The Business and Human Rights Review

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Foreword

Andrew Denny
Partner, Allen & Overy LLP
Co-Head Business & Human Rights

Recent headlines demonstrate that the intersection of business and human rights is no longer a passing concern for companies. Debate surrounding the human rights responsibilities of the private sector has touched on sectors ranging from finance to hospitality, while radical movements such as the Extinction Rebellion have made headlines by highlighting the effect of business activities on climate change and the associated impacts on current and future generations. Given the current political environment, it is no surprise that corporations are under increasing scrutiny from the public, shareholders, civil society groups, courts and regulators.

Investors are increasingly bearing the brunt of such scrutiny. On **page 24**, Margaret Wachenfeld, Senior Research Fellow at the Institute for Human Rights and Business, discusses how human rights concerns are becoming mainstreamed into regulation governing the conduct of financial market participants, including investors. One key takeaway is the important trend towards proactive demands by investors for consideration of human rights issues and the likely direction of regulation and relevant standards towards future convergence.

Participation in discussions regarding current and future business and human rights regulation is essential in industries with complex supply chains and multi-jurisdictional operations. A paradigm example is the hotel industry, where even the perception of complicity in human rights violations can lead to significant reputational damage. In the first of two pieces on human rights in the hotel industry, Sian Lea, managing director of Shiva Foundation, discusses at **page 12** how the unique structure of the hotel industry presents specific risks related to modern slavery. To combat potential human rights abuses, there is a growing emphasis on creating best practice resources through collaboration not only across the industry but also with NGOs and government bodies. An example of collaborative practices developed in the field can be found at **page 6**, where Caroline Meledo, Director of Corporate Responsibility and Human Rights at Hilton, presents an in-depth breakdown of Hilton's approach to human rights risks across three core hospitality business functions: operations, supply chain management, and hotel development.

It is easy lose sight of the reality on the ground when discussing industry trends operating at a global level. Hanningtone Amol, CEO of the East Africa Law Society (EALS), at **page 18** provides a unique and valuable insight into the role of regional law societies in promoting business respect for human rights by outlining the experience of EALS in engaging various stakeholders at the national level.

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Businesses that are unable or unwilling to proactively incorporate environmental considerations into their day-to-day operations expose themselves to significant litigation and reputational risk. As Gauthier van Thuyne and Marie Umbach discuss at **page 30**, there is a global rise in cases seeking to hold businesses liable for impacts on the environment. Of particular note is the way in which the human rights of the most vulnerable are threatened by climate change, and how claimants have used arguments grounded in the violation of such rights to seek to establish liability on the part of corporations.

One method by which companies can facilitate transparency as to their potential impact on climate change is by publicly disclosing climate-related data concerning their business. At **page 36**, my colleagues Matthew Townsend and Sara Feijao examine key drivers and trends in the climate change reporting landscape. One of their core findings is that businesses must be proactive in their climate-related disclosures to avoid being overwhelmed by legislative and regulatory developments.

A common theme running through contributions to this edition is that it is no longer enough for business to merely seek to avoid violating fundamental rights. Instead, it is the businesses that actively engage with stakeholders that will be best-placed to succeed in the future. We hope that this publication facilitates such proactive participation from the private sector by providing a platform for continued dialogue between businesses, affected individuals, shareholders, civil society groups, and national governments.

Editorial Team

Please contact BHRR@allenovery.com should you wish to contribute or provide feedback.

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An interview with Caroline Meledo

Director of Corporate Responsibility and Human Rights at Hilton

Caroline Meledo is the Director of Corporate Responsibility and Human Rights at Hilton. Caroline joined Hilton in 2013, and was responsible for setting up and leading Hilton's Corporate Responsibility team for Europe, the Middle East and Africa, before taking up her position in Hilton's HQ. Hilton is a global hospitality company, with nearly 6,000 hotels in 117 countries and territories, supported by 420,000 team members. In 2016, Hilton co-founded the UK Stop Slavery Hotel Industry Network, and has been involved in the establishment of the Network's Framework to Engage with Suppliers and Resource Hub, which both contain a variety of tools to help hotels tackle modern slavery.

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How did Hilton approach the task of identifying the biggest human rights risks that it faced as a business?

Four years ago, we undertook a global human rights impact assessment to identify the actual and potential risks that we faced as a major participant in the hotel industry. We analysed human rights risks by considering the three key roles that we play in the hotel industry. I like to think of these as the three categories of our business.

1. **'Operations'**: the basic operation of a hotel business;

2. **'Supply Chain'**: the purchase of goods and services used in hotel operations; and

3. **'Development'**: the development of new hotels, most of which are franchises.

It became apparent from our impact assessment that modern slavery risks, in various forms, were the most cogent human rights risks facing our business in each category.

In **'Operations'**, the key human rights risks we identified were in relation to the employment rights of direct employees (also appropriately viewed as a human resources matter) and the risk that our hotels would be used for sex trafficking and exploitation.

A very salient human rights risk identified in the **'Supply Chain'** category was the risk of forced labour due to our reliance on recruitment agencies and outsourcing agencies to provide workers for our hotels. There is also a risk that modern slavery will be present somewhere in the supply chain for goods we source for our hotels. Both of these risks will impact many businesses that rely heavily on labour providers or grapple with complex supply chains.

For **'Development'**, we identified a modern slavery risk with respect to the employment of construction workers. Construction contracts are typically between the hotel owners and the construction companies; hotel brands like ourselves are not usually directly involved in these relationships, but will be associated with the situation on the ground by virtue of the project structures. Another risk is around land rights, understanding the history of land title acquisitions to avoid potential legacy issues on land rights.

Can you describe some of the strategies Hilton uses to manage the risks identified with respect to each of the three categories?

We have adopted a myriad of strategies to manage these different risks, centred around the principle that we must use whatever leverage we have to address these risks.

Addressing the sexual exploitation risk within **'Operations'** is challenging, as this is essentially about customers misusing our hotels by taking advantage of the privacy they provide. We recognise that our staff may be well placed to disrupt this form of exploitation. Our approach is simple: "See something? Say something!" We are committed to ensuring our staff can identify visible signs of sexual exploitation, and we have protocols in place to connect with experts – including NGOs and local law enforcement – in any relevant situation. Our commitment to combat human trafficking has been included in our Code of Conduct since 2011, and we have been delivering training on how to identify signs of exploitation ever since. It is also now mandatory for all Team Members at all our hotels, both franchised and managed, to take specific training on this risk, and we conduct regular internal campaigns to communicate the issue to all those who work in our hotels.

To address risks regarding **'Supply Chain'**, we have focused on addressing our approach to labour suppliers. This is a big priority for us, because we are a massive global employer, with over 420,000 Team Members across the world. We amended our labour sourcing contracts with outsourcing agencies to ensure they included (i) specific reference to our human rights principles and (ii) the requirement that all labour suppliers undergo an audit every two years at the very least. The audit we carry out was

"It is vitally important that all players in the hotel industry collaborate to address modern slavery risks ... The hotel industry as a whole has been proactive in addressing the risks of modern slavery, as there is collective agreement that there is no benefit in waiting for a serious modern slavery crisis to emerge before actions are taken."

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designed by Sedex, and has been adapted so it is suitable for our business model. Most companies in the hotel industry were not conducting these audits yet, so there was no pre-packaged approach that we could follow. It has taken some time to design a labour supplier audit that fits neatly alongside our other audit processes and business structure, but we are pleased with the result. We provide our labour suppliers with a shorthand guide to ensure they understand why we are introducing these new contractual provisions, and what is required of them in order to fulfil these additional obligations.

In essence, the **'Supply Chain'** risks can be tackled by ensuring decision-makers are cognisant of (i) the leverage that we have and (ii) how they can use this leverage effectively where suppliers are concerned. To do this effectively, we had to raise awareness of modern slavery risks in our labour sourcing and supply chains among our own team members and leaders. We developed a comprehensive training module on these risks, taking inspiration from best practices in other industries, as no best practice had been developed for the hotel industry at that time. This training includes a number of scenario-based questions and an online test, and is mandatory in all our hotels for key decision-makers for labour (out) sourcing, including the General Managers, as well as the Directors of Human Resources, Procurement Leads and Directors of Finance.

In the **'Development'** phase of our hotels, we work in collaboration with our hotel owners, which can be local businesspeople, international investors or state-owned companies. They are essentially our clients, which creates a different dynamic in the business relationship and type of leverage the brand may have.

