The Blended Capital Group

RIDING THE DRAGON

The Future of the ESG Law Firm

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The Future of the ESG Law Firm

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Contents

We invite law firms to update us on their activities as we intend to repeat this exercise on an annual basis. Contact Michael Marais at mm@blended.capital

Foreword by Judge Professor Mervyn King

In 2022, we saw the emergence of the International Sustainability Standards Board as the vision of the IFRS Foundation to work alongside the IASB came to fruition. ISSB's mission is clear: "to deliver a comprehensive global baseline of sustainability-related disclosure standards."

As we progress towards UNFCCC CoP27, Cairo, in November, the ISSB development could not be more timely: accelerated consolidation of reporting standards is needed, as the global threats of climate change, ecosystems despoilation, human rights violations and the manifold social impacts of inequality become ever more manifest.

The emergence of the ISSB is an indication that we have come a long way in the past two decades but by no means far enough. The increasingly tragic human, social and economic costs of how we have trampled on our planetary boundaries provide the clearest of signals demanding change.

A shifting global context, coupled with the increasing accounting, reporting, and disclosure requirements for clients across every sector, requires lawyers to be ahead on sustainability and ESG integration. Lawyers have much catch-up work to do to serve clients as the era of regenerative capitalism arrives.

Riding the Dragon is our second progress report, building on *Chasing the Dragon* in March 21. The research hints at reasonable forward progress by some law firms. However, given the speed and intensity of policy, prudential oversight, and regulatory changes, as well as the distinct uptick in international climate and broader ESG litigation, the legal sector has to re-double its efforts.

One of the true highlights of this year's report is the generational shift which sees young lawyers demanding their firms have purpose to retain talent.

How should a law firm read these multiple developments?

What is intriguing in the developing standards and regulations, the ISSB Standards, the EU's European Sustainability Reporting Standards (ESRS), China's statements, and the US Securities and Exchange Commission's regulations — is that there is common cause: a need for integration between financial and non-financial information.

Ongoing collaboration and consolidation is laying stepping-stones across the river, from clutter and confusion on one side to a global, comprehensive corporate reporting system on the other. Equally, we are seeing the transition from a pure shareholder lead vision of the future to one of collaboration towards enterprise value creation rather than simply profit as the corporate guide star. The measure of future success will be the extent to which a company has added value to society.

IFRS: International Financial Reporting Standards

IASB: International Accounting Standards Board

COP: Conference of the Parties. COP is a short form referring to the UNFCCC (United Nations Framework Convention on Climate Change) COPs held every year, with COP26 (the 26th annual meeting of the Conference of the Parties to the UNFCCC) being held in Glasgow.

RIDING THE DRAGON

"Today's pre-eminent law firms continue to make reference to initiatives and recognition that — upon closer inspection — appear largely non-substantiated. Most others also lack an explicit ESG stance or approach."

In March 2021, we said the tectonic plates[1] for law firms globally were shifting because of the rise of the ESG (environmental, social and governance) phenomenon across business, investment and public interest issues. Nineteen months on, we believe the core of the earth is tilting.

The ultimate take-away for *Riding the Dragon*, after more than 1,000 hours of research on 100 global law firms by an independent team from the Green Enterprise Group (GEG), makes for concern:

> **"Despite significant progress in the adoption and integration of ESG practices, today's pre-eminent law firms continue to make reference to initiatives and recognition that — upon closer inspection — appear largely non-substantiated. Most others also lack an explicit ESG stance or approach.**
>
> **"Approaches to addressing and integrating ESG also appear haphazard and fragmented across the legal landscape, compared to other professional service sectors such as consulting.**
>
> **"Clearly, a centrally recognised body, leading firm, or organisational coalition can and should set standards and provide an example for how to take the adoption of ESG beyond terminology and rhetoric and implement it into everyday practice."**

The Road Ahead

No law firm can ignore or dismiss the rise of ESG despite questions raised recently over its' credibility, utility and effectiveness. We'll come back later to the ESG investment

A long history: ESG law at TBCG

Professor Paul Q. Watchman and Paul Clements-Hunt have worked on landmark ESG[5] law projects together since 2005. In 2020, Watchman and Clements-Hunt created the Legal Advisory Team for The Blended Capital Group (TBCG) supported by TBCG Partners Michael Marais (South Africa) and Gordon Noble (Australia). Carla Parsons, now an Associate, Mills & Reeve LLP (UK), also supported TBCG's ESG Law capability. In 2022, TBCG worked with Leonard Alf and his team at the Green Enterprise Group (GEG) to complete an assessment of 100 law firms globally in terms of their integration of ESG. This research provides the basis for *Riding the Dragon: The Future of ESG Law*. Our objective is to show the critical signals and signposts for the direction of travel of ESG in the global legal community. This briefing is the second in the Dragon series building on *Chasing the Dragon: The Rise of ESG Law*, published in March 2021.

bubble, the associated teething problems, and why we believe ESG is here to stay, despite hyper politicization, notably in the USA.

Whatever the three-letter acronym, the fundamental material risk and liability drivers represented by ESG, which have profound implications for fiduciary law and associated investor duties, are becoming deeply embedded in policy, regulatory, prudential oversight, and legal ecosystems. Namely, those systems which, in most jurisdictions, govern our corporate, investment and public institutions, while also defining their social licences to operate.

In short, the overarching frameworks governing the clients that underpin large swathes of legal business are changing at a pace we have not seen for many generations. The realities of complex converging systemic risks (CCSR),[2] such as climate change, biodiversity loss, the spoilation of natural ecosystems underpinning economics and commerce, including our oceans, and a panoply of social issues, are coming to the fore.

As this happens, the recognition of a requirement to shift from extractive capitalism to regenerative capitalism during the 21st century, is accelerating, as is our understanding of the rich promise of new, multi-trillion US dollar markets to deliver sustainable development as the world decarbonises. Accounting, reporting and disclosure regimes in the major capital market jurisdictions, as well as an intensifying effort to consolidate sustainability standards, internationally, are under-going assessment and overhaul in a manner we have not witnessed for generations. The compliance challenges for publicly listed corporations have always been manifold. Now, some General Counsels are asking whether current expectations are even manageable in an era of building ESG examination.

In *Chasing the Dragon: The Rise of ESG Law*, we identified nine legal practise areas (see diagram on page 8) which we believe are essential for a law firm to credibly claim that it is a wholly ESG integrated operation with comprehensive capabilities. In 2020-21, we explored how 55 law firms were developing ESG practises, signalling both the challenges and opportunities they were facing. In 2021-22, we have extended our assessment to 100 law firms globally and sought to internationalise the coverage in *Riding the Dragon: The Rise of ESG Law* through contributions from international experts from various sectors.

A group of international ESG thought leaders explore how lawyers, law firms, and the law itself, can impede, facilitate

Riding the World

For *Riding the Dragon: The Rise of ESG Law* we have gone global. Thought-leading contributors from Brazil, France, Hong Kong SAR, Italy, India, Kenya, South Africa, UK, and the USA, have kindly stepped up to shine a light on some of the most challenging ESG realities facing the legal world.

We've taken a 100,000 foot look from the edge of space at how the legal markets and law firms work — or don't, as the case may be — to drive ESG impact to support the broader and ultimate United Nations goal of sustainable development.

How should lawyers align with purpose (Carlos Joly)? What is "The Role of Law in Sustainability" (Judge Professor Mervyn King and Alexander Rhodes in conversation), and what role can lawyers play?

From Credit Rating Agencies (Dr Daniel Cash), to accounting for the future (Susan Harding), on to private equity in India (Archana Hingorani), and the work of the Brazilian Federal Police (Erico Negrini/ Associate Professor Ducineli Régis Botelho), *Riding* puts some of the thorniest challenges and emerging opportunities in front of the reader. A board-level view on ESG in South Africa (Karin Ireton) puts some very direct challenges to lawyers in the country.

On occasion, we swoop down to ground-level to focus on the decision-making conundrums facing senior executives in law firms to to shift culture, shape conduct and align ESG decision-making (Dr Roger Miles). We look at the current Klondike Gold Rush-style enthusiasm for ESG, contrasted with "ESG RIP", as it is characterized as hero or villain for assorted players in public and private markets where metrics, reporting and disclosure confusion reigns (Donato Calace). What, asks Ben McQuHae, is the entrepreneurial risk, reward, and reality of establishing a pure-play climate and ESG-focused law firm in Asia-Pacific?

Finally, and perhaps most importantly for the profession, Lucie Cruz asks a generational question: why study law and then opt out?

or speed the transition to regenerative capitalism, employing ESG approaches as one arrow in their quiver. We welcome a range of contributions this year, from the business, investor, public policy and academic communities to highlight different sectoral and thematic views on what the commercial possibilities are for law firms entering the ESG cage fight and where systemic challenges lie, preventing a global political economy based on regeneration.

Whether climate-related, through nature-based challenges, or human rights abuses in corporate value chains, there is a sharp rise in public purpose litigation[3] as a combination of criminal law and civil law are employed to address injustices impacting communities and the ecosystems they depend on worldwide. Third-party funding of litigation, while nascent outside of the US, is increasing as evolving multilateral norms, principles and soft law associated with ESG get a harder edged regulatory profile in regional and national legislation.

We highlight several illustrative cases, including BHP Billiton-Vale[4] (Brazil/environmental-social), Lafarge (France-Syria/human rights), and DWS (Germany/governance-greenwashing), while projecting ahead to see where the ESG litigative train is heading.

Riding the Dragon is neither a direct assessment nor ranking of law firms on ESG but rather a focused effort to understand the direction of travel for the legal world as the core of the legal earth tilts.

INTRODUCTION

The Future of ES

Since we embarked on a process to identify ESG law firms there has been an accelerating interest in the legal world on how they can serve the growing ESG demands of corporations, the financial and investment community, and entrepreneurs, as well as traditional extractive and industrial clients.

ESG archaeology

UNEP Finance Initiative, a partnership between the United Nations, with global banking, insurance and asset management, was initiated in May 1992. Between 2003-2006, the UNEP FI team, headed by Paul Clements-Hunt, initiated research on the materiality of environmental, social and governance (ESG) issues to equity pricing. In May 2004, ESG was coined and the work to create the UN Principles for Responsible Investment (PRI), accelerated. A critical legal step in the PRI evolution took place early in 2005. Professor Paul Q. Watchman, as a Partner and leading ESG authority at Freshfields Bruckhaus Deringer, was asked by Clements-Hunt to explore the fiduciary implications of ESG across the nine major capital market jurisdictions. The resulting 150- page legal interpretation, commonly known as *The Freshfields Report*, provided the legal foundation for the UN to push ahead with the launch of the PRI in April 2006. The PRI, launched by the late UN Secretary General Kofi Annan during an iconic Opening Bell Ceremony at the New York Stock Exchange, is backed in 2022 by more than 4,500 investment institutions representing some $120 trillion in assets. The core team, led by Clements-Hunt (2000-2012), which brought sustainable finance and responsible investment to the heart of the United Nations system, included, among others: Ken Maguire; Yuki Yasui; Careen Abb; Butch Bacani; Mengqi Cai; Jacinto Coello; Richard Hansen; Chaoni Huang; Marieke Hussels; Remco Fischer; Scott Flemming; Regina Kessler; Kiki Lawal; Jacob Malthouse; Niamh O'Sullivan; Lisa Petrovic; Mark Sanctuary; Cecilia Serin; Susan Steinhagen; and Philip Walker.

UNEP FI celebrated its 30th anniversary on May 27th 2022.

G Law Methodology

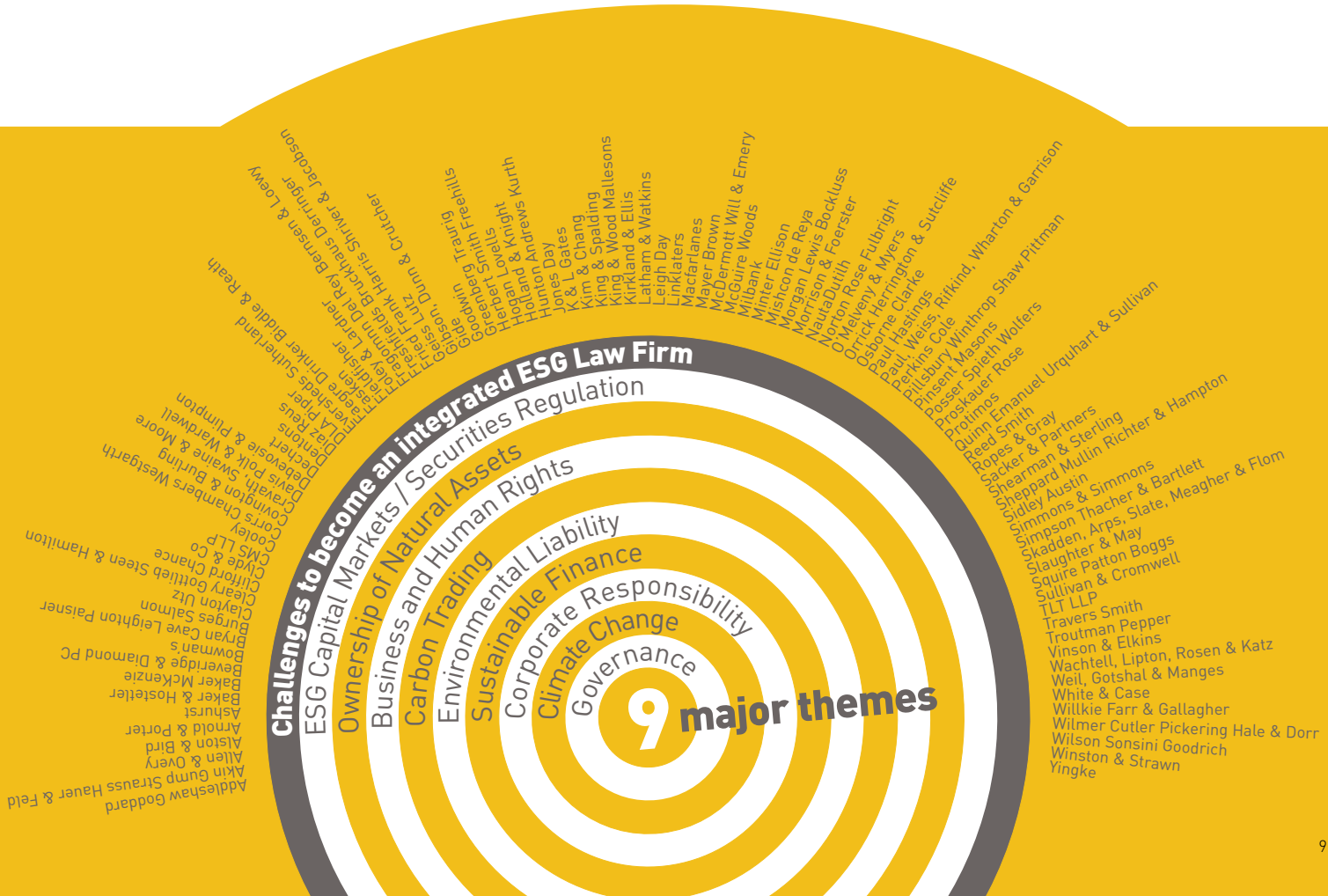
Our exploration, *Riding the Dragon: The Future of ESG Law*, is the second such briefing, the first being *Chasing the Dragon: The Rise of ESG Law*, published in March 2021. There certainly has been an upgrade across the industry in terms of ESG capabilities while the tendency to over-state those capabilities is also still present. As noted in our 2021 report, such is the speed of developments in the legal ESG world that it has been challenging to dismount from active research with any sense of confidence. Shortly before publication there was a tsunami of activity with, for example:

- HSBC censured by the UK's Advertising Standards Authority;
- a new legal action against German car maker VW related to alleged climate lobbying activity; and
- French construction giant Lafarge pleading guilty to financing the terrorist group ISIS in Syria.

So exceptions have been made for brief inclusions of the very latest important developments for the growing global ESG law community.

The 2022 survey focused on 100 law firms, up from 55 in 2021, and is based on public sources generally available in print form or digitally from the internet. The websites of law firms and press reports, professional journals, legal directories, client-briefings, blogs, webinars and other materials aimed at clients, corporate responsibility reports, and marketing materials and other materials produced by law firms on ESG and related matters have also been explored. In addition, we examined the biographical sketches of lawyers who held themselves out to have expertise on ESG matters, such as Net Zero, biodiversity, Business & Human Rights or the Circular Economy.

It was clear from the beginning that law firms differed markedly in how they put together short biographies for their lawyers. It was evident that there was an element of catch-up going on. Talent attraction and retention for the next wave of lawyers has a distinct sustainability underpinning where the coming generation places a high value on a firm's own values, conduct and purpose. Finally, the research process for the 100 firms was carried out independently by the UK-based Green Enterprise Group commissioned by The Blended Capital Group (TBCG) Legal Advisory team. GEG conducted 1,000 hours of active research.



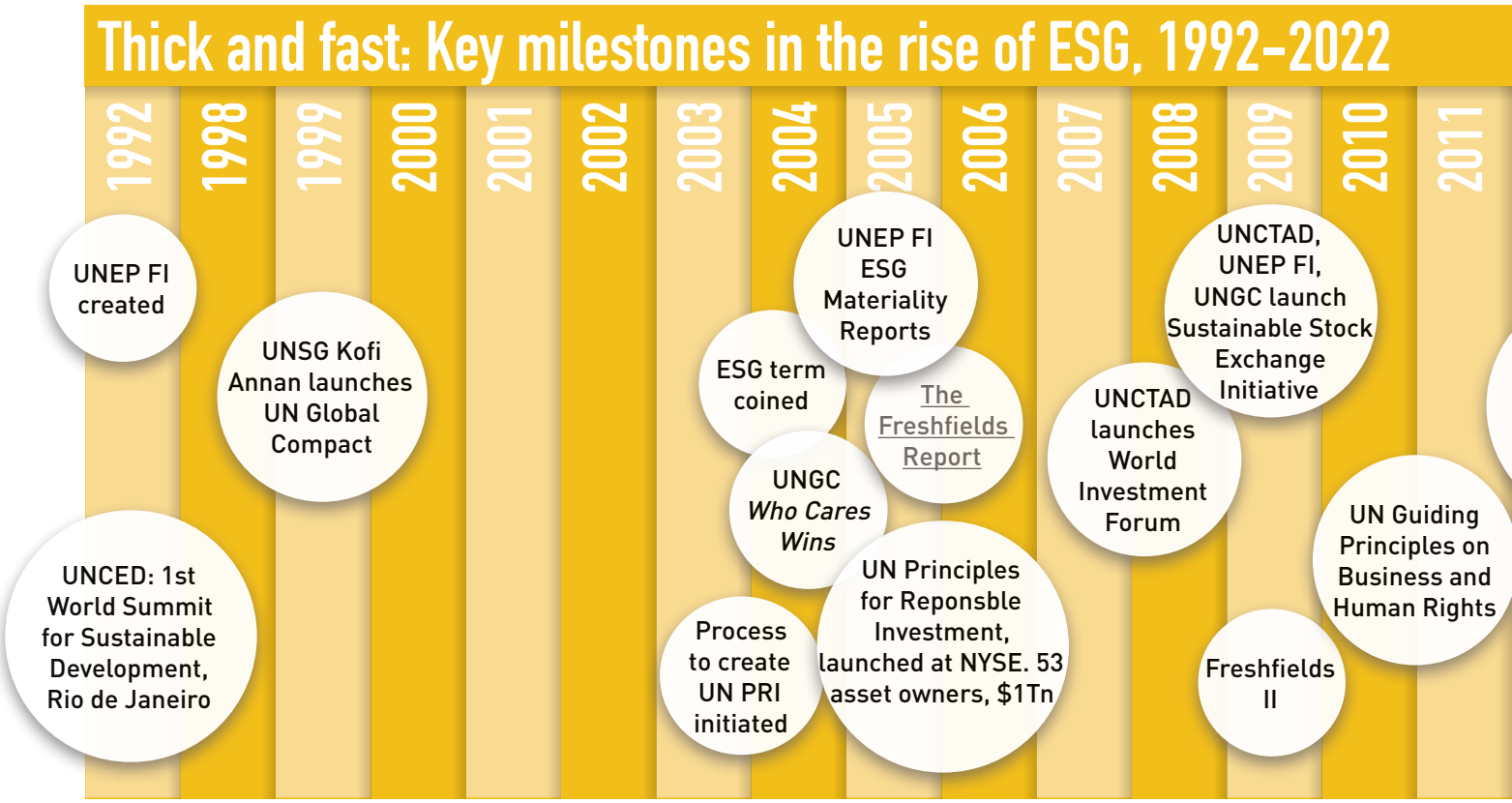
Research overview

"Institutionalized bragging": these are the words of a senior executive in a legal publications business after decades of involvement with the sector.

The exponential rise in demand for ESG equipped law firms is clear. Clear, also, is that many law firms are poorly equipped to deal with the building demand from clients for ESG services. Some firms are on the edge of greenwashing. As an integrity issue, that's dangerous for any law firm.

In short, the *Dragon's* 2022 survey of 100 firms confirms that lawyers have come to the sustainability field late. The news is not all bad for those leaders who have moved early, understanding that law must lead in the shift from extractive capitalism to regenerative capitalism on both the risk and value creation side for clients.

There are myriad questions: was it the distraction of the golden boom years in the run up to the 2007 financial crash, followed by a decade of the legal whirlwinds swirling around its contentious aftermath, that undermined a focus on sustainable development? How did we get to this state of affairs in a field where academic brilliance, pragmatic street smarts,



and excellence in execution are so greatly prized? Why did mainstream law not see sustainability and ESG earlier?

Despite significant progress in the adoption and integration of ESG practices, today's pre-eminent law firms continue to refer to initiatives and recognition that — upon closer inspection — appear largely non-substantiated. Many others also lack an explicit ESG stance or approach.

Approaches to addressing and integrating ESG also appear haphazard and fragmented across the legal landscape, compared to other professional service sectors such as consulting.

Clearly, a centrally recognized body, leading firm, or organisational coalition can and should set standards and provide an example for how to take the adoption of ESG beyond terminology and rhetoric and implement it into everyday practice. We're not suggesting or warning about a Climate-ESG cartel for law firms, as per the five US Senators covered by Professor Paul Q. Watchman, just a reasonable sectoral approach to build standards.

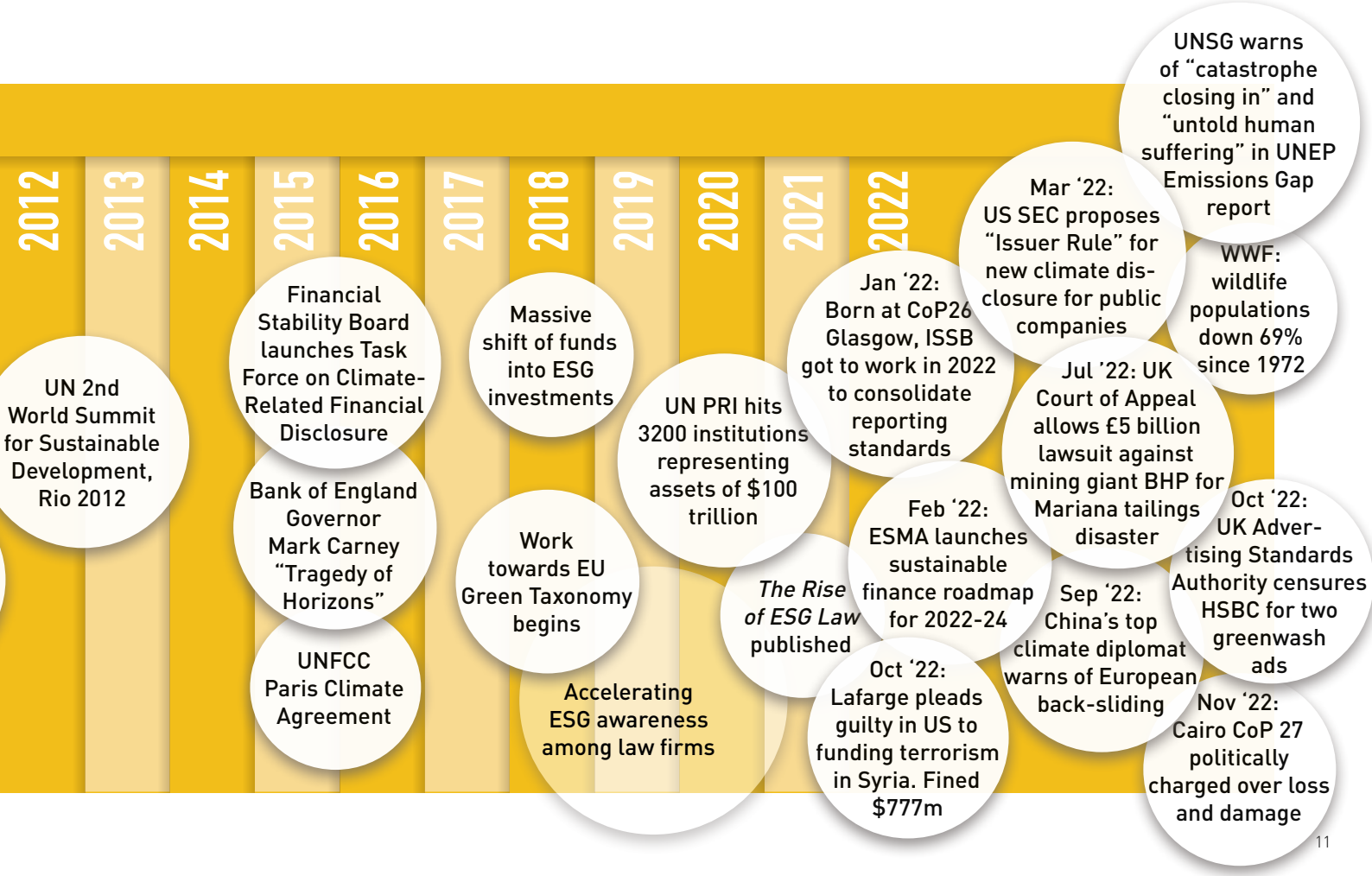
Numbers tell the ESG story

50% of law firms around Europe and the US have created an ESG practice area in the past three years.

27% of firms already have had an ESG practice for more than three years.

18% of firms are planning to create an ESG practice in the next three years.

Only **20%** of law firms believe that they are very prepared to handle the growth in ESG demand.



Headline research findings

Findings from the 2022 Wolters Kluwer Future Ready Lawyer Survey

Engagement

- For firms with a dedicated ESG practice, they were generally created in the last few years, particularly following Covid-19.
- Where they have sustainability/ESG policies, law firms develop their own individual policies rather than adopting an accepted industrywide framework.
- Few law firms adhere to well recognised international standards such as ISO 14001 (Environmental Management), ISO 26000 (Social responsibility) or ISO 37000:2021 (Governance). Some majors do.
- Many firms did not have a clear environment or sustainable procurement policy on their website.
- Most firms have some form of ESG practices, even if they aren't specifically labelled as such. Examples include: Sustainable Business & Climate Change; Business Integrity; and Sustainable Development.

Evolution of services

- Across multiple industrial, commercial, extractive and real estate sectors, ESG is top of the C-suite agenda and an increasing focus for investors despite recent criticism and politicization of the UN-Investor originated concept.
- Climate and pathways to Net Zero are front of mind for many businesses although the understanding and architecture to deliver such pathways is nascent.
- Increase in ESG regulations see law firms largely focused on compliance, disclosure, reporting requirements, and due diligence services for clients.
- Sustainability-linked finance services are an accelerating focus for law firms as ESG pressure builds on investment and finance institutions.

Securing talent

- Law firms need increased ESG involvement to increase their appeal to new talent as well as to clients.
- Increased 'workplace activism', notably post Covid, will mean that ESG will play an important role in employee recruitment and retention.

Communications and recognition

- An increasing number of firms offer thought leadership commentary and tools for clients to help them stay informed about ESG issues but this is not universal.
- Firm ESG updates are often centred on recognition with neither thought leadership or specific firm initiatives prominent for many firms in their external communications.
- Most firms have participated in and received ESG and CSR-related awards with Diversity and Inclusion recognition prominent in law firm focus.
- CSR department and CSR publications are less common with a building but focus on sustainability goals, ESG, and climate/environmental policy.
- Firms rarely link their use of legal innovation/ technology and their ESG goals.
- Many firms did not have a clear environment or sustainable procurement policy on their website.
- There is a lack of uniform reporting across the legal sector on key environmental metrics (e.g. carbon emissions, energy use, etc). This makes comparisons difficult.
- Impact from Covid-19:
  — Difficulties in integrating new employees.
  — Drastically increased workplace flexibility in law firms.
  — Fast-tracked digitalisation of operations and integration of tech.

Not all bad news...

Shining examples of world class ESG engagement and client support across the advisory, transactional and contentious aspects of law exist although we feel these remain far too few in numbers to date. There are clear signs that, as ever, the legal community is adaptable and can adjust at dramatic speed when new markets emerge. A tendency to overstate ESG capabilities and expertise remains, however, and for some firms they approach the cliff of greenwashing, a zone no law firm wants to be even within shouting distance of.

In the internal dimensions of law firm operations there are also wonderful initiatives to transform culture and to address deep seated and long-held accusations of the bullying, sexism, and a lack of diversity, which have given certain corners of the legal world a toxic profile. Such profiles will increasingly deter the very best talent from the values driven next generation from automatically seeing law as an obvious, rewarding and enriching career path. Without doubt, for the post Pandemic generation in particular, more questions are being asked ahead of employment in law firms despite the fact that securing a training contract remains hyper competitive.

Most widely subscribed to ESG-related organizations:

1. Greener Litigation Pledge = 77/100 signatories
2. Law Firm Sustainability Network
3. Environmental Protection Agency's Green Power Partnership
4. Legal Sustainability Alliance
5. Australian Legal Sector Alliance
6. UN Global Compact
7. Net Zero Lawyers Alliance

Take-aways

Law should be at the epicentre of efforts to both forge new pathways and accelerate the journey from 250 years of extractive capitalism to a global political economy where regeneration is the reality, not just the buzzword. As the systemic threats of climate change, ecosystems destruction, inequality, grinding human rights issues, and food insecurity become manifest, fundamental questions remain for how the legal world should build new offerings to serve the transition? The use of ESG-related litigation, and the rise of third-party funding, to address public purpose issues across jurisdictions, will accelerate and build. Increasingly, we will see voluntary ESG commitments for corporates and investors and the emergence of soft laws that such commitments drive, transition to policies and regulations with a harder edge. The age of ESG litigation, both civil and criminal, has only just started.

Risk radar and new profits lens a must for lawyers

ESG is often seen as a risk lens. It's not. It was never meant to be. Applied effectively, ESG is a Ying-Yang risk-reward tool. Understand the evolving risks fully and you will understand the new commercial rewards emerging from a sustainable economy.
Lawyers need to get this and let their clients know.

