U.S.-Asia Law Institute
New York University School of Law

The Social Role of Corporations in Asia-Pacific

Final Reflections

By Bruce Aronson
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The essays in this symposium and related discussions during the U.S.-Asia Law Institute's Gelatt Dialogue[1] in March 2022 reveal both similarities and differences across Asia-Pacific with respect to the social role of corporations. Rapid regulatory changes have occurred just within the past few years. As corporate governance is a multidisciplinary field, the policies, practices, and progress with respect to environmental, social and governance concerns (ESG) and climate change among Asian countries may be viewed from a number of different perspectives.

From a legal perspective, which is the primary focus of the essays, this symposium arguably provides a roadmap of rapid progress in regulation and disclosure of ESG risks: from a completely voluntary system (as in Taiwan), to a system of soft law with increasing pressure on corporations (as in Japan), to a system of hard law reform that mandates ESG disclosures (Australia, India). However, any discussion of regulation must necessarily include enforcement and the practical effects of such regulation.

The first step on this "roadmap" would be the voluntary system in Taiwan. The main approach there (essentially a compromise between activists' ESG goals and tech industry profitability) is to "nudge" companies through an ESG stock index and voluntary climate change

disclosure policies. However, disclosure is still not widespread and remains formalistic. Author Christopher Chen posits that Taiwan may need to consider a mandatory scheme.

The next "step" on the path is a more robust use of soft law. One common strategy is to strengthen ESG through a soft law approach based on UK-style codes of best practices (including stewardship codes and corporate governance codes) and code enforcement through "comply or explain" and market mechanisms. This approach is at the core of the stewardship movement in the UK due to the strong position there of institutional investors, who are cast in the role of corporate stewards. But it is unclear whether it will work in Asia-Pacific countries other than Australia and Japan because institutional investors in the region generally hold only a minority of shares, and most large companies have a single controlling shareholder (often a family or government). To address this problem, Singapore became the first jurisdiction anywhere in the world to adopt a code that focuses on stewardship by the controlling shareholders of family companies. Taiwan and Singapore also appear to be placing more emphasis on ESG in the most recent editions of their institutional investor-focused stewardship codes – in line with the emphasis on ESG and climate change in a significant amendment to the UK stewardship code in 2020 (see Puchniak essay).

A soft law approach has arguably been successful in Japan. ESG assets have grown rapidly over the past four years. A key role has been played by the Government Pension Investment Fund (GPIF), the world's largest pension fund, together with government-industry coordination and activities of institutional investors. Progress continues, as during the next two years Japan will institute mandatory disclosure of information related to climate change risk and corporate governance. In the past, Japan has been known for being strong on environmental issues, but a laggard on corporate governance. This raises the question of whether the categories within ESG are, in fact, closely related to each other and form a unified concept of corporate social responsibility, or whether they essentially represent three distinct areas of concern (see Aronson/Miwa essay).

From a legal perspective, Australia and India may represent the final step on our roadmap, as they have developed hard law mandates for ESG disclosures—with implications for fiduciary duties and even potential director liability. In Australia, a mix of factors (including banking scandals, corporate governance codes, shareholder activism and stewardship, directors' duties, and the actions of regulators) have resulted in a shift in public opinion on ESG and climate change, which is being reflected in corporate law and practice. It is noteworthy that the recommendations of the Task Force on Climate-Related Financial Disclosures (TCDF) for climate risk disclosure, formerly considered a "gold standard" for companies, have become a basic expectation. With climate risks now foreseeable, directors have potential liability for "greenwashing" (see Hill/Bowley essay).

In India as well, there has been a dramatic shift in how climate change is viewed: from a voluntary consideration to a material financial risk covered by

disclosure obligations and directors' fiduciary duties. This builds on India's corporate law, which includes environmental protection among factors for directors' consideration. However, this strong set of duties under corporate law has not led to robust enforcement. This serves as a reminder of the inadequacies of comparing Asia-Pacific jurisdictions on the basis of their legal obligations *on paper* when examining progress on ESG and climate change policies (see Varottil essay).