We are currently operational in over 100 jurisdictions, and are in the process of conducting country-level reviews of the remaining jurisdictions where we do not yet do business. These reviews, conducted by a cross-operational team, assess risks including those related to safety and security, corruption and human rights. In terms of human rights issues, the team focuses on our potential value chain, analysing external data and intelligence to determine the risks involved in operating in each jurisdiction. We compare this country-level analysis with our existing policies and processes to determine any additional steps that would be necessary to make any operations in that jurisdiction in line with our values. These additional steps form the basis of a 'mitigation plan' for that particular jurisdiction.

The implementation of such mitigation plans have now been integrated as part of our brand standards. It means that any new hotel (whether managed or franchised) will have to implement the relevant mitigation plan to that specific country. Examples of mitigation steps may include a requirement that construction companies involved in the development undergo mandatory modern slavery training, or a requirement that hotel management staff be educated on the risks associated with using labour suppliers. We recognise that some hotel owners may need assistance to implement our mitigation plan, and so we are committed to providing them with the necessary tools and guidance to ensure that they have the support needed to implement each mitigation step.

We are aware that there have been collaborative efforts within the hotel industry to address modern slavery risks. Can you please provide us with some examples of collaborative initiatives that Hilton has been involved in?

It is vitally important that all players in the hotel industry collaborate to address modern slavery risks, and we have utilised our leverage to encourage our partners and competitors to address the risks that arise in each of the three categories. As members of the International Tourism Partnership (**ITP**), an industry coalition bringing together the leading hotel brands to drive responsible hospitality, we supported the drafting and launch of the ITP Human Rights Goals and the ITP Forced Labour Principles. Those industry-wide commitments are critical to creating a level playing field amongst all players and raising the bar across the board. To help accelerate the impact of this movement, we adapted our modern slavery training and donated it for free to all ITP member companies. In November 2019, ITP announced that the training would be made available for free to all, a significant step to build capacity in the industry.[1] We were also co-founders of the UK Hotel Industry Stop Slavery Network with Shiva Foundation, and contributed to the drafting of the Framework to Engage with Suppliers.

The hotel industry as a whole has been proactive in addressing the risks of modern slavery, as there is collective agreement that there is no benefit in waiting for a serious modern slavery crisis to emerge before actions are taken. Industry-wide collaboration has permitted us to cooperate and develop new ideas, with smaller hotels in particular benefiting from knowledge sharing. Collaboration does not impact how competitive a hotel can be in the industry, and there is little to be gained by individual hotels fighting modern slavery alone. The industry itself has undoubtedly benefited from our joint efforts, and this has had wider positive implications for society more generally.

1. https://training.tourismpartnership.org/

What role do you think legislation has to play in creating more robust safeguards against human rights abuses in operations and value chains? Has the new modern slavery legislation in the UK had any impact on your approach?

The introduction of the UK Modern Slavery Act 2015 has been transformational. Discussions about modern slavery issues had taken place internally in Hilton since 2010, but the new law helped catalyse and elevate the agenda.

However, we recognise that the risks we face with respect to modern slavery and human rights go far beyond legal liability. As for many large consumer-facing companies, our brand is our biggest asset. In many ways, modern slavery legislation outsources enforcement of the spirit of the law to the court of public opinion. As such, we cannot approach modern slavery risks by merely ensuring that our legal liability in individual contracts is minimised. This myopic approach is not helpful when the risks that are being allocated between parties relate to human rights. Brands linked to human rights violations are likely to suffer considerable damage, regardless of whether they can point to a contract that absolves them of strict legal liability.

Tackling modern slavery issues is not about avoiding legal liability or improving public relations. It is about each company (regardless of its size) having a responsibility to use the leverage it has when engaging with business partners and industry stakeholders. For us, it is important that we are minimising the risk that we could be involved in infringing human dignity and rights in every jurisdiction in which we operate, as we do not wish to make profit at the expense of human rights.

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Do you have any advice for corporates in other sectors embarking on the process of identifying, assessing and considering how best to manage human rights risks in their business?

I would advise them to look at the work that their colleagues in anti-corruption and compliance teams are doing to combat corruption and bribery-related risks. Not only are the risks inter-related (modern slavery can feed off corruption), but the roadmap to identify and manage the risks is very similar. Most companies will now have robust anti-corruption policies in place, as well as a dedicated compliance team to ensure these risks are adequately addressed. The UK Bribery Act, the US Foreign Corrupt Practices Act and similar national legislation are all remarkably simple. They essentially oblige companies to ensure they are in no way implicated in bribery and corruption, without dictating how this is to be achieved. This has led to wholesale updating of most businesses' policies and processes, as well as the introduction of additional training, checks and due diligence. Corruption risks are now considered as part of every business decision, to ensure that businesses do not fall foul of these obligations.

There are considerable parallels between the way that anti-bribery obligations are framed in the Bribery Act, and the way that human rights obligations for businesses are framed in the UN Guiding Principles on Business and Human Rights (**UNGPs**). The UNGPs, which have formed the basis for domestic legislation in various jurisdictions, fundamentally oblige businesses to ensure that they are in no way implicated in human rights infringements when carrying out their activities. Therefore, the set of actions that need to be taken to fulfil these human rights obligations are similar in form, even if not identical in content, to those taken to meet anti-corruption obligations.

At Hilton, strategic collaboration across our human rights and anti-corruption teams is crucial. It is important that the measures being adopted to address human rights risks complement the established anti-corruption measures, with which other parts of our business are already familiar. I would recommend that companies consider framing their approach to human rights risks in a way that mirrors their existing approach to bribery risks. This will ultimately make it easier and quicker to embed human rights considerations into the decision-making process, alongside the corruption considerations.

A collaborative approach to addressing modern slavery risk in the hotel sector

Sian Lea, Managing Director of Shiva Foundation

Sian Lea is the Managing Director of Shiva Foundation. Shiva Foundation was established as a corporate foundation by Shiva Hotels four years ago. It aims to tackle and prevent the risks associated with modern slavery in the UK by facilitating a collaborative approach between major stakeholders. It has been working with the hotel sector for the past four years and has developed the Stop Slavery Blueprint toolkit – a variety of anti-slavery policies, procedures and templates – to help hotels effectively address modern slavery risks. Sian discusses the hotel industry's collaboration to address the serious modern slavery risks it faces.

Modern slavery risks faced by the hotel sector

At Shiva Foundation, we see two key risk areas that are specific to hotel companies. The first relates to the fragmented structure of the hotel industry, which exacerbates the risks related to modern slavery because it is not always clear who is responsible for mitigating this risk. Many hotel brands only manage a small proportion of hotels in their brand portfolio – sometimes less than 20% – and the remaining hotels are franchises, which may not be required to adhere to the same modern slavery reporting obligations as larger hotel companies, as they may be smaller or located in jurisdictions without such requirements. Comprehensive policies on modern slavery may be developed at brand level, but there may be no mandatory obligation placed on franchisees to actually implement these policies in the hotels they manage.

The second risk area that is specific to the hotel industry is the risk of sexual exploitation or domestic servitude in hotel rooms. Hotels, by their very nature, offer privacy. This can be taken advantage of by traffickers using rooms as temporary brothels, for example, or by families traveling with their domestic slave. If staff members are adequately trained to recognise the signs of exploitation and trafficking, hotels may actually be in a privileged position to disrupt these practices, which would otherwise remain hidden.

In addition to the sector-specific risks, there are also a number of modern slavery risks faced by the hotel industry that will also apply to many other industries, particularly with respect to supply chains for services and goods:

1. **Services**: Like many businesses, hotels frequently rely on outsourced labour for housekeeping and cleaning staff, and thus may have less oversight

of how outsourced staff are treated. Outsourced workers are often migrants and low-skilled, a demographic that is at particular risk of exploitation, because of potential language barriers or a lack of knowledge about workers' rights and entitlements in the country in which they work. Recruitment agencies and informal recruitment practices are often used in both the workers' home countries and the countries to which they move for work, which adds further opacity to the recruitment process.

2. **Goods**: Similar to many businesses, hotels also have long and complex supply chains that present a number of exploitation risks. Hotels must source a variety of goods (including everything from bath products and linen to food for their restaurants) and the supply chains for each product may have multiple tiers, making oversight of these supply chains very difficult.

Taking initial steps to address modern slavery risks internally

No organisation has managed to rid their supply chain of modern slavery yet, so it is important to understand that this is a long-term process. Sometimes the process can seem overwhelming, so as a first step we would suggest that companies consider the modern slavery risks their businesses create. This can be done by carrying out a risk assessment of a company's own operations and supply chain to identify high risk areas that should be addressed as a priority in both internal and external relationships. Supplier due diligence will be a key part of this risk assessment exercise; the most effective results come from working with your suppliers rather than demanding that a certain standard is achieved from the outset.

