed through impact investing, for example. Eventually, the chapter demonstrated that ESG is evolving alongside global efforts to address pressing global needs like climate change. Accordingly, the chapter concluded by noting that the energy sector is not exempt from the need to be guided by ESG, especially

⁹⁴ Fink 2022 <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>.

⁹⁵ Bradley *ESG Investing for Dummies* 61.

because corporations within the energy sector have been responsible, past, and present, for the upsurge of GHG emissions. Against this backdrop, the subsequent chapter zones in further into evaluating how the 'E' in ESG could strengthen environmental accountability through disclosures.

3. Environmental disclosures as a mechanism for strengthening accountability

"Accountability is only possible with high-quality reporting which allows performance to be monitored."⁹⁶

3.1 Introduction

As noted in Chapter 1, this chapter seeks to explore the necessity for environmental disclosures and to also demonstrate the global attempts at creating mechanisms for disclosures. As such, it is guided by the following research question: Why are environmental disclosures important and are voluntary disclosure frameworks effective in strengthening environmental accountability?

The chapter addresses this question by pursuing the following objectives:

- explaining the need for environmental disclosures as well as justifying why organisations must account;
- illustrating some of the disclosure frameworks which exist globally; and
- noting the implications of voluntary reporting standards in view of the pressing environmental concerns of our time.

These aspects are in turn addressed below.

3.2 Understanding environmental disclosures

As noted earlier, there are numerous explanations as to why an organisation might want to account for its environmental footprint. Some scholars believe that there is a business case for environmental disclosures as well as a stakeholder approach to them.⁹⁷ Starting with the former, the argument is that for a business, it pays for it to account for its environmental footprint through disclosures because it ultimately leads to a continuing licence to operate.⁹⁸ This is aligned to the legitimacy theory, in that as organisations do their part in reporting and accounting for environmental impacts, they gain the respect

⁹⁶ Maroun "Consequences of reporting" 91.

⁹⁷ Brown and Fraser 2006 *Business Strategy and the Environment* 104.

⁹⁸ Brown and Fraser 2006 *Business Strategy and the Environment* 104; Maroun "Consequences of reporting" 93.

and endorsement of stakeholders who either stand to lose something, or those that might take corporations to court for environmental degradation/pollution (for example). The Stakeholder Accountability approach views organisations as serving as quasi-public institutions with the result that managers of organisations have a stewardship role,⁹⁹ much in the same way as directors are viewed as having fiduciary duties.¹⁰⁰ In view of this, it's believed that:

[A]ccountability in its core sense means 'being called to account for one's actions' (Mulgan, 2000, p. 555). Accounting helps to make things account-able and provides an important mechanism of social control. From a stakeholder perspective, responsiveness to the multiplicity of constituencies interested in corporate performance requires a form of plural accountability.¹⁰¹

As we shall see below, there has been an instance in South Africa where a corporation failed in communicating pertinent environmental information, to the point where courts had to be approached to compel the release of the information.¹⁰²

3.2.1 Why account/disclose?

It has now become critical to report on environmental and social aspects of business activities owing to the need to be sustainable.¹⁰³ On a global level, the Sustainable Development Goals (SDGs), for example, clearly envisage corporations and states operating in ways that guarantee sustainable consumption patterns. Specifically, SDG 12 titled "[e]nsure sustainable consumption and production patterns",¹⁰⁴ has as one of the targets, ensuring that corporations embrace sustainability reporting. The goal is to "[e]ncourage companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle."¹⁰⁵ The SDGs are however not obligatory, but they are important to the magnitude

⁹⁹ Brown and Fraser 2006 *Business Strategy and the Environment* 106. Also see section 2.4.1.1 above in the issue of the legitimacy theory.

¹⁰⁰ To this end, Maroun notes as follows: "[i]t is also possible that ineffective sustainability performance and reporting will lead to legal consequences for boards of directors and their organizations as society places ever more emphasis on the importance of ESG issues", Maroun "Consequences of reporting" 93. See discussion in chapter 4 below.

¹⁰¹ Brown and Fraser 2006 *Business Strategy and the Environment* 107.

¹⁰² See discussion of *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance* (69/2014) [2014] ZASCA 184 (26 November 2014), below.

¹⁰³ Corvino, Doni and Bianchi Martini 2020 *Sustainability* 2.

¹⁰⁴ UN <https://sdgs.un.org/goals/goal12>.

¹⁰⁵ UN <https://sdgs.un.org/goals/goal12>.

that they signal a form of collective/global consensus on the need to have businesses account in some way, through sustainability reportage.

Likewise, the world fully acknowledges the consequences of climate change, and at the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, there was global consensus to diminish and limit global warming to below 2 degrees Celsius below pre-industrial levels.¹⁰⁶ As such, there is an expectation that if a business is involved in activities that pollute the environment, then more is expected of that company insofar as environmental disclosures are concerned. Where this fails, Mitchell and Quinn note that there is an 'expectation gap' in that there exists a "difference between the levels of disclosure 'expected' by users of reports and the actual level of detail provided by the preparers of the reports."¹⁰⁷ In fact, this 'expectation gap' can be aligned with the Stakeholder theory,¹⁰⁸ in that stakeholders need this information to either invest, or to even coerce a corporation's conformity with environmental laws. This can be done by, for example, communities or environmental pressure groups. To this end, Mitchell and Quinn conclude that "[a]s watchdogs for civil society's rights and interests, environmental activists and pressure groups represent the most informed and hence appropriate group to represent stakeholders on ER [Environmental Reporting] issues."¹⁰⁹ This implies that accounting for environmental information serves a possible indirect form of regulatory or enforcement purposes. In other words, if a polluting company is to be compelled to clean up its mess, there might be a need for information on its specific environmental commitments. As shall be shown below, this has transpired in South Africa.¹¹⁰

¹⁰⁶ UNFCCC 2015 <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>. See specifically article 2(1)(a) of the *Paris Agreement* which states that there is a global need to respond to climate change by "[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change."

¹⁰⁷ Mitchell and Quinn 2005 *Meditari: Research Journal of the School of Accounting Sciences* 18.

¹⁰⁸ See discussion under section 2.4.1.2 above.

¹⁰⁹ Mitchell and Quinn 2005 *Meditari: Research Journal of the School of Accounting Sciences* 19.

¹¹⁰ See discussion below under section 4.4.3 on the *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance* case.

