

# IPBA Journal

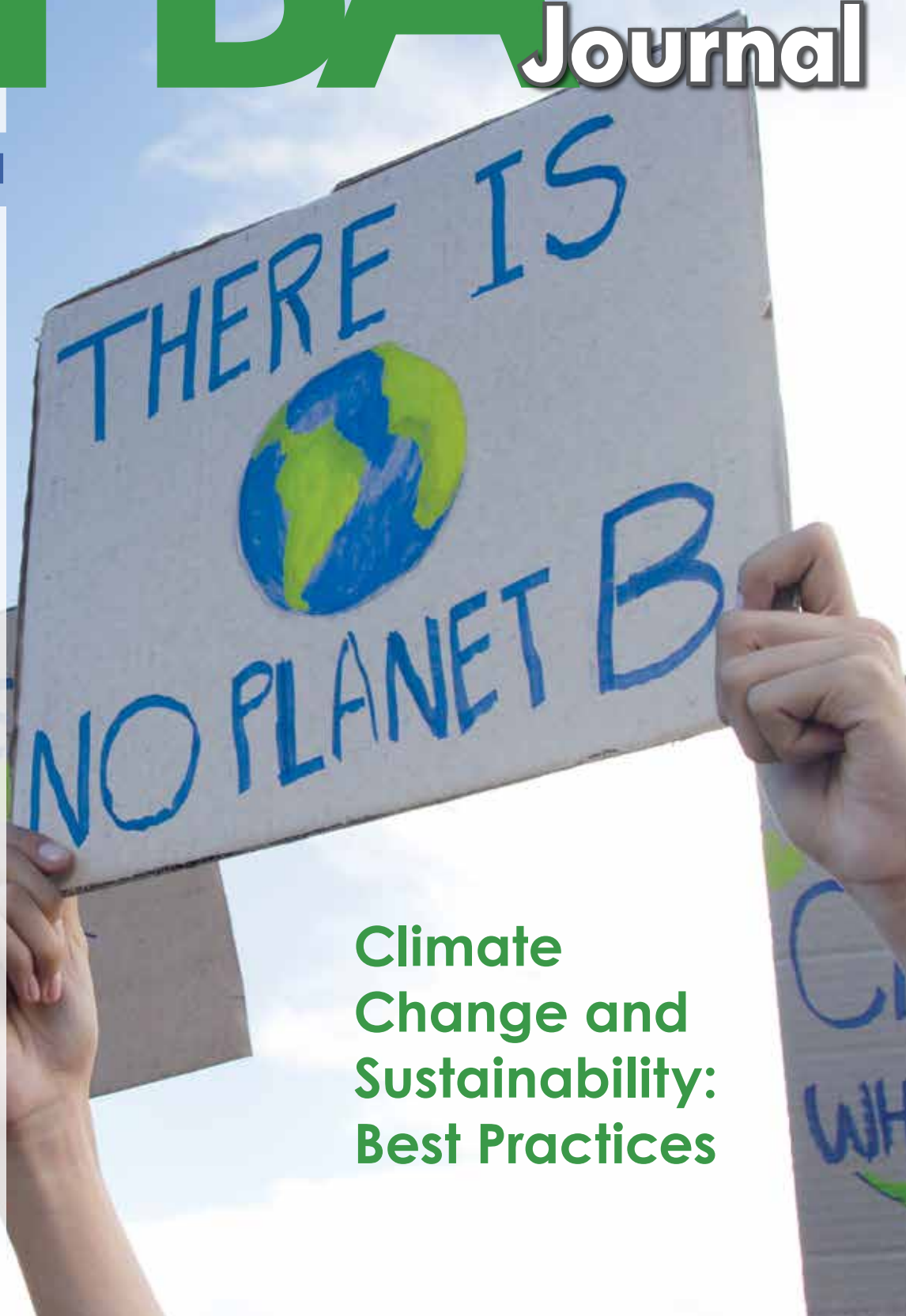
December 2021

No **104**

NEWS & LEGAL UPDATE



INTER-PACIFIC  
BAR ASSOCIATION



**Climate  
Change and  
Sustainability:  
Best Practices**



INTER-PACIFIC  
BAR ASSOCIATION

# IPBA Dubai 2022

March 21-24, 2022 | Dubai, UAE

## One World: Law & the Environment Beyond Covid



*For more information,  
please contact us at  
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# IPBA Journal

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**Editor** Paul Davis

**Editorial** Kiri Cowie  
Julie Yao

**Design** Ester Wensing

#### Advertising Sales

Jennifer Luk

E: jennifer@ninehillsmedia.com

Frank Paul

E: frank@ninehillsmedia.com

T: +852 3796 3060

**ninehills  
media**

#### Ninehills Media Limited

Level 12, Infinitus Plaza,  
199 Des Voeux Road,  
Sheung Wan, Hong Kong  
Tel: +852 3796 3060  
Fax: +852 3020 7442

Email: enquiries@ninehillsmedia.com

Internet: www.ninehillsmedia.com

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## The President's Message

Jack Li  
President



### *Climate Change and Sustainability—Our Shared Destiny*

My Dear Colleagues, Members and Friends, Brothers and Sisters,

I thank IPBA officers for their joint efforts and collaborations in organising all kinds of activities this year, as the clock on my tenure as President begins to count down. I should like to particularly express my heartfelt thanks to the IPBA Secretariat, and officers and members for your endeavours during this pandemic time.

Since the time of industrial civilisation, mankind has created massive material wealth. Yet, it has come at a cost of intensified exploitation of natural resources, which disrupted the balance of the Earth's ecosystem and laid bare the growing tensions in the human–nature relationship. In recent years, climate change, biodiversity loss, worsening desertification and frequent extreme weather events have all posed severe challenges to human survival and development. The past decade was the hottest on record. Dangerous greenhouse gases are at levels not seen in three million years. The global temperature has already risen 1.2 degrees Celsius—racing toward the threshold of catastrophe. Meanwhile, we see ever-rising sea levels, scorching temperatures, devastating tropical cyclones and epic wildfires.

On 12 December 2015, parties to the United Nations Framework Convention on Climate Change ('UNFCCC') reached a landmark agreement to combat climate change and to accelerate and intensify the actions and investments needed for a sustainable low-carbon future. The Paris Agreement builds upon the Convention and brings all nations into a common cause to undertake ambitious efforts to

combat climate change and adapt to its effects, with enhanced support to assist developing countries to do so. The Paris Agreement's central aim is to strengthen the global response to the threat of climate change by keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius. Additionally, the agreement aims to increase the ability of countries to deal with the impacts of climate change and is aimed at making finance flows consistent with a low greenhouse-gas-emissions and climate-resilient pathway.

At the Climate Ambition Summit this year, António Guterres, Secretary-General of the United Nations, urged world leaders to take actions and make sure the next step is in the right direction. He called on the world to build a global coalition for net-zero emissions by mid-century and make this a decade of transformation. He urged all countries to submit new and more ambitious Nationally Determined Contributions for mitigation, adaptation and finance, and to lay out actions and policies for the next 10 years aligned with a 2050 net-zero pathway. Also, he emphasised the importance of concrete and immediate action to keep all commitments. He said we must:

- Put a price on carbon, shifting taxation from income to carbon.
- End subsidies for fossil fuels.
- Ramp up investments in renewable energy and green infrastructure.

- Stop the financing of coal and the building of new coal power plants.
- Phase out coal by 2030 in the wealthiest countries, and by 2040 everywhere else.
- Ensure a just transition for affected people and communities.

As a response, Xi Jinping, President of the People's Republic of China, welcomed all countries' support for the Paris Agreement and their greater contribution to tackling climate change and called on developed countries to scale up support for developing countries in financing, technology and capacity building. Representing China, he announced further commitments for 2030 to lower China's carbon dioxide emissions per unit of GDP by over 65 per cent from the 2005 level, to increase the share of non-fossil fuels in primary energy consumption to around 25 per cent, to increase the forest stock volume by six billion cubic meters from the 2005 level and to bring its total installed capacity of wind and solar power to over 1.2 billion kilowatts.

Looking to the US, President Biden committed to cut greenhouse gas emissions to 50 to 52 per cent below 2005 levels by 2030. France's President Macron also promised to accelerate the implementation of the 2030 commitments with a precise, measurable and verifiable action plan. He said, 'Basically 2030 is the new 2050. It is this plan that the European Union put on the table in December, translated into a European climate law, with the Green Deal to give it substance'.

The Paris Agreement provides a framework for financial, technical and capacity-building support to those countries who need it. The Paris Agreement also reaffirms that developed countries should take the lead in providing financial assistance to countries that are less endowed and more vulnerable, while for the first time also encouraging voluntary contributions by other parties. Climate finance is needed for mitigation because large-scale investments are required to significantly reduce emissions. Climate finance is equally important for adaptation, as significant financial resources are needed to adapt to the adverse effects and reduce the impacts of a changing

climate. We need to fundamentally transform our financial system. The US has joined France and is among the 95 members of the Network for Greening the Financial System ('NGFS'). The One Planet Network made it possible to bring together sovereign funds, asset managers and private equity for all to get involved behind this common methodology. These initiatives are now setting the benchmark and changing global finance.

Technology and capacity building are also crucial within the framework of the Paris Agreement. The Agreement speaks of the vision of fully realising technology development and transfer to both improve resilience to climate change and reduce greenhouse gas emissions. It establishes a technology framework to provide overarching guidance to the well-functioning technology mechanism. The mechanism is accelerating technology development and transfer through its policy and implementation arms. Not all developing countries have sufficient capacities to deal with many of the challenges brought about by climate change.

Guided by the philosophy of common destiny and shared future, the world shall promote greener economic and social development in all respects while pursuing high-quality development so as to take solid steps to implement the targets announced and contribute even more to tackling the global climate challenge.

Earth is our only and shared home. Let us build on past achievements, work together to make steady progress in implementing all rules and regulations of climate changes and launch a new journey for global climate actions.

**Jack Li**  
President



## The Secretary-General's Message

**Yong-Jae Chang**  
Secretary-General



Dear IPBA Members,

Things have changed dramatically and swiftly within our organisation in recent months in order to find a practical and suitable alternative to hold an annual meeting and conference where our members can gather and meet in person in 2022. As most (if not all) of you are now aware, the venue for our next Annual Meeting and Conference has been changed from Tokyo to Dubai by a majority vote of all members (after a very difficult decision made by Miyuki Ishiguro and other Japanese host committee members to postpone its Annual Conference in Tokyo to 2023 instead). Special thanks to all members who have voted on the issue of changing the Annual Meeting and Conference to Dubai in 2022 and to Tokyo in 2023, with appropriate changes in position of the IPBA President-Elect and IPBA Vice-President.

I would also like to thank Richard Briggs and other key members in the UAE for giving us the opportunity to hold an annual conference in Dubai next year. It is greatly appreciated that the host committee in Dubai has officially commenced its preparation on such short notice, together with other relevant officers of the IPBA, and we need all your support for this important event. I truly hope that we will be able to successfully hold our Annual Meeting and Conference in the usual in-person format in Dubai from 21 to 24 March 2022 with the theme of *'One World: Law & the Environment Beyond Covid'* (and post-conference activities planned for 25 March 2022). It is expected that those members attending our annual conference will be able to enjoy the Dubai Expo concurrently.

In the meantime, our Mid-Year Virtual Conference was held on 15 November 2021 with the theme of *'Code Red: Our Responsibility to the Earth'*, and the IPBA Mid-Year Council Meeting was held virtually again from 13 to 14 November 2021. Since the climate crisis is worsening at a

pace faster than predicted, we must all work together to mitigate further damage to, and strive to preserve, the earth. The G-20 and COP26 summits are just a new starting point and it is imperative that the leaders of the world take concrete action to wisely and unequivocally deal with climate change. Many thanks to those members who worked hard to prepare various sessions and I hope many of you were able to participate in our Mid-Year Virtual Conference and also enjoy the virtual social networking sessions.

On 2 November 2021, our President Jack Li and I were invited to participate in the Presidents of Law Associations in Asia ('POLA') Conference which was hosted by the Korean Bar Association. Due to the pandemic situation, the 31st POLA Conference was held virtually, but it was a great occasion for Jack Li to give a speech and highlight the importance of the IPBA to other participating leaders of bar associations and law societies from many Asian jurisdictions.

Thank you for your continued support and strenuous efforts in these unprecedented times. We look forward to seeing you in Dubai in March 2022.

I wish all of you and your family good health and please stay safe until we meet again in person.

**Yong-Jae Chang**  
Secretary-General





## Message to the Reader



Dear Reader,

Welcome to the December issue of the IPBA Journal. As another pandemic-driven year inches to a close, we all have had time to focus on what is important in our lives and rejig what is necessary. Climate change is, perhaps, one of the biggest problems facing the world. It would be fair to say that the legal community has to not only embrace, but rapidly respond, adapt and improvise, to the winds of change in this area. The reality is there is no business-as-usual. Instead, businesses need to acclimatise if the world has to implement the objectives of Paris Agreement of 2015 and UN's 17 Sustainable Development Goals. An increased carbon footprint will have a cascading effect on the SDGs and highlight the existing crisis. There is a growing demand for sustainable investment where the approach focuses on accessing new forms of finance as part of overall business strategy based on environmental sustainability. Savvy investors now incorporate ESG into the central investment proposition. Effectively, the initial screening that focused on investments which incorporate, for instance, SDGs or mitigate climate change are no longer sufficient. Keeping in mind the absolutely dire need to focus on the planet and the recent COP26 discussions, the theme for the last issue of 2021 is the topical subject of 'Climate Change and Sustainability: Best Practices'.

In the last decade, a circular economy has been promoted as a more appropriate economic model to reduce pollutant emissions, reduce wasting resources and curb climate change. Given the quantum of global attention it has garnered, there needs to be a clear roadmap for the world to gravitate towards it. Companies will need align their circular economy initiatives with climate goals, and not treat them as mere discrete initiatives. Additionally, the interplay between innovative technology and circular economy can also be leveraged optimally by both large and

small organizations to create value. New innovative technologies will make the paradigm shift possible and be an enabler on the journey. Currently, the world is accustomed to operate in an environment where disposability rules. Shifting the system will take leadership, collaboration, innovation and commitment and a top-down firm and actionable approach. And the lawyers have to step in to help create and nurture ecosystems for the future.

In the present edition, four authors cover related themes from different jurisdictions. In the first article, 'Environmental, Social and Governance Issues—The Next Frontier for Corporate Due Diligence and Risk Assessment' Matthew Baird examines key issues and developments in ESG in the region and notes how the landscape is changing rapidly as businesses, regulators and stock exchanges aim to enhance business obligations while evaluating ESG impact. He underscores how due diligence is crucial to ensure that investors and companies can identify potential risks and liabilities for their actions. In the second article, 'Climate Change and Sustainability: Best Practices in Vietnam' James Bui describes mitigation policies and elaborates on the sustainability of responsive measures to climate change, notably the need to decarbonize and other related efforts to recycle and reuse. In the third article, 'Understanding the Interrelationship Between Climate Change and Modern Slavery—Suggests New Needs for Business Lawyers' Corey Norton provides a thought-provoking perspective on contributors to climate change, resource depletion and how to address them. He highlights the two-way equation between modern slavery and other environmental harms while explaining new challenges emanating from this relationship and means to address them. The final article is 'Future of Sustainable Development: Could Indian Best Practices

be Better' in which Ajay Bhargava from India discusses best practices for sustainability both in terms of judicial activism and legislative efforts and without compromising the future.

The spotlight in the section 'Up Close and Personal' is on Sara Marchetta, a supremely talented Italian lawyer in China. I am scared to ask how many languages she must speak fluently! In her candid responses, Sara reveals how she was influenced by strong women in her life and (for me) epitomises on how to stay on the path despite the challenges. In addition, there are details about new members between September and November 2021 as well as a section on Members Notes.