Once the risks have been identified, companies should put into place sustainable anti-slavery initiatives, which must be firmly embedded across all functions of a business. We suggest that businesses wishing to entrench anti-modern slavery standards appoint not only an Anti-Slavery Champion (in hotels, it is probably most appropriate for this person to be the General Manager) but also an Anti-Slavery Committee. We recommend that this committee is a cross-functional group, consisting of key representatives from relevant departments, including Human Resources, Procurement, Compliance, Legal and Communications. The committee should meet regularly to report on challenges, patterns and concerns, and to debrief on any incidents that have been encountered. It may also be beneficial to include a relevant NGO as part of the committee, to facilitate independent, expert analysis of the issues being faced and to encourage the adoption of a victim-centric viewpoint.

Industry collaboration to develop the Stop Slavery Blueprint

In addition to taking internal steps to combat modern slavery, it is important that all businesses, regardless of the industry, recognise that collaboration is key to tackling modern slavery. While collaborating with other businesses within an industry is vitally important, engagement with other organisations, such as government bodies and NGOs, should also be considered. Trafficking rings are well networked, and it is crucial for businesses to work in a similar fashion to combat trafficking. In collaboration with other hotel companies, including Hilton, we established the Stop Slavery Hotel Industry Network in 2017 to bring the industry, with all of its layers, to a common ground. This resulted in the creation of a **one-stop shop resource hub** with over 100 tools to help hotels address the risk of modern slavery, including the first of its kind Framework for Working with Suppliers, which is a guide that was produced based on the expertise of members of the Stop Slavery Hotel Industry Network.

It is necessary that all hotels play their part in addressing the modern slavery risks that exist in the industry. However, smaller hotels may not have the resources to develop their own policies and procedures, so it is vital that the industry as a whole works together to ensure that all hotels in the sector, regardless of size, have ready-made tools and processes to help them address the risk of modern slavery. For example, the Stop Slavery Blueprint, a toolkit that we launched in 2018, contains a variety of anti-slavery policies, protocols, procedures and templates that can be used by small and large players throughout the industry. Hotel-specific tools include a training presentation that can be delivered to staff, with case studies from the industry, as well as incident reporting protocols that inform staff members of actions they should take if they suspect that a guest or fellow staff member may be a victim of trafficking. There are also some tools within the Blueprint that would be useful for any business, including practical guidance on conducting risk assessments of supply chains.

"The Blueprint is now considered to represent best practice for tackling modern slavery in the hotel industry by a variety of prominent UK organisations and individuals, including the Independent Anti-Slavery Commissioner, the Director of Labour Market Enforcement and the National Crime Agency."

The employee information on modern slavery risks can also be used in other industries. Many victims of trafficking are not aware of their rights, so having information available to them, for example through a staff room poster in their language, can be very important.

The Blueprint was produced with the support of Shiva Hotels, and was piloted in one of its hotels over the course of six months. We recognised that it was vitally important to get the input of external players to make sure that the Blueprint was fit-for-purpose. As such, we partnered with the local police and anti-slavery NGOs throughout the pilot, to ensure the Blueprint addressed the concerns of these stakeholders and to help Shiva Hotels understand how well the pilot hotel was responding to situations of potential exploitation. We would advise any businesses that are attempting to strengthen their internal anti-slavery processes to establish and actively engage in a feedback loop with other agencies, as external advice can be invaluable when tackling this issue.

The Blueprint was refined after the pilot, taking into consideration the feedback received from all stakeholders involved, and was then rolled out across the Shiva Hotels' portfolio and trialled for a further year, with Shiva Foundation's assistance. It was important that all members of Shiva Hotels' management and staff were fully involved in the implementation of the Blueprint, so they could provide honest feedback on the effectiveness of the tools they were being asked to employ. Shiva Foundation also held monthly meetings with hotel general managers and directors to ensure we understood how the Blueprint worked in practice in the hotels that Shiva Hotels was responsible for.

Shiva Foundation also engaged collaboratively with other external stakeholders to make sure that the Blueprint could be successfully utilised in other hotels as well. We ran a consultation with the wider hotel industry, NGOs, academics and government agencies to ensure that the Blueprint set standards that all stakeholders agreed with. Taking the time to consult with other players and to agree strategies is essential to successful collaborations, and the hotel industry should be commended for its efforts in this regard. The Blueprint is now

considered to represent best practice for tackling modern slavery in the hotel industry by a variety of prominent UK organisations and individuals, including the Independent Anti-Slavery Commissioner, the Director of Labour Market Enforcement and the National Crime Agency. The Blueprint is free and accessible online and can be downloaded as a handbook.

We are aware that tools in the Blueprint have been integral to the identification of over 2,000 modern slavery indicators, as well as at least seven modern slavery incidents that were ultimately reported to the police. One example of the Blueprint's successful implementation is provided by a hotel that discovered, through using the Blueprint tools, that a staff member had no access to the bank account that her wages were being paid into. By identifying this key indicator of modern slavery, the hotel was able to facilitate this staff member's exit from a highly exploitative situation.

Next steps for Shiva Foundation

We currently offer free advisory services for hotels to help them mitigate the risk of modern slavery within their facilities, and we will continue to do this while promoting the Blueprint across the industry, with the help of industry bodies such as UK Hospitality. In terms of further collaboration within the industry, we are working with partners to target hotel owners, rather than brands, as they often fly under the radar. We hope to strengthen feedback loops with hotels so that we can support them more effectively. We are continuing to provide our expertise to hotels outside the UK, including in the Netherlands, Switzerland and Canada, and are also working with companies in other sectors to help them use their leverage to encourage the hotels they use for business purposes to adopt more proactive anti-slavery policies. We are also working with the Gangmasters and Labour Abuse Authority (**GLAA**) in the UK to further grow industry-wide collaboration.

We are taking our lead from the successful GLAA Construction Protocol, which sets a standard for the construction industry. The GLAA Hospitality Protocol is being developed and is expected to be launched in the first quarter of 2020. We hope to build trust between law enforcement and hotels through this collaboration, and garner greater attention on modern slavery issues in the hotel industry.

It is also important that the industry continues to work together to investigate trends in modern slavery risks, in order to identify future interventions that the industry can make. For instance, we are working to identify gaps in the recruitment chain between home country and hotel, which increase vulnerability to exploitation. We hope that continued collaborative efforts by all stakeholders within the hotel industry will mean that all hotels become better equipped to spot incidents of modern slavery swiftly, and that, together, we can reduce the occurrence of modern slavery incidents in the future.

"We initially worked with Shiva Hotels and an NGO consultant to complete a risk assessment exercise for Shiva Hotels. One of the challenges Shiva Hotels faced when this was completed was determining how often the exercise should be conducted. After consultation with us, Shiva Hotels decided to focus on 'high risk' areas of its supply chain, rather than repeating this exercise for its entire supply chain, which would have been a resource intensive exercise. Shiva Foundation has worked with Shiva Hotels to create an information sheet, which is regularly updated, to help Shiva Hotels' procurement staff incorporate risk assessments into the supplier review process. We use data from a variety of sources, such as the Global Slavery Index, the Global Corruption Perceptions Index and the US State Trafficking in Persons Report, to help identify the 'high risk' areas for Shiva Hotels' supply chain."

"It is also important that the industry continues to work together to investigate trends in modern slavery risks, in order to identify future interventions that the industry can make."

The role of law societies in a new era of responsible business: an East African perspective

Hanningtone Amol of the East Africa Law Society

*Hanningtone Amol is the Chief Executive Officer of the East Africa Law Society (**EALS**), the regional body representing lawyers from all partner states of the East African Community (**EAC**), including the Law Societies of Kenya, Uganda, Tanganyika, Zanzibar, Rwanda, Burundi and South Sudan. EALS provides training to lawyers and stakeholders on the UN Guiding Principles of Business and Human Rights, and works with global players to deepen understanding of responsible business, adapting this to take into account the particular challenges faced by the East African region, as well as their context. He is also a founding partner of ALP East Africa, a cross-border law firm that focuses on pro bono legal service and business and human rights around the EAC Treaty.*

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"The EAC is an economic bloc comprised of six nations: Kenya, Tanzania, Uganda, Rwanda, Burundi and South Sudan."