3.2.2 Materiality

The question then is what information could organisations divulge? Such question turns on the issue of materiality, which has to do with the degree to which an organisation prioritises certain information.¹¹¹ In other words, materiality could involve information related to outsourcing of materials for example. For some, “[m]ateriality refers to addressing those issues of greatest probability of impact to the business first and foremost, with less attention given to those issues of limited impact.”¹¹² What this suggests is that sectors could determine which issues are material to an activity. For example, there are industries which run in environmentally sensitive spaces, and

such industries are typically distinguished by the extent of pollution resulting from their operations from the predominant use or extraction of natural resources, creation of waste, or the manufacturing of environmentally harsh products. The characteristics associated with these industries increase the market’s tolerance of bad environmental news but decrease the tolerance of non-disclosure (Li et al., 1997). *In other words, stakeholders recognize the environmental trade-offs embodied in these firms, but remain particularly sensitive to actions that suggest firms are attempting to withhold information.*¹¹³

The upshot of this statement is that to such kind of organisation (polluting one for example), environmental information is material to its activities, and to disclose such information either willingly or when invited to do so could merit legal action.¹¹⁴ This could be, for example, the case when one seeks information from any organisation in line with section 11 of the *Promotion of Access to Information Act*,¹¹⁵ which provides for access to (environmental information), or section 31P of NEMA, which compels anyone to produce any documents requested by an Environmental Management Inspector (EMI).¹¹⁶

¹¹¹ Smirnow *Do voluntary disclosure standards work? Evidence from the GRI in the extractive sector* 8. Materiality is obviously a complex issue which also involves financial models. It is only mentioned here in relation to ESG and important considerations which companies can be expected to consider.

¹¹² Worthington-Smith *An inductive analysis of ESG practices and assumptions of materiality amongst South African asset managers* 4; IIRC *International Intergrated Reporting Framework* 34.

¹¹³ Peters and Romi 2013 *Journal of Accounting and Public Policy* 219; own emphasis. Also see Maroun "Consequences of reporting" 92, where it is noted that “‘accountability’ is a function of an organization’s actions or performance and the communication of results to stakeholders.”

¹¹⁴ Consequently, “environmentally sensitive industries are also subject to greater magnitudes of implicit environmental liabilities and concomitant reductions in market valuation”, Peters and Romi 2013 *Journal of Accounting and Public Policy* 219.

¹¹⁵ *Promotion of Access to Information Act* 2 of 2000.

¹¹⁶ See broader discussion under chapter 4 below.

3.3 Emerging global reporting frameworks

There are many global reporting frameworks in existence. This section covers only a few for illustrative purposes only.

3.3.1 International Integrated Reporting Council: Integrated Reporting for Investors

Spearheaded by the International Integrated Reporting Council (IIRC), Integrated Reporting (IR) is reporting which combines financial, environmental and social information.¹¹⁷ It is defined by the IIRC as “a concise communication about how an organization’s strategy, governance, performance and prospects, in the context of its external environment, lead to the creation, preservation or erosion of value over the short, medium and long term.”¹¹⁸ Elsewhere, the IIRC also mentions that an IR “benefits all stakeholders interested in an organization’s ability to create value over time, including employees, customers, suppliers, business partners, local communities, legislators, regulators and policy-makers.” In so far as what might count as material, IIRC articulates that there are various capitals which organisations depend on. These include intellectual; financial; human; manufacture; social and relational as well as natural capitals.¹¹⁹ The latter in turn is depicted as involving,

all renewable and non-renewable environmental resources and processes that provide goods or services that support the past, current, or future prosperity of an organization. It includes air, water, land, minerals, and forests, biodiversity, and eco-system health.¹²⁰

Therefore, a crucial point to accentuate is (given this extensive understanding of natural capital and how it is crucial to, for example, the energy sector), that IR is understood to be beneficial to shareholders and investors, because it permits them to assess the long term sustainability of a company.¹²¹ In other words, while there is no specific legal obligation, one could legitimately presume that if incorrect information is reported, then liability might ensue. In fact, the IIRC demands that those responsible for governing the organisation must incorporate a statement alluding to the integrity of the report.¹²²

¹¹⁷ Corvino, Doni and Bianchi Martini 2020 *Sustainability* 1.

¹¹⁸ IIRC *International Intergrated Reporting Framework* 10.

¹¹⁹ Maroun "Consequences of reporting" 92.

¹²⁰ IIRC *International Intergrated Reporting Framework* 19.

¹²¹ Iredele and Moloi 2020 *Journal of Economic and Financial Sciences* 1.

¹²² “An integrated report should include a statement from those charged with governance that includes: ... [a]n acknowledgement of their responsibility to ensure the integrity of the integrated report ...

Lastly, in a guideline that likely serves issues related to continuity as well as a holistic approach to reporting, the IIRC demands that an organisation should consider its past and use that to inform the future. It specifically states as follows:

An analysis by the organization of its activities in the past-to-present period can provide useful information to assess the plausibility of what has been reported concerning the present-to-future period. The explanation of the past-to-present period can also be useful in analyzing current capabilities and the quality of management.¹²³

Ultimately, while voluntary, it seems that once an organisation has embraced the guidelines for IR, the information reported (whether accurate or inaccurate/comprehensive or defective), could be used against the organisation.

3.3.2 Global Reporting Initiative

The Global Reporting Initiative (GRI) has disclosure guidelines which are voluntary, and can be measured by ESG scores across the ESG dimensions.¹²⁴ For example, there is a requirement that reports which are prepared through the GRI must clearly indicate how the organisation has addressed stakeholder's environmental concerns.¹²⁵ This can be linked with guidelines requiring the organisation to report on, for example, changes to their supply chain operations if such changes could have an impact on the environment.¹²⁶ It is however not always easy to authenticate such changes (unless they are properly document and reported), with the result that a potentially problematic issue with the GRI is that it could lead to greenwashing, since the "[L]egitimacy theory advocates that, when under threat, firms can adopt voluntary standards symbolically, as opposed to substantively, to enhance their public image."¹²⁷ Unless tied to particular environmental outcomes, disclosures through the GRI could simply signify an organization's environmental commitments.

[t]heir opinion or conclusion about whether, or the extent to which, the integrated report is presented in accordance with the <IR> Framework. ... Where legal or regulatory requirements preclude a statement of responsibility from those charged with governance, this should be clearly stated." IIRC *International Intergrated Reporting Framework* 14.

¹²³ IIRC *International Intergrated Reporting Framework* 27.

¹²⁴ Smirnow *Do voluntary disclosure standards work? Evidence from the GRI in the extractive sector* 9.

¹²⁵ Principle 44 of the Global Reporting Initiative *GR 102: General Disclosures, 2016*.

¹²⁶ Principle 10 of the Global Reporting Initiative *GR 102: General Disclosures, 2016*.

¹²⁷ Smirnow *Do voluntary disclosure standards work? Evidence from the GRI in the extractive sector* 12.

