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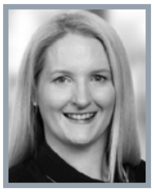
ESG IN 2024

Across the globe, environmental, social and governance (ESG) remains a polarising issue. In some jurisdictions, unprecedented harmonised action is being taken, while in others, a backlash is evident. Much of this divergence is being driven by an unstable geopolitical and macroeconomic backdrop which, in turn, has forced governments to make difficult choices. Whether a fad or the future, the issues at the heart of ESG remain critical and essential to resilience and long-term recovery, especially as the climate crisis worsens and social justice issues remain in the spotlight. ■

THE PANELLISTS



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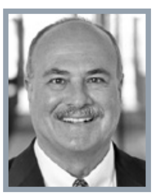

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FW: HOW WOULD YOU DESCRIBE THE POLITICAL LANDSCAPE DRIVING ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG) INITIATIVES? WHAT IS THE DIRECTION OF TRAVEL FOR ESG POLICY, IMPLEMENTATION AND PROGRESS?

REPUBLIC OF IRELAND

Shaw: Leading on the global transition to a sustainable economy is a key political priority for the European Union (EU). Private and public capital are needed to finance this transition and so there has been an emphasis on legislative and policy initiatives to redirect capital toward more sustainable economic activities. In Ireland, given the importance of our financial services sector, there has been a specific focus on sustainable finance and the opportunities it presents. The Minister of State for Financial Services recently stated that sustainable finance is very much to the forefront of the Irish government's efforts to develop Ireland's financial services sector. Businesses and their leaders have a key role to play in creating a sustainable and fair economy and society. The current Irish government's policy is focused not only on implementation of the EU's environmental, social and governance (ESG) initiatives but also on providing guidance and certainty to businesses.

PEOPLE'S REPUBLIC OF CHINA

Song: China is continuously strengthening the strategic implementation of sustainable development within its economy. In recent years, the government has committed to achieving the goals of 'carbon peaking and carbon neutrality', promoting the principle of high-quality development, and advancing eco-friendly economic and social development. The Central Committee of the Communist Party of China and the State Council, in relevant documents, have called for deepening the reform of the legal disclosure system for environmental information and exploring ESG evaluations. Under a low-carbon transformation strategy, with a focus on enhancing information disclosure, strengthening rating systems and reinforcing government regulatory frameworks, the ESG ecosystem is gradually being improved.

SWITZERLAND

Menoud: Switzerland's ESG initiatives are increasingly influenced by EU regulations, largely due to the presence of multinational corporations headquartered in Switzerland with significant EU operations. Even small and medium-sized enterprises are indirectly impacted through business partnerships within the EU. As a result, it is crucial for the Swiss government to balance its regulations to avoid overburdening market players while minimising regulatory overlap with EU rules. Switzerland, however, does not simply mirror EU regulations. Instead, it carefully assesses and adapts them to the domestic context. For example, in sustainability reporting, Switzerland is revising its laws to align with the EU's Corporate Sustainability Reporting Directive (CSRD). On supply chain due diligence, the government is observing EU implementation of the Corporate Sustainability Due Diligence Directive (CSDDD) before making changes. In sustainable finance, Switzerland has opted for self-regulation over hard law, demonstrating a distinct approach.

UNITED STATES

Vince: The political landscape driving ESG initiatives in the US is highly dynamic, and undoubtedly will be impacted by the November elections, especially if the Republican party wins the White House or makes substantial gains in the House and Senate. At the state level, there is a dramatic split on ESG policies. State attorneys general in red states have been active in filing lawsuits challenging administrative decisions by the Biden administration, while blue state policymakers are seeking to fill gaps as federal policies are rolled back. The Supreme Court's recent dismantling of 40 years of precedent on federal agency discretion in the *Loper Bright* ruling will significantly impact agency decision making and invite lawsuits from both sides of the political aisle, injecting uncertainty regarding regulatory risk into many business and investment decisions. We also are seeing a semantic shift away from the politically-charged term 'ESG', replaced by discussion of 'responsible' investment.

UNITED KINGDOM

Gagen: Globally, ESG remains a polarising issue. In some areas, notably the EU, we see unprecedented harmonised action being taken – not only on sustainability disclosure regimes, but also to force businesses to identify and take action on environmental and human rights impacts. Equally, and particularly in the US, a backlash is evident. Even where governments are committed to progress on climate, environmental and social standards, the geopolitical and macroeconomic backdrop has forced them to make difficult choices against a cost of living crisis, often driven by immediate political imperatives. This has been evident recently in the UK, as elsewhere, and our new government is unlikely to find this any easier to navigate. This presents real challenges. Unless there is policy certainty and a long-term ESG strategy from governments, it is hard for businesses to undertake the planning and capital expenditure which will achieve real change in the timescales needed.

