

GAIL Asia Pacific Impact Lawyers Journal

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Impact Law in the Region

Tokyo, Japan and Shanghai, China

Impact News

Sneak Previews

ESG

SUPPLY CHAINS

Sharing Responsibility for
Sustainable Supply Chains

Navigating Impact Investing in APAC

Legal Perspective

GAIL Annual Summit 2024

Building Communities,
Building a Movement

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SHARED RESPONSIBILITY THE ROLE OF IMPACT LAW

Welcome to the 2024 Q1 edition of the GAIL Asia Pacific Impact Lawyers Journal

In this issue we look at the substance of Impact Law, exploring the kinds of legal issues that Impact lawyers work on.

Our lead article by **Joseph Chun** *Sharing Responsibility for Sustainable Supply Chains under the European Union Deforestation-free Regulation* investigates how this EU law will have an impact in the Asia Pacific region. It highlights the need for Impact lawyers to think through the negotiation of supply chain contracts complying with ESG laws to ensure they don't have unintended negative consequences.

We continue our reports on Impact law in the region with

updates and overviews from **Sotaro Hotta** on Japan and **Giana Lin** and **Dorothy Tan** on China.

Since our last issue, **Steven Moe** has convened the landmark Seeds Impact Conference and **LISI** has launched version 2 of its ground-breaking **LISI** Impact Term Sheet. Each is marked with a brief update.

Ammara Farooq Malik and **Brian Tang** led a webinar last August on the Transposition in Pakistan and Hong Kong of The Chancery Lane Project's Climate Change Clauses which we have summarised for those who missed it. We also have secured **Vivien Teu's** presentation to GAIL North America on Impact

Approaches in Private Equity and Venture Capital.

And we have a couple of sneak previews – from **Michael Ryland** on the GAIL Blended Finance Project due to report at GAIL's Annual Summit in April, and from **Keya Advani** on the GAIL 2024 Summit itself.

This Journal is a place where impact lawyers can share their experience and expertise, with a particular focus on issues of interest in the Asia Pacific region.

We welcome contributions from any source. Please send your suggestions, comments and contributions to The Editor, GAIL Asia Pacific Impact Lawyers Journal at journal@gailnet.org. ■



ABOUT GAIL ASIA PACIFIC

The Global Alliance of Impact Lawyers (GAIL) is a global community of legal leaders using their careers to have a positive impact on people and the planet.

The goal of GAIL is to bring lawyers together into a community where we can share knowledge and best practices, support our common efforts, and work for

change – all in service of the vision of a sustainable and responsible world economy.

GAIL is organised into various geographic regions so that its activities and programmes can be tailored to local interests and timezones.

Currently there are Regional Boards for Africa, Asia Pacific, Europe, Latin

America, North America, and the UK.

Membership of a region is open to any GAIL member who resides in that region. In the case of the Asia Pacific Region, the timezones covered stretch east/west from Pakistan to the Pacific Islands and north/south from China to Australia/New Zealand. ■

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For membership information see page 42 and the membership page on GAIL's website

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A MESSAGE FROM THE APAC REGIONAL CHAIR



Dr. AMMARA FAROOQ MALIK
Chair of APAC Regional Board for GAIL

Welcome to this issue of the GAIL Asia Pacific Impact Lawyers Journal.

It is inspiring to see the steady growth of interest in Impact lawyering across our region, and I continue to be impressed by the breadth of the work being done.

We have in the short time since GAIL APAC was established, held seminars on Gender Lens Investing, and on Combining Impact and Career, explored the tools available for Impact lawyers in Corporate Structures and Climate Change contracts, and started to map out the frameworks for Impact law in different jurisdictions in our region.

As well, of course, as publishing this Journal!

We are building the community of Impact lawyers that the region needs to address the profound challenges we face. This is the need of the hour as we should not and cannot underestimate the tasks in front of us.

I was fortunate to attend COP28 in December last year in Dubai and that reinforced to me the urgency of the climate change challenge. It also gave me hope in witnessing the vast number of experienced government, NGO and private sector participants committed to finding and implementing solutions.

Apart from leading from the front as legally informed climate change advocates, there is a lot of work that

is done behind the scenes and away from the celebrity spotlight. There is ongoing day-to-day work pulling teams and finances together to achieve the social and environmental outcomes we need and this is where we can make a contribution as Impact lawyers as well: By applying our expertise for people and planet.

I hope you find this latest issue informative, interesting and, above all, inspiring! ■

Ammara

01

IMPACT LAW DEVELOPMENTS IN JAPAN



SOTARO HOTTA
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Interest in social impact and sustainability is growing in Japan. Regardless of the industry, efforts to incorporate the sense of sustainability into businesses are being made through trial and error. Regarding legislation, like other countries, Japanese business development often takes precedence over regulatory enactments. In Japan, while referring to discussions about ESG and sustainability led by Western countries, regulations related to these areas are gradually being established. This article introduces the current state of regulation in four prominent areas that have recently garnered attention in Japan.

1. CLIMATE CHANGE



Like other countries, addressing climate change is important in Japan. The

“Green Transformation” (“GX”), which involves transitioning societal structures from traditional fossil fuel reliance to clean energy oriented, has gained attention. In May 2023, the so-called “GX Promotion Law” was enacted in Japan. Under

this law, starting from 2028, a “Fossil Fuel Surcharge” will be imposed on entities involved in fossil fuel extraction. Additionally, from 2033, power generation companies will be required to pay fees based on their allocated carbon dioxide emission quotas. Furthermore, “GX Economic Transition Bonds” will be issued, to be redeemed by these charges, amounting to a preliminary investment of around 20 trillion yen over

a ten-year period starting from 2023. These funds will be used to support GX initiatives. Furthermore, alongside the GX Promotion Law, the “Climate Change Countermeasures Tax” has been implemented as part of carbon pricing, substantially acting as a carbon tax. Additionally, carbon credit trading known as “J-Credit” is being implemented, attracting attention to achieve carbon offset.



2. BUSINESS AND HUMAN RIGHTS



Business and human rights are among the most prominent topics in Japan. Regrettably, in Japanese businesses, efforts to meet international standards for respecting human rights have not been

sufficiently carried out. However, guidelines based on international standards, including the UN’s “Guiding Principles on Business and Human Rights,” were established in September 2022. These guidelines apply to all companies conducting business activities in Japan

and cover the formulation and publication of human rights policies, human rights due diligence, and remediation of human rights violations. The publication of this guideline is expected to foster a culture of human rights respect among domestic businesses.

3. ESG INVESTMENTS



Lately, there has been a substantial increase in ESG investment cases by institutional investors in Japan, drawing prominent levels of attention. Particularly, regulations concerning information disclosure about financial instruments have become more specific through the amendments of law and its relevant guidelines. For instance, the securities

report submitted by listed companies, which is mandatory, now includes a section for “Views and Efforts Regarding Sustainability,” with additions to the “Governance,” “Strategy,” “Risk Management,” and “Indicators and Goals” categories. These four items align with the recommendations of the Task Force on Climate-related Financial Disclosures and the International Sustainability Standards Board. Furthermore,

considering the growing number of ESG-focused funds, the Financial Services Agency (“FSA”) published and implemented guidelines for supervision regarding ESG investment trusts and greenwashing issues in March 2023. These guidelines strongly express the FSA’s concern about the use of ESG-related terms in publicly offered investment trusts that do not qualify as ESG investment trusts.

4. IMPACT INVESTMENTS



Impact investment, which has developed primarily in the UK, is also expanding in Japan. While most investments are directed towards non-listed stocks in terms of the number of cases, investments in listed stocks and loans constitute a larger share of the amount invested. The importance of measuring and managing impact is understood in Japan as

well, but the investment managers struggle with finding the appropriate way of measuring and management.

While regulations in this regard have not progressed significantly, the FSA published a draft of basic guidelines for impact investment in June 2023. These guidelines highlight four elements of impact investment: intention, additionality, measurement and management, and

novelty. However, as of now, they are undergoing a public comment process, and the final content of the guidelines might change. Additionally, apart from the comprehensive review of impact investment by the FSA, the significance of promoting impact investment in the global health field in Japan has been acknowledged based on expert considerations.