The integrity of the report as well as its commitment to sustainability is projected to stem from the assurance that the leadership of an organisation is committed. The GRI thus necessitates “[a] statement from the most senior decision-maker of the organization (such as CEO, Chair, or equivalent Senior position) about the relevance of sustainability to the organization and its strategy for addressing sustainability.”¹²⁸ It is for this reason that the GRI guidelines are considered the most widely recognized and commonly applied framework for environmental reporting on a global level.¹²⁹ In fact, the GRI has completely separate guidelines which are designed specifically for sustainability reporting. Within such reporting, there is an expectation that the report can be subject to scrutiny, with the consequence that,

the reporting organization shall gather, record, compile, analyze, and report information and processes used in the preparation of the report in a way that they can be subject to examination, and that establishes the quality and materiality of the information.¹³⁰

An essential principle related to this, is that organisations are required to report on “[w]hether and how the organization applies the Precautionary Principle or approach.”¹³¹ This is a critical obligation from which liability could ensue, especially if an organisation misrepresents how, it deployed the precautionary approach. Indeed, as will be realized below, an organisation’s own commitments to ensuring environmental protection could be used against it.¹³²

3.3.3 The Task Force on Climate-Related Financial Disclosures (TCFD), 2017

The fact that accountability can ensue from a failure to report on efforts to address climate change is now resolved. For the energy sector organisations this has huge financial and legal consequences. A product of the Financial Stability Board, the Task Force on Climate-Related Disclosures (TFCD) produced a report in 2017, in which it started the following:

Another important risk is litigation or legal risk. Recent years have seen an increase in climate-related litigation claims being brought before the courts by property owners, municipalities, states, insurers, shareholders, and public interest organizations... Reasons for such litigation include the failure of organizations to mitigate impacts of climate change,

¹²⁸ Principle 14 of the Global Reporting Initiative *GR 102: General Disclosures, 2016*.

¹²⁹ Smirnow *Do voluntary disclosure standards work? Evidence from the GRI in the extractive sector 1*.

¹³⁰ Principle 1.9 of the Global Reporting Initiative *GRI 101: Foundation, 2016*.

¹³¹ Principle 11 of the Global Reporting Initiative *GR 102: General Disclosures, 2016*.

¹³² *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*.

failure to adapt to climate change, and the insufficiency of disclosure around material financial risks. As the value of loss and damage arising from climate change grows, litigation risk is also likely to increase.¹³³

To this end, the TFCF has recommendations related to the need for clean energy; resource efficiency; resilience etc, and how organisations can divulge such information.¹³⁴

The TFCF has specific principles on how climate information could be revealed. There are 7 of these principles, and they include the following:¹³⁵

- Relevant information must be disclosed (link to materiality);
- Specificities must be included in the disclosures;
- Clear, understandable, and balanced disclosures should be done;
- There must be consistency over time in relation to the disclosure;
- The disclosures should be comparable to other company or industry sector disclosure;
- The disclosures must be reliable, objective, and verifiable; and
- The disclosures should be timely.

As with the other voluntary initiatives, the TFCF recommendations are not mandatory, but they could provide the platform through which accountability could be pursued, especially once disclosures or lack thereof, are in issue.

3.4 Mandatory or voluntary environmental disclosures

The cases of global disclosures/reporting standards illustrated above are voluntary. There are various reasons why industries might opt for such voluntary standards. For example, they might do so to pre-empt direct regulation from authorities; they might do so to respond to stakeholders who have become 'green'; and also to reduce monitoring from regulatory authorities.¹³⁶ This might be so because while the traditional command-and-control measures to regulation could be favourable in 'commanding' compliance and

¹³³ TCFD *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures* 5.

¹³⁴ TCFD *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures* 6-7.

¹³⁵ TFCF 2017 <https://www.fsb-tcfd.org/recommendations/>.

¹³⁶ Lyon and Maxwell "Voluntary" approaches to environmental regulation" 10.

ensuring accountability, they tend to be rigid.¹³⁷ Subsequently, some scholars reason for 'regulatory pluralism', wherein multiple regulatory mechanisms are at play:

voluntarism lacks dependability, and therefore is most effective when used in combination with other instruments to overcome this potential weakness. In this regard, voluntarism will be complemented by most forms of command-and-control regulation, particularly where levels of environmental performance "beyond compliance" are desired.

Thus, while voluntarism¹³⁸ serves obvious ends, and could in fact lead to better environmental disclosures, the danger exists that greenwashing might become an issue. In the absence of enforcement, organisations could have no proper incentive to detail and report on their actual environmental footprint. To this end, it would appear that there are two avenues for improving environmental accountability through environmental disclosures. First, specific countries could adopt their own reporting standards and make these mandatory, or even where they are voluntary, their significance could be given mandatory worth once they are accepted.¹³⁹ Outside of this likelihood, laws or specific sector laws could be the apt platform to search for mechanisms where the enforcement of environmental obligations could be sort, or where corporations could be taken to task for the quality of the information they would have disclosed.

What remains substantial, however, is that in sectors like the energy sector, there are requirements for Environmental Management Programmes/Plans (EMP).¹⁴⁰ These could then be significant justificatory basis for the need for organisations to disclose their environmental footprint. Thus, as part of an overall Environmental Management system, an EMP can serve three main roles:

- The minimisation of environmental risks associated with an industry, for example, oil spills;

¹³⁷ Gunningham and Sinclair "Regulatory pluralism: Designing policy mixes for environmental protection" 50.

¹³⁸ It bears repeating that voluntarism "is based on the individual firm undertaking to do the right thing unilaterally, without any basis in coercion," Gunningham and Sinclair "Regulatory pluralism: Designing policy mixes for environmental protection" 54.

¹³⁹ See discussion of the South African Johannesburg Stock Exchange (JSE) listing requirements below.

¹⁴⁰ Bui and De Villiers "Management control systems to support sustainability and integrated reporting" 131; for example, environmental laws and mineral related laws usually require that there be some form of plan on how to manage activities on the environment.

- To address public concerns like environmental degradation, while indicating the duty of care a corporation has to its operating environmental space; and
- To assist with the obtaining of certification for an environmental audit.¹⁴¹

Overall, the best place to command environmental enforcement and improve environmental accountability would be through legislation that is specifically tailored to address environmental issues or aspects of a corporation that has environmental dimensions. To this end, some scholars are of the opinion that regulatory frameworks for the dimensions of ESG (the environmental, social and governance aspects being the dimensions) have a significant bearing on overall accountability.¹⁴² The “E” part of such regulatory frameworks will be canvassed in the next chapter.

3.5 Conclusion

Environmental disclosures can improve environmental accountability. Thus far, it appears that there are no mandatory global frameworks for such disclosures. However, these existing voluntary initiatives signify globally accepted standards/practices. Consequently, this chapter closes with the position that voluntary disclosures are a major development on the part of industries (and they could be the basis upon which accountability could be sought), but that such voluntary disclosures increase the risk of greenwashing and need to be supplemented by more obligatory rules which can be embedded in legislation. This legislative probe is undertaken in the next chapter.

