# ESG – An overview of what we are seeing and things to look out for

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# Introductions

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# The continued rise of "Social" and "Governance"

- Recognising and protecting "Human rights" is becoming a key issue - Increasing focus on "rights" based approaches
- Whilst we have seen a lot of focus on transition finance projects it is increasingly recognised that these projects can raise human rights challenges
- As one issue is addressed new challenges are developing - there is a growing concern that prioritising transition finance has created an imbalance which needs to be addressed – "green grabbing"
- *"Large-scale acquisition of land for environmentally friendly purposes, with negative impacts on local communities"* (*FT May 2024*)
- In many countries on the continent of Africa respect for human rights continues to be an issue
- Litigation against banks related to the environmental and carbon impact of products increased twelvefold between 2020 and 2023 (*Sustainalytics, January 2024*)
- All against a backdrop of increased regulation - 2,400 ESG regimes in 80 jurisdictions (*Investor Relations Magazine, April 2024*)
- All leading to increased due diligence

# 2,400 ESG regimes in 80 jurisdictions

- Why so many?
- The key drivers:
  - Governance regulation – for example Sarbanes-Oxley Act of 2002 in the US
  - Environmental regulation
  - Social regulation – working conditions, child labour, etc?
  - Regulation momentum and competition
  - Avoiding greenwashing
  - Company competition

# Climate Change and Human Rights in the Courts

- Litigation against banks related to the environmental and carbon impact of products increased twelvefold between 2020 and 2023 (Sustainalytics, January 2024)
- High profile litigation against governments
- **Failure to take positive measures to mitigate the effect of climate change on human health and well-being**
- On 9 April 2024 the European Court of Human Rights issued its first ever comprehensive decision in a climate litigation case
- The Court found that Switzerland was in breach of its positive obligations to protect the health, well-being and quality of life of Swiss citizens from the impacts of climate change
- The breach was attributed to the Swiss government's failure to implement the robust regulatory framework necessary for fulfilling its commitment to reduce emissions as set out in the Paris Agreement including failing to set clear limits on greenhouse gas emissions and not meeting its past greenhouse gas emission reduction targets

# Climate Change and Human Rights in the Courts

- **Failure to ensure effective access to the court**
- The Court found that Switzerland had violated the right to effective access to court under Article 6 of the ECHR, guaranteeing the right to a fair trial
- The Court held that the domestic courts had not engaged seriously or at all with the applicant's complaints under domestic law regarding the effective implementation of measures to mitigate the impact of climate change
- The domestic courts had failed to provide any convincing reasons as to why they had considered it unnecessary to examine the merits of the applicant's complaints
- They had also failed to sufficiently examine the compelling scientific evidence on climate change and its inevitable future impacts on various human rights aspects

(“*ICJ welcomes landmark European Court of Human Rights' decision to hold Switzerland accountable for climate justice failures*”)

# LGBTI, human rights and their impact on emerging markets financings

- According to Amnesty International across the continent of Africa, 31 countries still criminalize consensual same-sex sexual activity
- This is despite the clear contradiction with established African Union and international human rights standards
- There has been a trend indicating a stiffening of existing laws in some African nations
- This has impacted financings
- The risk of causing or contributing to human rights abuses seen as a legal compliance issue – not just an “ESG” issue
- We have been working with a number of corporates to put in place Human Rights Policies and Procedures to manage human rights risks
- UN Standards of Conduct for Business Tackling Discrimination against LGBTI people
- United Nations Guiding Principles on Business and Human Rights

# LGBTI and Human Rights

- International human rights law provides that every person, “without distinction”, should be able to enjoy their human rights
- UN human rights treaty bodies have confirmed that international law prohibits discrimination based on sexual orientation, gender identity and sex characteristics
- Criminalising private sexual relationships between consenting adults, whether they are same-sex or different-sex, is a violation to <u>the right to privacy</u>
- Criminalising consensual same-sex relationships are discriminatory, and where enforced, violate rights to <u>freedom from arbitrary arrest</u>
- Criminalising transgender people on laws such as those that specifically ban “cross-dressing” violates a person’s fundamental rights to <u>non-discrimination</u>, <u>freedom of expression</u>, and <u>freedom from arbitrary arrest and detention</u>