From the description made so far, it is evident that regulations and guidelines related to social impact are not fully prepared at the current stage. Nevertheless, there is a steady increase in related regulations, and in conjunction with the accumulation of practical experience in social impact activities, it is anticipated that a legal environment conducive to domestic and international players’ activities will be established. ■



IT IS ANTICIPATED THAT A LEGAL ENVIRONMENT CONDUCTIVE TO DOMESTIC AND INTERNATIONAL PLAYERS’ ACTIVITIES WILL BE ESTABLISHED.

Impact Law in the Region

IMPACT LAW UPDATE FROM CHINA¹

In China, corporations and NGOs are both making great contributions to create a sustained impact ecosystem in response to the government’s implementation of various laws, policies and regulations to address environmental challenges and promote sustainable practices.



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and



DOROTHY TAN

Counsel,
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1 - In this article, China refers to the mainland of China.



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ENVIRONMENT AND CLIMATE CHANGE



In May 2022, the National Development and Reform Commission and the National Energy Administration released the *Implementation Plan on Promoting the High-quality Development of New Energy in the New Era*. It aims to accelerate the construction of a clean, low-carbon, safe

and efficient energy system and ensure that the total installed capacity of electricity and solar power generation reaches more than 1.2 billion kilowatts by 2030.

In response to *Action Plan for Carbon Dioxide Peaking Before 2030*, the *Notice of the Implementation Plan for Science and Technology to Support Carbon Peaking*

and *Carbon Neutrality (2022-2030)* focuses on developing science and technology to empower industry, urban and rural construction, transportation and other fields, and values the innovation of energy and power generation technologies.

Promoting green consumption also plays an important role in achieving carbon peaking and carbon neutrality. *The Implementation Plan for Promoting Green Consumption* was released in 2022 to promote green consumption transformation, enhance the service and

technology supporting system for green consumption and improve green consumption incentive policy as well.

The Ministry of Ecological Environment issued the *Administrative Measures for the Mandatory Disclosure of Environmental Information by Enterprises* in 2022.

For the first time, carbon information disclosure is required in a regulation and is supported by specific format requirements including the disclosure entity, the disclosure content, timeline and supervision.

SUSTAINABLE FINANCE



China has been actively working to develop and expand its green finance market.

It encouraged the issuance of green bonds and introduced guidelines for financial institutions to integrate ESG factors into their investment decisions.

At least 26 new laws and regulations regarding sustainable finance have been launched since November 2021², aiming to achieve “common prosperity” and “carbon peaking and

carbon neutrality” in the 14th Five-Year Plan (2021-2025). The *White Paper on ESG Development and Innovation in China 2022* summarized that the new laws and regulations are focusing on:

Improving financial
 ● monitoring in response to a more complicated financial environment, such as *Measures for Supervision and Administration of Publicly Offered Securities Investment Fund Managers*;

● Promoting standardization that applies to both domestic and international financial markets, such as *Financial Standardization “14th Five-Year Plan” Development Plan*;

● Developing financial technology to promote the construction and improvement of the financial infrastructure, such as *Guiding Opinions of the General Office of the CBIRC on the Digital Transformation of Banking and Insurance Industries*.

2 - https://ff.lingxi360.com/ff?id=sF6mW-b8=5Set&utm_bccid=LXE89gMpPrWqIQ6L White Paper on ESG Development and Innovation in China 2022, p25.

CORPORATE GOVERNANCE IMPROVEMENTS



There was an increasing emphasis on corporate governance reforms in China. The government aims to enhance transparency, accountability, and shareholder rights in Chinese companies, especially the state-owned companies and the listed companies, to maximize the interests of all parties.

To regulate the activities of independent directors, giving full play to the role of independent directors in the governance of listed companies and promoting the improvement to the quality of listed companies, *Administrative Measures for Independent Directors of Listed Companies* will become effective in September 2023. This new regulation further clarifies the independence of independent

director by imposing more restrictions on his/her other positions in a listed company and interest relationship might affect his/her objective judgment. It also confirms that the independent director will play a role in the participation of decision-making, supervision and professional consultation to promote the board of directors to make more reasonable decisions.

SUSTAINABLE SOCIETY AND COMMON PROSPERITY



Promoting “common prosperity” has become one of the top priorities in the Chinese

government’s second centenary goal and a major target in the 14th Five-Year Plan (2021-2025), and a series of policies are being adopted to address this. The third distribution (the first refers to income distribution in the market and the second relates to government-led redistribution) is a form of social responsibility that is considered to be an effective way to achieve common prosperity. Sustainability not only relates to the private

business sector but to all social aspects, including sustainable philanthropy. Ahead of the introduction of the *PRC Charity Law* in 2016, the Ministry of Civil Affairs issued a number of regulations emphasizing the importance of this concept, which is a key part of the common prosperity foundation.

Under common prosperity, the laws, regulations and policies aim to address social differences and equality. Policies related to rural revitalization have shown explosive growth under the framework of the National Rural Revitalization Strategy.

Law of the People’s Republic of China on the Protection of Rights and Interests of Women was revised in 2022 to further protect women from sexual harassment and sexual discrimination in employment and improve the remedy and supporting system accordingly. In order to effectively cope with the aging of the population, the State Council issued the *14th Five-Year Plan National Planning for the Development of the Elderly Cause and the Elderly Service System* to promote the construction of an inclusive and diversified care service system for the elderly. ■

Impact News

02



STEVEN MOE

Partner,
Parry Field Lawyers

SEEDS IMPACT CONFERENCE NEW ZEALAND OCTOBER 2023

Originating from a desire to gather some of the former guests of Seeds Podcast, this event was organised by Steven Moe, an impact driven lawyer in New Zealand who is a former GAIL Global Board Member and was the first Chair of the GAIL APAC Regional Board.

The entirely online event gathered 500 participants from across the world to hear from 100 speakers in 29 sessions with a very wide range of topics. Those included restorative finance, youth governance, reimagining business for the future and what degrowth means for large companies.

Participants could choose to join one of 4 zoom

rooms which were all running at the same time with 30 or 45 minute sessions. There was a very low cost to attend of NZ\$20 which meant it was accessible to all and many from remote regions joined. This also meant there were no flights or travel or hotel cost, catering or venue hire.

All of the content has now been uploaded and can be viewed here at no cost: <https://seedsconference.nz/2023> and much of the audio of several sessions are also episodes of Seeds podcast here, which has 377 conversations on similar topics and life stories getting into what has shaped people.

Link



SEEDS PODCAST

377 conversations

JUST A FEW HIGHLIGHTS FROM THE 29 SESSIONS IN A VERY DIVERSE PROGRAMME INCLUDED:

● *Larger Business in a Post-Growth Economy* was a panel of Jennifer Wilkins, Dr Katherine Trebeck (co-founder of Wellbeing Economics) & Dr Donnie Maclurcan (Executive director of the Post Growth Institute) exploring the challenging question of how existing larger businesses, especially multinational enterprises and corporations, can begin to prepare for a post-growth future. The video is [here](#)

● Economist Shamubeel Eeaqub in conversation with a panel on *Poverty and the Economy* with Helen Robinson (Auckland City Missioner) and Sasha Lockley (Co-founder of debt consolidation provider Money Sweetspot) about the economy and how we actually help break poverty cycles. The video is [here](#)

● Rosalie Nelson the CEO of the Edmund Hillary Fellowship hosting a panel on *Regenerative Blended Finance* as part of 500+ Fellows using NZ as base camp for global impact. The panel included Brad Leibov the CEO at EarthShare, Satya Kumar from India, Laina Greene the Founder and CEO at Angels of Impact and Andrew Hewitt an expert on funding. The video is [here](#)

● The most 'legal' of the talks, Steven Moe shared about *Business Models of the Past, Present and Future* and a shift from Milton Friedman towards other conceptions of the very role of the company in society and what it would mean to reimagine them as a force for good. The video is [here](#)

● Alex Hannant with a panel on *Systems Innovation*, joined by Dr Marissa Kaloga a transdisciplinary entrepreneurship global scholar and Ian Short who is working on a broad range of systems change initiatives in climate change, housing models that work for marginalised communities, and economic models that better support people and planet. The video is [here](#)



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Many of the hosts of the panels were selected as they had been guests on Seeds Podcast so there was a connection point back to the podcast, which has been downloaded more than 200,000 times and has had hundreds of guests (available in Spotify, Apple Podcasts and other apps).