CANADA

Caron: Contrary to its southern neighbour, the political landscape in Canada has not experienced a backlash toward ESG initiatives. In fact, many investors and stakeholders are demanding that governments at both the federal and provincial levels intensify their efforts to implement ESG regulatory initiatives. Examples of such initiatives are found in the requirement imposed on federally-regulated financial institutions (FIs), including Canada's big five banks, to report on financial risks related to environmental practices beginning this year. Likewise, the Canadian Securities Administrators (CSA), in October 2021, proposed that public listed companies disclose climate-related information aligned with the Task Force on Climate-related Financial Disclosures (TCFD). More recently, the federal government, through the adoption of Bill S-211, has imposed on certain economic participants that they disclose information on their efforts to prevent forced labour and child labour in their supply chains. So overall, I would say that some work has been done, but efforts are still needed in Canada to reach the level of ESG regulation attained by the EU and in particular in the field of sustainable finance.

INDIA

Dudhat: The Indian government is increasingly focused on fostering the adoption of ESG principles as an essential requirement for corporates. For the environment, the government has announced financial and non-financial incentives for energy security with a focus on clean energy projects, including nuclear and solar power, initiatives for water management and climate change resilience in the field of agriculture. Social transformation is being encouraged through diversity in employment by promoting access to education, skilling, internship programmes and providing incentives linked to employment, and looking toward integrating corporate social responsibility with ESG. The government is encouraging a robust governance infrastructure by making available capital, credit support and improvement in data digitalisation. There is an increased push for foreign investment through 'ease of doing business' models and decriminalising of offences. A regulatory framework is being created to enable transparency and accountability with respect to ESG parameters and to monitor companies' requirements and responsibilities.

LUXEMBOURG

Peter: Everywhere we look, the political landscape driving ESG initiatives is increasingly complex, torn between growing recognition of the importance of ESG initiatives, on the one hand, and rejection of a so-called 'woke' agenda that refocuses the discussion on business competitiveness and financial materiality, on the other hand. This is extremely prevalent in the US, which has seen a number of anti-ESG campaigns being led. However, it is also becoming apparent in the EU, particularly following the latest Draghi Report, which highlights a need to rationalise ESG policies in the EU to maintain attractiveness. Nevertheless, with climate impacts becoming increasingly severe and growing civil society pressure, the direction of travel for ESG policy is toward more stringent requirements and enhanced reporting frameworks. In Luxembourg, the government has implemented the Luxembourg Sustainable Finance Strategy, which includes measures to promote awareness, enhance transparency and ensure compliance with EU regulations, such as the EU Taxonomy and the Sustainable Finance Disclosure Regulation.

> UNLESS THERE IS POLICY CERTAINTY AND A LONG-TERM ESG STRATEGY FROM GOVERNMENTS, IT IS HARD FOR BUSINESSES TO UNDERTAKE THE PLANNING AND CAPITAL EXPENDITURE WHICH WILL ACHIEVE REAL CHANGE IN THE TIMESCALES NEEDED.
>
> HEATHER GAGEN
> Travers Smith

FW: COULD YOU PROVIDE AN INSIGHT INTO RECENT REGULATORY DEVELOPMENTS ON ESG? WHAT ARE YOU SEEING IN TERMS OF MANDATORY REPORTING AND DUE DILIGENCE, FOR EXAMPLE?

PEOPLE'S REPUBLIC OF CHINA

Song: China is placing increasing emphasis on the social responsibility of central enterprises. The State Council and State-owned Assets Supervision and Administration Commission have successively issued documents requiring central enterprises to meet high standards in fulfilling their social responsibilities, establish and improve their ESG systems and ensure that all listed companies controlled by central enterprises disclose special ESG reports. In the financial sector, the government is intensifying its support for green development and low-carbon transformation across related industries. In the capital markets, China's three major stock exchanges have simultaneously issued self-regulatory guidelines for sustainable development reports, requiring companies in key indices and those listed both domestically and internationally to disclose sustainability reports, while encouraging other listed companies to do so voluntarily.