Role of law societies with respect to business and human rights

The legal profession and lawyers in their role as trusted advisors are uniquely placed to bring to life the principles and processes set out in the UN Guiding Principles. Lawyers play a pivotal role in the development of effective legal instruments, regulatory tools and policies as well as ensuring compliance and supporting access to remedy. As the entities tasked with licensing and self-regulation of the legal profession, and in some instances with a mandate of providing public interest support to government institutions, national law societies are primary actors in holding governments and corporations to account in respecting human rights. National law societies can also provide a line of defence to vulnerable members facing harassment or similar challenges in enforcing business and human rights (**BHR**) standards. The collective voice of lawyers speaking through their national law society is a deterrent mechanism against bad governance and law societies are also best placed to undertake capacity building activities through professional development programmes. The regional law society has an even wider perspective of BHR in the region, and in the EAC, the EALS oversees six nations and systems. EALS is the regional body representing lawyers from the EAC – its membership includes the Law Societies of Kenya, Uganda, Tanganyika, Zanzibar, Rwanda, Burundi and South Sudan. The mandate of the EALS includes building capacity and integration of the legal profession across the EAC, and promoting the rule of law and good governance, with an emphasis on regional trade and sustainable development. EALS informs and addresses not only the particularities of a single jurisdiction, but fosters discussion between a range of practitioners from different jurisdictions, operating within different legal, cultural and socio-political contexts. This allows for the sharing of knowledge and experiences, and a platform for one lawyer's 'lessons learned' to be shared with a wider community. The ability of EALS to pool resources and run a series of capacity-building programmes is a plus to its professional development support to national law societies and even other stakeholders. EALS has therefore been working with global partners to foster discussion between practitioners from different jurisdictions about BHR issues, while taking care to recognise the complexities and nuances specific to many EAC partner states.

Background to the EAC

Before delving into a discussion of the unique BHR challenges faced in East Africa, it is necessary to provide a brief background to the EAC. The EAC is an economic bloc comprised of six nations: Kenya, Tanzania, Uganda, Rwanda, Burundi and South Sudan. It is designed as a customs union, with progressive movement towards a political federation. The EAC Treaty imposes stringent obligations for its partner states, and forms the foundation for the recognition of several principles relevant to BHR, such as sustainable practices, respect for the environment, conservation of

cultural heritage and empowerment of local communities. Partner states are encouraged to take measures to ensure that development and commercial activities align with these principles.[1]

Failure by a partner state to ensure compliance by private enterprises operating within its borders may result in an order against the partner state. The East African Court of Justice (**EACJ**), the regional court of the EAC, has previously issued injunctions against developmental activities seen as violating principles of sustainable development, for example in a recent order against Tanzania barring the construction of a highway through the Serengeti natural conservancy.[2]

EAC institutions are already providing leadership in commerce, good governance and human rights. The East African Legislative Assembly (**EALA**) has already passed laws that have far-reaching consequences on trade and commercial activities in East Africa. The EACJ, on the other hand, is churning out jurisprudence and setting new standards for business. Emphasis on the rule of law and good governance by the court has an impact across the region, with remarkable decisions on environmental protection and other human rights areas.[3] The development of EAC Gender Policy,[4] and the on-going discussions on the EAC Mining Bill[5] at the committee level of EALA all serve to show the role that regional integration plays in mainstreaming BHR.

BHR landscape in East Africa

It is fair to observe that many EAC partner states experience similar BHR challenges. These challenges include, for example, weak regulatory infrastructure, poorly transposed and implemented laws, weak regulatory supervision, and a lack of appetite for enforcement, which leaves the door open to bribery, corruption and human rights violations. Human development levels remain low in the region, with periodic civil and electoral conflicts and ethnic tensions escalating to loss of lives and settlements. In the sphere of business and economic development, overzealous security forces have in some instances forcefully displaced populations to pave way for development while in many instances properties have been forcefully acquired without consultation or timely compensation. Destruction of the environment to pave way for government projects has also been witnessed, and there is rising need for integrated development that takes into account environmental conservation.

EAC partner states rely on mining of natural resources and agriculture as the backbone of their economies, with the exception of Kenya, whose service industries are advanced. Tanzania depends on the extractive industry with mining of gold and diamond forming the backbone of its economy, supported by tourism. South Sudan relies extensively on oil while Kenya and Uganda have recently struck oil resources. There is urgent need to ensure EAC partner states mainstream BHR principles in their regulations, in order to minimise the risk of human rights violations in these sectors.

In recent years, we have seen many countries adopt regulations, for example relating to the environment and licensing, which could provide a foundation for the observation of BHR principles. Kenya, for instance, has elaborate environmental impact assessment (EIA) requirements for every new infrastructure, mining, or industrial project.[6] The law also provides for periodic environmental audits in projects

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that have potential to negatively impact on the environment and natural resources. Rwanda has enacted the Organic Law[7] outlining EIA requirements for projects and establishing the Rwanda Environment Management Authority to regulate environmental use. Almost every EAC partner state has some provision requiring assessment of environmental impacts of a project prior to or during its execution.

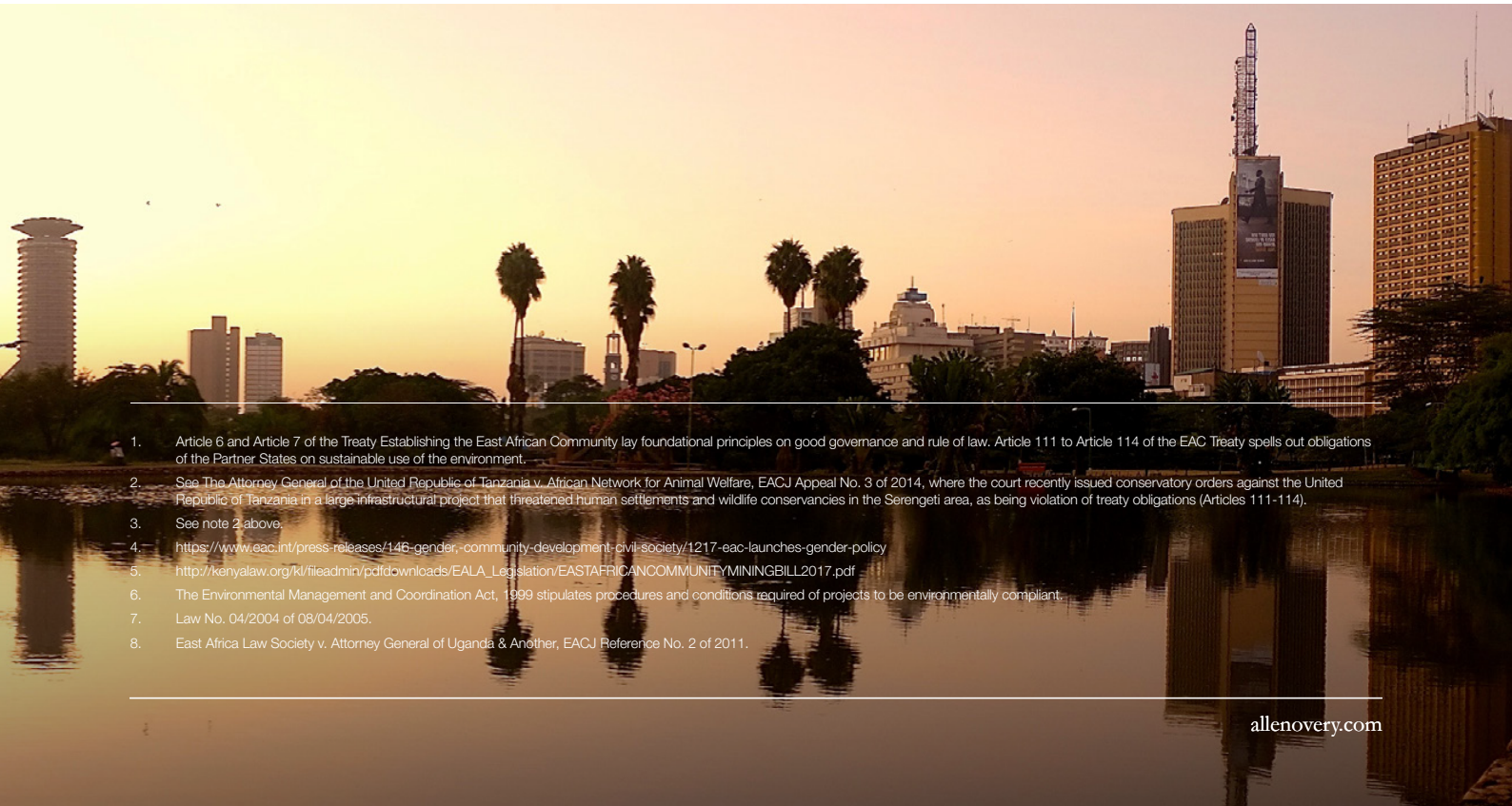
Nevertheless, the mere existence of such regulations is not enough. Several factors can undermine their effective implementation, such as weak local regulations, corruption or the exclusion of local communities from decision-making in relation to local resources. For example, the case of depletion of the Mau water catchment tower in the Rift Valley has been a headache for regulators in Kenya: incidents of human settlement encroaching onto an important water tower despite regulations being in place point to the detrimental effects of weak supervision or corruption. South Sudan is witnessing such impacts in its oilfields as, despite the existence of regulations governing environmental and human safety, some water bodies have suffered contamination, with serious impacts on wildlife.