This format and approach was something of an experiment to see if high quality content could be made available at a very low cost to as many as possible and the answer was: Yes. If you are organising a conference then it is worth keeping in mind this style is an option. The content has

now been viewed many times over those who watched the "live" sessions.

If you'd like to know more or have any questions, then Steven can be contacted at

stevenmoe@parryfield.com

<https://seedsconference.nz/> ■



PRACTICAL TOOLS FOR IMPACT

LISI LAUNCHES IMPACT TERM SHEET 2.0

The Legal Innovation for Sustainable Investments (LISI) Foundation launches an updated version of its Impact Term Sheet for equity investments, together with a “family” of complementary modules and resources.



Incorporated in the Netherlands and drawing on expertise from across the globe, the dedicated group of legal and sustainability experts who donate their time and expertise to developing open-source tools

that power more impactful investment deals launched the first Impact Term Sheet in November 2022.

Since then, the LISI co-creators have been continuing their research,

gathering insights from experts and real-life users to continuously improve this fundamental resource in line with LISI’s triple A methodology: making it more accessible, approachable and appealing than ever.

The organisation has also reached some incredible milestones:

- Over 1000 downloads from across the globe, including the North and Global South alike
- Winner of the first ESG award from the Dutch Legal Awards, De Gouden Zandlopers
- A feature in the leadership and strategy column of Forbes, thanks to Prof. Kate Vitasek
- An ever-growing team of amazing co-creators who are the soul of LISI’s impact
- Engaging in an in-depth research project about design-driven impact deals together with Visual Contracts, We Are Stewards, Rotterdam School of Law, and TU Delft, using the Impact Term Sheet as a case study
- Touring multiple continents to present the Impact Term Sheet to diverse audiences at several events

To celebrate these accomplishments and incorporate the lessons from a year’s worth of conversations on harmonising legal investment processes with impact, LISI launched the Impact Term Sheet 2.0 at ImpactFest in the Hague in November 2023.

This time, LISI is not just delivering a single document - it is introducing an expanded ecosystem with several resources.

WHAT’S NEW?



Steward Ownership Module: Together with We Are

Stewards, LISI has developed a dedicated module focused on ownership models which safeguard the mission of the company by separating economic and voting rights and enables the company to (a) put a ceiling on investor returns and (b) buy out an initial equity investment over time.



Regulatory Module: Offering guidance on incorporating

ESG regulations into deal-making to align investment negotiations with the latest EU standards.



Impact Card: A powerful tool designed to guide users through

investment terms and help maximise the intended impact and inclusivity of deals.



New user experience: Improved design and

better download experience make the Impact Term Sheet easier than ever to implement.

The Impact Term Sheet was designed with every stakeholder in mind, so no matter what role you play in impact investing, it’s worth taking a closer look! [Download the Impact Term Sheet here.](#)

Just like the original Impact Term Sheet, this upgrade was developed through open collaboration amongst a wide range of industry experts, in close dialogue with users and adopters. [Get to know the amazing people](#) who made this possible.

Particular thanks goes to the GAIL board members who acted as expert reviewers of the Impact Term Sheet 2.0, making this a truly global effort. Watch out for more potential GAIL/ LISI collaborations in the near future.

WHAT’S NEXT? AND HOW CAN I GET INVOLVED?

Work has already started on the Impact Term Sheet 3.0, which will include greater interactivity and ease of use as well as further new modules. LISI is always looking for new use-cases, feedback and sponsorships. Reach out to info@lisi-law.eu if you’d like to know more. ■

03

CLIMATE CHANGE CLAUSES - TCLP TRANSPOSITIONS IN APAC (PAKISTAN/HONG KONG)



AMMARA FAROOQ
MALIK

and



BRIAN WHA-LI TANG

Legal Tools for Climate Change Adaptation in South Asia

On August 2, 2023, GAIL Asia Pacific organized a virtual panel addressing some of the legal tools for climate change adaptation in South Asia. Dr. Ammara Farooq Malik, Chair of GAIL APAC, led the session, emphasizing the

crucial role that lawyers can play in shaping future climate laws.

The session aimed to introduce South Asian lawyers and law students to climate contracting in their

specific context. The panelists discussed the potential impact of climate contracting in South Asia. Following the virtual session, an in-person climate contracting workshop was hosted by AFMalik Law in Lahore.

Regional Context and Policy Interventions in South Asia

Izabella Koziell, Deputy Director General of the International Centre for Integrated Mountain

Development (ICIMOD) outlined work involving scientific knowledge production, cooperation

mechanisms, and an investment framework to reduce climate and environmental risks, foster

sustainable mountain development, and secure adaptation finance for the Hindu Kush Himalayan region. Koziell underscored

the significance of the region as the source of major rivers and emphasized the urgent need for coordinated action to address the 'quadruple

planetary crises' of climate change, water scarcity, biodiversity loss, and ecosystem degradation.



Fairy Meadows, Nanga Parbat, Pakistan



The Role of Commercial Contract Clauses in the Climate Crisis

Humzah Khan, Programme Manager at The Chancery Lane Project (TCLP) spoke to its global work on climate contracting, leveraging commercial contracts as a powerful tool for decarbonization. TCLP recognizes the emissions impact of commercial contracts and views them as a tangible and enforceable means for achieving reduced emissions.

It encourages lawyers to adapt its climate clauses to diverse jurisdictions, urging South Asian legal professionals to innovate in creating clauses focused on adaptation, resilience, and a just transition, given the unique challenges faced in the region.

The event underscored the urgent need for legal innovation in addressing

the climate crisis in South Asia and the transformative potential of climate contracting as a practical, scalable, and accessible solution. The collaborative efforts of GAIL, ICIMOD, TCLP, and AFMalik Law showcased the potential synergy between legal, scientific, and regional policy initiatives, providing a template for action in South Asia.

The Role of Lawyers in Climate Contracting: a Case Study and Template

Law societies, including the American Bar Association and the Law Society of England & Wales, prioritize climate-conscious lawyering. Brian W Tang, Founding Executive Director of the Law, Innovation, Technology & Entrepreneurship Lab at the University of Hong Kong Faculty of Law (LITE Lab@HKU) presented a case study on engaging lawyers in Hong Kong and Singapore in climate-conscious lawyering through focusing on open-source climate contracting. The LITE Lab@HKU x TCLP Climate Contracting Initiative case study offers a valuable template for lawyers, emphasizing adaptability to local contexts and aligning with the increasing trend of young lawyers and students joining firms based on net-zero commitments.

STEP 01 **Introduction to Climate Contracting:** TCLP initiated engagement with Brian Tang of LITE Lab@HKU on contributing to its climate clause transposition project after each met while sharing at a GAIL Asia Pacific webinar on Climate Contracting and Legal Innovation.

STEP 02 **Jurisdictional Scope:** While originally approached on the

transposition of English law clauses for Hong Kong SAR and China, LITE Lab@HKU decided to focus on common law jurisdictions, Hong Kong SAR, and Singapore as major international financial centres.

STEP 03 **Lawyer Outreach:** Initial involvement included lawyers from two international law firms with TCLP experience. LITE Lab@HKU engaged in extensive local outreach through its pro bono, impact, and legal innovation networks including PILNet and Asia-Pacific Legal Innovation & Technology Association (ALITA).

STEP 04 **Legal Design Thinking:** LITE Lab@HKU deployed Legal Design Thinking to expand involvement beyond private practitioners to include stakeholders such as in-house counsel and industry organisations such as International Capital Markets Association (ICMA), with usability, interoperability and adoption as priorities.

STEP 05 **Organisational Infrastructure and Delivery:** Initially run through monthly roundtable sessions across Hong Kong and Singapore, LITE Lab@

HKU (bringing together interested law and other students) serves as the convening hub for the current four working groups led by volunteer coordinators focussed on green loans, green capital markets, green investment funds and green construction and procurement, and a collaborative shared resource platform.

STEP 06 **Expanded Scope for Impact:** Going beyond the initial clause transposition project, the LITE Lab x TCLP initiative also seeks to co-design climate clause playbooks to serve as plain language resources for corporate users to better understand climate contractual obligations, cost allocation, and differing negotiating perspectives.