# UN Standards of Conduct for Business Tackling Discrimination against LGBTI people

- **At all times**
  - **1 Respect Human Rights**
  - Businesses should develop policies, exercise due diligence, and remediate adverse impacts to ensure they respect human rights of LGBTI people
  - Businesses should also establish mechanisms to monitor and communicate about their compliance with human rights standards
- **In the Workplace**
  - **2 Eliminate Discrimination**
  - Businesses should ensure that there is no discrimination in their recruitment, employment, working conditions, benefits, respect for privacy, or treatment of harassment
  - **3 Provide Support**
  - Businesses should provide a positive, affirmative environment so that LGBTI employees can work with dignity and without stigma

# UN Standards of Conduct for Business Tackling Discrimination against LGBTI people

- **In the Marketplace**
  - **4 Prevent Other Human Rights Violations**
  - Businesses should not discriminate against LGBTI suppliers, distributors or customers, and should use their leverage to prevent discrimination and related abuses by their business partners
- **In the Community**
  - **5 Act In The Public Sphere**
  - Businesses are encouraged to contribute to stopping human rights abuses in the countries in which they operate. In doing so, they should consult with local communities to identify steps they might take — including public advocacy, collective action, social dialogue, support for LGBTI organizations, and challenging abusive government actions

# United Nations Guiding Principles on Business and Human Rights

- **Foundational principles**
- 11. Business enterprises should respect human rights
- This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved
- 13. The responsibility to respect human rights requires that business enterprises:
  - (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
  - (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts

# United Nations Guiding Principles on Business and Human Rights – Foundational principles

- 15 In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:
  - (a) A policy commitment to meet their responsibility to respect human rights;
  - (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
  - (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute

# United Nations Guiding Principles on Business and Human Rights – Operational principles

- **Policy commitment**
- 16. As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a <u>statement of policy</u> that:
  - (a) Is approved at the most senior level of the business enterprise;
  - (b) Is informed by relevant internal and/or external expertise;
  - (c) Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
  - (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
  - (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

# United Nations Guiding Principles on Business and Human Rights

- **Human rights due diligence**
- 17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights <u>due diligence</u>. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.
- Human rights due diligence:
  - (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
  - (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
  - (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

# “Green grabbing”

- “Large-scale acquisition of land for environmentally friendly purposes, with negative impacts on local communities (*FT May 2024*)
- “Land Squeeze” – May 2024 recent report from The International Panel of Experts on Sustainable Food Systems (IPES-Food)
- The report found that 20% of large-scale land deals can be classified as “green” land grabs
- Projects with environmental objectives such as carbon-offseting projects and green energy production are subject to ever greater scrutiny
- Concern that these projects are “usurping” agricultural land and thereby excluding local land users and food producers

# Do the Equator Principles and the IFC Performance Standards protect against “Green Grabbing“?

- Most financings use the Equator Principles (EPs) and the IFC's Environmental and Social Performance Standards (IFC-PS) as a base for the “E&S Standards” in loan financings
- Are these enough?
- The IFC-PS provide practical guidance for businesses to handle the environmental and social impacts – for example:
  - PS 5 on Involuntary Resettlement
  - PS 7 on Indigenous People
- IFC-PS have not prevented projects from becoming embroiled in difficult disputes over their land rights impacts
- Many ventures that apply the IFC-PS have sparked sustained public campaigns against “land grabbing” and affected people have taken disputes to courts or complaint mechanisms
- (See for example *“Land rights and investments: why the IFC performance standards are not enough”* - Lorenzo Cotula 2019)

# Voluntary Guidelines on the Responsible Governance of Tenure (“VGGT”)

- IFC-PS 7 provides for consent-based approaches with regards to indigenous peoples
- IFC-PS primarily provide guidance on developing resettlement packages to ensure that displaced people are, in practice, not worse off
- IFC- PS emphasis is on livelihood restoration
- Whilst the IFC-PS often result in more generous measures than national rules the application of the IFC-PS are not without controversy
- Compulsory acquisition can itself expose businesses to disputes and contestation – especially if the project does not respond to local development agendas.
- Criticism the IFC-PS do not affirm or recognise rights