Notwithstanding these similarities, nuances and differences emerge at the national level between partner states in their respective approaches to these issues, which adds complexity across the region. Even in terms of mainstreaming BHR practice, the EAC partner states are at different levels. Kenya is at pole position and has already developed a comprehensive National Action Plan (NAP). Uganda and Tanzania are in the developmental stages of their respective NAPs, while the rest of EAC partner states are behind in these developments. Rwanda, however, already has comprehensive internal regulations for human rights and environmental protection which could be considered to be aligned with UN BHR principles.

Experience and lessons learned

Historically, EALS has championed good governance, the rule of law and respect for human rights through soft advocacy and strategic litigation. EALS has been a party to many cases at the regional court and the African Court on Human and People's Rights, with the recent one being the "Walk to Work Case"[8] at the EACJ against the Republic of Uganda for violating the right of opposition politicians to picket. EALS partners with national law societies and civil society to realise these objectives.

In pursuit of the objective of ensuring that businesses adhere to human rights requirements, EALS has entered into partnership with the Advocates for International Development and the Rule of Law Expertise Programme to provide capacity building in the area of BHR. Over ten training sessions have been delivered to over one thousand lawyers and policy makers since 2017, which have targeted lawyers in private practice, in-house counsel and state attorneys, as well as policy-makers in government and private corporations. The need to reach a wider pool of stakeholders has prompted us to set up the online EALS Institute that seeks to provide training to a wider community than may be able to attend in person. We are also creating a database of resources relating to BHR, and publications focusing on the role of BHR in sustainable development.



1. Article 6 and Article 7 of the Treaty Establishing the East African Community lay foundational principles on good governance and rule of law. Article 111 to Article 114 of the EAC Treaty spells out obligations of the Partner States on sustainable use of the environment.
2. See The Attorney General of the United Republic of Tanzania v. African Network for Animal Welfare, EACJ Appeal No. 3 of 2014, where the court recently issued conservatory orders against the United Republic of Tanzania in a large infrastructural project that threatened human settlements and wildlife conservancies in the Serengeti area, as being violation of treaty obligations (Articles 111-114).
3. See note 2 above.
4. https://www.eac.int/press-releases/146-gender,-community-development-civil-society/1217-eac-launches-gender-policy
5. http://kenyalaw.org/kl/fileadmin/pdfdownloads/EALA_Legislation/EASTAFRICANCOMMUNITYMININGBILL2017.pdf
6. The Environmental Management and Coordination Act, 1999 stipulates procedures and conditions required of projects to be environmentally compliant.
7. Law No. 04/2004 of 08/04/2005.
8. East Africa Law Society v. Attorney General of Uganda & Another, EACJ Reference No. 2 of 2011.

"The East African Legislative Assembly (EALA) has already passed laws that have far-reaching consequences on trade and commercial activities in East Africa."

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This experience has provided EALS with valuable lessons that will inform our activities going forward.

1. **Engaging government agencies** – We have learnt that the key to realising responsible business is working in harmony with relevant government agencies. Regulators have massive influence on how businesses behave, as they wield both incentives as well as deterrence mechanisms. Getting government agencies to understand the benefits of responsible business is a sure way to fast track development of relevant industry standards, and adoption of BHR principles. The national commissions for human rights are key stakeholders to cascading BHR in the region. The Kenya National Commission for Human Rights is already providing leadership by developing its NAP.

2. **Engaging business groups** – There are several business groups representing various industries. These include associations of manufacturers, chambers of commerce and many others. These associations provide a forum for self-regulation among industry players. They are key partners in getting the industry players to voluntarily adopt the principles of responsible business. The importance of voluntary actions lies in the development of a culture, not necessarily motivated by regulations.

3. **Engaging in-house counsel** – In-house counsel are responsible for advising on many internal processes and contracts. They are naturally the custodian of corporate governance and legal compliance for an organisation. They are an important partner in mainstreaming BHR principles into businesses as they are ultimately tasked with interpreting such requirements and assisting their organisations in implementing them.

4. **Engaging private practitioners** – Law firms serve a critical support and advisory role to corporations and government agencies through providing policy development support, training internal teams on best BHR practices and producing draft policies. Law firms also provide BHR audits for corporations, pointing out key findings that require compliance. Law firms can also be a source of legal service to the public. Where necessary, law firms can conduct specialised advocacy and litigation in support of affected communities, as evidenced by the rise of environmental, safety and health litigation. Retooling lawyers to recognise and manage BHR risk requires continuous partnerships between the regional law society and national law societies.

5. **Importance of customized language** – The first phase of our capacity building programmes experienced low turnout from critical stakeholders. We received feedback explaining that government agencies and certain major corporations did not attend on the basis that the use of the phrase 'Business and Human Rights' implied to them that these sessions would be a crusade against their activities. It involved considerable effort to turn some of these stakeholders around, and demonstrate that these capacity-building sessions were forward thinking. In Rwanda, for instance, we modified the language of our sessions to refer to 'Responsible Business' rather than 'Business and Human Rights'. This change in language has given the programme a larger appeal, and resulted in an increased appetite from traditionally reluctant stakeholders. Overall, our aim is to encourage attendance, foster awareness and discussion, so we strive to customise our content for local circumstances, to engage all essential stakeholders.

6. **Engaging development finance institutions** – EALS has a history of engaging with development finance institutions. EALS is a founding partner of the ALSF Academy, the pan-African training arm of the Africa Legal Support Facility (ALSF), an agency financed by the African Development Bank (AfDB). Under this partnership, EALS works closely with ALSF to build capacity of the legal profession and government institutions in mining, finance and other emerging areas while also ensuring that components of sustainable developments are highlighted in the process. Ultimately, we see this partnership as capable of providing a route through which BHR could be upscaled and mainstreamed into our emerging capacity building activities.

Financial resources are an essential ingredient of projects. In East Africa, multinational lenders like the World Bank, the Japan International Cooperation Agency and the African Development Bank have their footprints in major infrastructural projects. These institutions have the ability to scale up the BHR uptake if they introduce and maintain requirements for compliance within their financing contracts. The case of the Olkaria Geothermal Project demonstrates the importance of not only including compliance requirements in financing agreements regarding the resettlement of affected persons, but also taking further steps to ensure effective consultation and implementation.

Even at a cursory glance, the EAC presents a huge opportunity for establishing model BHR practices. A large section of critical stakeholders still requires education on BHR while many organisations will soon require assistance in developing these practices and building them into their commercial strategies. The regional law society will be instrumental in helping support the capacity of national law societies to meet the needs of individual lawyers and stakeholders in understanding the BHR principles, develop better standards and retool in readiness for opportunities considered above.

The rapid rise of the 'S' in ESG

An interview with Margaret Wachenfeld

Margaret Wachenfeld is an international lawyer and policy adviser, and has been working in the field of business rights and human rights for over 25 years. She is a Senior Research Fellow at the Institute for Human Rights and Business, a Senior Adviser for the Myanmar Centre for Responsible Business, as well as a Director and Co-Chair of Methodology of the Corporate Human Rights Benchmark and a Director of CREER, based in Colombia. She also serves on numerous advisory boards. In addition, she has her own advisory practice called Themis Research.

In recent years, there has been much discussion regarding environmental, social and corporate governance (ESG) issues. What is ESG and how does it relate to business and human rights?

"ESG" refers to the three central factors in measuring the sustainability impact of a company– "environmental, social and (corporate) governance". Investors are increasingly incorporating ESG factors into their investment considerations whether looking at individual companies, funds or asset classes. The "S" group is sometimes presented as a long, hodgepodge list of unrelated topics, with human rights thrown in at the end of the list. But in reality, human rights should be at the top of the list, providing the framework covering most, if not all the other "S" issues including workers' rights, diversity, health and safety.

