

The
Blended
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Group



CHASING THE DRAGON

The Rise of the ESG Law Firm

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The Blended Capital Group

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At the beginning of 2021 the IFRS foundation announced its intent to establish a sustainability standards board which would sit alongside the IASB under the oversight of the IFRS Board of Trustees. It hopes to do so at the COP meeting in Glasgow in November this year.

Ocean TOMO at the end of last year issued its analysis of companies listed on the S&P 500 exchange which showed that 90% of the make up of the market capitalisation of those companies consisted of ESG issues. Further, in the capital markets of the world ESG funds have outpaced conventional financial funds. The pandemic has highlighted the need for boards of companies to focus on how a company makes its money and the impacts which its activities in producing its product and its products itself have on the three critical dimensions for sustainable development namely the economy, society and the environment.

But sustainability does not only have that impact because the three critical dimensions themselves have a critical impact on a company's financial condition, its balance sheet, the operating performance, its income statement and cash flow as well as its risk profile reflected in its cost of capital and its market capitalisation. Consequently, it can be seen that professional advisers to companies such as lawyers need to become fully au fait with enterprise value creation rather than profit which has been subsidised by society and the environment. The test for success has moved away from increased profit, increased dividends and increased share price to positive impacts not only economically but socially and environmentally as well. The measure of success will be the extent to which a company has added value to society.

ESG issues have also been underscored since 2015 by the issue of the SDG's with companies endeavouring to embed into their business models and strategy the SDG's pertinent to the business of the company. Asset owners and managers are doing an ESG audit as well as a financial one on a company before investing their beneficiaries' monies in the securities of companies.

It is timeous that lawyers focus on the impacts which the economy, society and the environment have on a company because clients will need professional advice in changing their mindsets from focusing on increasing the wealth of shareholders to taking account of the needs, interest, expectations and concerns of all a company's stakeholders but making decisions in the long-term best interests of the health of the incapacitated and artificial person to whom directors owe their duties of good faith, care, skill and diligence, namely the company.

[IFRS: International Financial Reporting Standards](#)

[IASB: International Accounting Standards Board](#)

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

CHASING THE DRAGON

The Rise of the ESG Law Firm

In mid-2021 The Blended Capital Group's ESG Law Advisory Team will publish a report exploring ESG developments across the global legal community. This 16-page briefing flags key trends and findings to date based on a survey of 55 law firms worldwide. The survey will provide the foundation for the report later this year to be launched at an [UNCTAD World Investment Forum](#) online event. In summary: ESG has come roaring into the legal world, accelerating since 2018, and many firms are racing to polish their credentials and to position for new ESG business.

There is a tectonic shift taking place across the global legal sector forced by a relentless rise of environmental, social and governance (ESG) issues. The dramatic increase in the demands for law firms serving corporate General Counsel (GC), the accelerating ESG needs of the investment and finance community worldwide, and evolving ESG requirements of regulatory agencies, sees law firms scrambling to polish their ESG credentials.

Prospective clients, notably multinationals, have already started to select law firms for the depth and breadth of their ESG performance and capabilities, both internally and externally. The strong signal given in an open letter in January 2021 by The Coca-Cola Company General Counsel, Bradley Gayton, noting that “diversity efforts in law” are not working, is a harbinger of demands to come for the broader legal community, both in terms of transforming internal culture and serving evolving client ESG needs.

As the “ESG Zeitgeist” drives changes for capital market regulators and exchanges, and as Covid-19 profoundly accelerates societal expectations for business to “walk the talk” on ESG, sustainability, and stewardship, the race is on to become one of the ESG Law firms of choice. In an era increasingly

A long history: ESG Law at TBCG

Professor Paul Watchman, Vanessa Wood, and Paul Clements-Hunt have worked on landmark ESG law projects since 2005. In 2020 Watchman, Wood and Clements-Hunt created the Legal Advisory Team for The Blended Capital Group (TBCG) supported by TBCG Partners Michael Marais (South Africa) and Gordon Noble (Australia). TBCG Senior Advisor for Asia-Pacific Ingo Kunic (Australia) and Project Advisor Carla Parsons, now an Associate, Mills & Reeve LLP (UK), have also supported TBCG's ESG Law capability for our first major project. The project is a global survey of 55 law firms to explore the state of integrated ESG legal offerings across the industry to be formally launched in May 2021 at a United Nations World Investment Forum event. This briefing is to flag early findings from the full survey report including critical signals and signposts for the direction of travel of ESG in the global legal community.