# Voluntary Guidelines on the Responsible Governance of Tenure ("VGGT")

- VGGT are rights-based ("legitimate tenure rights")
- VGGT's starting point is that people have rights – that these rights should be respected even if they are not legally recognized
- "Tenure" covers:
  - legitimate tenure rights of individuals and communities
  - customary tenure systems, should be recognized, respected and protected
  - publicly-owned land, fisheries and forests that are collectively used and managed ("commons")
- Categories of tenure rights would, ideally, be clearly defined and publicized, through a transparent process
- States would strive to establish up-to-date tenure information on land, fisheries and forests that they own or control by creating and maintaining accessible inventories

# Voluntary Guidelines on the Responsible Governance of Tenure (“VGGT”)

- *“… 8.8 States have the power to allocate tenure rights in various forms, from limited use to full ownership*
- *Policies should recognize the range of tenure rights and right holders*
- *Policies should specify the means of allocation of rights, such as allocation based on historical use or other means*
- *Where necessary, those who are allocated tenure rights should be provided with support so they can enjoy their rights.*
- *States should determine whether they retain any form of control over land, fisheries and forests that have been allocated …”.*

# Voluntary Guidelines on the Responsible Governance of Tenure ("VGGT")

- 16. Expropriation and compensation
  - *"Subject to their national law and legislation and in accordance with national context, States should expropriate only where rights to land, fisheries or forests are required for a public purpose*
  - *States should clearly define the concept of public purpose in law, in order to allow for judicial review*
  - *States should ensure that all actions are consistent with their national law as well as their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments*
  - *They should respect all legitimate tenure right holders, especially vulnerable and marginalized groups, by acquiring the minimum resources necessary and promptly providing just compensation in accordance with national law."*

# Voluntary Guidelines on the Responsible Governance of Tenure (“VGGT”)

- Guiding principles of responsible tenure governance (I)
  - *“3.2*
  - *Non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights.*
  - *Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others.*
  - *They should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights.*
  - *Business enterprises should provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operational-level grievance mechanisms, where appropriate, where they have caused or contributed to adverse impacts on human rights and legitimate tenure rights.*
  - *Business enterprises should identify and assess any actual or potential impacts on human rights and legitimate tenure rights in which they may be involved. …”*

# Voluntary Guidelines on the Responsible Governance of Tenure ("VGGT")

- Guiding principles of responsible tenure governance (II)
  - *"3.2*
  - *… States, in accordance with their international obligations, should provide access to effective judicial remedies for negative impacts on human rights and legitimate tenure rights by business enterprises*
  - *Where transnational corporations are involved, their home States have roles to play in assisting both those corporations and host States to ensure that businesses are not involved in abuse of human rights and legitimate tenure rights*
  - *States should take additional steps to protect against abuses of human rights and legitimate tenure rights by business enterprises that are owned or controlled by the State, or that receive substantial support and service from State agencies. …"*

# Voluntary Guidelines on the Responsible Governance of Tenure ("VGGT") – What needs to be done

- To align with the VGGT businesses, investors, lenders and ECAs/DFIs due diligence would need to consider the more comprehensive spectrum of rights and issues covered in the VGGT (e.g. legacy issues and cumulative impacts)
- Businesses would need to create systematic opportunities for affected people to feed into due diligence processes
- Expectation that businesses, investors, lenders and ECAs/DFIs would take a "rights-based approach" to address land rights issues and pursue investment models that are based on consensual partnerships with local actors

# Looking ahead …

- The new “failure to prevent fraud” offence (Section 199 The Economic Crime and Corporate Transparency Act) is due to come into force after an implementation period following guidance being issued on ‘reasonable procedures’
- This is expected in early summer 2024 but will probably be delayed because of the election
- In 2022 the Law Commission put forward as an option a failure to prevent offence for a failure to prevent human rights abuses (“*Corporate Criminal Liability: an options paper*”) – one for the incoming Government?

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Mark's practice covers project and export credit finance, asset finance, structured trade and commodity finance, debt restructurings, acquisition finance and corporate advisory work.

He represents financial institutions, export credit agencies, corporates, boards, and national and supranational sovereign organizations in relation to finance transactions throughout Western, Central and Eastern Europe, Africa and the Middle East. Mark has extensive sector experience in infrastructure financing across Africa including off-grid power, healthcare and transportation. He also advises on ESG financings including hospitals, clean energy and transportation.