In 2004, striving to align the goals of the United Nations with those of the largest, long-term focused asset owners, a small UN team knew the risk-reward dynamic at the very heart of capitalism was the key to success. To forge alignment meant a broad range of players (political, investment, industrial and commercial) had to be incentivised beyond the reputational benefits of a political success or corporate social responsibility and, certainly, beyond the threat of divestment.

If a real shift from the extractive capitalism of the past 250 years was to deliver a new form of regenerative capitalism

Risks

1. Tsunami of ESG regulatory initiatives: legislation, directives, guidance, standards, scores, indices and disclosure and accountability requirements.

2. Coronavirus pandemic which has focused attention on ESG issues, particularly on the health safety of employees and workers in supply chains.

3. Climate change and the impact of the 2015 Paris Agreement and carbon zero targets driving the growth in climate change and ESG litigation.

4. Record number of ESG and climate change shareholder resolutions supported by important asset owners and asset managers, such as Aviva, BlackRock, and Vanguard, and organised by coalitions of NGOs, shareholder groups, boutique law firms which, if anything, has increased during the pandemic.

5. Modern slavery as well as the shift in human rights law to include complicity and the resulting exposure for companies which rely in their supply chain on the use of child labour and forced labour.

6. Demand for sexual and racial equality, social justice as well as diversity and inclusion.

7. Massive divestment of funds in ESG-unfriendly businesses and reinvestment in ESG-compatible businesses.

8. Changes in laws relating to directors' duties, pension funds, and financial investment. Targeting of responsible officers within companies with criminal and civil liabilities for corporate wrong-doing.

9. Reputational damage done to companies which ignore ESG considerations, which often result in ESG scandals and controversies.

10. Mulcting companies and banks with fines, penalties, settlements and conduct costs running into hundreds of billions, if not trillions, of dollars and pounds.

11. Re-purposing of and cultural changes within law firms driven by the values of lawyers of the new millennium and the need to attract and retain the brightest and best from the shallow diversity pools. ESG is an important magnet for the recruitment and retention of lawyers and has been explicitly acknowledged by law firms.

then both sides of the risk-reward equation had to be present and that stands at the core of ESG. Sure, there are increasingly well understood risks for ESG but, equally, the business and investment rewards of getting ESG right in the context of accelerating sustainability markets cannot be underestimated.

Eighteen years after the term was coined, the reward side of the equation has become a "poor cousin at the wedding." The value creation side of ESG in a world demanding innovative, clean, smart and decarbonising industries is often underplayed or overlooked. Why?

Perhaps it's an inevitable facet of modern capitalism dominated by deeply risk aware institutional investors? As Sean Flannery, a former Chief Investment Officer of State Street Global Advisors, often quips: "Once the risk bell is rung, it can't be unrung." In short, the reality of risks, quite rightly, gets investors attention and, as such, the rankers, raters, and data ghurus who serve global financial and investment markets, have co-opted ESG as, above all else, a risk lens first and foremost.

How do we rebalance the reward side? How do we marry ESG and the positive outcomes of Impact investing at real scale? Below, we take a quick look at some major themes emerging.

Opportunities

1. Legal services to enable companies and investors to understand the opportunities created by the multilateral ESG/SDG architecture, the Paris Climate Agreement, the EU Green taxonomy, and a broad proliferation of sustainability driven policy changes worldwide.

2. Representation of communities in class action suits where multinational corporations, including their subsidiaries, are shown to have acted outside of evolving ESG norms, notably where access to justice for local communities is not possible.

3. Industrial diseases and workers' health in frontier and emerging economies where international value and supply chains of multinationals are exposed.

4. Corporate involvement and/or association in human trafficking and modern slavery cases.

5. Corporate association with non-state security actors and human-rights violations.

6. M&A and for green energy, sustainable infrastructure, and SDG-aligned technology companies across the digital, artificial intelligence, machine learning, robotics, and e-mobility domains.

7. Legal work around the rapidly-increasing climate, green and social bond products for the finance and investment industries.

8. Standardization, systemization, scaling and securitization of a whole new range of sustainable and ESG-aligned investment products across public and private equity, fixed income, real estate and alternative asset classes.

9. Legal services on the status, ownership and transference of natural capital as well as the emergence of new contentious areas around Ocean pollution/plastics and a growing global suite of protected natural areas (Arctic/Antarctica, Amazon, the world's great forests etc).

10. Legal services in light of the emergence of off-grid and distributed infrastructure as a distinct sub-asset class to serve the basic services needs of the billions living in last-mile communities.

11. Engage with governments to manage/mitigate liability associated with political decision-making and policies at local, regional and state levels:

- climate change-related impacts: flooding, biodiversity loss, rising sea levels, loss of industry etc.
- pandemic-related impacts: viral introduction, loss of business, disruption to economic performance
- decisions regarding organisational employment practice, workplace equality, bullying, environmental health, etc.
- creating or exacerbating conditions that risk (not result in) compromised human and planetary health.

SECTION A

SUSTAINABILITY AND THE LAW

The questions around sustainability and the law are almost boundless and until recently, from the commercial perspective of law firms, largely unexplored. That's even before you get to how law firms handle the complexities, uncertainties and current arguments around ESG.

In this section we look at some of the key questions. At a systemic level what is the role of law in sustainability? How can law firms use ESG to help clients on the pathway to derive value from sustainable development? How can law firms assist clients more effectively manage and mitigate risk in an unfolding era of change?

How ESG thinking can be used in litigation to support sustainability is addressed in Section C.

In this section we have drawn in a range of views:

- Judge Professor Mervyn King SC and Mishcon de Reya LLP Partner Alex Rhodes, practitioners across legal generations, dive deep into a conversation on the role of law.
- Paul Clements-Hunt frames the case for why law firms need to become ESG integrated professional service providers across their practises and the scale of the opportunities emerging.
- Investor Carlos Joly explores how law might advance or obstruct environmental justice and ESG.
- Journalist Lucie Cruz poses some challenging questions as to why young law graduates opt out of the law as witnessed by her own journey.
- Dr Roger Miles probes how analysis used to understand poor conduct in the financial sector may be applicable for the law.

A common thread touched on in all pieces in Section A is the culture of law firms. Also, the transition underway from 250 years of extractive capitalism to an aspired one of regenerative capitalism is an underpinning theme. With the challenges of poorly understood converging systemic risks manifest, how does the law itself evolve and change to be fit for purpose in an era of uncertainty and change? Where is the opportunity for law in climate change, ecosystems destruction, food insecurity, financial instability, inequality, and supply chain challenges, to name a few overarching issues. How innovative and creative can coming generations of lawyers be to help society and clients tackle change?

Why become an ESG integrated law firm?

The business upside for law firms that move early on sustainable development, and the ESG thinking which supports this overall global goal, will define the legal leaders of the 21st Century.

Trillions of dollars will be needed annually to address climate change and deliver on the United Nations Sustainable Development Goals (UN SDGs).[6] Whichever of the 17 SDGs you pick, none of them will be achieved without the proactive, engaged, creative and fully committed involvement of law firms globally, and across multiple lines of their business.

As the Business Commission on Sustainable Development argues: "Contributing to and achieving the SDGs offer a compelling growth strategy for businesses and the world economy as a whole."[7] If the SDGs were pursued in "food and agriculture, cities, energy and materials, and health and well-being"[8] alone: it could increase the global economy by 26%[9] unlocking a $12 trillion annual business opportunity.

How ESG-aligned law firms can position to benefit from these new flows and markets is why we initiated the *Dragon* series.

On the flip side, the risk of not addressing sustainable development issues is an enormous constraint on economic development, which could threaten system stability, and have profoundly negative consequences for governments, communities, businesses, and investors.

Public purpose litigation, driven by third party funders, will be used increasingly to address grinding environmental and social issues of public interest. Clearly, another huge developing opportunity for ESG lawyers? (See Section B: In the Cross Hairs – Litigation, Litigation, Litigation)

The nerdy ESG gap – can law close it?

There remains a wide gap between the current system's focus on financial materiality and the true needs of sustainability where public interest materiality would benefit from an equal footing. The on-going ESG conflict has advocates for financial materiality and, amongst other names, the proponents for double materiality, in fiercely opposed camps battling incessantly on social media and in other forums.

How to unpick this nerdy ESG debate? Judge Professor Mervyn King, amongst many illustrious honours, the Founding Chair of both the Global Reporting Initiative (GRI), and the International Integrated Reporting Council, cuts through. Professor King asserts that the collapse of Lehman Brothers followed by the Global Financial Crash amplified a growing understanding that: "three critical dimensions for sustainable development — the economy, society, the environment — were having an impact on the limited liability company: its financial condition, balance sheet, operating performance, income statements, risk profile, cost of capital."[10] And his key point, enabling us to understand double materiality clearly: "Suddenly, sustainability like a coin was seen to have two sides. In the second decade of the 21st century, looking from the outside-in, how these three critical dimensions were impacting companies."[11]

There needs to be a much clearer and more readily understood common global narrative for the concept of double materiality.[12] Can the global legal fraternity, so accustomed to be at the very heart of contention and conflict, helped bridge the various schools of materiality?

Certainly, purpose litigation will play a role in defining public interest materiality and socialising it through global legal systems. We believe that the shift is already underway as a new generation of the judiciary come to the fore in an era when complex converging novel risks are manifesting themselves in natural, social and financial systems. From a practical business, investor, and capital markets standpoint, the role of law in sustainability is largely unexplored. In *Riding the Dragon* we take a deep dive into this question from both a legal and investor perspective: not just what the role of law in sustainability is but what it should become.

Complex converging systemic risks

Where's ESG legal business? Figures and thoughts to ponder:

- In the past decade, the focus of finance ministries, prudential oversight bodies and capital market regulators on sustainability issues has witnessed a sharp acceleration, as the system threats associated with complex converging sustainability risks have emerged. In 2021, the G20 Finance Ministries and Central Bank Governors finalised a Sustainable Finance Roadmap (SFR).[13]
- At current rates, the SDGs will not be delivered until 2082[14] and, post Covid-19, it is predicted that it will shift to the early 2090s, perhaps 2100.

- The annual gap for financing required to deliver the goals has jumped from $2.5 trillion (pre-Covid 19) to $3.7 trillion.[15]
- The links between key drivers of social deprivation with those of environmental destruction[16] have been further highlighted, notably in the 46 least developed countries (LDCs). Research in 2021 highlighted that "environment-human linkages affect the outcome of the vast majority of SDGs."
- The fragility of global food security has been highlighted by the impacts of the pandemic and the Ukrainian War which followed it, on worldwide supply chains. Can we collectively protect the inherent, financial, and nutritional value, embedded in the territorial supply chains for the benefit of vulnerable communities?[18]
- The ability to catalyse clean global financial flows, while de-risking and freeing pools of domestic capital in the developing and least developed economies, will empower the implementation of the SDGs.[19]

So, *Riding the Dragon* asks a series of questions for lawyers considering the Why of ESG? A truly ESG integrated law firm will be able to answer all of them in depth.

How can lawyers contribute and benefit from fundamental shifts as framed by the UN's SDGs? The SDGs provide a blueprint to understand the opportunities associated with the emergence of new industries, businesses, and new methods of financing a sustainable economy. The SDGs create a pathway for a new sustainability supporting approaches to government and broader public sector procurement practises, as well as targeted policy interventions to incentivise and accelerate the uptake of sustainable finance and responsible investment approaches by mainstream investment and business.

How can lawyers assist the global financial system and financial institutions to address a cascading torrent of converging systemic risks, covering manmade and natural systems, while also "achieving sustainable growth, environmental protection and poverty reduction."[20] Colliding systemic risks (*inter alia*, financial instability, climate change, food insecurity, supply chain fragility, inequality and human rights issues undermining economic models) have put the global financial system and the institutions that utilize it under intense forensic scrutiny. From continued investments and financing of fossil fuels, to the impact of financial flows on ecosystems, and the extractive nature of financial capitalism, many institutions are concerned about protecting their social licence to operate.

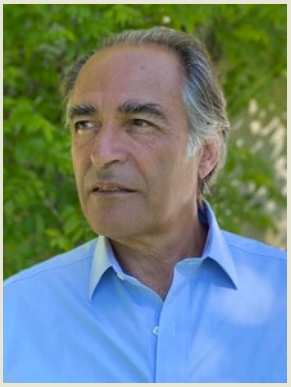
Can the legal world contribute to a Just Transition while forging new lines of business? Strengthening indicators across governments, markets, industrial and business sectors, as well as within the investment and financial communities, suggest positive sustainability change has never been more conceivable. Aggregation of data to understand system wide effects, with governments being able to include private sector contributions, will enhance understanding and decision-making. At the same time, the challenges around effective disaggregation of data to ensure an adequate focus on the last mile and the needs of the most vulnerable communities is required to identify gaps in SDG delivery. What role does law and law firms have in these processes?

Can forward-looking law firms accelerate a systemic shift based on cohesive global action while accelerating adoption by the financial system? Can this, in the mid- to long-term, support a form of sustainable growth which respects environmental and societal boundaries? These three important disciplines of market and public interest, refocused and well calibrated for positive impact, will help achieve sustainable growth through improved/innovative collaboration, while creating a path to decision making aligned with the sustainability as a norm in business and investment.

Law firms will need to operate, profit and contribute as we see a generational change in accounting, reporting and disclosure mechanisms responding to a fundamental change in the global political economy. Which law firms will lead on this and create new business doing so? Developing successful double materiality standards to guarantee achievement of the SDGs requires the involvement of stakeholders from both ends of the 'materiality spectrum' (financial and developmental). The legal world needs new forums that can gather different stakeholders at the international, regional, and national levels to ensure the applicability of the new standards at a national, regional and global level. The law firms that lead on this will play a critical role in accelerating a transition to regenerative capitalism.

The role of law: advancing or obstructing environmental justice and ESG?

What is proper and ethical professional conduct, as set out in codes of conduct? Complicity in perpetuating environmental and social harms cannot be professionally right when it is morally wrong, writes Carlos Joly .



Carlos Joly is a pioneer in responsible investment. He launched the first Scandinavian ESG fund (1998) and is a Fellow at the Institute for Sustainability Leadership, Cambridge (CISL). Formerly Chair of UNEP FI and Co-Chair of the UN PRI expert drafting group. Advised CEO of Groupama AM and of Mirova/ Natixis AM. Senior positions: Storebrand Kapitalforvaltning; Skandia Fonds; and Citibank (NYC, London, Buenos Aires). Visiting Professor (Toulouse B School) and presented at Oxford, Cambridge, and Yale. Participates in University of Oslo's Practical Philosophy Working Group. A Harvard M.A. and an active investor.

When nearly 20 years ago, and as Chair of the Asset Management Working Group[21] of the UNEP Finance Initiative, I commissioned Freshfields to provide us with a legal opinion whether fiduciary duty in institutional investment could include consideration of ESG,[22] ESG was not in vogue. Few investment professionals took environmental risk seriously in constructing portfolios or designing investment strategy. Today few fail to acknowledge that environmental degradation and climate change pose a risk to returns. Perhaps even more important, investors increasingly recognize the risk to the environment itself from where we put our money, and not only because it reverts into financial risk. Environmental degradation is seen as a risk even when it may not directly impact stock or bond valuations in the short term, because it in time undermines the foundations of the economy and of a well-functioning society. Some of us go further, acknowledging intrinsic and legal rights to entities in nature, a position increasingly litigated in the courts with varying success.[23] Underpinning the social responsibility of banks, insurers and investment managers is the fact that the license to operate — that financial firms benefit from, and that allows them to generate handsome profits — is a protective privilege granted by society, to which correspond reciprocal social responsibilities to fulfill socially valued roles.

Rationality demands that we do the right thing as we go about seeking to earn satisfactory returns for our clients. Today, the understanding of what it is to be an enlightened fiduciary goes beyond maximizing investment returns; it means achieving returns while aiming to do good by satisfying the spirit of the Paris Accord and similar treaties. Large institutional investors accept they have a systemic duty to avoid environmental collapse on both prudential and moral grounds, given their acknowledgment that how society's savings are applied determines what society's future will be like. In line with this, today one cannot be a competent portfolio manager if one does not take environmental matters into account in asset allocation, portfolio construction and stocks or bonds picking. This leads me to wonder whether a similar trend may not be emerging in the legal profession, as indicated by *Chasing the Dragon: The Rise of the ESG Law Firm*,[24] and its sequel for UNCTAD. What does it mean to be a trustworthy and responsible corporate lawyer today, and to satisfy lawyer professional ethics?

The opening lines of Rawls' *Theory of Justice*[25] state: "Justice is the first virtue of social institutions, as truth is of systems of thought". His view is that moral persons are distinguished by

two necessary features: first, a moral person is capable of or is assumed to have a conception of their own good as expressed by a rational plan of life; and second, a moral person must be capable of having a sense of justice. Following this, we may well think of the law as the codified embodiment of the morals of a rational society that seeks to be governed by justice; and of a lawyer as a professional who seeks to put that into practice.

The good society seeks the improvement of the economic, social and environmental conditions for most of its people in a democratic way — that is its rational plan of life. Thus, the role of law in the good society is, on the one hand, to create the conditions for a harmonious functioning of the various actors in the community as they go about their lives and their business and, on the other, to enforce certain prescribed behaviors through sanctions or penalties. Understood in this way, the law embodies, codifies and seeks to enforce the moral code of a particular society as well as forming it.[26] Consequently, a legal professional that seeks to operate with a high moral standard will not knowingly act in misalignment with this understanding of why we have laws and regulations. What does this mean in practice?

We know law is not always aligned with justice and fairness. A civilization's values changes over time and in interaction with other societies; and the law may either lag a society's predominant values or, by setting forth new standards, form them. Ready examples that come to mind are who is considered a citizen, which civil and welfare rights and duties pertain to immigrants, who gets to vote, whether slavery is permitted, whether there should be a death penalty, whether an individual's family should be jailed for his unpaid debts (as in 18th and 19th century debtor prisons).

Consequently, a legal professional who is involved in promulgating legislation and who wishes to further what is rational, given what we now know and experience about man made climate catastrophe[27] and biodiversity's demise,[28] will seek to bring the law up to speed with what reality requires.

But what about a lawyer's or a law firm's responsibilities to a corporate client like a major oil or coal company, known to be responsible for carbon emissions or other forms of pollution? Again, given the state of the world, how rational is it for a lawyer to defend a company that is known to be a major polluter or emitter of carbon, a company that lobbies actively against environmental laws and regulations or the advance of ESG in institutional investment or confuses the landscape by supporting fake ESG?[29] What about the institutional investor who claims to be doing ESG but really isn't? What is rational? What is proper and ethical professional conduct, as set out in codes of

The Famous Five go hunting ESG

Professor Paul Q. Watchman adds: Adam Smith wrote in *The Theory of Moral Sentiments* in 1759 that prudence and justice are necessary for society to survive but beneficence was necessary for it to flourish.

On 3 November 2022, five US Senators, ignoring Smith's moral sentiments, sent a letter to more than 50 major law firms which shines a light on unfolding complexity around ESG. The first paragraph of that letter states:

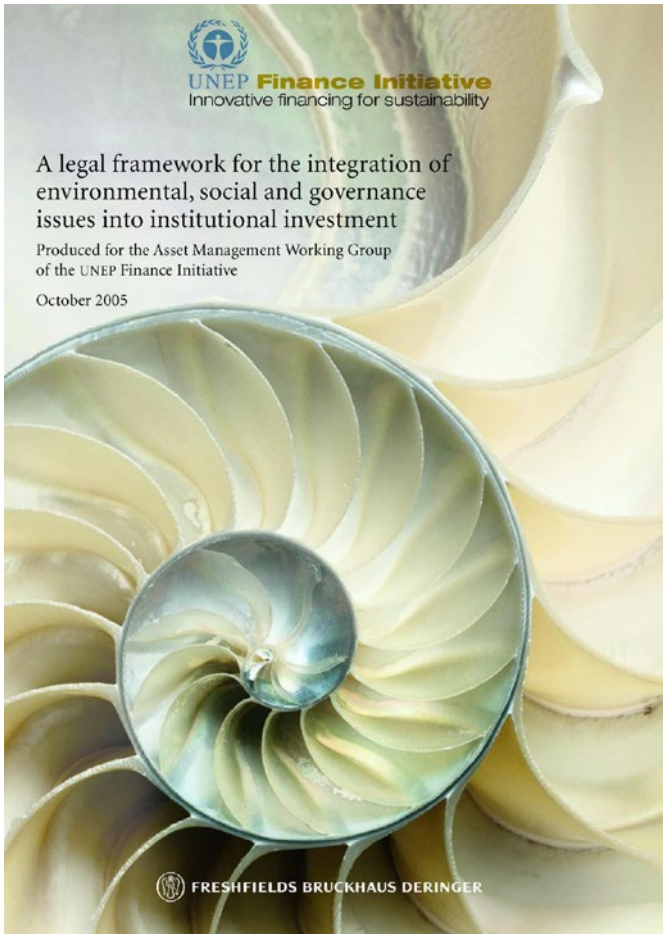
"We are writing about your firm's Environmental, Social and Governance (ESG) practice. Although businesses would certainly be wise to lawyer up before undertaking ESG initiatives,pt your firm has a duty to fully inform clients of the risks they incur by participating in climate cartels and other ill-advised ESG schemes."

In its last paragraph the letter states if these firms continue to advise their clients on participation in ESG initiatives the law firms and their clients should expect regulatory action.

Is there a precedent for politicians trying to intimidate lawyers and law firms? China, the USSR, and other countries which have been condemned for the persecution of lawyers by politicians, perhaps. But back in the USA, Home of the Brave, only McCarthyism in the 1950s and the 1964 debates on the Civil Rights Bill spring immediately to mind.

Paradoxically, and the Infamous Five Senators may not be aware of this, many of those 50 plus law firms who received their poison-pen letter are not paragons of ESG virtue, notably in a climate sense. A significant number of the firms targeted by the Senators are rated "F" by the US Law Students for Climate Accountability for the adverse impact of their legal advice on climate change.

There is, in fact, no real dispute that lawyers have a legal



How ESG became legal in 2005 with a critical fiduciary law question answered.

conduct? What is morally right in furtherance of the good society? Is there a disconnect between what is rational, what the codes of conduct say and what is morally right?

There are several aspects to this: 1. The distinction between providing legal advice versus defending a client in court; 2. The role of the lawyer in an adversarial court system; 3. The doctrine of innocent until proven guilty when it works in favor of corporations; 4. The moral duty of the lawyer as a professional and whether the professional code of conduct is consistent with what moral duty calls for. I do not pretend to answer these questions in what follows, but rather hope to open a discussion around them.

In the first place, let's distinguish between the lawyer's role as advisor as distinct from as defender in court. As advisor, a lawyer can either counsel and urge the client to follow the law and its intent or can look for a clever way to circumvent the law. The lawyer who wishes to uphold what's morally right will chose the former. Thus, the proper professional approach with a corporate client may be to urge it to uphold the spirit of environmental laws and ESG principles, to not circumvent or fake environmental and social performance; and if that does not work, to drop the client. Accountants will drop a client who fakes financial reports. They are duty bound to do so. Lawyers may not be duty bound in the same way, but there is no reason why they shouldn't act the same regarding environmental fakers and deniers. In some jurisdictions, France for instance, the code of ethics would appear to enjoin a lawyer from helping a client circumvent the law by misusing the law.[30]

In the US, the code of conduct is broadly interpreted as justifying hired gun practice: do whatever it takes to get your client off, and whether you think they're guilty or not is irrelevant. Many lawyers act as if their code of conduct provides immunity from

duty to advise their clients fully of material risks, such as potential breaches of anti-trust law or competition law, or climate change and other ESG issues where their impacts are potentially material risks for the client. Again, I am led to doubt the awareness of the Infamous Five of these basic legal duties. Lawyers are required to inform their clients about risk — who'd have thought?

Sarah de Gay of UCL in April 2022 stated that lawyers not advising clients of material climate change risk was not only unacceptable but a breach of the legal duties of lawyers to their clients. The same, it is suggested, applies to other material ESG risks. Law Societies, Bar Associations and Bar Council all provide guidance on the duties of lawyers to their clients to disclose material risks. It is, however, a matter for the discretion of the lawyer what amounts to relevant and material risks to the client. It's clear that large, specialist law firms, such as the Big 50, will be judged more harshly than non-specialist smaller law firms. It is banal to suggest otherwise.

It is, of course, contrary to fiduciary duties to exclude relevant and material risks such as climate change and ESG. The Freshfields Report established this in 2005 and, in doing so, provided the legal platform for sustainable finance and the launch of the UN Principles for Responsible Investment (PRI). Sixteen years after launch in 2096, the PRI is now the largest voluntary investor initiative in the world with almost 5,000 signatories. Between them these institutional investors control assets under management estimated at over $121 trillion.

The findings and conclusions of the Freshfields Report found that the consideration of the impact of material ESG risks, as part of financial investment decision-making, is consistent with and sometimes required by fiduciary duties. These findings were endorsed by the Law Commission for England and Wales in 2014.

behaving in a way that would under normal circumstances be considered unethical. From an ethical point of view, it seems rather strange that professionalism should require abstaining from moral judgment. As I argue below, the philosopher Aquinas has something to say about that.

Under what circumstances might the hired gun doctrine make sense? I suppose in the context of an adversarial system that works according to the ideal, based on the presumption of a balance of power and resources between prosecution and defense. Justice is presumed served when two conditions obtain: first, the truth prevails through the process of prosecution and defense setting out the facts and circumstances to prove a case before a judge or a jury. Second, the process takes place in a timely manner, allowing prohibitions, remedies, or punishment to occur before it is too late for justice. The reality, however, is that corporations can all too often indefinitely delay a final judgment through successive appeals while they continue to cause emissions; in addition to which the balance of power is also often in their favor, either because they can afford more high-powered legal talent than the plaintiffs or because US courts have in recent years become packed with extremist rightwing political appointees at state, federal and Supreme Court level; and they generally rule on the side of corporations rather than the environment or the public.[31]

The notion of innocent until proven guilty is rather sacrosanct. But one may well wonder whether it ought to be so, particularly as the wheels of justice grind too slowly to help against climate catastrophe. Dilatory tactics and appeals can mean that urgent climate action gets postponed indefinitely. How can this be avoided? One way might be to reverse the burden of proof. When a competent government environmental agency, e.g. the EPA, determines that a corporation's policy and behavior run counter to delivering on, say, Paris Accord objectives why not shift the burden of proof on the corporation to prove its innocence? In such cases, why not turn innocent until proven guilty into guilty until proven innocent as a way of correcting the balance of power for the sake of environmental justice and the larger good?

Instrumenting such a fundamental change in legal procedure is likely a very long shot and may result in unintended consequences. Another way, less effective probably but nevertheless available, is to encourage law firms and lawyers to exercise professional prudence understood in Aquinian terms. This is what this article proposes as a tactical way forward: in the absence of structural changes to how justice is organized and administered, an appeal to the conscious of the legal profession — self-regulation driven by moral purpose.

Being a good lawyer is not solely about technical proficiency. Justice is not decided by algorithm, it requires moral judgment. A lawyer who interprets their moral duty as seeking the good

Ignoring relevant and material financial risks, however, can never be consistent with the fiduciary duty of prudence. Fiduciary duties, the Senators may care to know, are not preserved in 17th century aspic. They are organic and grow or contract according to changes in legislation, laws, and the marketplace. Since 2015 there has been many changes to all three — legislation, the law, and rules governing the marketplace — which have placed climate change and ESG at the core of fiduciary duties.

Riding believes that a series of simple questions sit at the heart of vibrant capitalism and the investment which makes it beat. We believe further that lawyers are duty bound to help clients with these questions: "Is this a risk, yes, or no? If it is a risk, how are you going to handle it? If you recognise it as a risk and do not prioritise it, then what does that mean for your fiduciary duties or, in appropriate cases, directors' duties?"

Senators, you may relax. The 50 law firms may be working against the solutions to climate change (as the students giving them an F grade believe) and are undermining ESG or, as you suggest, or they are breaching their duties to their clients.

Whatever group is right in its assessment of these law firms you can rest assured that their clients will be advised by these law firms of the many, sometimes conflicting relevant and material risks, such as antitrust law infringement and climate change and ESG risks. As Robert Eccles wrote recently in Forbes in an Open Letter to the Five Senators: "The issue of financial materiality is indeed at the heart of the question of ESG".

These law firms know that and so does the United Nations and the many governments, corporations, banks, insurers and reinsurers, asset owners and asset owners, lawyers and other professional advisers 30,000 of whom

through the application of justice can chose to avoid defending environmental and ESG miscreants, even though it means losing profitable billings. "Just say no!" to taking on environment-related cases where your moral judgment conflicts with the excuse "I am simply a hired gun" — as many senior lawyers seem to have said to Donald Trump when asked to defend him after his January 6 coup attempt and keeping nuclear secrets as if they were his private property.[32]

The 13th century philosopher Thomas Aquinas has a telling explanation why technical proficiency is insufficient and morals are a necessary part of professional performance. He says a military commander performs his function well if and only if in exercising it, as in war, he acts morally, if and only if the war he conducts conforms to the criteria of a just war. For an agent to act in a way that is fit for purpose, the purpose must be understood correctly. If the purpose is for the common good, the agent's actions must be such as to conform with and lead to the common good. And the agent's performance towards such purpose must be done in a morally correct way. Aquinas is clear about this: a commander who commits crimes against humanity in conducting his war may win it but is immoral. He argues the good governance of one's individual self (*prudentia boni proprii*) requires good counsel (*consilium*), foresight (*providentia*), and shrewdness or know-how smarts (*sollertia*). He thought of military action as a form of moral agency to be undertaken only when necessary in order to protect the good life and only in that way can the warrior lead a good life. Thus, proper professional conduct directs actions for the good of the agent by aligning with what is in the common good. The former cannot obtain without the latter.[33]

If one follows this reasoning, the professional duty of a lawyer ought not be understood in purely technical terms but also encompasses a moral dimension. A lawyer's fiduciary duty may start by guiding their clients to meet environmental or ESG legal compliance, but compliance should be seen as a minimum.

The standard of good practice in advising your corporate or institutional investment clients should be to channel them to meet their Paris Accord and social responsibilities by incorporating these objectives in corporate strategy and business models, or investment strategy, strategic asset allocation, portfolio composition and stock and bond picking.

This dovetails with good business practice and expediency, such as helping clients avoid damaging class action suits, or gaining goodwill with regulators, courts and customers.

Given the increasing importance young professionals place in facing up to their environmental footprint and responsibilities, the law firm that wishes to attract the best and the brightest will seek to align its practice on the side of environmental protection rather than defending corporate polluters or investors that persist in avoidance, obstruction, and obfuscation, just as it will have refused to defend the tobacco companies that lied about the addictive toxicity of their product or the politician who seeks to subvert a valid election by staging a legal coup.