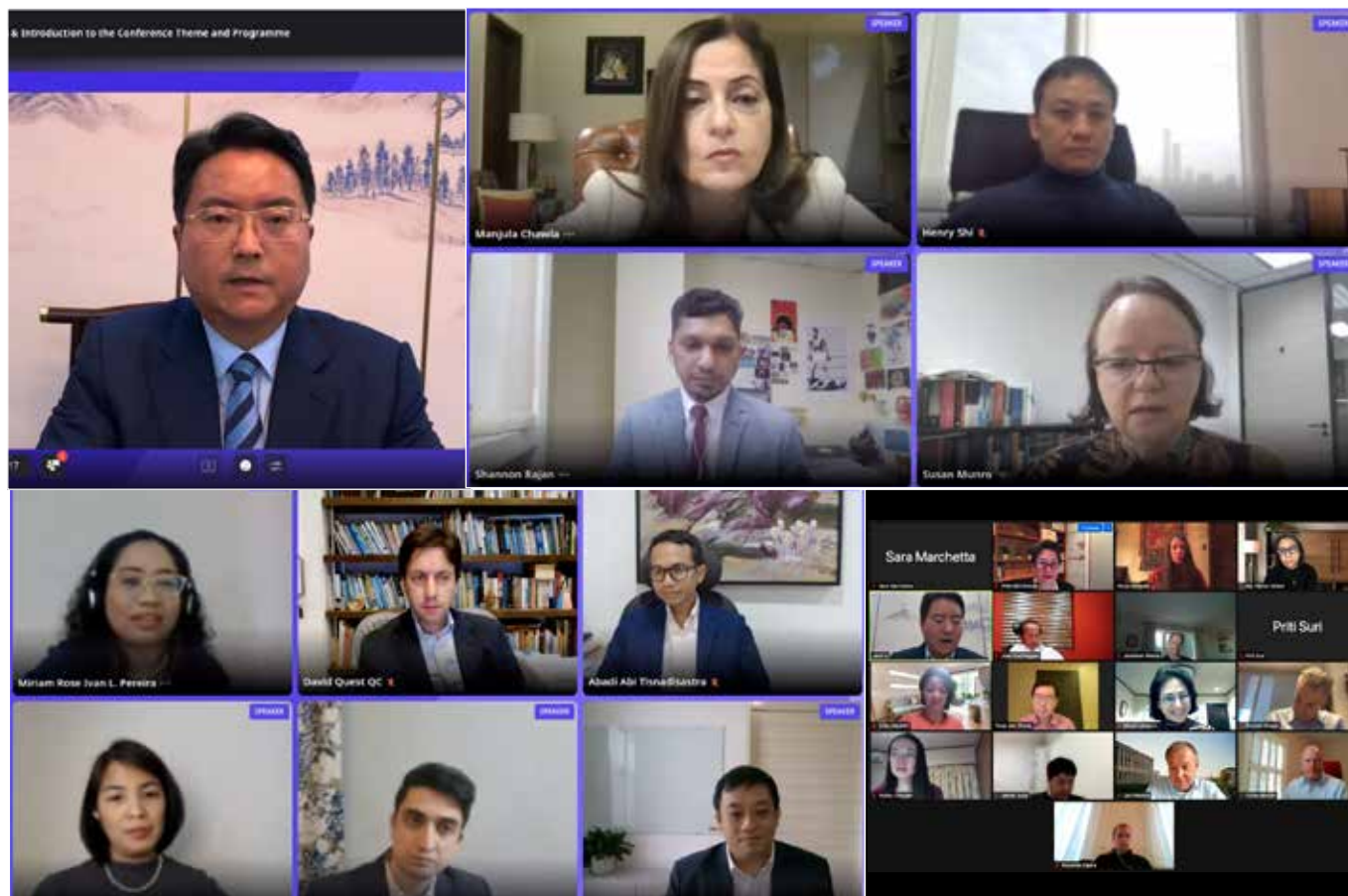
We love to hear about professional milestones in the journal, so keep them coming.

Time races. I cannot quite believe that this is my second-to-last issue as the Chair. My entire term has been virtual. I sincerely hope that I get to see many of you at the next in-person conference in Dubai from 21-24 March 2022 where I handover the reins to my very competent and committed Vice-Chair, James Jung. As always, thanks for the consistent contributions. Both James and I remain grateful.

**Priti Suri**  
Chair – Publications Committee, IPBA

IPBA Upcoming Events		
Event	Location	Date
<b>IPBA Annual Meeting and Conferences</b>		
31st Annual Meeting and Conference	Dubai, UAE	March 21-24, 2022
32nd Annual Meeting and Conference	Tokyo, Japan	1st Quarter 2023
<b>IPBA Mid-Year Council Meeting</b>		
Meetings of the IPBA Council and One-Day Regional Conference	Moscow, Russia	4th Quarter 2022
More details can be found on our web site: <a href="http://www.ipba.org">http://www.ipba.org</a> The above schedule is subject to change.		

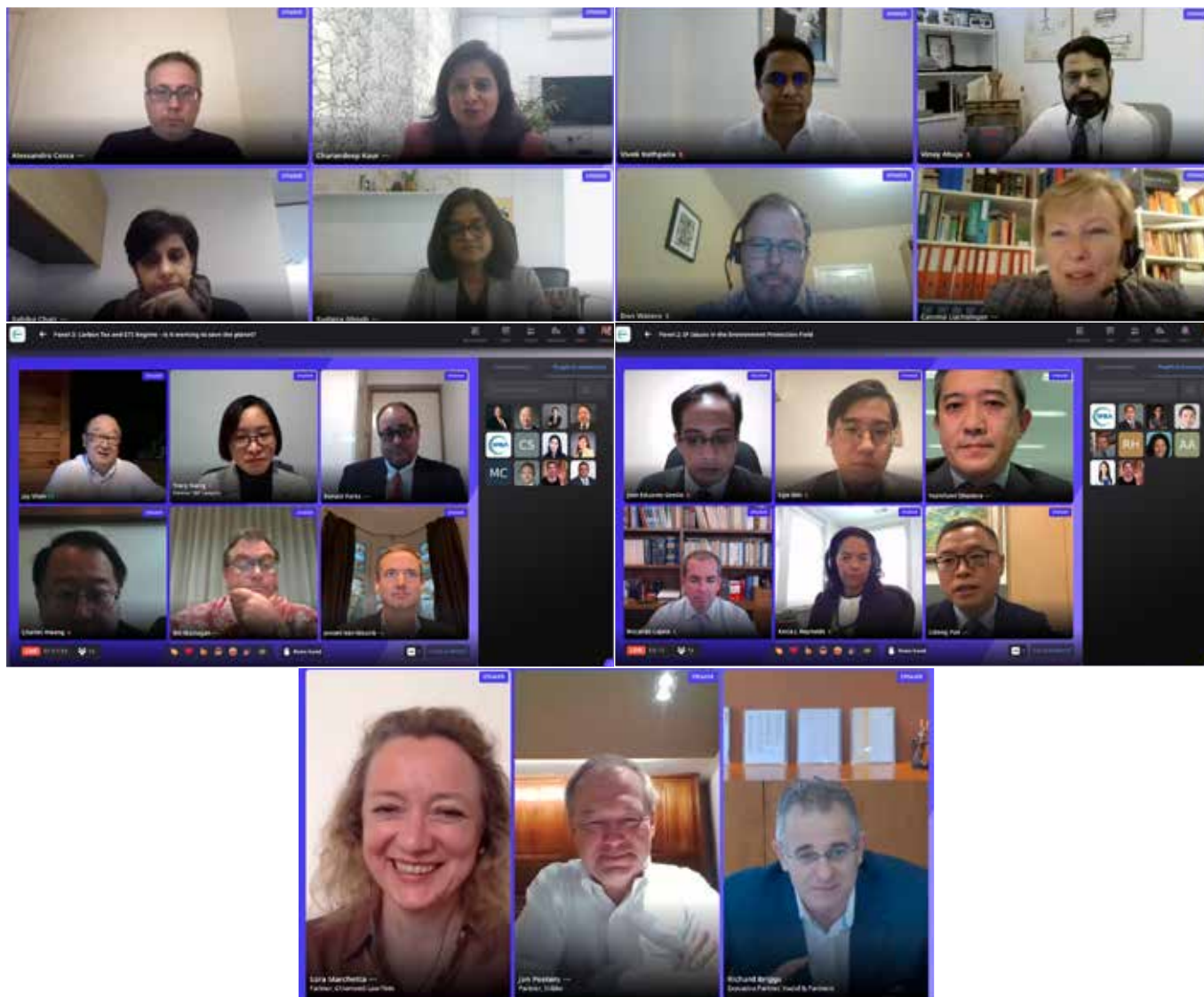
# IPBA 2021 Mid-Year Council Meeting and Virtual Conference



The IPBA Council comprises 15 Officers, 32 Membership Leaders (21 Jurisdictional Council Members, 6 At-Large Council Members and 5 Regional Coordinators), 34 Committee Chairs/Co-Chairs and the Immediate Past President, making a total of 82. The Council meets twice a year to discuss business matters of the Association: just prior to the Annual Meeting and Conference and again around six months later. In normal times, the Council members meet in person the day before the Annual Conference begins and meetings end with a wrap-up by the new Officers right after the AGM on the final day. The Mid-Year event takes place in the third or fourth quarter, with the primary focus being the Council meetings followed by a one-day Regional Conference.

The IPBA 2021 Mid-Year Council Meeting and Virtual Conference took place online from 13 to 15 November. This was the second time that the Mid-Year Council Meeting has been held online due to the pandemic and attendance was high, despite the uncomfortable time frame for several Council members.

The Officers started the weekend of meetings discussing the financial health of the IPBA (we're in good shape!), the transition to onsite events starting with the Annual Meeting and Conference in Dubai 2022, membership issues, the IPBA Journal, committee leadership, the IPBA website, upcoming programs and the continuing project to improve administrative processes at the IPBA



Secretariat that will help to make the Association more efficient and technologically advanced. This meeting was followed by an open discussion with all Council members, who offered various comments on how to make the Association better in the upcoming months as we transition from online events to the onsite Annual Meeting and Conference in Dubai. At the official Council Meeting, members voted on the budget for 2022 and nominations for Council and committee leadership positions that take effect from the end of the AGM in 2022. Those nominees will be announced to the general membership in mid-December for ratification at the AGM.

The Virtual Conference 'Code Red—Our Responsibility to the Earth' was the second IPBA event held on the Airmeeet platform. Over 200 delegates registered to attend a total of nine sessions during three time frames, with the focus on law and the environment. IPBA President Jack Li started the event with opening remarks. Delegates also took part in table-based networking at which they connected with speakers, delegates and friends made through the years at the IPBA. Many thanks go to all the committees that organised the sessions, managed by Program Coordinator and Deputy Jan Peeters and Sara Marchetta, for a successful event. We must also thank our sponsor, LexisNexis, for their support.



# Environmental, Social and Governance Issues— The Next Frontier for Corporate Due Diligence and Risk Assessment



## Introduction—What is ESG?

ESG or environmental, social and governance, is often related to a noun such as issues, risk, impacts, framework, taxonomy, reporting or indicators. At its core, an ESG approach is about governments and enterprises taking into account several key issues that will impact the future risks associated with an activity, process, enterprise or policy. ESG risks are emerging as key risks for the financial sector and in supply chains and are also routinely required as part of the reporting requirements for companies listed on stock exchanges across the world. Globally, assets under management by the United Nations Principles for Responsible Investment ('PRI') signatories have surpassed US\$1 trillion in 2020. In 2019 alone, Green Bonds issued topped US\$251 billion with some estimate of assets under management adhering to sustainable practices, including ESG at US\$45 trillion. There can be no doubt that the appetite for ESG advice will continue to expand in the coming years.

It can be argued that ESG reporting requirements, for example, are a logical extension of the due diligence and risk assessment reports that have been required of listed entities for many years. Likewise, directors, and their advisors, have always been required to address issues and risks that may have a material impact on the activities of a company and its shareholders.

Some of the key ESG risks are set out in Table 1 below.

### ESG Financial Reporting

ESG financial reporting is not a new concept, even in the Asia-Pacific Region, but the importance of ESG indicators and financial disclosure regulations have taken significant steps in recent years.

Over the past few years, the European Union and China, in particular, have increased discussion on the obligations of entities and financial entities in environmental and human rights reporting obligations. The development of the OECD Guidelines for Multinational Enterprises 2011 ('OECD Guidelines') and the related OECD Due Diligence Guidance for Responsible Business Conduct provided a comprehensive overview of the expectations for businesses to contribute to sustainable development. Since then, the EU Commission has announced plans to introduce mandatory rules requiring companies to carry out environmental and human rights due diligence. The EU Non-Financial Reporting Directive ('NFRD'), together with the Sustainable Finance Disclosure Regulation ('SFDR') and the Taxonomy Regulation, are the central components of the sustainability reporting requirements underpinning the EU's sustainable finance strategy. In April 2019, the European Parliament adopted an EU Regulation for Sustainability-related Disclosures in the Financial Services Sector. The regulation entered into force on 29 December 2019 and became applicable as of March 2021.

The European Supervisory Authorities ('ESAs') have also developed draft Regulatory Technical Standards ('RTS') concerning the content, methodologies and presentation of sustainability-related disclosures under the SFDR. Several other rules and frameworks directly

relate to ESG issues, including the EU Regulation on the Establishment of a Framework to Facilitate Sustainable Investment, also known as the 'Taxonomy regulation', and a revision of the Non-Financial Reporting Directive in the European Green Deal and its 2020 Work Programme.

In China, significant developments in ESG reporting were identified in a World Economic Forum White Paper issued in March 2021. This ESG Reporting White Paper highlighted the significant developments in China's ESG reporting driven both by the Government of China's commitment to carbon neutrality by 2060 and its focus on biodiversity issues and post-Covid recovery strategy. The WEF noted that in both Mainland China and Hong Kong investors and regulators (in particular the Hong Kong Stock Exchange ('HKEX') and the Shanghai Stock Exchange) were both driving the push for greater ESG reporting. The role of the HKEX has directly impacted the ESG reporting requirements for listed companies with increasing requirements for reporting since 2012. ESG reports have been required since 2016 for all listed HKEX companies. In Mainland China, the Shanghai Stock Exchange requires some disclosure of environmental information. Both the Shanghai Stock Exchange and the Shenzhen Stock Exchange have issued guidance on voluntary ESG reporting since 2008 and 2006 respectively.

In Europe, other significant developments in ESG due diligence include the French 'Duty of Vigilance Law' 2017, the German Due Diligence in Supply Chain Act 2021, a Dutch Bill on Responsible and Sustainable International Business Conduct 2021 and a Swiss Supply Chain analysis.

In Asia, in August 2020, Japan's Ministry of the Environment published an 'Introductory Guide on

**Table 1: ESG Risks**

Environment	Social	Governance
Climate Risk	Labour Standards	Board Diversity
Greenhouse Gas Emissions	OH&S	Bribery and Corruption
Pollution	Data Privacy	Data Security
Resource Use	Product Safety	Executive Compensation
Biodiversity Impacts	Land Tenure Disputes	Gender and Inclusion
Waste – Hazardous and Toxic	Resettlement	Conflict and Instability
Energy Use	Indigenous People	
	Modern Slavery	



Environmental Due Diligence along the Value Chain – Referring to the OECD Due Diligence Guidance for Responsible Business Conduct'. In Australia, the Australian Prudential Regulatory Authority ('APRA') released in April 2021 a draft guidance to banks, insurers and superannuation trustees on climate-related financial risk management. Despite a denial of climate change by the current Government of Australia, most industries and the financial sector have recognised the risks associated with climate change and biodiversity collapse. New Zealand has also introduced legislation for mandatory climate change-related disclosure.

### Business, Human Rights and the Environment

The growing nexus between the emerging rights to a safe, clean and healthy environment and environmental law has been the subject of significant discussion in several fora. The Paris Agreement on Climate Change, that entered into force on 4 November 2016, acknowledged that:

Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.