STEP 07 **Grow Awareness of Approach:** Invitations to present LITE Lab x TCLP initiative in events like GAIL Annual Summit, World CC Sustainable Contracting Day, and NYU Grunin Conference assists to socialize and publicize this approach to climate-conscious lawyering and inspire greater participation. ■

Recent Gail Apac Events

NAVIGATING THE EVOLVING LANDSCAPE OF IMPACT INVESTING IN ASIA-PACIFIC: A LEGAL PERSPECTIVE



VIVIEN TEU
Partner,
Dentons Hong Kong

In recent years, there has been a significant evolution in the private equity (PE) space, particularly within the context of impact investing, and this is similarly having an effect in the Asia Pacific region. This article delves into the unique dynamics and challenges faced by legal practitioners operating in this space, offering insights into the multifaceted nature of impact investing in the diverse economies of the region.

The Uniqueness of Asia-Pacific

Asia Pacific is an extremely diverse region in terms of its economies, stages of development and its legal systems. Many areas within Asia Pacific are classed as 'emerging markets', 'developing economies' or 'the global south'. This has often meant that investments into Asia Pacific are from non-Asian funders that are funding into Asia Pacific. However, in recent years

there has been a growth in the number of Asian impact actors and funders, which has brought a different dynamic to the impact ecosystem in the region.

Unlike other jurisdictions like the EU which benefit from a single market, Asia-Pacific lacks such cohesion. Moreover, the region has not experienced the same regulatory push as seen in

the European Union, where the Sustainable Finance Disclosure Regulation (SFDR) drives engagement in sustainable investments, along with a focus on double materiality under the Corporate Sustainability Reporting Directive (CSRD) and mandatory supply chain due diligence domestic laws or the upcoming Corporate Sustainability Due Diligence Directive (CSDDD).



The absence of such regulation in Asia-Pacific makes it a distinctive and challenging environment for impact investing, especially for European or international investors who are concerned with compliance or the implications of the SFDR, CSRD or CSDDD on investments or operations in the region, without the force of similar local requirements or even at times considered as being opposed to local cultures or contexts.

Another by-product of the lack of a single market is

that impact projects in Asia Pacific almost inevitably or necessarily have a cross-border dimension. This characteristic introduces additional challenges for legal practitioners, particularly in addressing issues related to scalability and local contextualization within the broader conversations about climate or ESG issues within the global impact landscape. This is perhaps best illustrated by how the “definitions and understanding of social enterprise vary across the Asian region”³, according

to studies conducted by the British Council in collaboration with Social Enterprise UK and the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP). As such, quite often a first step in navigating impact investing is to clarify whether the funders and/or operators involved are on the same page as regards the ‘non-profit’ or ‘for-profit’ nature of the enterprise or initiatives and aligning structures or objectives.

3 - The state of social enterprise in South East Asia, February 2021.

Regulatory Drivers Shaping the Landscape

Notwithstanding the diversity of markets in the region, there are some common themes and trends emerging.

investment objectives or targets, while intending to tackle greenwashing.

impact alongside a financial return.

However, there have been some fairly specific focuses on net-zero goals and decarbonization within the region, taking priority over other ESG topics.

In 2020, China announced its aim to peak CO2 emissions in 2030 and to achieve carbon neutrality before

2060 – Hong Kong followed shortly after with its own commitment to reach net-zero by 2050.

While the more developed economies in Asia including Japan, Hong Kong and Singapore have pledged to reach net zero by 2050, Indonesia has set the same 2060 target as China, whereas India aims to reach net zero by 2070.

More recently, the Monetary Authority of Singapore (MAS) as well as the Hong Kong Monetary Authority (HKMA) have called for financial institutions to have credible transition pathways to support net-zero commitments, signalling an expanding focus. Further, financial institutions in Singapore are expected to develop capabilities in development finance and blended finance, under the MAS’ supervisory push

” In the ASEAN Sustainable and Responsible Fund Standards, ‘impact investing’ is defined as investments made with the intention to generate positive social and environmental impact alongside a financial return.

As one example, China and Hong Kong have had a strong focus on green finance. Regulatory requirements, such as the adoption of the Recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) and comprehensive Environmental, Social, and Governance (ESG) reporting requirements of the Hong Kong Stock Exchange, have driven more asset managers towards management and disclosure of climate-related risks and the adoption of investment strategies or policies taking into account ESG risks or factors.

The Hong Kong Securities and Futures Commission (SFC) as early as 2019 had published circulars on green or ESG retail funds which further highlighted the region’s commitment to developing green or ESG funds with specific ESG

Malaysia is another jurisdiction which has proactively introduced sustainability regulatory requirements on listed companies and on investment funds. The Securities Commission of Malaysia issued its first set of Guidelines in 2017 on Sustainable and Responsible Investment for investment funds, further revised in 2021 and 2023, while also introducing a Sustainable and Responsible Investment linked Sukuk Framework in 2022.

In both Hong Kong and Malaysia, as examples, impact investing is one of different types of sustainable investment strategies or ESG strategies. In the ASEAN Sustainable and Responsible Fund Standards, ‘impact investing’ is defined as investments made with the intention to generate positive social and environmental

for transition planning and blended finance.

At the same time, Hong Kong has proposed to introduce enhanced requirements for listed companies that will almost mirror the Climate Disclosure Standards (S2) published by the International Sustainability Standards Board (ISSB) in June 2023. S2 will likely be adopted in many other jurisdictions including Japan, Korea, Singapore and Malaysia.

Impact Initiatives and Foundations

Within this context, there is a complex dynamic when non-Asian funders respond to policy drivers in the region. In this regard, it is important to understand the drivers in local and regional economies – from what is considered “green” or “sustainable” according to local or regional taxonomies (for which the Common Ground Taxonomy mapping the EU Taxonomy and China’s Green Bond Projects Catalogue and the ASEAN Taxonomy for sustainable finance are of importance) through to the efforts of United Nations Development Program in analysing the progress to the Sustainable Development Goals (SDGs) in Southeast Asian countries or the Asia-Pacific SDG Partnership in collaboration with ESCAP and ADB (Asian Development Bank).

Separately, the ASEAN Capital Markets Forum (ACMF) has developed the ASEAN Green Bond Standards, the ASEAN Social Bond Standards, the ASEAN Sustainability Bond Standards and the ASEAN Sustainability-linked Bond Standards, based on the Green Bond Principles, Social Bond Principles, Sustainability Bond Principles and Sustainability-linked Bond Principles respectively of the International Capital Markets Association (ICMA). Remarkably, in collaboration with Asian Development Bank (ADB), Sustainable Finance Institute Asia (SFIA) and Climate Bonds Initiative (CBI), the ACMF in 2021 published the ASEAN SDG Bond Toolkit, highlighting SDG financing needs in ASEAN and the emerging opportunities for SDG bonds. This is a unique initiative developing and applying the ICMA-based capital markets sustainable bond instruments to development finance.

Increasingly Asian impact actors and funders are entering the space, introducing a new dimension to the ecosystem. Initiatives such as those of Temasek Trust and the establishment of the Centre for Impact Investing and Practices (CIIP) in Singapore, the Yayasan Hasanah, the impact-based foundation of Malaysia’s sovereign wealth fund, and the Indonesia Investment Authority with the specific mandate of

investing in the country’s sustainable growth are some of the examples of how Asian funders are responding to impact policy drivers and needs. These initiatives will play a crucial role in shaping the future of impact investing in the region by bridging the gap between existing impact enterprises and emerging social enterprises.

Conclusion

As Asia-Pacific undergoes rapid transformations in the impact investing space, legal practitioners must navigate a complex and diverse landscape. The initiatives mentioned above are just a handful of examples from a selected few jurisdictions, with many more that can be covered, whether taking each specific jurisdiction in turn or for a regional comparison. The evolving dynamics and complexities present unique challenges to both non-Asian and Asian funders, which underscores the need for a nuanced legal perspective that considers the cross-border nature of impact projects and adapts to the regulatory contexts of the region. The initiatives and infrastructural foundations being established within Asia Pacific are paving the way for a future where impact practices developed in the diverse legal and regulatory frameworks of the region will play a central role in fostering sustainable and impactful investments in Asia-Pacific. ■

ESG Supply Chains

04

SHARING RESPONSIBILITY FOR SUSTAINABLE SUPPLY CHAINS

UNDER THE EUROPEAN UNION DEFORESTATION-FREE REGULATION



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Summary

Deforestation is a major global challenge. To contribute towards ending it, the landmark EU Deforestation-free Regulation (EUDR) was legislated with the main goal of reducing the EU’s impact on global deforestation from the consumption of listed products in the European market. When its main provisions apply

from 30 December 2024, such products can only be sold in or from the EU if they are deforestation-free, produced in compliance with the relevant sustainability requirements, and covered by a due diligence statement to confirm compliance. These provisions will profoundly affect supply chains sourced and resourced everywhere, including in the APAC region.