SWITZERLAND

Menoud: Recent regulatory developments in Switzerland have focused on increasing transparency in ESG reporting. Currently, large public interest companies must prepare annual sustainability reports, with the first mandatory reports submitted in 2024, covering the 2023 financial year. While companies approached this inaugural reporting year as a learning experience, expectations will shift next year. Reports will need to include more comprehensive quantitative data and climate disclosures aligned with TCFD guidelines, including transition plans to meet Switzerland's net zero emissions target by 2050. Further changes are expected as the Swiss Federal Council reviews amendments to align non-financial reporting rules with the EU's CSRD. These revisions aim to expand mandatory reporting to more companies, clarify the concept of double materiality, and set minimum reporting standards, such as the European Sustainability Reporting Standards (ESRS) or other recognised frameworks. The proposed rules also introduce an assurance requirement. By aligning more closely with the CSRD, Switzerland seeks to reduce regulatory overlap and potentially gain recognition of its rules as equivalent to EU regulations. Switzerland also introduced supply chain due diligence requirements in 2022 for companies exposed to risks related to child labour and conflict minerals. As these rules are still in early implementation, companies face a learning curve. Whether these regulations will expand to cover broader human rights risks remains uncertain, but the EU's CSDDD has increased interest, especially among non-governmental organisations pushing for stricter regulations.

> "THE RESPONSIBILITY TOWARD THE PLANET, ITS PEOPLE AND PROFIT IS NOW A CLEAR REQUIREMENT IN THE GROWTH STORY OF ANY COMPANY."
>
> RADHIKA M DUDHAT
> Shardul Amarchand Mangaldas & Co

UNITED STATES

Vince: The US Securities and Exchange Commission (SEC) is facing tremendous pushback on its recent ESG and climate reporting initiatives, and has paused implementation of the rules pending the outcome of litigation. Environmental groups contend that the rules do not go far enough, while businesses, trade groups, and Republican state attorneys general argue that the rules exceed the agency's regulatory authority. The longstanding 'materiality' baseline for disclosure is unchanged; however, litigants dispute the SEC's authority to determine as a general matter that climate impacts or ESG issues are 'material' risks important to investment decisions about a particular company, and to the extent they are 'material', how far through a company's supply chain and business relationships the SEC may reach to require reporting. Regardless of reporting requirements, public and private companies alike view ESG diligence as essential in M&A transactions because it provides insight into potential liabilities, and ultimately, value.

UNITED KINGDOM

Gagen: We see organisations with global footprints considering carefully the implications of the new EU CSRD and CSDDD regimes. The immediate focus of those businesses is to what extent they are in scope and when reporting requirements will bite. The task then of working out how, operationally, to collect the data and information that will be required to comply with these regimes is time-consuming and complex, even for the most well-resourced organisations. From a policy perspective, the UK has signalled its ambition over recent years on, for example, net zero, and the new government has been clear that it will not depart from that trajectory. The big question is whether the pace of regulatory change, including around mandatory due diligence regimes akin to those already seen in the EU, will pick up in the UK over the course of the new parliamentary term.

CANADA

Caron: Canada has yet to mandate climate disclosure from its publicly listed companies. In 2021, the CSA published a draft national instrument, or regulation, to force disclosure of climate-related matters. Unfortunately, this initiative has yet to become a reality due in part to the publication by the International Sustainability Standards Board in June 2023 of International Financial Reporting Standards (IFRS) S1 and S2 and their subsequent transposition in Canada through the publication in March 2024 of Canadian Sustainability Disclosure Standards (CSDS) 1, General Requirements for Disclosure of Sustainability-related Financial Information, and CSDS 2, Climaterelated Disclosures, by the newly formed Canadian Sustainability Standards Board, and in part by the SEC's delayed climate rule, which was published in March 2024 only to be stayed one month later. Because of its geography and closely-linked economy with the US, Canada needs to adopt climate rules which are aligned with the requirements found in the rest of the world, and particularly in the US.

INDIA

Dudhat: The applicability of the ESG legal framework in India is being implemented in a phased manner through the Securities and Exchange Board of India's (SEBI's) Listing Obligations and Disclosure Requirements 2015. The SEBI has prescribed the Business Responsibility and Sustainability Reporting (BRSR) framework for ESG reporting, along with the BRSR Core, which includes the value chain of an entity. Furthermore, the SEBI has also notified a separate chapter on ESG rating providers under the 1999 SEBI Credit Rating Agencies Regulations. Banks in India have also initiated integration of ESG principles on an operational and lending level, with a growing need for a separate ESG department and a dedicated sustainability committee with a robust ESG policy for priority lending options based on an entity's ESG initiatives. In 2023, the Reserve

Bank of India also released a framework for FIs accepting green deposits and the government also notified the 2023 Green Credit Rules, with a view to incentivising environmentally positive actions by entities through a market-based mechanism to generate green credit, which will be tradable and made available for trading on domestic market platforms. In addition, the 2024 Insurance Regulatory and Development Authority of India regulations also mandate every insurer to have in place a board-approved ESG framework and to establish a comprehensive climate risk management framework to facilitate climate risk management, keeping the size, nature and complexity of operations in view. Further, ESG due diligence is even more critical given the requirements under law, and as an essential benchmark of sustainability for investors.

