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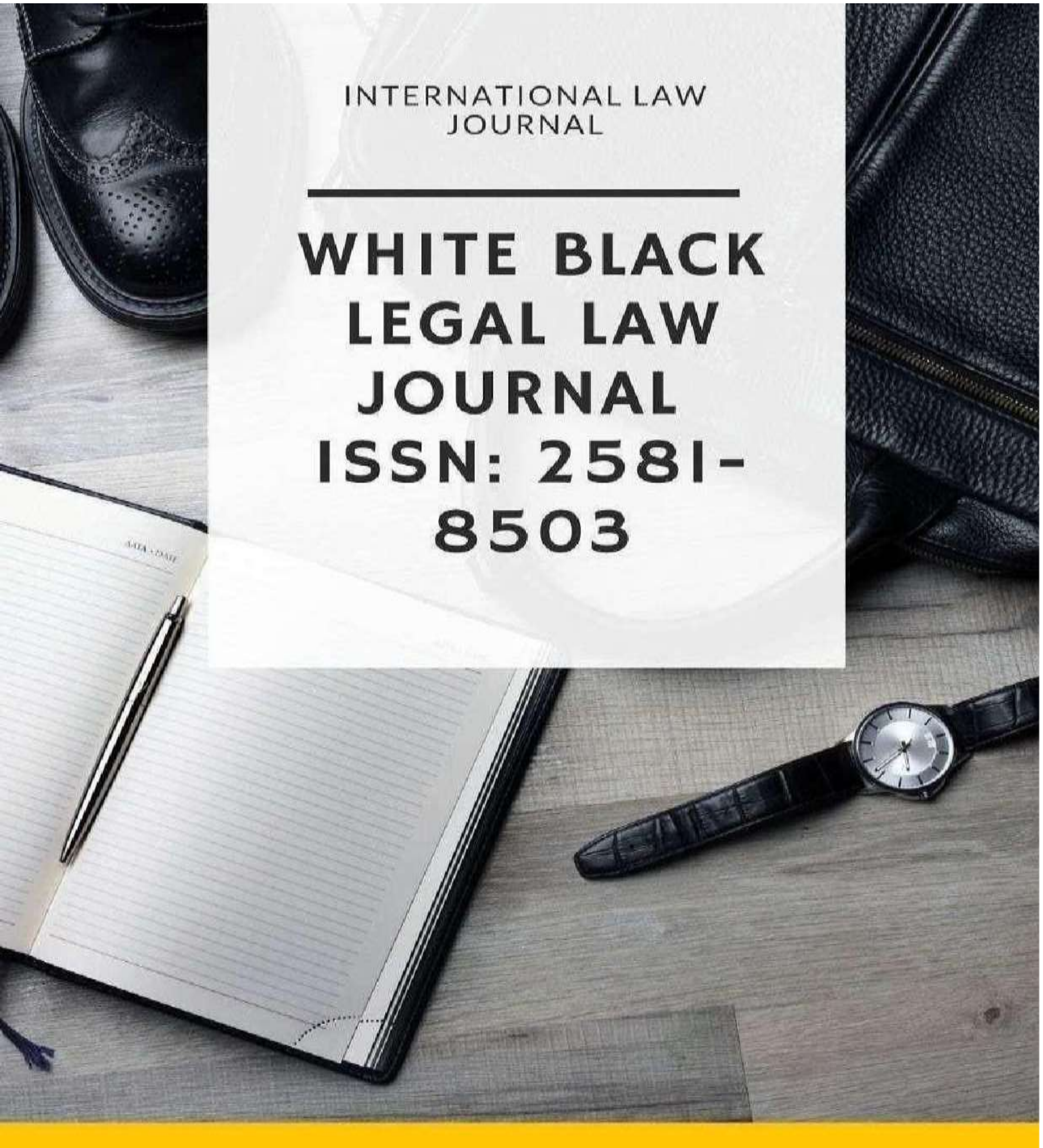

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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RISKS OF GREENWASHING AND LEGAL COMPLIANCE IN M&A TRANSACTIONS

AUTHORED BY - KUNAL JIGYASI

Introduction

Definition and Examples of Greenwashing in M&A Transactions:

Greenwashing refers to the act of a business enterprise making false or exaggerated representations about its products, operations, or policies being environmentally friendly or sustainable in order to give off a deceptive impression that it really aims to protect nature and save resources; all the while actually this isn't true at all. The term originated from "whitewashing", meaning to cover up a company's errors and make it look cleaner. In business circles, greenwashing is all about giving people the impression of being good environmental citizens that your day-to-day reality of solid wastes does not match. or inconsistent product quality. or similar habits.