There has undoubtedly been an imbalance between the attention paid to each of the three core pillars of ESG. Corporate governance is very well established in national law, and environment standards are also well established and accepted, both by businesses and by national governments, including through widespread enactment of international and national environmental laws. There was a danger, therefore, that the social aspect of ESG would remain overshadowed by the other two pillars – until recently. The infusion of human rights into the "S" pillar means it is taking on a more defined shape along with some hard edges that are prompting businesses, and increasingly investors, to wake up and pay attention. We are seeing a steady uptake of the UN Guiding Principles on Human Rights (**UNGP**s) in the business community, as well as in the financial community that has brought business and human rights (**BHR**) into ESG agenda. In addition, numerous human rights standards are becoming legally binding on business through the intermediation of national laws and through references in contracts or an increasingly wider array of international standards that are legally or contractually binding. Together with the very small but growing list of laws or proposed laws covering mandatory human rights due diligence linked to the

UNGPs, there is a legal dimension to many human rights issues that is beginning to 'bite', through legal penalties, disqualifications, and litigation that is catching the attention of corporate counsel and other corporate directors and making the "S" just as significant a factor to consider as the "E" and the "G" when considering risks to investments. But it is not just about risks to investments – the ESG trend is and must be about considering the impacts of investments on sustainability – on the environment, on human rights, on good corporate governance. That is really where we will start to see the significance of re-aligning capital markets to deliver on the goals that are now becoming burning imperatives – climate change and the Sustainable Development Goals.

Interestingly, we are also seeing increased recognition of the linkages between human rights and the 'E' in ESG, for example in relation to the right to water, climate change and biodiversity, to name a few, and this trend is set to continue. Indeed, the UN High Commissioner for Human Rights recently addressed the 2019 UN Climate Change Conference, specifically discussing the link between climate change and human rights. On the other side, we see the European Union (**EU**) launching a study on the sustainability dimension of corporate governance – so the "G" pillar. That too could eventually result in incorporating human rights into corporate governance frameworks.

What is driving the recent surge of interest in ESG?

There has been a phenomenal surge of interest from various stakeholders in ESG, particularly in the past year. While this has largely focused on climate change and the environment, there has also been a clear increase of interest in social issues, including human rights, from investors. We are seeing growing investor demand for tools and data to better assess whether those principles are being met by the companies they invest in. A smaller, more mature subset of investors are also trying to understand their role with regard to implementing the UNGPs which we would like to see far more of. There are a number of drivers behind this increase, three of which stand out in particular.

The first is **development of financial sector regulation** on sustainable finance, some of which specifically addresses human rights. The EU stands out as leader. It adopted an Action Plan on Sustainable Finance in 2018, and is on the cusp of introducing the first EU financial regulation which specifically addresses human rights issues, among other topics. Broadly speaking, the EU regulation on sustainability related disclosures in the financial services sector (the **EU Regulation**) has two parts. The first part, and in my view, the most significant part of the Regulation addresses mainstream investment, and requires investors to disclose their principal adverse impacts on environmental, human rights and social, anti-bribery and corruption issues and their due diligence policies in certain conditions. The second part of the EU Regulation is focused on a very small but growing segment of the market – investments that specifically promote environmental or social characteristics. Much attention has focused on the EU's work on climate change and green issues in the financial sphere, but it also deserves credit for opening the agenda as regards the intersection between human rights and the financial sector. The EU Regulation was adopted in less than a year, which is almost unheard of, demonstrating the EU's recognition of the urgency of current climate crisis and sustainability more generally.

Numerous **central banks and stock exchanges** around the world have recognised the significance of sustainability and climate change and begun using their leverage to address the issue – through regulations and requirements but also through convening power and raising awareness. The UNEP Inquiry on a Sustainable Financial System has done a remarkable job in illuminating the many dimensions of shifting the financial sector onto a more sustainable path, including working with central banks and a wide range of other actors such as stock exchanges. Interestingly, some developing nation central banks have been highly attuned to sustainability, especially in light of the potentially huge and disproportionate impacts such issues may have on their communities, long before selected developed country central banks began engaging on climate change. An increasing range of stock exchanges around the world, particularly through the Sustainable Stock Exchanges Initiative, which has 93 member exchanges, are leading on the agenda. They have exchanges from every corner of the globe as members. It is really a global phenomenon. I recently spoke at a conference at the Thailand Stock Exchange on sustainable finance and was impressed by the breadth of their sustainability agenda.

Two other important drivers of the growing spotlight on ESG include **business and consumer demand**. Private actors are launching products marketed as sustainable investments in order to capitalise on the increasing public attention to sustainability. It remains to be seen whether all products marketed in this way are in fact truly sustainable. Nevertheless, this is a response to burgeoning demand, in particular from younger generations more keenly attuned to the impact of

climate change and the importance of human rights, and looking to invest their savings in sustainable ways. This trend is clearly both fuelled by, and in turn fuels, a wider focus on ESG issues amongst the public.

How do such regulatory standards interact with industry standards and benchmarks which address human rights performance by companies and financial institutions?

An important development has been the growth – indeed the proliferation – of numerous standards, guidance and benchmarks relating to ESG, in some cases with a particular focus on human rights. These perform a key role by providing investors, companies, governments, civil society and importantly, customers with the information required to monitor company performance on ESG-related issues. Investors are an important force behind many of these initiatives.
For example, the Corporate Human Rights Benchmark (**CHRB**) began as a collaborative initiative between the Institute for Human Rights and Business and Aviva Investors, but it very rapidly expanded to become a multi-stakeholder initiative drawing on the investment, BHR, and benchmarking expertise of six organisations and several independent advisers, like myself. The CHRB is grounded in the UNGPs and seeks to create a competitive race to the top by developing a benchmark to measure and rank companies' performance on human rights.

There are a number of other related, open-source benchmarks that look at various dimensions of human rights, such a Know the Chain that looks at forced labour in supply chains, and Ranking Digital Rights, that looks at issues on freedom of expression and privacy policies and practices of internet, mobile, and telecommunications companies, based on international human rights standards.
These benchmarks like the CHRB provide transparent, free and useful metrics both for stakeholders as well as the companies themselves. We have seen some of the largest companies in the world move on the human rights agenda in response to benchmarking – using the rankings as a way to get human rights onto the boardroom agenda, adopt human right policies, or as the basis for work plans to improve their human rights performance. For some companies, especially consumer-facing ones, it can be an effective lever.
For others, based in countries or in business segments that do not face the same exposure, there may be less incentive to move. Those are the companies that we want investors to focus on, rather than addressing the companies towards the top of the rankings. The CHRB and other benchmarks also provide an important evidence base for governments when considering whether further regulatory action is needed.

At the same time, companies have voiced concerns that they are subject to too many different benchmarking and ranking systems. This is compounded by the presence of various voluntary

"Interestingly, some developing nation central banks have been highly attuned to sustainability, especially in light of the potentially huge and disproportionate impacts such issues may have on their communities, long before selected developed country central banks began engaging on climate change."

or industry-specific standards, and national regulations which may differ between jurisdictions. While the various open-source benchmarks each have their own research and rating methodologies, in the human rights field, we are all talking to each other to share information and seek ways to align our approaches, reduce duplication and amplify our voices. It is about collaboration. Presumably the commercial rating services do not do so as they are selling a service.

What developments can we expect in relation to ESG and particularly the BHR component in the future?

There has been much discussion of aligning and streamlining disclosure and due diligence requirements. Several private initiatives aim to do this, including the Corporate Reporting Dialogue, which seeks to promote greater consistency and comparability between different reporting frameworks and standards. The EU is expected to launch a revision to its Non-Financial Reporting Directive, with a view to harmonising EU reporting requirements and potentially including more definitive requirements on what needs to be reported. The data revolution may be here but we are still stuck in turn-of-the century approaches to producing meaningful information. You cannot drive a sustainability revolution in a Model T. We need to continue to innovate in the ways we gather, communicate and analyse the impacts of business and business models on sustainability. It is important for regulators to get involved in order to harmonise approaches, but without quashing innovation, within and across jurisdictions so that we can scale analysis. In my opinion, there is likely to be a trend towards convergence in Europe given the EU Action Plan on Sustainable Finance, and the European Commission's recognition that corporate transparency on sustainability issues is a prerequisite to enable financial market actors to properly assess company management of sustainability risks, and in turn, their potential for long-term value creation.

There is also a growing trend of soft law standards and guidance being used to inform, and in some cases even crystallising into, hard law obligations. This is evident in the recitals to the EU Regulation on investor disclosure, for example, which urges not only financial market participants, but more importantly the European Supervisory Authorities who will develop regulatory technical standards on due diligence, to consider the due diligence guidance developed by the Organisation for Economic Cooperation and Development (**OECD**) and guidance from the Principles for Responsible Investment (**PRI**).

