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ESG Legal Outlook 2023 – Asia

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Despite the ongoing geopolitical and economic headwinds globally, the general direction of travel for ESG in Asia in 2023 seems to be one of increased regulation and scrutiny, which will have a significant impact on how businesses operating in the region plan, operate and report. Increased transparency and accountability, as well as ongoing concerns over greenwashing allegations and supply chain due diligence, are likely to rank high on Asia's ESG agenda this year. In addition, sustainable finance products will remain popular amongst lenders and investors active in the region.

We continue to see an increasing focus on the Asia region as key to efforts to decarbonise the global economy. Despite Asia-based governments setting national climate targets and signalling significant policy shifts, the region faces major challenges to close the emissions gap. There remains huge demand in carbon-intensive sectors which will need to transition for Asia to meet its climate targets – this will require a significant increase in energy-transition spending. The question for investors in 2023 will be how to tap into the truly green opportunities.

01 Net zero and energy transition

Energy transition

Geopolitical hostilities and supply constraints at a time of rebounding energy demands post Covid-19 have, amongst other factors, led to extraordinary volatility in energy prices and a focus by market participants on inflationary pressures and energy security. All of this is happening at a time where ESG issues remain front-of-mind and the transition to a lower carbon world continues to gain momentum in Asia.

Despite the uncertain global geopolitical backdrop, the pace of development and investment in renewable energy in Asia continues to outstrip other parts of the world. Factors supporting this drive for renewable energy include rising populations, robust economic growth and the greenfield nature of the power market in a region underpinned by relatively attractive government support initiatives and political impetus for building new infrastructure. We expect to continue to see in 2023:

> the ongoing rise of offshore wind in Asia Pacific, including as Japan, South Korea, Vietnam, Australia and other new markets (notably the Philippines and India) look to build on the success of the Taiwan story;

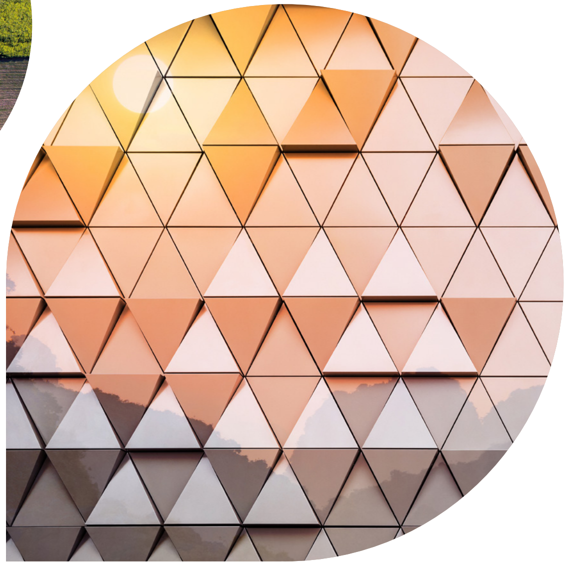
> new investors entering Asia, including strategic developers seeking new opportunities away from their existing markets, and an upsurge in interest from financial sponsor clients, including specialist energy and infrastructure funds. This has increasingly involved innovative investment platforms that facilitate the transfer of existing assets and arrangements for the joint acquisition and funding of future opportunities;

> the development of innovative financing approaches to support renewables projects, including portfolio structures, holdco financings, green bonds and other solutions which are tailored to the specific requirements of the sector; and

> a continued focus on new and emerging technologies, such as green hydrogen, including in Mainland China where hydrogen energy is considered a key strategic emerging industry and in Japan as an export target for leaders in this space (such as Australia), and utility-scale batteries, an asset class closely linked to renewables projects being explored in South Korea and elsewhere.

In each case, these factors are likely to accelerate the renewables story and attract further international investment.

A focus in 2023 will also be on ensuring that net zero targets and pledges made by businesses are translated into concrete and robust plans as corporates and the financial sector will face increasing pressure to follow through on their climate pledges.