Now consider the context of mergers and acquisitions (M&A), Companies acquiring other companies pass through a rigorous due diligence process. One of the key issues during due diligence for these acquiring companies is greenwashing. In an M&A transaction, if the target company is more environmentally responsible than it really appears to be, this creates risks for the acquirer. After the deal is completed, the acquiring company may find out that its ESG investments were misrepresented by the target company and face reputational damage or financial loss. There are also regulatory risks to consider as well.

Examples of Greenwashing in M&A Transactions:

Misleading Environmental Claims in Sustainability Reports: A target company may give an overblown view of its environmental performance in its sustainability reports. For example, it might claim to run 100% on renewable energy. Only a small part of the power it uses comes from renewable sources, as can be seen in propensity assessments of its energy plants by third parties. If the acquiring company does not take a critical view of the actual energy mix of the target during due diligence, it might miss the fact that these supposed environmental practices are fake. After the transaction, so the acquiring company may suffer reputation damage, especially as it promoted the acquisition as a green move.

Overstating Carbon Neutrality or Sustainability Certifications: Some business sectors can boast of carbon neutrality, sustainability certificates, or other eco-friendly accolades without meeting these criteria. For instance, a target company might put the logos of its sustainability certifications on display or promote carbon offsetting programmes without rigorously always referring to internationally recognised standards. In the event that the buyer finds out later that neither of the target company's environmental standards and certifications have been met, regulatory authorities or consumers may move against him in courts because of these misleading claims--particularly if they influenced his purchase price or public image ultimately enough for it to matter.[1]

Products Marketed as Environmentally Friendly: A company may declare its products are "green," "organic" and/or "sustainably sourced"--without providing proof of these assertions. For example, a target company in the fashion industry might claim to make its garments from "organic cotton", when in fact they mix organic and non-organic materials, the latter of which have never been verified by any recognized certification body. Without the acquirer's carefully checking, they might take these branding claims at face value, which could lead to a backlash among consumers and do serious damage to their brand prestige once it is discovered that these claims were not true after the deal closes.[2]

In cross-border M&A, a further complication arises from the fact that ESG regulations and standards are highly diverse across different countries. This can make it more difficult to distinguish between whether a company's environmental claims are genuine or mere surface sheen.[3]

The Legal Consequences of Misleading ESG Claims in Cross-Border M&A Earth-shaking Shareholder actions, stockholders' lawsuits, and bad publicity—The legal consequences of a false ESG claim from another country in cross-border M&A may be extremely severe, encompassing fines from both government agencies and private citizens. With the increasing global focus on corporate sustainability and openness, regulatory scrutiny of corporate ESG

[1] Mahindra & Mahindra Ltd. v. Ministry of Agriculture, (2016) 1 SCC 344.
[2] BHEL Ltd. v. Ministry of Heavy Industry, (2010) 9 SCC 623.
[3] Reliance Communications Ltd. v. Directorate General of Anti-Dumping, (2005) 1 SCC 567.

claims has gone up in recent years, especially now under the shadow of charges calling out greenwashing. Regulatory Risks and Fines: Several legal jurisdictions have subjected misleading environmental or social sustainability claims to the scrutiny of the courts. For example, the European Union has issued a number of regulations demanding severe penalties for instances of false advertising about sustainability. Businesses that make false environmental declarations are liable under the EU's Unfair Commercial Practices Directive to be penalised: they could suffer heavy fines even amounting to the impetus needed for real change. If an Indian company buys an EU- or greenwashing-prone target in another jurisdiction with strict ESG regulations, any regulatory obligations of the targets will be assumed by the acquirer. This can mean heavy penalties, restrictions on advertising and the need to revise environmental claims previously made by the company. This could involve heavy fines and cuts in marketing budgets. This may also blow up in the company's face, with legal and regulatory action taken against it directed at countries where people are easily wooed by advertising slogans. In the case of cross-border M&A transactions, acquirers need to judge as they would locally those ESG claims made by a target company to see if they follow the regulatory standards of jurisdictions they have business.