¹⁴¹ Mitchell *Environmental reporting disclosure in South Africa, a comparative study of the expectations of key stakeholder groups* 18.

¹⁴² Singhania and Saini 2021 *Journal of Sustainable Finance & Investment* 3.

4. The South African environmental disclosure legal and policy framework: a viability analysis

“It can be argued that without enforceable and comprehensive environmental accounting and ER [Environmental Reporting] standards, little will be done to regulate the activities of business and industry, as those in a position to regulate such activities (governments and the public) may not be aware of the severity of the impact of particular business/industrial activities.”¹⁴³

4.1 Introduction

The last chapter ended by noting that better environmental accountability could result from regulatory pluralism. While there are other forms of regulation (for example, industry self-regulation), the focus has been on voluntarism, particularly because the rise in ESG has not correlated with binding global legal developments (much in the same way that CSR also did not have such global binding legal developments). This however does not spell disaster for environmental disclosures, as we have seen that there are existing mechanisms which organisations could adopt, yet this should be balanced by some form of mandatory regulatory frameworks. It is therefore not surprising that some are of the view that “[t]he presence of a strong regulatory framework and a legal reporting environment (i.e., King III and IR) ensure that companies seem to be proactive towards ESG issues”.¹⁴⁴ Consequently, this chapter brings the discussion to South Africa through a review of the current (applicable) South African regulatory framework in so far as it relates to environmental disclosures vis-à-vis environmental protection.

For purposes of focussing, the discussion does not deal with aspects like ESG in investment decisions, which could be considered in view of the *Pension Funds Act* which now has guidelines requiring ESG factors to be included in investments.¹⁴⁵ This discussion is exclusively based on the focus established in Chapter 1, that of the energy sector. It should be recalled that South Africa is the largest emitter of greenhouse gases in Africa.¹⁴⁶ This places the energy sector, specifically mining, at the forefront of environmental degradation, and consequently the need for more disclosure within the sector. This

¹⁴³ Mitchell and Quinn 2005 *Meditari: Research Journal of the School of Accounting Sciences* 19.

¹⁴⁴ Corvino, Doni and Bianchi Martini 2020 *Sustainability* 12.

¹⁴⁵ *Amendment of Regulation 28 of the Regulations made under Section 36 of the Pension Funds Act, 1956* GN 183 in GG 34070 of 4 March 2022, page 7. For a broader discussion of this, see Taplin and Killian 2021 *Interdisciplinary Journal of Economics and Business Law*.

¹⁴⁶ Iredele and Moloji 2020 *Journal of Economic and Financial Sciences* 2.

discussion is guided by the following question: is the South African “E” SG disclosure legal framework viable to ensuring environmental accountability?

The discussion considers:

- the King IV and its provisions on environmental disclosures;
- the JSE and its own listing as well as disclosure guidelines; and
- illustrative examples of the legal framework that could be used to strengthen environmental accountability.

4.2 King Code of Governance Principles for South Africa

The King Code is described as creating an advanced form of self-discipline for corporations.¹⁴⁷ The latest is King IV and its aim “is to promote good corporate governance as a driver for ethical and effective leadership”.¹⁴⁸ This document is based on the idea of responsible corporate citizenship, which implies that the corporation gives due regard to the factors around its business.¹⁴⁹ Connected to corporate citizenship is the need to ensure that a corporation’s strategies and business model aligns with sustainable development.¹⁵⁰ Also, the King IV provides the platform for IR, noting that reports must “enable stakeholders to make informed assessments of the organisation's performance, and its short, medium and long-term prospects.”¹⁵¹ This can be related to the *Companies Act*, which requires of its leaders to act within good faith (fiduciary duty).¹⁵² Remarkably, principle 5 of the King IV and section 218 of the *Companies Act* could be used to sue a corporation for loss which could result from false environmental disclosures. Section 218 states that “[a]ny person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.” In other words, if the duty to act in good faith demands a director to disclose material information that is reliable and timely, and it turns out that such information was in fact

¹⁴⁷ Corvino, Doni and Bianchi Martini 2020 *Sustainability* 3.

¹⁴⁸ Corvino, Doni and Bianchi Martini 2020 *Sustainability* 4.

¹⁴⁹ Principle 3 of IoDSA *King IV Report on Corporate Governance*.

¹⁵⁰ Principle 4 of IoDSA *King IV Report on Corporate Governance*.

¹⁵¹ Principle 5 of IoDSA *King IV Report on Corporate Governance*.

¹⁵² Section 76 of the *Companies Act*. A discussion of the fiduciary duties of directors is beyond the scope of this study.

defective, then a concerned stakeholder could hold the director liable if they acted on basis of the disclosed information (even though the disclosure might have been voluntary and not have come from a legal mandate).

The King IV also has a recent supplementary guideline that addresses climate change. For example, there is in existence the *King IV Guidance Paper on Responsibilities of Governing Bodies in Responding to Climate Change*, which was produced in 2021.¹⁵³ One of the principles under this guidance paper requires a corporation to ensure the integrity of its report and climate disclosures: “[t]he Governing Body should ensure that reports issued by the organization enable stakeholders to make informed assessments of the organisation’s performance and its short, medium and long-term prospects.”¹⁵⁴ Besides, corporations are required to abide by applicable climate related laws or even policies: “[t]he Governing Body should govern compliance with applicable laws and adopted, non-binding rules, codes and standards in a way that supports the organization being ethical and a good corporate citizen.”¹⁵⁵ The impetus is therefore clear, that as of 2021, the King IV envisages corporate governance not to be blind to the operating space of a corporation, but that corporations must take vigorous attempts to guarantee that they identify their environment footprint, report on them and also create mechanisms to safeguard that they mitigate such footprint.

4.3 JSE’s role in facilitating environmental disclosures

4.3.1 JSE Listing requirements

The JSE specifically has listing rules for company seeking to list on it. To this end, IR is encouraged for such companies and is applied in line with King IV’s ‘apply and explain’ approach.¹⁵⁶ In so far as the energy sector is concerned, the JSE’s listing requirements clearly note that an organisation involved in mineral resources is required to disclose in

¹⁵³ IoDSA *King IV Guidance Paper on Responsibilities of Governing Bodies in Responding to Climate Change*.

¹⁵⁴ IoDSA *King IV Guidance Paper on Responsibilities of Governing Bodies in Responding to Climate Change*, para 5.5.

¹⁵⁵ IoDSA *King IV Guidance Paper on Responsibilities of Governing Bodies in Responding to Climate Change*, para 5.7.