Financing net zero

The low and no-carbon technologies required to transition to clean energy in Asia and clean up existing carbon-intensive infrastructure need significant capital to scale up at pace. Investment will be needed across all stages of technology evolution – from early-stage equity financing of deep-tech start-ups producing next generation solutions to high-value project financing to develop large-scale storage and generation facilities for more established technologies. The sources of finance are diverse and includes venture capital, private equity, sovereign wealth, and pension funds alongside corporates, banks, multilateral agencies, asset managers, and national governments.

Delivering a "just transition" headlined at COP27 with increasing discussion on how to finance the energy transition in emerging markets in Asia. To support developing countries in Asia to access green finance, we expect to see more focus on "blended finance" initiatives to unlock private capital for green and transitional projects in the region. Examples include the initiative launched at COP27 by the Network of Central Banks and Supervisors for Greening the Financial System ("NGFS") (co-led by the Monetary Authority of Singapore ("MAS")) as well as efforts to accelerate the decommissioning of existing coal-fired power plants, most notably the Just Energy Transition Plan ("JETP") for each of Indonesia and Vietnam. We can expect a greater focus in 2023 on how best to finance "transition" activities to support emerging markets in the region.

Growth of carbon markets in Asia

We expect to see further developments in the compliance and voluntary carbon markets in Asia as more exchanges build out the infrastructure for carbon trading.

In 2022, the Tokyo Stock Exchange began to trial the trading of carbon credits and the Japanese Financial Services Agency ("JFSA") importantly clarified that banks and certain other financial institutions licensed in Japan may engage in voluntary carbon credit-related transactions. In Hong Kong SAR, HKEX launched Core Climate – a new international voluntary carbon market – in October last year. Singapore has two locally based carbon credit exchanges – AirCarbon Exchange and Climate Impact X. Singapore announced plans to increase its existing carbon tax level from US$5/tCO2e to US$25/tCO2e in 2024/2025 and subsequently US$45/tCO2e in 2026/2027 with a view to reaching US$50-80/tCO2e by 2030 and, as part of this, will allow businesses to use high-quality international carbon credits to offset up to 5 per cent. of their emissions. Indonesia recently enacted legislation to further enable carbon trading and will launch its national carbon exchange later this year. Mainland China's national emissions trading system ("ETS") is set to become the world's largest carbon market by both trading volume and value and will continue to be one to watch.

Challenges around the quality and regulation of carbon trading platforms and greenwashing concerns in relation to the use of offsets will continue to be a focal point, together with further fragmentation as markets respond with their own carbon initiatives.

Net Zero Tech in Asia

Against the backdrop of a challenging economic climate, turmoil faced in the public markets, and the apparent scaling back of growth/VC investment in tech start-ups and scale-ups, the impetus for transition to net zero will ensure continued investment in net zero tech in the region in the year ahead.

Faced with increasing regulation and scrutiny, market participants and regulators in Asia are looking to harness innovation and technology to promote green finance ecosystems and support organisations in monitoring compliance with their regulatory obligations and net zero commitments. Singapore's MAS is actively promoting strategies to harness its strength in fintech to address key challenges in the green finance space – particularly the development of digital solutions to facilitate the flow of consistent, clear and reliable ESG data. With last year's launch of the blockchain-based platform ESGpedia and the Point Carbon Zero Programme as part of Project Greenprint, we expect further focus on Singapore's fintech solutions in 2023.

Further reading:

- Asia Pacific Renewable Energy Insights 2022
- Recent developments in the low carbon hydrogen sector in Asia
- Net zero system materials
- Net zero tech materials
- Tech Legal Outlook 2023
- Linklaters' climate change experience
- COP 27 materials



02 Greenwashing and litigation risks

Tackling green claims (i.e. false or misleading statements that products or services meet certain environmental standards) continues to be a priority for regulators (particularly financial regulators) in Asia.