Following Aquinas, complicity in perpetuating environmental and social harms cannot be professionally right when it is morally wrong. Consequently, as applied to the investment industry this means a lawyer advising investors should work to strengthen ESG methods and their application, pushing ESG-light to the wayside, moving to portfolios with positive real-world impacts and that differ significantly from the market indices that reflect the status quo. On the legislative side, the constructive thing to do is to help enact stronger environmental and ESG laws and regulations, and work to enforce them in practice.

who are now squeezed into COP27 in Egypt. The riddle has been solved. It is man who created global warming. Lawyers and law firms have a leading role cleaning up this mess. The starting point for lawyers and law firms is to develop the necessary legal expertise on ESG to be able to competently tell your client as it is. No greenwashing, no broken promises, no dishonoured pledges, and no backsliding.

Senators, sleep easily at night. The last thing a lawyer or law firm will do is to fail to inform a client of all the material risks they face. Sometimes, however, a difficult choice must be made by a client, advised by a lawyer, between the lesser of two evils. For example, to obey the unfit for purpose anti-trust laws which, except for China as far as we are aware, have no exceptions or exclusions for environmental benefits, or to reduce carbon footprints and attain Net Zero.

"Corporations will not thrive if communities and ecosystems are going to hell in a basket."

Some may consider the Ford Model T, rolling back planetary destruction, 21st Century social dislocation, the illegal ivory trade, and the role of law as unusual bedfellows. Not so when you spend an hour with Judge Professor Mervyn King SC and law firm partner Alex Rhodes.

With combined experience spanning decades of judicial and legal practice across multiple facets of the law, we explored with these two thought leaders The Role of Law in Sustainability. We asked why had lawyers been so slow to the ESG race?

"We have studied law in siloes and in an era when the primacy of the shareholder was dominant," said Professor King.

Rhodes, a lifelong conservationist, added: "I am not sure how far we have progressed as a profession in the levels of understanding and our collective mindset since the United Nation's Brundtland Commission defined sustainable development in 1987?"

In the 100 years from 1919 to 2019, King explained, we have seen a century book-ended by a fundamental transformation in the way courts in an increasing number of jurisdictions see the relationship between corporations, society and the environment. At the start of this period, the Supreme Court of Michigan judged against Henry Ford in his efforts to plough part of the unimaginable figure of $65 million in accumulated profits into plant modernisation and better pay for his employees assembling the Model-T car. Ford had been opposed by minority shareholders, the Dodge brothers, who sought the primacy of shareholders through the payment of a special dividend. The brothers got their special dividend payment and spurred on a sentiment which lasted well into the 20th century. "I have debated with other professors of law this central case in the development of early corporate law. No court today would make such an order," added King.

Big Tuskers come in natural and commercial forms

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The Dodges stance was exacerbated by Milton Friedman 51 years later when, in 1970, he declared that the sole purpose of companies was to make profit as long as it was within the law. King believes the Friedman ethos meant that most companies over the past fifty years have continued to be "subsidised by society and the environment."

With the general exception of Delaware, where more than 50% of US public companies are registered, the legal position today is that the judgment of directors can be expansive when it comes to benefitting the company as a whole. In short, Ford may have prevailed in his desire to invest for the good of the company and his employees a century after the court ruled for the Dodge brothers.

The age of anticipation…?

Rhodes, the former CEO of Stop Ivory, and a Partner in law firm Mishcon de Reya LLP, added: "It's clear we have challenges in terms of the profession and the understanding of our role. A question we must ask is whether we move from the age of instruction to the age of anticipation?"

"We will be dealing with global accountability and standards. Even the most short-term focused shareholders and traditionalist companies need to take ESG factors, so relevant to value, into account," explained Rhodes. "We need to find balance between regulatory frameworks and self-regulation for which business will settle," he added.

Outside in–Inside out

King and Rhodes spent a considerable period of time discussing sustainability's "outside-in and inside-out" conundrum. A problem markets and corporations avoided for decades and leaves many regular people perplexed. In its shortest form, the problem is the inability of current accounting, reporting and disclosure systems, as well as traditional capital markets, to factor in the double challenge that companies impact people and planet, while the condition of planet and people impact companies. Corporations will not thrive if the communities and ecosystems they depend on are going "to hell in a basket."

Professor King stressed: "Lawyers have to understand this to advise on prospectuses and contracts." However, the reality for lawyers has been that "we were taught about the primacy of the shareholder and we advised on the primacy of the shareholder. I did this as a Silk, a Queen's Counsel, now King's, and as a Judge."

The two legal thought leaders agreed that over decades much corporate reporting, traditional financial issues and, separately, "non-traditional" issues, were delivered in siloes "divorced from reality."

"I believe there remain challenges in terms of the profession and understanding of our role in sustainability," added Rhodes. "To what extent do we get on the pitch? How can we advise on new value? In some ways it's been pretty straight-forward for lawyers in that we don't have to move from the shareholder primacy model."

He continued: "A real emerging challenge relates to the new expectations on lawyers, those have changed. Do you take on a client to act for or not? What is the impact of your advice? This is an existential challenge for the profession."

The pair agreed that for company boards, in an era when multiple complex ESG issues are coming to the fore and supporting policy and regulation is accelerating, the challenges are manifold. "The lawyer advising the director has to be up to date in the context of ESG and asking whether these factors have been considered to ensure you are discharging your duty of care," explained King. "The collective mind of the board is a strange thing. You have to consider whether that mind has been applied in a unified manner on key issues."

Rhodes agreed then framed how new challenges were emerging for companies tackling the ESG agenda: "We're already seeing courts interpreting the scope of directors duties differently and regulators adapting frameworks to incorporate ESG." Clearly, he added, lawyers need to have deep understanding of the sustainability context and associated ESG issues to advise clients effectively.

Concluding, Professor King, 85, said: "The answer lies in money. The capital markets have spoken. The capital markets are integrating broad issues. They're doing an ESGT (Technical) audit to see if these issues are integrated and adding value to society or if companies or funds are failing in their duties as investors. Unless ESG is factored in there is no longevity."

King added: "What keeps me cage fighting is that I see the difference and I have been party to making that difference and it's all still happening. There is definitely movement. The right of ESG factors are vital."

We need to talk about really doing ESG

A conversation is needed to get everyone thinking pro-socially and behaving in a way that spontaneously aligns claims to ESG-positive behaviour. How in practice does the planet, and human society, benefit from a firm's stated ESG posture?

It's all very well introducing ESG indicators, but how far should we regard these numbers as aspirational or as a genuine account of "what's actually happening" at the business end of a law firm? When any organization introduces new indicators, especially for behaviour change, the measures can trigger perverse consequences : virtue-signalling, teaching-to-the-test, performative compliance.[34] Any law firm that's serious about engaging with ESG, whether on its own account or advising clients about this, would do best to start by reflecting on ESG's underlying intent – which is not to impose metrics for their own sake but to raise societal awareness and stimulate collective action.

For a law practice that's serious about addressing this broader aim, the first task should thus be to step away from the metrics and simply start a conversation. True ESG engagement springs from all-staff conversations at ground level; gathering anecdotes and encouraging purposeful agreement on ESG-positive attitudes that drive day-to-day, socially positive behaviour.

On which point, it's good to see the legal profession collectively starting to confront a few awkward questions of past complicity in socially destructive behaviour, whether as employer or client's enabler. Like any long-established sector, law practices have legacy behavioural issues which are out of step with new public expectations of "what good behaviour looks like". To their credit, many of the profession's leaders are now taking this into account.

By way of example: For the best of reasons — to protect the client's reputation and market access — law firms' instinct historically was to seek to "gag" anyone who called attention to questionable behaviour by a client or by one of their own business units. Whilst of course we've all paid lip-service to legal protection for genuine whistleblowers,[35] the much-reported "lonely road" experiences of anyone who speaks out suggest that actual protection is patchy at best.[36] Whistleblowing is in any case a poorly conceived risk control, activating only after harm is done. A better risk control would seek out early and weak signals of not-quite-right behaviour, then intervene to nip them in the bud.

On the front line in the firm, any staffer who's had to put up with obnoxious behaviour will first wonder how hard they should listen to the quiet prompting of their natural conscience to speak up about it. Before saying anything, they'll also recall others' reported experiences of facing reprisals, ostracism and career reversal.[37] The younger employee intake knows this

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narrative well[38] and already behaves accordingly; they're likely to be sceptical of your firm's "official channels" and may well turn to faster-acting remedies such as: quiet-quit presenteeism; resign; convene an informal activist group; post a "smoking gun" artefact on social media.[38]

At least one part of the legal profession is already alert to this. In the UK the Solicitors Regulation Authority (SRA) has reflected on "matters of principle, integrity and social conscience" and now advises law firms that their top priority is to look after their own staff. Explicitly: a firm's greatest duty of public interest is now to its staff; it's no longer OK to assume that the best way to manage your firm's reputation risk is simply to gag any troublesome complaints. The SRA will call out law firms' governance leaders — hello, Managing Partners everywhere — and challenge them to act now to deal with serially obnoxious employees, to frankly address awkward truths, and to question over-optimistic claims to corporate virtue.

If you've never paused to think how any of this relates to your firm's ESG agenda, now's the moment. Misconduct takes many forms, and as financial and competition regulators have already noted,[40] its occurrence is a useful red flag for likely wider ethical laxity. Knowing how to recognize and call out bad behaviour could save many lawyers much embarrassment. So let's explore another sector's experiences of tackling this.

Learn the systemic factors that drive ESG-unfriendly conduct, so you can challenge them

Ever since my sector, financial services, carelessly crashed its global system 15 years ago, some of us have been working hard to identify early signs and patterns of bad behaviour and so avoid the sequel Systemic Misconduct II: An Extinction Event. Though industry-level culture change remains very much a work in progress for us, by studying behaviour scientifically we've opened up useful new perspectives; as an at-risk fellow professional, these should interest you, too.

We recognized that financial market-makers had prioritized contract risk over conduct risk: we'd naively assumed that by roping down legal definitions of operational risk and value-at-risk econometrics, we'd create a clear picture of human risk-taking. It wasn't, of course. Finance therefore now looks much harder at human-factor risk – at the "what actually happens" behaviour in professional trading spaces and with customers, at working relationships, at how risks are perceived and how biases disrupt good decision-making.

When reporting to regulators we also now look beyond plain old Financial Misconduct,[41] to identify Non-Financial Misconduct.[42] Our research suggests that an employee who lacks empathy and is routinely offhand with colleagues may well be more likely, sooner or later, also to misbehave client-side. How far should any employer tolerate profitable-but-obnoxious individuals?[43]

15 years after our last self-induced catastrophe, many financial brands are just beginning to formally identify the costs that flow from poor behaviour, such as a steep drop in task performance, and exodus of talent. Other sectors — even Silicon Valley — have also begun to challenge the "myth of the genius jerk".[44] Is the legal profession ready for this debate, as a prelude to firm-wide ESG conversations?

There are many other pre-incident indicators for misconduct.[45] Whilst it'd be fun to discuss here how we can identify sociopathic traits in individuals, ESG is more about driving behaviour change all the way through from systemic to desk level. So let's briefly explore a few systemic preconditions for mass misconduct.[46] Loosely speaking, "ESG-unfriendly" patterns of systemic misbehaviour happen more often in organizations showing characteristics such as:

- *Sheer size:* a monolithic organization risks becoming "Too Big To Care". The bigger the firm, the less likely that any formally published high-level Values will be experienced as meaningful by each member of staff at local level.
- *Deep pockets:* if your firm's cashflow exceeds, say, the GDP of certain jurisdictions who are trying to regulate you, then a belief in force majeure prevails.
- *Longevity:* likewise, if your firm's been around for a century or two, perhaps even taking sides in actual geopolitical or trade wars of the past (or indeed, now), your senior managers may tend to regard regulators, or even elected governments, as mere short-term inconveniences.[47]
- *Opacity:* If your business activity is sufficiently opaque and/or virtual, it may have left a trail of successfully deflected public challenges; helped along by copious jargon and/or 'sponsored science' to bamboozle critical outsiders. If your profession's previous "worst moment" was perhaps just the occasional item of popular entertainment,[48] you've played the deflection game successfully. At least, until now.

Do any of these describe your firm? And if so – or even if not – what can you do about any of this?

How to align real behaviour with your firm's and clients' claims to ESG: regular reality checks

The first step to embed ESG in your firm's daily routine sounds deceptively simple: make it a normal topic of open conversation all around the firm, rather than a point-scoring exercise. "Socialise the risk".

Self-evidently, now is a good moment to think about what you can do in practice; how to get everyone thinking pro-socially and so behaving in a way that spontaneously aligns with the firm's claims to ESG-positive behaviour. To really do this needs a conversation that's nurtured both top-down and bottom-up. Behavioural research shows that senior manager hopes of "trickle-down" positive effects are just that: fond but baseless hopes[49] that can be vastly overoptimistic. Don't, then, embark on this as just an exercise in paternalistic governance by Partners. Because ESG-aware working also aligns the firm better with (most) clients, everyone can and should get involved.

Working closely with financial sector people at all levels, I've found that certain "mental prep" exercises help all staff to get started.

- Encourage habits of thinking afresh, about how we build our mental model that frames our perceived place in the world.[50] To better solve problems, get used to seeing each one from many different angles; to do that, practice drawing on the diverse lived experiences among all your staff. Adopt others' view to challenge your own assumptions about "what good behaviour looks like".
- When applying this critical thinking to challenge each others' assumptions, be civil but not unduly deferential; recover the lost art of disagreeing politely. What's informing the authors of such-and-such an ESG claim? Do colleagues indulge in motivated reasoning ? Is it alarming to you to hear the words "I don't know", in your office? (It shouldn't be; honest intellectual humility is a fine quality.)[51]

Then apply that critical thinking to all aspects of your firm's, and its clients', claims to ESG probity. For each message, *cui bono*? How in practice is the planet, and human society, benefiting from the stated ESG posture? — or are ESG claims inflated and aimed at polishing a patchy reputation? Certain ruthless corporate brands, sometimes with their lawyers' complicity, run a "social propaganda playbook" whose commonest current gameplay is greenwashing.[52]

Again, financial conduct regulators have been showing the way forward. One of them simply asks practitioners to "show me an example of a piece of prospective client business that you turned down, and why?" The question is deceptively simply phrased, but cuts straight to What Actually Happens; are claims to ethical conduct borne out in practice? In the final section here, we'll look at some action points that flow from this.

Starting to take action

To help gather your thoughts an launch into getting that all-important ESG conversation started, here's a killer double-barrelled question set that one financial conduct regulator is now randomly testing on front-line staff:

- Can you recall any of the Values that you subscribed to, when you did your induction training on first joining the firm? So then…
- If you can recall one or more of those Values: Can you point to a piece of work that's on your desk or screen today, that is an example of you putting that value into practice?

The answers given to this will reveal, in a trice, how far any of your staff routinely consider the real-world consequences of their actions; or, in other words, how their day-to-day behaviour shows real engagement with ESG concerns. Of course, the first time to think about an answer is not the moment when the regulator's standing there asking you the question. You need to have started the ESG thought process long before then.

With that in mind, let's end with some behavioural building-blocks that a firm needs, to align value for the client with its own values. An action-point 'prep list' might therefore include:

1. Triangulate your own claims to "good conduct", for credibility in the face of What Actually Happens. This will help your firm to recognise rapidly changing public expectations including those of your own staff.[53]

2. Build your awareness of biases that disrupt clear-sighted decisions. Don't overly rely on turn-key "unconscious bias training" programmes; cultivate a firm-wide habit of seeking out others' lived experiences.[54]

3. Cultivate also a learning attitude grounded in psychological safety. Every employee should feel confident to openly question

and discuss the plausibility of any proposed ESG indicator, without fearing for consequences to their career. How far are those indicators effective proxies for the workplace cultural factors that drive engaged behaviour? Is your approach the same as some firms' easy go-to solution, measuring inputs ("how much effort are we making / resources thrown at ESG program interventions")? Or do you measure the, generally harder to quantify, outcomes? ("what changed, inside and outside the firm, as a result of our initiative?"). Are your indicators "feel-good" or "do good"?

4. Then, start an open, jargon-free conversation that encourages the above expectations of intelligent engagement among all staff. Returning to an earlier theme above: frame this as a process of migrating beyond whistleblower protection structures (however good and necessary those are), towards routine safe-to-ask discussions based on regularly gathering anecdotal experiences from your front-line staff.

In conclusion

To ground your ESG efforts and expressions in reality, reflect on the financial sector's research in its own conduct space. Look to the structural roots of misconduct; licence your people to speak openly and act on their natural sense of integrity – whether or not they're on chargeable time, at the time. Modern professional employees expect to engage in "purposeful work" and will soon resort to social media to criticise obnoxious behaviour. This may make older, more senior managers uncomfortable; but firms' historic tolerance for "eccentric" behaviour by big-earning partners is at an end. Rather than the "gagging order", make your firm's response to constructive criticism a welcoming of the opportunity to learn, where nobody fears reprisal for asking an intelligent question.

Finally, a warning. When a profession fails to respond at systemic level to legitimate criticisms of its attitudes, be aware that the public's attention to unanswered harms has probably been moving much faster than yours.[55] Noticing the public mood of disquiet over corporate "serial recidivists", regulatory agencies are now swift to act to support the public interest — as the public are, indeed, interested.[56] You can regard these culture shifts as hazards; or, better, as opportunities to change firm-wide behaviour and ESG engagement for the better, to align with modern public expectations of a healthy employer culture.

If, though, a profession doesn't respond positively to this opportunity, a bleaker future awaits: a time when employers can not make assumptions that employees' consciences can be bought off; and when nobody who's any good is going to want to work for an ethically rootless employer. Organizations that fail to raise their ESG game, both in-house and when advising clients, will find that the talent pool has emptied itself of anyone who's properly talented. Of course, you can run a firm from a talent base of mediocrity. But would you want to?

Make that difference from within, as well as without

Every year, writes Lucie Cruz, streams of law graduates join the ranks of prestigious corporate law firms both in the UK and abroad. A career that is still considered to have status and standing in society, corporate law is an appealing honeypot for many.

Swanky offices, challenging and highly esteemed work, larger than ever pay packets, and a promise that you'll never be out of a job draws in floods of applicants who far exceed the number of training contract places that are annually available.

Less talked about, though, are the law graduates like me, who despite the allure are choosing not to go into corporate law. It's always been the case: you'd lose a few to a variety of other careers from teaching, to charity work, to consulting or working in an NGO. And while large firms have never struggled to recruit trainees, they are being faced with issues of retention at all levels which is something that hasn't been seen on this scale before. Their solution: to throw money at it. They're missing the point. Choosing to leave law means a lot more.

Young workers these days are labelled as lazy and disloyal for their unwillingness to work long hours and their preference for job hopping. Yet, this overlooks a significant reason that many of us consider leaving our jobs for: values. For some of us, we chose to leave law because we feel we are looking at attempts to promote values that are disingenuous. We couldn't justify those salaries, those working hours, doing something we just didn't believe in.

Not all firms are like that, that is true: there are some out there who are genuinely looking to push better practices. From reducing alcohol consumption at events after Me Too, to implementing pro bono work as part of their core strategy, actively looking to address diversity, and prioritising net zero targets.

The list could go on

The paradox is — at the same time as all of this, you have firms who despite multi-millions in profits chose to use furlough schemes because partners didn't want to risk sacrificing any of the millions they were taking home (sure, a bunch of them are paying it back now, but that defeats the point). Firms who condemn those still doing business in Russia, yet continue to work for other countries who are plagued with reports of human rights abuses. Those who are raising green funds they know to be not actually that green. Putting associates from diverse backgrounds as the face of their pitches, but not letting them get a piece of the actual work once it has been won. The list could go on.

Things are changing – but slowly. Firms are seeing that not all graduates of today are gripped by big salaries, the all-nighter buzz, or being wined and dined on a vacation scheme. We are living in a society that is waking up to conscience and that cares about the consequences that arise from what we do. That cares that environmental, social and governance issues are given real weight, and genuine solutions. There is nothing lazy or disloyal about that.

Some days I wonder if I made the right decision; taking myself out of law's inner circle, perhaps I missed out on a chance to make change from within. But, at the end of the day, change has to be driven from both sides of the table. Let's just hope that there are enough law graduates going in who want to make that difference from within, as well as without.

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SECTION B

CLIMATE AND BEYOND

For more than two decades, climate change issues have overwhelmingly dominated the sustainability debate. Slowly at first, the realities, risks and opportunities of our collective response, or not, to global warming impacts have caught the focused attention of capital markets, investors and the largest, high profile, global companies.

The majority of lawyers have been late to the climate game. Many are playing catch up in terms of serving in-house and or clients regulatory and reputational risk management needs as the policy vice tightens on Net Zero goals. Anecdotally, a senior Partner in a Magic Circle firm was asked a question recently at a major client's Board meeting about how to handle Scope III: not a clue for what the phrase even stood for.

As many lawyers wake to the technical challenges and commercial opportunities presented by climate change, however, the risk agenda itself is shifting. The interrelations and amplification between different types of risk, from climate, through ecosystems to global supply chains, on to food security and social stability, is becoming apparent. How to handle a collision of such risks is unknown, uncertain and changing how we view the nature of risk. As converging systemic risks become manifest, how are lawyers to advise clients, work with them to understand the new nature of risk as sustainability-aligned regulation comes thick and fast, and help them build more resilient businesses and institutions?

We are already seeing how grand corporate and investor pledges to tackle climate change with impressive Net Zero plans on global platforms can quickly turn to claims of grandstanding, greenwashing, and can form the foundation for a multiplying climate-related litigation. We believe the same dynamic will unfold, and in some jurisdictions is already doing so, for a broad range of biodiversity-related issues as the next challenge.

The vast non-government (NGOs) ecosystem around climate change and biodiversity protection, which has demanded systems change for decades, is now increasingly aligned with an emerging global public Zeitgeist as fear comes into play. Whether last mile farmers in East Africa, Vineyard owners in California, the Mittlestand of Germany, or fishing communities in Southeast Asia, many are feeling and witnessing the realities of drought, flood, fire, famine, food insecurity and destruction of their natural ecosystems, to different degrees. Impacted communities, including the most vulnerable, will look increasingly for justice and redress.

In this section we have drawn in a range of views:

- Adam Woodhall and Jane Pittaway from Lawyers for Net Zero (LNZ) look at the role of General Counsel as the decarbonisation train accelerates.
- Lawyer and entrepreneur Chris Stears explores how law firms can tackle the greenwash conundrum as regulation speeds past slick sustainability marketing, acceptable yesterday, not today.
- Lawyer Ben McQuhae describes his own journey from the corporate life to an entrepreneurial one establishing a climate-ready law firm in Hong Kong SAR.
- Karen Ireton, a highly experienced executive across finance and extractives with deep sustainability expertise, examines the challenges for lawyers in South Africa asking can they take "a leading edge role?"
- Private equity investor Archana Hingorani probes ESG in India seeing that it is "gaining currency" while the country's legal fraternity, in time, will need to offer clients more focused ESG services.

When the lights go out in South Africa…

More than 300 representatives from law firms and legal departments worldwide connected October 4-6 for the 2nd annual Legal ESG Summit. The fully virtual event featured the latest Environmental, Social, and Governance (ESG) developments, regulations, and practices that are quickly becoming preeminent topics for leadership teams and boards of directors.

In what can only be described as prophetic, a panelist from South Africa who spoke at the event had to participate via candlelight — when the power in Johannesburg was cut just as the session began.

Some might think we scripted the South African power outage for effect, but the blackout's timing was a coincidence. The South African utility that powers the area relies on aging coal-fired power plants that frequently break down. The utility has struggled with unplanned outages, requiring it to implement rolling blackouts to repair systems and replenish generation capacity.

The blackout drove home the point of why many elements of ESG are important and affect all of society.

More than ever, organizations are applying an ESG framework to their strategic plans to create enterprise value. They're assessing and measuring elements of ESG to manage sustainability risks and create opportunities with clients, suppliers, and employees. It's clear that:

- The way we have always done things is not sustainable or viable for the future.
- Those who recognize the need to change, and who lead the change will emerge as victorious rather than as victims.

ESG is not charity. It is not a philosophy, not a political position, and not a program. ESG is a strategic perspective for all business decisions. ESG cannot be a check-the-box compliance exercise. Boards of directors and senior executives must engage and lead.

Summit takeaways

For a taste of the highlights, I offer the following points that resonated the most with me. Note that it's still possible to register to access the replays of all the sessions on the Legal ESG Summit website.

Insights for law firms:

- The cost of doing nothing. When considering the cost of and ROI on ESG, remember to consider the cost of doing nothing — which is everything. ESG is a strategic imperative that stands to affect firms' profitability, reputation, and relationships with clients and employees and other stakeholders.
- Stakeholder Engagement is a "listening tour," NOT a "talking tour!" Everyone needs to feel heard, but not everyone will feel happy with the ultimate, necessary decisions.
- Transparency on the journey — good or bad — is expected from all stakeholders.
- Data, data, data. Metrics, metrics, metrics. Start collecting NOW! Whether required by regulations or because your

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For more information on the Legal Foresight Summit (29-39 March 2023), visit www.insidepractice.com/legal-foresight-summit

firm is part of your clients' Scope 3, you must know your metrics.
- You can't treasure what you don't measure.

When it comes to ESG, we all win if we all win. We must collaborate on this journey for all of us, for our society, to meet our objectives.

Every professional services firm is part of its clients' Scope 3 emissions. So, when it comes to carbon emissions and the environment, you must know your metrics, whether required by regulations or not. Your clients will need the carbon emissions metrics from each of their vendors, including their outside law firms, to meet their Scope 3 reporting requirements.

If you don't know your firm's carbon emissions metrics, start collecting data and metrics now so you will have some answers when your clients ask.

Consider your culture. Law firms have cultures, whether by default or by design. It's possible to analyze the maturity of your culture, deliberately set out to change it, and measure your progress toward that goal.

Embed ESG within your firm. ESG is more of a mindset or a lens through which to advise and serve clients in all areas of practice. Consider how you can you embed ESG performance as a metric in your firm's success.

- People, planet, and profit are NOT mutually exclusive aspirations.
- Compensation plans at law firms must evolve to include ESG performance metrics.
- The climate crisis is just one of many converging crises facing society today. And all of them need to be considered in your legal advice to clients and in your law firm leadership's decisions.
- ESG is not all that different from work around diversity, equity, and inclusion. It is not a single person's role—but the responsibility of all—and senior management must lead it.

Advice from general counsel and clients to law firms

Greenwashing should really be labeled ESG washing. Too many law firms are practicing greenwashing when declaring their ESG expertise. How many of your lawyers truly have deep ESG expertise?

Know your firm's values. Your answers do not have to be the same as mine, but when asked about your law firm's values, you'll need to have answers.

Understand the liability of inaction. Ignoring the climate crisis when advising clients is a potential liability. What did the lawyers know or what should they have known, and when did they know it?

Do no harm. Law firms make choices all the time, and the clients you work with are a choice you have made. Defending the accused is not the same as helping clients who are doing harm.

Show commitment and transparency. Your firm may not even be aware of the RFPs you are NOT receiving due to lack of (or perceived lack of) ESG commitment, including evidence on your website. Clients are doing research and making choices. Prospective clients and employees are paying attention. And clients and law students have a very low "BS" meter.

Match actions with ESG strategies. My company is aggressively reducing our carbon footprint, yet my outside law firms fly teams of lawyers to a meeting, each carrying thick folders of papers. We are a paperless company! I have lawyers on my team who could NOT attend that same meeting in person because we are restricting air travel to reduce our carbon. Somehow, outside law firms seem oblivious to these points.

Be proactive. Clients are dragging their law firms on this ESG journey. Why are some firms so slow to act and lead on this?

View ESG as an opportunity not a cost. Consider making ESG a part of your firm's value proposition.

Form partnerships and create a team. If anyone calls themselves an expert in all things ESG, run the other way. It will take a village of experts to truly figure out all the interrelated components of ESG.

Be a trusted advisor. It seems to me that law firms' current billing model doesn't support a broader "trusted advisor" approach, which holistic ESG advice requires. Instead, law firms tend to focus on discreet "disclosure advice," which is only the tip of the iceberg.

Firms are missing opportunities to provide comprehensive, integrated strategies and consulting to meet clients' needs.

With their broad view of industry trends, law firms are well-positioned to guide their clients as they benchmark ESG performance, address regulatory issues, and navigate transformative new business opportunities. To quote one of our panelists from the 2nd Annual Legal ESG Summit: "We must act with URGENCY and with AGENCY"

The critical role of the GC: decarbonisation through forward-looking counsel

How, and why, are General Counsel helping some of the biggest companies in the world navigate the need for decisive decarbonisation, whilst adapting to the impacts of a rapidly heating world?

Effective leadership is the biggest need for any organisation steering itself through the inevitable climate transition disruptions that we face in this turning point in human history. GCs are ideally placed to provide this effective leadership, and many are already helping drive the action, such as Rosemary Martin, Global GC of Vodafone:

> *"Increasingly, general counsel or others in the legal team are actively shaping their company's position and activities to address climate change."*

This comment is confirmed by Pfizer's Assistant General Counsel Sally Fisk:

> *"Lawyers must help clients assure a climate-resilient supply chain… at Pfizer climate change risk is being assessed as part of its enterprise and business continuity risk management process. The company conducts operational risk evaluations to study those that have the potential to impact the company substantially."*

There are multiple enterprise risks inherent for companies both in the short and long term due to global heating, and GCs are well placed to help manoeuvre their companies through these difficult waters. These waters cover the direct legal, with a large increase in climate legislation and litigation, and also a spike in companies being held culpable of misrepresentation of their environmental activities, known as 'greenwashing', by both regulators, and in the court of public opinion. All these, and more can lead to the business being holed underwater by considerable reputational damage.

Examples are bans on fossil fuel advertising in France, increasing activity by regulators in the UK, such as by the ASA and CMA, shareholder activism around the world, including in the USA, and activists winning litigation in many countries such as the Netherlands.

Other issues on the horizon that climate smart GCs are factoring in are production risks, such as blackouts or floods of factories and offices, transport routes being interrupted and climate induced disruptions along supply chains with potential for parts to completely collapse. There is also the issue of discontented employees, both prospective and current, due to the perception that the business is part of the climate problem.

Financial risk needs to be factored in, for example insurance required to mitigate losses, client base being affected by climate disruptions, stranded assets, and multiple other challenges which are increasingly muddying the waters. Furthermore most of the world's largest businesses have climate commitments, which is admirable, but also opens them up to potential to being attacked if they are found to be lagging on the action required to fulfil their public pledges. This pledge / action gap is not only a significant problem for society, but also a direct threat to businesses.