The EUDR aims to protect and improve the health of existing forests, but risks ultimately undermining this aim. Transactional lawyers are conditioned to represent their clients’ interests by taking a “zero-sum contracting” approach – sustainability clauses in supply chain contracts are deemed by the stronger party, typically the buyer,

to be conditions which if breached allow the buyer to terminate, and warranties and indemnities allow the buyer to shift liability to the weaker party, typically the supplier. However, small upstream producers may lack the financial and technical resources to change their supply chain processes or undertake the compliance due diligence, and will likely lack the leverage to resist buyers shifting the EU regulatory responsibility and liability onto their

shoulders. A potential consequence is that these producers will be unable to meet the EU regulatory requirements on their own and find themselves excluded from the supply chains for the listed products destined for the EU market, eventually supplying their produce in markets with less stringent anti-deforestation requirements instead.

There is an alternative approach that is more equitable and effective.

Contracts can be drafted so that, the buyer shares in the responsibility for achieving the objectives of the EUDR, by contributing to compliance due diligence throughout the business relationship, by committing to responsible pricing, and ensuring that remedies are victim rather than party centred. This article explores this alternative, and the legislative and professional movements supporting the shift towards it.



Introduction

The world's forests are where most of the terrestrial biodiversity are found. Today, forests are disappearing at an unprecedented scale and pace, due to a large extent, to expanding agricultural production. Deforestation is a major driver of climate change and biodiversity loss. It also contributes to desertification and loss of livelihood of some of the most vulnerable people in the world, including indigenous peoples, and increases the risk of cross-species transmission of zoonotic diseases due to greater human-wildlife contact.

The EU contributes to deforestation by consuming a significant share of products associated with deforestation. It therefore considers that it has the responsibility to contribute to ending it. To this end,

the European Deforestation Free Regulation ("EUDR") was legislated, and came into force on 29 June 2023 following publication in the *Official Journal of the European Union*.⁶ Its main requirements will apply as soon as from 30 December 2024.⁷ The Regulation regulates the placing and making available on the EU market as well as export from the EU of relevant products,⁸ that contain, have been fed with or have been made using relevant commodities, namely cattle, cocoa, coffee, palm oil, rubber, soya and wood, with a view to minimising the Union's contribution to deforestation and forest degradation worldwide.⁹

Prohibitions

Under Article 3 of the EUDR, a natural or legal person (an "operator") will only be permitted to, in the course of a commercial activity, "place"

(i.e., first make available) relevant products in the EU market or export them if the products

(a) are deforestation free;¹⁰

(b) have been produced in accordance with the local relevant legislation;¹¹ and

(c) are covered by a due diligence statement¹² on the basis of a three-stage due diligence exercised in accordance with Article 8.

Operators that obtain or are made aware of relevant new information indicating that a relevant product that they have placed on the market is at risk of not complying with the EUDR must immediately inform the competent authorities of the Member States in which they placed the relevant product on the market, as well as traders to whom they supplied the relevant product.

5 - European Commission, "Deforestation".

6 - Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.

7 - EUDR, Art 38. For operators that by 31 December 2020 were established as micro-undertakings or small undertakings, the main requirements apply from 30 June 2025.

8 - As listed in EUDR, Annex I.

9 - EUDR, Art 1.


10 - "Deforestation-free" is defined to mean (a) that the relevant products contain, have been fed with or have been made using, relevant commodities that were produced on land that has not been subject to deforestation after 31 December, 2020; and (b) in the case of relevant products that contain or have been made using wood, that the wood has been harvested from the forest without inducing forest degradation after 31 December, 2020. "Deforestation" is defined to mean the conversion of forest to agricultural use.

11 - The relevant legislation are the laws applicable concerning the legal status of the area of production in terms of (a) land use rights; (b) environmental protection; (c) forest-related rules; (d) third parties' rights; (e) labour rights; (f) human rights; (g) the principle of free, prior and informed consent (FPIC); and (h) tax, anti-corruption, trade and customs regulations.

12 - EUDR, Arts 3 and 4.


In the case of exports, it is the competent authority of the Member State which is the country of production that must be informed. A natural or legal person in the supply chain that makes available the relevant products on the EU market (“trader”) faces similar obligations as an operator, but small and medium enterprise (“SME”) traders face reduced obligations.¹³

Due Diligence

 The due diligence requirements under Article 8 include, firstly, the collection of information, data, and documents set out in Article 9, for the purpose of demonstrating that the relevant products comply with Article 3;¹⁴ and secondly, the carrying out of a risk assessment to establish whether there is a non-negligible risk that the relevant products intended to be placed on the market or exported are non-compliant, particularly taking into account criteria

specified in the EUDR, including “any information that would point to a risk that the relevant products are non-compliant” and “complementary information on compliance with this Regulation, which may include information supplied by certification or other third-party verified schemes, ... provided that the information meets the requirements set out in Article 9”.¹⁵ Except where a risk assessment reveals that there is no or only a negligible risk that the relevant products are non-compliant, the operator must, thirdly, adopt risk mitigation procedures and measures that are adequate to achieve no or only a negligible risk. Such procedures and measures may include supporting compliance by the operator’s suppliers, in particular smallholders, through capacity building and investments.¹⁶

Enforcement

 Member States must conduct checks within their

territory for compliance by EU operators and traders.¹⁷ When situations where relevant products present such high risk of non-compliance that they require immediate action by competent authorities before those relevant products are placed or made available on the market or exported, competent authorities must take immediate interim measures to suspend the placing or making available of those relevant products on the market or require customs authorities to suspend the release for free circulation or export of those relevant products.¹⁸

Member States must also provide for the possibility for their competent authorities to take immediate interim measures, including the seizure of the relevant commodities or relevant products, or the suspension of the placing or making available on the market or the export of the relevant commodities or relevant products, when potential non-compliance has been detected.¹⁹

13 - EUDR, Art 5.

14 - This includes “the geolocation of all plots of land where the relevant commodities that the relevant product contains, or has been made using, were produced, as well as the date or time range of production...”; “adequately conclusive and verifiable information that the relevant products are deforestation-free”; and adequately conclusive and verifiable information that the relevant commodities have been produced in accordance with the relevant legislation of the country of production...”. See EUDR, Art 9(1).

15 - EUDR, Art 10.

16 - EUDR, Art 11.

17 - EUDR, Arts, 16, 18, and 19.

18 - EUDR, Art 17.

19 - EUDR, Art 23




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Where non-compliance is established, competent authorities must without delay require the operator or trader to take appropriate and proportionate corrective action to bring the non-compliance to an end within a specified and reasonable period of time, which must include at least one of the following, as applicable: rectifying any formal non-compliance; preventing the relevant product from being placed or made available on the market or exported; withdrawing or recalling the relevant product immediately; or donating the relevant product to charitable or public interest purposes or, if that is not possible, disposing of it in accordance with EU law on waste management.²⁰

Member States must lay down rules on effective, proportionate and dissuasive penalties for infringements by operators and traders and take all measures necessary to ensure that they are implemented.²¹ They may also authorise their competent authorities to reclaim from the operators or traders the totality of the costs of their activities with respect to instances of non-compliance.²²

Impact of EUDR on Small Producers

 Whilst the EUDR directly imposes obligations only on operators and traders, its impacts, both positive and negative, are

intended by design, to be felt by the producers and intermediate suppliers of relevant products and relevant commodities in these operators’ and traders’ supply chains anywhere in the world. Indeed, these producers and intermediate suppliers may expect to be required by way of contract cascading to at least provide some of the information, data, and documents required under Article 9, and possibly additional information, data, and documents as well, and to assist in the due diligence analysis by the operators and traders.