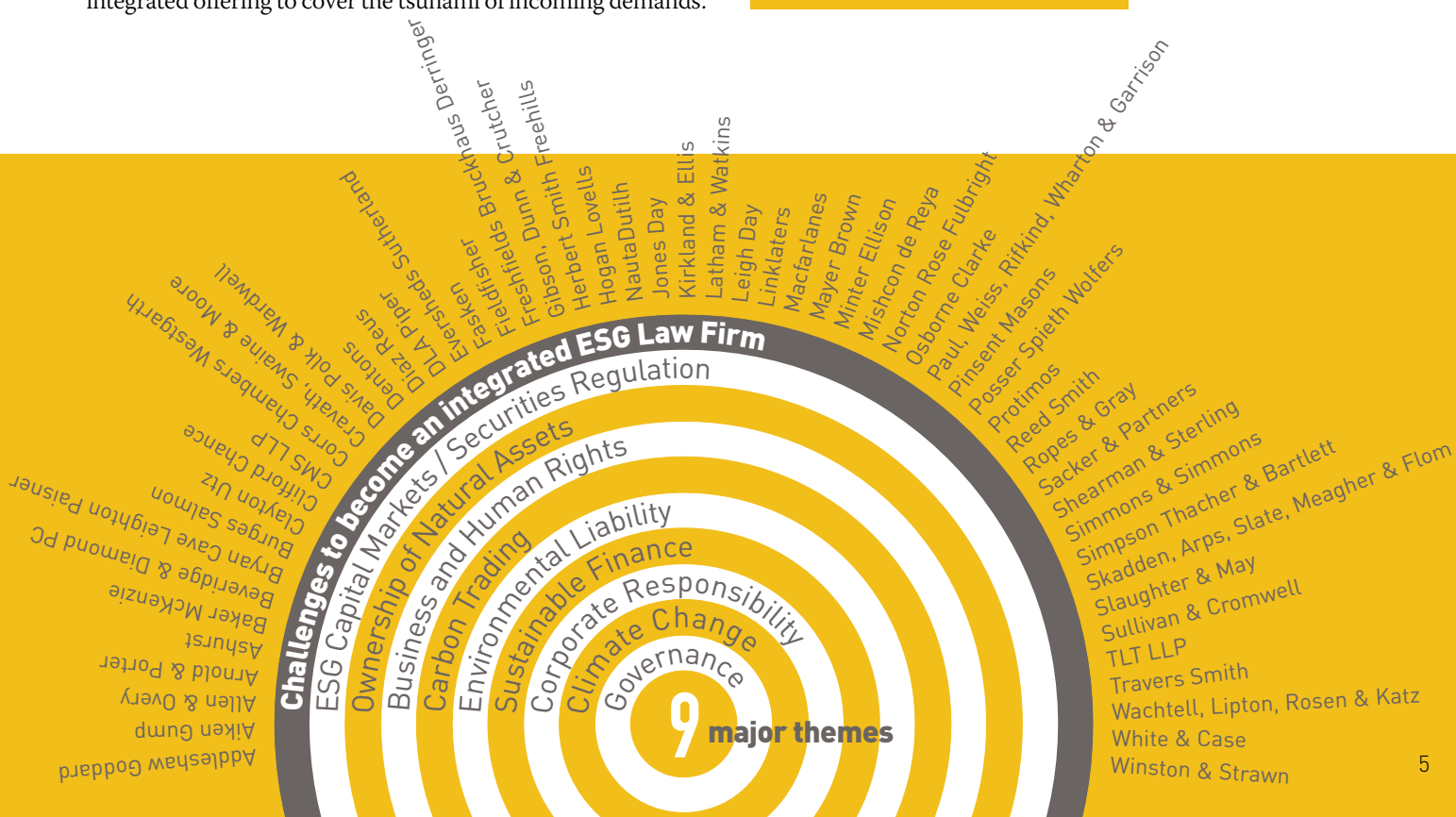
defined by climate change, inequality and geo-political volatility, and when the [United Nations Sustainable Development Goals \(UN SDGs\)](#) have caught the imagination of major businesses and investors, the new business prize for deep capability ESG law firms will be great.

In many ways the legal world is late to the game. With a few exceptions, we see 2018 as a tipping point for the legal sector. Time is precious for those firms needing to play catch-up on client ESG demands driven by converging forces including, *inter alia*, a huge flow of investment funds from 2019 accelerating in 2020-21 into a broad range of ESG-aligned public and private offerings, a massive uptick in policy and regulatory ESG demands, and a clear increase in corporate board and, therefore, GC attention to ESG disciplines.

No law firm seems to have achieved, as yet, a fully integrated service ESG offering across the nine major themes we have defined as covering the broad and sometimes complex ESG “piste”. However, a number of Magic Circle, White Shoe, international and ESG specialist firms are closing in on an integrated offering to cover the tsunami of incoming demands.

Our global survey and report, to be published in late Q2/ 2021, provide informed observations on key developments within ESG Law rather than seeking to rank and rate firms across what remains a complex and evolving ESG landscape. Standardization of ESG metrics, reporting and accounting across multiple jurisdictions, further complicated by legacy policy and regulations not aligned to ESG, has a long way to go despite recent efforts by standard setting bodies to commence multi-jurisdiction and multi-standard coordination. The road to standardization will be long and complicated.

“Time is precious for firms needing to play catch-up on client ESG demands”



