

ESG 专题系列（六）：缘起：从 EHS 到 ESG

导言：过去几年间，国际层面关于环境、社会和治理（ESG）的讨论不绝于耳。而对于绝大部分国内企业而言，其接触 ESG 这一概念或认识到 ESG 对于企业的战略意义，往往发生在企业作为海外客户供应商或接受投融资时的标的公司被要求通过 ESG 尽职调查，或者企业未能在国际层面取得较好的 ESG 评级从而影响其商业伙伴或投资者关系等诸如此类情境下。同我们多年深耕的环境、健康和安 全（EHS）话题一样，ESG 也是一个舶来品。当我们此次探讨这一话题时，一个无法回避的问题是：它从哪儿来。

本文所述观点，并非法律评论，亦不在于介绍具体的 ESG 标准及其运用（我们会在后续的研究简讯中逐一讨论），即便您可能有不同的意见，我们仍希望能够抛砖引玉，引起对于 ESG 话题更多的思考和交流。

一、ESG 从哪儿来？

ESG 的诞生经历了一个历史演变的过程，从早期的企业社会责任（CSR），彼时公众心目中的印象更多是“慈善”，到对环境（E）维度的关注（尤其是污染、塑料垃圾、温室气体问题等）及社会（S）维度的关切（尤其是安全、强迫劳动等），之后意识到治理（G）对于实现环境（E）和社会（S）目标的意义（这里强调的治理是基于规则的、可以确保 E 和 S 目标得以实现的治理体系，对投资者来说，最基本的如产权、少数股东利益的保护及获得公平审判的权利）。ESG 这个概念慢慢出现在人们视野中，相应地，我们看到一些公司（特别是上市公司）发布了社会责任报告，可持续发展报告或者 ESG 报

告。

二、ESG 由谁推动？

伴随应对气候变化问题在巴黎协定和碳达峰、碳中和背景下变成日益紧迫的任务，新冠疫情所带来的对于“生命共同体”（区别于“人类共同体”或“人类中心主义”）以及社会不平等问题 的更多思考，这一切都将 ESG 推向了一个新的高度。ESG 依赖“向善而生”的理念，从某种意义上，我们似乎可以将 ESG 理解为与“可持续性”等同的概念。在“可持续性”的标准下，我们期待社会需要有尊重自然法则的治理体系，而企业需要有一个基于规则的治理体系。ESG 并非花园里触手可及的似锦繁花，它更像是天上的星辰，而摘星的过程是一个企业迈向“伟大”企业的必经之路。

三、ESG 为何重要？

“伟大”一词本无约定俗称的定义。古典经济学家亚当·斯密认为财富并非唯一的目标，幸福和谐才是人类经济行为的终极目标，哲学家杰里米·边沁曾提出：“大多数人的最大幸福乃是判断是非的标准”。边沁的功利原理强调最大幸福和自利选择。功利原则的约束力不仅来源于肉体、宗教，也来源于政治、道德（公众）。从功利原理出发，我们似乎可以推导出：一个伟大的公司，应能做出自利的选择，而这一选择，受到政治及道德的约束，从长期来讲，应以实现大多数人的最大幸福为己任，并以此作为判断一切活动和其规则的准则。

实现“大多数人的最大幸福”这一目标的难点在于，不同地域和行业的企业无法采用单一的标准

来衡量。然而，可以确定的一点，仅凭借单纯传统意义上的财务数据来衡量公司的价值，无法实现这一目标，甚至有的时候可能背道而驰。从这一点上延伸，在投资领域，一些概念出现了，如：社会责任投资，负责任投资，影响力投资，可持续性投资，ESG 投资。而这些概念似乎能够从古典经济学的功利原理中找到其根基。实现“大多数人的最大幸福”这一目标的难点还在于，企业不仅需要关心自身现状及发展（这里所讲的不止于经济回报），也需要关心利益攸关者（如客户、供应商、消费者、员工、政府和社区等）的反馈，特别是供应链管理。ESG 理念及其实践，与实现“大多数人的最大幸福”这一目标是一致的。基于 ESG 理念，国际上已形成的一些 ESG 信息披露指引，评级及投资指引似乎为企业及投资人提供了通往“伟大”的某些路径。

四、ESG 与 EHS

对于我们所服务的生产型企业而言，其 ESG 管理面临非常实质的环境和安全议题，这些议题下发生事故或突发事件，往往直接地为公众所感知。例如，1984 年一家碳化物工厂在印度发生毒气泄漏事件，造成 2 万人死亡，50 万人患病；2020 年黎巴嫩发生硝酸铵爆炸事故，造成 100 多人死亡，4000 多人受伤。从这一角度，环境、职业健康和安全（EHS）合规及其相关供应链管理构成生产型企业 ESG 实践的重要组成部分，这一点是不言而喻的。并且，ESG 里的环境（E）维度，例如气候变化和能耗管理是所有类型的企业或法人（不仅仅是生产企业）需要关注的议题。然而，ESG 又不等同于 EHS，其范围广于 EHS（它还包括社会和治理维度的很多其他议题，典型的如普适性的反腐败、董事会多样性，非典型的、取决于行业和业务的如冲突矿产）。