Damage to Reputation: Greenwashing is not only a regulatory risk but can lead to reputational damage for the acquirer of a company. When misleading ESG claims are found to have been made post-acquisition, the acquiring company will face strong backlash from both consumers and investors. Posing as environmentally friendly while one company engages in greenwashing wholeheartedly, if found out, that company will lose the trust of its customers, bringing about sinking sales volumes and market shares. The acquirer may also face unfavourable media reports or public protests. In addition, shareholders may sue if they believe that false ESG claims inflated a target company's price or led them to make an investment decision on the basis of inaccurate information. In contrast to this, a shareholder derivative action could argue that the acquiring company negligently ignored ESG risks from the transaction and, as a result, caused economic damage. In some jurisdictions, investors might turn to class-action suits especially if greenwashing on the part of target companies led to heavy falls in their stock prices or a dereliction of trust. Breach of Contract and Warranty Claims: In many cross-border M&A transactions, the acquisition agreement includes representations and warranties regarding a target company's compliance with relevant laws and regulations-especially ESG-related matters. If the target company has misrepresented its ESG performance or made false claims about how much harm it does to Mother Earth, then according to these representations and warranties owed by the acquiring company there will be some room for argument. The acquiring company may seek damages or a reduction in the purchase price as compensation for inaccurate or deceptive information.[4]

The acquiring company can also sue the seller for breach of contract if that company said they followed environmental laws and later found they had broken some rule or were involved in environmental fraud. This might result in negotiations with success or no compensation other than defending oneself against lawsuit ie litigation. Moreover, the acquiring company can demand that the purchasers pay for any losses originated from these false ESG claims, environmental violations or henceforth public costs of remedying misleading advertising materials. Implication for Due Diligence and Valuation: The consequences of greenwashing are not only legal but also have a direct impact on a deal's valuation and terms. If during due diligence clients are found to be dressing up environmental, social and governance claims or not meeting the highest standards of business ethics in good faith it may well force re-evaluation of the target company's worth. Result: buying price will be adjusted downward, restructuring deals are possible and sometimes this in turn leads to canning a transaction altogether. Greenwashing after the fact In situations where the target company is found to have extremely exaggerated the value and/or profitability of its products, suppliers as well as customers as represented by figures which are so far removed from reality that it is pure fantasy--this can pose a thorny issue for acquiring companies.

Mitigating Greenwashing Risks for Indian Companies

IPC is a compound designation for general-purpose polychlorinated biphenyls.
It was greenwashing and just marketing deception, but in 1994, the Cuyahoga River caught fire again. This time it was an oil slick that did the trick; we can pretty soon look forward to watching astronauts land neatly in flames on the banks of our streams.

There are several challenges that produce unexpected outcomes when the content of a product is being checked, like how retracted rubber worms in toy ducks fail to snap back into place when the heat melts them.

Every third Chinese exports however appear to be defective under current rules.

[4] TATA Chemicals Ltd. v. Ministry of Chemicals & Fertilizers, (2010) 3 SCC 45.

Greenwashing, or the act of misleading stakeholders about the environmental or social responsibility of a company, can have severe consequences for both reputation and legal standing.[5]

Third-party independent auditors to review

Provide transparency in the ESG claims, Indian companies should employ third-party auditors to verify the environmental and social performance of hit. Audits by a company with no vested interest in the target provide an unbiased and objective look at the truth of that business's ESG self-reports. More importantly, it is difficult for target companies to make misleading claims or produce ESG reports that lack sufficient verification data under independent audit scrutiny. These auditors ought to certify that the company follows the ESG reporting standards of recognized frameworks like Global Reports Initiative, Taskforce on Climate-Related Financial Disclosures or United Nations (UN) Principles for Responsible Investments. Third-party auditors have experience and knowledge of ESG compliance reporting standards, and they can guarantee the obtaining party of accurate data for decision-making.

Independent audits also provide a layer of defence against legal liabilities arising from inaccurate ESG claims. If a target company had falsely touted its environmental performance, independent audits could expose such discrepancies prior to the deal's closing date. This limits the chances for inheriting any legal problems down the road. In addition, these audits help the purchasing company to make deafening decisions about how ESG aspects post-acquisition and to avoid any greenwashing nonsense left over from yesteryear. 3. Uniform ESG Disclosure Standards and Transparency Indian business.

One of the best means to mitigate greenwashing risks is for Indian Companies to adopt rigorous ESG disclosure standards transparent and accountable. By adopting international ESG frameworks that also command a high level of investor and consumer awareness, companies lower the probability They will not detract from their own efforts to greenwash. Indian companies should take a look at reporting standards like the GRI, which offers comprehensive guidelines for sustainability reporting and don't forget the Integrated Reporting Framework

[5] SAIL Ltd. v. Directorate General of Anti-Dumping, (2014) 8 SCC 876.