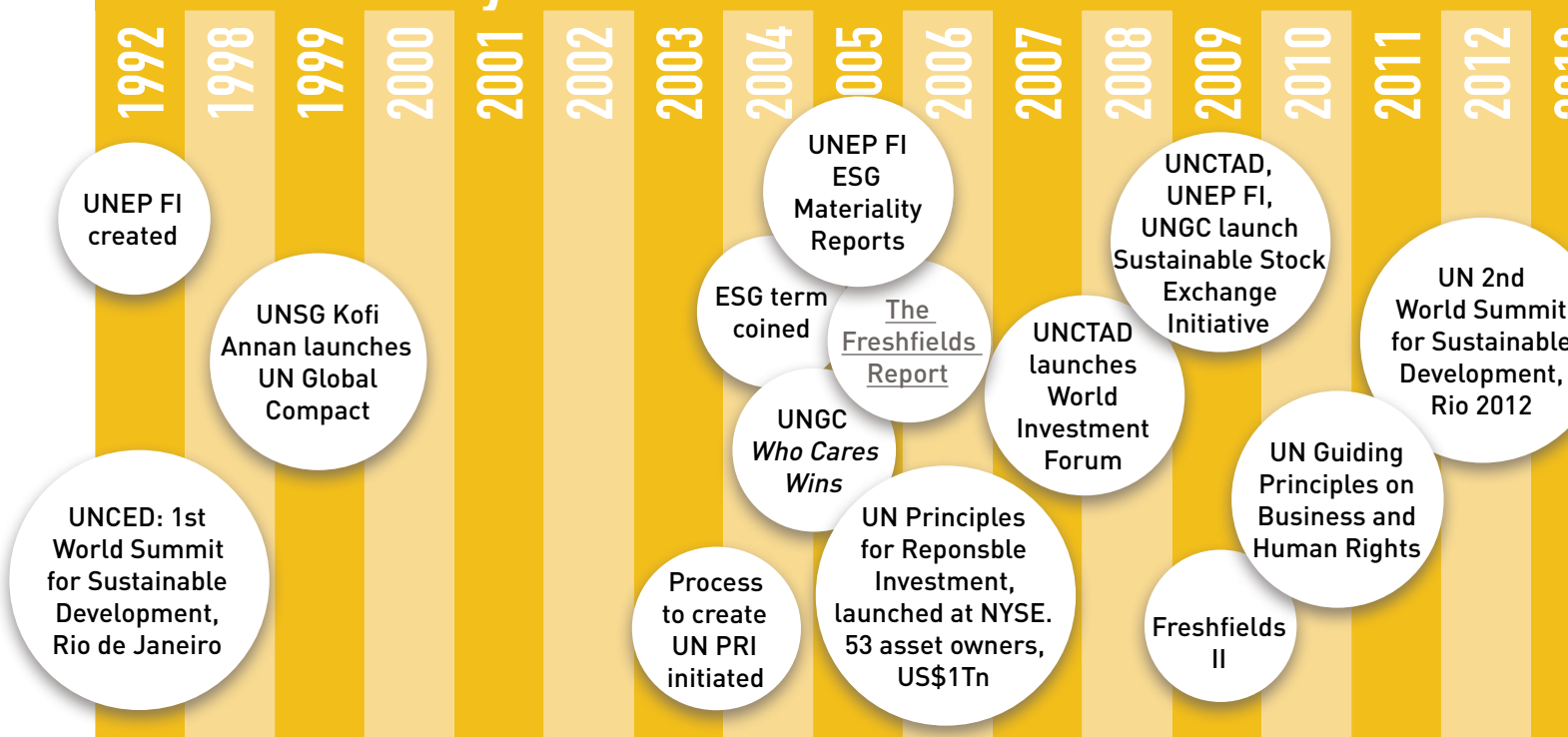
The Rise of ESG Law: Study methodology

Our exploration, *The Rise of ESG Law*, is an initial study. As we embarked on identifying ESG law firms we became aware of a number of law firms which had a decent claim for ESG capabilities, and a number which prior to beginning of our research we were not aware of having any material ESG capabilities. Equally difficult has been an unfortunate but uplifting discovery that carrying out this study was like riding the tiger or chasing the dragon. Law firms appear to be using the Coronavirus 19 lockdowns to produce a fast-travelling wave of ESG materials. As noted, it has been challenging to dismount from active research with any sense of confidence as we became aware of more and more law firms which had not previously appeared on our radar screen suddenly moving into the ESG space. We tried to stick to a general 31 October 2020 deadline. However, exceptions were made for important ESG law firm developments, notably with respect to the distinct uptick during 2020 in diversity and human rights issues and the resulting law firm responses later in the year.

The survey is based on public sources generally available in print form or digitally from the internet. The websites of law firms and press reports, professional journals, legal directories, client-briefings, blogs, webinars and other materials aimed at clients, corporate responsibility reports, and marketing materials and other materials produced by law firms on ESG and related matters have also been explored. In addition, we examined the biographical sketches of lawyers who held themselves out to have expertise on ESG matters, such as Business & Human Rights or the Circular Economy. It was clear from the beginning that law firms differed markedly in how they put together short biographies for their lawyers. It was evident that there was an element of catch-up going on. It can, for example, be challenging to present a law firm which until relatively recently were identified as having used their legal skills and expertise defending tobacco companies as business and human rights law firm that offers legal services advising companies on modern slavery and child labour.

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

1992–2021: Key milestones in the rise of ESG



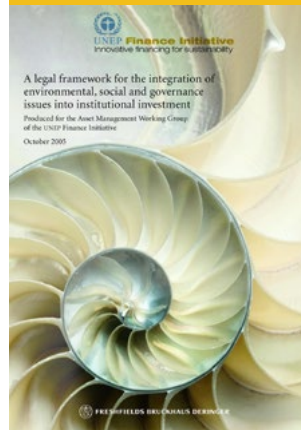
ESG archeology

From an initial desktop study, we were able to identify a number of firms across five continents, ranging from Wall Street leviathans to small boutique law firms and NGO/law firm hybrids which appeared to be promoting their services to provide advice to clients on ESG matters. Most of the firms are global although their fulcrum for ESG activities appears to be where the principal ESG leaders are located. Inevitably the focus of law firms has been on the markets of New York and London because that is where financial system participants congregate. ESG teams are to be found in these markets with firms which are openly committed to rolling out ESG through their law firms globally.

We expect that, beyond our desk-based research which was focused on ESG practice development in law firms up to October 2020, we will see further innovation in and evolution of ESG Law practices. For example, in relation to advising clients on Diversity and Inclusion and the need for Boards of Directors to be trained, supported and advised on the ESG challenges facing their companies.