Advising on sustainability, governance and compliance matters, Mark has extensive experience counseling corporate boards in connection with bribery, corruption, modern slavery, criminal finance and sanctions issues. He also advises financial institutions on the UK's Capital Requirements Regulation and the EU's equivalent capital requirements regimes.

Recognised as a Leading Individual in *The Legal 500 UK*, 2024 for Trade Finance, he has been noted as 'excelling' in structured export credit transactions. He is also ranked by *Chambers UK, 2024* and included in *Best Lawyers UK, 2024* for his work in banking and finance law.

In May 2022, he was re-elected Deputy Chair of the British Exporters Association (BExA). He sits on BExA's Executive Committee as well as UK Finance's Export Finance and Trade Committee.

Mark is based in the UK but has lived and practiced law in the Czech Republic, England, Germany and Russia.

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# Counsel

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Daniela focuses on trade and commodity finance structures and export credit finance, acting for banks and non-bank financial institutions, development finance institutions and multilateral organizations as well as borrowers. She has significant knowledge of supply chain finance techniques, blended finance and export financing across the globe with a focus on emerging markets.

**Education**

- BPP Law School (GDL and LPC)
  - Graduate Diploma in Law
  - Legal Practice Course
- University of Manchester (M.Sc)
  - Trade Policy and Development (M.Sc)
- Emory University
  - Political Science (B.A.)

# Awards & Recognition

***Receivables Finance International (RFIx) Annual Awards***
Partner Geoffrey Wynne presented with the “Lifetime Achievement Award” at the Receivables Finance International (RFIx) Annual Awards, 2024
Geoffrey Wynne named “Industry Ambassador of the Year” at the RFIx Annual Awards, 2023

***Global Trade Review (GTR)* “Best Export Finance Law Firm”, 2023**
*GTR* named Sullivan “Best Export Finance Law Firm” at the GTR Leaders in Trade Awards, 2023

***Trade Finance Global* “Legal Innovation in Trade” 2023**
Sullivan recognised for “Legal Innovation in Trade" 2023 by *Trade Finance Global* (in connection with BAFT) at its Trade, Treasury and Payment Awards 2023

***The Legal 500 UK, 2024***
Sullivan ranked in Tier 1 for Trade Finance by *The Legal 500 UK, 2024* for the tenth year running
Partner Geoffrey Wynne is included as a Leading Individual for Trade Finance in the “Hall of Fame”
Partners Simon Cook, Mark Norris and Sam Fowler-Holmes are recognised as Leading Individuals

***Chambers UK, 2024***
*Chambers UK, 2024* ranked Sullivan for Commodities: Trade Finance (UK-wide)
Geoffrey Wynne and Simon Cook are both ranked in Tier 1
Mark Norris and Sam Fowler-Holmes are both ranked in Tier 3

***IFLR1000, 2024***
Sullivan recognised for Banking Lending - Lender Side in the United Kingdom by the *IFLR1000, 2024*
Partner Geoffrey Wynne is recognised as a Leading Lawyer – Highly Regarded in the United Kingdom

***The Best Lawyers in the United Kingdom®, 2024***
*Best Lawyers* included five London partners — Marian Boyle, Simon Cook, Sam Fowler-Holmes, Mark Norris and Geoffrey Wynne — in the 2024 edition of *The Best Lawyers in the United Kingdom®*

***Trade Finance Global* “Best Trade Finance Law Firm” 2022**
Sullivan named “Best Trade Finance Law Firm” 2022 by *Trade Finance Global* (in connection with BAFT) at its International Trade Awards, 2022

**In 2022, 2021, 2020 and 2019, GTR recognised Sullivan**
The firm was named “Best Trade or Supply Chain Finance Law Firm” at the 2022 *GTR* Leaders in Trade Awards, “Law Firm of the Year” in the category “Leaders in Trade for Innovation” at the 2021 *GTR* Leaders in Trade Awards and “Best Trade Finance Law Firm” at the GTR Leaders in Trade Awards in 2020 and 2019

**2021 Lexology "Client Choice" award for Banking, United Kingdom**
Geoffrey Wynne named a recipient of the *Lexology* “Client Choice” Award 2021 for Banking, United Kingdom

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