Moving to a financial perspective, one could look at the total volume and percentage of ESG assets under management in each country. These numbers might serve as indicators of both the outcome of the relative prominence of ESG concerns and the degree of investor pressure on corporations to adopt sustainable business policies. Although the US and EU account for over 80% of global ESG assets, Asian countries are also expanding their ESG assets rapidly. By percentage of total assets classified as ESG, Australia and Japan lead the region, with Australia having a higher percentage of assets labeled ESG than the US (37.9% versus 33.2%). Japan has made significant strides over the past four years to reach 24.3%.[2] These results may reflect, in part, the creation of institutional investor organizations in these countries to promote sustainable investment.[3] But the lack of a common definition of sustainable investing and accusations of deliberate "greenwashing" limit the value of the figures and comparisons.

From a political perspective, one could look at the role of government and political actors, and here China stands out. China continues to emphasize corporate social responsibility (CSR) more than ESG as the chief measure of the social responsibility of corporations.[4] This difference is partially due to the fact that social responsibility in China has been a top-down project in which companies support the political agenda of the ruling Chinese Communist Party (CCP) and government (see Wang essay). In addition, each province in China has its own definition of social responsibility for purposes of earning public credit scores (part of a corporate social credit system); these definitions tend to focus on charity and volunteer activities rather than improving the ESG outcomes of operations related to the company's business. Supposedly volunteer activities by corporations in China are often not truly voluntary, but rather result from government-imposed mandates that reflect party-state political and policy concerns (see Lin essay).

CSR in China may represent a survival strategy for some companies in an increasingly hostile business environment; rather than corporate social responsibility, it might fairly be labelled corporate political responsibility. While the leaders in CSR are state-owned enterprises, there has also been an increase in ESG activities by some private enterprises seeking to appeal to investment funds (through disclosure and market mechanisms) with less CCP involvement. The CCP has also recently embraced ESG, possibly as a step toward developing a Chinese ESG rating system rather than defer to foreign investors and consultancies that produce ESG ratings (see Wang essay).

As for the political economy of other countries, one could look at the number and extent of various kinds of pressure

that are brought to bear on corporations, including pressures generated by government regulation and policies and by other political actors (see, for example, Hill/Bowley essay). This is a promising approach for future research, although measuring the intensity and effects of such pressures likely would be challenging.

In sum, just as it may be difficult, and even misleading, to reduce the ESG policies of a corporation to a single ESG score, it is also challenging to analyze the situation and progress of Asia-Pacific countries through a single lens. Each of the disciplinary approaches noted above has its value, but also limitations; each is relevant and none is perfect. There is a general perception that Asian countries lag behind the EU and US/UK in terms of ESG generally and climate change policies in particular. However, that may be because there is little coverage in the Western media of these issues as applied to Asia.

During the Gelatt Dialogue, discussants (including four of the symposium authors) noted that for corporations to play a significant role and meet public expectations with respect to climate change, they may first need to change their attitude—to move away from a traditional industry view of environmental regulation as an economic burden and potential competitive disadvantage, and move toward a more enlightened recognition of the benefits from sustainability measures and their potential to produce a competitive advantage. Ultimately, such an attitude change depends on a similar, underlying change taking place among members of the public in Asia-Pacific countries and globally, so that they both pressure corporations to address climate change issues and support companies that are willing to do so.

By this measure, our Gelatt panelists viewed the EU as being the unquestioned leader in ESG and climate change, with powerful EU-wide directives that are strongly supported by the public. They raised the possibility that Asia-Pacific is actually ahead of the US. The US Securities and Exchange Commission recently published a proposal to require listed companies to publicly disclose climate-related risks, but there is reason to doubt whether there is sufficient public and industry support for the rule to be approved.[5]

It seems safe to say that Asian countries (with the notable exception of China) have largely accepted the concept of ESG as the primary measure of the social responsibility of corporations, as well as the necessity of corporations working to address climate change. In addition, rapid progress has been made over the past few years in incorporating ESG and climate change concerns into corporate disclosure and policies, although starting from a lower base (in terms of policies and amount of ESG assets) than in the West. As in other areas of corporate governance, the actual functioning of ESG in Asia varies among Asian countries and displays some differences from Western practices. To the extent that we can make simple characterizations of the EU approach as government-based (regulatory) and the US approach as market-based (institutional investors), these essays suggest the existence of a greater variety of approaches in Asia including the possibility of a "middle path" that combines the two (see, for example, Aronson/Miwa essay).