### Framework Principles on Human Rights and the Environment

Professor John Knox, the Special Rapporteur on Human Rights and the Environment, was appointed in 2012 by the UN Human Rights Council. He notes that over 90 countries have adopted a constitutional right to a healthy environment and that this has also been included in the African Charter on Human and Peoples' Rights (Art 24, 1981), the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Art 11, 1988), the Arab Charter on Human Rights (Art 38, 2004) and the ASEAN Human Rights Declaration (Art 28, 2012).

Professor Knox also noted that these obligations inter-relate to procedural obligations, such as those contained in Principle 10 of the Rio Declaration. There is also an inter-relationship between the rights

of indigenous peoples and other people who may be displaced or whose livelihoods may be impacted by large-scale or mega-developments. The role of environmental law can be to ensure that these rights are protected. The role of public participation and the recognition of 'free, prior and informed consent' by indigenous groups to development that may have an adverse impact on their lands or community, including the possibility of relocation and resettlement, highlights the importance of human rights in sustainable development.

The principles themselves focus on the obligations of the State to ensure that these human rights obligations, in the context of the environment, are protected and enhanced.

### OECD Guidelines for Multinational Enterprises 2011

The OECD Guidelines for Multinational Enterprises 2011 ('GMNE') provides a series of recommendations for responsible business conduct in a global context. There are 11 chapters in all, dealing with the following matters: Concepts, Principles, Disclosure, Human Rights, Employment and Industrial Relations, Environment, Combating Bribery, Consumer Interests, Science and Technology, Competition, and Taxation.

The GMNE are non-binding recommendations on responsible business conduct ('RBC') directed from governments to businesses. It brings together all thematic areas of business responsibility, including human rights but also labour rights, as well as information disclosure, environment, bribery, consumer interests, science and technology, competition and taxation. The GMNE provides recommendations for enterprises to raise ESG performance and help maximise their contribution to ESG compliance through improved internal management, continuous measurement and better planning. This includes the expectation that businesses carry out due diligence to identify, prevent and mitigate real and potential adverse impacts across their operations and business relationships—and to account for how those impacts are addressed.

Due diligence is an integral part of decision-making and risk management systems and is an ongoing, proactive and reactive process-oriented activity. Environmental and human rights due diligence capture compliance with domestic environmental protection,

human rights obligations and resource management laws, as well as best-practice conduct that can have positive environmental and social benefits. It should be commensurate with the risk and appropriate to a specific enterprise's circumstances and context. Each stage of a supply chain will likely have an impact on these issues. However, due to the wide variance in processes, inputs and outputs, the extent and nature of that impact may vary significantly from one stage to the next.

Due diligence is the process enterprises should carry out to identify, prevent, mitigate and account for how they address actual and potential adverse impacts of their operations, their supply chain and other business relationships, as an integral part of business decision-making and risk management systems, as recommended in the OECD Guidelines for MNEs.

## UN Global Compact

The UN Global Compact was developed as part of the movement to promote and develop sustainable development through a voluntary alignment with businesses. The aim of the UN Global Compact is to mobilise a global movement of sustainable companies and stakeholders to create a more sustainable world. With over 12,000 corporate participants and other stakeholders from over 145 countries, it is the largest voluntary corporate responsibility initiative in the world. To make this happen, the UN Global Compact supports companies to:

- do business responsibly by aligning their strategies and operations with Ten Principles on human rights, labour, environment and anti-corruption; and
- take strategic actions to advance broader societal goals, such as the UN Sustainable Development Goals, with an emphasis on collaboration and innovation.

The UN Global Compact developed a series of Ten Principles and is compliant with the United Nations Guiding Principles on Business and Human Rights. It requires clear commitments from businesses in areas of Human Rights, Labour, the Environment and Anti-Corruption. As is suggested in this article, these are all issues that should be incorporated by lawyers and law firms in their compliance with the UN Guiding Principles on Business and Human Rights ('UNGP').

## Ten Principles of the Global Compact

### Sources of the Global Compact

The Ten Principles of the United Nations Global Compact are derived from the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.

### Human Rights

- *Principle 1:* businesses should support and respect the protection of internationally proclaimed human rights; and
- *Principle 2:* make sure that they are not complicit in human rights abuses.

### Labour

- *Principle 3:* businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- *Principle 4:* the elimination of all forms of forced and compulsory labour;
- *Principle 5:* the effective abolition of child labour; and
- *Principle 6:* the elimination of discrimination in respect of employment and occupation.

### Environment

- *Principle 7:* businesses should support a precautionary approach to environmental challenges;
- *Principle 8:* undertake initiatives to promote greater environmental responsibility; and
- *Principle 9:* encourage the development and diffusion of environmentally friendly technologies.

### Anti-Corruption

- *Principle 10:* businesses should work against corruption in all its forms, including extortion and bribery.

## UN Guiding Principles on Business and Human Rights

The UNGP provides a series of three interdependent pillars and consists of 31 principles and commentary.



The unique feature of the UNGPs is that they are not limited to State duties to protect human rights.

The UNGPs are a statement on the relationship between business and human rights, recognising that while governments have the primary duty to protect and promote human rights, businesses have a distinct responsibility to respect human rights. It also recognises the importance of access to effective judicial and non-judicial remedies when things go wrong.

The UNGP failure to address environmental concerns and recognise the links between human rights and the environment, as well as the voluntary nature of the obligations for business, makes them less relevant to the modern conception of ESG principles.

The three core pillars are:

- *Pillar 1*: the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication;

- *Pillar 2*: the corporate responsibility to respect human rights, which means to avoid infringing on the human rights of others and addressing adverse human rights impacts with which they are involved; and
- *Pillar 3*: the need for greater access by victims to an effective remedy, judicial and non-judicial.

The UNGPs make it clear that they should not be read as creating new international law obligations or as limiting or undermining any legal obligations a State may have undertaken or been subject to under international law concerning human rights.

The unique feature of the UNGPs is that they are not limited to State duties to protect human rights. They also contain non-binding principles relating to the corporate responsibility to respect human rights. The UNGPs require business enterprises (regardless of size, sector, operational context, ownership or structure) to:

- respect human rights: this means that businesses should avoid infringing upon the human rights of others and should address adverse human rights impacts with which they are involved;
- avoid causing or contributing to adverse human rights impacts through their activities and address such impacts as they occur, and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, services or business relationships; and
- have in place policies and processes appropriate to their size and circumstances.

Although not legally binding, the UNGP has become one authoritative global standard for the human rights responsibilities of enterprises. Also, the principles have been incorporated into legislative instruments, Codes of Professional Practice and by businesses and law firms as part of corporate governance practices. The UNGP applies—as far as the principles reach—to all business sectors. Lack of compliance with the UNGP would also amount to an issue under Chapter IV of the OECD Guidelines for Multinational Enterprises. This could form the basis for a complaint to the OECD National Contact Points.

## UNGP Modified by the Recognition of Environmental Rights

I. State Duty to Protect Human Rights and Environmental Rights	II. Corporate Responsibility to Respect Human Rights and Environmental Rights	III. Need for Greater Access to Remedy and Grievance Redress Mechanisms
<ul style="list-style-type: none"> <li>State duty to <i>protect</i> against business-related human rights and environmental rights abuse.</li> <li>Through laws, policy, regulation, and adjudication.</li> <li>Based on <i>existing legal obligations</i> under <i>both</i> national and international law.</li> <li>Recognising the development of new legal obligations under international law, especially concerning environmental rights.</li> </ul>	<ul style="list-style-type: none"> <li>Business should <i>avoid</i> negative human rights and environmental rights <i>impacts</i> and address those with which they are involved.</li> <li>Recognises that a business may be involved with impacts where:               <ul style="list-style-type: none"> <li><i>it causes or contribute</i> to them; or</li> <li>its operations, products, or services are <i>directly linked to them through a business relationship</i>.</li> </ul> </li> <li>Expects that businesses will:               <ul style="list-style-type: none"> <li>adopt a high-level human rights and environmental rights <i>policy commitment</i>;</li> <li>develop and implement human rights and environmental rights <i>due diligence</i>;</li> <li>have processes in place to <i>remediate</i> harm that business causes or contributes to for environmental harm or human rights violations.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li><i>States</i> should take appropriate steps to provide <i>access to an effective remedy</i> for human rights abuse and threats to environmental rights.</li> <li><i>Businesses</i> should use effective <i>operational-level grievance mechanisms</i>:               <ul style="list-style-type: none"> <li>to identify and address grievances <i>early</i></li> <li>to act as a <i>feedback loop</i>.</li> </ul> </li> <li><i>Businesses</i> should provide for and/or cooperate in <i>legitimate processes to remedy</i> adverse impacts that they identify that they have caused or contributed to.</li> </ul>

### ESG Due Diligence and Risk Assessment

ESG due diligence is a process that businesses should undertake to identify, prevent, mitigate and account for their environmental and social impact and governance issues, and includes:

- identifying and assessing actual and potential adverse ESG impacts of activities and associated relationships on stakeholders;
- integrating ESG findings from impact assessments across internal processes;
- tracking ESG performance to verify whether adverse impacts are being effectively addressed; and

- communicating publicly, including formal reporting, on company responses to actual and potential ESG impacts.

Accurately and systematically assessing the risk of ESG impacts associated with a company's operations, including supply chains, is critical to being able to address impacts and build mitigation mechanisms into ongoing activities. ESG due diligence should take full account of the perspective of the affected stakeholders in assessing risks.

The ultimate aim of due diligence and risk assessment is a recognised international and standardised process with four elements:

- Identify – based on collated data.
- Assess – including measurement and metrics from data.
- Mitigate – derived from measurable criteria.
- Adapt – from existing procedures based on observations from proposed measures.

An ESG risk assessment typically includes:

- Setting the risk context, including the objectives and proposed activities.
- Identification of potential impacts associated with the relevant environmental and social factors.
- Determination of management measures for each of the identified potential impacts. Depending on the phase of the project, these measures are based on existing controls and standard practices or are additional mitigation controls required to lessen the risk to as low as reasonably practicable.
- Assignment of a severity and likelihood factor for each potential impact to determine the risk rating and its significance as low, minor, moderate, major or critical.

The following categorisations can assist in any ESG risk assessment for the issues identified in Table 1 (see page 12).

- **Risks:** Risk is the probability of harm arising from activities or failure to anticipate harm. That harm is either directly related to the project or indirectly for stakeholders.
- **Assess:** Risks are assessed and prioritised based on measurable criteria. The criteria are based on

two elements: likelihood and consequences. The measurement is based on some qualitative and quantitative observations.

- **Mitigate:** The risk assessment priority then determines the type and extent of mitigation. Mitigation activities and steps are identified to reduce the likelihood and consequences of risk. There may be a focus to reduce the impact and recurrence of high-priority risks.
- **Adapt:** Adaptation is the process of continuous assessment of approaches to mitigating risk. It is composed of a standardised process of review, revision and remediation. This is aimed at reducing the impact or probability of occurrence of a risk, but it is unlikely to remove the risk completely. This is called residual risk.
- **Sustainability:** The required mitigation and degree of adaptation that will ensure the viability of the project or enterprise and financial return required for the longevity of a project and its stakeholders.

A risk assessment is usually composed of two metrics: severity and likelihood or frequency. Each can be given a numeric value from 1–5, with increasing severity and likelihood respectively and displayed in a risk matrix as shown in Table 2 below.

The risk level is indicated by a colour code, with the green denoting generally acceptable risks and red denoting generally unacceptable risks. The intermediate orange zone requires careful examination for a particular activity to identify the level of acceptability, where risks are reduced to as low as reasonably practicable following any ESG guidance adopted by an enterprise.

**Table 2: Risk Assessment Matrix**

	Improbable/Rare	Remote/Unlikely	Occasional	Probable/Likely	Almost Certain/ Frequent
Catastrophic	Yellow	Yellow	Red	Red	Red
Critical	Yellow	Yellow	Yellow	Red	Red
Moderate	Teal	Yellow	Yellow	Yellow	Red
Minor	Teal	Teal	Yellow	Yellow	Yellow
Negligible	Teal	Teal	Teal	Yellow	Yellow





Due diligence and ESG are becoming more technical and more crucial to ensure that investors and companies can identify potential risks and liabilities for their actions.

by its subsidiary, Shell Petroleum Development Company of Nigeria Ltd ('SPDC'). Together, these cases indicate that the UK Supreme Court acknowledges the role that enterprises can and should play in recognising and acting upon risks of potential adverse environmental impacts in their subsidiaries and other business relationships, as well as in their operations.

### Further Developments in ESG and Due Diligence

This article seeks to provide an overview of some of the key issues and developments in ESG in the region. What can be observed is that the ESG landscape is changing rapidly. It was only ten years ago that

### Due Diligence and Corporate Liability

the UNGP was seen as providing good practice guidance for companies. The OECD GMNE have become far more relevant in dealing with the practical realities of business operations and these have now been adopted by regulators and stock exchanges to enhance the obligations of a business and their advisors in addressing ESG impacts.

Two recent cases determined in the UK Supreme Court demonstrate the evolving landscape of corporate liability and the implications for enterprises' approaches to designing, implementing and reporting on their policies and procedures and their business relationships. In the case of Vedanta Resources PLC v Lungowe [2019] UKSC 20, Zambian farmers alleged that they suffered harm from pollution and environmental damage caused by a copper mine owned and operated by Konkola Copper Mines PLC ('KCM'). They claimed that both KCM and its holding company, Vedanta Resources PLC, owed them a duty of care to ensure the mine did not cause harm to the environment or communities. The Supreme Court stated that whether a duty of care exists in the context of parent/subsidiary relationships 'depends on the extent to which, and how, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary'. Therefore, the role a parent company plays in setting policies, facilitating policy implementation or reporting on these matters—all of which are key parts of the due diligence process—could lead to a duty of care arising.

The Vedanta decision was affirmed in the case of Okpabi v Royal Dutch Shell [2021] UKSC 3, which involved claims against Royal Dutch Shell over oil spills caused

the UNGP was seen as providing good practice guidance for companies. The OECD GMNE have become far more relevant in dealing with the practical realities of business operations and these have now been adopted by regulators and stock exchanges to enhance the obligations of a business and their advisors in addressing ESG impacts.

Due diligence and ESG are becoming more technical and more crucial to ensure that investors and companies can identify potential risks and liabilities for their actions. This is a growing area of law and advice work that requires skilled and multi-disciplinary practices to be able to provide relevant, timely and practical advice.



### Matthew Baird Director, Asian Research Institute for Environmental Law

Matthew Baird is the Director of the Asian Research Institute for Environmental Law. Since being called to the New South Wales Bar in 1991, he has practiced in environmental and planning law in Australia and Southeast Asia. He is a Fellow of the Environmental Impact Assessment Association of Australia and New Zealand, a Fellow with the Myanmar Centre for Responsible Business, and an Adjunct Lecturer with the College of Law. He provides advice on the implementation of environmental law and ESG law and practice. He has been based in Southeast Asia for the past 12 years.



## The 16 Framework Principles on Human Rights and the Environment

States should ensure a safe, clean, healthy, and sustainable environment in order to respect, protect and fulfil human rights.

States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.

States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment.

States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence.

States should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters.

States should provide for education and public awareness on environmental matters.

States should provide public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request.

To avoid undertaking or authorising actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.

States should provide for and facilitate public participation in decision-making related to the environment and take the views of the public into account in the decision-making process.

States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.

States should establish and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights.

States should ensure the effective enforcement of their environmental standards against public and private actors.

States should cooperate with each other to establish, maintain and enforce effective international legal frameworks in order to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights.

States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.

States should ensure that they comply with their obligations to indigenous peoples and members of traditional communities.

States should respect, protect and fulfil human rights in the actions they take to address environmental challenges and pursue sustainable development.

# Climate Change and Sustainability: Best Practices in Vietnam





## Introduction

In recent years, the concept of 'climate change' has become increasingly accepted and is generally defined as a significant variation of average weather conditions. This change, in combination with natural fluctuations, leads to changes in climate over time. Previously, climate change occurred over a long period of time due to the impact of natural conditions, but in recent times, climate change has occurred more rapidly due to the impact of human activities.