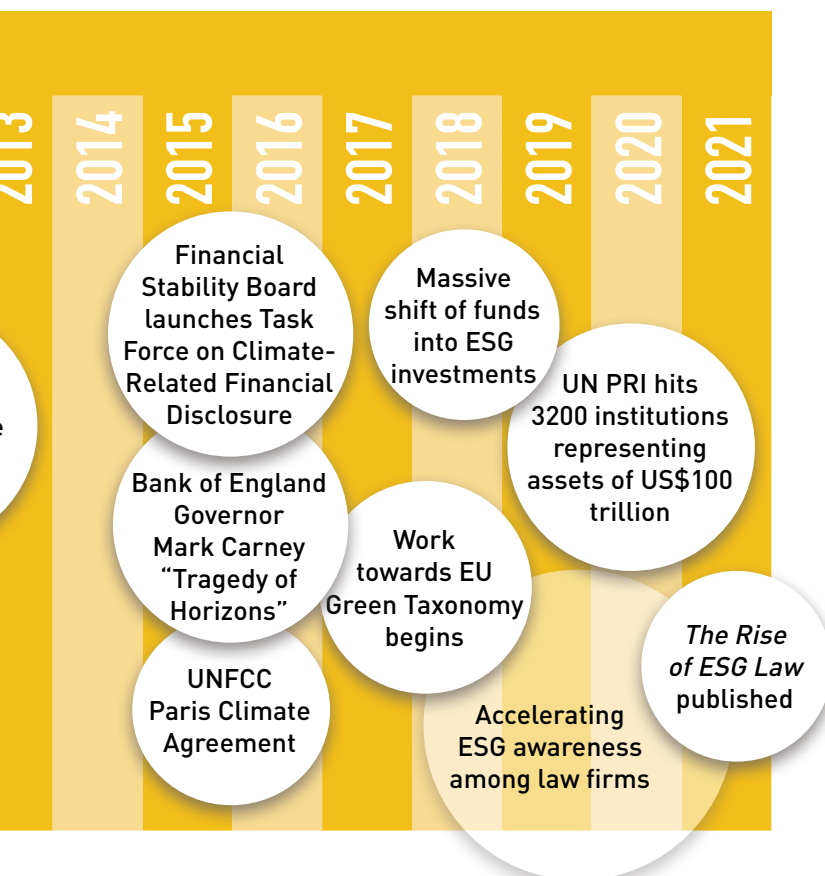
Professor Watchman, as a Partner and leading ESG authority at Freshfields Bruckhaus Deringer, was asked early in 2005 by Paul Clements-Hunt, in his role as a United Nations Official heading the UNEP Finance Initiative partnership, to explore the fiduciary implications of ESG across the nine major capital market jurisdictions. The resulting 150-page legal interpretation, commonly known as [The Freshfields Report](#), provided the legal foundation for the

UN to push ahead with the launch of the UN Principles for Responsible Investment (PRI) in April 2006. The PRI, launched by the late UN Secretary General Kofi Annan during an iconic Opening Bell Ceremony at the



New York Stock Exchange, is backed today by more than 3,200 investment institutions representing more than US\$100 trillion in assets.

At the same time in 2005, Wood conducted a benchmarking report for Business in the Community, examining the top 50 UK law firms corporate responsibility (CR) practices. That report provided the early foundation for the international exploration of legal companies underway at TBCG now. Wood is an experienced and knowledgeable corporate responsibility consultant whose wide-ranging environmental and social experience sees her advising and representing major accountancy and law firms, FTSE100 companies, leading charity and interest groups.



The Bonfire of the Vanities: ESG ignites boards, exchanges

Since 2018 there has been a rapidly growing demand for law firms from Chief Executive Officers and General Counsel for ESG advice covering both ESG risks and evolving ESG-related market opportunities. Law firms are also looking at the evolving internal benefits from differentiated ESG leadership with recruitment and retention, reducing the firm's own carbon footprint and gender equality topping their to-do lists.

Covid-19 has accelerated all of these external and internal trends. The increased demand has been prompted by many powerful factors on both the risk and opportunity side of the ESG equation. Together these drivers represent both a systemic threat to the "Business as Usual" maxim adopted by businesses and financial institutions and a once in a generation opportunity stemming from a fundamental structural transformation towards sustainability. On the opportunity side of the coin, calls for an accelerating transition to a more equitable global

Risks

1. Tsunami of ESG regulatory initiatives: legislation, directives, guidance, standards, scores, indices and disclosure and accountability requirements.
2. Coronavirus pandemic which has focused attention on ESG issues, particularly on the health safety of employees and workers in supply chains.
3. Climate change and the impact of the 2015 Paris Agreement and carbon zero targets driving the growth in climate change and ESG litigation.
4. Record number of ESG and climate change shareholder resolutions supported by important asset owners and asset managers, such as Aviva, BlackRock, and Vanguard, and organised by coalitions of NGOs, shareholder groups, boutique law firms which, if anything, has increased during the pandemic.
5. Modern slavery as well as the shift in human rights law to include complicity and the resulting exposure for companies which rely in their supply chain on the use of child labour and forced labour.
6. Demand for sexual and racial equality, social justice as well as diversity and inclusion.
7. Massive divestment of funds in ESG-unfriendly businesses and reinvestment in ESG-compatible businesses.
8. Changes in laws relating to directors' duties, pension fund and financial investment and targeting responsible officers within companies with criminal and civil liabilities for corporate wrong-doing.
9. Reputational damage done to companies which ignore ESG considerations often resulting in ESG scandals and controversies.
10. Mulcting companies and banks with fines, penalties, settlements and conduct costs running into hundreds of billions if not trillions of dollars and pounds.
11. Re-purposing of and cultural changes within law firms driven by the values of lawyers of the new millennium and the need to attract and retain the brightest and best from the shallow diversity pools. ESG is an important magnet for the recruitment and retention of lawyers and has been explicitly acknowledged by law firms.