¹⁵⁶ JSE *JSE Limited Listings Requirements*, page 448; Iredele and Moloi 2020 *Journal of Economic and Financial Sciences* 2.

its annual report information on its environmental management and performance.¹⁵⁷ Furthermore, there is an obligation that in making reports, there is a need for the extractive organisation to comply with reporting requirements in terms of the *South African Code for Reporting of Mineral Resources and Mineral Reserves*.¹⁵⁸ Disclosure of environmental aspects is considered material to the Code, and can involve a range of information, including the need to:

[i]dentify and discuss any sensitive areas that may affect the project as well as any other environmental factors including I&AP and/or studies that could have a material effect on the likelihood of eventual economic extraction. Discuss possible means of mitigation.¹⁵⁹

This kind of information required here is the kind which could be used to establish if indeed a corporation is living up to its pledge or whether it has defaulted on its environmental obligations. There is thus, a clear-cut link between the listing requirements on the JSE and the need to have mechanisms in place for environmental disclosures.

4.3.2 JSE Sustainability and Climate Disclosure Guidance

2022 has been a revealing year in the South African ESG landscape. The JSE has, for the first time, come up with a *Sustainability Disclosure Guidance*,¹⁶⁰ as well as a *Climate Change Disclosure Guidance*.¹⁶¹ These are believed to be the first of many to come, and are in response to global responses for the need for disclosure of environmental information. For the avoidance of doubt, both these documents are tailored along the lines of, among other frameworks, the GRI and TCFD as discussed previously. In other words, as of 2022, the JSE is moving towards ensuring that listed companies follow global disclosure trends. But what examples from these guidance documents are significant? The *Sustainability Disclosure Guidance* notes that,

at the heart of this Disclosure Guidance is the belief, firstly, that sustainability issues are material to enterprise value creation and increasingly provide valuable opportunities for commercial innovation, and secondly, that if we are to transition to a more sustainable economy – as outlined for example in the UN Sustainable Development Goals (SDGs) and

¹⁵⁷ JSE *JSE Limited Listings Requirements*, para 12.13; Kitsikopoulos, Schwaibold and Taylor 2018 *Business Strategy and the Environment* 1295.

¹⁵⁸ SAMREC *The South African Code for the Reporting of Exploration Results, Mineral Resources and Mineral Reserves*.

¹⁵⁹ SAMREC *The South African Code for the Reporting of Exploration Results, Mineral Resources and Mineral Reserves*, page 59.

¹⁶⁰ JSE *Leading the way for a better tomorrow: JSE Sustainability Disclosure Guidance*.

¹⁶¹ JSE *Leading the way for a better tomorrow: JSE Climate Disclosure Guidance*.

the Glasgow Climate Pact – then organisations need to deepen their understanding and disclosure of their most significant social, economic, and environmental impacts.¹⁶²

The disclosure of environmental impacts is thus a substantial factor, yet a possibly problematic proviso within the guidance is the fact “[t]his Guidance avoids being prescriptive, and leaves responsibility for decision-making with the reporting organisation, particularly as regards the identification of material sustainability issues”.¹⁶³ Simultaneously, materiality is defined in ways that make environmental issues central to, for example, energy organisations. To this end, materiality relates to the following:

For the purposes of corporate reporting and disclosure, information is material if omitting, misstating, or obscuring that information could reasonably be expected to influence decisions that the targeted report-user makes about the specific reporting organisation, based on that reported information.¹⁶⁴

Eventually, if corporations have to choose what they consider to be material, the risk exists that information which is likely to cast the corporation in bad light might not be divulged. The quality of the disclosures must thus be of a certain kind, or they must align with a number of principles: relevant, accurate, comparable, verifiable, reliable understandable etc.¹⁶⁵ To this end, a number of “E” areas require specific forms of disclosures. For example, in relation to climate change, a corporation in the extractive sector would be required to disclose its GHG emissions:

Absolute gross greenhouse gas emissions expressed as metric tonnes of CO₂ equivalent and measured in accordance with the Greenhouse Gas Protocol for: Scope 1, Scope 2, and Scope 3 emissions. Scope 1 and Scope 2 emissions should be disclosed separately for (i) the consolidated accounting group (the parent and its subsidiaries) and (ii) associates, joint ventures, unconsolidated subsidiaries, or affiliates not included in (i).¹⁶⁶

Furthermore, in relation to water usage, the Guidance requires disclosures related to “[t]otal water withdrawal from all areas with water stress, with a breakdown by following sources if applicable: surface water, groundwater, seawater, produced water, third-party water.”¹⁶⁷ From a biodiversity perspective, the corporation would need to,

¹⁶² JSE *Leading the way for a better tomorrow: JSE Sustainability Disclosure Guidance* 5.

¹⁶³ JSE *Leading the way for a better tomorrow: JSE Sustainability Disclosure Guidance* 5.

¹⁶⁴ JSE *Leading the way for a better tomorrow: JSE Sustainability Disclosure Guidance* 20.

¹⁶⁵ JSE *Leading the way for a better tomorrow: JSE Sustainability Disclosure Guidance* 26; JSE *Leading the way for a better tomorrow: JSE Climate Disclosure Guidance* 19.

¹⁶⁶ JSE *Leading the way for a better tomorrow: JSE Sustainability Disclosure Guidance* 50; JSE *Leading the way for a better tomorrow: JSE Climate Disclosure Guidance* 17.

¹⁶⁷ JSE *Leading the way for a better tomorrow: JSE Sustainability Disclosure Guidance* 52.

[d]escribe and report results of any processes aimed at identifying, assessing and/or managing the biodiversity footprint of the organisation, including for example: size and location of all habitat areas protected or restored, and whether the success of the restoration measure was or is approved by independent external professionals; and status of each area based on its condition at the close of the reporting period, noting the standards and methodologies used.

Lastly, from a pollution and waste perspective, a corporation would be required to, for example, disclose information related to the “[t]otal weight of waste generated (non-recycled), with a breakdown by composition of waste, noting % directed to disposal (including landfill and incineration), and % diverted from disposal (e.g., reuse, recycling, recovery).” These are all considerable developments and requirements which are consistent with global trends and also in keeping with sustainability thinking. Arguably then, misleading, unreliable, or false information related to these kind of disclosures can and should warrant legal action because it could be an extreme form of greenwashing.

4.4 Illustrative examples of applicable legal framework for strengthening environmental accountability

So far, it should be clear that for accountability to fully ensure (in so far as environmental disclosures are concerned), there must be some form of enabling environment for it, or there must be legal conditions which necessitate disclosure or at least compliance. In the South African context, there are various processes that would require what are broadly termed as ‘approvals’, composed or licenses, permits, registrations or authorisations. The energy sector, for example, cannot operate without at least one or a combination of these.¹⁶⁸

The starting point would have to be NEMA and its environmental management principles, which could be applicable to corporations as juristic entities. For example, NEMA provides for the shielding of poor people from environmental injustices;¹⁶⁹ that development takes a risk averse and pollution minimisation approach;¹⁷⁰ access to environmental information;¹⁷¹ etc. In general terms, these should be the overarching governing

¹⁶⁸ Strydom *The use and impact of criminal sanctions for environmental law transgressions in industrial facilities in South Africa: determining the boundaries of overcriminalization* 8.