Climate change is one of the biggest challenges facing humanity in the 21st century because it is directly affecting ecosystems, environmental resources and human life. The consequences of this phenomenon have clearly affected the development of all countries, including Vietnam. In this article, the current situation with regards to climate change will be discussed together with mitigation policies and the sustainability of responsive measures to climate change in Vietnam.

## Climate Change is Becoming a Global Challenge

### Global Climate Change

Climate change has always been considered an urgent issue since it impacts the process of sustainable development worldwide. Climate change impacts are becoming the cause of climate security challenges. In fact, extreme weather is considered a challenge to world peace and security as data shows that climate change increases the risk of conflict by 10 to 20 per cent. Further, climate change poses a threat to public health and causes more epidemics.

According to the World Meteorological Organization ('WMO'), human-induced climate change has been affecting many regions all over the world. The Special Report, *Global Warming of 1.5°C*, by the Intergovernmental Panel on Climate Change ('IPCC') shows that climate change will escalate in all regions in the coming decades. Global warming of 1.5°C will lead to increased heat waves, longer warm seasons and shorter cold seasons as well as changes in precipitation causing floods and droughts all over the world. Further, 2020 was one of the three warmest years on record with temperatures as high as in the year 2016, according to data from the WMO. Climate change is expected to continue to evolve unpredictably and its adverse effects will become more serious.

## Climate Change in Vietnam

Vietnam is a Southeast Asian nation with an extensive coastline and a diverse but generally warm climate. Vietnam has a coastline of more than 3,200 km and is an archipelago of islands with diverse ecological characteristics. Most of Vietnam's population is concentrated in lowland areas in the Red River Deltas, Mekong River Deltas and coastal urban areas. These are areas that are heavily affected by climate change.

Vietnam's rapid growth and industrialisation over the past 30 years has helped develop its economy and transform it from one of the poorest countries in the world to a lower middle-income country. However, industrialisation also has many negative impacts on the environment and natural resources. Vietnam is assessed as one of the countries seriously affected by climate change, in which the Mekong Delta is one of the most vulnerable and susceptible regions to rising sea levels.

Over the past two decades, Vietnam has emerged as the fastest-growing per capita greenhouse gas ('GHG') emitter in the world, with an increase of around five per cent per year. Big cities like Hanoi and Ho Chi Minh City with high urbanisation rates and rapidly growing populations are facing serious challenges from environmental pollution and increasing GHG emissions.

In Vietnam, the consequences of climate change have initially been seen through natural hazards, and the impact on the economy, the people and society. When it comes to natural hazards, Vietnam is one of countries most vulnerable to climate-related disasters. The extent of vulnerability to climate change is different between regions depending on the geographical and socio-economic conditions. In the Mekong Delta and the Central region in Vietnam, recurring droughts in 2019 to 2020 had more impact and severity than the saline intrusion drought in 2016. In 2020, water resources in rivers and streams in the Central and Central Highlands regions continued falling by 35 to 70 per cent compared with previous years. In addition, unusual climate phenomena have occurred continuously in many regions, causing landslides and flash floods and great devastation. In particular, the historic floods in 2020 in the North Central and South Central regions profoundly affected, destroyed and delayed the economic development of the Central region of Vietnam.

In addition, Vietnam is one of the world's most vulnerable countries due to rising sea levels. Recent statistics show that, in the past 10 years, 1.7 million people have migrated out of the Mekong Delta, while only 700,000 have moved in. This migration rate is twice that of the national average. Further, this area has subsided by an average of 18cm over the past 25 years. The rate of land subsidence fluctuates between 1.1cm to 2.5cm per year, about 10 times higher than the rate of sea level rise. It is predicted that many locations in the Mekong Delta might be flooded up to 100cm by the mid-21st century due to the impact of climate change in combination with land subsidence and sea level rise.

Big cities in Vietnam, such as Hanoi, Da Nang and Ho Chi Minh City also have faced many challenges from climate change such as flooding, saltwater intrusion, high tides, prolonged heat and severe cold. Ho Chi Minh City and Hanoi are considered important economic, cultural, educational, scientific, technical and technological centres of Vietnam. Therefore, these cities are also important to be considered by the Vietnamese for taking measures to respond to climate change associated with economic development in these localities. Further, it can be seen that these cities and their constituent systems are better able to predict, adapt or recover from the effects of climate change than other regions. In addition, the individuals, communities, organisations, enterprises and ecosystems of these cities can continue existing, adapting and thriving despite pressure and challenges in huge fluctuations (if any) caused by climate change.

Natural disasters are also increasing due to the impacts of climate change, causing the loss of many of the achievements of the country's socio-economic development. As an agricultural country, climate change in Vietnam affects all regions and industries. Hence, agricultural production and rural development will be most affected. Climate change affects food production directly and crop growth processes indirectly due to drought and saltwater intrusion. Climate change shrinks arable land and reduces crop production and productivity, which is predicted to cause a loss of about 0.4 per cent of GDP by 2030. In addition, increased temperatures, drought and lack of irrigation will affect the distribution of crops, reducing crop yields in Vietnam. The most vulnerable sectors are agriculture, fisheries and tourism, while the most severely affected people are those in the mountainous and coastal areas, especially the poor, women, and children.



In general, climate change in Vietnam has continued to intensify at a higher rate in recent years.

Droughts, saltwater intrusion, floods, environmental pollution and lack of drinking water affect human health and the healthcare system by increasing infectious diseases. In the future, there may be more new diseases due to climate change impact in Vietnam. Prolonged hot weather also increases the death rate and increases the number of people hospitalised. According to statistics, when the average temperature increases by 1°C, the hospitalisation rate of children aged 0 to 2 increases by 3.4 per cent and the hospitalisation rate of children aged 3 to 5 increases by 4.6 per cent. For every 1°C temperature increase, the hospitalisation rates among children under 5 years old for respiratory infections increases by 3.8 per cent. Flooding in urban areas in flood-prone rural areas will affect the poorest communities which could lead to poverty and inequality in the future.

In general, climate change in Vietnam has continued to intensify at a higher rate in recent years. In over 30 years of renovation, Vietnam has achieved great results in economic and social development. However, economic growth is high and consistent but not sustainable (in terms of people, ecology, environment, economy and property). While the process of implementing national plans for economic and social development has not been effectively integrated with environmental protection and a climate change response, pollution

levels and environmental degradation continue to increase. The exploitation and use of natural resources is still unreasonable and wasteful. Many resources are being seriously degraded and biodiversity is rapidly declining. The proportion of poor people and inequality is still high. Self-response to natural disasters and adverse impacts of climate change are very limited. These concerns have profoundly affected economic and social life in Vietnam.

### Mitigation Policies and Legislation for Climate Change in Vietnam

The Vietnam government is trying to reduce the impact of economic growth on the environment and effectively adapt to climate change. Vietnam is willing to respond to climate change, which is demonstrated by the range of national policies and concrete GHG mitigation and climate change adaptation measures that were undertaken throughout the past decade.

To overcome the challenges arising from climate change, the Government of Vietnam took part in international commitments on climate change, in particular:

- Signed the United Nations Framework Convention on Climate Change ('UNFCCC') on 11 June 1992 and ratified it in 1994.



- Signed the Kyoto Protocol ('KP') in 1998 and ratified it in 2002.
- Signed the Paris Agreement in 2015 and ratified it in 2016 within the framework of the UNFCCC and as a follow-up to the Kyoto Protocol. (The agreement builds on voluntary contributions to reducing emissions, with particular emphasis on climate change mitigation measures and increased reporting obligations.)
- Set up a National Steering Committee to implement the UNFCCC and KP.
- In 2015, Vietnam ratified the amendment of Doha to the KP to contribute to the establishment of a global legal basis for controlling and reducing GHG emissions.

Besides participating in international commitments, Vietnam also has built a legal framework on climate change in line with Vietnam's international commitments and sustainable development goals. Since 2005, the Vietnam National Assembly has paid more attention to the promulgation of policies and laws on natural disaster prevention and response to climate change. Some of these measures include:

- The Constitution in 2013 included the task of responding to climate change for the first time:

**Article 63**

The State shall adopt environmental protection policies; manage and use natural resources in an efficient and sustainable manner; conserve nature and biodiversity; and take the initiative in preventing and controlling natural disasters and responding to climate change. ...

- Both the Law on Environment Protection 2014 and the new Law on Enterprise 2020 (effective from 1 January 2022) have a separate chapter on responding to climate change in Vietnam.
- The Law on Hydrometeorology 2015 has specific provisions on monitoring the scenarios of climate change.
- The Law on Forestry 2017 specifies rules for forestry operations that forests are managed sustainably

in terms of area and quality to ensure harmony targeting socio-economic development, national security, biodiversity conservation and to enhance the forest canopy and forest service value and preparedness to climate change.

- The Law on Economical and Efficient Use of Energy 2010 sets goals to use energy economically and efficiently as well as protect the environment and reduce GHG emissions.
- The Law on Water Resources 2012 specifies climate change in ensuring measures relating to water sources, preventing droughts and floods in the event of extreme and unusual weather phenomena.
- The Law on Natural Disaster Prevention and Control 2013 (amended in 2020), specifies that:

... natural disaster prevention and control activities must be based on scientific grounds, combining traditional experiences and scientific and technological advances, and structural and non-structural solutions, protecting the environment and ecosystems and adapting to climate change.

- The Law on Construction 2014 (amended in 2020) specifies that the basic principle is to:

... ensure the compliance of work construction investment with master plans and designs, landscape and environmental protection, suitability to natural and social conditions and cultural characteristics of each locality to ensure the stable life of people, combine socio-economic development with national defence and security, disaster preparedness and management, and response to climate change.

In addition to legal documents, Vietnam has also issued many strategies and programs to respond to climate change through each target period. Vietnam promulgated the Resolution No 06/NQ-CP, promulgating an action plan to continue implementing Resolution No. 24-NQ/TW on proactively responding to climate change and many decisions to respond to climate change on a national scale. The Government is also drafting a decree to regulate greenhouse gas emission mitigation and ozone layer protection. The objective of this decree is to



reduce GHG emissions in the fields of energy, agriculture, land use and forestry, waste management and industrial processes in accordance with the conditions of economic development and society in Vietnam and international treaties to which Vietnam is a member.

However, the regulations related to climate change are scattered throughout the many laws and there is no unified legal document on climate change. Although Vietnam has issued a National Strategy and Action Plan response to climate change, many regulations are not based on current resources for implementation. The system of policies and laws has been gradually promulgated, but it has not given due attention to climate change adaptation and GHG emission reduction. Policies on GHG emission reduction are not strong enough and separately regulated in some economic sectors. In addition, the current legal framework has not yet shown the orientation to reduce GHG emissions in potential fields in Vietnam

such as renewable energy, energy conservation, agriculture and forest protection and development. In the meantime, the system of legal documents on responding to climate change has not been adjusted in time to adapt to the constantly changing domestic and international situation of climate change.

In general, the measures against climate change include raising awareness and a sense of responsibility, proactively preventing natural disasters, responding to climate change and strengthening resource management and environmental protection by focusing on perfecting policies and laws and consolidating the state management system in response to climate change, resource management and environmental protection. Responding to climate change needs to be implemented by many policies integrated in many laws and legal documents. In fact, over the past 10 years, the government and its agencies have paid more and more attention to the implementation of policies and laws on climate change. As a result, Vietnam has made much progress in promulgating policies to respond to climate change and policies related to the management of industry and natural resources.

### Enterprises and Climate Change in Vietnam

At present, Vietnam has not developed a legal framework defining the obligations and accompanying legal responsibilities for enterprises that directly affect climate change in Vietnam, but only a legal framework for violations in the field of environmental protection.

According to Decree No 155/2016/ND-CP and Decree No 55/2021/ND-CP on administrative sanctions in the field of environmental protection, individuals and organisations (including foreign individuals and organisations), committing administrative violations in the field of environmental protection in Vietnam will be sanctioned according to current regulations. These cover administrative violations in the field of environmental protection specified in such decrees, such as violations against regulations on environmental protection plans, environmental impact assessment, acts of violation causing environmental pollution; violations against regulations on waste management; violations against regulations on environmental protection committed by production, business and service establishments and industrial parks, export processing zones, high-tech parks, industrial



complexes and concentrations of businesses and service providers; violations against regulations on environmental protection in the fields of import of machinery, equipment, means of transport, materials, fuels, scraps, bio-preparations, import of used seagoing ships for dismantlement, festival and tourism activities, and mining of minerals; violations against regulations on prevention and control of environmental pollution and degradation, and environmental emergencies, acts causing obstruction of state management, inspection and the imposition of penalties for administrative violations; and other acts of violation against regulations on environmental protection. The decrees also stipulate fines corresponding to each act of violation. In addition, regulations on dealing with environmental crimes were also institutionalised in the Criminal Code 2015.

Currently, the Ministry of Natural Resources and Environment ('MONRE') is finalising the draft of a new decree on penalties for administrative violations in the field of environmental protection. The draft decree also supplements administrative violations on the conservation of nature and biodiversity, violations of regulations on protection of natural heritage, natural ecosystem services, mitigation of GHG emissions, protection of the ozone layer and violations of regulations on environmental monitoring. This draft is built on the provisions of Decree No. 155/2016/ND-CP and Decree No. 55/2021/ND-CP to update new regulations of the Law on Environmental Protection 2020, which aim to meet management requirements in the new circumstances in Vietnam.

Another positive sign is that MONRE is also developing a draft of a circular detailing the implementation of a number of articles of the Law on Environmental Protection 2020 in response to climate change. On the basis of the Law on Environmental Protection 2020 (which will take effect from 1 January 2022), the development of the circular aims to concretise a number of aspects of the content of the law and a decree regulating GHG emission reduction and protection of the ozone layer. Regulated entities of this circular are expected to be agencies and organisations involved in climate change mitigation activities in Vietnam, agencies assigned with developing strategies and planning in

the case of assessing environmental impact, agencies and organisations involved in GHG inventory appraisal and GHG emission reduction results and organisations and individuals involved in the recycling, reuse and destruction of ozone-depleting substances and substances causing greenhouse effects that must be under control. Therefore, organisations and individuals that conduct activities related to recycling, reuse and destruction of ozone-depleting substances controlled under the Montreal Protocol need to pay attention to the upcoming legal regulations to comply with regulations in Vietnam.

**Natural resources are still being exploited unsustainably and inefficiently.**

In order to proactively adapt to climate change in Vietnam, enterprises need to actively update information on the current situation and legal regulations and connect with other enterprises to interact and share information and experiences in adapting to climate change and epidemics. This will also contribute to raising compliance consciousness of enterprises, promoting the willingness of enterprises to invest and improve the level of environmental compliance and to safely adapt to epidemic situations, thereby creating a community that is more resilient to natural disasters, climate change and epidemics.

### **Some Drawbacks of the Legislation and Implementation of Mitigation Policies to Climate Change in Vietnam**

In the light of new challenges faced by Vietnam due to the impacts of climate change, sea level rise and more severe natural disasters, Vietnam has to implement investment and economic development policies with the requirement of 'fast, efficient and sustainable development' in the meantime to cope with the negative impacts of climate change. These are considered huge responsibilities, considering the fact that national resources are limited. Investment costs for climate change adaptation and mitigation are tens of billions of dollars (possibly hundreds of billions) per year. This is considered a significant burden, especially due to the impact of the COVID-19 pandemic on socio-economic development.

As mentioned above, the regulations related to climate change are scattered within the many laws and there is no unified legal document on climate change.

Some legal documents on climate change response are not specific and lack many mechanisms to utilise the country's resources effectively. In addition, we realise that Vietnam still does not have specific policies to encourage socialisation and mobilise people's association with the responsibilities and interests of the community in responding to climate change.