and entrepreneurs

economy, a low carbon future, a vocal generational shift, upswell in calls for cleaner-greener infrastructure, and protection of natural capital, see an increasing need for ESG legal services. Those companies positioning for a shift to a sustainable future whether in agriculture, automotive, consumer products, construction, energy, investment, finance or many other sectors, will need to have the best ESG lawyers on board if they are to be successful in transitioning to a sustainable future.

The aforementioned drivers also represent a moral and legal pandemic, or Bonfire of the Vanities, which struck long before the coronavirus pandemic. Amongst those factors are a series of risk and opportunity developments with other ESG-related drivers emerging all the time. We capture the key risk and opportunity drivers here although the lists below are not exhaustive.

Opportunities

1. Legal services to enable companies and investors to understand the opportunities created by the multi-lateral ESG/SDG architecture, the Paris Climate Agreement, the EU Green taxonomy, and a broad proliferation of sustainability driven policy changes worldwide.
2. Representation of communities in class action suits where multinational corporations, including their subsidiaries, are shown to have acted outside of evolving ESG norms and, notably where access to justice for local communities is not possible.
3. Industrial diseases and workers' health in frontier and emerging economies where international value and supply chains of multinationals are exposed.
4. Corporate involvement and/or association in human trafficking and modern slavery cases.
5. Corporate association with non-state security actors and human-rights violations.
6. M&A and for green energy, sustainable infrastructure, and [SDG](#)-aligned technology companies across the digital, artificial intelligence, machine learning, robotics, and e-mobility domains.
7. Legal work around the rapidly-increasing climate, green and social bond products for the finance and investment industries.
8. Standardization, systemization, scaling and securitization of a whole new range of sustainable and ESG-aligned investment products across public and private equity, fixed income, real estate and alternative asset classes.
9. Legal services on the status, ownership and transference of natural capital as well as the emergence of new contentious areas around Ocean pollution/plastics and a growing global suite of protected natural areas (Arctic/Antarctica, Amazon, the world's great forests etc).
10. Legal services in light of the emergence of off-grid and distributed infrastructure as a distinct sub-asset class to serve the basic services needs of the billions living in last-mile communities.
11. Engage with governments to manage/mitigate liability associated with political decision-making and policies at local, regional and state levels:
 - climate change-related impacts: flooding, biodiversity loss, rising sea levels, loss of industry etc
 - pandemic-related impacts: viral introduction, loss of business, disruption to economic performance
 - decisions regarding organisational employment practice, workplace equality, bullying, environmental health, etc
 - creating or exacerbating conditions that risk (not result in) compromised human and planetary health.

The two headed coin: Bullying and lawyers

During the 1990s and the first decade of the 21st century, the physical, emotional and mental well-being of lawyers was not a top priority for law firms. Bullying and harassment of junior lawyers, if not common, was far from isolated. Partners who had suffered or been abused when they were junior lawyers justified their conduct towards legal associates and support staff on their own past experiences of cruelty, bullying and harassment. Ill-treatment seemed to have become an undesirable norm in pockets of the legal community. It was hoped that incidents of bullying and sexual harassment in law firms were matters in the past. However, with the intense spotlight thrown on sexual harassment and gender abuse by the #MeToo movement, the message within law firms and Barristers' Chambers for the need for change seems to be finally getting through.

In part, this acceptance of the need for law firms to stamp out inappropriate conduct has been driven by a number of high-profile cases reported in the media of sexual harassment and abuse of power by partners in leading international law firms which should have a zero tolerance towards such conduct. Also, a worrying series of reports that bullying and sexual harassment appears to be endemic in the legal profession globally have deepened an awareness of the need for profound systemic change at the highest levels within firms. In May 2019 the IBA (International Bar Association) Report, *US Too? Bullying and Sexual Harassment in the Legal Profession*, a survey of 7,000 workers in legal workplaces in 135 countries (in addition to law firms the survey included barristers' chambers, in-house legal departments, government lawyers and the judiciary) stated that 50% of female respondents and over 30% of male respondents had been subjected to bullying and that 1 in 3 female respondents and 1 in 14 male respondents had been sexually harassed.

The reports in the United Kingdom and the United States make for particularly unpalatable reading for those senior lawyers in firms advocating for change in culture and inclusivity. In the UK bullying was reported by 62% of female respondents and 41% of male respondents. The proportion was in line with another eight legal jurisdictions analysed but the overwhelming number of sexual harassment cases in the UK (74%) were not reported. The United States showed a similar pattern on bullying as the UK but whereas sexual harassment was experienced by 38% of women respondents in the UK in the USA 54% of female respondents reporting stated that they had experienced sexual harassment, fully 16 percentage points above the UK.

LawCare reported in the same year that bullying complaints from lawyers in England and Wales to the charity had increased by 70%. In January 2020 Legal Cheek reported that in 5 years from 2014-15 to 2018-2019 complaints of sexual harassment to the Solicitors Regulation Authority more than doubled from 25 to 63.