LUXEMBOURG

Peter: The most recent focus in terms of regulatory developments has been on mandatory ESG reporting frameworks, reflecting a significant shift from a medley of different voluntary disclosures to harmonised mandatory disclosures. For instance, the EU's CSRD provides uniform standards for ESG reporting. While Luxembourg is among the many countries that are late in implementing this EU Directive into national law, this is largely attributed to the technicality and length of the text and its provisions rather than to a lack of political will. The trend toward harmonised mandatory ESG reporting frameworks is global, and other initiatives, such as the IFRS Sustainability Standards, are being endorsed in various countries. Similarly, the US SEC is also looking to implement similar rules for climate-related disclosures. These regulations not only enhance transparency, but also encourage businesses to take active action to assess and mitigate ESG risks. They also emphasise the importance of due diligence in supply chains, a topic which is further covered by the EU CSDDD.

REPUBLIC OF IRELAND

Shaw: Legislative and regulatory developments on ESG have been steered by the EU. One of its strategic priorities, the European Green Deal, and other initiatives that stem from it have led to a broad range of ESG-related legislative and policy proposals being introduced. These place obligations on businesses to consider the relevance of specific ESG matters to their operations. For example, in-scope companies are required, under the CSRD, to report on sustainability matters in accordance with the ESRS and to conduct human rights and environmental due diligence in compliance with the CSDDD. Following Ireland's transposition of CSRD on 6 July 2024, businesses have been increasingly focused on these developments. The Irish government has described it as a significant step that the government is taking in the context of the European Green Deal.

> EFFORTS ARE STILL NEEDED IN CANADA TO REACH THE LEVEL OF ESG REGULATION ATTAINED BY THE EU AND IN PARTICULAR IN THE FIELD OF SUSTAINABLE FINANCE.
>
> BRUNO CARON
> Miller Thomson LLP

FW: WHAT ARE SOME OF THE PREVALENT ESG-RELATED RISKS FACING COMPANIES TODAY? WHAT STEPS ARE BEING TAKEN TO MANAGE THEM?

SWITZERLAND

Menoud: ESG-related risks today are multifaceted, with key challenges revolving around data availability, supply chain traceability, talent acquisition and governance – particularly cross-departmental coordination. A major hurdle is gathering consistent, accurate ESG data, especially for companies with complex supply chains. While environmental metrics like carbon emissions are easier to quantify, social metrics – such as employee wellbeing – are more subjective and harder to measure. Supply chain due diligence adds further complexity. As companies trace their supply chains, they often uncover hidden risks that could expose them to reputational and legal consequences. This process, while essential, can paradoxically be seen as a risk in itself during its early stages. Another challenge is finding skilled professionals to manage ESG topics. Their interdisciplinary nature requires expertise across various departments – legal, procurement, finance, sustainability and compliance – each with its own priorities. While companies are investing in staff and systems to improve reporting, compliance costs can be burdensome for smaller businesses. The learning curve remains steep as companies develop strategies to bridge these gaps.

UNITED STATES

Vince: The most prominent ESG-related risks for companies in the US at the moment are the regulatory, legislative and judicial uncertainties arising from the recent US Supreme Court decision disrupting decades of precedent on federal agency regulatory discretion. This ruling, together with another Supreme Court decision extending statutes of limitations for challenging federal agency actions, will lead to a significant increase in litigation, which will impact investment and operational decisions. These court decisions have occurred against the backdrop of a major split between federal and state policies and a patchwork of red and blue state regulations, which adds another layer of risk. Companies best positioned to manage these risks are those that build relationships with their regulators, especially at the state and local level, as a matter of course and not just in moments of crisis, and those that are intentional about defining company purpose and management of internal governance risk.

> IT IS CRUCIAL FOR THE SWISS GOVERNMENT TO BALANCE ITS REGULATIONS TO AVOID OVERBURDENING MARKET PLAYERS WHILE MINIMISING REGULATORY OVERLAP WITH EU RULES.
>
> VALÉRIE MENOUD
> Lenz & Staehelin

UNITED KINGDOM

Gagen: Global businesses increasingly face mandatory sustainability reporting requirements. The biggest risk this presents is that there are actual or alleged disconnects between what companies have disclosed and what they have done, or that due diligence and mitigation planning for adverse sustainability impacts is inadequate. The reputational risk around sustainability is acute. Even if allegations are ultimately disproved, they can cause a real-world and pretty immediate impact on stakeholder confidence and value. The best tools to mitigate this risk are careful and evidence-based disclosures, a holistic organisational approach to due diligence, and clear and timely engagement with stakeholders. It is an incredibly complex task to respond to the climate crisis and the operational complexities of global value chains. Being clear about those challenges with stakeholders, and being forensic about what is or is not within an individual organisation's control, is an important means of maintaining trust while making progress.