Producers, particularly small producers, of relevant commodities and products, are concerned about the

20 - EUDR, Art 24.

21 - EUDR, Art 25.

22 - EUDR, Art 20.

impact of the EUDR, not least because there has not been sufficient clarity on what will be expected of them downstream by the operators and traders to whom they supply these commodities and products.²³ Non-governmental organisations see in the EUDR an opportunity for small producers to be put in a stronger competitive position to sell their commodities into global value chains, if technical and financial support from the private and public sectors are forthcoming to offer practical measures and engagement with these farmers to meet EUDR requirements.²⁴ There have also been calls for support for small producers amidst concern that the EUDR's rules, including the obligation to provide maps and satellite data to prove exactly where their crops were grown,²⁵

and the submission of “adequately and conclusively verifiable information” that the relevant commodities are deforestation-free and have been produced in accordance with relevant local legislation,²⁶ may be disproportionately difficult and costly for small producers to comply with.

There is further risk that operators and traders may, by virtue of their superior bargaining position, seek to shift responsibility and liability for non-compliance to their upstream producers and interim suppliers potentially through cascading contractual representations and warranties, and indemnities against losses arising from the enforcement actions of competent authorities. Operators and traders, and intermediate suppliers, may also, in seeking to minimise legal

risks, choose to terminate certain relationships with their upstream suppliers and producers that may have difficulty complying with onerous contractual obligations, instead of engaging constructively with them, resulting in worsening deforestation and its associated human rights risks, particularly if the termination drives them to export more of their commodities to markets with weaker sustainability standards.²⁷ Business relationships that are terminable at short notice also create uncertainty for suppliers and producers and are not conducive for the long term investments necessary for improving sustainability. Such unintended consequences run counter to the objectives of the EUDR.

23 - Sandra Cordon, “Palm Oil Stakeholders Say More Details Needed on Planned EUDR Regulation, Implications”, Forest News, 14 July 2023 <<https://forestsnews.cifor.org/83578/palm-oil-stakeholders-say-more-details-needed-on-planned-eudr-regulation-implications/>>; Robin Hicks, “Will EU Deforestation Law Save Trees or Marginalise Poor Palm Oil Farmers?”, Eco-Business, 27 June 2023 <<https://www.eco-business.com/news/will-eu-deforestation-law-save-trees-or-marginalise-poor-palm-oil-farmers/>>; and “Global Coffee Farmers Need Support Ahead of EUDR”, Wood Central, 4 July 2023 <<https://woodcentral.com.au/worldwide-impact-eu-passes-law-banning-deforestation-products/>>.

24 - Robin Hicks, *ibid*; and Lou Del Bello, “Will the EU's Deforestation Law Keep Forests Standing?”, China Dialogue, 13 July 2023 <<https://chinadialogue.net/en/nature/will-the-eus-deforestation-law-keep-forests-standing/>>.

25 - “EU's New Regulation on Deforestation-linked Products Head-scratcher for Vietnamese Producers”, Viet Nam News, 19 June 2023 <<https://vietnamnews.vn/economy/1549960/eu-s-new-regulation-on-deforestation-linked-products-head-scratcher-for-vietnamese-producers.html>>; Sarah Carter, et al, “3 Ways Global Forest Watch Can Support the EU Law on Deforestation-free Supply Chains”, Global Forest Watch, 23 June 2023 <<https://www.globalforestwatch.org/blog/commodities/satellite-data-eu-regulation-deforestation-free-supply-chains/>>; Robin Hicks, *ibid*; and Lou Del Bello, *ibid*.

26 - EUDR, Art 9(1).

27 - Puah Chiew Wei, et al, “The EU Deforestation Regulation: The Challenge and Importance of Inclusive Implementation in Palm Oil” Euractiv, 12 April 2023 <<https://www.euractiv.com/section/energy-environment/opinion/the-eu-deforestation-regulation-the-challenge-and-importance-of-inclusive-implementation-in-palm-oil/>>; and Roundtable Sustainable Palm Oil, “Sustainable Palm Oil Players Discuss Implementation of EU Deforestation Regulation” (15 June 2023) <<https://rspo.org/sustainable-palm-oil-players-discuss-implementation-of-eu-deforestation-regulation/>>.



ZERO-SUM CONTRACTING DISCOURAGES COOPERATION, TRUST, AND TRANSPARENCY, AND CAN EXACERBATE HUMAN RIGHTS RISKS

The risk of shifting responsibility and liability upstream to intermediate suppliers and producers is increased by the conditioning of transactional lawyers to represent their clients' interests by taking a “zero-sum contracting” approach.²⁸ This, as Sarah Dadush, a law professor and a member of the working group that drafted the *Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0* (“MCC”)²⁹, explains, is the consideration by parties of one another as adversaries, engaged in competition rather than a common endeavour, keeps the parties singularly focused on their own interests, to the detriment of the other party or stakeholders whose wellbeing is socially

connected to the contract. Common zero-sum contract drafting approaches that may be adopted by a buyer's lawyer include deeming ESG clauses in a supply contract as essential or conditions the breach of which give the ‘innocent’ party the unilateral right to suspend or terminate the supply contract; conferring audit rights against the buyer's direct supplier and its agents and subcontractors down the chain; using representations and warranties to impose obligations of outcomes (as opposed to obligations of means); and imposing on the supplier a duty to indemnify the buyer for all losses resulting from non-compliance of legislative requirements or enforcement action by regulators.

Zero-sum contracting discourages cooperation, trust, and transparency, and can exacerbate human rights risks by making bad practices in the supply chain harder to uncover.³⁰ In the face of a serious power disparity, zero-sum contracting also encourages unfair exploitative practices, without sufficient consideration for the social implications.³¹ Exploitative practices that can negatively impact social performance by putting pressure on suppliers to cut corners and squeeze their workers include imposing prices that are too low to cover socially responsible production; requiring too-short turnaround times for manufacturing and delivery; making last-minute changes to orders; making late payments; and exiting the contract without giving the supplier adequate notice, paying for outstanding invoices, or taking measures to mitigate the social impacts of termination.³²

28 - Sarah Dadush, “Prosocial Contracts: Making Relational Contracts More Relational” *Law and Contemporary Problems* (2022) 85: 153, 158 <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5052&context=lcp>>.


29 - Working Group to Draft Model Contract Clauses to Protect Human Rights in International Supply Chains, American Bar Association Section of Business Law, “Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0” (2021) <https://www.americanbar.org/content/dam/aba/administrative/human_rights/contractual-clauses-project/mccs-full-report.pdf>. Dadush led the Principled Purchasing Project to move the MCC towards a more balanced allocation of responsibility for the human rights performance of supply contracts between buyers and suppliers, and produced Schedule Q of the MCC

30 - Sarah Dadush, *supra* n 25, at 158-9.

31 - *Ibid*, at 159.

32 - *Ibid*, at 162.

From Shifting to Sharing Responsibility

 Dadush argues that zero-sum contracting may be unfit for the purpose of managing human rights risks if they exonerate the stronger party from responsibility for human harm even though they actively participate in the process that contributes to it, instead of sharing responsibility between the buyer and seller for addressing the root causes of negative social performance, when not all root causes lie with the suppliers.³³ When a company publicly commits to improving its social and environmental performance but undermines its own efforts to achieve positive social performance through its legal and operational practices, this creates a “coherence gap” and is potentially greenwashing for creating a false or misleading impression of its practices.³⁴

Companies should instead “seriously consider upgrading to prosocial contracts now, not only because it is the right thing to do, but also

because the legal, business, and reputational cases for doing so are becoming stronger by the day”.³⁵

Drafting Guidance for a Shared Responsibility Approach

 The MCC may provide some guidance for aligning supply contracts with a shared responsibility approach that can help parties to improve social performance. Together with their Schedule P (Building Blocks)³⁶ and Schedule Q Version 1.0 (Responsible Purchasing Code of Conduct),³⁷ the MCC commit:

- a** both the buyer and supplier to engage in human rights due diligence before and during the term of the contract, throughout their relationship and throughout their supply chains (instead of to buyer-only representations and warranties of compliance with applicable human rights standards);
- b** the buyer to engage in responsible purchasing practices; and

c the buyer and supplier to place victim centred human rights remediation ahead of traditional contract remedies.³⁸