“Bullying and sexual harassment appears to be endemic in the legal profession globally”

ESG: A talent magnet like no other

ESG Law is “hot”, according to *Legal Cheek*. Seven hundred would-be lawyers tuned into a Linklaters ESG recruitment webinar, and the Wilkins brothers Freshfields ESG-themed diversity and inclusion webinar attracted thousands of participants worldwide.

ESG is also an outstandingly effective means of recruitment beyond law firms. Alan Jope, the Chief Executive Officer of Unilever, recently described ESG in a [Tortoise Media Responsible Business Summit Webinar](#) as a “talent magnet”.

In two recent, illustrative, high profile moves for ESG, Linklaters Senior Partner Charlie Jacobs, one of the main forces propelling ESG as a major practice area within the firm, and former UK Labour Shadow Cabinet member Chuka Ummuna, who had moved post-politics to communications company Edelman, have both moved to the US bank J.P. Morgan. The former to advise on leadership, and the latter to play a senior role in its ESG Advisory Business.

A number of law firms confirmed that amongst millennials ESG is a hot button. Reasons given include that, unlike the baby-boomers, millennials were not in the legal profession only or mainly for financial rewards. Attracting the best and brightest from a diverse mix of university students is highly competitive. It would appear from discussions with law firms that ESG reaches into the depths of their target recruitment pools in ways which securitisation, collateralized debt obligations and M&A no longer do.

It is not, however, only a matter of recruitment but retention of lawyers and other staff. As business has re-purposed itself, so have law firms. Compare the thin corporate responsibility reports of law firms of a decade ago with those produced by some of the major law firms today. In terms of scope, rigour, length and subject matter they have been transformed. No longer do they focus weakly on virtue signalling (tick) or recycling spent ink cartridges (tick) but are strong on areas such as diversity, race, equal opportunity and social justice.

The flip side of recruitment and retention is resignation. A number of lawyers resigned from their law firms because of what they saw as an inherent conflict between the values their law firms espoused and the firm’s legal practice. In common parlance, because their law firms did not “walk the walk” but merely “talked the talk.” A firm’s commitment to climate change and carbon zero while advising energy companies on the extraction of fossil fuels or the funding or development of coal-fired power stations in Asia or Europe is an obvious example of such a conflict. Other conflicts which were highlighted to us include representing mineral companies which have destroyed sacred and irreplaceable heritage assets, the widescale devastation of natural assets and the endangerment of rare species to plant cocoa or soya or to produce palm oil, and representing companies with a long list of human rights abuses or complicity in human rights abuses.

“ESG reaches into the depths of target recruitment pools, attracting the best and brightest”

Tectonic shifts forge integration “inside and out”

Integrated ESG legal practices are very much in their infancy. However, some law firms, spurred to varying degrees by the Coronavirus pandemic, the epochal shift of businesses from an exclusively shareholder model to an inclusive stakeholder and systems value model, the exponential growth of ESG and changes in the values of their own lawyers and staff, are propelling fast progress.

Few of these law firms have an ESG lineage stretching back beyond 2018. There are even fewer lawyers who can justifiably claim that they had an integrated “ESG” practice which predated 2018, although some do with greater or lesser credibility. However, our survey results across more than 50 firms indicate that these practices were “E”, “S” or “G”, not integrated ESG practices and these practitioners, with notable exceptions, if truth be told, tended to be quarantined from their self-assessed more thrusting colleagues working for Private Equity, M&A and Securitisation. Isolated in silos by their law firms they often appeared to be decorative additions to the more serious legal work of M&A transactions, defense litigation or the securitization of sub-prime mortgages. It was necessary to have lawyers who could advise on environmental liabilities as it was necessary to have tax lawyers, pension lawyers and employment lawyers but they were peripheral to mainstream legal practice before the financial crash and the pandemic. In theatrical metrics their role was not that of a leading male character but, no matter how talented or gifted a lawyer, was strictly as spear-carrier.

The most surprising finding of this study is how many law firms have become infected by the ESG virus. New areas of legal practice seldom emerge, as most areas on which law firms give advice are traditionally defined around property law, corporate and commercial law, banking law, financial law, family law, criminal law, civil litigation, arbitration, projects, taxation and exotica related to those areas such as intellectual property, competition and securitization law.

Integrated ESG partly builds on existing practice areas — environment, corporate governance and business and human rights — but other aspects have been added or amplified such as diversity and race based on existing employment law offerings. Climate change is more difficult to pigeon-hole but offers opportunities for lawyers versed in bonds and class-action litigation, such as former tobacco defence lawyers. This has opened up not only new or re-moulded areas of legal practice but also a very significant fee income stream from advice on green buildings to corporate governance and pension trustee and D&O (directors’ and officers’) liability.

For many partners in law firms a consequence of advising clients about ESG appears to have led them to examine the challenge of ESG within their own firms. This is reflected in the many cultural changes, from greater institutionalization of pro bono work to setting up internal structures to deal with issues arising from social mobility and the need for diversity and inclusion. There are cases where the rhetoric does not match the reality but overall hard and circumstantial evidence point to ESG as an aspirational and inspirational model for law firms throughout the world.