Further, the database on climate change is incomplete and lacks a mechanism to share and provide information on climate change on a national scale. Solutions to respond to climate change focus mainly on emission reduction projects with little emphasis on other solutions. In addition, facilities and monitoring equipment are still weak. Forecasting and warning for some types of natural disasters have not met the requirements while the infrastructure for natural disaster prevention and control still has many shortcomings and the capacity to adapt to climate change has not improved significantly. Moreover, activities to reduce GHG emissions are still limited and the capacity to absorb GHG by natural forest ecosystems continues to decline. Natural resources are still being exploited unsustainably and inefficiently.

Therefore, to adapt and mitigate the impacts of climate change in Vietnam, the government needs to develop a low-carbon economy and conduct GHG emission reduction activities simultaneously to effectively respond to climate change and to protect and improve the quality of life. Solutions to respond to climate change must be systematic, synchronous, inter-regional, focused and suitable to current times and international treaties to which Vietnam is a party. Vietnam needs to accelerate the transformation of its economic structure towards a green and sustainable future, increasing recycling and reuse of waste. The legal framework needs to better promote the role of promoting climate change adaptation measures, combined with the participation of enterprises and people. In addition, Vietnam needs to gradually increase the budget for environmental protection in line with the growth rate of the economy and increase the effective use of resources in environmental protection.

## Conclusion

In conclusion, Vietnam is one of the countries most affected by climate change. Therefore, in order to realise the development vision and show common responsibility to the international community, Vietnam needs to quickly improve the above-mentioned drawbacks and

utilise international relationship expansion in addition to restructuring the economy to develop in a more sustainable way and develop environmentally friendly technologies and focus on propagandising and educating people and the enterprise community about environment protection for the purpose of creating a green and sustainable living environment.

## Notes

<sup>1</sup> <https://public.wmo.int/en/media/press-release/wmo-new-climate-report-clarion-call-urgent-action> (accessed 9 November 2021).

<sup>2</sup> [www.ipcc.ch/sr15/](http://www.ipcc.ch/sr15/) (accessed 9 November 2021).

<sup>3</sup> <https://public.wmo.int/en/media/press-release/2020-track-be-one-of-three-warmest-years-record> (accessed 9 November 2021).

<sup>4</sup> <http://baochinhphu.vn/Khoa-hoc-Cong-nghe/Bien-doi-khi-hau-dang-tro-thanh-thach-thuc-an-ninh/426559.vgp> (accessed 9 November 2021).

<sup>5</sup> Vietnam's National Decision on Contribution Technical Report\_MONRE 2020.

<sup>6</sup> [https://tapchiconsan.org.vn/web/guest/media-story/-/asset\\_publisher/V8hhp4dK31Gf/content/thich-ung-voi-bien-doi-khi-hau-va-bao-ve-moi-truong-theo-tinh-than-nghi-quyet-dai-hoi-xiii-cua-dang](https://tapchiconsan.org.vn/web/guest/media-story/-/asset_publisher/V8hhp4dK31Gf/content/thich-ung-voi-bien-doi-khi-hau-va-bao-ve-moi-truong-theo-tinh-than-nghi-quyet-dai-hoi-xiii-cua-dang) (accessed 9 November 2021).

<sup>7</sup> Vietnam's National Decision on Contribution Technical Report\_MONRE 2020.



**Bui Cong Thanh (James Bui)**  
Managing Partner, PLF Law Firm,  
Vietnam

Mr Bui Cong Thanh is the Managing Partner of PLF Law Firm. He is also a member of the Vietnam Business Lawyers Club, Ho Chi Minh City Bar Association and Vietnam Bar Federation. He specialises in real estate and M&A deals related to enterprises operating in various sectors, such as services, retailing, manufacturing, technology and F&B.

# Understanding the Interrelationship Between Climate Change and Modern Slavery: Suggests New Needs for Business Lawyers

As climate change and sustainability are increasingly the focus of a wide variety of stakeholders, experts are making new inroads to understand contributors to climate change and resource depletion and how to address them. To this end, many have begun to identify that modern slavery is a key contributor to climate change and unsustainable sourcing, rather than being only a concurrently occurring crisis. Research is also showing the relationship goes both ways, with climate change and other environmental harms increasing modern slavery. Further awareness of this two-way relationship raises new challenges to avoid legal liability and reputational harm as well as how to predict and mitigate the effects of climate change. Work in this area will require businesses to incorporate and navigate diverse new types of expertise and outside partners. Doing so is critical but also a huge challenge, and one for which lawyering skills will likely be in new demand.





## Introduction

As experts point to deforestation as the greatest cause of CO2 emissions after the burning of fossil fuels and to protecting forests as critical mitigation of climate change,<sup>1</sup> some are increasingly focused on a lesser studied contributor to deforestation as an important new strategy. An expanding body of literature asserts that modern slavery is a main reason deforestation is possible at scale and that the human rights objective of ending modern slavery should also be an environmental one. Modern slavery is also linked as a key driver of natural resource depletion, such as overfishing, and experts argue that eliminating it should be part of a sustainability strategy, too. The literature is also teaching that the relationship between modern slavery and climate change/natural resource depletion goes in both directions, meaning those environmental harms also accelerate modern slavery by making populations more vulnerable to abuse.

As this two-way relationship is understood better, it could have significant implications for businesses seeking to avoid legal liability. It arguably should also be influencing businesses trying to predict and adapt to the effects of climate change. Such efforts will require new business and legal strategies and, consequently, require new types of legal services.

Understanding the influence of modern slavery on the environment could affect legal liability because, as modern slavery is more widely understood as a contributor to climate change and resource exploitation, efforts to combat such abuse could experience enhanced vigour as environmental strategies in addition to human rights strategies. New US laws in this area are already developing rapidly to disrupt businesses benefitting from modern slavery and the impact they have had already could make





them attractive as greater leverage to combat climate change and promote sustainability. Compliance with these laws is difficult given that their requirements continue to be clarified and they compel new coordination among supply chains and incorporation of new types of expertise. New interest in using these laws for environmental objectives would likely increase cases and expand the scope of companies wrestling with these challenges. Lawyers, and perhaps local lawyers in particular, could be a good asset in helping companies reform their supply chains where needed and responsibly navigate an enhanced wave of enforcement under these laws. Counsel will need to be forward thinking, not only regarding the direction of new legal requirements but also to help businesses forge new relationships with environmental and human rights experts needed for compliance.

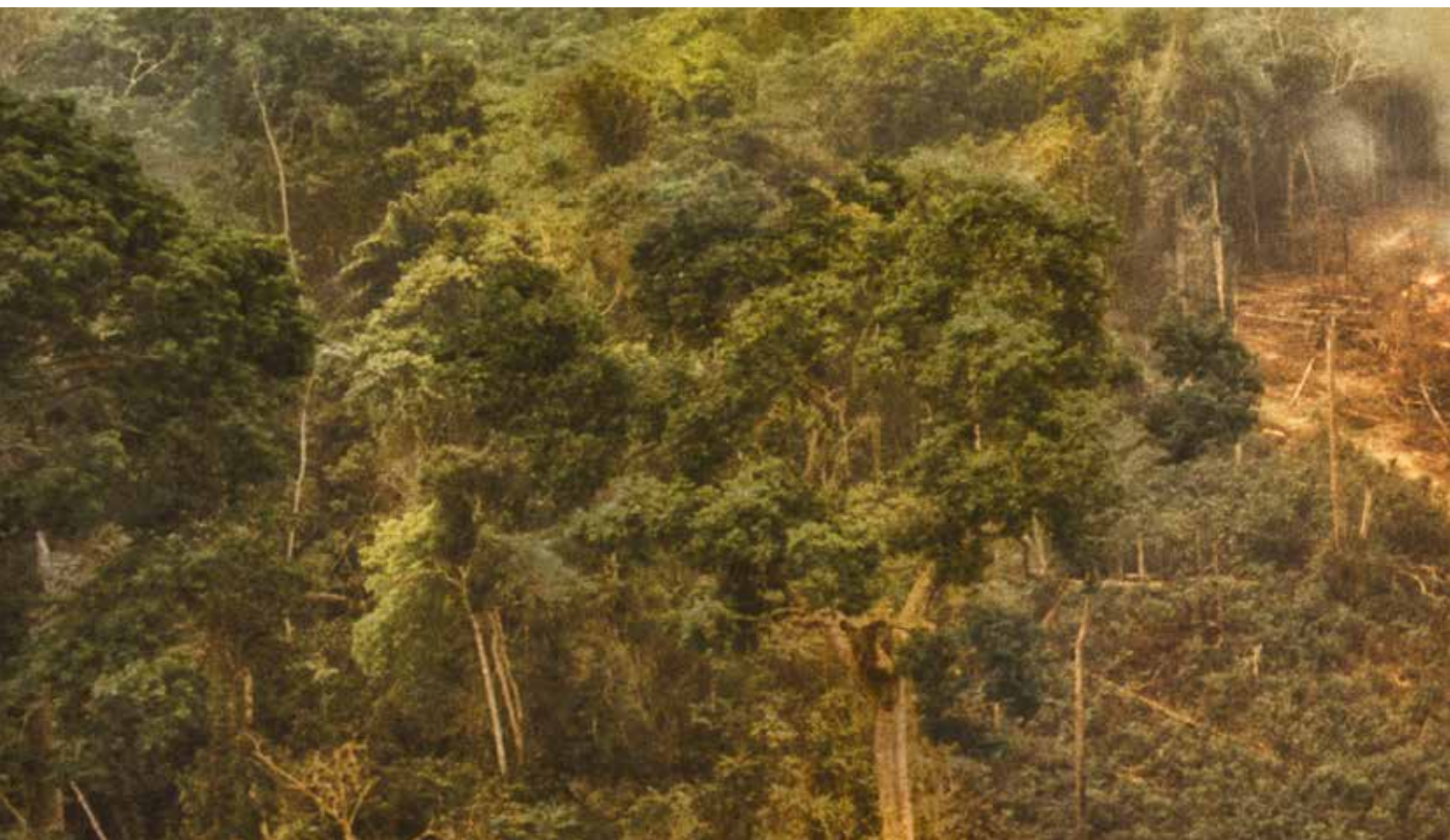
Understanding the influence of the environment on modern slavery should already be relevant to businesses trying to understand how climate change will affect their operations as the treatment of people associated with a business will be not only a legal and reputational concern, but also an operational one. This will need to be a risk businesses address and seek to mitigate, in advance if possible, along with other climate-related risks to supply chains, such as shifting agricultural regions

and decreasing yield in raw material harvests. New relationships will also be needed for businesses to predict where and how these issues will affect operations and suppliers; for example, climate modelling scientists to pinpoint impact and economists, environmentalists and human rights experts to quantify the impact and design any appropriate interventions that can be done now. Businesses will need advisors to synthesise diverse streams of information to develop appropriate strategies and evaluate and negotiate collaborations with appropriate partners. Legal advisors are poised to be a valuable resource in this endeavour as well.

A key theme overall in how businesses could be affected by both directions of the two-way relationship between environmental harms and modern slavery is that new relationships between businesses and outside experts are needed to protect businesses and the environment and people they rely upon.

### **The Interrelationship Between Climate Change, Sustainability and Modern Slavery**

While evidence on the interplay between environmental harm and human rights abuses is expanding and becoming more specific, the concept of their relationship is not new. For example, one of the UN Sustainable Development Goals is directly on point. UN SDG Target 8.7





calls for 'immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour...'.<sup>2</sup> This mandate launched Alliance 8.7,<sup>3</sup> a UN-affiliated partnership, that has been facilitating efforts between businesses and experts in this area, and Delta 8.7,<sup>4</sup> which is a related knowledge hub to capture shared learnings. In the past year, however, efforts exploring how environmental harm and modern slavery are linked have expanded significantly and are becoming more detailed in understanding the two areas as having causal links rather than possibly being seen only as coexisting.

The recent UN report 'Developing Freedom – The Sustainable Development Case for Ending Modern Slavery, Forced Labour and Human Trafficking' addresses several ways in which modern slavery impedes sustainability. One of its top conclusions is that, '[s]lavery harms the environment' by skewing 'production to unsustainable labour-intensive methods' and that this 'reduces space for carbon sequestration, increases carbon emissions, and often leads to loss of biodiversity and natural capital stock.'<sup>5</sup> Said differently, modern slavery<sup>6</sup> is essentially a subsidy that enables immoral businesses to exploit natural resources and contribute to climate change.

That text offers several detailed case studies on the influence modern slavery has in the production of several important commodities and begins to map out how it harms the environment. These include that modern slavery has been a major contributor to deforestation in the Brazilian cattle industry<sup>7</sup> and in the Malaysian and Indonesian palm oil industries<sup>8</sup> and that fisheries in multiple countries have been dangerously overfished due to the exploitation of people.<sup>9</sup> Regarding modern slavery's contribution to climate change via the cattle industry, the report concludes, 'There is a tight connection down to the worksite level between deforestation, use of exploitative and unregulated labour practices including slave labour, and dangerous levels of carbon emissions (including through use of slave labour to burn cleared timber as charcoal)'.<sup>10</sup> With respect to modern slavery and palm oil, it concludes the research is not as far along and that, 'While there have been moves to address labour recruitment and migration practices in some relevant jurisdictions in recent years (notably Malaysia), it has only been through journalistic exposés and civil society advocacy that these issues have found their way into larger discussions of palm oil sustainability'.<sup>11</sup>

The UN report also covers the reverse direction of the relationship, the impact of environmental harm,



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particularly climate change, on modern slavery. As it explains, 'Climate change exacerbates numerous factors that increase vulnerability to modern slavery—such as conflict onset, disaster risk and risk of forced migration'.<sup>12</sup> It elaborates, 'Climate change and its impacts on rural production increase labour exploitation, as well as the risky migration practices often connected to human trafficking'.<sup>13</sup> The key message on this aspect of the relationship is that numerous signs point to effects of climate change becoming worse and more frequent and, therefore, the risk of further enslavement grows exponentially worldwide.

The UN report is useful to show the substantial multilateral attention to these issues, but it is hardly the only resource expanding the body of evidence showing that environmental harms and modern slavery have significant effects on each other and create a cycle of harm; that is, modern slavery is a major contributor to climate change and resource depletion, which then make people more vulnerable to modern slavery, which causes more environmental harm, and so it continues. Several researchers are publishing and pursuing research to explore this cycle in greater detail.<sup>14</sup>

A particular focus for some academics is to try to quantify the effect modern slavery has on the environment. One alarming conclusion is, 'If modern slaves were a country, they would be the third largest emitter of carbon dioxide in the world, after China and the United States'.<sup>15</sup> Its reasoning is admittedly imprecise but is tied to the author's leading experience with modern slavery and is based on what the author believes are conservative assumptions given the amount of illegal deforestation in areas with corresponding modern slavery data. Additional efforts are underway to enhance the methodologies behind such conclusions and will continue to be scrutinised and developed by scientific peers. These types of studies are innovative in their use of technologies such as satellite images showing deforestation in areas around the world against which one can plot local data on modern slavery and at least begin to see compelling associations.

While methodologies for quantifying the carbon footprint of modern slavery might evolve for some time, rolling estimates and numerous anecdotes supporting them suggest a strong connection. As this body of knowledge expands and becomes more widely understood, it would seem likely that efforts to end modern slavery would be

bolstered as climate change strategies. It would also seem likely that US modern slavery laws targeting supply chains would become focal points given their potential to terminate tainted businesses and their impact so far in doing so, as discussed below.

It is worth noting, however, that we can't yet predict what form environmental support for existing and developing strategies against modern slavery might entail. For example, that support could translate primarily into environmental groups helping raise the profile of various human rights efforts, or, on the other end of the spectrum, some environmental groups might consider asserting their own thinking on how best to address modern slavery. In a recent survey of leading human rights experts there was broad agreement that environmental and human rights issues have mutual impact and could best achieve both objectives through better coordination, but there was concern of scope creep by organisations going outside their respective areas of expertise.<sup>16</sup> There was also some distaste towards the idea that human rights might be seen as an environmental strategy and thereby perhaps seem to diminish the importance of the human rights objective itself.