五、如何到达彼岸？

古人有云，千里之行，始于足下。边沁曾言：“太想伸手摘取星星的人常常忘记脚下的鲜花”。对绝大部分中国企业而言，ESG 提升的历程犹如上天摘星，只能是一个踏花而行，拾级而上的过程。这个过程需要企业在了解 ESG 相关国际标准、熟悉国内的监管和披露要求的基础上，基于其既有的产品、技术、组织架构、运营，管理和合规体系及运转，评估自身的

ESG 表现，了解同行差异，找到差距，分阶段地靶向重点突破。

对于我们所服务的基金和投资人而言，风险和机遇总是相伴。ESG 的价值发现，总体上应本着“投资向善”的逻辑。我们期待投资人的投资决策需要纳入 ESG 考虑，最重要的是建立一个适合自己的“何为善”的模型，基于此筛选有价值的投资标的，并且在投后致力于成为积极投资人（即使不掌握多数股权），将 ESG 问题纳入其股权治理政策和实践，影响被投资公司的管理，特别是治理体系（尤其是治理规则）的建立和运行。

对投资人而言，在筛选有价值的投资标的时，ESG 尽职调查是一个行之有效的方式。ESG 尽职调查本身不是一个全新的话题，其与投资人在投资过程中履行勤勉义务是一致的。作为传统并购业务的升级服务，我们深耕并开始尝试将并购中的法律尽职调查衍生至定制化的 ESG 尽职调查，并将 ESG 尽职调查的发现纳入交易文件层面进行考虑。

我们相信，在 ESG 领域的持续积累和努力，将使我们能够陪伴我们的客户（无论是基金、投资人，还是企业），乘风破浪，驶向成功的彼岸，即成为国际社会上能够被普遍认可的“优秀的”甚至“伟大”的投资人或企业！

关于君合 ESG 团队：君合是国际公认的、提供优质法律服务的中国大型综合律师事务所之一，拥有逾 900 人的专业团队。君合是开拓中国 ESG 法律业务领域的先驱之一并且有中国最大的 EHS 律师团队之一，为客户在 ESG 领域提供法律服务。君合以可持续性为导向，依托不同的法律及合规专业团队（ESG、EHS、劳动人事、知识产权、贸易与数据、财税、商业和刑事合规等所有与 ESG 领域相关的专业团队），在并购事宜中提供 ESG 尽职调查服务，配合企业或第三方机构起草 ESG 报告并结合我们服务不同行业客户的经验在企业日常运营中提供 ESG 相关的专项法律及合规诊断、与商业合作伙伴合同中的 ESG 条款起草及审阅、ESG 体系搭建和提升等一揽子服务。

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ESG Series VI

Origin: From EHS to ESG

Introduction: There have been many discussions over the years regarding Environmental, Social and Governance (ESG) issues at the international level. For the majority of domestic companies, the initial concept of ESG issues occurs when they are facing ESG due diligence initiated by overseas suppliers or, as a target company, they are accepting investment or financing, or there has been a failure in obtaining a well ESG rating. This then has an adverse effect on their business partners and/or investor relationships. Like the topic of the Environment, Health, and Safety (EHS) on which we have been working on for many years which originated outside China, the concept of ESG originated outside China as well. Where did ESG originate?

The opinions expressed in this article are not intended to be legal commentary, nor an overview regarding specific ESG standards and their applications (which will be discussed in subsequent research newsletters). We hope this article will stimulate more discussions on ESG topics.

I. Where did ESG come from?

ESG has undergone an evolution, beginning with the early days of Corporate Social Responsibility (CSR), when the public perception of CSR was more like that of a charity, with concerns about the environment

(E) (pollution, plastic waste, greenhouse gas, etc.) and society (S) (safety, forced labor, etc.), and then to more awareness of the importance of governance (G) in achieving the goals of the Environment (E) and Society (S) (here the emphasis of governance was on a rule-based governance system that ensured the achievement of environment (E) and society's (S) goals; and, for investors, property rights, the protection of minority shareholder's interests, the right to a fair trial, etc.). The awareness of ESG is growing, and as a result we have noticed that some companies (particularly, listed companies) have begun to publish social responsibility reports, sustainability reports and/or ESG reports.

II. Who drives ESG?

Greenhouse gas emissions have become an increasingly urgent task in context of the Paris Agreement and carbon peaks and carbon neutrality, and the COVID-19 pandemic have led to discussions about "the community of life" (as opposed to "the community for mankind" or "anthropocentrism") and social inequality, highlighting the role of ESG. ESG relies on a philosophy of "living for the good" and, in a sense, the concept of ESG is somewhat equivalent to the theories of "sustainability". Under the criterion of "sustainability", we expect that society will have a governance

system that respects the laws of nature, and enterprises will have a rule-based governance system. Unlike flowers that can be picked in a garden, ESG is more like reaching for the stars in the sky. The process of reaching for the stars is a way to become a “great” enterprise.