CANADA

Caron: On the environmental side, there are physical and transition risks related to climate change and greenwashing risks. On the social side, there are risks arising from human rights violations in supply chains. And on the governance side, a prevalent risk is a cyber security breach or attack. With the more prevalent forest fires and extreme meteorological events – heat domes, tornadoes and torrential rain leading to flooding, for example – experienced in Canada in recent years, economic actors are seeing, and have seen, the devastating impact that these events can have on their business, supply chains and workforce. Most medium to large enterprises in Canada are now gradually adapting to this new reality. Operationally, the C-suite and boards need to be aware that these risks exist and they also need to possess and understand the tools required to assess these risks and identify any existing gap. This will allow them to put in place the appropriate mitigation and adaptation measures needed. On the legal side, expected changes to the climate disclosure regime will require organisations to implement controls and procedures over extra-financial information that they disclose to mitigate the risk of greenwashing. Dealing with their supply chains' environmental and social risks will be another area of focus.

INDIA

Dudhat: The pressure to match required capital-intensive ESG practices has led to the risk of greenwashing and setting unrealistic expectations. Until recently, India had no distinct law solely focused on tackling greenwashing. However, in January 2024, the government issued draft guidelines for the prevention and regulation of greenwashing, which encompasses actions such as concealing, omitting or obscuring relevant information by making exaggerated, vague, false or unsubstantiated environmental claims. Owing to the complexity in monitoring the end use of funds, all major lending institutions such as banks, investment companies and others are exercising increased caution while approving investments, financing projects or sanctioning loans. Furthermore, it is only a matter of time before corporates undergo scrutiny and face consequences with respect to any false claims or reporting. Digitalisation and technological advancement are key drivers and will empower regulators, investors, lenders and stakeholders to hold companies accountable without an expiration date.

REPUBLIC OF IRELAND

Shaw: Companies highlight reputational risk associated with greenwashing as a particular concern. European legislators, regulators and policymakers have sought to prevent greenwashing and drive the right corporate and customer behaviours through the introduction of the Green Transition Directive and the proposal for a Green Claims Directive. In addition, the recommendations of the European Supervisory Authorities in their recent final reports on greenwashing in the financial sector have generated plenty of discussion. These measures are driving businesses to take action to reduce the risk of potential greenwashing claims. Businesses are more carefully assessing the information provided to the public on the sustainability impacts of their products, services and business operations. Specific actions include substantiating any sustainability claims being made. More broadly, the myriad of legislation on ESG topics has left many firms grappling with the capacity to keep up. Compliance risk is therefore a significant issue for many.

LUXEMBOURG

Peter: The specific ESG-related risks facing a company will differ from one industry sector to another, from one geographic area to another and simply from one company to another. Nevertheless, broadly speaking, environmental risks include climate change, resource scarcity and regulatory pressures regarding emissions. These factors can lead to operational disruptions and increased costs. Social risks often stem from workforce management, human rights issues and consumer sentiment, which can affect brand loyalty and market position. Governance risks involve issues like executive accountability, diversity on boards and compliance with evolving regulations, which are critical for maintaining investor confidence. All of these risks can be financially material to companies and must therefore be duly managed. For this reason, companies are increasingly adopting comprehensive ESG frameworks that integrate risk assessments into their strategic business planning. This includes conducting thorough due diligence to identify potential vulnerabilities, engaging stakeholders and promoting transparency through regular ESG reporting.

PEOPLE'S REPUBLIC OF CHINA

Song: From an external perspective, the ESG ratings of Chinese companies still fall behind global advanced standards, particularly in areas such as carbon emissions, toxic substance discharge, solid waste management, as well as protection of privacy, data security and occupational health. Companies face stricter external regulations in these areas, which may result in administrative penalties, civil compensation and even criminal liability. These risks are associated with inadequacies in companies' ESG frameworks and institutional systems. At the level of state-owned enterprises, the government is actively promoting the implementation of comprehensive compliance management.