> *"It is alarming that the vast majority of companies have not set medium-term emissions reduction targets aligned with 1.5°C or fully aligned their future capital expenditures with the goals of the Paris Agreement, despite the increase in net zero commitments."*

This is the sobering statement from the highly regarded investor-led initiative 'Climate Action 100+', which constitutes 700 investors, responsible for over $68 trillion in assets under management.

There are numerous cases going through the courts where businesses are being targeted for their contributions to the environmental crisis, especially if they are seen to have a yawning pledge / action gap. If you judge your organisation is at risk of greenwashing, then it's the role of the GC to help colleagues either dial down any exaggerated or unsubstantiated claims and move the business away from environmentally damaging activities.

The activists and authorities are not going to telegraph ahead when ¬¬¬¬they will come for you. Examples are the French retailer Casino not being able to predict that it would be sued by indigenous Amazonians over deforestation linked beef. Or DWS the asset manager owned by Deutsche Bank, only finding out it was under-investigation for greenwashing when 50 German police did a dawn raid on their Frankfurt head office.

How is Lawyers for Net Zero helping them tackle these challenges?

> *"GCs have a unique position, being able to ask the necessary questions and help deliver the required actions. Joining*

Lawyers for Net Zero and working with other GCs, has helped me build my climate leadership, benefiting my company and society, and together we can achieve so much more." Alberto Nino, GC of the Asian Infrastructure Investment Bank and Lawyers for Net Zero Champion.

Whilst GCs and their teams do have this unique position, some may think that taking action on climate is the exclusive preserve of the sustainability team. However, the experience of the Lawyers for Net Zero Champions is that sustainability teams welcome the leadership, credibility and practical support provided by the GC and their team.

There are two key drivers to the Lawyers for Net Zero approach. The first are the 'Net Zero Action Principles', with five headline Principles, which are listed on our website. The real value comes in the 50 'Action' points which sit beneath the Principles and are available to Champions to help them navigate, whether they are early or mature in this journey.

Examples of initial Action points are "Use appropriate language" and "Join a relevant cross-organisation committee", whilst later on they might "Generate thought leadership" and "Design and implement climate and environmental governance".

In the earlier stages, Vodafone's GC, Rosemary Martin observes:

"in-house legal teams can also focus their efforts on pure legal areas, for example bringing environmental and sustainability clauses into the contracts they are preparing."

Then as they get more mature, they can be

"working on financing through a green bond issue or maybe in the context of supply chain contracts or customer contracts".

'Champions Groups' are the second driver of Lawyers for Net Zero's work, as these Action points are only useful if they are being applied. This is a facilitated small group coaching process for GCs of similar status. These groups provide peer-to-peer accountability, motivation, insight and learning.

As GC of Cambridge University Press & Assessment, and Lawyers for Net Zero Champion, Catie Sheret, states:

"The Net Zero Action Principles provide excellent, clear and practical guidance: they are a great business tool. Short but regular Champions Groups sessions ensure that net zero is kept as a strategic priority. That's why it really works to help drive the necessary actions."

What can GCs do to ensure their companies continue to move forward despite political uncertainty?

Political uncertainty is increasingly the rule, not the exception. It is the role of GCs to be professionally curious and horizon scan for the climate risks both in the current political cycle of 3-5 years and over the longer term, which is where many of the most commercially and societally disastrous consequences will play out.

There will be therefore always strong winds threatening to blow a corporation off course from the direction set by their net zero and other environmental pledges. GCs are very well placed to keep a steady hand on the ships helm, steering through these choppy waters. As global businesses have arguably as much, if not more, power as the governments of the world, there is a real opportunity AND imperative for influential individuals such as GCs to step into the leadership space and help keep a liveable planet for all.

Adam Woodall is an entrepreneur and sustainability expert. For 15 years he has delivered climate action with cleantech star,t-ups and some of the world's biggest brands using behavioural insights and proven engagement techniques. In 2020 he realised the legal sector, particularly in-house, was a largely untapped driver for achieving Net Zero.

Jane Pittaway is a climate conscious lawyer and sustainability consultant championing climate and ESG action in the legal sector. The transactions she led were often highly complex, strategic projects which were legal firsts. More recently, a sustainability consultant advising law firms and their clients on ESG and climate action.

Law and the flow of finance

The potential-packed, resource rich economies of the world's 46 least developed and lower middle-income countries are often deprived of capital and saddled with debt.

WIthout a flow of finance, those countries, the most likely to benefit from a "demographic bounce" born of super youthful populations, will miss out again and in doing so create a systemic risk with global implications.

How can the legal world help unlock this puzzle? How do we incentivise timid, risk-averse capital, locked up in the G7/OECD countries to invest in what should become the dynamic economies of the future? Does the law have a role to play here?

When Napoleon invaded Egypt in 1798, he was told that the Red Sea was thirty feet higher than the Mediterranean. Digging a canal, he was told, would result in the Red Sea pouring into Mediterranean resulting in catastrophe. The argument, although wrong, repeated Darius, King of Persia's belief in 500 BC that at the time prevented the Persians from digging a canal. The ancients knew that flow is subject to simple physical mechanics.

The flow of finance is similarly based on fundamentals. The foundations of finance at its heart are actually very simple. Two products, debt and equity are the foundations of how a financial system flows finance to all. Financial markets are the mechanism through which debt and equity are transacted.

The concept of debt itself is simple. In return for borrowing money, interest is paid to the lender. The scale of borrowing depends on the capacity of the individual or entity. In our modern society, an individual may borrow money to buy a house or a car while a nation may borrow money to finance its spending. According to the International Monetary Fund (IMF), prior to the COVID-19 pandemic, public and private debt reached 225 percent of GDP. The Institute of International Finance estimates that the global level of debt to GDP rose in Q1 2021 was 289 trillion dollars or 360 percent of global GDP.

Equity is the share of ownership of an asset. Historically, assets were physical, but the concept of the corporation gave rise to the ability to own a share of a company. The value of an asset might be thought of as an indicator of optimism. In war time, for instance, the most precious assets can become food, water, and gold. In our modern society, individuals have equity in the assets they own such as houses and cars. There are two principal types of equity investments. Listed equity investments are held on publicly traded stock exchanges while unlisted equity investments are held privately. The common way to value a business is by listing it on a local stock exchange. According to the World Federation of Exchanges (WFE), the global capitalization of ninety-eight stock exchanges as of November 2020 amounted to USD 109.21 trillion.

The key difference between debt and equity is that there is no guarantee on the level of return for equity whereas the rate of return for debt is generally capped. The mechanism that enables the flow of debt and equity is the market. Whether buying and selling of fruit and vegetables or trading of financial securities, markets are subject to the principles of supply and demand. In theoretical economic models, participants in a market have access to perfect information. Price is then the mechanism through which supply and demand reach equilibrium.

Financial markets are however different from a fruit and vegetable market where an individual may physically walk away with an apple after paying for it. The ownership of a large corporation requires mechanisms to acknowledge property rights. Enabling an individual to transfer ownership to another individual is core the operation of financial markets. For assets that involve a right to an ongoing or future benefit, there is a need for some form of paperwork to demonstrate that ownership has transferred. In the case of physical goods such as a car, an individual registers a transfer of ownership with the relevant transport authority. From a purely theoretical

perspective, it is possible to register the ownership of different kinds of assets including a train ticket to a gym membership. In practical terms, registration of assets is focused on assets with high values such as land.

The origins of the world's first modern stock exchange in 1602, brilliantly captured by Lodewijk Petram, reveals that the transfer of ownership of a share, which became a foundation of modern stock exchanges, happened by accident, not design. Petram outlines the history of the Dutch East India Company (Verenigde Oost-Indische Compagnie, VOC) and its first "initial public offering" in August 1602. The core purpose of the Dutch East India Company was to gather sufficient finance to commission a flotilla to travel to the Dutch East Indies (Indonesia) to bring back cargoes of coffee, tea, cacao, tobacco, rubber, sugar, and opium. Normally, flotillas operated for three to four years with the proceeds from cargoes sold and profits distributed to private investors. The challenge that the founders of the Dutch East India Company needed to address as they sought to attract investors through their invitation to "All the residents of these lands" to "buy shares in this Company," was the time length of the company's charter. By proposing that a private investor's money would be locked up for twenty-one years, the Dutch East India Company needed to establish a process where an investor's share of the enterprise could be traded to another person. The company's capital subscription register stated that "Conveyance or transfer [of shares] may be done through the bookkeeper of this chamber." In practical terms the buyer and the seller of a share, or their authorized representatives, "had to appear together before the company bookkeeper, and two directors had to approve the transfer before it became official. The bookkeeper kept a large ledger in which every shareholder had an account. If a shareholder sold a share, his or her account was debited by the amount concerned. And if he or she bought a share, the account was credited".

The importance of the Dutch East India Company's charter was to outline clear rules to transfer the ownership of shares. In modern terms, the Company's bookkeeper provided the role of a clearinghouse. Whilst authorities in Amsterdam tried to regulate where the trading of shares would take place, the reality was that share trading occurred across the city from morning to night with the trade then confirmed through an official transfer of ownership. The impact of what at the time seemed like an innocuous innovation was that the Dutch East Indies Company was able to raise ten times the capital of the British East Indies Company, which in turn resulted in huge profits with dividends of up to 3,600 percent at a time when the British East India company was struggling to deliver a dividend at all. Trading of Dutch East India Company shares illustrates that the process to transfer an asset from one person to the next was the key to unlocking financial markets. This is a critical point that is worth repeating. The key invention that led to the development of modern financial markets was the establishment of a governance mechanism to transfer an asset from one person to another. It was not, as we commonly think, to price an asset. In fact, it was almost a hundred years later in 1698 when the London Stock Exchange was established in Jonathan's Coffee House where John Castaing established the practice of posting a list of stock and commodity prices called, "The Course of the Exchange and other things".

What does this mean for today's modern lawyer? The history of financial markets, whether processes to acknowledge property rights or transfer ownership, has involved the establishment of new rules that may have at one time been seen as radical, but which quickly became entrenched into practice. Through understanding and owning this history of innovation, today's lawyers can take their turn to innovate rules, regulations and laws that can create the flow of finance to the places needed tomorrow.

This is an extract from FLOW: How to open the flow of finance for all *authored by Gordon Noble, Paul Clements-Hunt, Ingo Kumic and Michael Marais, 2022.*

Gordon Noble's 30-year career includes frontline roles in banking and investment management, as a political advisor, in industrial roles representing finance sector workers and in policy/research roles with industry associations and universities. One of the first employees of the United Nations backed Principles for Responsible Investment, Gordon founded what is now the PRI Academy.

Financing the future…or not?

Paul Clements-Hunt writes: Loss and damage is a phrase which strikes anxiety, even fear, into those old hands whose United Nations Climate Summit CoP (Conference of the Parties) memories stretch back to the 1990s. For loss and damage is the vicious Claymore Mine, buried deep into a destructive form of DNA, which occupies the whole history of these annual multi-lateral, UN climate jamborees experiencing their 27th outing in the Egyptian capital Cairo in November 2022. In plain English, loss and damage captures the agenda through which, historically, the carbon heavy developed and industrialized countries, who've benefited, in some cases, from fossil fuels since the industrial revolution of the 1750s, would make recompense for the planetary damage already done. A bill for OECD countries would include also the future costs of adaptation needed by vulnerable countries to boost resilience. In short, loss and damage is payment from the G7/OECD nations to those less developed countries to where industrialization came late, or not at all, and whose historical and current carbon debt is very low. In a post-pandemic era of fiscal stretch, inflation, and with a global economic recession, at best, and extended depression looming, at worst, this is politically unpalatable for developed countries. This is unfolding even while the least developed countries suffer deeper and, in some cases, intractable debt exposure as the US dollar rises. The perfect economic storm is merging with the ferocious prospect of more coming climate storms.

Loss and damage is the biggest sticking point in multi-lateral efforts to tackle the climate change threat. It has haunted every CoP that I have been to and that numbers 16 since Buenos Aires in 1998 and includes Paris 2015 and Glasgow 2021.

Mistrustful of $ billions when trillions needed…

Developed countries believe climate aid plus climate markets will help capital flow while developing countries are mistrustful of this formulation to say the very least. Who can blame them? To date, the much-touted 2015 Paris Climate Agreement figure of an annual extra $100 billion in climate finance has not been delivered. Again, harsh reality: $100 billion, even when leveraged significantly, will hardly touch the problems ahead. We need flows of $ trillions required annually plus re-imagined, climate smart policy and action for donor aid, every public and private pot of capital, as well as powerful and novel capital market mechanisms. Essentially, we must reinvent the global political economy with collaborative sustainable finance one of the tools yielding new approaches, structures, products, platforms, and climate securitization of a gold-plated standard. That's why the Bridgetown Agenda, [61] proposed by Prime Minister Mia Amor Mottley of Barbados,[62] is getting such traction with lower middle income, least developed economies, and others. Her proposed plan is designed "to reform the World Bank and the International Monetary Fund (IMF), institutions set-up at the end of World War II and still dominated by the US and Europe."[63] Mottley and a gathering band of leaders believe time is up on failed climate finance promises from developed countries.

Systemic failure to flow capital

Tangentially, loss and damage touches on a broader and developing systemic threat which goes beyond climate and is the simple failure to flow capital and finance at scale into the lower middle-income countries and the 46 least developed countries, many in Africa. In today's financialized global economy, markets are the principal means through which financial systems allocate capital. Markets could be the principal means for finance to support the delivery of the SDGs and or undermine them by exacerbating, amongst other things, carbon intensity, inequality, human rights issues, and ecosystems destruction. Ideally, markets should be both the reservoirs and canals of a financial system which ensures both delivery of the SDGs and the commonality of the UN's 2030 Agenda. Such a financial system would act to underpin global sustainability built out from the local and subnational levels while firmly anchored by national priorities. However, there is great disparity across our global capital markets in terms of their depth, liquidity, and the flow of investment into those markets outside a very concentrated set of OECD countries, principally those with just 10% of the total number of exchanges control 80% of assets in exchanges. A precipitous decline in Foreign Direct Investment (FDI) during Covid-19, when FDI "flows plunged globally by 35% in 2020, to just under $1 trillion from $1.5 trillion in 2019" [64] compounded financing issues for governments and businesses worldwide.

Counter intuitively, by far the largest drop in FDI, at 58%, was in the developed economies with a reduction of just over $500 billion "in part due to corporate restructuring and intra firm financial flows"[65] seeing actual annual global FDI total down to $999 billion. By contrast, the FDI decline in developing countries was just 8%, dropping to $663 billion and as a result "accounted for two thirds of global FDI, up from just under half in 2019."[66] However, for the developing world, the critical impact was in new projects tumbling by 42%, including a 14% decrease in international project finance transactions which are the key for critical infrastructure.[67]

The world has never been so wealthy but…

During 2020, despite the Covid-19 Pandemic, total global financial wealth reached a record high at $250 trillion, rising by 8.3% because of stronger than expected stock market performance and a spike in savings worldwide. By comparison, the figure was $54 trillion in 1990 and $212 trillion in 2010. The nature of global inequality is revealed further by forward projections to 2025 which see more than 87% of the growth in financial wealth stemming from North America, Asia (excluding Japan) and Europe. With respect to the asset management industry, actively managed funds are predicted to reach $87.6 trillion by 2025 and passive funds $36.6 trillion in the same year. Real assets, notably property, hit $235 trillion in 2020.

A critical component of the overall change agenda, to ensure sufficient SDG aligned flows to LDC and middle-income countries, is effective localisation of Agenda 2030 at the subnational levels to support national SDG priorities. The challenge we identify today is that as global financial markets are becoming deeper and deeper, local markets are not benefiting from this strength. This is a distinct and overriding challenge for the SDGs, including the climate change-related ones, as well as the world's capital markets and the exchanges that serve them.

Unpeeling the statistics further reveals both the opportunities and challenges for effective flows of finance to deliver the SDGs to countries outside of the developed economies of the G7/G20. As one example, the amount of capital that flows into a stock exchange is a measure of its potential to finance sustainable development.

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According to the World Federation of Exchanges (WFE), there are ninety-eight stock exchanges that as of November 2020 held assets that were valued at $109.21 trillion.[68] The largest stock exchange in the world, the New York Stock Exchange, had an equity market capitalization of over $25 trillion in April 2020. The combined market capitalization of the exchanges for a very concentrated set of OECD countries, including Euronext, Hong Kong, London, NASDAQ, NYSE, Shanghai, Shenzen, and the Tokyo Stock Exchange, represents 80% of assets in exchanges. To repeat: 10% of the total number of exchanges control 80% of assets.

Blindly engineering inter-generational systemic risks through ignorance, greed, or a "not my problem" attitude is a continuation of the thinking that has delivered climate change.

Where does the law and lawyers stand on this and how can the most noble and commercial aspects of law speed solutions?"

Greenwashing: The first mis-selling scandal under ESG?

Lawyer and entrepreneur Chris Stears unpeels the evolving challenges of greenwashing for companies and the lawyers, internal or external counsel, who must assist their clients to navigate an unlit and fast changing labyrinth. The focus here is the UK although there are important broader developments and lessons for lawyers working across many jurisdictions.

In June 2022, the UK's Financial Conduct Authority (FCA), published a paper[57] exploring "ESG Integration in UK capital markets." The paper followed a consultation exploring "potential harms that may require further policy intervention" as the investing approach mainstreams further.

This is just the latest development in a tsunami of ESG-related regulatory standards, market and investment industry voluntary action which has gathered speed globally in the run up to and during the pandemic. More than 4,500 institutional investors and their service providers now back a United Nations-supported initiative called the Principles for Responsible Investment, launched in 2006.[58] The collective assets controlled by this group, which includes many of the world's largest asset owners, is estimated to be at least $100 trillion, passing that figure in March 2020,[59] and now seemingly closer to $120 trillion. Although voluntary, the PRI is a significant signal to the market that ESG has indeed mainstreamed.

So, corporates and investment funds in pursuit of capital can see clearly now, more than ever, that a focus on ESG presents an opportunity for longer term improved performance and access to capital. Better performance of course includes:

- Enabling sustainable growth; attracting and retaining talent; and achieving cost savings, for example by reducing waste or energy consumption.
- It also increasingly attracts investors, may well have a positive effect on the cost of funding and enhances reputation.

The easy bit no more

The PRI is one of the factors which has driven listed global corporations, firms courting private equity, law firms, consultants, asset managers, raters and many of the service providers making up the broader capital market and financial ecosystem, to clasp clean, green, sustainable and responsible to their identity. The marketing, public relations and pledges to a sustainable ethos, including alignment with Net Zero Carbon pathways, to this point, has been the easy bit. Not anymore.

The drum beat around allegations of Greenwash, made by a broadening group of stakeholders internationally, has been growing louder every month, reaching a crescendo in the weeks before this report was published. Sustainability, and notably climate focused litigation, is accelerating in many countries. Across multiple sectors,[60] from banking (HSBC), to auto-makers (Volkswagen VW), fast fashion (BooHoo),

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and the prime target of fossil fuel-based energy companies (BP, ExxonMobil), General Counsel are battening down the hatches as a green hurricane builds.

This is both a huge challenge and opportunity for a legal world itself playing catch up on sustainability and ESG.

Critical aspect

The critical aspect of an allegation of greenwash, proven or otherwise, is that it questions corporate integrity and that is a direct route to Board-level concerns for any company. How effectively are directors and officers discharging their duty to a company if its fundamental integrity is questioned? How robust is a company's governance if greenwash allegations can even come on the risk radar?

Put simply, companies are exposed to greenwashing allegations where their ESG and sustainability claims and practices conflict with or fall short of their antecedents, their credentials or where their plans and projections lack credibility and/or a credible path to a defensible ESG-aligned objective. It follows that accountability, fault and indeed liability, have the potential to manifest against a plethora of legal, regulatory and ultimately reputational risks – not least as the standards and expectations in this area are far from universally prescribed, codified or even applied. And they certainly do not stand still. The velocity of change to the legal risk profile of ESG/sustainability-aligned expectations on corporates (and its senior management) has been significant over recent years. It is no wonder that fault for proven greenwashing may stem from mere ignorance or negligence through to misrepresentation, mis-selling, wilful blindness and even fraud. At any point in that spectrum a company's integrity falls under a spotlight.

While it is true to that the cause of many a greenwashing action will cite a breach of legislation or regulation, disclosure rules or rely on misrepresentation or the tort of deceit – whether that be in connection with a public, regulatory or private action – this area has seen an explosion of legislative and regulatory attention specific to this so-called ESG renaissance.

We've seen the TFCD Recommendations for example, creating a framework for voluntary, consistent climate-related financial disclosures; this framework being reflected in the UK by the Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022. There is also, of course, the EU sustainable finance package, consisting of the Taxonomy Regulation, the Sustainable Finance Disclosure Regulation (SFDR) and the Low Carbon Benchmark Regulation. With the SFDR notably imposing requirements on financial services participants and financial advisers in relation to disclosure of sustainability information. And, the Taxonomy Regulation requiring EU investors and asset managers to disclose additional sustainability information about their portfolio companies which in turn, will require portfolio companies to disclose more information about sustainability and climate change risks and opportunities. The EU has also considered the issue of greenwashing a matter for consumer protection with the EU Commission proposals, with the Green Deal package, to amend the Consumer Rights Directive and the Unfair Commercial Practices Directive to require traders to provide consumers with certain pre-contract information relating to the durability and repairability of goods and to increase consumer protection against unfair commercial practices that prevent sustainable purchases.

Irrespective of the raft of ESG-related legislative and voluntary frameworks and the pressure from stakeholders, organisations need to consider what type of organisation it aspires to be. The idea of corporate purpose, rooted in sound governance, is certainly in vogue.

Increasingly, stakeholders assert that doing business involves a consideration of purpose as well as profit and investing in the future of the communities in which it operates as well as our planet. There are various factors driving this focus on ESG beyond the alignment of many of the world's largest investors with the idea. Stakeholder demands to do business responsibly and to prove more demonstrable alignment between stakeholder interests with those of both wider society and the environment. The expectation is to minimise the risks the organisation's beneficiaries face and create opportunities that sees a benefit to the environment or society and potentially to the organisation's financial performance.

There is also a growing trend for ESG requirements and compliance to be a pre-requisite for contracting. This is quite aside from the multiple laws, principles and codes of practice that impose ESG requirements, some of which are legally binding. The UK Competition & Markets Authority's Green Claims Code, for example.

Clearly, as noted, the flip side is a real risk of greenwashing

if a company exaggerates its' green credentials or makes misleading green claims. Much of the emphasis here will fall on the capabilities and experience of GCs, their teams, and the advice of external counsel to manage, mitigate, and transfer the risks of greenwashing through early action and, once an allegation has been made, to act proactively and effectively

Clearly, the FCA is embedding ESG into its regulatory functions referring to the need to build "trust in the market for sustainable investment products and tackling greenwashing through our work on sustainability disclosures and product labelling." The FCA is looking also at "supporting integrity in the ESG ecosystem, by encouraging improvements in ESG data, ratings, assurance and verification services." One of the FCA Key Performance Indicators (KPIs) under development is focused on the "incidence of misleading marketing for ESG products".

As the FCA June 2022 paper has floated the prospect of increased regulation, it is worth taking a closer look at the paper's areas of focus? These include:

1. **Debt instruments:** Issues related to green, social, sustainability and sustainability-linked debt instruments (ESG-labelled debt instruments), including:
   a. Prospectus and 'use of proceeds' (UoP) bond frameworks;
   b. The role of verifiers and second party opinion (SPO) providers.

2. **ESG data and rating providers:** the FCA supports the UK Government's consideration of bringing ESG data and rating providers within its regulatory perimeter stating: "We see a clear rationale for regulatory oversight of certain ESG data and rating providers – and for a globally consistent regulatory approach informed by the recommendations on ESG data and ratings developed by the International Organization of Securities Commission (IOSCO) in 2021."

The FCA also encourages, inter alia:

1. Issuers of ESG-labelled UoP debt instruments to consider voluntarily applying or adopting relevant industry standards, such as the Principles and Guidelines that the International Capital Market Association (ICMA) has developed for green, social, and sustainability bonds;

2. they have reminded issuers, their advisors and other relevant market participants of their existing obligation to ensure any advertisement is not inaccurate or misleading, and is consistent with the information contained in the prospectus; and

3. they also encourage issuers and their advisors to consider verifiers' and assurance providers' expertise and professional standards, and to engage with SPO providers.

As noted, this paper has focused on the UK context while in Switzerland, Germany, and the US, amongst other jurisdictions, regulators are also actively developing or considering guidance on preventing greenwashing. This comes after a swathe of high profile cases, notably related to finance and investment, although also extending to a range of commercial and industrial sectors.

In short, across the UK and other regulatory landscapes there exists serious and growing concerns over greenwashing. The EU's and UK's work on sustainable finance seeks to address the risk of greenwashing, but the complexity of ESG issues and measurement, and the lack of unified frameworks for assessing and comparing risks and opportunities bring significant challenges.

Recent criticism goes even further and argues that ESG investing risks harming, rather than helping, the causes that it purports to support (not least because it creates a distraction from effective action on these issues). Critics also suggest that there is less overlap between ESG purpose and investment profit than proponents for ESG investment claim, in part because ESG issues are often very long term and so are not relevant to the short timelines of many investment strategies.

Despite these concerns, investment funds that focus on ESG issues are growing in popularity and requirements in relation to ESG issues are increasingly becoming mandatory in a number of jurisdictions. It is clear that greenwashing will remain high up the political, regulatory, and business agendas for the foreseeable future and the legal world needs to be in a position to serve clients' growing needs effectively.

Beyond this, law firms have every reason to stress test their own green, ESG and sustainability marketing and public relations as the research work exploring 100 law firms underpinning the *Riding the Dragon* report confirmed.

We expect climate and ESG issues to continue to gain traction and are addressing pressure from investors through a range of measures, including their governance structures, stakeholder engagement, public disclosures and specific targets and strategies. Greenwashing is one of many issues in play but by far the highest profile and potentially damaging for corporate and investor interests when not managed effectively. This should be "bread and butter" for the legal world although there is need for much greater internal experience and capacity within law firms.

The climate-ready law firm

Can a law firm can choose to only do work that is consistent with sustainability values and also be successful and profitable according to conventional metrics? Ben McQuhae felt these were compatible outcomes.

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Ben McQuhae is an industry leading commercial lawyer, founder of a sustainability-focused law firm (described as perhaps "the first ESG dedicated law firm on the planet") and an active leader in sustainable finance. He is a founder of the Hong Kong Green Finance Association and is the Hong Kong representative of the United Nations Financial Centres for Sustainability network.

We launched Ben McQuhae & Co in 2021 as a law + ESG offering and have committed to only accept mandates aligned with the UN Sustainable Development Goals (UN SDGs). We appreciate our uniqueness in the market, and the many generous accolades ("the only true ESG law firm on the planet") and awards (INSEAD Business as a Force for Good), but our primary motivation was not to set ourselves apart using sustainability as a branding tactic. It was to apply our skills as lawyers to contribute additionality to the global imperative of building a sustainable future. Our first challenge was to work out how to frame this as a business case in a way that made sense to us, to our clients and to the broader market.

Commitment to Values

We determined the best way for us to achieve our objectives, which includes transparency and being fully aligned with the Paris Agreement, was to build a new law firm and place sustainability at the heart of our business plan and value proposition. To us, this means: (1) to provide legal support only to projects that make a positive impact through UN SDG-alignment; (2) to develop a service offering that leverages legal solutions to help drive corporate sustainability efforts; and (3) to integrate sustainability in our own internal operations.

Law and sustainability are vast, complex and ever-expanding universes that frequently intersect. It is important to us that we are clear about what we mean by ESG and/or sustainability and which of these intersections represent our focus areas and target markets. Notwithstanding our head start in ESG relative to many others, this was still a complex process that took us time to properly think through and shape.

We started by trying to understand what our clients wanted and the impact that we wanted to drive and worked backwards from there. In anticipation that ESG skills could become as important as legal skills to our clients, we determined that to serve our clients effectively we need to be skilled in all of the relevant disciplines and this required us to rethink how we shape and deliver our services. This is why we placed our firm and our offering at the intersection of law, ESG and innovation. To us, lawyers should be adaptable and able to quickly learn and develop new skills, but an experienced ESG professional is just that and a lawyer can no more readily become skilled at advising on ESG than an ESG professional can become skilled at advising on matters of law. To better serve our clients, we launched www.venturis.eco at the same time as our law firm to provide robust ESG counsel through our Legal Solutions + offering.

Transparency

Integrity is fundamental to the execution of our sustainability commitment. It is therefore important to us that our ESG commitments are clear and measurable.

Having the courage to hardwire ESG into our DNA and commit to providing legal support only to projects that make a positive impact through UN SDG-alignment

makes us unique, but for us it is not enough. We must be able to prove that we practice what we preach, both to ourselves and externally. For this reason, we developed our SDG Tracker through which we assess mandates and measure alignment with the UN SDGs. We chose to define our sustainability commitment by reference to the UN SDGs because they are the most relevant metrics to measure the impact of sustainability initiatives and progress towards sustainable development. While the UN SDGs represent the most relevant and applicable metric for us to measure the objectives we want to achieve, we appreciate they are intended for policy integration and so are not a perfect fit for a law firm. We made our SDG Tracker, including our thoughts on some of the practical limitations and challenges, open source and available on our website so other law firms and professional services providers may review and adopt it too.

Committing to our values means being ready to say "no" to a mandate that is not aligned even though we have the legal skills to do the work. This will likely seem counter-intuitive or crazy to some colleagues, but to us it is an obvious and necessary outcome of our commitment to our value proposition. It is a matter of choice, and all law firms make choices about clients and mandates based on considerations such as conflicts, anticipated fee revenue, and reputation risk. We make choices based on our values as well.

Opportunities

We are often asked if we have had to say "no" to a client, and how the client takes it. On a number of occasions, we have said "no". With one exception, each time we determined the mandate as framed by the client was probably not UN SDG-aligned we were asked to work with the client to restructure the project so that it was aligned. The exception related to a mandate where the project was non-alignable. In all other instances, we have been able to influence a positive ESG outcome and we believe our clients consider our willingness and ability to guide them as they navigate their transition to be a unique value-add to our offering. We appreciate the opportunity to help inform our clients on sustainability-related matters relevant to their business, and where appropriate will write it into our client engagement letters. This is empowering. The legal profession has a unique court-side seat at every policy decision, major transaction and dispute and thereby we collectively have a unique opportunity, through our engagement letters, to make a positive difference. We can all choose how we want to make impact relative to the need to make money.

We launched our firm in February 2021 in the middle of a pandemic. We felt that sustainability must be a growth area and that the market was ready for our offering for various reasons including the wave of national policy commitments to decarbonise and an appreciation of the broad ESG problems exposed by COVID.