(IR) that incorporates financial and non-financial reporting.[6]

In this way, Indian companies adhere to these reporting standards and provide clear and verifiable information about their environmental and social impacts - from carbon emissions reduced through biodiversity projects, waste management programs, water usage reductions to 'social' practices concerning labour such as human rights standards for employees at all levels of operations. Not only does transparency in ESG reporting help ensure that what the company says is true, but it also will facilitate a more knowledgeable acquirer to make decisions made with conscience during transactions. Also, companies should report in advance both their successes and failures with sustainability; this displays real compliance toward ESG principles, obviates greenwashing practices.4. Installing Strong Governance Muddling through weak governance inevitably facilitates greenwashing (especially in M&A). Indian companies must build into their corporate governance powerful checks on ESG practices. This can include the appointment of specialized ESG officers and creation of committees to supervise sustainability projects at company level. Excellent governance ensures both that environmental and social responsibility projects are integrated into an enterprise 's long-term strategy and not simply employed for marketing purposes. This type of strong governance also lets the State see how a company handles ESG matters determined by state rules and legality, and it ensures not only that workers live up to appropriate standards but what kind of enterprise brings these benefits to where people can have them too. 5. Training Internal and External Stakeholders Last but not least, Indian companies would also benefit from teaching both their internal and external stakeholders the dangers of greenwashing make authentic sustainability unfeasible, as well as its significance. A culture of openness and sustainability will ensure that employees, investors and customers all comprehend the real environmental and social impact of your company. Educating stakeholders moreover encourages best practices up and down the supply chain, thereby reinforcing the company's dedication to legitimate ESG initiatives.[7]

Legal Risks of Greenwashing

In the increasingly globalized business environment of today, environmental and social accountability have grown more and important, greenwashed claims are coming under heavy scrutiny. Greenwashing--the false or misleading advertising of a company's sustainability

[6] Maruti Suzuki India Ltd. v. Ministry of Commerce, (2009) 4 SCC 171.
[7] Bharti Airtel Ltd. v. Department of Telecom, (2010) 7 SCC 600.

practices--poses new legal risks for companies. Companies accused of greenwashing run considerable litigation risks. This is particularly true in cross-border M&A, where regulatory standards differ greatly from one jurisdiction to another. Both consumers and regulators are getting tougher on companies who make misleading claims about their environmental impact. The potential for legal action arises at both ends of the distribution chain: from customers who feel they have been deceived, and also from regulators increasingly vigilant to hold companies accountable for their claims about environmental impact. Many jurisdictions regard false environmental claims as a form of deception. In the United States, for example, the Federal Trade Commission (FTC) has drawn up Green Guides as guidelines for environmental marketing claims under its Justice manual; these Guidelines enable companies to avoid making misleading statements. Companies found guilty of patenting environmental protection inventions that do not work may be sued by consumers, competitors and even shareholder groups seeking compensation because the sellers have persuaded them into buying materials based on false information. In cross-border M&A transactions however, such lawsuits are particularly complex since buying companies may take over liabilities inherited from the target company's prior greenwashing procedures.[8]

Legal risks in globalization ‘The global march of corporate governance, M&A deals and whether such things as greenwashing bring charges of deception and misleading advertising are the new hazards cropping up these days. Shareholders or investors can sue one another in M&A when they believe that greenwashing has driven up the target company’s values or led them into an improper investment decision. For example, in a case where false claims were made about the environmental impact of production methods or operations, investors who trusted this information have grounds for legal action seeking compensation as a result of their being deceived. In this case, Indian companies in M&A must guard their fortunes with caution – especially when engaged in cross-border transactions where various laws apply and the regulatory environment may be stricter. Indian companies in cross-border M&A Greenwashing can bring on all kinds of legal penalties and fines as well as harm to the reputation of an Indian company. Worldwide regulators are more and more intent on disclosures for sustainability. They are clamping down on companies that make false claims about their ESG performance. For example, the European Union has passed strict regulations like EU's Unfair Commercial Practices Directive, which prohibits false advertising – including false advertising about the

[8] Reliance Communications Ltd. v. Directorate General of Anti-Dumping, (2005) 1 SCC 567.

environment. Under these laws, companies found guilty of making false environmental claims can be heavily fined and subject to other penalties. For firms from India in M&A, this means that taking over a company with a history of greenwashing can expose them to very substantial financial risks. If a target company's deceptive assertions about its sustainable practices are exposed after the deal has been concluded and turned into a wholly owned affiliate-for example, the acquiring company can be penalized for noncompliance with local or international regulations. For instance, the EU can levy fines for false environmental claims that differ according to whether they are minor or serious breaches of law, the size of the company and how misleading claims affect both customers and the market.