FW: TO WHAT EXTENT ARE YOU SEEING AN INCREASE IN INVESTIGATIONS AND DISPUTES ARISING FROM ESG ISSUES? WHAT ARE YOUR EXPECTATIONS FOR THE NATURE AND FREQUENCY OF DISPUTES IN THIS AREA?

UNITED KINGDOM

Gagen: Investigations and disputes are certainly on the rise. Regulators are deliberately signalling their focus on ESG-related issues, illustrated recently in the UK by the Financial Conduct Authority's anti-greenwashing rule. The 'S' in ESG is also important, with diversity, equity and inclusion issues increasingly a feature of investigations in the UK. The litigation landscape is dynamic. In the UK, the availability of litigation funding and a variety of mass claims mechanisms makes for fertile ground for ESG-related claims. A notable trend is novel negligence-based claims which seek to expand the scope of UK companies' responsibility for alleged ESG harms in their corporate groups or value chains. We have also seen innovative, if unsuccessful, activist shareholder ESG-related claims against Shell and, separately, the UK's biggest private pension fund. As more companies make investor-facing ESG statements, I have no doubt that we will see attempts to bring large-scale securities-based ESG claims in this jurisdiction too.

CANADA

Caron: A June 2024 study by the Grantham Research Institute on Climate Change and the Environment shows an increase in the number of cases involving climate-washing – a form of greenwashing where a company is lying on its progress toward some predefined climate goals. In Canada, we have already seen claimants seeking relief under the Competition Act involving greenwashing claims. With recent changes made to this Act by Bill C-59, we are likely to see an increase in the number of claims as private parties, starting in June 2025, will be able to bypass the Competition Bureau and directly initiate an action with the courts under the new anti-greenwashing provisions of Bill C-59.

INDIA

Dudhat: In India, the ESG framework is set out under the SEBI regulations, which are currently applicable to specified listed entities. Under existing ESG statutes, there is a detailed framework with respect to applicability, requirements, filings and mechanisms for addressing

> "REGARDLESS OF NOMENCLATURE, ESG IS AN INEVITABLE TREND, ESPECIALLY AS CLIMATE CONDITIONS WORSEN AND SOCIAL JUSTICE ISSUES REMAIN ON THE FOREFRONT."
>
> CLINT VINCE
> Dentons US LLP

any non-compliance, investigations and disputes. In addition to ESG disputes filed by environmental advocacy groups, trade unions, investor activists and regulatory vigilance agencies, there will be a plethora of claims and disputes arising from business transactions, customers, lenders and investors, as well as employee disputes and claims by stakeholders and investors pursuant to ESG due diligence. Furthermore, there is also an expectation of increased consumer disputes in the areas of greenwashing owing to the recent draft 'Guidelines for Prevention and Regulation of Greenwashing' issued by the Indian government.

> IT IS ESSENTIAL TO INTEGRATE THE CONCEPT OF SUSTAINABLE DEVELOPMENT INTO THE SUPPLY CHAIN, ENCOURAGING BOTH UPSTREAM AND DOWNSTREAM ENTERPRISES TO FULFIL THEIR RESPONSIBILITIES COLLABORATIVELY.
>
> JUNBO SONG
> DeHeng (Jinan) Law Offices

LUXEMBOURG

Peter: Environmental litigation has been around for decades, and many industries are facing, and have been facing for a while, their own ESG-related disputes and investigations. In the asset management industry, these risks materialise primarily in the form of greenwashing allegations. Some actors, and not only those in the EU, have already had to face legal action following greenwashing accusations, and this trend is likely to continue growing in the coming years. In the EU, supervisory authorities are increasingly focused on greenwashing, with the European Securities and Market Authority publishing two reports on the topic, one in May 2023 and one in June 2024. These reports provide a roadmap of regulatory expectations in the EU, from defining greenwashing to identifying at-risk areas and issuing recommendations. The report has already been followed by the launch of a Common Supervisory Action on sustainability risks and disclosures in the investment fund sector during which all EU local regulators have been probing asset managers' disclosures and claims.

PEOPLE'S REPUBLIC OF CHINA

Song: When companies engage in business activities, they must bear corresponding liability for any harm caused to the public interest in areas such as ecological and resource protection, food and drug safety, state-owned property protection, the transfer of state-owned land use rights and the preservation of memorials for national heroes. Such infringement disputes often arise in the form of public interest litigation or lawsuits for ecological and environmental damage compensation. As companies improve their ESG risk management capabilities, the frequency of these disputes is expected to gradually decline.