In Hong Kong SAR, the Securities and Futures Commission ("SFC") has highlighted greenwashing as a key threat to the development of green and sustainable finance and is focused on mitigating this risk to position Hong Kong as a key sustainable finance hub. We are yet to see whether the SFC's approach will include new greenwashing-specific regulation, an ESG-enforcement taskforce, direct enforcement action, or a combination of these. It has been reported that regulators in Mainland China are looking to make changes to regulate "green funds" in order to prevent greenwashing claims, and the JFSA has proposed amended guidelines for public ESG funds to tackle potential and actual greenwashing in Japan. Although we are likely to see more regulation and guidance in this space, it should be noted that regulators in Asia already have the tools to take action against companies that make misleading claims under existing laws addressing misrepresentation.

Regulators across the region are looking at ways to facilitate sustainability reporting and additional disclosure on ESG-related activity (see Increased ESG regulation and disclosure requirements section). The key driver for these new requirements is the need for increased transparency and accountability so that investors, consumers and other key stakeholders can make better informed decisions and help corporates and the financial sector combat greenwashing risks. However, one of the key downsides of companies and financial firms being required to disclose more sustainability-related information in a world of imperfect information is the increased risk of greenwashing allegations. These could, in turn, result in regulatory investigations or litigation, which we are seeing increasingly in the European market and Australia.

While we are yet to see regulatory enforcement or activist claimants alleging greenwashing in this region, it is notable that a number of complaints have been brought to the Korea Fair Trade Commission by activist groups in South Korea. The country's largest private gas supplier was instructed by the environment ministry in March 2022 to disclose more detailed facts about its environmental claims in future advertisements and the supplier edited its marketing materials in response.

Given the focus by regulators globally on tackling greenwashing, firms operating in Asia should continue to take steps to identify and mitigate potential greenwashing risks across their businesses. This includes developing a credible and consistent narrative around what greenwashing means in the context of their business, implementing robust internal procedures to monitor compliance and developing disclosures in line with emerging Asian and international standards.

Further reading:

- Greenwashing: Lessons learned and practical tips
- ESG Disputes Bulletins
- ESG and Climate Change Disputes
- Hong Kong Monetary Authority publishes good practice for due diligence processes for green and sustainable products
- Financial Services Agency of Japan introduces number of ESG developments

03 Sustainable finance

Funds, asset managers and banks

Looking ahead, investor demand for sustainable funds remains strong in Asia. 2023 is a year in which we expect increased ESG-related fund disclosure under recently enacted regulations to result in greater investor, and wider market, scrutiny. One particular challenge facing fund managers will be compliance with overlapping but different disclosure regimes across the region (and globally), which are developing at different rates.

Defining, policing and preventing greenwashing will be the supervisory and enforcement priorities for regulators in Asia (see Greenwashing and litigation risks section). There will continue to be increasing expectations on the financial services sector in respect of its governance, oversight and control frameworks in order to build and maintain trust in this growing market.

In notable developments last year – in June, the China Banking and Insurance Regulatory Commission published the "Green Finance Guidelines for the Banking and Insurance Sectors", which, amongst others, require banks and insurers to promote green finance at a strategic level and, in the same month, the HKMA introduced a two-year plan to integrate climate risk into its banking supervisory processes. In October, the Association of Banks in Singapore ("ABS") published its "Sustainable Private Banking and Wealth Management Guidelines" defining the minimum standards to be integrated into member banks' business models and, in December, Indonesia's newly enacted "Law on Financial Sector Development and Strengthening" pushed the country's sustainable finance agenda.

ESG bond and loan markets in Asia

For Asia (ex-Japan), ESG bond volumes remained relatively flat in 2022 due to macroeconomic volatility. ESG bonds in Asia (ex-Japan) for 2022 amounted to approximately US$162.23bn compared with approximately US$164.95bn in 2021, whilst ESG loans in 2022 amounted to approximately US$124.46bn compared with approximately US$82.04bn in 2021.[1] Interestingly, the data shows that the ESG bond markets has been spearheaded by green bond issuances, whereas the ESG loan market has shown a preference for sustainability-linked loans. A notable development was the publication in July 2022 of the China Green Bond Principles, which are intended to be aligned with international principles and are broadly based on the standards administered by the International Capital Market Association ("ICMA").