This marks a watershed moment in ESG regulation, including with respect to BHR. Financial regulation that increasingly drives capital towards sustainable investments that internalise ESG externalities has implications for corporates and investors across the world. But among all the numbers, the whizz-bang analytics and slick communication, we in the human rights community want to make sure that the human rights impacts and the human voices are not lost. There are promising developments. Participants in the financial markets would do well to closely follow these ESG and BHR developments.

Climate litigation: an efficient tool for change?

Gauthier van Thuyne and Marie Umbach of A&O

In 2014, the Intergovernmental Panel on Climate Change released its Fifth Assessment Report, which stressed that, without more extensive mitigation efforts, it is very likely that warming of the climate system will lead to *"severe, widespread and irreversible impacts globally"*, both for humans and for ecosystems in general.[1] To limit these adverse consequences, the report highlighted the need to substantially reduce greenhouse gas emissions and stabilize the global temperature increase to a maximum of 2°C above pre-industrial levels.

In response to these alarming conclusions, 196 States adopted the Paris Agreement in 2015 under the auspices of the United Nations Framework Convention on Climate Change. This Agreement aims to keep global warming below 2°C above pre-industrial levels, with parties endeavouring to limit it to 1.5°C. However, it is widely accepted that current national mitigation efforts are insufficient to achieve these objectives.[2] According to the International Energy Agency, after a period of stagnation, CO^2 emissions started soaring again in 2017, with energy-related emissions reaching a historic high in 2018.[3]

International organizations were not the only ones to be alarmed by the urgency of the situation, which has drawn the attention of citizens and NGOs around the world. Over the past few years, litigation has increasingly become a tool used to try and hold large actors accountable for the impact of their actions on the environment. This article gives an overview of trends and themes in non-US climate litigation around the world, and focuses on human rights claims in such cases.[4]

The role of human rights

Climate change affects the enjoyment of a wide array of human rights, including, most fundamentally, by threatening the right to life of both current and future generations. Every year, tens of thousands of premature deaths occur around the world as a result of extreme weather events such as floods, storms, droughts, heat waves and wildfires, in addition to air pollution- and other warming-related diseases.[5] Similar causes threaten rights to health, food and water and erode communities' livelihoods.[6] In recent years, the previous trend towards diminishing levels of hunger and malnutrition reversed, chiefly due to the climate, according to the Food and Agriculture Organization.[7] The Special Rapporteur on Human Rights and the Environment has stressed that *"the worst impacts afflict those who have contributed least to*

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the problem and who have the fewest resources to adapt to, or cope with, the impacts".[8] A right to a healthy environment has been developed and enshrined in international treaties, national constitutions and legislation in an effort to formulate a basis to provide a holistic response to this global challenge.[9]

As the enjoyment of these rights is threatened by climate change, they are routinely invoked as sources of climate-related obligations for states and corporations. Broadly speaking, these cases either seek to challenge the general climate change policies and practices of States and companies, or they are more limited in scope, and target specific projects or behaviours deemed harmful to the climate.

Trends and themes

Climate litigation has been a disproportionately American phenomenon, with over 650 cases filed in the U.S. as of March 2017, compared to only 230 cases in the rest of the world combined.[10] However, a growing number of cases have been filed in other countries in recent years. A large majority are filed against governments, but there are also instances where specific corporations have been named as defendants. The scope of these cases varies greatly, from challenges to a particular permit or project, to broad claims for inadequate climate policy. In these lawsuits, petitioners rely on a combination of different legal sources to support their assertions. These include national climate-related legislation and policy, international and national human rights law, and private law grounds such as nuisance and negligence (or their civil law equivalents). Spanning multiple national jurisdictions and legal traditions, some hybrid concepts such as the duty of care and the public trust doctrine have also emerged as sources of climate obligations for States. In addition, company law, commercial law and financial law also increasingly contain climate-related obligations for companies, such as climate-related disclosure and consumer protection requirements.

The wide variety of claims and sources found in climate litigation is unified by a common purpose: to compel public and private stakeholders to develop and implement effective measures to mitigate and adapt to climate change. A few key trends can be identified in cases that seek to achieve this overarching purpose.

1. Challenges to States' climate policies:

A common type of action seeks to push governments to adopt climate policies in line with their national and international commitments, particularly their emission reduction targets. While a number of these cases are currently pending before national courts, to date, they have been met with mixed results. Certain courts have adopted a rights-based view, including three notable examples:

– The 2015 case of *Leghari v Republic of Pakistan*,[11] where the Lahore High Court ruled that the government's failure to implement the National Climate Change Policy and the associated framework violated citizens' fundamental rights. The court held that fundamental rights such as the rights to life, human dignity, property and information, read in combination *"with the constitutional values of political, economic and social justice"*, form a base for the judiciary to *"fashion a jurisprudence that meets the needs of climate change"*.[12] The court also raised concerns of food and water security and of the rights of the most vulnerable.[13]

– The landmark Dutch case *Urgenda Foundation v. State of the Netherlands*

concerned a petition demanding that the Dutch government adopt more ambitious emissions reduction targets on the basis that excessive emission levels constituted, among other things, a violation of citizens' rights to life and private and family life under Articles 2 and 8 of the European Convention on Human Rights (**ECHR**). In a 2015 decision, the first instance court's held that the Dutch government had breached its duty of care to its citizens as interpreted in combination with Articles 2 and 8 ECHR.[14] On appeal, The Hague Court of Appeals upheld the first instance's decision, concluding that as a result of States' positive obligation to protect the lives, homes and privacy of their citizens under Articles 2 and 8 ECHR, *"if the government knows that there is a real and imminent threat* [which the Court accepted there is]*, the State must take precautionary measures to prevent infringement as far as possible."*[15] An appeal is now pending in front of the Dutch Supreme Court. The petitioners' success in *Urgenda* has encouraged others around the world to introduce similar actions in front of their national jurisdictions.

– In *Future Generations v. Ministry of the Environment and Others*, citizens argued that climate change and deforestation violated their fundamental rights to life, health, food, water and to a healthy environment. The Supreme Court of Colombia held that the Colombian government had breached the petitioners' fundamental rights, while establishing that the Amazon forest is *"a 'subject of rights'* [rights holder]*, entitled to protection, conservation, maintenance and restoration led by the State and the territorial agencies"*.[16]

Nevertheless, there remain several obstacles to the rights-based approach to climate litigation. Courts have often rejected cases challenging the government's emissions reduction targets for lack of standing[17], or have refused to venture into reviewing the executive's discretion in defining climate policy, on grounds of deference.[18] However, in *ENvironnement JEUnesse v. Canada*, although the class action was rejected because of a flawed definition of the proposed class, the Court made clear that deference alone is insufficient to prevent review of fundamental rights violations. The Court underlined the need to strike a balance between the doctrine of justiciability and the role of the Court in ensuring that the executive does not *"act in such a way as to harm the lives of individuals and the safety of their person"*.[19]

2. Challenges to companies' climate policies:

In a string of recent cases, claims have been brought against companies, requiring them to adopt more ambitious emission

reduction targets. However, these claims have less of a proven track record. In S*ao Paulo Public Prosecutor's Office v. United Airlines and Others*, the Public Prosecutor of Sao Paulo attempted to compel airlines using the regional airport to offset their emissions through reforestation; the court held it had no jurisdiction over the claims.[20] Other similar cases before national courts are still pending: their outcome will likely depend on the existence of clear legal obligations upon private actors in the national legal order.