In the short time since then we have witnessed a global ESG explosion and the proliferation of related policy, regulation, integration, finance, litigation and greenwashing. It is not possible for most clients to keep up with developments, make sense of the new rules and market expectations, and find opportunity in transition. As the ESG landscape becomes more complex, the need for clear guidance becomes greater. By placing sustainability at the heart of our business, we believe we are well placed to help clients who are in transition and working towards building a sustainable future.

We set out to demonstrate that a law firm can choose to only do work that is consistent with sustainability values and also be successful and profitable according to conventional metrics. We felt these were compatible outcomes and still believe we were correct. ESG has become relevant to every business in every market globally and we are anticipating a shift in client expectations and counsel selection that will increasingly prioritise values-alignment, ESG integration, relevant expertise, knowledge of emerging trends and the ability to contribute additionality to the sustainability transformation.

We may have been the first mover in our industry, but we must not be the last.

Lawyers capable of taking a leading edge role

The ESG agenda presents some unique challenges for General Council. For one, much of the current focus in the sustainability agenda, built on the ESG foundations, is ahead of national law but firm in the minds of stakeholders, policy makers and the international community.

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The mandate and legal philosophy of some companies to defend every action places them firmly at odds with international sentiment and likely to be viewed by critical stakeholders as defensive, denialist and out of sync with the times.

In the ESG field there are lawyers at every step of the way: Interpreting and seeking licencing agreements that unlock mining rights; Defending companies following failures in due process or compliance and, apparently, protecting companies by drowning out messages in reams of legalise. The numerous cases of SLAPP suits brought against NGOs and the emergence internationally of cases brought against both companies and governments in terms of climate change denialism show how muddy the waters can be.

Part of the challenge is that much of sustainability is not yet fully codified in law. There are specific laws, sometimes very good laws, in many jurisdictions that outline the need for environmental impact assessments or specify, for example, the parameters of performance linked to water extraction and usage permits. There are laws that specify social limitations on corporate behaviour, such as in the field of health and safety and labour law or guard against market manipulation. But they seldom come together to address the whole, the complex interlinkages of environmental, economic, social and governance factors that lead to a sustainable outcome.

In the sustainability field, big picture, forward-looking and connected, thinking is what advisers need and should impart.

South Africans are rightly proud of their Constitution, which sets out in Clause 24 of the Bill of Rights that "Everyone has the right –

a) To an environment that is not harmful to their health or well-being; and

b) To have the environment protected, for the benefit of present and future generations through reasonable legislative and other measures that —
   (i) Prevent pollution and ecological degradation.
   (ii) Promote conservation; and
   (iii) Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.".

The environmental law that flows from this right is detailed and specific in addressing, amongst other technical aspects, environmental and social impact studies prior to authorisations, water use and management, waste, air pollution and biodiversity conservation.

The social and people issues are addressed both in the technical and the general in other departments and other legislation. What we need is that General Council address and advise further on the linkages because neither social nor environmental sustainability can be achieved without each other. Sustainability is yet well defined in law, but the growing number of codes and UN Commitments that countries commit to – such as the Sustainable Development Goals, the UN Global Compact and the Paris Agreements and subsequent goals on addressing climate change present us with a clear understanding of the major challenges. Companies will be well advised

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to make early and significant progress in addressing these rather than waiting for national adoption.

In South Africa, sustainability is an underlying theme in national environmental legislation, particularly addressed in the preamble and the principles. The problem with principles is they are quite hard to police. And it seems that much of the legal emphasis has fallen to the issues of enforcement or enforceability, the minutia of regulation and licencing or compliance, rather than the grand sweep of intent. Yet, when advising corporate clients, the reminders of the principles and the constitutional rights are frequently avoided, in part because to date they have seldom been invoked and few cases have gone as far as challenging the environmental right.

Recent controversial cases, where mining developments, coal-fired power generation or seismic exploration have been won – or at least temporarily stopped – have been significantly based on the inability or unwillingness of corporations to give full effect to the requirements for full and meaningful consultation, to meet even the current legal requirements and their expectation, that should consultation go against them, they will outlawyer the opposition. In a recent case against the Minister of Forestry, Fisheries and the Environment the courts upheld the constitutional rights of citizens with regard to the control of air pollution from South Africa's coal-fired power stations.

It begs the question of whether legal advisers brought in at the early stage of major projects provide the right advice. Or if single minded clients disregard the advice and expect the lawyers to make magic in getting around the spirit and intent of the law, if not its detailed text.

If that is not the role of corporate legal advisers, whose is it? While we need the legal technicians to work on the licencing and compliance aspects, we also need the General Council who can address the ethics, the social and environmental justice concerns and the oft forgotten polluter pays principle, and the reality that no financial penalty can remedy some environmental harm. A growing number of General Council are positioning themselves as strategic advisers who can see the big picture and advise clients accordingly, even when that means presenting the client with a picture that denies the clients will, and advises them to step away from a desired course of action.

Recent international developments, particularly around misstatement (intentional or otherwise) of emissions data, probably means that much more focus will be informing disclosure around emissions data and other sustainability issues, particularly as the clamour for mandatory disclosure grows. It begs the question of whether one wants lawyers steeped in the details of the law or lawyers capable of taking a leading edge role and advising clients through the deeply complex field of sustainability, beyond where current legal frameworks take us. Because most laws are still specific, limited and focused, whereas sustainability requires the dots to be joined and the collective good be positioned alongside the corporate interests.

Perhaps where there are pressures and contestations about use of finite resources such as land, flora and fauna, the pressure for the General Council to address the issue of environmental as well as social ethics is significant. It sometimes seems the history of development has been written in the externalisation of environmental damage to the most vulnerable, rather than the pursuit of a healthy environment.

Some of that may change as the emphasis on climate makes way to share the stage with the growing number of voices sounding alarm bells about the decline in biodiversity and the consequences of that for environmental and human health. In South Africa a recent white paper, seeking to protect the country's incredible biodiversity, recognises the sentient nature of animals and their right to be protected from harm and abuse. This seems to in particular be driven by concerns over "canned" hunting, much favoured by hunters whose desire for quick trophy has them "hunting" lions and other creatures in what amounts to large cages, where the creature has no ability to escape and no defences against the high powered weaponry aimed at them.

However the law develops in the short term. General Council willing and capable of advising their clients on the long term and long view are the key to corporate sustainability and the ability of companies to address — at Board level — the strategic issues in time for transition to new and more sustainable practices and lines of business.

ESG in India: rapidly gaining currency

ESG in India, while at an early trajectory, is rapidly gaining currency. India has already committed to reduce its carbon emissions by 30% by 2050, and procure 40% of its energy from non-fossil fuel sources by 2030.[69] Many corporates have started recalibrating to achieve a net zero position.

Sustainability, as it is popularly called, is certainly becoming *de-jure* just as technology has. Both have interesting parallels, conceptually their genesis goes back a few decades, but focus and common place acknowledgement of its importance has just about started. ESG spurred by climate change, wealth inequalities and governance gaps, is today front and centre just like technology is. In many ways it is now self-feeding itself, as time and importance progresses.

There is sufficient empirical evidence to indicate that ESG can help companies reduce costs significantly and this is being noticed in forward-looking Indian businesses. Good corporate governance combined with disclosures and transparency do lead to improved firm valuations and significantly better operational performance.[70] As per McKinsey, implementing ESG efficiently can lead to an increase in operating profit by up to 60%.[71] A recent study of listed markets during the COVID-19 pandemic showed that companies that had good ESG congruence were relatively stable during the state of global uncertainty.[72]

At the beginning of 2020, responsible investing was at $35.3 trillion in the five regions of global markets, a 15% increase since 2018. Responsible investment now commands a sizable share of professionally managed assets in these regions, ranging from 24% in Japan to 62% in Canada.[73] Some investors in the United States — which is being thought of as a follower rather than a leader — have also started to address ESG. For example, BlackRock has demanded that the companies it invests in, must show plans to reach net-zero emissions by 2050, and the US President signed a raft of executive actions to combat climate change. Delta Air Lines in 2020 pledged to become carbon neutral.[74] While corporates need to lead the way, regulation and investing community lenses are providing the added impetus to imbibe good ESG practices. Investments via Alternative Assets, Mutual Funds, Exchange Traded Fund (ETF) etc, are all rapidly adopting ESG positive strategies.

Different regions are adopting varying formats to mainstream ESG practices. These include strategies such as negative/exclusionary screening, ESG integration in the business (decision making) process, corporate engagement, shareholder action etc.. Negative screening remains the largest strategy in Europe, while ESG integration continues to dominate in the United States, Canada, Australia and New Zealand. Corporate engagement and shareholder action is the dominant strategy in Japan, as is the case for India and other Asian countries.

Today, global and country level institutions / regulatory bodies have made it mandatory for companies to measure and disclose ESG-related statistics annually. Companies therefore need to create transparency and imbibe best business practices, both to mitigate business risks and loss of competitiveness as also to avoid potential reputational and litigation risks. With various lenses being used to adapt best practices, there is fragmentation in reporting standards in the sustainability standard-setting landscape. A comprehensive framework providing measurement standards and interoperability across regions and jurisdictions is the need of the hour. The International Sustainability Standards Board (ISSB), is developing a "global baseline" for sustainability disclosure standards, which would eventually lead to a universal standard.

A recent report in November 2021, by legal and business services provider DWF, based on a survey of 480 senior executives around the globe, identified a pressing need for companies to have a solid ESG strategy and how poor ESG practices are affecting businesses. Nearly 60% of respondents, acknowledged that they had lost work as a result of ESG issues within their business.[75] While these surveys may largely include developed countries in their cohort, the problem is universal and will also impact the fast developing countries of Asia, South America and Africa. Adapting to various standards, reporting formats and best practices, requires new skill sets and resources. While an eco-system to hone these skills has developed on the measurement end with ESG specialist and consultants, validation of measurements by assurance/ audit agencies, a third area of legal expertise in the ESG space is starting to develop.

This is happening at two levels, the expertise within a law firm to provide support for regulatory compliance as well as evaluate potential acquisitions and investments for their ESG compatibility. While there is heavy reliance on ESG consultants and audit agencies for verification, there is an urgent need for law firms to also create in-house expertise that can lead to integrated and cohesive adoption and compliance. At a second level, the new generation employees at law firms are started to demand ESG positive policies even at the law firms themselves. Many corporates while pledging carbon neutrality / negativity are insisting that their service providers also adapt best practices in this space. For example, Microsoft Corp pledged to become carbon negative, taking into account emissions tied to its law firms.[76]

While anecdotally, expertise and advisory services are starting to become available, both corporates who have to adopt these practices and the investing community that is evaluating these practices as a precursor to their investment, are still using in-house learnings and consultants (who have largely honed skills from their Multi-Lateral Agency experiences). While law firms are beginning to create these practices in developed countries, in the developing countries, where the adaption need is equally urgent, they probably have the least amount of legal expertise available for ESG. Most investment firms that do practice ESG as an integral part of their investment strategy, such as ours, need to rely heavily on past experience and consulting fraternity to create the much required frameworks. Law firms at best can provide protective clauses related to measurement and compliance, both commercial and regulatory. Over time the integration of the legal aspects with the commercial expectations would need to come to bear.

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SECTION C

IN THE CROSSHAIRS

The sustainability global litigation spectacular is on its way, starring climate change with human rights in the supply chain, biodiversity, and greenwashing performing strongly…

It's wrong to be flippant in any way about sustainability-related litigation when the issues that at the heart of it are, often, critical to individuals, communities and countries themselves as the role of law plays out in real time. Riding apologises for this section's introductory sentence but we are looking to get your full attention.

From Shell to Volkswagen and onto French construction giant Lafarge, German energy colossus RWE, and mining major BHP Billiton, we are witnessing a steadily increasing wave of purpose driven litigation make headlines. We believe this is set to continue and build to a crescendo in coming years.

Three factors are driving the spike in such litigation:

1. the internationalisation of both criminal and civil actions for ESG-related issues;
2. third party funders creating investable mechanisms for access to justice and redress for injured parties; and
3. the appetite of NGOs to front down some of the largest and most powerful corporations and institutions in the world.

In this section we have a powerful set of international contributions looking at how litigation is putting some of the most complicated clashes between corporations, communities and individuals in the legal cross hairs. We believe this is only the beginning as sustainability policy and regulation harden, and the understanding of how to seek justice deepens.

Here, through the eyes of global legal experts, we introduce:

- Barrister Margherita Consiglia, of Doughty Street Chambers, explores climate litigation as we run up to the United Nations climate summit CoP27 in Cairo, Egypt.
- Professor Paul Q. Watchman gives his take on the seven pillars defining the new era of ESG lawsuits on a changing planet.
- Érico Negrini, Criminal Accounting Expert, Federal Police of Brazil and Ducineli Régis Botelho, Associate Professor, University of Brasilia, dig deep into an unfolding criminal and civil ESG reality in Brazil.
- We briefly touch on the complexities of chocolate and its contentious global supply chain worth US $ billions where justice for communities and child labour is complicated and drawn out.

Doing business with the Islamic State... Really?

How did a major European industrial company, Lafarge,[78] end up paying the terrorist group Islamic State (IS)[79] €13 million to keep a Syrian cement plant producing while a brutal conflict unfolded around the operation? Keeping the plant open brought Lafarge "approximately $70.3 million[80] in revenue." The company now will pay criminal fines and forfeiture of $777.78 million in the USA.[81] Paul Clements-Hunt reports.

On 18th October, 2022, the US Department of Justice announced that: "A global building materials manufacturer and its subsidiary pleaded guilty today to a one-count criminal information charging them with conspiring to provide material support and resources in Northern Syria from 2013-2014 to the Islamic State of Iraq and al-Shan (ISIS) and the al-Nusrah Front (ANF), both US designated foreign terrorist organisations."[82]

That's not the end of it for the Paris-headquartered company. Five months before the US ruling, in May 2022, the French Court of Appeal confirmed a judgment[83] from the French Supreme Court of September 2021 that the company could be indicted for crimes against humanity.

What legal implications does this concluded US case and on-going French case have for multinational corporations operating in conflict zones, failing or failed states, and jurisdictions where the rule of law is fragile? How can corporate general counsel and external counsel advise boards where the prospect of enterprise and individual director liabilities are, once again, coming to the fore through the amplifying lens of high-profile cases such as Lafarge?

The European Centre for Constitutional and Human Rights (ECHCR)[84] comments: "When operating in conflict regions, transnational corporations may fuel armed conflicts and contribute to grave human rights violations. Since the beginning of the armed conflict in Syria, an extensive war economy has developed in which nearly all conflict parties are involved. This includes trade in weapons, raw materials, and other goods of interest to conflict parties, states, and corporations."[85] ECHR commented that major corporate actors, such as Lafarge, "must ensure that their activities neither fuel war economies, nor contribute to the commission of serious human rights violations."[86]

The world remade with few safety nets

Let's go back 30 years to address the fundamental question and highlight how an evolving ecosystem of international standards framing responsible multinational corporate behaviour have been ignored or side-stepped. The Lafarge case has profound implications for multinational operations in the context of human rights abuses.

As the free trade, privatization and liberalization ethos grew out of the 1980s, the decade 1991-2001 saw a fundamental

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For thirty years, through roles in business, the United Nations and as an entrepreneur, his focus has been on how to mobilize finance and capital at scale into sustainable development. Paul has private equity holdings in last mile impact businesses where digital, technology, and sustainability developments merge.

In today's wars, civilians pay the highest price. A ruined residential street in Aleppo, Syria.

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global overhaul in international investment regulations which empowered multinational business operations around the world. A rapid expansion of bilateral investment treaties, regional free trade agreements and a supporting intellectual property regime, gave multinationals the confidence to enter new markets.[87] A UN study estimated that in the ten-year period to 2001, 94% "of all national regulations related to foreign investment that were modified in the decade"[88] were intended to smooth the spread of multinational business. While benefits were delivered for many communities, the dark side of the story leaves the prospect of legacy and future litigation for many powerful companies.

In 2015, the late Professor John Ruggie and Tamaryn Nelson, commenting on the decade of regulatory overhaul, wrote: "Global social and environmental protections lagged behind, and domestic safety nets, where they existed at all, began to fray. Income inequalities began to rise. International attempts to regulate the conduct of multinational corporations, going back to the 1970s, continued to fail. Sweatshops, displaced communities, child labor, forced and bonded labor, corporate security providers raping and sometimes killing demonstrators or mere bystanders, are among the abuses that were amply documented."[89]

After a slow start characterised by a catch-up reflex, the international community, building on a series of evolving international normative standards, forged a set of frameworks to inform responsible corporate behaviour. By 2011, the UN's Guiding Principles for Business and Human Rights,[90] steered by Professor Ruggie through the UN Human Rights Council in a fractious process, had been delivered and became the foundation for the OECD Guidelines for Multinational Enterprises delivered in the same year. These developments enable "individuals, communities or their representatives to bring complaints against multinational corporations."[91] For Ruggie, a close friend of the former and late UN Secretary General Kofi Annan and a relentless force for good addressing the complex questions raised over multinational companies and human rights issues, a perpetual question was how can this complaint mechanisms be strengthened? Perhaps third-party funding of public good, purpose-driven litigation provides a concrete answer? (We will come back to that later in the report.)

Blowing the planet

Whistle-blowers, greenwashing, mis-selling and sustainable finance roadmaps? Not likely ingredients for a Hollywood blockbuster but let's imagine the green version of the iconic 2007-8 financial crash story brilliantly captured by the 2015 movie, *The Big Short*, based on author Michael Lewis's book.[92] What would such a movie look at?

Essentially, the film would focus on how asset managers harvested huge capital inflows by shorting the planet, playing with the climate, and imperilling communities globally, to extract maximum fees for short-term gain while claiming their investment products contributed positively to sustainable development. Which circle of hell would Dante banish such rogues to?

Back to the real world. The eruption of investment sector greenwashing claims which gathered pace in 2021-22 built on the surge of investment funds into sustainable, impact, green and ESG products during 2018-21. In March 2021, estimates suggested that "global ESG assets are on track to exceed $53

trillion by 2025, representing more than a third of the $140.5 trillion in projected total assets under management."[93] And then the greenwashing dam broke as a broad spectrum of market observers, whistle-blowers, policymakers and regulators turned a forensic spotlight on the estimates, the products, the sustainability and positive impact claims being made by asset managers.

A perfect global storm brewed up around ESG, green claims, the prospect of another finance sector mis-selling scandal, and the role of investment sector service providers such as the world's largest Credit Rating Agencies (CRAs), Fitch, Moody's, S&P, and the specialist ESG raters trailing in the wake of the big three (see Daniel Cash, page 76).

The policy, regulator and capital market oversight reaction is only just now, in late 2022, getting into second gear in the EU, USA and other major capital markets worldwide. The wild west era of ESG will be reined in.

For the legal world, greenwashing and mis-selling associated with some of the most powerful investment institutions dominating capital markets, and directly associated with their investee corporations, suggests a rich vein of work on both sides of the litigative coin as both institutional and individual executive reputations are questioned, and credibility potentially collapses.

Die Polizei ist hier……

Of a range of high-profile whistle-blowers, Desiree Fixler,[94] formerly of German money manager, DWS, majority owned by Deutsche Bank (DB), itself bedevilled with a range of scandals[95] this past decade, grabbed more headlines than most. Fixler's actions ultimately catalysed a police raid by 50 or so Federal officers on the company's head-office which was the continuation of an inquiry into her greenwashing claims. Staff from BaFIN, Germany's financial regulator, also joined the raid.[96] DB's headquarters, also in Frankfurt, were visited by the police. Within 24 hours, DWS's CEO, Asoka Woehrmann,[97] resigned as the severity of the reaction to the whistle-blower claims played out.

So where does this leave law firms?

- First step, master as quickly as possible for your clients — and your own sustainability credibility — an ESG policy and regulatory environment developing at warp speed and fuelled by deepening political and public concern globally.
- Second step, ensure your firm has the deep bench capability to understand, assess, advise on, and hold a client's hands — behind the increasingly valuable wall of privilege as ESG issues get ugly and real.
- Finally, do not claim what you cannot do easily, in depth, and with expertise. A greenwash claim — ESG-wash just does not sound right — is a not a medal any law firm needs to win.

Flexing ESG muscles with climate steroids

At a regulatory level, both the EU's market watchdog, the European Securities and Markets Authorities (ESMA)[98] and in Germany, the UK, and the US respectively, BaFin,[99] the Financial Conduct Authority (FCA), and the Securities and Exchange Commission (SEC), have started to flex their muscles by questioning asset manager ESG claims.[100]

At market level, whether voluntary or regulatory, chaos reigns despite policy-maker efforts to speed consolidation across ESG accounting, reporting and disclosure requirements. In 2022,[101] across multiple jurisdictions, it is difficult for consumers, companies and other market actors to make sense of the many ESG and environmental labels and initiatives on the performance of products and companies. With more than 200 environmental labels active in the EU and more than 450 worldwide, the landscape is confusing to say the very least. Added to this, there are some 80 widely used reporting initiatives and methods for carbon emissions only and quality and requirements vary.

But let's go back to the real stuff.

BHP-Vale and the Mariana tailing disaster in 2016

"The days of huge corporations doing what they want in countries on the other side of the world and getting away with it are over,"[77] said Tom Goodhead, managing partner of law firm PGMBM, which represents Brazilian individuals, businesses, churches, municipalities and indigenous people.[102]

Justice will be served… if you've got funds

Bonfire night in the UK but a horrific, allegedly pre-warned, disaster in Brazil. On 5 November 2015, the Mariana Dam, holding back a massive pond of mining tailings, failed catastrophically.[103] 19 people were killed after flood waters engulfed and "devastated the downstream villages of Bento Rodrigues and Paracatu de Baixo",[104] 40km from the dam.[105]

In July 2022, mining giant BHP Group lost an appeal in the London Court of Appeal to prevent a £5 billion lawsuit by 200,000 Brazilians over the 2015 dam collapse.[106] The judgement overturned earlier rulings by both the UK High Court and the Court of Appeal itself.

Beyond the tragic deaths, headline impacts of the failure included:[107]

1. Release of 43.7 million cubic metres of mine tailings into Brazil's Doce River, reaching the Atlantic Ocean 17 days later;
2. Cities along the Doce suffered water shortages as their water supplies were polluted;
3. In 2016, manslaughter and environmental damage charges were filed against 21 Samarco executives, the Brazilian frontline company owned by Vale and BHP Billiton.
4. A leaked 2013 report indicated structural issues in the dam.

But let's get personal — it's about the people, not just the money[108]

The Krenak indigenous group[109] in Brazil have suffered many injustices over the decades, covering a range of human rights abuses, containment in concentration camps, bans on their native language and inter-communal sexual relations. In 2021, a Brazilian Federal Court condemned abuses against the group carried out by the country's federal and provincial governments, as well as specialist indigenous agencies, during the military dictatorship which ran from 1964-85. Now, the Krenak people, along with other indigenous groups, have been propelled into legal proceedings in the UK which hold profound implications for corporate behaviour globally. *Riding the Dragon* explores how this case will influence company action, at the enterprise and individual director-levels, to better understand complex ESG risks? The condemnation by the Brazilian Federal Court came six years after the Krenak community was at the epicentre of the country's "worst ever environmental disaster" when the Fundão Dam collapsed.[110] The failure created a devastating tsunami which brought death and destruction to communities in its path.

HERIBERTO ARAUJO | GUARDIAN | EYEVINE

Is third-party funding part of the answer?

The total potential annual market for third-party litigation funding is estimated to be $50-100 billion. The current market is a fraction of that. Estimates go as high as $11.5 billion, with a forecast of nearly 10% year-on-year growth by 2031. The world's largest funder of third party litigation, Burford Capital, L.P., has financed 94 of the 100 largest US law firms.[111]

The UK litigation market has doubled since 2018 and it is estimated there is a pipeline of court cases and funding of more than £2 billion. Globally, the litigation funding market is expected to reach $13 billion in 2021, whilst 89% of 250 global institutional investors expect to be impacted in respect of claims that are funded.[112]

The potential liability does not end with enforcement, fines and reputational damage. There are also litigation levers which those who are, or claim to be, aggrieved can pull; more and more class actions or group litigations are being brought in the ESG space. The principal causes of action that are relevant under English law (and that of many other common law jurisdictions) include:[113]

- claims brought in tort (such as negligence, nuisance, conversion of property, and trespass to the person);
- statutory claims (such as human rights claims against public authorities under the Human Rights Act 1998, claims under consumer protection legislation, claims against issuers oissuers of securities who may have misled investors about ESG risks under section 90 or 90A of the Financial Services and Markets Act 2000, and claims based on breaches of directors' duties under the Companies Act 2006);
- equitable claims (such as unjust enrichment and breach of fiduciary duties by directors or trustees);
- criminal claims (such as facilitation of modern slavery or child labour, participation in money laundering, acquisition of criminal property); and
- administrative law claims (such as challenges to planning decisions or environmental permits and approvals).

Elsewhere, efforts to enhance ESG protection are underway. In France, for example, the introduction of the Corporate Duty of Vigilance Law places obligations on companies to report on their compliance with human rights and environmental regulations The law also enables citizens and other stakeholders, such as NGOs, to obtain court relief to force companies to stop non-compliant behaviour. In the UK the government will introduce new supply chain due diligence obligations for deforestation (Environment Bill). Non-compliance could result in fines.

Clearly, tougher policy and more regulation will follow. The European Commission is preparing draft mandatory human rights and environmental due diligence legislation. EU member states will have the power to investigate and fine non-compliant companies if the framework comes into force. The UK Parliament's Joint Committee on Human Rights has urged the UK government to advance legislation to impose a duty on all companies, including parent companies, to prevent human rights abuses, with failure to do so becoming an offence, along the lines of the equivalent provisions of the Bribery Act 2010.

Much of the commentary around climate change litigation focuses on direct claims against those responsible for greenhouse gas emissions (see *Riding* article by Doughty Street Chamber Barrister Margherita Consiglia on climate litigation page 57).

For a final word, I turn to Professor Paul Q. Watchman who stated in March 2021: "In some of the more important material changes in ESG litigation, it is clear that a large number of corporations in a wide range of industries, from banking to automotive and pharmaceutical industries, have intentionally set out to break the law by enabling falsification of data, bribery and corruption of officials and company officers and employees in positions to decide on the procurement of goods and services and the creation of false markets, rigging rates and mis-selling products for financial gain." Litigants will be busy in coming years.

Supreme Courts, third party litigation funding, and the ESG revolution under a media spotlight

With the tsunami of ESG regulation coming through, there is an opportunity for law firms to be more nimble in translating what these new laws really mean for companies, says Sonali Siriwardena, Partner and Head of ESG at UK law firm Simmons & Simmons.

Whether it's a new term of the US Supreme Court, with seven critical corporate cases on its roster, the rise and rise of third-party litigation funders with a climate and social bent, or the emergence of a new band of ESG Partners, the London-based Financial Times (FT) is digging deep on the rise of ESG in law.

In recent articles, the main FT, the FT's Moral Money and Reuters have flagged key developments in the evolution of the legal system, law firms and lawyers as the opportunities and challenges of sustainability, and ESG as an approach to help deliver it, manifest themselves. Below, *Riding* highlights recent media reporting.

FT Moral Money reporter **Kenza Bryan** reported October 14, 2022,[114] on the accelerating focus of third-party funders with a focus on ESG. "Historically, the biggest firms have been reluctant to become involved in public action on green issues. However, the number of climate litigation cases has doubled globally since 2015, according to the Grantham Research Institute at the London School of Economics. Many of the companies targeted are in the fossil fuel, plastics, transport or finance sectors, with claims addressing allegations of greenwashing and contributions — direct or indirect — to climate change. There have also been more than 70 "framework cases" that challenge governments' responses to climate change. Financing these cases can be difficult. Before taking on a case, law firms must decide who will pay to take on governments and heavily polluting companies."

Opening the article Bryan noted: "Alexander Rhodes, head of the sustainability arm of Mishcon de Reya, the City of London law firm, draws a bell curve in the air and points either side of the peak." Most companies are making good progress on sustainability goals such as emissions reduction, he says, but some are at the extremes: either leading the way, or lagging behind. At Mishcon Purpose, a team of lawyers and experts in environmental, social and governance (ESG) matters advise those leading groups on developing sustainability strategies, but bring litigation against the poorest performers. The unit represents groups of individuals or small businesses in climate-related claims and other environmental problems, such as being affected by toxic waste. "It's about increasing access to justice and having a wider systemic impact beyond just recompense [payment] for the claim," explains Rhodes. Funding from legal aid and philanthropic groups is finite and pursuing litigation on behalf of groups of victims can be costly. "If you just try to do this kind of litigation on a pro bono bit of the business, or on an ad hoc basis, you're never really going to be able to tuck in and focus and drive the kind of systemic impact we'd like to see," says Rhodes."

Since September 2021, Reuters reported, that Mishcon de Reya LLP have been working with Harbour Litigation Funding,[115] to "fund litigation and arbitration cases for its clients."[116] Reuters continued: "Mishcon is at least the third law firm to publicly team up with a big litigation funder in about a year. Willkie Farr & Gallagher in June entered into a $50 million agreement with Longford Capital Management LP. In August 2020, DLA Piper partnered with Litigation Capital Management and a new third-party funder, Aldersgate Funding Limited, led by a former DLA Piper corporate partner. That deal also set out to offer clients access to about $200 million."[117]

Bryan's FT article continues: "Many law firms already use investors to finance no-win no-fee cases — although, with that type of litigation, there is a risk of hefty losses if it fails. A fund can spread the risk of this happening. Law firms Willkie Farr & Gallagher and DLA Piper have also struck agreements with litigation funders, and Aristata Capital, a litigation funder focused exclusively on ESG

matters, raised £40m in July. Industry collaborations have proliferated since the Paris climate agreement in 2015. They include the Net Zero Lawyers Alliance, Pinsent Masons' One Million Hours project and the UK-based Legal Sustainability Alliance. In addition, non-profit bodies have built multiple strategic litigation cases against company boards and individual directors for alleged breaches of fiduciary duty, including a failure to consider climate risks. ClientEarth, for instance, is exploring the potential of applying consumer and advertising law in greenwashing cases, says Sophie Marjanac, who heads the corporate law project at the non-profit organisation. Law firms are also looking to quantify their own climate impact, while some campaigners suggest that firms should reconsider their choice of client. Everyone has an opportunity to make a positive impact, says Marjanac, who joined ClientEarth from the corporate law sector. But, she argues: "Law firms need to think about whether they continue to serve high emissions clients, and work with clients to develop transition plans." Sonali Siriwardena quit her job as head of sustainability regulation and policy at Morgan Stanley Investment Management this year, and is now a partner and global head of ESG at UK law firm Simmons & Simmons... "I realised that, with the tsunami of ESG regulation coming through, there was an opportunity for law firms to be more nimble in translating what these new laws really mean for companies." Ultimately, even the cases that climate campaigners do not win can highlight gaps in the law and spur parliamentarians into reforms, says Jeff Twentyman, head of sustainability at Slaughter and May. Law firms should not refuse to represent clients who move slowly, he says: "You cannot shift the economy faster than it is shifting itself."