“The most surprising finding is how many law firms have been infected by the ESG virus”

Seven Pillars: Refocusing ESG Lawsuits

In recent years there has been several shifts in not only toxic torts law and practice but also in relation to human rights and business and corporate governance which are of importance. We believe there are seven pillars which are refocusing ESG lawsuits:

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

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

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

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

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

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

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

Regulation by ESG litigation and class action

Class actions, as shown by the multiple cases in the USA on toxic waste and water contamination dating back to the 1960s, has long been a feature of the legal landscape. Now, we are seeing ESG-related cases spring up in multiple jurisdictions and often, although not always, with cases brought before courts in second countries. Class actions are increasingly bringing litigation into the general ESG space as opposed to being restricted to toxic tort and water contamination. Prospective liability and legal exposure of multinational companies embedded in a range of value and supply chains, whether chocolate, fashion, mining, palm oil, and others, is growing around the world. In February 2021, the German Government reached agreement on prospective legislation that would oblige their larger companies to undertake due diligence with respect to environmental and human rights issues in global supply chains.

Illustrative snapshot examples of evolving litigation and class action around the world, *inter alia*, include:

Australia: the action brought by an Australian litigant, a 24-year-old pension fund member, Mark McVeigh, in a 2018 action against his pension fund, the \$41 billion Retail Employees Superannuation Trust. The pension fund settlement involved committing itself to a net zero carbon emissions portfolio by 2050 undertaking and to police their asset-managers approach to climate change. Michael Gerrard, the Professor of Environmental, Climate Change and Energy Law at Columbia University predicted that if the McVeigh litigation in Australia was successful it may spawn more copycat litigation around the globe.

Brazil/UK: In November 2020, the High Court in England ruled against a £5bn damages class action by over 200,000 Brazilians against mining company BHP. The case arose from the failure of the Samarco Fundao tailing dam part of a BHP/Vale 2015 joint venture. The dam failure caused the deaths of 19 people. The ruling was on the grounds that it was an abuse of process. The lawyers for the plaintiffs, PGMBM, an international class action law firm have indicated that they will appeal the High Court decision.

Denmark/USA: Danish pharmaceutical company Novo Nordisk resolved claims that the company's US salesforce misled or failed to disclose information with respect to a United States Food and Drug Administration (FDA) warnings about the cancer risks of its diabetes drug, Victoza.

Ivory Coast/Netherlands/UK:

In one of the UK's largest ever class actions, Trafigura, a multinational oil trading company, in 2006 transported hazardous waste from The Netherlands to Ivory Coast. The waste was dumped in 12 different sites and, subsequently, local communities began to "suffer with symptoms ranging from headaches and skin rashes to severe respiratory problems." Up to 100,000 people sought medical assistance. UK law firm Leigh Day represented 30,000 people whose claims were settled out of court in September 2009. Commenting on the Supreme Court decision *Martyn Day* emphasised that the decision was important because it "will send a strong message to other large multinationals that their Corporate and Social Responsibility (CSR) policies should not just be seen as a polish for their reputation but as important commitments that they must put into action."

Zambia/UK: In April 2019 the UK Supreme Court allowed 1,826 Zambian villagers to sue the mineral company Vedanta Resources Plc, and its Zambian subsidiary, Konkola Copper Mines Plc, in the UK courts because access to justice was absent in Zambia. A key issue for the Court now is to examine whether a parent company can be liable for the operations of its subsidiary.

UK: In an explicit recognition of the role of litigation in regulating the conduct of companies, a case was brought for 95,000 British drivers as part of the Dieselgate Scandal against Volkswagen. This claim is being funded by Therium Capital Management and it is estimated that disclosure alone could cost £100m.

Australia: The out-going Global CEO of mining giant Rio Tinto, Jacques Jean-Sébastien, speaking about his company's destruction of a 46,000 year-old Sacred Aboriginal cave, told a Government inquiry: "I can only restate how sorry we are. It should have never happened." The site was destroyed in an effort to expand the Brockman 4 iron ore mine to increase the possible take from the mine in the Pilbara Region of Western Australia by US\$ 134 million. The cave in Juukan Gorge was one of the only inland sites in Australia that showed signs of human occupation throughout the last Ice Age. In September 2020, a group of Australia's major asset owners, including AustralianSuper, UniSuper, HESTA and the country's Future Fund criticised Rio Tinto for its "catastrophic actions."

I love chocolate because...?

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

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

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

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

Shakespeare and ESG

The roles of CEO, GC and ESG leaders and law firms in creating demand and supply for integrated ESG legal services are important to an understanding of the rise of integrated ESG practices in law firms. However, there are other important drivers which must be noted. For reasons of space these are not dealt with fully here but deserve to be mentioned for the sake of completeness.

The coronavirus pandemic has focused the minds of lawyers, fund managers, CEO, GC, Board Members and financial investors and intermediaries on ESG values and the purpose of corporations in ways which had not happened before. Allied to these concerns are a ubiquitous acceptance of the deleterious impacts of global warming and the destruction of oceans, biodiversity and natural assets. Concerns which have been amplified by the rapid increase in ESG regulations and the actions against ExxonMobil and Chevron for misleading investors about the risk of climate change and against many European governments for their failure to implement the Paris Agreement, as with, as an example, the Third Heathrow Airport Runway case, for which the UK Supreme Court in early 2021 made a decision in favour of the airport owners.

Together these many factors have all contributed to a major shift in the tectonic plates of the ESG regulatory landscape. A shift which has required pension funds, financial institutions and companies to meet more demanding standards of transparency, disclosure and accountability in respect of ESG matters. Conduct costs (excluding legal fees) have also focused minds as banks and companies have disgorged billions to regulators in fines, penalties, damages and compensation.

Forty years after Martin Lipton railed against Friedman and his acolytes and fifteen years after the Freshfields Report and the coining of the term, ESG is taking central stage in business, financial, legal and governmental risk assessment and decision-making, as well as deepening broad business understanding of new sustainability-aligned market opportunities.