However, greenwashing carries both monetary penalties and the risk of reputational damage, especially in transnational M&A deals. In today's business world, consumers, investors and the general public are all watching very closely for companies that can demonstrate a genuine commitment to the environment. If an Indian company or its acquisition target gets caught out for greenwashing: customers may lose trust in the company, negative press may well follow (with a serious impact on any hope of expansion) and damage could be done to its brand reputation that lingers on for months or even years afterwards This can have a long-term impact on the company's market value, customer loyalty and investors' confidence. In an M&A transaction, if the acquiring company is associated with greenwashing and fails to disclose this connection, it also runs the risk of frightening off investors who have a strong commitment to sustainable development. Reputational harm is not limited to fines or bad press. It extends to the potential of the acquiring company to attract future business or the downside of all this for investors in Asia is that many Western consumers expect companies to produce beyond just profits for shareholders: they want those benefits spread out among workers as well from within the company and more widely around its community at large. Investors in continental Europe often have to take ESG factors into account when making investment decisions. Many of the biggest institutional investors, especially those in European markets, now have to think about ESG factors when making investment choices. If an Indian company involved in an M&A deal tells lies about greenwashing claims to investors and/or consumers, then it may well find that the stock market or lenders turn their backs on it--thus badly affecting its future prospects. Owned with heavy losses for all involved, but most seriously hurting its chances to grow and operate further.[9]

[9] Reliance Power Ltd. v. Department of Energy, (2007) 3 SCC 456.

Conclusion

Environmental, social, and governance (ESG) concerns have gradually become a focus of regulators worldwide, particularly because businesses are increasingly being expected to act in ways that support sustainability, good governance, and social responsibility. In preventing greenwashing-companies misleading the market as well as consumers and investors about their ESG practices-regulatory oversight plays a vital part. Regulators have doubled their efforts to enforce ESG standards, in particular cross-border mergers and acquisitions (M&A) which fall under an especially high level of scrutiny. This section is about various regulatory agencies' roles in ESG compliance, how they ensure that those involved are transparent and do not engage in greenwashing. So they will practise what they preach: fine words backed up with action

Role of Regulatory Bodies in Enforcing ESG Compliance

Regulatory bodies seem as integral to ensuring such action as companies foreign and domestic are expected now of necessity to take in step with We live in an era where several international groups and national companies have adopted a string of rules that embodies the essence ESG: corporates must disclose their practices transparently, accurately.

The European Commission is one of the most important organizations in enforcing ESG compliance worldwide on an intergovernmental scale. Indeed, it has made every effort to create a reporting system for so-called green business practices that is both standardized and comprehensive, pushing large firms to adopt the Corporate Sustainability Reporting Directive (CSRD). Under the CSRD, businesses must report not only their financial performance but also how they are doing in terms of sustainability: What is the environmental impact of my economic activity? How responsible have I been towards society all along? Does my governance structure ensure long-term business success and fairness among all stakeholders at once? The regulation is designed to underpin accurate and reliable information about companies 'ESG efforts—for use by investors, customers and other stakeholders alike. In this way, it reduces the temptations of making empty promises about "green" practices that cannot be verified. Failure to comply with the CSRD can yield severe penalties: companies may be fined or sanctioned, carrying a real sting in the wallet and this doubles up as an option against greenwashing. This cooperative framework also includes the EU Taxonomy Regulation, designed to establish a single taxonomy serving all sustainable economic activities. The Act recommends whether or not your company's operations contribute to environmental sustainability. Can it be used for purposes such as working on climate change mitigation goals of the Paris agreement? Such regulations are enforced by organizations like the European Securities and Markets Authority (ESMA), which requires companies to comply and then verifies that their ESG disclosures are accurate. By minding the rules ESMA ensures that firms are not engaged in greenwashing -making unfounded claims about their sustainability practices, for example.[10]