Agreement on the relationship modern slavery has on the environment and these types of concerns both seem to have merit. There will likely be much more research and discussions to come on how resources and expertise can best be marshalled to improve society on both issues. In the interim, sensitivity to all angles of these particular topics also seems best as efforts advance.

US law enforcement, however, appears committed to requiring supply chains to show the absence of forced labour. Any contrasting views that might develop between environmental and human rights organisations are not likely to alter the course of US import requirements becoming increasingly rigorous. As the environment-human rights nexus is studied further and understood more by organisations in both disciplines, there is more than enough reason to believe that it is most likely the consensus will be more support for human rights legal requirements in supply chains with environmental groups supporting the leadership of human rights expertise.

There is more current agreement, however, on the notion that climate change is having a deep impact on numerous populations and increasing their vulnerability





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to abuse.<sup>17</sup> As businesses consider how they can predict climate change's likely effects on their own operations and supply chains, it should be expected that a business's environmental and human rights partners, as well as outside advocates, will encourage companies to consider climate change's effects on the environment and people when investing in new studies and possibly interventions to try to mitigate future effects of climate change for the business.

## Understanding Modern Slavery's Impact on the Environment Could Create New Legal Compliance Roles

### Introduction

With a massive current focus on climate change and stakeholders of all types grappling with its existential threat, if even a fraction of them come to understand modern slavery is a key contributor to climate change, that fraction could amount to a huge additional push to end modern slavery. One of the outlets that would likely grab attention would be the growing US laws already targeting forms of modern slavery in supply chains.<sup>18</sup>

### US Laws Already Increasing Pressure to Eliminate Modern Slavery

Below are three examples of US laws with global supply chain impact that are already gaining traction due to their existing or potential business and human rights impact, that would be ripe for receiving new environmental community support once seen as also having a climate impact.

1. *Import prohibitions on goods made with forced labour.* Many industries have already become aware of the rejuvenated US Customs mandate to prohibit imports of goods with forced labour in their supply chains.<sup>19</sup> Following a recent removal of a legislative loophole in the law and forced labour in supply chains becoming a political priority in the United States, numerous companies have been prohibited from exporting their goods to the US market. Those companies, and numerous others trying to avoid the massive supply chain disruptions this law can cause, have likely also experienced that the US program continues to grow and is regularly

experiencing new developments in its evidentiary standards and procedures. These create challenges and opportunities as described further below.

In addition, the EU has recently announced that it is also considering imposing a new prohibition against imports tied to forced labour.<sup>20</sup>

As a recent sign of the relevance this US law has to the environment, some of the most impactful recent enforcement has been against industries under the highest scrutiny for their environmental harm. These include: (1) fishing vessels due to concerns about their crews being enslaved<sup>21</sup> and this abuse is increasingly tied to exploitation of fishing stocks;<sup>22</sup> and (2) palm oil due to concerns of slavery on plantations<sup>23</sup> and palm plantations are criticised for clearing climate-critical tropical rainforests.<sup>24</sup>

2. *Application of anti-trafficking laws to supply chains.* The US Trafficking in Victims Protection Act contains prohibitions against traffickers as well as a 'venture liability' provision that could be used to prosecute companies benefitting financially from trafficking that fail to conduct adequate due diligence that would have discovered it.<sup>25</sup> This provision also allows victims to sue the company benefitting financially. Victims are currently looking to US courts to hold that these provisions extend to US companies when they fail to prevent trafficking in their overseas supply chains. For example, child labourers in Côte D'Ivoire are suing chocolate companies to establish such liability.<sup>26</sup> If these cases succeed, there will likely be much more modern slavery supply chain litigation under these laws.
  
3. *Consumer protection law.* Plaintiffs are litigating under US state laws alleging, as a matter of consumer protection, that chocolate companies are required to notify consumers at the point of sale about risks for human rights abuses in their supply chains.<sup>27</sup> These cases have not gained substantial traction, but they are numerous and seem to be continually revised to overcome any preliminary deficiencies in complaints, etc. They are ripe to increase in number once any case prevails. Similar corporate disclosure laws are also receiving substantially more attention, such as a Washington, DC law permitting non-profits to challenge in court whether a company's marketing is false.<sup>28</sup> We are

starting to see company claims of good stewardship being challenged on human rights grounds under various business laws,<sup>29</sup> and they're already being challenged on environmental grounds.<sup>30</sup>

### **An Environmental Boost to Supply Chain Human Rights Laws Could Create New Roles for Lawyers**

Part of what is unique about the foregoing laws is that they impose or might impose liability on a US company based upon business conduct in supply chains far away, over which the companies typically have little regular influence, to the extent they even have any visibility due to supply chain complexity. This geographic distance, if nothing else, could give local lawyers in natural resource and processing-rich markets an opportunity to be influential in these matters. Local lawyers often have existing relationships with suppliers or might develop these relationships more easily than US lawyers based on proximity, familiarity with the economy and culture, etc. Sometimes exporters to the United States do, however, prefer engaging US lawyers on market access issues, likely under the theory they understand their law best, but, even then, a local lawyer can still be a key partner. Under either scenario, for suppliers with a heavy reliance on sales destined for the US market, and soon the EU market, an environmental boost even in the number of cases could have a substantially increased need for legal guidance on the local business practices that will help ensure their ability to access the US market. While the possible increase in volume of cases would create new legal roles just based on the demand for services, the substantive direction of these laws could create a new type of need for a lawyer's skills.

A particular challenge for businesses dealing with these laws is that the standards to show appropriate business practices continue to be clarified as government procedures develop and precedent grows under the various US legal regimes covered above. In particular, whereas social audits have long been the standard for demonstrating appropriate labour practices,<sup>31</sup> social audits have recently been heavily criticised as multiple 'failed to detect or report' issues before US authorities launched enforcement actions.<sup>32</sup>

The standard now advocated by many human rights experts to demonstrate that workers are treated properly, and which seems to be gaining favour among some US authorities, is a system where workers are engaged directly by independent entities that have gained

their trust, represent their interests and can negotiate complaints with management.<sup>33</sup> In one recent case, a forced labour import prohibition was released seemingly in large part because workers were repaid millions in improper recruitment fees that came to light due to work with an independent consultant working directly with migrant workers and confronting the company with his findings.<sup>34</sup> In many geographies and supply chains, such independent worker entities or advocates might not yet exist to support workers. Seeing the direction of evidence that seems to be influencing US authorities, it is in the interest of suppliers, and lawyers guiding them, to take steps now to help develop such capacities and negotiate mutually beneficial ways to collaborate.

This is arguably the hardest work and where the lawyer's ability to evaluate and synthesise diverse and competing streams of information and demands could be particularly important and most challenged. To help develop such worker-centric entities successfully, a business would likely need to help arrange independent financial support for local workers or leaders trusted by the workers to organise, possibly with guidance from a credible global consultant or union. There would be a need to enter the process with eyes wide open and expect the group funded to challenge the business. Such groups will have key demands to maintain the integrity of their work,

such as unfettered access to workers, and they will want the ability to escalate matters, such as to authorities or customers, should local management be perceived as not responding adequately to concerns. On the flip side, businesses will have numerous legitimate concerns, such as confidentiality of their operations, having the opportunity to remediate matters, and avoiding reputational harm and harm to customer relationships should varying reports of wrongdoing be released.

These efforts may seem entirely counterintuitive and directly against a company's interests at first, but further consideration of their significance to maintaining US or EU customers can show these arrangements are in a company's interests. In addition, we are starting to see evidence they can work.<sup>35</sup> A balance of these types of issues is needed, and, while not easy by any means, it is a natural place where lawyering skills can guide the numerous interests involved towards a solution.

### Predicting and Mitigating Effects of Climate Change Could Increase Roles for Business Advisors

The need for businesses to engage new partnerships and expertise is also evident when it comes to the need to better predict climate change and determine what mitigating action might be possible now. Businesses

seem to understand increasingly that climate change will have substantial effects on numerous aspects of their operations and supply chains. The influence climate change could have on modern slavery emphasises that businesses will likely be faced with impacts on the people in their supply chains. It would make sense to address that as a key issue in risk mitigation, and again, diverse partners will need to be coordinated on this issue and others relevant to business risk.

For example, businesses will need to address whether workers will be able to remain in current production regions or need to migrate due to loss of their communities and whether workers that cannot migrate will become even more vulnerable to abuse. Given not



The influence climate change could have on modern slavery emphasises that businesses will likely be faced with impacts on the people in their supply chains.



only the operational disruption various scenarios of worker availability could cause, but also the legal or reputational—not to mention, ethical matters—these issues should be ranked high along with other environmental challenges for supply chains.

As an initial thought on how a company might reasonably proceed, it would seem that for the purposes of predicting and mitigating the human and environmental consequences of climate change, a business would want to coordinate at least the following areas of expertise:

- *Production officers* to identify the most valuable raw materials.
- *Procurement officers* to map key regions and supply chains.
- *Climate modelling scientists* to identify climate effects that might be expected for key supply regions and alternate regions.
- *Agricultural specialists* to predict the effect anticipated climate changes will have on raw materials in current and alternate supply regions.
- *Human rights specialists* of various types would be needed depending on the demographics of production regions to predict how the range of anticipated climate changes will affect relevant populations, particularly whether they will be forced out of their communities; if they stay, what risks will be heightened; whether cultural, religious or other priorities will be relevant; whether resources exist to help; and whether practices could be changed now to mitigate any anticipated harm.
- *Urban and rural planners* to determine whether physical community or regional changes now would offer mitigation.
- *Policy specialists* to determine whether government policy changes would offer mitigation and their feasibility.

These are among several others, for sure.

Just as navigating new partners is critical for the legal compliance issues noted above, it will also be critical for

protecting the business as much as possible from climate change going forward. Again, many lawyers will likely find themselves in a good position to help a business given their overall knowledge of how it operates and its interests, as well as being adept at evaluating the offerings of prospective partners and their ability to work with the company. Lawyers would also be valuable in helping synthesise how various types of expertise could work best in projects to predict and then, as follow-up, to mitigate anticipated harms to the people and environment upon which the business and its supply chains rely.

## Conclusion

Climate change and sustainability generally are rightfully the focus of a wide variety of stakeholders and it makes sense that all possible strategies to prevent and mitigate climate change and loss of natural resources would be pursued. To that end, the work of many experts to drill down on the main causes of climate change and how they can be avoided is likely a benefit for everyone. The work being done to understand how climate change, resource depletion and modern slavery affect each other is one such powerful example. However, it is also clear that, as this area develops, a particular challenge for businesses will be how they can work with the right partners, which can be seen to have aligning interests but will certainly also push businesses to evolve. This work of wrestling with multiple interests, numerous sources of information from diverse experts and multiple possible areas of legal liability, seems to be just the type of challenge for which lawyers are suited and where they can make substantial contributions to protecting people and the environment.

## Notes

<sup>1</sup> See e.g., World Wildlife Fund explains '[f]orests are nature's greatest technology for combating climate change: they naturally absorb carbon dioxide (CO<sub>2</sub>), reducing the amount of this heat-trapping gas in our atmosphere. When forests are not managed responsibly, they release large quantities of CO<sub>2</sub> into the atmosphere. Deforestation and degradation are the largest sources of CO<sub>2</sub> emissions after the burning of fossil fuels. Scientists estimate up to 13% of global carbon emissions come from deforestation'; available at [www.worldwildlife.org/initiatives/climate](http://www.worldwildlife.org/initiatives/climate) (accessed 9 November 2021).

<sup>2</sup> <https://sdgs.un.org/goals/goal8> (accessed 9 November 2021).

<sup>3</sup> [www.alliance87.org/](http://www.alliance87.org/) (accessed 9 November 2021).

<sup>4</sup> <https://delta87.org/> (accessed 9 November 2021).

<sup>5</sup> J Cockayne (2021), *Developing Freedom: The Sustainable Development Case for Ending Modern Slavery, Forced Labour and Human Trafficking*, United Nations University, New York, at xiv.

<sup>6</sup> *Developing Freedom* notes: 'former IMF Director Peter Doyle has recently pointed out, slavery, forced labour and human trafficking (often referred to by the catch-all term 'modern slavery') all involve the intentional restriction or denial of the basic economic agency that is

assumed by our economic models ... In each case, someone is profiting by controlling or stealing another's economic agency, in part or in whole ... we refer to that conduct throughout this text simply as 'slavery', in part to highlight the continuity between chattel slavery, as was practiced in the era of trans-Atlantic slavery and contemporary 'modern slavery', at xi–xii. While there are times to distinguish between modern slavery-related terms, here they are used interchangeably unless an emphasis indicates otherwise.

<sup>7</sup> Ibid at Ch 3.

<sup>8</sup> Ibid at Ch 4.

<sup>9</sup> Ibid at Ch 6.

<sup>10</sup> Ibid at 97.

<sup>11</sup> Ibid at 133.

<sup>12</sup> Ibid at 12.

<sup>13</sup> Ibid at 67 (internal citations omitted).

<sup>14</sup> E.g., see K Bales (2016), *Blood and Earth: Modern Slavery, Ecocide and the Secret to Saving the Planet* (Spiegel & Grau, New York); D Brown, DS Boyd, K Brickell, CD Ives, N Natarajan and L Parsons (2019), 'Modern slavery, environmental degradation and climate change: fisheries, field, forests and factories', *Environment and Planning E: Nature and Space*; C O'Connell (2021), 'From a vicious to a virtuous circle: Addressing climate change, environmental destruction and contemporary slavery', *Anti-Slavery International*, London; JL Decker Sparks, DS Boyd, B Jackson, CD Ives and K Bales (2021), 'Growing evidence of the interconnections between modern slavery, environmental degradation, and climate change', *One Earth*, 4(2).

See also 'Modern Slavery, environmental degradation and climate change: present and future pathways for addressing the nexus', University of Nottingham Rights Lab Forum (Reporting on a 17 June 2021 roundtable at which experts elaborated on their evidence of the nexus and practical examples from the field), available at [www.nottingham.ac.uk/research/beacons-of-excellence/rights-lab/resources/reports-and-briefings/2021/august/modern-slavery-environmental-degradation-and-climate-change.pdf](http://www.nottingham.ac.uk/research/beacons-of-excellence/rights-lab/resources/reports-and-briefings/2021/august/modern-slavery-environmental-degradation-and-climate-change.pdf) (accessed 9 November 2021).

<sup>15</sup> K Bales and K Sovacool (2021), 'From forests to factories: How modern slavery deepens the crisis of climate change', *Energy Research & Social Science*, Volume 77, 2021, 102096.

<sup>16</sup> 'Integrating Forced Labor and Environmental Harm to Support New Collaborative Action' (August 2021), Prepared by the Virgil Group, available at [https://7a4dcf78-777f-420e-965f-b18747a92629.filesusr.com/ugd/1693e8\\_28b83952272e4d8b962d7977150745cd.pdf](https://7a4dcf78-777f-420e-965f-b18747a92629.filesusr.com/ugd/1693e8_28b83952272e4d8b962d7977150745cd.pdf) (accessed 9 November 2021).

<sup>17</sup> See e.g., the Solidarity Center's work on climate and labour justice and belief that, '[t]he climate crisis impacts workers and their communities in a multitude of ways. Flooding, drought and extreme weather events push workers to migrate, often into low-wage jobs under dangerous conditions.' Available at [www.solidaritycenter.org/category/what-we-do/climate-labor-justice/](http://www.solidaritycenter.org/category/what-we-do/climate-labor-justice/) (accessed 9 November 2021).

<sup>18</sup> Numerous strategies to end modern slavery could be the focus here, as could numerous laws seeking via different strategies to end modern slavery. This article addresses three particular U.S. laws given the attention they are receiving and ability to target commodity supply chains where much modern slavery is reported to exist.

<sup>19</sup> See generally, [www.cbp.gov/trade/programs-administration/forced-labor](http://www.cbp.gov/trade/programs-administration/forced-labor).