REPUBLIC OF IRELAND

Shaw: To date, ESG-related disputes have principally been centred on environmental issues, primarily judicial reviews of planning decisions and environmental assessment processes. Examples of explicit climate litigation are more limited. From a consumer law perspective, the Irish Advertising Standards Authority is increasingly investigating complaints received about misleading environmental claims in advertising. While the Irish Competition and Consumer Protection Commission has yet to focus specifically on misleading sustainability claims, actions being taken by the EU Consumer Protection Cooperation Network suggest that it is only a matter of time before we see such investigations being commenced in Ireland, particularly when the Green Transition Directive and Green Claims Directive come into force. In addition, greenwashing claims will be in scope for the new consumer class actions under the Representative Actions Act 2023, making it more likely that ESG claims will be taken before the Irish courts in the medium term.

UNITED STATES

Vince: Despite reports of popular support for ESG initiatives, several companies have publicly retreated from ESG commitments under pressure from influential critics, including lawsuits filed by conservative organisations against companies, banks and even professional sports organisations. Additionally, a number of prominent financial firms have cited concerns about the compatibility of ESG programmes with fiduciary responsibilities to shareholders. Meanwhile, high-profile incidents have highlighted the importance for companies to identify and focus on their core purpose, determine when and when not to speak on an issue, and foster an ethical culture throughout their organisation. For example, Boeing is reeling from the disastrous disconnect between external safety and quality messaging and internal emphasis on cost-cutting and business practices that deterred employees from voicing concerns. Other companies have experienced substantial backlash from positions taken on a broad range of issues and are now re-evaluating when and where they will speak or act.

SWITZERLAND

Menoud: At present, investigations and disputes in Switzerland still focus on traditional environmental issues, such as water and soil pollution, typically involving administrative or criminal law, with civil cases remaining rare. However, the first climate change litigation cases are emerging. In 2023, four residents of the Indonesian island of Pari filed a lawsuit against Swiss company Holcim for personal rights infringement and tort, marking Switzerland's first civil climate case. Additionally, the 2024 European Court of Human Rights decision in the KlimaSeniorinnen case clarified that, to effectively uphold the right to respect for private and family life, states must take concrete steps to reduce greenhouse gas emissions, a ruling likely to shape future legal and political developments. In the financial sector, future disputes may arise from breaches of promised ESG characteristics in investment products, particularly during periods of market downturn or challenging returns.

FW: WHAT ESSENTIAL ADVICE WOULD YOU OFFER TO BUSINESSES ON NAVIGATING ESG TRENDS IN TODAY'S SHIFTING ENVIRONMENT?

INDIA

Dudhat: The Indian government and regulators are using ESG to actively implement responsible action that focuses not only on creating wealth for stakeholders but also safeguarding the interests of non-stakeholders. Furthermore, the integration of ESG and sustainability principles is aiming to put 'sustainability reporting' on a par with 'financial reporting'. The responsibility toward the planet, its people and profit is now a clear requirement in the growth story of any company. With major technological, social and geopolitical transitions being seen worldwide that will have a lasting impact on overall ESG and sustainability initiatives, we are rapidly being pivoted toward global cooperation and responsible action. The ambitious push toward ESG by the government will result in boosting investor confidence, adoption of sustainable business practices, improvement in data digitalisation and making responsible governance an absolute necessity.

PEOPLE'S REPUBLIC OF CHINA

Song: Companies should establish ESG management systems that align with their own governance structures, strengthen the oversight of ESG matters by the board of directors and company management, and develop an internal control framework for non-financial information. Additionally, they should allocate appropriate resources to ensure the smooth implementation of the company's ESG action plan. At the same time, it is essential to integrate the concept of sustainable development into the supply chain, encouraging both upstream and downstream enterprises to fulfil their responsibilities collaboratively.

REPUBLIC OF IRELAND

Shaw: Companies need to be clear on what legislation will apply to their business and the potential impacts on their operations. Given the pace at which legislation is being introduced in the EU, our experience is that businesses find conducting a horizon-scanning exercise and preparing a legislative tracker extremely helpful. Companies should be aware of how greenwashing risk may be relevant to their business activities. Greenwashing can occur more broadly than in relation to sustainability claims being made in advertising. For example, it also applies to specific targets, such as net-zero targets, being set. Finally, companies should consider the mandatory sustainability reporting and due diligence obligations being introduced by CSRD and CSDDD respectively and determine whether they apply. In-scope companies should start planning for implementation while those that do business with in-scope companies need to engage with them to understand what information they will need to provide.