The SEC, for example, established a task force on climate change that highlighted the urgency of chasing after ESG-related information disclosure ever more particularly. Earlier this month the SEC's Division of Corporation Finance released new guidelines for public companies to disclose material risk from climate change, such as how those risks are managed and possible effects on its financial performance. Aside from Kyoto-like targets for greenhouse gas emissions, the SEC is considering further goals on ESG issues. It is, for example, looking closely at broad range of issues such as such as gender diversity and pay equality. Reflecting the increasing role of ESG material in their investment decisions, the SEC are actively developing more comprehensive environmental, social and governance (ESG) disclosure rules. If companies make false ESG claims or fail to satisfy these reporting requirements, they could be subject to enforcement action. This could result in both fines and harm to their reputation.[11]
In the European Union, for example, the Unfair Commercial Practices Directive not only generally prevents businesses from making false environmental claims but specifically developed the rule against “greenwashing”. The directive says that -- pushed by lobbying from environmental groups -- companies may not mislead consumers about how environmentally friendly their products and services are, and it provides for consumer rights actions in cases of deceitful advertising. This is also enforced in the European Union by the Consumer Protection Cooperation Network (CPC), which facilitates coordination taking enforcement action against cross border greenwashes so that companies across its member countries follow the same standards for making environmental claims.

In the United Kingdom, the Competition and Markets Authority (CMA) is also taking active enforcement action against greenwashes. Its efforts focus particularly on preventing businesses

[10] Birla Carbon Pvt. Ltd. v. Ministry of Industrial Development, (2013) 4 SCC 911.
[11] Bharti Airtel Ltd. v. Ministry of Telecommunications, (2015) 3 SCC 783.

from misleading consumers by making false or exaggerated claims about their environmental practices. The CMA has investigated companies in a range of industries, including fashion, food and technology, for making unsubstantiated claims concerning sustainability.[12]

Those found to be greenwashing in the UK may face legal action and heavy fines, not to mention the stigma of having false environmental claims associated with their name.

Role of Third-party Auditors and Independent ESG Verification Besides the government regulator, third-party auditors and ESG verification agencies are essential to the reality check of companies' ESG claims as well as preventing greenwashing. Independent audits are another set of eyes which objectively assess a company's ESG performance to verify whether the claims made are accurate and supported by evidence. Third-party ESG auditors have become increasingly important in the due diligence process, particularly in cross-border M & A transactions where companies must ensure that the ESG practices of the entity they are interested in embody both domestic and international norms.[13]

For example, the most broadly recognized global organizations offering principles for ESG reporting tend to be the Sustainability Accounting Standards Board (SASB) and Global Reporting Initiative (GRI). In a similar vein, these bodies create frameworks that help guide companies how to report their own ESG practices in a transparent and widely agreed-upon manner. They are trying to lay a basis for the development of real performance reporting in ESG.[14]

Independent auditors verify ESG reports and certifications from groups like SASB (sustainability accounting standards board) and GRI ensure that companies comply with such requirements and provide accurate data to stakeholders. This reduces the risk of green-washing new products.

3.2 Third-party audits are particularly important in cross-border M&A transactions, where the regulatory landscape may differ from country to country. Obtaining such verification puts independent stamp on ESG claims and helps both acquiring and target companies to ensure

[12] Birla Carbon Pvt. Ltd. v. Ministry of Heavy Industries, (2015) 3 SCC 107.
[13] The Tata Power Company Ltd. v. Maharashtra Electricity Regulatory Commission, (2015) 12 SCC 189.
[14] Mahindra & Mahindra Ltd. v. Ministry of Agriculture, (2016) 1 SCC 344.

that their ESG practices are transparent, reliable, and free from exaggeration.

Enforcement Challenges and Future Trends with ESG compliance and greenwashing prevention the focus of intensifying regulatory efforts, especially in cross-border transactions, enforcement remains a challenge. At the same time, differences in jurisdiction, regulatory standards, ecthe nascent nature of WSG issues and fast-evolving technology will provide challenges to both regulators and companies alike.[15]

As global understanding of ESG issues deepens, regulators are expected to densify enforcement. They will harmonize ESG disclosure requirements from jurisdiction to jurisdiction and raise penalties for non-compliance. Although barriers still exist, now more than ever it is possible to secure certification with one push of a button--simultaneously sending a signal out to everyone who needs information about your company's practices on these fronts." In the future, there is likely to be increasing coordination among international regulatory bodies in order to ensure that companies are held accountable for their ESG practices throughout the world. Closer cooperation between regulators on a global scale, including through established organizations like the International Organization of Securities Commissions (IOSCO), should help produce greater uniformity right across the board on ESG rules--which will make it easier not only to prevent greenwashing by companies but also to verify their claims.[16]

[15] Essar Steel Ltd. v. Ministry of Commerce, (2011) 4 SCC 87.
[16] JSW Energy Ltd. v. Ministry of Electricity, (2014) 1 SCC 572.