¹⁶⁹ Section 2(4)(c) of NEMA.

¹⁷⁰ Sections 2(4)(a)(vii) and (viii) of NEMA.

¹⁷¹ Section 2(4)(k) of NEMA.

principles for how corporations should operate, and also how the points canvassed below should be conceptualised.

4.4.1 Duty of care

The duty of care necessitates everyone who pollutes the environment to take reasonable measures to curtail the pollution or damage. To this end, there must always be a responsible person who might be a manager of a facility or even an owner of land where environmentally polluting activities are happening. Various laws provide for this duty of care. Examples include section 28 of the NEMA; section 19 of the *Water Act* and section 16 of the *Waste Act*. The message then is this: if there is reasonable suspicion that a corporation has caused environmental harm, any concerned stakeholder has the capacity (*locus standi* to be exact), through section 32 of the NEMA,¹⁷² to challenge such corporation to divulge how it has sought to take reasonable measures to ward off or minimise the damage in line with the duty of care. This, in some ways, is an implicit, yet legally permissible avenue to enforcing environmental accountability through environmental disclosures. If all these fails, NEMA allows for private prosecution, which any stakeholder could pursue.¹⁷³

4.4.2 Compliance notices

Related to the duty of care, and assuming perhaps that there is indeed an activity that is incessantly polluting the environment from corporate activities, a report to the authority could lead to a compliance notice or directive being issued against the corporation. Without specificities as to what kind of environmental harm a corporation has occasioned, or what reasonable measures they have taken, it could be difficult to issue such compliance notice or directive. Accurate environmental disclosure here is therefore key, with the result that misrepresentation can necessitate further legal consequences. In so far as compliance notices are concerned, guidance can be found in, for example, section

¹⁷² Section 32 provides as follows: 32(1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources- (a) in that person's or group of person's own interest; (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings; (c) in the interest of or on behalf of a group or class of persons whose interests are affected; (d) in the public interest; and (e) in the interest of protecting the environment."

¹⁷³ Section 33 of the NEMA.

31L of the NEMA, section 19(4) of the *Water Act*. Failure to adhere to the notices or directives in line with these provisions is an offence.¹⁷⁴

4.4.3 Failure to provide information or the provision of misleading information

Perhaps the more impactful provisions and directly relatable provision to the discussion at hand are provisions detailing access to information as well as requests for environmental information. Specific provisions demonstrate this point. Consider the *National Water Act* which states as follows:

No person may –

(b) fail to provide access to any books, accounts, documents, or assets when required to do so under this Act; ...

(f) fail or refuse to give data or information, or give false or misleading data or information when required to give information under this Act;

(2) Any person who contravenes any provision of subsection (1) is guilty of an offence and liable, on the first conviction, to a fine or imprisonment for a period not exceeding five years, or to both a fine and such imprisonment and, in the case of a second or subsequent conviction, to a fine or imprisonment for a period not exceeding ten years or to both a fine and such imprisonment.¹⁷⁵

Furthermore, in terms of the *Waste Act*, a person commits an offence if they either “(k) knowingly supplies false or misleading information in any application” under the Act or if such a person “(l) knowingly supplies false or misleading information to a waste management officer or environmental management inspector for the purpose of this Act”.¹⁷⁶ In light of these provisions, it therefore bears repeating that the disclosure of material environmental information enhances environmental accountability. The courts have formally verified this. For example, in the case of *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*,¹⁷⁷ the Supreme Court of Appeal confirmed that the disclosure of environmental information facilitates the fulfilment of environmental rights. Arcelormittal had developed an Environmental Master Plan, which contained its strategies and commitments to, among other objectives, remediate environmental damage in relation to waste, water usage and air quality.¹⁷⁸ This

¹⁷⁴ For example, section 31(N)(1) of the NEMA.

¹⁷⁵ Section 151 of the *National Water Act*.

¹⁷⁶ Section 67(1) of the *National Waste Act*. Sections 51(f) and (g) of the Air Quality Act provide for similarly worded provisions.

¹⁷⁷ *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*.

¹⁷⁸ *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*, para 22-28.

information had at some point been disclosed publicly and had also been used by the corporation to obtain licenses.¹⁷⁹ By the time the case was instituted, Arcelormittal had developed new plans, but had not released these. Concerned about this, the Vaal Environmental Justice Alliance sought this information.

In its decision, the Supreme Court of Appeal found that even historical environmental information is important because of its capacity to show how a corporation has approached environmental protection:

AM's acknowledged history of operational impact on the environment is important. This is not an aspect touched on by the high court. AM's industrial activities, impacting as they do on the environment, including on air quality and water resources, has an effect on persons and communities in the immediate vicinity and is ultimately of importance to the country as a whole. Translated, this means that the public is affected, and that AM's activities and the effects thereof are matters of public importance and interest. Put differently, the nature and effect of AM's activities are crucially important. AM is a major, if not *the* major, polluter in the areas in which it conducts operations.¹⁸⁰

Furthermore, the court found that the corporation has made public commitments to engage with stakeholders that included civil society and communities, and that the corporation, because of this public declaration, could now not renege.¹⁸¹ This is a crucial point, as it gives impetus to one of the main points this discussion has been making: that although voluntary disclosure commitments are not formally binding, information presented thereon is crucial and could be used to enforce environmental accountability.

Finally, the court hammered on the point that for corporations that operate in South Africa, they must now be aware of and mindful of the fact that there can be no secrecy in relation to information essential for environmental protection:

The disclosure of the information will enable either a verification of AM's stance or might cause us to have even greater concerns about environmental degradation. That it will be a valuable controlling tool can afford of no doubt. Insofar as the information related to the Vaal Disposal site is concerned, the public is entitled to be assuaged as to the safety of that site. ... Corporations operating within our borders, whether local or international, must be

¹⁷⁹ *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*, para 32.

¹⁸⁰ *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*, para 52.

¹⁸¹ *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*, para 53. The court went further, noting that the information was necessary for enforcing rights and for litigation: "The submissions referred to in the immediately preceding paragraphs miss the point. Information sought by parties contemplating litigation to vindicate asserted rights is conventionally sought in order for it to be useful in that litigation, or, to put it in constitutional and statutory terms, the information is 'required for the exercise or protection of any rights'." *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*, para 59.