Rather than theorizing a pathway, however, our Gelatt panelists generally preferred to view Asia-Pacific countries as using the set of tools available to address climate change in somewhat different combinations. In addition to dealing with well-known issues such as achieving a generally accepted definition of ESG and common climate-related disclosure standards, the panelists also raised a number of additional factors for research and discussion, including executive compensation and other incentives, activities of supernational organizations, a greater emphasis on compliance, and a greater focus on decision-making and monitoring at the board level.

The panels also discussed how to evaluate the results of ongoing efforts to address climate change in Asia-Pacific. There was widespread recognition that the Russian invasion of Ukraine complicates the discussion. The panelists agreed that the short-term impact will be negative due to an increased emphasis on limiting economic dislocation from the war by securing a supply of fossil fuels. However, there also was optimism that in the longer term, the war will provide additional impetus for a global transition from fossil fuels to renewable energy.

The essays' descriptions of various measures to combat climate change create an impression of substantial progress, but so far such efforts do not seem to be having a significant impact on climate change problems. It may be that there has been real progress in recent years, but that we are also only now recognizing the severity of climate change.[6] Hopefully, the tools being developed to address climate change can be used more broadly and effectively to help meet the growing challenge. Because on one point panelists were in agreement: the social role of corporations is key to fighting climate change in Asia-Pacific and throughout the world.

Notes

[1] *See* Gelatt Dialogue on the Rule of Law in East Asia, Panel 3 "US-Japan Partnership in Climate Change" (March 25, 2022, video available at https://www.youtube.com/watch?v=11RcLiZEe4g) and Panel 4 "Corporate Governance and Climate Change in Asia-Pacific" (March 30, 2022, video available at https://www.youtube.com/watch?v=Af368WdHjXA&t=3s).

[2] See GLOBAL SUSTAINABLE INVESTMENT ALLIANCE, GLOBAL SUSTAINABLE INVESTMENT REVIEW 2020 (2021) (Figure 4, at 10), available at http://www.gsi-alliance.org/wp-content/uploads/2021/08/GSIR-20201.pdf. The fifth edition of this biennial report, found that the total of ESG assets was US $35.3 trillion in 2020 (id., Figure 1, at 9), an increase of 15% since 2018, and that the global percentage of ESG assets was 35.9% of all assets under management in 2020 (*Id.*, Figure 2, at 9).

[3] The Global Sustainable Investment Alliance, which is the most widely cited source for trends in ESG assets (see *Id.*), is an alliance of seven national and regional sustainable investment membership organizations. The Asian members of this alliance are Australia and Japan. For

member information, see http://www.gsi-alliance.org/alliance-members.

[4] While CSR, a concept that became popular in the 1970s, tends to refer to philanthropic donations or other activities for the public good apart from a company's business activities, the newer concept of ESG generally means exercising social responsibility in conducting one's own business, such as reducing carbon emissions.

[5] US Securities and Exchange Commission, Press Release, "SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors," (March 21, 2022), *available at* https://www.sec.gov/news/press-release/2022-46.

[6] *See* the latest report from the United Nations body that assesses the impact of climate change, Intergovernmental Panel on Climate Change, Working Group III contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, "AR6 Climate Change 2022:Mitigation of Climate Change," (April 2022) *available at* https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_FinalDraft_FullReport.pdf.

Bruce Aronson is a resident affiliated scholar at the U.S.-Asia Law Institute and co-editor of a textbook, Corporate Governance in Asia: A Comparative Approach.

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