<sup>20</sup> 'EU will propose ban on products made by forced labour, says EU Commission President von der Leyen,' *Business & Human Rights Resource Centre* (16 September 2021), available at [www.business-humanrights.org/en/latest-news/eu-will-propose-ban-on-products-made-by-forced-labour-says-eu-commission-president-von-der-leyen/](http://www.business-humanrights.org/en/latest-news/eu-will-propose-ban-on-products-made-by-forced-labour-says-eu-commission-president-von-der-leyen/) (accessed 9 November 2021).

<sup>21</sup> For coverage of one recent example, among others, see, 'U.S. bans imports from Chinese fishing fleet over forced labor allegations', *Reuters* (31 May 2021), available at [www.reuters.com/world/asia-pacific/us-bans-imports-chinese-fishing-fleet-over-forced-labor-allegations-2021-05-28/](http://www.reuters.com/world/asia-pacific/us-bans-imports-chinese-fishing-fleet-over-forced-labor-allegations-2021-05-28/) (accessed 9 November 2021).

<sup>22</sup> See e.g., 'Task Force on Human Trafficking in Fishing in International Waters,' U.S. Department of Justice Report to Congress, January 2021, available at [www.justice.gov/crt/page/file/1360366/download](http://www.justice.gov/crt/page/file/1360366/download).

<sup>23</sup> See e.g., 'US bans second Malaysia palm oil giant over forced labor,' *AP News*, December 30, 2020, available at <https://apnews.com/>

[article/forced-labor-malaysia-261eb108042b23eee596091a40a9a9aa](https://www.reuters.com/world/asia-pacific/forced-labor-malaysia-261eb108042b23eee596091a40a9a9aa) (accessed 9 November 2021).

<sup>24</sup> See [www.worldwildlife.org/industries/palm-oil](http://www.worldwildlife.org/industries/palm-oil) (accessed 9 November 2021)..

<sup>25</sup> See generally [www.justice.gov/humantrafficking/key-legislation](http://www.justice.gov/humantrafficking/key-legislation) (accessed 9 November 2021)..

<sup>26</sup> 'Victims of trafficking file US lawsuit against major chocolate brands over allegedly profiting from child & forced labour in Côte d'Ivoire', *Business & Human Rights Resource Centre*, 15 February 2021, available at [www.business-humanrights.org/de/neuste-meldungen/victims-of-trafficking-file-us-lawsuit-against-major-chocolate-brands-over-allegedly-profiting-from-child-forced-labour-in-c%C3%B4te-divoire/](http://www.business-humanrights.org/de/neuste-meldungen/victims-of-trafficking-file-us-lawsuit-against-major-chocolate-brands-over-allegedly-profiting-from-child-forced-labour-in-c%C3%B4te-divoire/) (accessed 9 November 2021).

<sup>27</sup> See e.g., summary available at [www.business-humanrights.org/en/latest-news/hershey-lawsuit-re-child-labour-in-c%C3%B4te-divoire-filed-in-massachusetts/](http://www.business-humanrights.org/en/latest-news/hershey-lawsuit-re-child-labour-in-c%C3%B4te-divoire-filed-in-massachusetts/) (accessed 9 November 2021).

<sup>28</sup> 'D.C. appeals court empowers consumer nonprofits in Hormel false ad case,' *Reuters*, 3 September 2021, available at [www.reuters.com/legal/litigation/dc-appeals-court-empowers-consumer-nonprofits-hormel-false-ad-case-2021-09-03/](http://www.reuters.com/legal/litigation/dc-appeals-court-empowers-consumer-nonprofits-hormel-false-ad-case-2021-09-03/) (accessed 9 November 2021).

<sup>29</sup> See "CAL Files Suit Against Hershey and Rainforest Alliance," available at <https://corppaccountabilitylab.org/calblog/2021/11/2/cal-files-suit-against-hershey-and-rainforest-alliancensbsp>.

<sup>30</sup> See e.g., 'Greenwashing: A survey of recent litigation', *Eversheds Sutherland*, 18 October 2021, available at [www.jdsupra.com/legalnews/greenwashing-a-survey-of-recent-3195116/](http://www.jdsupra.com/legalnews/greenwashing-a-survey-of-recent-3195116/) (accessed 9 November 2021).

<sup>31</sup> The social audit/adequate evidence of appropriate practices issue is critical, but other high priority issues could be explored too such as the challenge in tracing supply chains to prove one is not sourcing from a supplier using forced labour.

<sup>32</sup> See the resources collected at 'Beyond Social Auditing,' by the *Business & Human Rights Resource Centre*, available at [www.business-humanrights.org/en/big-issues/labour-rights/beyond-social-auditing/](http://www.business-humanrights.org/en/big-issues/labour-rights/beyond-social-auditing/) (accessed 9 November 2021).

<sup>33</sup> See e.g., the principles and updates shared via the *Worker-Driven Social Responsibility Network*, available at <https://wsr-network.org/> (accessed 9 November 2021).

<sup>34</sup> See 'Debt Bondage Payouts Flow to Workers in Malaysia's Glove Industry', *The Diplomat*, 14 September 2021, available at <https://thediplomat.com/2021/09/debt-bondage-payouts-flow-to-workers-in-malysias-glove-industry/> (accessed 9 November 2021).

<sup>35</sup> See e.g., 'Ethical Recruitment: Translating Policy into Practice,' 5 November 2019 (documenting an independent evaluation of one of the world's largest seafood companies incorporating a migrant rights group to its efforts to ensure workers are recruited fairly), available at <https://humanityunited.org/ethical-recruitment-translating-policy-into-practice/> (accessed 9 November 2021).



**Corey L Norton**  
**Vice President for Supply Chain**  
**Legality, World Wildlife Fund,**  
**Washington, DC**

Corey L Norton is Vice President for Supply Chain Legality at the World Wildlife Fund in Washington, DC. He was previously in-house counsel for a large multinational working on market access and supply chain management issues. He also represented global clients on these issues and numerous other international trade issues in large global law firms. He is currently the IPBA's Membership Committee Chair and was previously Chair of the IPBA International Trade Committee.

# Future of Sustainable Development: Could Indian Best Practices be Better?

In 1987, the United Nations Brundtland Commission defined sustainability as meeting the needs of the present without compromising the ability of future generations to meet their own needs. The message today seems to have been lost on the way. With about 140 developing countries in the world exploring newer ways to meet their needs, the inevitable threat of climate change is looming larger than ever.

At this critical stage for the environment, this article seeks to analyse best practices for sustainability with the message the United Nations Brundtland Commission first set out for the member nations to follow, to meet their needs without compromising the future. India has since then made several attempts to further the agenda of sustainability, both in terms of judicial activism and legislative efforts. However, these efforts are backed with a myopic view for damage control. What is lacking in India's effort to be at the forefront of sustainable development is a futuristic view.





## Introduction

The essence of the definition of 'sustainability' was crystallised as far back as 1996 in India, when the Honourable Supreme Court attempted to balance the requirements of the economy and the environment in its judgment in *Indian Council of Enviro-Legal Action v Union of India*. The Apex Court held that '*while economic development should not be allowed to take place at the cost of ecology or by causing widespread environment destruction and violation; at the same time, the necessity to preserve ecology and environment should not hamper economic and other developments*'. Hence, importance must be given both to development and the environment and the quest should be to maintain a fine balance between the environment and economic development.

This Article attempts to analyse the initiatives taken in India and across the world to understand whether Indian best practices could be better to achieve the desired target. This analysis will be done on three counts, first being classification of green activities; second, the use and potential of renewable energy; and finally, third, the duty of the board/directors in ensuring sustainability.

## Classification of Green Activities

Climate change is one of the defining issues of our generation. New studies show that global warming needs to be limited to 1.5°C (rather than 2°C) compared to pre-industrial levels, to avoid the worst effects of climate change. While there are several ways which could help mobilise green investments, a comprehensive 'list of green activities', as done by the European Union recently in the form of European Union Taxonomy, is a great place to begin. As investments have grown in sustainable instruments, there is an increasing number of definitions of sustainability being propounded by non-governmental organisations ('NGOs'), commercial data providers, etc. This abundance of definitions has given way to the issue of 'greenwashing', a phenomenon whereby, given the lack of standardisation, asset managers market funds as green funds by misleading consumers by making them believe that a product or service they provide or the organisation itself is environmentally sustainable, when it is not. To curb greenwashing, the European Union passed into law a framework for the classification of green activities, which it calls the 'European Union Taxonomy'.



According to this European Union Taxonomy, any green activity should satisfy the following three criteria. First, it should make a 'significant contribution', to at least one of six environmental objectives: climate change mitigation, adaptation, water use, waste prevention and recycling, pollution control, and protection of ecosystems. Second, it should do no significant harm to the other five objectives; so for instance, nuclear energy may contribute to climate mitigation but would not meet the recycling objective, and hence would not be included. Lastly, the activity should comply with minimum social safeguards; for instance, a company's hydropower plant might contribute to climate mitigation, but it would do so at the expense of violent displacement of local communities.

While there are several such measures being taken by various governments, China's Green Industry Guiding Catalogue is a great Asian example. Following suit, India has made some remarkable efforts itself in meeting its commitments in accordance with the Paris Agreement, particularly towards the use of renewable energy. Environmental, Social and Governance ('ESG') Funds and Green Bonds have been gaining popularity, with the State Bank of India recently raising US\$100 million through green bonds. Keeping pace with developments worldwide, Indian regulators have also attempted to provide clarity regarding environmentally sustainable or green activities themselves. One such attempt was the Securities Exchange Board of India's ('SEBI') 2017 Green Bonds Circular which defined 'green' as falling broadly under one of eight categories, including renewable energy, green transportation, and biodiversity conservation. Another attempt was also made by the Reserve Bank of India ('RBI') when it considered issuing green finance guidelines and fielded requests from the Government to remove project size limits for classifying renewable projects as a priority sector. However, consequently, in its 2019 Report on Trend and Progress of Banking in India, the RBI suggested the lack of a standard terminology as a bottleneck in the development of the green finance market in the country.

Besides regulators, NGOs have attempted to define green activity as well. Shakti Foundation's 2019 report was the first attempt at defining a green taxonomy for India. However, despite these steps being unprecedented and monumental in the objective they seek to achieve, these initial Indian steps are quite pale in comparison with the European Union Taxonomy;

with 35 members representing 32 organisations having worked over the course of two years, work on full technical criteria and sub-legislation is expected to continue until the end of 2022.

### The Way Forward

While all countries continue to make efforts in this direction, India will feel the pressure of the European Union taxonomy in two ways particularly: indirectly via the globally integrated capital markets and supply chains; and directly through its participation in international groupings, especially given that India is seeking to grow its stature internationally. However, India's attempt at a taxonomy for green activities would not be very similar to the European Union Taxonomy. The primary reason for the same is that the European Union Taxonomy excludes any reference to fossil fuels, including 'clean coal' from its definitions. However, India's fuel mix predominantly consists of coal.

Hence, as suggested by the Institute of Chartered Finance Analysts in their article, 'Defining Green Activities—What the New EU Rules Mean For India', the best practice in creating an Indian taxonomy could include three of the following important aspects: First, India's taxonomy should be aligned with India's own international climate goals—40 per cent renewables in the energy mix by 2022, 33 per cent forest cover and a 35 per cent reduction from 2005 carbon dioxide levels by 2030. For all of these to fall into place, India also needs a clear sector classification, quite akin to the sector classification of the European Union Taxonomy, which is based on NACE, its industry classification system. India could adopt its domestic equivalent, the National Industrial Classification ('NIC') system.

### Renewable Energy: The Best Next Step

It is surprising that there is dismal compliance with the Paris Agreement and the Paris Agreement has not been reflected as policies enacted by some of the largest polluters in the world. Thus, the Paris Agreement's target of limiting global warming to 2°C, a threshold past which climate disruption is likely to become increasingly unpredictable, is ambitious. Fortunately, renewable energy has seen astonishing growth in recent years in India. India has successfully managed to more than double its stock of wind and solar power in the last five years. However, this doubling has been driven more by clean energy's potential for cost-effectively meeting citizens' pressing needs than by concerns of sustainability.





For India, one of the biggest challenges in promoting renewable energy would be coordination of the flow of power between disparate state-run grids.

For India, one of the biggest challenges in promoting renewable energy would be coordination of the flow of power between disparate state-run grids. An effective way to meet this challenge could be that periods of surplus power in one region are used to compensate for deficits in others, making for a more stable and reliable supply of renewable energy to effectively displace polluting fossil fuels. However, such reforms would be difficult under the unique dysfunctions of India's power sector. With its loss-making electricity distribution companies that are already struggling, such bold changes to shift primarily to renewable energy would not be easy to achieve. However, Indian reforms are pivotal. India's rapid expansion of renewable energy could possibly help the world offset the approach of more lackadaisical countries, perhaps even bringing within reach the Paris Agreement's aggressive target of keeping global warming to within 1.5°C, given the scale and quantum at which power demand in India operates. This has also been reflected in how India has responded to its international obligations on climate change. India long refused to adopt specific commitments to reduce its carbon emissions; such action hinged on the argument that India and such other developing countries should not be expected to respond as rapidly as wealthy industrialised nations, given the former's pressing development needs and low share of historical emissions. Now, as surprising as it may be, India's

development-first stance has in fact proved compatible with the decarbonisation of its energy sector, which is the single largest source of Indian carbon emissions. Such decarbonisation has been done with rapid installations of new generating capacities for renewable energy and such installation has outpaced fossil fuels, making India the fifth-largest supplier of renewable energy in the world. Furthermore, India has recently set for itself a more progressive target for expanding its supply of renewable energy to 450 gigawatts by 2030; this would constitute a majority of its total energy capacity and would roughly be equal to the current combined renewable energy resources of the United States, Japan and France.

In terms of policy measures at the Central or State level, countless initiatives have been made by the Government of India. The Tariff Policy and the National Electricity Policy 2005 broadly encourage energy from renewable sources. Additionally, the Ministry of New and Renewable Energy ('MNRE') has launched the National Solar Mission ('NSM'), the National Offshore Wind Energy Policy and the Policy for Repowering of the Wind Power Projects as energy source specific policies. According to the Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations 2017, all renewable energy power plants except biomass power plants with installed capacity of 10MW and above and non-fossil fuel-based cogeneration

plants shall be given a 'must run' status and will not be subject to 'merit order despatch' principles.

The Government of India has also provided various tax and fiscal incentives to electricity generated from specific energy sources such as accelerated depreciation. There are incentives available to renewable power projects at state level as well. Many of these states have specific policies for the source of energy which has high potential in a particular state. Through these policies, the state governments grant various fiscal incentives such as exemption of electricity duty, exemption from cross-subsidy surcharge, exemption from payment of stamp duties and land registration charges, and exemption from transmission and distribution charges for wheeling of power. Certain states also provide procedural relaxations such as deemed non-agricultural status of the approved project land. In certain states, open access is given on priority basis or deemed to be given if the application for open access for renewable power projects is not granted within the time frame specified under the regulations. However, in view of the increased generation from renewable sources and the enhancement of technology, it is now being argued that renewable projects should have parity with conventional sources of energy. For instance, in Tamil Nadu and Karnataka, transmission charges, cross-subsidy charges and other charges have been made applicable for new solar and wind energy projects.

### The Way Forward

In contrast to the Indian landscape for green energy, the European Union is one of the most committed world regions for climate mitigation, with domestic legislation that has formulated into law the objective of net-zero greenhouse gas ('GHG') emissions by 2050, and an emissions GHG reduction target of 55 per cent (as compared to 1990 levels) by 2030. India, too, has instituted ambitious programs, including that of renewable energy expansion in the power sector, such as the National Cooling Action Plan and a National Clean Air Plan, among other climate commitments, but there is nothing that matches the rigours of a codified law. While India has been adding large scale renewable power to its energy mix as part of its commitments, the deployment of increased renewable capacity and a sustainable phase-out of coal are necessary next steps to be made in the context of the energy sector. Some of the positive developments have been the declining solar photovoltaic costs in India. However, ensuring that

this transition to renewable energy is long lasting requires declining costs of storage as well, it requires planning to deal with solar diurnal variability: for example: overnight firm clean power backup is necessary, possibly using hydrogen generated during the day.