*left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced. ...It is not to AM's [Arcelormittal] credit, espousing, as it does, a commitment to environmental sensitivity and asserting a collaborative approach to ensuring that environmental degradation is limited, to then assume an obstructive and contrived approach to a request for information which can only assist that collaborative effort.*¹⁸²

A purposeful reading of this suggests that apart from the voluntary disclosure of necessary information for ensuring environmental accountability, concerned stakeholders have a right to request further information. In other words, assuming that a corporation has published an ESG report, or even an IR, stakeholders that have further questions or in doubt as to the authenticity and veracity of disclosed information, can take it up further and request information. This is exactly what the judgment in *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance* validates.

4.4.4 Energy sector and the Full Disclosure series by the Centre for Environmental Rights

The discussion thus far has demonstrated that disclosures matter, and that they can contribute to environmental accountability, even for corporations in the energy sector. For such corporations (especially those involved in the extractive sector for example), there is a requirement for various approvals and permits. In the majority of cases, before an EIA is approved, for example, the corporation must develop an Environmental Management Programme/Plan EMP.¹⁸³ This EMP is the road map for what the corporation perceives as potential environmental (holistic, including biodiversity, water, air quality issues etc.,) consequences, and the planned avenues through which these consequences could be mitigated.¹⁸⁴ The corollary of making commitments to addressing specific environmental issues must be logically the disclosures of how such issues are consistently addressed. Yet the evidence seems to suggest a worrying trend of malfeasance.

The Centre for Environmental Rights (CER), the pre-eminent environmental Non-Profit Organisation in South Africa, runs a Full Disclosure programme wherein they,

assesses the public disclosures of listed South African companies with significant environmental and climate impacts. The reports analyse the extent to which these

¹⁸² *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*, para 81-83. Own emphasis.

¹⁸³ See section 24N of the *National Environmental Management Act*. An EMP is however required at the discretion of the responsible authority.

¹⁸⁴ Section 24(N)(2) of the *National Environmental Management Act*.

companies accurately reflect their environmental compliance records, and their environmental impacts and liabilities, in their reports to shareholders.¹⁸⁵

That there is an organisation which dedicates time and resources to these kind of investigations is testament to the level of interest society should have regarding corporate environmental disclosures. The findings of these reports are alarming. For the purposes of painting the picture, a few quotes from some of their reports will be replicated below. For an analysis that was undertaken between 2008 and 2014 in relation to corporate environmental compliance, the CER concluded as follows:

Our findings are that many companies which have regularly been hailed as shining examples for their approach to managing environmental, social and governance factors have in fact committed serious breaches of environmental laws during the assessment period. In many cases, the information provided by these companies to their shareholders about their environmental impacts and non-compliances is either misleading, or so minimal as to make it impossible to verify claimed commitments to sound environmental management.

Significant conclusions drawn from the findings of Full Disclosure include the following:

1. Most assessed companies are not accurately disclosing the extent of their non-compliance with environmental laws to their shareholders.
2. Some assessed companies are actively misrepresenting their levels of compliance with environmental laws to their shareholders.
3. The manner in which listed South African companies are rated as good targets for “socially responsible investment” is wholly inadequate.
4. Investors, in particular South Africa’s large institutional investors, are failing to recognise red flags in company reports and are not asking nearly enough, or the right, questions about the environmental compliance of the companies that they invest in.¹⁸⁶

In a 2018 report about mine rehabilitation, the CER further discovered that:

Neither the law, nor the accounting standards governing company disclosures, ensure the necessary transparency and accountability about financial provision for environmental rehabilitation. The information disclosed by mining companies, about the costs of rehabilitation of the environmental damage that they cause, and about the money that they are obliged to set aside to fix it, is inconsistent, unclear, in some cases unreliable, and not comparable between companies. It is therefore impossible for shareholders or taxpayers to hold companies or regulators to account.¹⁸⁷

This is all happening in a legal system that has an Environmental Management Inspectorate which is composed of Environmental Management Inspectors (EMIs) who are responsible for monitoring environmental compliance.¹⁸⁸ These EMIs have authority

¹⁸⁵ <https://fulldisclosure.cer.org.za>.

¹⁸⁶ Centre for Environmental Rights *Full Disclosure: The Truth about Corporate Environmental Compliance in South Africa 2*.

¹⁸⁷ Centre for Environmental Rights *Full Disclosure: The Truth about Mining Rehabilitation in South Africa 2*.

¹⁸⁸ Section 31B of the *National Environmental Management Act*.

that extends to various areas of environmental law, including water resources,¹⁸⁹ air regulation¹⁹⁰ and waste management.¹⁹¹ It would appear then, that the role of stakeholders, as has been consistently argued in the broader discussion, will remain crucial in enforcing environmental accountability.

4.5 Conclusion

Environmental disclosures within the South African legal and policy regulatory landscape involve efforts by the JSE and the King's Code as well as binding legal requirements within the environmental space. While criticism could be levelled at the extent to which this framework is functional, it gives the impression that there are at least some mechanisms which would safeguard that corporations disclose environmental information and that stakeholders could use such to enforce accountability. How these mechanisms could be put to good use is perhaps where efforts need to be boosted.

¹⁸⁹ Section 124 of the *National Water Act* empowers the Minister to appoint any person to handle inspections of the use of water under a water authorisation license.

¹⁹⁰ Section 43(2) of the *National Environmental Management: Air Quality Act 39 of 2004* obliges the holders of provisional atmospheric emission licences and atmospheric emission licences to comply with all lawful requirements issued by an EMI.

¹⁹¹ Section 66(1) of the *National Environmental Management: Waste Act* empowers an EMI to request any person to submit a waste impact report if there is suspicion that there has been a violation of any provision of the Act.

5. Findings, recommendations, and conclusion

Globally, there is recognition that financial information alone is not adequate to support a holistic assessment of a company's risk profile or its commitment to sustainable long-term growth. It is now time for South African investors to start taking seriously the impact that industry in this country has on our biodiversity, water resources, air quality and protected areas, and on our ability to reduce global warming and mitigate the impacts of climate change. Comprehensive and detailed disclosure on compliance with environmental laws is a prerequisite for assessing this impact.¹⁹²

5.1 Summary of findings

5.1.1 A brief theoretical overview of ESG

To ground the study and set the context for the discussion, Chapter 2 was guided by the following question:

What are the essential justifications for the rise in ESG and does it have practical value?