Coming next: A blockbuster ESG term for the US Supreme Court?

Writing on October 27, 2022, the FT's Stefania Palma and Joe Miller[118] wrote: "After a blockbuster term that reverberated through American society, the Supreme Court's new session could have far-reaching effects on US business as it confronts a bench that has not shied away from rewriting decades-long legal precedents. Over the coming months the court will hear cases on issues from affirmative action to the reach of state regulation and the question of where companies can be sued. Last term's decisions on polarising issues including abortion and school prayer were split down ideological lines, revealing a clear delineation on cultural, social and religious themes. But when it comes to corporate cases, the justices' willingness to reject settled precedents suggests "it's much harder to predict" what they will do, said Eric Talley, professor at Columbia Law School. The decision to reverse Roe vs Wade, the 1973 ruling that enshrined the constitutional right to abortion, suggests "this court simply is not as inclined as prior courts to treat precedent as a particularly large constraint if they don't agree with the outcome in the case... [It] throws things in a little bit of disarray," Talley added. Despite a solid 6-3 conservative majority, there is no guarantee that the justices will prove friendly to business interests, legal experts say. Gregory Garre, a former solicitor-general in the administration of George W Bush, said it was "wrong to characterise this as a reflexively pro-business court." The court's right-leaning wing has also been tilting "towards a type of cultural or political conservativeness as opposed to a libertarian and federalist bench" that existed about 25 years ago, said Talley. "It is a lot more issue-oriented than it is a commitment to decentralisation overall." Here are summaries of some of the cases the FT reports that US businesses will be focused on:[119]

- **Sackett vs Environmental Protection Agency:** The Supreme Court will look at "navigable waters" under the Clean Water Act, a law regulating the release of pollutants and the quality of water".

- **National Pork Producers Council vs Ross:** Pork producers have challenged "Californian regulation that bans the sale of meat and eggs derived from farm animals "confined in a cruel manner."

- **Gonzalez vs Google:** Relatives of an American student killed in 2015 by the terrorist group Isis have sued Google for "having allegedly "aided and abetted" the terrorist organisation through radicalising videos on its YouTube platform".

- **Students for Fair Admissions vs Harvard University** & **Students for Fair Admissions vs University of North Carolina:** These two cases "address affirmative action based on race in university admissions... Some of America's largest corporations, including Apple, Google and Meta, have filed briefs supporting affirmative action, worried that ending those policies could narrow the pool of diverse graduates they can recruit from."

- **Axon Enterprise vs Federal Trade Commission (FTC)** & **Securities and Exchange Commission (SEC) vs Cochran:** These cases explore "the power of US federal regulatory agencies" with plaintiffs claiming that FTC and SEC in-house courts are unconstitutional.

- **Glacier Northwest vs International Brotherhood of Teamsters:** The court will "consider whether US laws shield unions from claims of destroying an employer's property amid a labour dispute."

Climate: Where is the litigation train heading, and how much speed will it gather?"

"Climate-related litigation, for example by governments, private sector, civil society and individuals is growing, with a large number of cases in some developed countries, and with a much smaller number in some developing countries, and in some cases, has influenced the outcome and ambition of climate governance."

"Climate litigation is growing and can affect the outcome and ambition of climate governance (medium evidence, high agreement). Since 2015, at least 37 systemic cases have been initiated against states that challenge the overall effort of a state to mitigate or adapt to climate change. If successful, such cases can lead to an increase in a country's overall ambition to tackle climate change. Climate litigation has also successfully challenged governments' authorisations of high-emitting projects setting precedents in favour of climate action. Climate litigation against private sector and financial institutions is also on the rise"

"Cooperation is occurring at multiple governance levels including cities. Transnational partnerships and alliances involving non-state and sub-national actors are also playing a growing role in stimulating low-carbon technology diffusion and emissions reductions (medium confidence). Such transnational efforts include those focused on climate litigation; the impacts of these are unclear but promising."

"Climate change presents both risks and opportunities for the financial sector. The risks include physical risks related to the impacts of climate change itself; transition risks related to the exposure to policy, technology and behavioural changes in line with a low-carbon transition; and liability risks from litigation for climate-related damages."

IPCC AR6, WGIII "Mitigation of Climate Change"

Climate litigation has grown vertiginously in recent years. The LSE Grantham Institute's Global trends in climate change litigation: 2022 snapshot notes that "globally, the cumulative number of climate change-related litigation cases has more than doubled since 2015. Just over 800 cases were filed between 1986 and 2014, and over 1,200 cases have been filed in the last eight years, bringing the total in the databases to 2,002. Roughly one-quarter of these were filed between 2020 and 2022."

The range of cases filed touches on an increasing number of wildly different issues – they go from cases where individuals sue states for the state's failure to limit emissions or adapt to climate change, to cases where states sue high-emitting corporates to recover the costs of adapting their cities to climate change, to greenwashing or climate washing claims, to claims seeking to hold directors personally liable for climate-related breaches of duty.

The most renowned of the class of cases claims against governments is perhaps the landmark Urgenda Foundation v. The State of the Netherlands, where the Dutch government was ordered to reduce emissions on the basis of human rights law. The success of Urgenda in raising the Dutch Government's climate ambition was in part responsible for the proliferation of similar claims against governments, termed "framework" or "ambition" claims. These include Neubauer et al v Germany, l'Affaire du Siècle (aka Notre Affaire a' Tous and Others v France), Klimatzaak v Kingdom of Belgium, Giudizio Universale (aka A Sud et al. v Italy), Do-Hyun Kim et al. v. South Korea, Juliana v United States and many others. A subsequent group of claims seek to ensure that states are duly implementing their targets on climate mitigation (e.g. IEA v Brazil, Deutsche Umwelthilfe (DUH) v. Germany).

Four cases seeking to clarify the responsibilities of states vis-à-vis their citizens to take action on climate, and to establish the relevance of the Paris Agreement to the application and interpretation of human rights, are currently pending before the Strasbourg (Duarte Agostinho et al. v 33 states, KlimaSeniorinnen v Switzerland, People v Arctic Oil, Careme v France). Just recently, a similarly landmark decision by the United Nations Human Rights Committee found that the Australian Government is violating the human rights obligations it owes a group of eight Torres Strait Islanders through climate change inaction. Vanuatu, backed by a growing coalition of more than 80 nations, is calling for a non-binding Advisory Opinion from

the International Court of Justice "to gain clarity how existing International Laws can be applied to strengthen action on climate change, protect people and the environment and save the Paris Agreement." (Vanuatu ICJ Initiative)

However, litigation stretches beyond claims against governments and public authorities. Carbon Majors are responsible for large amounts of GHG emissions (90 majors estimated as responsible for two thirds of global emissions), and growing attention is being placed on holding them accountable for their emissions and consequent climate impacts. The Philippines Human Rights Commission, following a "path-breaking four-year inquiry into the human rights impacts of climate change and the contribution of 47 Carbon Major companies to those impacts," concluded "that Carbon Major companies played a clear role in anthropogenic climate change and its attendant impacts. The Commission found that, based on the evidence, Carbon Major companies could be found legally and morally liable for human rights violations arising from climate change." Its report, published on 6 May 2022 concludes that the 47 companies had engaged in "wilful obfuscation" of climate science and obstructed the transition to clean energy. It concluded that these efforts were driven "not by ignorance, but by greed."

Similarly, a string of cases are pending before USA courts, aiming to hold Carbon Majors accountable and to make them pay a fair share of the costs of adapting US cities to climate change. As noted on Climate Integrity's cases page, "19 municipalities, six states, the District of Columbia, and one industry trade association are suing major oil and gas corporations for deceiving the public about the climate damages they knew their products would cause. The plaintiffs in each of these cases have made the following argument. Big Oil companies knew, they lied, and they should be held accountable." The claims are being brought on the basis of (1) common law tort, (2) products liability and (3) consumer protection. In parallel to these litigation efforts, the US Government is ramping up its action against big oil in a waltz where policy change and litigation go hand in hand.

It is now undeniable that action or inaction on climate and biodiversity poses an identifiable litigation risk for most non-state actors. Non-state actors are increasingly held to account in respect of the credibility and sufficiency of their net zero commitments and wider sustainability or "green" claims. A growing segment of the public has lost faith in empty promises - governmental and non - and has, as a result, taken to the courts to prevent misleading action on climate. While this litigation is on the rise, regulators are also under pressure to ramp up oversight of non-state actor net zero commitments, which is leading to ever more stringent regulation (see, for instance, the action now being taken by the UK Competition and Markets Authority to tackle greenwashing under its Green Claims Code).

Margherita Cornaglia is a junior barrister specialising in climate and human rights law, and is building a practice focusing on climate litigation. She has been appointed to act as the First Legal Coordinator for the UNFCCC Climate Champions Team, in conjunction with FILE Foundation. In her role, Margherita leads on setting up Race to Zero's first Independent Compliance Mechanism, and she is responsible for fostering links between the Climate Champions and the legal community in the lead up to COP26 and COP27.

Bold claims by companies.....

As noted by Bloomberg's Green Newsletter of 30 May 2022, "several years of bold claims by companies making net-zero pledges and setting recycling targets has provided a new set of standards against which they can be judged. In many countries, government regulation isn't strong enough to ensure businesses live up to their environmental goals, leading to increased support from civil society for court cases that seek to bring accountability." Greenwashing or climate washing claims have been brought against a wide array of diverse corporate actors across a range of jurisdictions (see e.g. these cases: Danish Crown, Terracycle, Danimer Scientific, Coca Cola, BP's misleading claims, Total, ACCR v Santos. A high profile climate washing claim currently pending before the OECD contact point in the UK challenges the basis for claiming that burning biomass is "carbon neutral," is likely to involve detailed assessment of the concept of net zero and different methodologies in accounting for emissions and may lead to a change in the regulatory status of biomass as a "renewable."

Another limb of litigation sees civil society demanding that courts require corporations to decarbonise credibly. Following its successful suit against Shell in the Netherlands, Milieudefensie is threatening legal action against 30 other major climate polluters in light of their substandard and misleading transition plans. On foot of the Dutch Supreme Court's judgement in the Shell litigation, which ordered Shell to reduce its emissions by 45% by 2030 compared to 2019 levels, claims have already been filed against Daimler and BMW, Mercedes Benz, Total and Volkswagen, amongst others. ClientEarth, an environmental litigation NGO, recently initiated a legal action against Shell's Board of Directors, arguing that the Board's failure to properly prepare the company for net zero puts them in breach of their legal duties under the UK Companies Act.

Finally, litigants are relying on increasingly climate-friendly laws and regulations. Taking advantage of more stringent laws on supply chain environmental due diligence, such as the French Corporate Duty of Vigilance Law, litigants are probing the climate and biodiversity impacts of dirty supply chains (see in particular Envol Vert v Casino). Proposals in the EU on

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corporate sustainability due diligence, due to come into effect in 2023, aim "to foster sustainable and responsible corporate behaviour throughout global value chains. Companies play a key role in building a sustainable economy and society. They will be required to identify and, where necessary, prevent, end or mitigate adverse impacts of their activities on human rights, such as child labour and exploitation of workers, and on the environment, for example pollution and biodiversity loss." Just recently, the United Kingdom's Pension Regulator published its amended climate reporting guide, which now includes a mandatory requirement for pension schemes to disclose information explaining how their investments match global climate change targets. Arguably, these legislative and regulatory developments have been heralded by litigation such as McVeigh v. Retail Employees Superannuation Trust or Abrahams v Commonwealth Bank of Australia, which it was argued marked "a move beyond cases focused on disclosure to cases focused on due diligence."

As we look forward to COP27 and beyond, the most fractious topics plaguing the political agenda, from finance for adaptation to reparations for losses and damages, are also making their way through the courts. All eyes are set, for instance, on Luciano Lliuya v RWE, where a Peruvian farmer is asking the German courts to order RWE to pay a proportionate part of the costs likely to be incurred to adapt his village in Peru, which is critically vulnerable to extreme weather events allegedly partly caused by RWE's contribution to global emissions. Similarly, in Four Islanders of Pari v. Holcim, the claimants are asking a Swiss court to award them compensation for climate change-related damages on Pari, proportional to Holcim's GHG emissions. These claims rely on attribution science[120] to ascribe responsibility for local climate harms to specific high-emitters, and, if successful, may open the floodgates for a large number of similar claims.

On a more positive note, there is growing understanding of the importance of nature and biodiversity in the fight against climate change. The Taskforce for Nature Related Financial Disclosures promises to grow in relevance, as has the Taskforce for Climate Related Financial Disclosures. Litigants are starting to turn their gaze to the protection of nature and biodiversity, and legal practitioners have started to conceptualise a new "framework by which biodiversity-related liability risks should be considered by financial sector supervisors and participants in their broader assessment of biodiversity-related financial risks." With clearer and clearer evidence of the interdependence of climate and biodiversity, it is hoped that strategic climate litigation will play a positive role in ensuring that a comprehensive approach is adopted to tackle the twin climate and ecological crises. Just as it has in the past, it is expected that climate litigation will continue to play an important role in holding decision-makers in the public and private spaces accountable to the law, and in clarifying and refining legal obligations in a fragmented landscape posing multiple, urgent challenges.

Seven pillars refocusing ESG law suits

Professor Paul Q. Watchman believes we are living through a period of judicial creativity not seen for generations. His "Seven Pillars Refocusing ESG Law Suits" are highlighted below. First, here he looks ahead to a prospective UK Court of Appeal decision with pivotal implications for climate change.

This comes after the UK High Court recently dismissed a Friends of the Earth's (FoE) challenge concerning UK Export Finance (UKEF). The challenge can now go to appeal. Essentially, FoE challenged UKEF's ability to finance fossil fuel projects as it creates legal implications associated with the Paris Climate Agreement of 2015. The challenge related to a public bodies decision-making.

Professor Watchman writes: The UK Court of Appeal decision will have profound implications for the success of the Paris Agreement. As in the BHP Billiton case, the Prorogation of the UK Parliament, and Shell cases, the Court of Appeal and the UK Supreme Court have demonstrated an appetite for judicial creativity to reform or extend public and private law. There is developing in many legal jurisdictions, including the UK, European States, the EU, and Australia, a willingness on the part of the judiciary to be creative about international law's standing, outdated defences, soft law, the corporate veil and the accountability of national parent companies and foreign subsidiaries. The New Enlightenment Jurisprudence goes to the heart of tort law and public law, covering, for example, intergenerational justice, legal standing of groups, attribution, fiduciary duties, and causation. The tsunami of litigation on climate change and ESG globally has made litigation a subsidiary activity of oil and gas companies, food production companies, governments and governmental bodies, as well as mineral companies. Client Earth, Friends of the Earth, and law firms such as Pogust Goodhead, other class action law firms and NGOs, are internationalising litigation and massive class action.

In 1932, the Law Lords revolutionised the law of tort over a decomposed snail found in a bottle. In 2022, almost a century later the legal world is being turned upside down again.

Pamela Cone of Amity Advisory interviews Watchman and Clements-Hunt at the Legal ESG Summit 2022

1 There has been a widening of legal responsibility to include not only the direct legal relationship between parties, such as employers and employees, but indirect or vicarious relationships. The concept of corporate complicity in human rights abuses by business is now enshrined in laws and wlegislation relating to disclosure, transparency, accountability and the investigation, regulation and enforcement of rules and protocols in relation to the supply chain, value chain, modern slavery and human rights due diligence. Each links the operating company with the companies it supplies and those companies supplied with goods and services with the operating company. It is possible, therefore, for legal action to be taken in the English Courts by employees of a textile manufacturer in Bangladesh as well as in Leicester against a fashion apparel company such as Boohoo or H&M and by Nigerian farmers and fishermen for the repeated pollution of rivers and waterways by major fossil fuel companies, such as Shell.

2 Mass tort claims with tens of thousands of litigants from developing countries in Africa and Asia are being brought successfully by native litigants suing multinational companies in Europe and the United States.

3 There is a much greater willingness of law courts and the judiciary to allow legal actions where it is shown that there is no access to justice in the country in which the alleged harm or injury took place.

4 Judges are increasingly willing to pierce the corporate veil and refuse to accept that the responsibilities of European or American companies for workers remain behind the legal fiction that an overseas subsidiary company is a completely separate and unrelated entity from its parent company.

5 The emergence of class action law firms and litigation funders has levelled the playing field where there was once a gross inequality of arms in terms of legal representation and resources.

6 There is a greater willingness of the courts and regulators to take regulatory action or to approve settlement agreements against companies for misconduct resulting in massive fines or payment of compensation. An outstanding case being the payment of conduct costs by global and international banks amounting, since the financial crash of 2007-2008, to many hundreds of billions of dollars.

7 In this list of some of the more important material changes in ESG litigation, it is clear that a large number of corporations in a wide range of industries, from banking to automotive and pharmaceutical industries, have intentionally set out to break the law by enabling falsification of data, bribery and corruption of officials and company officers and employees in positions to decide on the procurement of goods and services and the creation of false markets, rigging rates and mis-selling products for financial gain.

Brazil – a global ESG power? Structural and legal challenges for effective action

In recent years, we have followed the exponential growth of ESG, recognized as guiding and integrative principles for conducting sustainable corporate business, especially helping to make long-term investment decisions.

Brazil should assume a central role in global ESG initiatives due to its population, territory, and privileged geographical position. Historically, the country has been present at the main UN events, contributing mainly to advances in the commitments made by other countries, including the current agreement in force, Agenda 2030.

The advances achieved so far in mobilizing the corporate world for the debate on the necessary initiatives to guarantee the future of the planet and humanity are unquestionable. Large investment funds recognized the need to include risk matrices based on ESG dimensions in their long-term plans. Companies are showing an increasing concern about environmental, social and corporate issues, which has led to an increase in the disclosure of accounting reports with information of this type.

However, in 2022, after the world going through a critical period due to the COVID-19 pandemic, the challenges are still abundant, and the efforts made by everyone so far have not been enough to achieve the goals outlined in the 2030 Agenda. The last Spotlight Report, released in July 2022, showed that Brazil did not advance in 80.35% of the 168 goals analysed for the implementation of the Sustainable Development Goals (SDGs).

Brazilian legal framework

One of the reasons that justify the existence of an effective and balanced legal framework is the need to ensure that the commitments assumed by corporations are effectively fulfilled, avoiding greenwashing and social washing practices. There are currently more than 4,000 signatories of the Principles for Responsible Investment (PRI), who together manage more than $100 trillion and are committed to incorporating ESG principles into their investment policies. Therefore, it is necessary to guarantee an environment of legal security and transparency in the flow of information, minimizing information asymmetry, so that the targeting of investments that seek assets in line with these principles is favoured.

Erico Negrini has worked, for the past eight years, as a Federal Criminal Expert on Accounting and Finance for the Brazilian Federal Police. With a deep knowledge in the areas of ESG, forensic accounting, sustainability, and technology, Negrini also conducts extensive research, including for the Brazilian Institute of Forensic Accounting and Sustainable Finance. He holds an MA in accounting sciences from the University of Brasília.

Ducineli Régis Botelho holds a PhD from the Multi-Institutional and Interregional Postgraduate Program at the University of Brasília. She is currently an Associate Professor at the University of Brasília's Department of Accounting and Actuarial Sciences. Amongst a number of projects, Botelho leads a Brazilian National Council for Scientific and Technological Development research group on Applied Financial Accounting.

This phenomenon has drawn the attention of regulatory and justice bodies in Brazil, which began to analyse how ESG principles can be integrated into current legislation, the need for new instruments and what the contributions to the execution of their functions were. It is true that in Brazilian legislation there is no kind of aggregating code on the subject, but the existence of a vast legal and normative framework needs to be understood and analysed in an integrated way in order to identify the necessary challenges to be overcome in order to effectively reach its goals.

The Brazilian Federal Constitution (1988) has a wide scope of provisions for social guarantees and environmental protection. The constitutional text is also based on the basic principle of the Democratic State of Law, the dignity of the human person. The expanded view of this principle presupposes the recognition of its inseparable ecological dimension.

Thus, the Constitution provides in its art. 225:

> Art. 225. Everyone has the right to an ecologically balanced environment, a good for common use by the people and essential to a healthy quality of life, imposing on the Public Power and the community the duty to defend and preserve it for present and future generations.

Within the scope of the Brazilian Supreme Court, the so-called "green agenda", a series of actions brought together under the same environmental theme, related to omissions and changes that make the current legal provisions more flexible. In her vote, the rapporteur of one of the cases, Justice Cármen Lúcia, argued that:

> It is the role of this Supreme Court to keep the constitutional order, which is to ensure compliance with the principle of protection of an ecologically balanced environment, protection and prevention for the preservation of an ecologically balanced environment. As it is the role of the Brazilian State to guard and protect the Amazon Forest, the rights of indigenous peoples and all Brazilians and people of the present and future, holders of the right to environmental dignity that is inherent to a dignified existence.

Regarding environmental legislation, the following laws that were created from the constitutional text stand out: the National Environmental Policy (Law 6,938/1981), Environmental Crimes Law (Law 9,605/1998), National Policy for Solid Waste (Law 12,305/2010), and the New Forest Code (Law 12,651/2012).

In the social dimension, the infra-constitutional legislation includes important provisions, such as the Consolidation of Labour Laws (CLL), the Child and Adolescent Statute (Law 8,069/1990), the Law on Crimes of Prejudice of Race (Law 9,459/1997), and the Consumer Defense Code (CDC).

Regarding governance aspects, Brazil has several laws that create obligations that are also related to the other two dimensions, "E" and "S", such as the Anti-Corruption Law (Law 12,846/2013), the new Public Bidding and Administrative Contracts Law (Law 14,133/2021), which establishes general rules for bidding and contracting for public administrations, and the General Data Protection Law (GDPL), Law 13,709/2018.

Performance of the Federal Police in environmental and related crimes

Brazil has an extensive legal system of repression against fraudulent practices and crimes in the environmental area. However, the State's action is limited by the prevalence of the anthropocentric view in relation to environmental law and the requirement to prove the causal link between the conduct and the damage.

The Federal Police is an agency of the direct federal administration, as provided for in article 144 of the Federal Constitution of Brazil, with powers of judicial police and competence to investigate and combat organized, cross-border and international crime, environmental crimes, and crimes against Brazil's environmental heritage, including mineral resources. In addition to judicial police activities, it performs other administrative activities such as immigration, issuance of passports, registration and control of weapons and private security companies, and control of chemical products.

It has an essential strategic role in the so-called Legal Amazon, which has an area of more than 5 million km² (1.9 million square miles), corresponding to about 58% of Brazilian territory, fighting deforestation and illegal mining, predatory fishing, slave and child labor, drug trafficking, corruption, and money laundering. For more than 20 years its organizational structure has been improving, with the creation of Police Stations specialized in investigating and combating environmental crimes and through the work of criminal experts specialized in 20 different areas of science, responsible for carrying out forensic examinations. Work in the region is carried out in collaboration with an extensive network of organizations that make up the National Environment System (SISNAMA).

Law nº 9,605/1998 is one of the main legal frameworks used to characterize and punish environmental offenses in Brazil,

with the Public Prosecutor's Office being responsible for the criminal action on an unconditional basis, regardless of representation on the part of the offended parties, applying in a subsidiary manner the provisions of the Penal Code and the Criminal Procedure Code.

However, there are challenges to be overcome for the effective application of this law, especially related to the investigation of related crimes that have economic and financial repercussions. The number of infractions in the administrative field generated by the diversity of cases that fit the environmental legislation, composed of open articles, leads to the consumption of most of the confrontation structure of the Federal Police and other agencies, leaving few resources for the investigation of related crimes, especially those related to large corporations.

According to a survey carried out by the Igarapé Institute, of a total of 369 operations carried out by the Federal Police in the Amazon between 2016 and 2021, related to environmental crimes, only 4% mention illegalities in the production chain. The same study showed that operations focused on mining and wood are the ones that most occur without correlation with other criminal types. In order to understand illegal deforestation in the Amazon, it is essential to associate these practices within a broader ecosystem of criminal modalities practiced in an interconnected way. The existence of a sparse legislation does not favor the investigation in an integrated way, since the criminal typologies are foreseen in different laws, generating several individual investigation processes. As an attempt to expand the scope of investigations of environmental crimes in broader and more complex cases, the Sensitive Environmental Investigations Groups (GIASES) were created by the Federal Police, but they depend on the availability of human and material resources in each region in order to act.

Administrative public bodies also face similar challenges. IBAMA acts in the administrative inspection of environmental irregularities, but does not act in the inspection of other areas of the production chain, which depends on other public bodies. ESG has contributed to reinforcing the need for change to a culture of collaboration and integrated action in order to identify not only immediate fraud, but also irregularities practiced by people and companies that act throughout the operational flow and financial resources.

Crimes are fueled by the existence of a consumer market, legal or illegal. It is essential that the people and companies benefiting from the illicitly obtained financial profits are identified, punishing them in accordance with the law. Thus, an effective strategy to combat crime must include not only environmental crimes, but also financial crimes, identifying the network of organizations that operate in Brazil and also in other countries.

The Federal Police and the judiciary have developed actions to identify these people and adopt measures to block assets aimed at economic reparation for the crime. Linked to the Ministry of Justice and Public Security, the Department of Asset Recovery and International Legal Cooperation is responsible for establishing guidelines for communication and integrated action in the fight against crimes involving other countries. It is also part of a wide network of government agencies brought together to define actions and strategies in the fight against corruption and money laundering, the ENCCLA. However, the scarcity of human and material resources should be highlighted. There are currently less than 300 federal criminal experts in Brazil with training in accounting and finance, spread across the 27 Brazilian states. Although this vision of integrated action is advancing, limited resources will always be an obstacle to facing the vast economic power of large corporations that have a global presence and influence.

Regarding the structure and performance of public bodies in Brazil, two aspects still need to be highlighted: the potential risk of involvement in corruption cases and insufficient organizational autonomy and independence. The results of the National Corruption Prevention Program (PNPC), released at the end of 2021, which had the voluntary participation of more than 9,000 public institutions from the three branches of government, reveal that less than 2% have an adequate protection system against harmful acts, such as fraud and corruption. The lack of autonomy and independence in these bodies is also a factor that hinders their performance. The directors occupy positions by way of free appointment by the head of the respective power and are responsible for appointing the other subordinate leadership positions, favoring management aligned with government guidelines and not with institutional objectives. It is noteworthy that in Brazil a presidential government system exists, with alternation of power every 4 years, making it difficult to implement long-term plans and public policies. Although government planning instruments are designed with a sectoral and long-term view, in practice an environmental and social policy depends on

prioritizing public policies defined by each government, which will define the volume of investments for inspection, control, and combating of crimes.

Given this context, the use of legal instruments in the field of private law and civil law can lead to a more effective path to ESG. Law firms will need to invest in the necessary qualifications to act in corporate litigation and in the formalization of partnerships with companies that provide services through multidisciplinary teams and have their own IT solutions and database.

The role of technology in combating environmental crimes

Investigations of crimes by the Federal Police in the Amazon are only possible with the use of technology solutions based on monitoring deforestation and environmental changes emitted by satellite imagery systems. INPE is a public agency, of administrative nature, which also has extensive expertise in this type of monitoring, developing over decades, and which assists the work of SISNAMA agencies. Recently, the Brasil M.A.I.S. program was launched to combat crime in the Amazon region, with the acquisition of a new system of satellite images with greater precision and daily updating, in which the data is shared by means of an agreement with the bodies that act in the fight against this type of crime.

The broad use of technology and the integration of systems are important factors that contribute to counterbalance the shortage of human resources and to make the flow of processes and documentation faster and more transparent. However, this process depends not only on the implementation of IT solutions but mainly on overcoming bureaucratic restrictions that exist between different bodies for information sharing. There are dozens of systems developed or acquired by public agencies that could be integrated, but which have restricted access due to a compartmentalized view of information. The approval of the General Data Protection Law and the creation of the National Data Protection Agency (ANPD) can contribute to the establishment of guidelines that are better balanced between the right to confidentiality of personal information and the public interest in sharing data on environmental issues, as well as favor the definition of an environment of legal certainty for the expansion of operations of the private sector.

Effectiveness of the justice system in Brazil

Despite the existence in Brazil of environmental legislation that was considered advanced at the time of its implementation, the environmental tragedies of Mariana and Brumadinho showed that there are still legal and regulatory gaps in the environmental area and structural problems in auditing, monitoring, and inspecting by public bodies.

Organized civil society plays an important role in demanding transparency in the information provided by these companies. Currently, there are hundreds of dams spread across the country, of which monitoring takes place indirectly through audits contracted by the companies themselves, with no broad access to how they are performed.

The control and monitoring systems employed by the companies were not able to predict the occurrence of such failures, or the alerts were ignored. Inspection bodies need to be equipped with agile mechanisms to have access to complete corporate information to carry out their work, as well as the authority to communicate risk factors and take measures to avoid the occurrence of tragedies in case of problem detection.

These cases served to prove that control, inspection, and judiciary bodies still have great difficulty in accessing transparent data and tools to demand adequate compliance of obligations by companies, which contributes to the lack of effectiveness of the law.

Investigations of environmental crimes in Brazil are initiated with the crime news sent to the public prosecutor by inspection bodies such as IBAMA and ICMBio, which, in turn, determines the opening of investigations of the complaints.

Although environmental legislation in Brazil has advanced in recent decades, in the criminal area there are many criticisms regarding its effectiveness, considering the low rate of convictions and the high potential for recidivism, since the penalties are very lenient and sentences of detention or restriction of liberty are rarely applied, due to the short statute of limitations compared to the procedural complexity in cases of this type. Therefore, the most appropriate approach would be priority action focused on preventing and repairing damage.

Public inspection bodies also face challenges to perform their functions effectively. A study developed by Schmitt (2015) showed that, of a total of 11,823 administrative assessments made by IBAMA in the Legal Amazon between 2008 and

2013, 3,110 (26.3%) were judged in the first instance, and only 482 (4.1%) in the second instance. These assessments arrive at the Public Prosecutors Office for the opening of a police investigation or the proposal of a criminal transaction, as a faster alternative procedural measure. However, most of these agreements involve derisory values that do not discourage the recurrence of crimes.

In Brazil, Public Civil Action (PCA) and Popular Action are powerful instruments available to society against acts that harm the community and in search of reparation for the damages committed. The associations and the public prosecutor have the legitimacy to file a public civil action, based on Law 7,347/85, and the citizen can file a popular action, as provided in article 5 of the Federal Constitution, although the use of these and other legal instruments also have some obstacles, such as the procedural cost, the restriction of legitimated persons, and the lack of protection for the proponents. Debates on ESG can contribute to the increase of jurisdictional activity and public prosecutors in the field of civil law, and encourage proceedings from law firms.