III. Why Does ESG Matter?

When we are talking about a “great” enterprise, there is actually no agreed definition about the word “great”. The classical economist Adam Smith believed that wealth is not the only goal, and happiness and harmony are the other goals of human economic behavior. The philosopher Jeremy Bianchin once said, “the maximum happiness of the majority of people is the criterion by which right and wrong are judged”. Bianchin’s utilitarian principle emphasizes maximum happiness and self-interested choice, and the binding force of the principle comes not only from the human body and religion, but also from politics and morality (the public). From an utilitarian principle, we can reach the conclusion that a great company shall be able to make self-interested choices which are bound by politics and morality, and shall, in the long run, commit to achieving the maximum happiness for the people and use it as a criterion for judging all its activities and rules.

The difficulty in achieving the goal of “the maximum happiness of the majority of the people” is that there is no single standard for assessing enterprises in different regions and industries. However, measuring the value of an enterprise solely based on their traditional financial data may not achieve the target and, in some cases, may even lead to the reverse. Extending from this point, concepts such as social responsibility, sustainability and ESG investments have emerged in the field of investment. These concepts find their roots in utilitarian principles in classical economics. The challenge in achieving the goal of “the maximum happiness of the majority of people”

also lies in the fact that an enterprise needs to care not only about their own status and development (it is not only about financial returns), but also about feedback from stakeholders (e.g., customers, suppliers, consumers, employees, governments and communities), especially in supply chain management. The concept and practice of ESG is consistent with the goal of “the maximum happiness of the majority of people”. Certain ESG disclosure guidelines, ratings and investment guidelines that have been formed in the international community, seem to help enterprises and investors find some path to “greatness”.

IV. ESG and EHS

For the manufacturing enterprises that we serve, their ESG management concerns material issues regarding the environment and safety. Environmental and safety accidents or emergencies might have a direct impact on the public. For example, a toxic gas leak from a carbide factory in India in 1984 killed 20,000 people and hospitalized 500,000, and an ammonium nitrate explosion in Lebanon in 2020 killed more than 100 people and injured more than 4000. From this perspective, it is evident that Environmental, Health and Safety (EHS) compliance and related supply chain management are important parts of the ESG practice of manufacturing enterprises. Moreover, from the environmental (E) perspective of ESG, all types of enterprises or legal entities (not just manufacturing enterprises) should pay attention to the topic of climate change and energy management. However, ESG is not the same as EHS and it has a broader scope than EHS (which also includes other issues in social and governance areas; typical topics include anti-corruption and board diversity - atypical ones are industry and business specific, such as conflict minerals).

V. How to Reach the Other Side?

A journey of a thousand miles begins with a single step. Bentham once said, "Stretching his hand up to the stars, too often a man forgets the flowers at his feet". For most Chinese companies, the journey toward ESG improvement is like reaching for the stars in the sky. Based on an understanding of international ESG standards, and familiarity with the domestic regulatory and disclosure requirements, this process requires enterprises to assess their own ESG performances. Enterprises need to understand their differences between peers, identify shortfalls and make targeted breakthroughs in key areas in stages based on the existing products, technologies, organizational structures, operations, management systems, compliance systems and their unique operations.

For the funds and investors that we serve, risk always accompanies opportunity. In general, ESG value should follow the logic of "investment for goodness". We expect that investment decisions will incorporate ESG considerations, among which, the development of suitable models of "what is good" and use of such models to identify valuable investment targets. We expect that post-closing, investors will become active investors (even without majority equity interests) and incorporate ESG issues into their policy related to equity governance and practice, and influence the management of portfolio companies, particularly the establishment and operation of governance systems (especially, the rules of governance).

ESG due diligence is an effective approach for investors to screen valuable investment targets. ESG due diligence is not a new topic and it is consistent with the duty of diligence exercised by investors in the investment

process. As an upgraded service to our traditional M&A business, we have cultivated and attempted to extend legal due diligence in M&A to customize ESG due diligence and have addressed the findings of ESG due diligence in the transaction documents.

We believe that our persistent efforts in ESG will enable us to accompany our clients (regardless of whether they are funds, investors or companies) to sail through the waves and reach the shore of success, i.e., to become "excellent" and even "great" investors or enterprises that can be recognized in the international community.

About JunHe's ESG team: JunHe, with over 900 professionals, is one of China's largest full-service law firms with an international reputation for providing high quality legal services. As one of the pioneers in the practice area of ESG in China and with one of the largest teams of Environmental, Health and Safety (EHS) lawyers in the country, JunHe provides enterprises with a full range of ESG legal services. JunHe is sustainability-oriented and relies on different legal and compliance teams (including ESG, EHS, labor and HR, IP, trade and data, finance and taxation, business and criminal compliance and other professional teams related to ESG) to provide ESG due diligence services in M&A matters. The team cooperates with enterprises and third-party agencies in drafting ESG reports and provides services which include specialized ESG related legal and compliance diagnosis, the drafting and reviewing of ESG related terms in contracts with business partners, and ESG system construction and enhancement in connection with the daily operations of enterprises.

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