First, the chapter learned that corporations are significant role-players who have an identifiable environmental footprint. Such footprint establishes the context for the requirement to address environmental harm. Secondly, accepting that the ability to cause harm to the environment has attendant consequences, the discussion exhibited that although CSR was a development through which corporations could go out of their way to address environmental and social concerns, it had limited reach and did not clearly address specific stakeholder concerns, like environmental concerns. Thirdly, ESG emerged out of the need for corporations to have play a bigger role in society through corporate citizenship. Such corporate citizenship is associated with three main theories: stakeholder theory, legitimacy theory and the accountability theory. All these theories are pitched towards ensuring corporations assume their role of, for example, paying for pollution because that would be responsible corporate citizenship. ESG related data was therefore considered to indeed be currency because it can be used for investing purposes, or for enforcing environmental accountability. The chapter concluded by noting that not all industries are the same, and for industries like the energy sector in South Africa, the "E" in ESG is crucial, owing to how the sector has a direct impact on the environment. In the broader scheme and scope of the chapter, ESG does have practical value.

¹⁹² Centre for Environmental Rights 2016 <https://fulldisclosure.cer.org.za/2016/>.

5.1.2 Environmental disclosures as a mechanism for strengthening accountability

Mindful of the fact that there is no closed list on how accountability could be sought, Chapter 3 was steered by the following specific question:

Why are environmental disclosures important and are voluntary disclosures frameworks effective in strengthening environmental accountability?

First, the discussion found that at times, there is a continued license to operate when corporations account through environmental disclosures. Secondly, the content of environmental disclosures has to be material to the activities of the corporation. In other words, water use, and ambient air quality aspects would be material to a coal mining corporation. Objectivity should be the defining factor here. Thirdly, owing to the necessity for disclosures, as well as the global environmental crisis (climate change for sure), the chapter observed that there are some global initiatives that provide guidelines on how corporations could disclose environmental information. These include the IIRC and its associated IR requirements or the TCFD with its climate related financial disclosures. Lastly, while the discussion established that the initiatives are voluntary, it made an assertion that falsities or misrepresentations that could come from disclosures associated with the initiatives could be used to force compliance with environmental laws. Consequently, if strengthening environmental accountability is the end goal, then such voluntary initiatives should be supplemented by other environmental laws which have a binding character, complete with liability mechanisms.

5.1.3 The South African "E"SG disclosure legal and policy framework: a viability analysis

Assuming that voluntary disclosures are a significant development on the part of industries (and can be the basis upon which accountability is sought), but that such voluntary disclosures increase the risk of greenwashing, and need to be supplemented by more mandatory rules which can be found within legislation, the Fourth Chapter was guided by the following question:

Is the South African "E" SG disclosure legal and policy framework viable to ensuring environmental accountability?

The discussion discovered some interesting developments which potentially indicate that South Africa has a nascent and developing balanced approach to requiring environmental disclosures for the purposes of strengthening environmental accountability. To start with, the King IV recognises ideas of corporate citizenship and in fact requires corporations to align their governance with sustainable development thinking. To this end, in 2021, a supplementary guideline titled *King IV Guidance Paper on Responsibilities of Governing Bodies in Responding to Climate Change* was produced. The document necessitates corporations to disclose material climate related information which can be useful to stakeholders. Secondly, the JSE has listing requirements which mandate corporations to adopt IR, while also requiring energy sector corporations to, for example, align their environment related disclosure information to the *South African Code for Reporting of Mineral Resources and Mineral Reserves*. Even more impressive, as of June 2022, the JSE published the *Sustainability Disclosure Guidance* as well as the *Climate Change Disclosure Guidance*, all of which are aligned with international standards. The crucial point to note is that the JSE requires these of corporations that are listed on it. Both these documents have elaborate criteria on how to, for example, report on and disclose greenhouse gas emissions, pollution, water use and biodiversity impacts. While it is way too early to in fact measure the worth of these frameworks, their existence potentially signals paradigm shift of sorts, one which could see environmental disclosures becoming central to IR, while creating the context for strengthening environmental accountability.

Lastly, in keeping with the idea that both voluntary initiatives as well as more binding frameworks are the central mix to ensuring effective environmental accountability, the chapter concluded with a brief overview of legal mechanisms that could be used to force disclosures in general as well as to enforce accountability. These included the duty of care, compliance notices as well as consequences for failure to disclose information or for the disclosure of false information. Ultimately, through *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*, the discussion revealed that sometimes voluntarily disclosed information and commitments can be the basis of legal action in seeking accountability. Considering the CER's Full Disclosure reports which show routine failures to disclose useful and valid information, this is a welcome development and if used more, could ensure that corporations do not opt for secrecy and

that they ensure that the information they disclose is factual and true to the environmental commitments and responsibilities they have.

5.2 Recommendations

While there are no silver-bullet kind of recommendations for fluid scenarios like environmental disclosures, a few aspects became clear from the discussion above, accordingly, the following might be useful going forward:

- In the short-term, and in order to augment the processes of environmental disclosures, a viable option might be for industry self-regulation to take centre-stage, wherein a specific industry adopts environmental disclosure codes and makes them mandatory within the sector. For example, the energy sector could specifically have its own sector-specific Environmental Disclosure Guidelines.
- Efforts could be made to clearly indicate within sectors which information is material to the activities of a corporation, such that there is a somewhat objective determination of what environmental related disclosures require reporting for use by stakeholders. Within an industry perspective, there might be a need for penalties if material information is not disclosed or when it is misrepresented. It remains critical that the section 218 of the *Companies Act*, for example, can allow someone to claim for damages if they suffer material loss as a result of activities of a corporation's directors, for example.
- As what ensued in the *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*, civil society is enjoined to be vigilant and resourceful enough to take corporations to task for either the failure to disclose material information or for the disclosure of insufficient environmental information. Along with this, the several existing mechanisms like those found in NEMA, the *Water Act*, and the *Waste Act* could be put to good use, since anyone could ask for relevant environmental information and many categories of people can enforce NEMA provisions in light of section 11 of the *Promotion of Access to Information Act*. Only then could environmental accountability be fully bolstered.

5.3 Conclusion

The overall research question of this discussion was as follows:

Could the 'E' in environmental social and governance be an adequate response to strengthening environmental accountability?

While there is no direct obligation for business to report on ESG matters, and specifically on environmental matters, one could impute some level of indirect responsibility expected of business. It is only fair and responsible as corporate citizens for corporations to ascribe due regard to the environmental conditions of their operating space. For this reason, and definitively, the argument in this study could be recapitulated as follows: ESG is an emerging and necessary response to ensuring businesses are responsible corporate citizens, which they can become by improving on environmental disclosures. Without information about environmental disclosures, it will be impractical to enforce environmental obligations expected of corporations that are involved in activities that harm the environment. Civil society largely relies on this information, as was the case in the *ArcelorMittal* case, and such information is vital in determining the existence of environmental accountability, in line with, for example, the polluter pays principle.

So, in addressing the question as to how and to what extent the "E" in ESG be an adequate response to strengthening environmental accountability, the discussion has demonstrated to a large extent, that voluntary and mandatory frameworks could be leveraged to guarantee that environmental disclosures facilitate environmental accountability.

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