Looking ahead, as borrowers need to link their ongoing ESG commitments to real action, we expect ESG bond and loan markets to continue to grow throughout the year. We do not expect the current tapering off in volumes to be seen as a sign that the demand for ESG bonds and loans in Asia is slowing down. Rather, we expect to continue to see rising interest in sustainability-linked bonds and transition bonds.

ESG derivatives market

With the range and types of ESG-linked products continuing to widen, the market for ESG-related derivatives is also expected to grow in the coming year given its role in helping market participants hedge risk related to ESG factors. Although the market for sustainability-linked derivatives ("SLDs") (where transactions were first seen in the second half of 2019) is at a nascent stage, it continues to be an interesting one to watch in Asia. SLDs use key performance indicators ("KPIs") to set sustainability targets and have a key role to play in the transition to a more sustainable economy and in enhancing the flow of capital to meet ESG objectives.

In Asia, transaction structures for SLDs are highly bespoke, however, at the end of 2022, the International Swaps and Derivatives Association, Inc. ("ISDA") set up a working group to develop standardised documentation for SLDs. ISDA has also published various papers (including the regulatory treatment of SLDs in various jurisdictions and principles in drafting KPIs) to assist the development of the SLD market. It is expected that the evolution of the SLD market will accelerate with these industry efforts.

1 Source: Refinitiv

Further reading:

- Looking at Hong Kong SAR as a sustainable finance hub now and beyond
- Sustainable finance
- ESG Derivatives and Structured Products
- The 2022 ISDA Verified Carbon Credit Derivatives Definitions

04 Increased ESG regulation and disclosure requirements

ESG and sustainable finance remain high on the regulatory agenda, with regulators in Asia focusing on ESG risk management and sustainable finance in a number of key regulatory developments during 2022 paving the way for 2023, including sustainability disclosures, establishing taxonomies and controlling greenwashing in financial products.

In Asia, the approach to disclosure requirements varies across jurisdictions and industries given there is no convergence or common set of standards as yet. Businesses with cross-border operations are required to work across these non-harmonised regimes by navigating both the synergies and differences. A focus in 2023 will be on the adoption and interoperability of the new International Sustainability Standards Board ("ISSB") climate disclosure standards with local standards being developed. Although the ISSB standards are voluntary, the SFC is working with the Hong Kong Stock Exchange to develop a climate reporting framework for listed companies which will align with the global baseline being developed by the ISSB. Singapore's regulators have also generally signalled support for the work of the ISSB. IFRS also expects to open an ISSB Beijing office in mid-2023.

We have also seen a plethora of taxonomies being developed in the region. The Green Finance Industry Taskforce ("GFIT") aims to finalise Singapore's proposed green and transition taxonomy for identified sectors in 2023. Hong Kong has also announced plans to adopt the EU-China Common Ground Taxonomy and develop a local green classification framework.

Corporates

Although ESG reporting for listed companies has been on the radar of regulators in Asia for some years (particularly around promoting high standards of responsible corporate governance), we continue to see the shift towards mandatory climate-related disclosure regimes. The Singapore Stock Exchange ("SGX") will "phase-in" mandatory reporting under the Task Force on Climate-related Financial Disclosures ("TCFD") for listed issuers in certain sectors from 2023 onwards. Similarly, in Japan, from April last year certain listed issuers were required to implement TCFD (or TCFD-equivalent) reporting. In Hong Kong, climate-related disclosures aligned with the TCFD will become mandatory across certain sectors by 2025. Listed companies will need to ensure processes are in place to comply with these requirements when they bite.