The buyer particularly commits inter alia under the MCC to support a supplier’s compliance with Schedule P by:


- a** responsible purchasing practices – engaging in responsible purchasing practices in accordance with Schedule Q;
- b** reasonable assistance – employing commercially reasonable efforts to assist the supplier to comply with Schedule P, including supplier training, upgrading facilities, and strengthening management systems;
- c** pricing – collaborating with the supplier to agree on a contract price that accommodates costs associated with upholding responsible business conduct, including, minimum wage and health and safety costs;
- d** modifications – considering the potential

human rights impacts of any material modification and taking action to avoid or mitigate any adverse impacts;

e excused non-performance – excusing a breach of Schedule P by the supplier because of a material change to a condition affecting the supplier; and

f responsible exit – in any termination of contract by the buyer, considering the potential adverse human rights impacts and employing commercially reasonable efforts to avoid or mitigate them; and providing reasonable notice to the supplier of its intent to terminate the contract; and not prejudicing any rights or obligations accrued prior to the date of termination.³⁹

Legislative Support for a Shared Responsibility Approach

 Dadush’s arguments for a shared responsibility approach to supply chain due diligence appear to have gained legislative

momentum with the EU Commission’s proposal in February 2022, for a draft Corporate Sustainability Due Diligence Directive (“CS3D”) to mandate due diligence by in-scope entities on actual and potential human rights and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by established business relationships.⁴⁰

Dadush notes of the Commission’s proposed text that “the current language does (a) explicitly recognize the role of contracts in HRDD, both for purposes of preventing and remediating adverse impacts, and (b) appears to identify unfair, unreasonable, and discriminatory contract terms as inadequate for meeting the legal requirements laid out in Article 7 [on the prevention of potential adverse impacts] and Article 8 [on bringing actual adverse impacts to an end]”; and that the Commission’s guidance on model contractual clauses contemplated in Article 12 will establish that responsibility for upholding

human rights in supply chains is shared and that firms may not attempt to contractually offload that responsibility onto other, weaker actors down the chain.⁴¹

The EU Parliament subsequently agreed on amendments to the Commission’s proposed text of the CS3D in June 2023.⁴² If a compromise text can be approved by the EU Parliament and Council of EU Ministers, and published in the Official Journal, the CS3D will become law and enter into force 20 days thereafter, and EU Member States would be required to adopt and publish national acts incorporating provisions of the directive into their national legislation. While it is not clear what the final approved text of the CS3D will be, of particular interest for our purpose is the direction in which they are proposing to take Articles 7 and 8 of the Commission’s proposed text. On Article 7:

- a** Beyond the Commission’s proposal for in-scope entities to, where relevant, seek contractual assurances from a business

33 - Ibid, at 159 and 163.

34 - Ibid, at 165-6.

35 - Ibid, at 157. By “prosocial contracts”, Dadush means contracts that are concerned with improving the relationship between the parties, and with contract stakeholders.

36 - <https://www.americanbar.org/content/dam/aba/administrative/human_rights/contractual-clauses-project/schedulep.pdf>. Schedule P (P for Policy) purports to set out the human rights standards that the supplier must comply with and is outside the scope of the MCC.

37 - <https://www.americanbar.org/content/dam/aba/administrative/human_rights/contractual-clauses-project/scheduleq.pdf>. Schedule Q purports to set out the standards that the buyer must comply with.

38 - Sarah Dadush, supra n 25, at 172.

39 - MCC, cl 1.3.

40 - European Commission, “Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937” (“Commission Text”) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>>.

41- Sarah Dadush, supra n 25, at 170.

42 - European Parliament, “Amendments(1) adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937” (“Parliament Amendments”) <https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html>.

partner with whom it has a direct business relationship that it will ensure compliance with the company's code of conduct and, as necessary, a prevention action plan, including by seeking corresponding contractual assurances from its partners, the Parliament has proposed the additional requirement that partners with whom the company has a business relationship could be asked to establish *corresponding reasonable, non-discriminatory and fair contractual provisions* with their partners.⁴³

b Whereas the Commission proposed that contractual assurances be accompanied by the appropriate measures to verify compliance,⁴⁴ and for in-scope entities to bear the cost of independent third verification where such verification is sought in relation to SMEs, the Parliament added an option for SMEs to, at its request, cover the verification cost fully or partly on its own, and share the results of the verification with multiple parties. It also proposed that such contractual provisions be accompanied by measures to support due diligence. Additionally, the contractual provisions sought must not be such as

to result in the transfer of responsibility for carrying out due diligence and of the liability for failing to do so. In seeking such contractual provisions, in-scope entities must also assess whether the business partner can reasonably be expected to comply with those provisions.

c The Parliament removed the Commission's proposed prerequisite that in-scope entities, where relevant, provide targeted and proportionate support for an SME with which the company has an established business relationship, *only where compliance with the code of conduct or the prevention action plan would jeopardise the viability of the SME*.⁴⁵

d The Parliament also added a new measure for in-scope entities to consider, if relevant – “adapting business models and strategies, including purchasing practices, including those which contribute to living wages and incomes for their suppliers, in order to prevent potential adverse impacts, and developing and using purchase policies that do not encourage potential adverse impacts on human rights or the environment”.⁴⁶

e As regards potential adverse impacts that cannot be prevented or adequately mitigated, the Commission proposed that in-scope entities temporarily suspend commercial relations with the partner in question, while pursuing prevention and minimisation efforts, if there is reasonable expectation that these efforts will succeed in the short term, and terminate the business relationship with respect to the activities concerned if the potential adverse impact is severe.⁴⁷ The Parliament went beyond this to propose additionally that suspension or termination of business relationships take place in line with responsible disengagement, and only where there is no reasonable prospect of change. Prior to temporary suspension or termination, there should be an assessment of whether the adverse impacts of doing so would be greater than the adverse impact which is intended to be prevented or mitigated. Steps should be taken to prevent, mitigate, or end the impacts of suspension or termination, reasonable notice should be provided to the business partner before suspension or termination, and the decision to suspend/terminate should be kept under review.

Similar amendments to the Commission's proposed text for Article 8 were proposed by the Parliament.⁴⁸

The CS3D provisions on due diligence are potentially relevant to the due diligence obligations under the EUDR. Recital 56 of the EUDR clarifies that:

“Other Union legal acts that provide for due diligence requirements in the value chain with regard to adverse impacts on human rights or on the environment should apply in so far as there are no specific provisions with the same objective, nature and effect in this Regulation which can be adapted in the light of future amendments to Union legal

acts ... Where such other Union legal acts provide for more specific provisions or add requirements to the provisions laid down in this Regulation, such provisions should be applied in conjunction with this Regulation ...”.

Conclusion

 The EUDR imposes on importers and traders exacting requirements to ensure that relevant commodities and products are deforestation-free and comply with local human rights legislation before they are made available in the EU market. These requirements are expected

to create an onerous burden on small intermediate suppliers and producers, particularly if relatively well-resourced buyers and other downstream suppliers unfairly exploit their stronger bargaining position to shift responsibility and liability for compliance upstream. Such an approach is potentially counterproductive and may give rise to greenwashing risk. It may also run counter to emerging legislative requirements on supply chain due diligence, such as those found in the draft CS3D. Buyers should therefore be advised to consider adopting a shared responsibility approach to sustainable supply chain contracting, drawing reference from the MCC. ■

48 - See Parliament Amendments, Arts 8.3, 8.4, 8.5 and 8.6.

43 - Commission Text, Art 7.2(b).
44 - Ibid, Arts 7.4(1) and (2).
45 - Ibid, Art 7.2(d).
46 - Parliament Amendments, Art 7.2(ca).
47 - Commission Text, Art 7.5.



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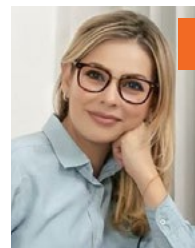
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Welcome to the GAIL Asia Pacific Regional Board's Newest Member



Takahisa Watanabe
Associate,
Nishimura & Asahi

Sneak
Previews

05

BLENDED FINANCE - GAIL GLOBAL PROJECT



MICHAEL RYLAND

Director, Centre for
Social Finance Law

GAIL has convened a working group of more than 40 lawyers across 15 jurisdictions for a global report on the legal frameworks for blended finance.

Why have we convened this group?