It may be that Dick the Butcher, an evil tortured thug in Shakespeare's play *Henry VI* who uttered one of the Bard's most controversial quotes, was far too hasty in urging his companions "The first thing we do, let's kill all the lawyers". However, there is an elephant in the room which law firms can no longer ignore.

It is, to put simply, how can a law firm promote sustainability and ESG as important factors in business and financial decision-making while defending their own and the unsustainable businesses of their clients?

Climate change provides a stark, but not the only, example of this dilemma. As a law firm is it possible to support the Paris Agreement if your clients are carbon majors who

are significantly responsible for global warming or diesel-emitting car manufacturers which have accepted legal liability for using software to lower diesel emissions during testing? Can it really be said that you and your law firm are living up to publicly-proclaimed ESG and sustainability values?

Business and human rights is another area where there are contradictions and challenges for law firms. Consider the supply chain, the value chain and human rights due diligence and the defence of chocolate manufactures against the abomination which is child labour and forced labour. Equally, fast fashion is based on a financial model which fundamentally depends on sweat shops and cheap labour. During the coronavirus pandemic ESG issues have come to the fore and the importance of pharmaceutical companies in striving to find effective vaccines is appreciated: does that mean that their corporate governance sins are forgiven or forgotten?

These are difficult questions for businesses, law firms and society generally. There is a very long way to go but our study shows that in part a large number of law firms have begun the long journey towards sustainability and responsibility in their client work and in their own offices. Not only are law firms practising ESG law throughout their legal practices but the practise of advising on ESG issues has resulted in what is hoped is a seismic shift in the culture of law firms throughout the globe. The evidence so far, however, is mixed.

"The first thing we do, let's kill all the lawyers."

Dick the Butcher,
Henry VI, Part 2, Act IV

Pathway to the Waterberg Declaration*

Without the [Freshfields Report](#) of October 2005 it is very unlikely that either ESG or the UN-backed PRI would have gained the traction they have by 2021. Professor Watchman's 150-page legal interpretation, commissioned by the United Nations, provided asset owners with confidence that their actions were consistent with their fiduciary duties. More than 15 years after the term ESG was coined by Paul Clements Hunt's team at UNEP FI, the PRI was launched and five years after the [SDGs](#) were unveiled, the world's largest asset owners and asset managers have aligned multiple US\$ trillions into ESG products and the [UN SDGs](#) they feed. The sustainability revolution across investment and finance is now at full tidal bore. As light at the end of the long, dark pandemic tunnel is glimpsed, lawyers globally are positioning to serve a proliferation of ESG demands from public and private clients. It's clear that Professor Watchman's legal interpretation lit the blue touch paper on a long ESG fuse with explosions now rippling across global markets.

And next?

In a process concluded at an [UNCTAD World Investment Forum](#) event in January 2021, the forthcoming Waterberg Declaration highlights the critical role of the legal community in delivering ESG and the SDGs. The Declaration stems from a year-long discussion across a global mix of legal thought leaders, entrepreneurs, corporate executives, investors, policy-makers, and civil society representatives exploring a re-imagined positive role for business and investment during and post Covid-19.

The ESG challenges and opportunities for law firms, are manifold. Put simply: "How can a law firm promote sustainability and ESG as important factors in business and financial decision-making while defending their own and the unsustainable businesses of their clients?" The saying that "you can't ride a horse in two directions" applies. The opportunities to ride in the one direction — towards the SDGs — are also manifold, including the potential for universal infrastructure coverage which we identify [in a recent discussion paper](#) with the International Institute for Sustainable Development which is resulting from technical innovations that are creating opportunities for investment at scale in last-mile communities.

The Waterberg Declaration flags the critical potential for the mainstreaming "and integration of ESG disciplines in the world's capital markets, investment institutions and professional services organizations — legal, accounting and consultancy — as an important lever for positive change at the systemic, institutional and individual executive levels."

*The Declaration is named after The Waterberg region of Limpopo Province, South Africa. Waterberg has been chosen by the government of South Africa and the United Nations to trial a new District Development Model over the next decade. Waterberg is recognised by the UN for its outstanding natural beauty and the need for accelerated social and economic development to deliver on the UN SDGs. Waterberg has global lessons for communities seeking accelerated development.

The Blended Capital Group works globally with entrepreneurs, companies, policy-makers and investors to optimise their execution of UN SDG and ESG-aligned vision and strategy. With TBCG Partners in London, Nairobi, Cape Town and Melbourne, and associates in Boston, Sao Paolo, and Tokyo, the team brings together more than a century of experience working in business, investment, the UN, media and policy with a global network rich in experience at the most senior levels.

TBCG team members played an instrumental role in the definition, roll-out and investor uptake of ESG from the moment the term was coined in 2005.

Since 2012, TBCG has worked with last mile entrepreneurs in frontier economies, at the highest levels of the United Nations, and with the world's largest investors as well as ESG specialist funds. TBCG's approach is focused on operationalisation, results and impact which empowers companies and vibrant communities to make the most of their dynamic entrepreneurs and market opportunities.

In 2020 TBCG launched its ESG Law Advisory Service with Professor Paul Q. Watchman, Paul Clements-Hunt and Vanessa Wood supported by our Partners and research team.

TBCG can assist your law firm lead on the UN SDGs and ESG.

We also work with corporates, investors and governments at all levels to identify law firms with deep ESG capabilities.

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