Singapore is developing its sustainability reporting road map for incorporated companies beyond SGX-listed companies. In June 2022, the "Guidance for Enterprise ESG Disclosure" went into effect, which is widely touted as the first set of ESG disclosure guidelines issued in Mainland China (albeit voluntary) – it will be interesting to see whether the market pushes for additional mandatory rules.

Funds and financial institutions

Regulators in the region have also been focused on enhancing environmental risk management practices and climate-related disclosure requirements for asset managers and banks. The "Environmental Risk Management Information Papers" published by MAS in May 2022 for banks, asset managers and insurers developed Singapore's regulatory framework for ESG risk management, and which financial institutions are now working to implement. Prescriptive requirements in respect of climate-related risk management both for banks by the HKMA and for fund managers by the SFC took effect in Hong Kong in 2022. Japan's FSA also published (non-binding) guidance for financial institutions on climate-related risk management measures in July 2022. We will see if banks and asset managers meet regulators' expectations as these new rules are implemented this year.

MAS expected financial institutions in Singapore to make climate-related disclosures from June 2022 (in accordance with the TCFD) and, in July 2022, MAS published disclosure and reporting guidelines for retail ESG funds. MAS has also flagged that it will consult on introducing mandatory disclosure requirements for financial institutions when a global baseline sustainability reporting standard is established by the ISSB.

Other developments to keep an eye on is the potential impact on businesses following the agreement at the United Nations' Biodiversity Conference ("COP15") summit in December 2022 of a global framework on tackling biodiversity loss and the various biodiversity disclosure frameworks, including the Taskforce on Nature-related Financial Disclosures ("TNFD"), which is expected to publish its final recommendations in September 2023.

Further reading:

- ESG Asia: Regulatory Trends
- Singapore: Round up of latest ESG regulations and policies
- The Hong Kong Stock Exchange publishes analysis of corporate ESG disclosure practices
- Financial Services Agency of Japan introduces number of ESG developments
- China's new ESG Disclosure Standards
- ESG Summer School on disclosure regimes
- COP15: Outcome of global biodiversity summit

05 New due diligence requirements, supply chains and social aspects

New human rights and environmental due diligence requirements

There will continue to be a focus on the “S” in ESG in 2023, with greater scrutiny on managing and mitigating adverse environmental and social impact associated with certain global supply chains, particularly by companies operating or sourcing in Asia.

A significant development is the forthcoming EU Corporate Sustainability Due Diligence Directive (“CSDDD”), which is currently under negotiation and could be adopted in final form in 2023. The CSDDD will require in-scope EU and non-EU companies to carry out due diligence to identify actual or potential adverse impacts on human rights and the environment arising from their own operations, those of their subsidiaries and their business partners. The CSDDD will undoubtedly have a significant impact on supply chains and supply contracts in Asia. A significant amount of capacity-building and preparation will be required in order for global companies to comply with these new requirements, including changes to the way they currently operate and report, the data they will require to be able to report and how they interact with their business partners.

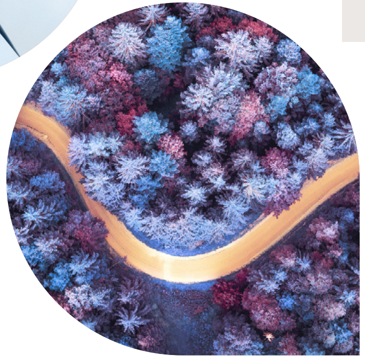
Although we are not seeing the same focus in Asia on direct regulation mandating human rights due diligence, it is worth noting that Japan released its finalised “Guidelines on Respecting Human Rights in Responsible Supply Chains” in September 2022 – the first in this region. While mandatory obligations are not imposed under these guidelines, they seek to assist entities to identify and prevent human rights related abuses in their global supply chains.