The legislator limited the legitimacy to file a popular action only to the citizen, but a lone individual does not have the necessary resources to face the interests of large economic groups, making the necessary observance of the principle of parity of arms unfeasible.

Associations are a legitimate party to propose PCA, but they also need to be provided with sufficient technical and financial resources to counter the power of large companies, in the defense of collective and diffuse environmental rights. In relation to the public civil action, although there is a greater number of legitimate people to propose the action, only public bodies can sign Terms of Conduct Adjustment (TCA).

There is a culture of litigation in Brazil in which companies prefer to defend themselves to the last judicial instance rather than having to recognize a failure in management or operation. It is also a fact that this entrepreneurial attitude becomes an important source of revenue for law firms.

As an alternative measure to make lawsuits viable, law firms adopt legal instruments to relocate the conflict, using Brazilian legislation that has mechanisms to protect environmental rights, but which are filed in foreign judicial systems, faster and more effectively. Actions for damages over Mariana's environmental crime, considered one of the greatest in the history of environmental law, have been included in the courts of England and Wales.

Precisely, Schmitt (2015) summarizes the main problems and challenges to be overcome in controlling and fighting crime in the Amazon:

> The seizure of assets involved in environmental infractions, the embargo of deforested areas and the susceptibility of a part of society to the deterrent value are the elements that explain the share of influence of environmental inspection in reducing deforestation in the period studied. However, this reduction could be greater if some proposed measures were implemented, such as: increasing the capacity to enforce sanctions, especially the payment of fines and the destination of seized goods; reduction of the time of judgment of environmental infractions; increase in the capacity to seize assets involved in environmental infractions; expansion of the number of areas embargoed by illegal deforestation; use of technological tools to increase the capacity for prosecuting environmental infractions; increased ability to detect deforestation; structuring state environmental agencies to act in the control of deforestation; use of Public Civil Action as a strategic measure to hold certain offenders accountable; joint efforts with the judicial police and the Public Ministry to hold those who deforest criminally accountable; and employ market logic in environmental inspection strategies to enhance deterrence and inhibit illegal deforestation.

Corporate law and the fiduciary duty

Brazilian corporate law (Law 6,404/76) has several articles aligned with ESG principles, imposing duties on shareholders, controllers, and administrators, but their application depends on the existence of specific laws related to each of the three dimensions. The majority of Brazilian jurisprudence still understands that the social function of the company is realized through the creation of jobs, the payment of taxes, and the fulfillment of existing labor and environmental obligations.

Within organizations, there is still a strong incentive to exceed financial goals, linking executive compensation and employee incentive policies. The financial factor is also still considered as one of the main criteria for capital allocation by investors. For many administrators, legislation is seen as an obstacle to doing business, which encourages the practice of lobbying by the business sector with the legislature, for the approval of laws that relax requirements considered bureaucratic, as is the case of "green agenda" that is being analyzed by the Brazilian Supreme Court.

With the advancement of discussions on ESG as a risk measure for companies, the fiduciary duty takes on new contours by recognizing that the failure to adopt a culture of proactivity and prevention in environmental, social, and governance

aspects can generate reputational damage and lead to to the judicialization of cases for non-fulfillment of its purposes before the stakeholders. Business decisions that disregard ethical and socio-environmental aspects can damage reputation and credibility, thus expanding the application of the fiduciary duty to administrators, not because stakeholders have become holders of rights not provided for by law, but because the negligence of these principles can destroy shareholder value.

The spread of ESG in the corporate world has led companies to look for ways to adapt quickly. But the apparent contradiction between profit generation and the adoption of ESG practices, associated with the existence of information asymmetry, has fostered the adoption of greenwashing and social washing practices. Companies do not want to be left out of the ESG wave, but they are not willing to make effective and materially relevant commitments. In a global Harris Poll survey of 1,500 CEOs and other C-level corporate leaders, 58% said that their companies practice greenwashing, which would result in a potentially large number of cases for lawyers in the field of civil law and investigations by police bodies in the field of criminal law, involving, in addition to environmental offenses, crimes against the national financial system, corruption, money laundering, and formation of a criminal organization, among others. This alert is included in the FATF report released in July 2021, so that the world community and economic and regulatory actors can develop strategies to identify and minimize the risks of money laundering in environmental crimes.

Companies will need to adopt feasible ESG commitments and targets, objectively and transparently verified, at the risk of responding in court. The complexity in verifying compliance with commitments and the lack of standardization of information will require the training of professionals and researchers from different areas of science, both in public sector bodies, including criminal and police experts, and in the private sector, including lawyers and accountants.

The investment for the development of IT tools and solutions, fundamental to support corporate decisions and to assist investigations, should come largely from the private sector itself, creating a potential market for the emergence of new companies guided by ethical principles and a culture of integrity, with the purpose of contributing to the alignment of current corporate practices with true ESG.

In practical terms, this trend is beginning to have repercussions in court. In a recent case involving a brewery in Brazil, a distributor had an injunction partially granted in a lawsuit challenging the brewery's stance on ESG practices by unilaterally terminating the existing contract. The petition was based on articles of the Civil Code related to the protection of trust and the prohibition of contradictory behavior (articles 186 and 187), the economic freedom law (article 113 of the civil code), the company's code of ethics, and reports with voluntary information on ESG practices. Among other arguments, the opinion prepared by experts and included in the proceeding included the following:

Recent rules by the Central Bank of Brazil on ESG

Number	Theme	Description
Res. CMN 4,943	Risk management	Amends Resolution No. 4,557/17, which provides for the risk management structure, the capital management structure, and the information disclosure policy.
Res. CMN 4,944	Capital Requirements	Provides for the simplified optional methodology for calculating the minimum requirement for capital (PRS5), the requirements for opting for this methodology and the additional requirements for the simplified structure of continuous risk management.
Res. CMN 4,945	PRSAC	Provides for the Social, Environmental, and Climate Responsibility Policy (PRSAC) and actions aimed at its effectiveness.
Res. BCB 139	GRSAC	Provides for the disclosure of the Social, Environmental, and Climate Risks and Opportunities Report (GRSAC Report)
IN BCB 153	GRSAC	Establishes standardized tables for the purpose of disclosing the Social, Environmental, and Climate Risks and Opportunities Report (GRSAC Report)
Res. 140/2021	Rural credit	Restrictions on access to rural credit due to provisions relating to ESG issues

In the same way that the company encourages social and environmental management of its suppliers, they also expect Heineken to have real practices that are **beneficial not only to the environment, but also to the stakeholders themselves, such as distributors. Demanding social, environmental and economic-financial standards from partners requires that the house is in order. Therefore, in my opinion, Heineken's behavior related to the distributor process does not align with its public sustainability and ESG stance. It is crucial that society organizes itself and puts pressure on companies and their managers to align their communication with real sustainability and ESG practices. A company that deliberately makes a public commitment to society needs to provide truthful information about its practices and results.**

ESG and the legal and corporate perspectives

CVM Resolution 59 of the Brazilian Securities and Exchange Commission (CVM) updated and standardized the reference form for companies listed on the stock exchange, requiring that from 2023 companies provide information on ESG. They should include environmental risks, the inventory of greenhouse gas emissions, how their practices are aligned with the Sustainable Development Goals, and whether such information is audited by a third party. The CVM has important attributions as a regulatory body for the capital market, acting through instruments such as the sanctioning administrative process, and more recently through Law 14,195/21, which gave active legitimacy to file a public civil action.

Discussions involving the adoption of a global accounting reporting standard will also be in the spotlight in Brazil. Pursuant to Law 11,638/2007, Brazil adopts the international accounting standards defined by IFRS. However, currently the disclosure of ESG or sustainability reports is voluntary and most of them follow the standard defined by the GRI.

During the UN Conference of the Parties, COP26, in November 2021, the IFRS Foundation announced the creation of the International Sustainability Standards Board (ISSB), which could significantly change this scenario in the country. In line with this scenario, in 2022 the Federal Accounting Council approved the resolution creating the Brazilian Sustainability Pronouncements Committee (CBPS), which will be responsible for studying, preparing, and issuing technical documents on the disclosure of sustainability practices (environmental, social, and governance - ESG), preparing technical pronouncements to be adopted by regulators in Brazil. According to the agency's statement, the new committee will interact with the ISSB.

The phenomenon of dissemination of ESG indices by rating agencies has been the subject of global concern, including Brazil. The consequences of the lack of standardization and transparency in relation to the metrics and methodologies adopted were addressed in a specific IOSCO report, which expressed the need for monitoring by regulatory bodies, and which has received attention by the CVM in Brazil.

Scientific production and the participation of universities in the various topics related to ESG have increased, especially as a result of debates and inclusion of the topic in curricula, as is the case of the Accounting Department of the University of Brasília, with the objective of scientifically analyzing aspects of greenwashing, ESG indices, the standardizing and regulatory role, and accounting standards and reports, among others. Although training in accounting sciences in Brazil still has a strong link with the tax function, ESG has helped to promote the debate on the role of accounting in the face of the demand for new professional skills in a broader, complex and multidisciplinary corporate environment.

The regulation of a carbon credit market, approved at COP-26, will also result in new challenges of a legal, regulatory and operational nature. It will be necessary to develop new skills to evaluate and inspect projects that generate these credits in an integrated manner, with the appropriate accounting and economic repercussions. Professionals working in this area will need to develop extensive technical and scientific knowledge to work both in the elaboration and certification of these projects, as well as in the follow-up, monitoring, and inspection, with possible consequences in civil and criminal law. In Brazil, in 2022 the National Bank for Economic and Social Development of Brazil (BNDES) announced that it will allocate $60 million for the acquisition of carbon credits. In another example of the corporate market movement related to this theme, partners of a newly created company, who came from the financial sector, announced investments of $70 million for the acquisition of 1 million hectares of Atlantic Forest and Amazon forest.

The financial sector will play an important role in the ESG agenda. In 2022, the Central Bank of Brazil edited a set of rules related to social, environmental, and climate risks, in line with the recommendations of the TCFD.

The global efforts to direct the performance of the markets are also reflected in Brazil. In 2022 the European Parliament first approved a resolution establishing a regime of trade sanctions against Brazil due to deforestation. The proposal calls for European companies to ensure that the supply of meat, soy,

cocoa, and other products does not occur from deforestation. Importers will have to prove that the purchase of products is from suppliers that meet environmental requirements.

Conclusion

The prospects for the future of ESG in all sectors of society are promising. The movement of mobilization and global awareness seems to have been successful. Now, the challenge lies in understanding and adapting legal and regulatory requirements to ensure balanced mechanisms of legal enforcement to reduce information asymmetries and ensure a corporate environment that is increasingly conducive to ESG practices. The ability to mobilize and direct significant amounts of human and financial resources, from the public and private sector, will set the speed of global alignment.

Finally, we need to understand ESG as a definitive, necessary, and urgent culture change applied to all our personal and business relationships. Encouraging good practices at home, in schools, and at work, to develop a critical sense in our consumer relations and encourage social participation and control, is an essential factor for the future of the planet and humanity.

I still love chocolate...

"There is a moral responsibility... not to allow slavery, child slavery in the 21st Century," insisted Eliot L. Engel, Democrat, House of Represenstatives, in 2001. The ILO (International Labour Office) has estimated there are 170 million children in child labour around the world. Of those children, the University of Chicago claims that about 1.56 million work in cocoa production in Ghana and on the Ivory Coast.

In 2012, a number of chocolate manufacturers repeated a commitment given in 2001 to end child labour in cocoa plantations. For world-leading food companies to set critical targets on eliminating child labour in their supply chains and not to achieve them a decade later requires explanation.

In 2012 it was estimated that the cocoa industry was worth more than $90bn per year. In 2001 chocolate manufacturers signed the Harkin-Engel voluntary protocol to end child labour (named after US Senator Tom Harkin and US Representative Eliot Engel who negotiated the protocol). Deadlines set by the chocolate industry in 2005, 2008 and 2010 have all come and gone, leaving the promise of ending child labour in the cocoa farming industry unfulfilled. No longer is the elimination of child labour a commitment for the chocolate companies as the target is reduced to 70%. To give a few of very many possible examples of chocolate companies and alleged abuse of child labour and cocoa plantation farmers:

- A class action was brought against Nestlé West Africa for the alleged use of child labour in supplier cocoa farms despite labelling their product "sustainably sourced";
- Nestlé, Mars and Hershey's were accused of trafficking children from Mali and Burkina Faso to harvest cocoa on the Ivory Coast;
- Nestlé and Cargill faced a class action by former children trafficked from Mali and forced to work on Ivory Coast cocoa farms, on the ground that the companies allegedly had been complicit and aided and abetted child slave labour.

ACCOUNTING FOR YOUR SINS

The ESG world of accounting, disclosure, reporting, data, ranking, rating, and assessment resembles the Klondike Gold Rush chaos of 1896–99. In the late 19th Century, more than 100,000 prospectors raced to what became an infamous part of Alaska over a few years. Reality was that the shovel sellers, wheelbarrow hawkers, bar and brothel owners, were more likely to make fortunes than the gold miners themselves.

What are lawyers to make of this and where is public purpose to be served and money made by the legal profession? In the case of the ESG rush 120 years later, millions of professionals globally have raced to the field as ESG-focused assets under management exploded into $ trillions as the 21st century reached its late teens. From ESG's emergence out of the United Nations in 2004, to being nominally backed by more than 4,650 investment institution members of the UN-supported Principles for Responsible Investment (PRI)[121] 18 years later, the market did what the market does. With a nominal $120 trillion backing the PRI, opportunistic firms, large and small, local and global — the shovel sellers and hawkers — stepped forward to offer products and services, rating, ranking, assessment, data slicing and dicing, to feed the accelerating ESG industry. Chaos reigns in the ESG market place. ESG fortunes have been made and lost and, although ESG is widely questioned globally and increasingly politicized in the polarized USA, this three-letter acronym appears welded into the DNA of the global financial system and investment chain for now.

Globally, lawyers came to the game late and some are paying the price when demanding clients insist on deep ESG experience across climate, biodiversity, human rights, supply chains and, the all-important, governance and purpose frameworks underpinning ESG strategy and operationalisation.

Riding believes that, firstly, lawyers need to understand why and how ESG is becoming embedded in financial systems, prudential oversight and resonates in fiduciary law, as well as the evolution of data-driven policy choices at multi-lateral, regional and national levels. This is where lawyers should start or they will continue to miss the big picture.

Frothy ESG bubble to be replaced by Real ESG

Riding believes the frothy ESG bubble will be replaced by Real ESG as policy-makers and regulators catch up with a heady market where opportunistic prospectors have staked their claims. These claims emerged alongside a clear shift in public Zeitgeist to favour people, planet, as well as profit, following two decades of colliding crises and a precipitous decline in trust. Whether through lost trust in the global banking system following the 2007-8 crash and its long devastating legacy, or a diminishing faith in liberal politics and multilateralism to tackle critical systemic issues, climate being the prime example, and or a wide swathe of 20th-century institutions failing on the job

"Lawyers came to the game late and some are paying the price…"

ARCHIVIST | ADOBE STOCK

as a pandemic gripped the world and war took hold in Europe, ESG seems to have touched public and market sentiment.

Here *Riding* looks at the sometimes arcane, often opaque, and always deeply technical worlds, covering three specialist areas underpinning the emerging digital, data-fuelled, global financial system and the metamorphizing investment chain where capital is allocated:

- Sue Harding, in her article "A failure to give account: climate ignored in company financial statements and audit," explores the unfolding liabilities and exposure of the international accountancy industry as it fails to get to grips with climate change across obligatory audit, reporting and disclosure regimes in many key jurisdictions, with global implications.
- Rhodes Scholar Daniel Cash, in "The E(SG)volution of credit rating regulation," probes whether the credit rating majors are fit for purpose for the needs of a crowded, warming planet cursed by inequality and ecosystems destruction.
- Data and sustainability maestro Donato Calace, in "The materiality multiverse madness: a call for policies that can really make a difference," analyses what is really needed to plug and play information, data and precise interventions to make the digital world work for sustainability.

A failure to give account: climate ignored in company financial statements and audit

Change, profound change, is coming to the world of accounting. Some aspects of this transition may not be anticipated fully by the custodians of Luca Pacioli's truly revolutionary double-entry system introduced in 1494. Some 528 years later, a new revolution is needed and, in the first instance, our global accounting industry needs to ensure, it is not in breach of the law.
This is not "hot air"... although in some ways it is.

Could accountants be the unlikely heroes of global decarbonisation?

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Every so often, a crisis comes along to challenge company accounting and disclosure. Climate change is emerging as the next of these, given the significant business and financial risk it represents to companies globally, and the associated risk of misstated financial statements if existing requirements are not applied. This is set alongside ambitious proposals for enhanced climate-related disclosure outside of the financial statements, by the newly established International Sustainability Standards Board (ISSB), by the US Securities and Exchange Commission (SEC), and by the European Financial Reporting Advisory Group (EFRAG), which may make deficiencies in the existing financial statements all the more obvious. In this article, we focus on the financial statements and their audit under existing requirements as being the subject of legal/compliance risk for companies (and their auditors), and even a risk to the principle-based approach to accounting standards, if the requirements are not properly upheld.

So what's the problem?

On the face of it, the problem is simply stated. Climate consideration and disclosure is required but is not much in evidence — either in financial statements or audit reports.

- "They are Required." So say the standard setters themselves.[122] Both the IASB (International Accounting Standards Board) and FASB (Financial Accounting Standards Board) which determine standards outside and inside the USA, have confirmed that their existing standards already apply to climate risk, requiring both accounting adjustments where criteria are met, along with disclosure of material information such as climate-related assumptions and estimates. The IAASB (International Auditing and Assurance Standards Board) has also published guidance confirming that the International Standards on Auditing (ISAs) already require consideration of financial statement risk relating to climate.
- "Not in evidence." Evidence of climate being considered in financial statements and audits often cannot be found, even for companies — such as oil and gas companies — where climate risk poses clearly material business and financial risk. The report by Carbon Tracker "Flying blind" shows that over 70% of some of world's largest corporate emitters failed to demonstrate how the effects of climate risk were considered in preparing their 2020 financial statements, and 80% of the related audit reports showed no evidence of how climate risk was assessed.

Building on this, the Climate Action 100+ (CA100+) published its Net Zero Company Benchmark assessment of Climate Accounting & Audit. This also showed very limited demonstration of meeting requirements, by companies identified by investors as generating up to 80 percent of corporate industrial greenhouse gas emissions.[123] Less than 4% of the reports studied appeared to have met any of five separately assessed categories relating to accounting and audit requirements in a comprehensive manner. Though more analysis is needed, initial reviews of year-end 2021 reporting do not suggest significant improvement.

The sort of things looked for included information on how climate risk was considered for asset values that appear to be exposed to climate risk. For example, carbon-intensive property, plant and equipment (PPE) values, such as fossil fuel reserves, assets powered by fossil fuel energy sources or used in producing them (e.g. diesel/petrol fuelled vehicles or production lines for manufacturing them). Such asset values may be impacted by shortened asset lives and/or impairments, for example. For some businesses/sectors, climate-exposed assets may include intangibles such as goodwill, financial receivables, or deferred tax assets, but the same concern applies with respect to recoverable values that depend on the generation of future cash flows that may be at risk from climate change and transition to a low-carbon economy. The disclosure of information on assumptions made, for example the commodity prices/volumes and carbon costs assumed in making these accounting determinations, can represent material information for exposed companies. Yet shareholders are mainly kept in the dark.

Consistency of company reporting within the financial statements with information provided outside of them, for example descriptions of risk analysis and company strategies and targets relating to climate, was also reviewed. Indeed, this consistency across the annual report is also subject to audit procedures under both international and US standards. It would be expected, for example, that if a company's emissions targets require early retirement of assets (a coal fired power plant might need to be retired in 10 years not 40), then this would be reflected in the estimates of remaining useful lives and cash flow generation in the financial statements, and asset retirement obligations too would reflect acceleration. But across the financial statements of the world's most climate exposed companies, such information is missing.

Does it matter?

The absence of this information presents many risks, including those to the financial system. Markets are not getting the information that is already required and needed. On this former aspect, of course, regulatory compliance matters and brings its own set of risks. The failure of companies and auditors to report will undoubtedly become the subject of legal challenge in coming years. Additionally, delays may risk continued investment in carbon-intensive infrastructure, that will later need to be early retired and written down if limits on global warming are to be met. Capital might better be allocated to the many opportunities that the transition to a low-carbon economy represents. At company level too, financial results and position is often also linked to payment of bonuses to executives and even dividend payments, which may be unintendedly generous based on accounting amounts absent consideration of climate risks.

And in the case of climate, delayed action and unchecked investment will increase the risk of climate change to the globe's inhabitants. If company financial statements turn a blind eye to climate, companies may fail to abate and adapt as might otherwise have been the case to mitigate the most dangerous effects.

What's gone wrong?

Returning to the simple problem stated, the consideration of climate is not being sufficiently evidenced. Without disclosure, it is not clear how (or even whether) the accounting requirements are being applied. There are various potential reasons being offered, but none are convincing. Some of these include:

- "Backward looking." For example, it is often said that accounting is largely backward looking. But today's accounting is loaded with expectations of the future, even if accounts mistakenly still claim to be based on 'historical cost'. Examples include property, plant, and equipment balances for which estimates are reviewed for changes reflecting future expectations at each reporting date (depreciation methods, lives, residual values, and retirement costs) and adjusted if appropriate. Beyond this, impairment assessments, not only of PPE but of intangibles, often take account of current estimates of future recovery, using explicit forecasts of cash flows for an initial period, followed by future year amounts based on assumed growth rates, all discounted

to a current recoverable value, which takes account of uncertainty and risk.

- Effects are "Uncertain and very long-term" — Absolute certainty is not a requirement of accounting, with impairment and asset lives largely being determined on current best estimates. While uncertain, there is a current state of risk assessment and climate strategy to be taken account of, with appropriate contextual disclosures being provided. Indeed, some aspects are not even all that long-term, as many companies have set interim targets for 2025 or 2028, and meeting even longer-term targets will require phased retirements of carbon-intensive assets, and research and development of new products and technologies in the near term. However, it is often unclear whether any of these have been considered.
- "Not material." There is a strange circularity to this one, but the circle must be completed. Materiality definitions rely on both quantitative and qualitative aspects of the information being considered. Reasonable expectations that climate is material — even if it has not resulted in a quantitatively material adjustment to the financial statements — make it material by its nature, and information such as the assumptions made, required information that is needed to understand how it has been considered. For example, it would not seem reasonable to assume business as usual cash flows for an oil and gas company's future revenue stream thereby avoiding any impairment, without disclosing material information to provide an understanding of the price and volume assumptions made.

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So why is there such a glaring gap in the information companies and auditors are providing? Perhaps it is because even several years ago, not much of a thought may have been given in terms of financial statement risk of climate, and few would likely have expected this. It is awareness of the risk that climate change poses together with the interest of investors, that has been changing over time, rather than the accounting requirements themselves. Companies are increasingly developing their own risk assessment and strategies including setting targets to reduce their emissions. However, and representing a dangerous anomaly, they do not yet appear to have updated their reflection of this in the financial statements. This is a gap that needs filling.

Global, systemic problem – for the climate and financial markets

At a high level, the situation is similar under both the world's accounting standards; IFRS and US GAAP — though some of the accounting mechanics differ in detail. Given the geographic spread of companies, their global footprints and of course the global nature of climate change itself, this accounting anomaly is indeed a global, systemic problem.

The direction of travel on climate is abundantly clear. Nearly 200 countries have now committed to the Paris Agreement, and while countries are still working out their individual and collective contributions to the aims, the Intergovernmental Panel on Climate Change has published as part of its 6th Assessment Report, analysis suggesting that the un-burnable portions of oil, gas, and coal reserves will be 30%, 50% and 80% respectively if global warming is even to be limited to 2°C. Without effective carbon capture technologies, the coal and gas fired power plants globally will need to retire nearly two decades earlier than expected in order to achieve this limit. The range of sectors affected is far wider than this, including transportation, industrials and consumer goods and services. This suggests that at least companies with carbon exposed businesses not only have business and financial risk, but financial statement risk that needs addressing.

Standard setters made it clear in 2020 (if not before) that there isn't a loophole in their requirements that somehow provides an exception for climate, and regulators too are increasing their emphasis on climate in financial statements and audits. Climate, in particular, is being included as a priority topic

for 2022 by the UK's Financial Reporting Council (FRC), the European Securities and Markets Authority (ESMA), and the US PCAOB, with the SEC's recent proposals on climate disclosure containing a significant reliance on the existing financial statement requirements as well. Additionally, and key to materiality considerations under the accounting standards, investors have also made abundantly clear their interest in the topic, when it is material to a company's business.[124]

What should happen?

While it could be tempting to excuse current practices and ask for new rules, new standards have a habit of taking an age to write and enforce. Furthermore, there is also another systemic issue to consider. Central to accounting requirements is that they are principle based, because it is unrealistic to think detailed rules can keep pace with every new situation before it arises. Climate is one of many risks, and while guidance may be required or helpful to assist in the consistent application of principles, standard setters have already asked in the course of their periodic agenda consultations, whether new standards are needed. No specific projects are planned, with the IASB maintaining a watching brief in the future and the FASB to continue work on the narrow topic of environmental credit programs that may require new guidance.

Put simply then, the option with regards to existing financial statement requirements is to uphold them or not. Companies, auditors, regulators (financial statements, market, and audit) must get on with applying the existing standards so that good practices are developed and can be shared to inspire others. This would provide a positive underpinning for investment and other decisions made on the basis of appropriately improved information, potentially also avoiding expensive legal/regulatory challenges that may arise if this does not take place.

Financial statement information and the proposed improvements in business and risk reporting relating to climate, should be complimentary. However, the lack of visibility in the financial statements may call into question whether risk-assessment is robust and target-setting meaningful — or whether a disconnect suggests that aspects of financial statement or other reporting is misleading.

2022 therefore seems a critical year to start setting things right, and for material climate-related information to be provided — linking current risk assessment and current strategy into the current year's accounts. These may all change in the future as it unfolds, but once the linkage is clear, maintaining it over future developments in risk assessment and transition of the economy to a low-carbon future should become routine. Only then can the accounting principles be said to be applied — and principle-based standards functioning.

The E(SG)volution of credit rating regulation

"We are in the midst of the next real test for the system – ESG. ESG, as a concept, has become mainstream…"

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His research is exclusively concerned with the regulation of the credit rating industry, with a wider focus on the financial regulation of financial service providers, and the relationship between the financial sector and its impact upon society.
He was awarded his PhD in January 2017 with his doctoral thesis entitled "The Regulation of Credit Rating Agencies: An Analysis of the Transgressions of the Rating Industry and a measured proposal for reform."

The 2007-8 Financial Crisis, and its longtail social and economic aftermath, was the epitome of regulators not achieving balance. To correct its mistake, the global regulatory framework sought to put in place 'safeguards' that would adequately tip the balance back in favour of, well, balance. So far, those corrections have, on the face of things, worked. However, we are in the midst of the next real test for the system — ESG. ESG, as a concept, has become mainstream. The act of 'mainstreaming' the concept has brought with it many challenges, but also many opportunities. The largest opportunity of all is the potential of unlocking a new tsunami of capital that can be pumped around the system, as investors flock towards objectively 'safer' options for their investments, and market participants flock to meet the new demand. Yet, whilst traditional capital has a framework built around it to aid its facilitation i.e., think of the traditional credit rating dynamic, the ESG phase is building a new framework day by day. As of yet, the natural regulatory lag that accompanies any new phase of a capitalistic societal shift is yet to catch up, but pressure is being applied to change that.

The reason for the context above (see "The "Why?' of credit rating agencies", below) is to provide you with a picture of what the parameters are to the new game.

ESG Rating Agencies, as they have been called (amongst a list of other descriptors) are separate to Credit Rating Agencies that are incorporating ESG into the credit analyses, and who

The "Why?" of credit rating agencies

Credit Rating Agencies are inherently adaptive. The history of the commercial rating (and formerly reference) agency is one that is inherently tied to the concepts of fear and facilitation. It is based in that fear of the unknown, and of potential loss, and gave the industry its initial lifeblood. The financial crises of the mid-1800s in the United States unsurprisingly bore the first commercial agencies, and the growth spurts of the industry were witnessed in the late 1920s/1930s, and the 1970s (the Wall Street Crash and the collapse of particular US railroad companies, respectively). These were the 'fear periods' of the agencies' development that saw investors genuinely embrace the agencies for the want of more and better-quality information. However, there is a more impactful and fundamental purpose for the credit rating agencies: facilitation. In the antebellum United States, and in the earlier periods in the United Kingdom, the need for credit or trade repositories was real, owing to a lack of technological development to improve informational proliferation. In later periods, rapid technological development reduced the need for information, but instead ushered in the era of facilitation. 'Signalling' is a core component of the credit rating dynamic with investment managers, that dominate modern capitalism because of the emergence of the institutional investor, needing to signal to their principals (internal mandates) or to regulators, depending upon their constitution and societal role/impact (external mandates). Issuers of debt need to signal to the marketplace the

are now also developing their own "ESG scores." The leading ESG Rating entity, MSCI, now arguably stands alone with its competitors already falling to the more resourced oligopolistic rating agencies (Sustainalytics, another ESG Rating provider, has already been acquired by Morningstar). For the Credit Rating Agencies, the race has been on for a while to build up their ESG informational provisions, otherwise known as Ancillary Services. None of the above is currently regulated.

In the US, the SEC via the Office for Credit Ratings has already determined that the influx of ESG considerations into the credit rating model will bring with it inherent conflicts of interests, while the EU is, in 2022, considering how best to regulate the ESG rating industry. One can assume that the credit rating agencies, because of their fervour to provide related services, will be caught up in the regulatory push too. The need to regulate is being pushed from all sides, with think-tanks and experts being commissioned to provide their take on how important it is for this new field to be regulated. That need to regulate however must also be extended to the credit rating agencies because, as preliminary research has shown, ESG rating entities that are purchased by the larger credit rating agencies begin to overly-favour the clientele of their parent credit rating agency, providing ESG ratings that are one, two, or sometimes three notches higher than before.

What has not been discussed, however, is why? Regulators have, in their attempts to regulate credit rating agencies, made it abundantly clear that they will not regulate the content of the rating agencies, but merely the processes. This is because it would be seen as anti-capitalist to do so, but the reality is that the market is not particularly concerned with the content of the ratings, but that they can be consistent enough to be relied upon for signalling purposes. The market pushback to inadequacies in the ESG rating space all focus on "divergence" for this specific reason. However, ESG ratings are inherently more subjective than credit ratings, and determining processes for developing such subjective ratings is something regulators are already struggling with.