Convergence – the global network for blended finance – calculates that blended finance has mobilised approximately US\$198 billion in capital towards sustainable development in developing countries to date, sourced in approximately 6,800 financial commitments⁴⁹.

That's a good start but not nearly enough. The UN calculates that about US\$3.3-4.5 trillion per year needs to be mobilized to achieve the 2030 Agenda for

Sustainable Development. Back in 2014 the UN estimated that the financing gap to achieve the SDGs in developing countries was US\$2.5 – 3 trillion per year⁵⁰.

The job has got bigger since then. Financial markets are not meeting the need and are not structured to do so. Blended finance is essential.

Blended finance for developing countries is only part of the story. All countries are facing deep challenges around climate change, energy, migration, inequality, technological disruption and a plethora of other issues. All countries are required to make – and fund – social and economic transformations “of a scale and speed unexperienced in human history”.⁵¹

Financial markets are responding. Green bonds have become mainstream. Project and infrastructure finance has a long and deep history.

But many of the problems have resulted from market failure – from failures of the same financial markets that are now needed to fix them. Those markets cannot do this without blended finance. The

49 - <https://www.convergence.finance/blended-finance>

50 - <https://unsdg.un.org/2030-agenda/financing>, quoting UNCTAD World Investment Report, 2014

51 - <https://justtransitioninitiative.org/about-just-transitions/>

solutions that the financial markets support are directed towards investor returns, not solving the challenges. They will not build the communities and social cohesion needed to meet the challenges. They will not focus on or achieve a just transition.

Fortunately, blended finance structures are being developed that combine commercial and concessional capital to achieve those objectives.

That is what this GAIL global project is about – the legal structures and arrangements that support blended finance in all its forms, whether employed in achieving the SDGs in developing countries, or marshalling funds to address climate change, or engaging impact investment to address social issues, and irrespective of jurisdiction or sector.

What are we doing?

The working group has been set up to map out the main legal structures used for blended finance and to identify common legal and tax issues.

Our primary objective is to promote an effective, well-supported and streamlined legal framework for blended finance with consistent principles as far as possible across jurisdictions. This will not be achieved through

this project alone but it is the vision that guides the project.

We have been drawing on the experience of lawyers in the GAIL network to share case studies and examples, with a view to showcasing models that are replicable and scalable across jurisdictional contexts.

We have also been consulting with investors, financiers and the impact community to understand where the practical issues are and where they are looking for legal help.

What have we found so far?

Purpose is key. It is the fundamental guide for the legal design of each blended finance transaction.

Legal innovation is always required. By its nature blended finance is providing new solutions for social and environmental needs where the market fails. It raises governance, risk allocation, reporting and operational requirements that are different from financing that is purely commercial or purely concessional.

Encouragingly, much of the legal innovation involves re-working existing legal infrastructure and instruments to fit the blended finance project, and there are a wide range of legal structures and instruments

that are being used in blended finance and that are available to be used.

Many blended finance structures require multi-jurisdictional legal support and therefore multi-jurisdictional legal innovation.

Tax and regulatory requirements are of course key factors influencing the design of blended finance structures. This is an area that requires ongoing legal reform to enable blended finance – particularly impact finance – to become more widely used.

Scaling up is frequently sought by commercial capital. Legal arrangements are contributing in different ways to scaling up, including for example:

- new legal instruments and arrangements can help better manage risks, and legal advice can help overcome inflexibilities and misperceptions, that are otherwise barriers to blended finance;
- innovation in designing wholesale impact funds effectively scales up blended finance that is otherwise quite bespoke;
- In some contexts blended finance instruments can be designed so that they can be traded and work as a reference benchmark for other forms of capital raising.

Integrity is essential. The legal arrangements are seen to be – and are in fact – vital to the Impact integrity of each blended finance project.

Finally, there is only patchy awareness and experience in the market of the use of blended finance structures. The work that GAIL is doing, and in particular the case studies, are seen as a valuable way to spread knowledge of blended finance and its potential within and across jurisdictions.

What are the next steps?

The working group will deliver its report to the GAIL Annual Summit in April 2024.

We expect this will only be the first report. It will show the scope of the legal issues and the potential for Impact lawyers to contribute.

It will also show that there is a prodigious amount of further work to be done to help grow blended finance in all of its potential uses, to provide better legal

frameworks and to overcome legal barriers.

Any lawyers interested in joining the working group, particularly as it moves to its next phase after the GAIL Annual Summit 2024 should contact Michael Ryland and Keya Advani on events@gailnet.org.



GAIL

Global Alliance of Impact Lawyers

GAIL ANNUAL SUMMIT 2024

**BUILDING COMMUNITIES,
BUILDING A MOVEMENT**
22 - 23 APRIL 2024

KEYA ADVANI

Director of Programmes & Policy, GAIL



In a world grappling with urgent environmental and social challenges, the legal profession finds itself at the forefront of driving change. The upcoming GAIL Annual Summit

convenes legal practitioners from around the globe to explore the intersection of law, sustainability, and impact. As we stand on the cusp of a new economic era, characterized by

decarbonization and stakeholder-centric models, lawyers have a unique opportunity to shape legal frameworks that prioritize people and the planet.



Practical Seminar

Day 1 of the GAIL Annual Summit sets the stage for meaningful interactions and knowledge exchange among GAIL members. Exclusive to GAIL community members, this Practical Seminar offers a platform for legal practitioners to come together, collaborate, and expand their impact networks. Through a series of dynamic panels, workshops, and

structured networking sessions, attendees will gain insights into the latest developments in impact law. Whether you're a private practice lawyer, in-house counsel, or legal academic, this day is tailored to equip you with the tools and knowledge needed to maximize your impact in the evolving legal landscape.

Highlights of Day 1

- **Panel Discussions:** Engage with thought leaders and industry experts as they delve into cutting-edge topics such as how to build an impact law practice, legal innovations in sustainable finance mechanisms, and the correlations between impact law, ESG and pro bono work.
- **Workshops:** Participate in interactive workshops designed to deepen your understanding of key impact law disciplines and practical strategies for driving change.
- **Networking Opportunities:** Forge connections with like-minded professionals who share a commitment to leveraging the law for positive societal impact.



Legal Conference

On Day 2, the GAIL Annual Summit transitions into a Legal Conference, offering delegates a comprehensive exploration of impact law across diverse themes and disciplines. From corporate models to sustainable finance, attendees will have the opportunity to delve into the

intricacies of legal frameworks that underpin a sustainable and equitable future. Through multiple parallel sessions, participants can tailor their experience to align with their interests and expertise, gaining valuable insights from leading practitioners and scholars.

Highlights of Day 2

- **Deep-Dive Sessions:** Immerse yourself in discussions on climate change and the law, sustainable finance, philanthropy, and more, led by experts shaping the future of impact law.
- **Keynote Addresses:** Gain unique perspectives from prominent figures in the legal and impact law communities, as they share insights on the transformative role of lawyers in building a just and sustainable world.
- **Networking Opportunities:** Connect with fellow delegates during dedicated networking sessions, fostering collaborations and partnerships that drive meaningful change.

Join us in building communities and shaping a global movement that redefines the role of law in the 21st century.

JOIN GAIL

JOIN US TODAY



JOIN
US
TODAY

to be part of our journey to create a culture in which impact lawyers actively support, share and collaborate with each other to multiply the impact of our community.

Our mission is to grow the next generation of impact lawyers who will advocate for and champion a rapid and just transition towards a truly sustainable and inclusive economy.

Our work will not end until the just transition has been achieved – and all lawyers are impact lawyers. We cannot do this without you. We are building a community that supports lawyers to have a positive impact on people and planet through their work.

All members will be able to share knowledge and benefit from networking

opportunities. Through our programming and member platform, the community shares market intelligence and discusses the latest legal developments affecting businesses in the impact economy.

As a member, you will be connected to your peers across the globe. You will have the opportunity to attend regular global and regional events to hear about the innovative, interesting and impactful work lawyers like you are engaging in. At all levels, members are able to vote for, and be elected to, their regional board.

Thank you

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If you have enjoyed reading this magazine please visit the GAIL website for more news and insights, consider joining us for a future event or becoming a member at gailnet.org

If you would like to suggest content or contribute to a future issue of the Journal, please get in touch with us [here](#).



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