The incoming CSDDD and other European laws mandating due diligence (including, for example, the German “Supply Chain Due Diligence Act” and the French “Devoir de Vigilance”) mean that there is some focus in Asia on scoping the extraterritorial application of these foreign regimes. However, given the increasing global and market consensus on the need to conduct robust due diligence to identify and mitigate the risks of corruption, modern slavery or other “S” issues – particularly in Asia where some of those risks may be more prevalent within supply chains – businesses will need to be well-placed to review the systems and controls in place to ensure they are fit-for-purpose and considered sufficiently comprehensive by external stakeholders.

Social aspects on the rise

Although climate change dominates the ESG debate in Asia, the pandemic has put a sharper focus on the “S” in ESG and this trend is set to continue in 2023. Highlights in this year’s regulatory developments with regards to the “S” have been the new amendment to the women’s protection laws in Mainland China to enhance discrimination, wellbeing and sexual harassment protections for female employees and a guiding case released by the Supreme People’s Court against geographical discrimination during recruitment.

This year we also saw growing attention on how to address online harms and social stewardship, in line with a broader global trend. Looking again at Mainland China, guidance on ESG commitments to data security and personal information protection were introduced by a key trade body, whilst Singapore passed its online safety law to enhance protection for internet users – particularly children – from the start of February 2023.



Further reading:

- EU proposal for a Corporate Sustainability Due Diligence Directive
- Japan Publishes Human Rights Due Diligence Guidelines
- Managing supply chain risks: reporting and diligence
- Human rights: What does it mean for businesses?
- China amends women’s protection law
- China releases guidance on ESG commitments to data security and personal information protection
- Swipe ‘right’ on online content regulation

06 ESG in M&A

Diversification of ESG opportunities

We have seen a diversification of ESG assets coming to market in the Asia Pacific region. Whilst opportunities for investors in traditional targets in the ESG space remains strong – for example renewables, where valuations have remained robust in response to sustained interest – we anticipate that the acquisition of both service providers and technology companies focused on supporting the energy transition will become a more significant aspect of the regional M&A market.

ESG in investment processes

ESG has noticeably become an increasingly important feature of market participants' institutional decision-making across the Asia Pacific region. We particularly see this in the appointment of, and prominence given to, key ESG stakeholders in board and committee level investment decisions. In the financial services sector, this change has been, at least in part, driven by the changing regulatory landscape in certain markets that require organisations to factor ESG into their overall strategy.

ESG due diligence trends

We expect the market to continue evolving in its approach to ESG diligence in 2023, seeking more sophisticated solutions and best practices, including the development of in-house metrics and the use of technology and data to assist purchasers in understanding and valuing otherwise unpriced risks. In leveraged deals, this will be, in part, driven by the expectations of lenders (subject to their own institutional ESG strategies) as to the scope of diligence undertaken by borrowers – a consideration we anticipate will become increasingly important in the context of tighter financing conditions during 2023.

Similarly, reduced capacity of insurers in the Asia Pacific region (as compared with the US and European markets) with appetite for covering environmental risks may push purchasers into allocating risk more through the transaction documents, predicated on an enhanced diligence exercise to ensure the scope and potential impact of the relevant issues are properly understood (see New human rights and environmental due diligence requirements section).

Further reading:

ESG and private equity

ESG key resources

Linklaters’ ESG experience and capabilities

In conversation with the ESG team – media hub

Sustainable Finance Survival Guide

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> Sustainable Futures blog

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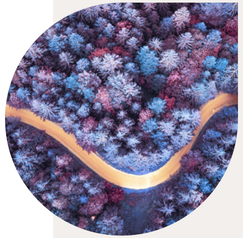

ESG Legal Outlook 2023 – Global Themes

Contacts

We welcome the opportunity to discuss our publication with you and to hear your thoughts and feedback.

Linklaters ESG Team

Our global ESG team

We would also welcome the opportunity to discuss how we can support your organisation on its ESG and net zero journey. Our global, multidisciplinary ESG team is at the forefront of supporting clients on all aspects of climate change, human rights and other ESG matters. We have a strong appreciation of the opportunities and challenges arising out of the growing focus on sustainability and are perfectly positioned to support businesses in meeting their net zero and ESG goals.

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