UNITED STATES

Vince: Regardless of nomenclature, ESG is an inevitable trend, especially as climate conditions worsen and social justice issues remain on the forefront. Nevertheless, disruptive policy developments will continue to cause investor uncertainty and regulatory and reputational risk, and to increase litigation. The extent to which policies developed by administrative agencies survive judicial attack will depend upon whether Congress has provided explicit guidance in its legislation regarding agency discretion. Looking beyond US borders, ESG is moving forward globally, but also with increased uncertainty wrought by a surge in right-wing leadership and pressure in a number of countries. To navigate these tumultuous seas, corporations must be in close communication with regulators at all levels to understand policies and political nuances, and must develop a clear sense of corporate purpose and internal and external messaging to establish a clear understanding of the mission of the organisation.

> **IN THE MIDDLE OF A COMPLEX POLITICAL ENVIRONMENT WITH CONSTANTLY EVOLVING REGULATIONS, THE SAFEST COURSE OF ACTION IS TO FOCUS ON TRANSPARENCY AS A KEY DRIVER FOR REPORTING ON ESG INITIATIVES.**
>
> ANTOINE PETER
> Arendt Regulatory & Consulting

LUXEMBOURG

Peter: Although the advice can differ from one industry to another, it can be summarised into a general framework for navigating ESG trends. First, integrate ESG into core strategy. In order to ensure the long-term sustainability and viability of businesses, ESG should be embedded into the business strategy and not be seen as just an add-on. Second, stay informed on regulations. Regulations and standards are rapidly evolving and there is not a month that goes by without new developments. Keeping up to date and having a good view of what is coming is crucial to ensure compliance and avoid fines, as well as avoiding undue compliance costs. Third, enhance transparency. In the middle of a complex political environment with constantly evolving regulations, the safest course of action is to focus on transparency as a key driver for reporting on ESG initiatives. Fourth, engage with stakeholders. Actively involve employees, customers and investors in ESG discussions, as their input is crucial and provides valuable insights. Lastly, invest in technology. ESG data management is a headache, and an expensive one at that. Many tools are emerging, be they for mere carbon accounting purposes or full CSRD reporting. These are vital in helping to build streamlined processes for data capture, storage and use.

> “BUSINESSES ARE MORE CAREFULLY ASSESSING THE INFORMATION PROVIDED TO THE PUBLIC ON THE SUSTAINABILITY IMPACTS OF THEIR PRODUCTS, SERVICES AND BUSINESS OPERATIONS.”
>
> JILL SHAW
> A&L Goodbody LLP

CANADA

Caron: Environmental claims about future environmental performance without clear and objective commitments that are not publicly available and verifiable should be banned. Companies should have a detailed and realistic implementation plan in place that includes measurable, time-bound targets and other relevant elements required to support its achievement. These allegations and this plan should be verified regularly by an independent third-party expert. The governance of this plan should be entrusted to the board of directors or a committee of the board of directors and its application to the company’s senior management. Companies should give environmental claims as much importance as they give to financial information. With respect to supply chains and human rights violations, companies should be prepared to go from a regime where disclosure is the only item required to a regime where an obligation of due diligence is imposed covering not only tier one suppliers but also any party with which the business has a business relationship – basically, the regime adopted by Europe with its recent CSDDD.

SWITZERLAND

Menoud: To successfully navigate the evolving ESG landscape, businesses must adopt a proactive, structured approach. Staying informed about regulatory changes is critical. As ESG requirements grow more complex, particularly around reporting and supply chain due diligence, companies must stay ahead of national and international legislative developments, including EU-driven standards shaping global practices. Integrating ESG into core operations is equally vital. This involves collecting relevant data early and embedding sustainability and governance into supply chain management, risk assessments and overall strategy. Effective ESG management also requires fostering cross-departmental collaboration, from legal and procurement to compliance and finance. Having the right frameworks and professionals in place is essential. Finally, ESG is no longer a marketing exercise; it is driven by hard legal requirements. Companies must shift to a risk-oriented approach, focusing on quantifiable results over broad promises or boilerplate statements. As scrutiny increases, those that show real progress, particularly in climate action and human rights, will be better positioned to manage risks and seize opportunities.

UNITED KINGDOM

Gagen: Businesses should take a strategic position on the level of ambition they want their organisation to have on sustainability, and ensure there is top-down buy-in to this. ESG issues are incredibly interlinked in practice, and often require parts of a business to interact in a new way, so having senior support and clarity around which functions have ownership of the strategy is vital – especially because the regulatory environment is moving fast. Do not be afraid to set carefully calibrated and evidence-based boundaries around what can be achieved on sustainability – but make sure that time and resource are then dedicated to implementing the governance and operational structures needed to make that a reality. Even if a business does not want to be a leader on sustainability, it is unlikely to be able to insulate itself from the regulatory and commercial impact of a growing focus on ESG globally – so plan accordingly. ■