Regulators are faced with questions that are difficult to answer. Can they develop regulations that are broad enough to capture the variety of rating processes and opinions regarding ESG and its suitability whilst remaining focused enough to be relevant and impactful? If the aim will be, like what has been witnessed with credit ratings, to focus on the transparency of the process rather than the content, then how useful is it really to focus on procedures which are inherently more subjective? Will that satisfy the market's need for consistency and predictability? Furthermore, how will liability be considered and potentially applied to a procedure that is inherently more subjective that developing credit ratings? These difficult regulatory questions are also being played out in a political environment that is starting to turn its attention towards the

worthiness of their debt, and regulators need to signal to the marketplace what standards are required within the overarching dynamic. The easiest way to communicate these signals, in a world that is anchored in 'conscious complexity', is via the easy-to-understand rating scale. This, in a nutshell, is the core dynamic of the credit rating arena. On one side there is an entity that produces low informational content, and on the other are entities that merely require a seemingly independent third-party to verify and communicate potentially commercially sensitive data. To really understand credit rating agencies and the issue of regulating them a broad, wide, and systemic view is required. At the core of the modern human existence is the social system of capitalism (in all its differing forms), and the core facet of that capitalistic system is the flow of capital around it. To facilitate that flow is its greatest need, and for a variety of reasons the credit rating industry have been allowed to develop into the microsystem that allows the larger system to function. The question of regulation is, fundamentally, linked to this dynamic. The role of the regulator is not, as they will say, to 'protect the investor' or 'protect the public'. It is merely to facilitate the maintenance of the system in place. Damage to the investors or the public is discouraged, certainly, but is allowed (the stunning refusal to hold senior people in credit rating agencies liable for losses, but instead to use financial penalties which are less than yearly profits, is testament to this). The question for the regulator becomes can it find the balance between allowing for the facilitation of capital without putting investors and the wider public at too much risk.

ESG rating space, further ratcheting up the pressure. S&P's decision to provide lower ESG scores to Republican-held US States has led to a concerted backlash from the Republican Party as part of its wider argument that ESG is too subjective and being used as a political weapon. In another example, a number of US State financial institutions recently launched an unprecedented campaign against Morningstar because of its ESG entity, Sustainalytics, downgraded entities relating to Israel which resulted in a concerted political rebuke from State representatives and associated think-tanks and lobbying groups that argued the data being used by Sustainalytics was anti-Israeli. S&P has not backed down, but Morningstar have and subsequently amended their methodologies relating to Israel. The environment surrounding ESG rating agencies (and Credit Rating Agencies) is tremendously nuanced and within that space exist large and influential regulators and legislators tasked with taking impactful action in a very delicate situation.

The reality, unfortunately, is too predictable but, in that reality, there is only one outcome. The coming regulations for both the credit and ESG rating industries have to focus on the systemic need for facilitation above all else. For this reason, the deeply conflicted practice of allowing said agencies to develop ancillary service provisions that constitute the epitome of economic rent taking will be allowed to grow stronger still. For this reason, the continued domination of the credit rating industry over its ESG counterparts via acquisitions will be encouraged, not prohibited. For this reason, the regulatory frameworks being developed will focus on processes rather than content. The global economy and the system of capitalism itself requires the ESG tsunami to flow over it and nourish its depleted cells, cells that were depleted with one of the largest financial malfunctions on record. The regulations will focus on allowing the signal to be incorporated into market practice as the market needs it to be, i.e. in a convergent, predictable, and unchallenging manner. This is what regulation exists for, and it will meet its goal. The risk, and fear, is that the ESG tidal wave will be so significant that not getting the balance correct now can have catastrophic effects later. Making sure that credit and ESG rating providers are provided with enough incentive, but also enough deterrent to move away from malfeasance and malpractice is of crucial importance to humankind. Meaningful and well-considered analyses are being put forward to regulators right now, but the reality of what a financial regulator is and who it serves is not being considered. What is absolutely required now is for regulators to be reminded of the need to protect the wider public from the systemic inadequacies, and for those regulators to be held to account at all times. Facilitation can be achieved whilst protecting the wider society from having to internalise era-defining losses, if there is a genuine will to do so.

In the materiality multiverse madness: a call for policies that can really make a difference

It is a truth universally acknowledged, that every policy maker working on the standardisation of ESG or sustainability information must provide a definition of materiality. This trend flourished over the recent years, originating a materiality multiverse rich in labels — single, double, financial, impact, context, sesqui. These proposals — which most of the time are conceptually intriguing and elegant — typically share a common limitation: they fall short of providing applicable practical and operational guidance. In other words, they leave decision makers on their own when it comes to gathering and assessing evidence to make sound and credible materiality judgements.

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Not by chance, the words that Simon Zadek and Mira Merme wrote 20 years ago in their *Redefining Materiality* (2003) — the first public paper addressing materiality in the sustainability context still hold true:

"Materiality is being redefined — through pressure on business from wider civil society, and through precedents established by company practice and, increasingly, regulation and litigation. But current experimentation in redefining materiality suffers from being ad hoc, often confused and confusing, and rarely credible. As a result, companies too often disclose information that is not used, incurring unnecessary costs without satisfying intended audiences."[125]

This gap should be considered as a top priority for the legal ecosystem aiming at bringing clarity in the ESG Wild West. There are at least two key arguments in support of this.

The first argument regards ensuring the usability and comparability of the outcome of materiality assessments. Without clear boundaries and procedures on how materiality assessment should be conducted, even agreeing on a shared definition of materiality would prove ineffective, as variations in the outcomes of the materiality assessment would be due to its operationalisation and determination process rather than reflecting the organisation's own positioning, strategy, impacts, and dependencies.

Relevant academic literature explored this challenge, highlighting how even within the application of the same standard (GRI), the outcomes of two materiality assessments are de facto non-comparable due to significant divergences in the methodology and determination process.

The second argument, instead, concerns the nature and ultimate purpose of materiality assessments. The development of effective operational guidance on the application of the materiality definition should start from taking stock that transplanting materiality from the auditing and accounting domain to the sustainability field has substantially altered its characteristics and purpose.

A "traditional" accounting materiality statement reads like this one: "Generally speaking, economic events are recognized and presented based on their relative importance or materiality. In the case of the financial statements for 2010, materiality was determined on the basis of 5% of consolidated EBITDA."

In accounting and auditing, materiality is the principle that guarantees disclosures free from significant misstatements and omissions, and it can be determined through a rather straightforward numerical test (e.g. more than x% of consolidated EBITDA), just like in the above example.

In the ESG and sustainability domain, materiality still holds its original purpose of ensuring disclosures free of misstatements and omissions, and in addition it is assigned further objectives related to corporate strategy, governance mechanisms and structure, risk management, and even budgeting.

For example, in the Exposure Draft of the European Sustainability Reporting Standards proposed by EFRAG and published in April 2022, paragraph 70 of ESRS 2 General, strategy, governance and materiality assessment disclosure requirements indicates that:

"Once identified, material sustainability impacts, risks and opportunities are considered by the undertaking to deploy prevention, mitigation, adaptation and other management measures. This may imply strategic decisions, governance consideration, the establishment of policies, targets, action plans and allocation of resources as well as the use of metrics to monitor the evolution of impacts, risks and opportunities over time. All of the above addressed by other ESRS disclosure requirements."

This broader purpose of materiality assessments in the context of sustainability is not a recent shift in the concept: indeed, it has been a part of the redefinition of materiality in the context of corporate sustainability since it was first proposed. Zadek and Merme, back in 2003, proposed that materiality assessment should be embedded within an appropriate corporate governance framework, including:

1. *"An explicit process through which the tests are applied, which ensures that the required information is identified, assessed and made available to the Board.*
2. *A Board that collectively has the necessary competencies to be able to make sound decisions on the basis of the information provided.*
3. *An external assurance of the entire process that is independent, delivered by providers with adequate competencies, and based on standards designed specifically to handle the range and complexity of non-financial as well as financial, and qualitative as well as quantitative, information."*

Materiality and materiality assessments in accounting were never designed to achieve such a broad range of strategic, governance, and risk management goals - again, it is exclusively about ensuring that financial disclosures are free of significant misstatements and omissions.

Hence, policy makers working on materiality in sustainability should bear in mind that they're dealing with a substantially different object than materiality in accounting. This is a key reason why simply providing a new definition of materiality is not sufficient — if materiality is attributed additional purposes related to strategy, governance, and risk management, proper workable guidance of how the materiality determination process can achieve these goals should be provided.

A good starting point could be to identify what elements of the materiality assessment process can be standardised. Those could be, for example:

1. **Standardisation in the typology of evidence** that can be used to demonstrate the materiality of a sustainability issue in materiality tests. The table opposite, extracted from the think tank Organismo Italiano Business Reporting OIBR's recent guidelines on Operationalising Materiality gives an example of how the standardisation of the typology of evidence might be structured.
2. **Standardisation in the governance of the materiality determination process**, with step-by-step guidance describing the different phases of the analysis and the various organisational bodies and levels that should be involved;
3. **Standardisation in the disclosure of the outcomes and of the process itself**, so auditors, market authorities, and other interested stakeholders can easily find information on what issues an organisation identified as material and how it came to such conclusions.

Whilst 2 and 3 have been addressed more extensively by policies and voluntary frameworks and standards so far, an important policy gap still exists on the standardisation of the typology of evidence and related materiality test. Not by chance, the EFRAG Sustainability Reporting Board asks the following crucial question in the EFRAG SRB 15 August 2022 Agenda Paper 05.01 "Approach to materiality assessment in ESRS".

Example of evidence	Description	How does it demonstrate financial materiality?	How does it demonstrate impact materiality?
Disclosure in annual reports of other companies	Narrative, KPIs, commitments, and other qualitative or quantitative content addressing sustainability topics in annual reports (including financial and non-financial filings).	Coverage in annual financial filings is evidence that a sustainability issue has relevance in terms of its impacts on the value of the organization and/or its ability to create value.	Coverage in sustainability or non-financial reports provides evidence that a sustainability topic is relevant in terms of the impacts it has on different stakeholder groups.
Science based thresholds	Carrying capacity thresholds of ecosystems and natural/ social environments determined following a scientific approach.	Exploiting a natural or societal resource over its carrying capacity has an impact on the ability of the organization to rely on that resource in the future.	Over exploitation of natural or natural resources triggers irreversible damage on environment and society
Mandatory regulation and policies	Laws, regulations, and other binding policy tools that require organizations to act in a certain way.	Violation of mandatory provisions results in litigation, sanctions, fines, and other consequences that impact the value and cash flows of an organization.	Mandatory regulation institutionalizes the interests, preferences, and orientation of regulators, institutions, and civil society more broadly.
Soft law, best practices, guidelines,	Non-binding policy instruments issued by institutions, NGOs, Think Tanks, and other members of civil society	Financial market institutions such as stock exchanges, central banks, market authorities often issue non-binding guidance and interpretation of rules that signal the financial relevance of certain topics.	Voluntary policy initiatives set out best practices aimed at measuring, managing, and reducing impacts on the environment and society
Coverage in media	News articles addressing sustainability topics in relation to organizations	Volume of news in from financial markets media wprovide evidence of the financial implications of sustainability issues	Media attention (e.g., volume of news) more broadly represents public opinion's sensitivity on certain sustainability topics
Academic research	Peer-reviewed academic articles, scientific papers, and other kind of academic publications	Body of research investigating the relationship between financial value and sustainability topics	Body of research addressing the impact of organizations on the environment and society
Investors and financial markets' interest	Analysts' opinions, investor calls' transcripts, equity research reports	Evidence of relevance representing financial markets	Certain financial consequences are triggered by environmental and social impacts
Stakeholders surveys and engagement	Surveys and questionnaires collecting internal and external stakeholders' viewpoints and opinions	Surveys asking stakeholders to indicate to what extent a sustainability issue generates or can trigger financial impacts for the organization	Surveys asking stakeholders to what extent an organization's direct and indirect activities generate or may generate impacts on environment and society

At page 12, paragraph 37 (b) the document asks:

"Is the quantitative element of materiality assessment equally important in impact and financial materiality? For example, some consider that disclosure about workforce is to be provided irrespective of materiality consideration (e.g. if an undertaking has only 15 employees the disclosure about gender gap would be equally important than for an undertaking with 15.000 employees; having only one child exposed to child labor in the value chain out of thousands of workers involved would be material). Other consider that materiality should be assessed per each DRs and for some of them undertaking shall be able to conclude that the info is not material."

It is clear from this interrogative that the number of employees is not the correct test to determine the materiality of workforce disclosures. The real unasked and unaddressed question here is: "what is a good materiality test for workforce disclosures? What kind of evidence should be used to demonstrate materiality of this matter or lack thereof?"

Until the standardisation of materiality evidence and test is not addressed by policy makers, practitioners, auditors, and market authorities will be left with an unbridgeable gap between the conceptual definition of materiality and its operationalisation.

A second vital element policy makers should consider is the role of data and technology. A recent report prepared by the EFRAG Task Force on reporting on sustainability-related risks and opportunities and their linkage to business models analyses the role that technology and data play in ensuring good quality disclosures. See figure below:

This analysis illustrates how different technological solutions can enable the qualitative characteristics of good disclosures. As it emerges from the visualization, some technologies have broader applications than others, a finding that can be helpful in informing implementation and investment decisions for report preparers.

More importantly, it is clear that technology should be considered holistically in the entire disclosure journey, from preparation to consumption.

The landmark US SEC proposal on Climate-related financial disclosures also recognises the crucial role of technology:

"We recognize that determining the likely future impacts on a registrant's business may be difficult for some registrants. Commenters have noted that the science of climate modelling has progressed in recent years and enabled the development of various software tools and that climate consulting firms are available to assist registrants in making this determination."

Technological solutions' contribution to qualitative characteristics of useful sustainability reporting information

Technological solutions	Technological solutions contribution to information attributes							
Blockchain	Faithful representation	Comparability	Materiality/ relevance					
Satellite imagery	Faithful representation	Verifiability/ reliability	Materiality/ relevance					
Structured data (XBRL)	Faithful representation	Comparability	Connectivity	Understand-ability				
ESAP	Verifiability/ reliability	Timeliness	Stakeholder inclusiveness	Comparability				
Multimedia	Faithful representation	Timeliness	Stakeholder inclusiveness	Connectivity	Understand-ability			
Data management	Faithful representation	Verifiability/ reliability	Timeliness	Materiality/ relevance	Coherence			
AI	Faithful representation	Comparability	Verifiability/ reliability	Connectivity	Timeliness	Stakeholder inclusiveness	Materiality/ relevance	Coherence

To provide a more concrete example of how technology and data can help identify those companies that have a credible plan to deliver on stated Net Zero or other ESG goals, consider this case based on Datamaran's analysis of disclosures. Datamaran is a SaaS solution used by the C-suite to determine current and emerging material ESG risks and opportunities in a data-driven and credible way leveraging AI.

This is a climate-related disclosure identified by Datamaran in the sustainability report of a large pharmaceutical company:

[Company X] has long acknowledged the significant risks posed by climate change, including potential adverse impacts on human health, frequency of severe weather events impacting personnel and operations, and the potential disruption of value chains critical to providing medicines and vaccines to patients.

If the US implements a federal carbon pricing scheme aligned with World Bank recommendations, the cost to Company X could range from approximately $28 million to $73 million annually by 2030 based on current scope 1 and 2 emissions.

Climate change presents risks to our operations and those of our suppliers, including the potential for property damage, business interruption, and/or loss of stored product as a result of more frequent and severe weather events and water availability challenges. The potential loss that could reasonably be expected is challenging to quantify and predict given the number of variables but could range from $20 million to $400 million based on facility and product values.

The same company, includes the following disclosure in their 10-K filing:

Climate change presents risks to our operations, including the potential for additional regulatory requirements and associated costs, the potential for more frequent and severe weather events, and water availability challenges that may impact our facilities and those of our suppliers.

Based on our reviews, we do not believe these potential risks are material to our operations at this time.

Inconsistencies like this one are a sign of potential greenwashing, and can lead to liability risks for the organisation as the US SEC itself clarified (sample letter from US SEC). Technology is key to identify those and other inconsistencies that can poke holes in the credibility of a company's stated commitments and goals.

As stakeholder pressure, financial market interest, and regulatory scrutiny mount, there are other likely liabilities and exposures for companies that do not have credible or actionable plans in place to address the evolving materiality considerations associated with broad ESG. The key drivers are:

- Increased legal and compliance risks and associated costs;
- Reduced and less favorable options to access capital and funding;
- Losing touch with the demands and expectations of the next generation of consumers, talents, and decision makers;
- Failing to recognise that best practices that once drove competitive advantage are now quickly becoming hygienic essentials as regulation and policy are raising the bar at an accelerating pace.

Stakeholders have been asking for long enough for reliable, material, consistent, timely, and comparable information on sustainability matters. These requests are now top of the policy agenda, and that is going to profoundly change sustainability accounting. Will those changes bring a more sustainable society? The question will remain most likely open as we try to address the broader sustainable development challenge - at the very least a more transparent and comprehensive information ecosystem will be established, which hopefully will inspire more responsible and sustainable decision making.

SECTION E

CONCLUSIONS

The exponential rise in demand for ESG-equipped law firms and lawyers with deep sustainability expertise is clear. Clear, also, is that many law firms are poorly equipped to deal with the building demand from clients for ESG services appearing across multiple practises.

In 2021, we identified nine areas of legal expertise we believed would signal the emergence of a law firm as integrated across critical ESG issues. These areas cover: Governance; Climate Change; Corporate Responsibility; Sustainable Finance; Environmental Liability; Carbon Trading; Business and Human Rights; Ownership of Natural Assets; and ESG Capital Markets/Securities Regulation. Of the 100 firms in surveyed in 2022, building on the 55 covered last year, none have achieved this integration.

In short, we believe lawyers have come to the sustainability field late and nor is there a clear and definitive expression of the role of law in sustainable development despite its intuitively obvious linkages in so many areas.

How did we get to this state of affairs — law late to the game — in a field were academic brilliance, pragmatic street smarts, and excellence in execution, for a diverse range of individuals, institutions, government and corporations, including powerful investment and finance actors, are so greatly prized?

Why did mainstream law not see sustainability, and ESG as an approach to support the ultimate goal of sustainable development, earlier?

Law should be at the epicentre of efforts to both forge new pathways and accelerate the journey from 250 years of extractive capitalism to a global political economy where regeneration is the reality, not just the buzzword. As the systemic threats of climate change, ecosystems destruction, inequality, grinding human rights issues, and food insecurity become manifest, fundamental questions remain for how the legal world should build new offerings to serve the transition? The use of ESG-related litigation, and the rise of third-party funding, to address public purpose issues across jurisdictions, will accelerate and build. Increasingly, we will see voluntary ESG commitments for corporates and investors and the emergence of soft laws that such commitments drive, transition to policies and regulations with a harder edge. The age of ESG litigation, both civil and criminal, has only just started.

It's not just the risk dimensions of sustainability which demand attention from lawyers. The ability to work with clients as new sustainability-aligned investment and commercial opportunities emerge in agriculture, extractives, clean energy, industry, and

transport, as well as across a range of ecosystems covering sustainable forests, the marvel of the often-forgotten ecosystem soil, rehabilitated marine environments, to name a few areas where new wealth will be created.

The best lawyers will employ ESG thinking to steer their clients through the complexity posed by converging systemic risks and the opportunities presented by the rise of new industries underpinning a future-fit 21st century. Legal leaders will be well rewarded for doing so.

There is a legal race underway for ESG credibility, ESG talent, and ESG clients, in all the major jurisdictions and an increasing number of emerging economies globally. Attraction, retention, and incentivisation of the brightest young lawyers is fast becoming existential for the leading global firms and the ability to show authentic values and purpose underpin this growing war for talent.

The news is not all bad…

Riding the Dragon purposefully does not point out, praise, highlight or criticise any individual firms and, as noted, we have carried out a deep dive research into 100 firms in 2022.

Shining examples of world class ESG engagement and client support across the advisory, transactional and contentious aspects of law exist, although we feel these remain far too few in numbers to date. There are clear signs that, as ever, the legal community is adaptable and can adjust at dramatic speed when new markets emerge. A tendency to overstate ESG capabilities and expertise remains, however, and for some firms they approach the cliff of greenwashing, a zone no law firm wants to be even within shouting distance of.

In the internal dimensions of law firm operations there are also wonderful initiatives to transform culture and to address deep seated and long-held accusations of the bullying, sexism, and a lack of diversity, which have given certain corners of the legal world a toxic profile. Such profiles will increasingly deter the very best talent from the values driven next generation from automatically seeing law as an obvious, rewarding and enriching career path. Without doubt, for the post-pandemic generation in particular, more questions are being asked ahead of employment in law firms despite the fact that securing a training contract remains hyper competitive.

A trainee lawyer in the UK summed it up: "Graduates are really questioning the value of being with a Magic Circle firm or large US firm if the work-life balance appears wrong. Also, if the firm has even a whiff of a toxic work culture my generation just will not consider applying — it's as simple as that. Some people will swap money for life but that's there choice."

"I think there's always been a presumption by the leading law firms that securing a trainee contract with a prestigious name cancels out these value-based concerns. Well, it doesn't. In my experience the pandemic has propelled these concerns to a whole new level as hybrid working has shone an intense light on balance and culture," she concluded.

Finally, *Riding* understands that the ESG world is also becoming a tightrope for large, international law firms. Recent developments in the USA, where the acronym has been intensely politicized, would suggest that the legal world is faced with a converging firestorm. On one side, from clients demanding ESG services, and on the other side with politicians battling over ESGs ideological roots.

The first paragraph of a November 3rd letter sent from five US Senators to more than 50 major law firms shines a light on unfolding complexity around ESG. The letter states: "We are writing about your firm's Environmental, Social and Governance (ESG) practice. Although businesses would certainly be wise to lawyer up before undertaking ESG initiatives, your firm has a duty to fully inform clients of the risks they incur by participating in climate cartels and other ill-advised ESG schemes."

***Riding* believes that a series of simple questions sits at the heart of vibrant capitalism and the investment which drives it. We believe further that lawyers are duty bound to help clients with these questions: "Is this a risk, yes or no? If it is a risk, how are you going to handle it? If you recognise it as a risk and do not prioritise it, then what does that mean for your fiduciary duties or your Director's duties?"**

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28. Maljean-Dubois, Sandrine. 'COP15: negotiations must come out of the shadows', Social Europe (May 2022). Access: https://social-europe.eu/cop15-negotiations-must-come-out-of-the-shadows; "Today, we are seeing a very significant erosion of biological diversity…This is unprecedented in human history. It would be the sixth such crisis, the last of which took place 65 million years ago and led to the extinction of the dinosaurs. However, two characteristics make this crisis unique. First, its cause is the rapid expansion of the human species on Earth. Secondly, it is taking place at a much faster pace than the previous ones (1,000 or even 10,000 times faster), leaving no time for species to adapt. This could jeopardise the re-diversification of species that normally follows such crises." Dubois is CNRS director of research at Aix-Marseille University, expert in international environmental law, biodiversity and climate-change law. Her publications include *Le droit international de la biodiversité* (2021), forthcoming in English.

29. 'Fake ESG' refers to portfolios that differ very little from business as usual, continuing to hold coal and oil assets and companies whose profitability relies in large part on not paying their fair share of tax.

30. The French code of conduct is explicit about not using the law to cheat the law. It requires a lawyer to drop a client who, against their advice, seeks to proceed with a legal procedure that would constitute an infraction. See https://www.cnb.avocat.fr/fr/reglement-interieur-national-de-la-profession-davocat-rin

31. Perez et al. 'How a Secretive Billionaire Handed His Fortune to the Architect of the Right-Wing Takeover of the Courts', ProPublica (August 2022). Access: https://www.propublica.org/article/dark-money-leonard-leo-barre-seid; Ahmari et al. 'We Know How America Got Such a Corporate Friendly Court', The New York Times (June 2022). Access: https://www.nytimes.com/2022/06/14/opinion/conservatism-federalist-society-populists.html

32. Arnsdorf et al. 'Trump is rushing to hire seasoned lawyers – but he keeps hearing 'No", The Washington Post (August 2022). Access: https://wapo.st/3UqOTQn

33. See Reichberg, Gregory, 'Thomas Aquinas on War and Peace', Cambridge University Press (2019).

34. Known to behavioural scientists as 'Goodhart's Law': loosely, that "when a measure becomes a target, it ceases to be a good measure". Or, more precisely, when an organisation adopts any specific indicator as a core behavioural metric, its members will marginally alter their behaviour to confirm the metric, rather than to engage with its underlying intent.

35. Some jurisdictions are adopting the new term 'person of conscience'. This author prefers it as it seems to divide the burden of proof more equitably between the 'whistle-blower' and the badly-behaving employer.

36. Gillum, Jack. 'Whistle-blowers Face a Lonely and Risky Road', Bloomberg (September 2022). Access: https://www.bloomberg.com/news/newsletters/2022-09-14/peiter-zatko-and-other-tech-whistle-blowers-face-real-challenges

37. Shepardson, David. 'US FAA moves to protect safety employees from planemaker interference', Reuters (September 2022). Access: https://www.reuters.com/business/aerospace-defense/us-faa-moves-protect-safety-employees-planemaker-interference-2022-09-07/; Just one from among many topical examples at the time of writing.

38. Reinforced by a constant stream of popular culture (all the way from 'On The Waterfront' to 'We Steal Secrets' and 'Dopesick'), and by news stories about corruption in social media, big pharma, defence procurement).

39. Pegg et al. 'Revealed: Credit Suisse leak unmasks criminals, fraudsters and corrupt politicians', The Guardian (February 2022). Access: https://www.theguardian.com/news/2022/feb/20/credit-suisse-secrets-leak-unmasks-criminals-fraudsters-corrupt-politicians

40. Among many regulatory agencies who have published recently on the links between tolerance for "casual bad behaviour" and deeper systemic cultures of misconduct: in the US, the Federal Reserve Bank of New York and the Consumer Financial Protection Bureau; in the UK, the Financial Conduct Authority and the Competition and Markets Authority; and central banks in Singapore, the Netherlands, Germany, Ireland and Australia.

41. Roughly speaking, selling the wrong contracts, and/or to the wrong people.

42. Very summarily, "obnoxious behaviour".

43. Miles, Roger. 'Culture Audit in Financial Services: Reporting on Behaviour to Conduct Regulators, Kogan Page (2021). Access: https://amzn.to/3U7Mb2d

44. See 'Netflix Culture: Freedom and Responsibility'. Access: https://bit.ly/3U7qW0A

45. With acknowledgements to Gavin de Becker for this useful phrase.

46. For a more detailed account, see Miles, Roger, 'Conduct Risk Management: Using a Behavioural Approach to Protect Your board and Financial Services Business', Kogan Page (2017). Access: https://amzn.to/3NSEScN

47. "Here today, gone tomorrow – unlike us", as a global bank's CFO once said to this author, only half-jokingly.

48. For lawyers, that'd be Bleak House – all of 170 years ago – but also modern TV drama producers' fascination with dysfunctional working relationships in law firms. Art imitating life?

49. Sheedy, Elizabeth and Griffin, Barbara. 'Empirical Analysis of Risk Culture in Financial Institutions: Interim Report', Macquarie University Applied Finance Centre (November 2014). Access: https://www.lse.ac.uk/accounting/Assets/CARR/documents/Previous-Seminars/2014/Sheedy-Risk-Culture-Paper-Nov-14.pdf

50. From the thousands of introductions to cognitive diversity (deliberately varying your daily routine) this author recommends these two sources: Criado-Perez, Caroline. 'Invisible Women: Exposing Data Bias in a World Designed for Men', Random House (2019); Syed, Matthew. 'Rebel Ideas: The Power of Diverse Thinking', Flatiron Books (2019).

51. Roughly, "I'm right, because my belief system is superior to yours". Prof Dan Kahan continues to publish exemplary work on this at Yale Law School.

52. Exaggerating the benign impacts of environmental and social programmes; fudging your ESG indicators, overstating ESG-related assets; funding 'science' that misdirects public attention. From among a huge literature on this subject, see Surpan et al., 'Three Shades of Green(washing): Content Analysis of Social Media Discourse by European Oil, Car, and Airline Companies', Algorithmic Transparency Institute (2022). Access: https://es.greenpeace.org/es/wp-content/uploads/sites/3/2022/09/ThreeShadesofGreenWashing_compr.pdf

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54. For great discussion prompts on this, see Syed's 'Rebel Ideas' and Criado Perez's 'Invisible Women'.

55. An instructive recent example is the contrast between academia's slow, deliberative formal re-examination of its past complicity in propaganda. For example, MIT Prof Charles Harvey's recantation on carbon capture, or Prof Chater and Loewenstein's Mea Culpa for academic institutions' wilful blindness to the abuse of 'nudge' techniques that blame-shifted producers' systemic harms onto consumers. Meanwhile on the activist side - from among a large cast, a few personal favourites: Dogged US-based data aggregators, Violation Tracker; UK political guerrilla billboard critics, Led By Donkeys; and sweary 'spoofomercial' video producers, Honest Government/Juice Media.

56. For example, US consumer protection regulator CFPB pledging to tackle "repeat offenders" and UK competition regulator CMA's new 'Green Claims Code' which provides a framework to challenge questionable ESG claims.

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125. It has to be noted that before Redefining Materiality, materiality was introduced in the sustainability space in 1999 in the first draft of GRI Guidelines. However, that publication did not attempt to define materiality in the context of sustainability, and focused on indicating that sustainability reporting guidelines should include materiality as a principle.

In March 2021 we said the tectonic plates for law firms globally were shifting because of the rise of ESG across business, investment and public interest issues. Nineteen months on, we believe the core of the earth is tilting.

No law firm can ignore or dismiss the rise of ESG despite questions raised over its credibility, utility and effectiveness. The fundamental material risk and liability drivers represented by ESG, which have profound implications for fiduciary law and associated investor duties, are becoming deeply embedded in policy, regulatory, prudential oversight, and legal ecosystems.

The overarching frameworks governing the clients that underpin large swathes of legal business are changing at a pace we have not seen for many generations. The realities of complex converging systemic risks such as climate change, biodiversity loss, spoilation of natural ecosystems underpinning economics and commerce, including our oceans, and a panoply of social issues, are coming to the fore. As this happens, the recognition of a requirement to shift from extractive capitalism to regenerative capitalism during the 21st century, is accelerating, as is our understanding of the rich promise of new, multi-trillion US dollar markets to deliver sustainable development as the world decarbonises.

Whether climate-related, through nature-based challenges, or human rights abuses in corporate value chains, there is a sharp rise in public purpose litigation as a combination of criminal law and civil law are employed to address injustices impacting communities and the ecosystems they depend on worldwide.