Both the European Union and India have embarked on journeys to build their electricity system to allow transport, building and light industry electrification. While India has announced its target of setting up 450 GW of renewable energy by 2030, the European Union has led many of the early efforts in the area of renewable energy. India has also announced US\$214 million (INR1,500 crore) towards renewable energy development and its National Hydrogen Mission. Both the European Union and India face the challenge of maintaining their industrial capacity while eliminating coal combustion pollution to the atmosphere. There are common opportunities in developing hydrogen direct reduced iron and steel making, and targeted applications of 'carbon capture and utilisation' in cement making.

The transport sector in India is the third highest greenhouse-gas-emitting sector and its biggest contributor is road transport. Out of the total carbon dioxide emissions in India, 13 per cent come from transport, 90 per cent of which comes from road transport. The logistics and freight transport sector is key for India and the best way to achieve deep decarbonisation here would be to replace road freight with rail freight. India has one of the largest rail companies in the world. In July 2020, Indian Railways announced that the national transportation system will be a net zero carbon emitter by 2030. This would effectively result in eliminating emissions equivalent to 7.5 million tonnes of carbon dioxide each year. The railways are targeting to replace fossil fuel sources with renewable energy sources to achieve net zero carbon emissions by 2030. As for decarbonising road transport, the most essential link is the shift to electric vehicles for both short- and long-distance travel. Strengthening the enabling of an environment for transitioning towards electric vehicles, and thereby building the required infrastructure, is immediately needed. The European Union as well had made a strong push towards decarbonising its transport sector through revising fuel and carbon dioxide standards. For example, in April 2019, the European Union approved a new fuel economy standard for cars and vans for 2021 to 2030 and a carbon dioxide emission standard for heavy-

duty vehicles with specific requirements, or bonuses for electric vehicles ('EVs').

### Board's Role in Combating Climate Change

Climate change has attracted immense attention from corporations. It is not simply because it poses a serious challenge to sustainable development, but it is more so because there is a nexus between climate change and the manner in which corporations are governed. On one hand, activities of corporations, such as their emissions of greenhouse gases, cause climate change, on the other hand, such climate change consequently becomes a material financial risk to corporations, their shareholders and other stakeholders. Hence, corporations play a vital role in addressing climate risk, as does the law governing corporations.

Until recently, the role of corporations in tackling climate change was more voluntary in nature and was an indicator of the discharge of social responsibility. For the discharge of such social responsibilities, companies were and still are required by 'soft law' to have regard to

environmental concerns and engage in Environmental, Social and Governance ('ESG') Reporting. However, lately this discourse has dramatically transformed. Climate change is no longer within the domain of the voluntary conduct of corporations, it has instead transformed into a financial risk that corporations encounter, thereby imposing duties on the boards of directors of corporations to recognise and address climate risk. Corporate boards undermining the importance of climate risk will only invite reputational and legal consequences. As a natural result of which, various stakeholders such as financial regulators, debt and equity investors and credit rating agencies, both globally and in India, have begun recognising risks arising from climate change and have thus been calling upon companies to mitigate them. This includes a realisation of the magnitude of climate risks, which gives rise to supply-chain risks, which can adversely affect businesses.

These developments have already immensely changed corporate behaviour. Many companies have adopted net zero carbon policies. Investors with trillions of dollars of assets under management have also announced net zero commitments. Moreover, recent developments in policy responses or regulatory changes in various jurisdictions around the world will likely have global ramifications, with an impact on India. These developments include trends in climate-related financial disclosures and guidance from accounting and audit standard setters on the relevance of climate change as a material financial risk for purpose of corporate reporting. Thus, companies and their directors have a duty to act to protect long term sustainable value for various stakeholders, which the importance of climate risk brings into focus. This would require companies to make a detailed assessment of climate risk, consider appropriate advice and prepare and implement strategies to deal with the risk. Failure to account for the financial risks arising from climate change may expose companies and their directors to liability.

Indian law incorporates such duties of directors through a framework for risk management. Such a framework enables courts, regulators and stakeholders to hold directors accountable in a more effective manner, even more appropriate in the context of climate risk. For example, the World Economic Forum has identified extreme weather, climate action failure and human environmental damage as the three most prominent risks in terms of livelihood. Moreover, the failure by



The transport sector in India is the third highest greenhouse-gas-emitting sector and its biggest contributor is road transport.



boards to offer strategic responses to these risks not only engages legal liability but could also result in considerable reputational harm. In addition to the duties under the Companies Act, the Securities and Exchange Board of India ('SEBI') (Listing Obligation and Disclosure Requirements) Regulations, 2015 define responsibilities and key functions of the board of directors under regulation 4(2)(f) in Chapter II titled 'Principles Governing Disclosures and Obligations of Listed Entity'. These include 'reviewing and guiding corporate strategy, risk policy, to review that appropriate systems of control are in place, in particular, systems for risk management, overseeing the process of disclosure and communications'. The regulations also require members of the board of directors to act on a fully informed basis, in good faith, with due diligence and care and in the best interests of the company and its shareholders, thereby casting a duty on all directors to respond actively to climate change-related risks.

These requirements for corporations to report on environmental impact evolved from early corporate social responsibility frameworks mandated by the Government. In 2009, the Ministry of Corporate Affairs ('MCA') published voluntary Corporate Social Responsibility ('CSR') Guidelines which mandated businesses to draft CSR policies respecting the environment. In 2011, the MCA published National Voluntary Guidelines on Social, Environmental, and Economic Responsibilities of Business ('NVGs'), which were to be used by all businesses to report on nine principles in the form of a Business Responsibility Report. In 2012, SEBI mandated the 100 largest listed companies to publish an annual Business Responsibility Report which was subsequently extended to 500 companies in 2015. The MCA revised the NVGs which are now called the National Guidelines on Responsible Business Conduct. Duties of independent directors are laid down in Schedule IV, Part III of the Companies Act of 2013 and require independent directors to keep themselves well informed about the company and the external environment in which it operates. For our purpose, this duty would translate to being informed of the changing regulatory landscape and an understanding of the consequences of climate change.

Prior to the Companies Act of 2013, directors' duties were limited to the shareholders of that company. However, under section 166(2) of the Companies Act of 2013, directors are now required to have regard to the

community and the environment whilst discharging their duties. This position was also endorsed by the SEBI Circular for Business Responsibility Reporting 2015, which states that enterprises are no longer only accountable to their shareholders, they are also accountable to the larger society, which is a stakeholder. According to the circular, the '... adoption of responsible business practices in the interest of the social set-up and the environment are as vital as their financial and operational performance'. This approach of accountability of directors being extended to these wider stakeholders in the context of the Companies Act of 2013 has also been crystallised by the Supreme Court in their recent decision on the critically endangered Great Indian Bustard, when it directed in April 2021 that overhead power lines be laid underground in the bird's habitat as these overhead power lines would cause many Bustard fatalities. To reach this conclusion, the Supreme Court referred to section 166(2) of the Companies Act of 2013 and held that the expression 'environment' would include the 'inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property'.

Fortunately, Indian companies have responded very well to the changing regulatory landscape. A 2020 report found that 98 per cent of the top 100 companies by revenue had included sustainability information in their statutory annual reports. The Annual National Stock Exchange Report on Business Responsibility Reporting 2019, which analyses the disclosure practices of the top 100 listed companies, found that 90 per cent of the companies stated that they identified environmental risks. The Bombay Stock Exchange ('BSE') launched themed indices in 2012. The S&P BSE Carbonex tracks the performance of the companies within the S&P BSE 100 index based on their commitment to mitigating risks arising from climate change. The S&P BSE Greenex assesses 'carbon performance' of stocks based on quantitative performance-based criteria. BSE also published guidance on voluntary ESG disclosures mapping on global sustainability reporting frameworks. Twenty-four top private companies, including Tata, Reliance, Mahindra, ITC, ACC, Adani and Dalmia Cement have signed a declaration on climate change, pledging to move towards 'carbon neutrality'. Reliance Industries, a conglomerate engaged in businesses which include energy, oil & gas and telecom pledged to go net zero and carbon neutral by 2035. Other Indian companies that have pledged to go net zero include

Wipro and Tata Consultancy Services. According to the 2020 Annual Report by the Carbon Disclosure Project, investor-requested corporate disclosures for climate change grew by 17 per cent compared to 2019. Companies calculated climate change-related risk to be INR7,138 billion (US\$92.8 billion).

## Conclusion

In order to achieve these ambitious goals for climate actions by 2030, India would require humungous capital investments, likely to run into trillions. Naturally, a substantial portion of it needs to come from private investors and international agencies. A standard taxonomy of green finance based on best principles would mobilise such desperately needed investments.

Additionally, what lies at the core of all the aforesaid suggested best practices for transitioning to greener alternatives in energy production, industry and transport is access to the best available technologies and accessing scalable finance. In the context of India's ambition to set up 450 GW of renewable energy by 2030, India has an opportunity to scale up the investments through innovative measures. Instruments, policies and frameworks must be explored to identify means of reducing the cost of finance. According to the Global Risk Index 2020, India ranks as the fifth most vulnerable country to climate change. Given that India is heavily dependent on climate-sensitive livelihoods (for example, agriculture, fishery, livestock, etc.) for its development, there is a need to enhance vulnerability assessment in the country. India's vulnerability needs must be mapped across its various geographies, demographics and economic sectors. Accordingly, there is also need for adaptation and building resilience. All of this will aid in reducing the vulnerability of people, infrastructure and the economy and enables economic growth. India has established a National Adaptation Fund for Climate Change ('NAFCC') to meet adaptation costs for protecting the most vulnerable. However, greater support, both internationally and bilaterally, is required to better fight against these environmentally induced vulnerabilities. A great step in that direction is the Coalition for Disaster Resilient Infrastructure ('CDRI'), a multi-actor initiative launched by Prime Minister Modi in 2019, which seeks to promote the resilience of new and existing infrastructure systems to climate and disaster risks. It can be the international forum for India to demonstrate leadership, next to the International Solar Alliance ('ISA') and the global Leadership Group for Industry Transition ('LeadIT').

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**Ajay Bhargava**  
Partner, Khaitan & Co LLP, New Delhi

Ajay Bhargava is a Senior Partner at the New Delhi-NCR Office of Khaitan & Co, specialising in dispute resolution – litigation and international and domestic arbitration. He also advises and represents clients on constitutional matters, civil and criminal matters, IPR law, employment law, environment law and corporate-commercial disputes, among others.



# Up Close and Personal: Sara Marchetta



## Tell us about your years growing up, such as interests, hobbies and causes that you are passionate about. What are some of the childhood experiences that shaped you?

I was a very quiet child, but not so shy and potentially 'bossy' from the very beginning. I grew up in a small town in Italy, which I found very early on to be a bit boring. I always had a very deep interest in languages, thanks also to the fact—which I loved—that my parents often took my brother and me on their travels. I am particularly grateful to the role models of 'silent' women in my life: my grandmother, who separated from her husband before divorce was legal in Italy because he was abusive; and my mother, who during her life as a housewife wrote two books, helped me with two dissertation theses in two different universities and, when I was in China, travelled alone to come and see how I was.

## Why did you choose to work in the law? Describe your career trajectory.

I started my academic career by studying Chinese language and literature as I had a passion for languages. Then I became interested in Chinese contemporary history and that is how I got close to the law: the construction of a modern legal system to support economic development was one of the pillars of the reforms promoted by the Chinese government in 1978. I wrote my first dissertation about the history of the Chinese legal system and when I got a scholarship from the Chinese government I chose to spend my year at the Faculty of Law of Peking University. While there, I soon realised: (1) that being an interpreter—

as I was holding temporary jobs—was not really what I wanted; and (2) studying law in China would make me miss the long tradition and scholarly knowledge of the European systems. So, I went back to university in Italy to study Italian law. I stayed connected with China and soon found a job in an Italian firm in Beijing and I loved it: M&A was constructing projects, understanding business strategies and finding ways for two different parties to cooperate.

## What is the biggest challenge you have faced to date and how did you overcome it?

I became the head of an office in Beijing in 2003. I think it was too early as I was still learning and needed mentorship and coaching, and more importantly, I had no notion whatsoever about management and human capital and as I was very busy with clients, I had no time to study anything! It took me quite a long time (several years) to understand how I wanted to be the leader of the office, what was important to my colleagues and to me and what type of environment I would have liked to have in the place where I work. Chiomenti was providing large support—from logistics and practical things—so that I finally had time to focus on colleagues and work environment in the office.

## You are enormously passionate about the IPBA. What does the IPBA mean to you and what do you think other people should know about the IPBA?

I got into the IPBA in 2007 when the annual conference first came to China. My first mentor introduced the IPBA to me, so I have a very personal connection with the



I am particularly grateful to the role models of 'silent' women in my life

organisation. With time, I appreciated the colleagues and the members—and have made really good friends—and the professionalism of its staff and events. I think that the IPBA is: (a) very useful and supportive for emerging market jurisdictions; and (b) the perfect organisation for firms like mine—that is, focused on their own jurisdiction and open to contacts with firms operating in other jurisdictions, differently from 'international firms'.

### Have you faced gender-related challenges in your career? If so, what have they been and how have you overcome the adversities?

I believe that the largest gender challenge for a female Italian lawyer is making it to partnership: you need to be professionally strong, technically capable and always available—but you also need exposure and this is less available for female lawyers in Italy.

### Since you are such a global traveller and citizen, what advice or tips can you provide women lawyers on managing a work/life balance and overcoming professional challenges?

Having studied the language and starting as a student allowed me to get into Chinese culture without the typical pressures of delivering in a working environment. Being a woman—often travelling alone—with very white skin and blond hair, I was always at the centre of attention for several years, wherever I would go, as 20 years ago there were not so many foreigners around. It was a nice feeling! However, the downside was that 20 years ago it was impossible to find a hairdresser able to deal with my thin and super-curly hair!

### What advice or tips can you provide women lawyers on managing a work/life balance, and overcoming professional challenges?

I think that being able to say 'I am not available for family reasons' (which is something I learned to do not too many years ago) and asking for help when we are overwhelmed are two basic skills which women need to consider deeply, as without these, it is very challenging to work as if we do not have a family and for our kids to grow as if we were not working.

### Finally, some quick questions...

#### What is a motto you live by?

If you are desperate, shoot for the top!

#### What would you say to your 20-year-old self?

Taste experience more deeply and without always looking forward for new ones.

#### Cats or dogs?

Cats (but we have a dog).

#### If I could be a superhero, I would be...

Ursula von der Leyen

# IPBA New Members September 2021 to November 2021

We are pleased to introduce our new IPBA members who joined our association from September 2021 to November 2021. Please welcome them to our organisation and kindly introduce yourself at the next IPBA conference.

<b>Australia</b> , Robert Newlinds SC <i>Banco Chambers</i>	<b>Indonesia</b> , Stephen Igor Warokka <i>SSEK Indonesian Legal Consultants</i>
<b>Australia</b> , Haylen Pong <i>Diligent Corporation</i>	<b>India</b> , Somesh Arora <i>Sapphire and Sage Law Offices</i>
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<b>Hong Kong</b> , Richard Keady <i>Dentons Hong Kong LLP</i>	

## Members' Note

### Kieu Anh Vu, Vietnam



Mr Kieu Anh Vu, Esq., Founding and Managing Partner of KAV Lawyers (based in Ho Chi Minh City Vietnam), an Arbitrator, a Mediator of Southern Trade Arbitration Centre, Vietnam has been appointed one of the ICC Young Arbitrators Forum Representatives for the mandate 2021–2023, since September 2021. He has also been empanelled with the Asian International Arbitration Centre ('AIAC') as an arbitrator and a mediator for the term 2021–2024. This is a new development in his career path in the field of ADR in Vietnam and international arbitration.



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