3. Challenges to companies' disclosure practices:

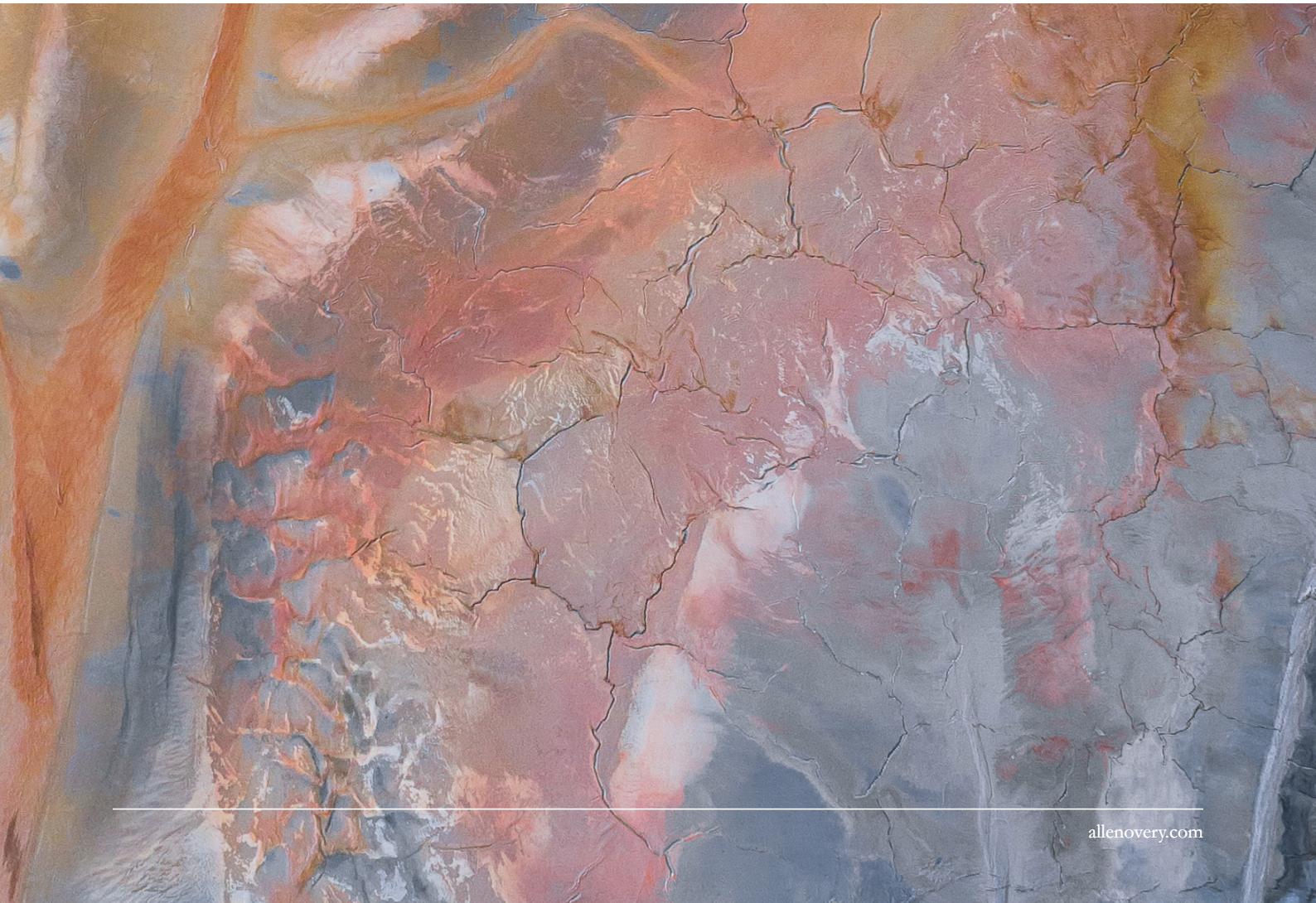
Litigation has also arisen out of a failure on the part of companies to adhere to climate-related disclosure regimes. In *Abrahams v. Commonwealth Bank of Australia*, shareholders sued a bank for failure to comply with its legal obligation to disclose business risks related to climate change. This prompted the bank to make such a disclosure in its next annual report, in addition to which it adopted a climate policy statement and decided not to invest in a controversial coal mine project. As a result, the legal claim was withdrawn.[21] This demonstrates that climate litigation can have an impact on corporate behaviour beyond the court's decision.

4. Challenges to specific projects:

In another type of action, petitioners have challenged specific projects as detrimental to climate commitments. One strand of such cases attempts to link greenhouse gas emissions and climate change to resource extraction. While certain cases remain pending, to date, courts have usually not been willing to accept this formulation, as long as public authorities have complied with existing legal requirements in approving the project; courts have generally not been willing to compel authorities to consider climate consequences beyond what was already foreseen in the legislation. For example:

– In *Greenpeace Nordic Association v. Norway Ministry of Petroleum and Energy*, petitioners claimed that the grant of licenses for deep-sea oil and gas extraction violated Norway's climate commitments because the extracted materials would later emit CO^2 when combusted. The court decided that this was irrelevant to whether the license should be granted.[22]

– In *In re Vienna-Schwechat Airport Expansion*, petitioners challenged the extension of the Vienna airport. The first instance court initially overturned the government's approval of the project because it deemed that this would be contrary to Austria's



"Companies must be ready to reckon with a future in which climate change is a main preoccupation for policymakers and civil society."

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3. IEA, Global Energy and CO2 Status Report (2019), (https://www.iea.org/geco/emissions/.
4. Much attention has been placed on developments in the US, which have had by far the most climate litigation to date. However, this article focuses on significant developments in other jurisdictions, which must not be overlooked as a growing number of climate cases are being filed in different parts of the world.
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11. Leghari v. Republic of Pakistan (2015) W.P. No.25501/2015.
12. Id. at para. 7
13. Id. at para. 6
14. Urgenda Foundation v. State of the Netherlands (2015) Rechtbank Den Haag C/09/456689, at paras. 4.45 and 4.46.
15. Urgenda Foundation v. State of the Netherlands (2018) Gerechtshof Den Haag 200.178.245/01 at para. 43.
16. Demanda Generaciones Futuras v. Minambiente [2018] Supreme Court of Colombia 11001 22 03 000 2018 00319 00, §14.
17. See for instance Verein KlimaSeniorinnen Schweiz v. Federal Department of the Environment, Transport, Energy and Communications (DETEC) (2018) Bundesverwaltungsgericht A-2992/2017, and Carvalho and Others v The European Parliament and the Council (2019) EU General Court T-330/18.
18. See Plan B Earth and Others v. The Secretary of State for Business, Energy, and Industrial Strategy (2019) UK Court of Appeal C1/2018/1750; Friends of the Irish Environment v. Ireland (2017) High Court of Ireland No. 793 JR.
19. Environnement Jeunesse v. Procureur Général du Canada (2019) Cour supérieure du Québec 500-06-000955-183 at para. 64.
20. São Paulo Public Prosecutor's Office v. United Airlines and Others (introduced in 2014) Regional Federal Court, 3rd Region (Brazil) 000292010.2014.4.03.9999.
21. Abrahams v. Commonwealth Bank of Australia (introduced in 2017) Federal Court of Australia VID879/2017.
22. Greenpeace Nordic Association and Nature and Youth v. Norway Ministry of Petroleum and Energy (2018) Oslo Tingrett 16-166674TVI-OTIR/06. For a similar type of decision, see for instance PUSH Sverige, Fältbiologerna och andra v. Sverige regering (2016) Stockholm District Court (similar type of claim rejected).
23. In re Vienna-Schwechat Airport Expansion (2017) Bundesverwaltungsgericht W109 2000179-1/291E.
24. In re Vienna-Schwechat Airport Expansion (2017) Verfassungsgerichtshof Österreich E 875/2017, E 886/2017.
25. In re Vienna-Schwechat Airport Expansion (2018) Bundesverwaltungsgericht. For a similar type of decision, see for instance Plan B Earth and Others v. Secretaryof State for Transport (2019) High Court of England and Wales 1070 (Admin) (claim rejected).
26. Royal Forest and Bird Protection Society of New Zealand Incorporated v. Buller Coal Ltd. (2012) New Zealand High Court 2156.
27. Gloucester Resources Limited v. Minister for Planning (2019) New South Wales Land and Environment Court 7.
28. Lliuya v. RWE AG (2016) District Court Essen 2 O 285/15.
29. Lliuya v. RWE AG (2017) Landgericht Essen 1-5 U 15/17 2 0 285/15.
30. See above note 22.
31. ClientEarth v Enea (2019) District Court in Poznan IX GC 1118/18.

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national and international obligations to mitigate climate change.[23] However, this was overturned by the Constitutional Court which found that the first instance court had considered environmental protection overbroadly and that it had been overinclusive in its consideration of emissions.[24] On remand, the petitioners' claim was rejected.[25]

– In *Royal Forest and Bird Protection Society of New Zealand Incorporated v. Buller Coal Ltd.*, petitioners attempted to challenge the attribution of a coal mining permit to Buller Coal on the ground that the contribution of the future combustion of the extracted coal to climate change should have been taken into consideration when deciding whether to attribute the permit. The court dismissed the claim, holding that the end use of the coal for which the mining permit was granted, was irrelevant under current national legislation.[26]

– Contrary to these cases, in *Gloucester Resources Limited v. Minister for Planning*, the Land and Environment Court of New South Wales (Australia) recently admitted that the impact of coal extraction on climate change could be taken into consideration when deciding whether to grant a mining license.[27]

However, this case does not break away from courts' tendency to defer to executive authorities: the company's application to construct a coal mine had already been denied by the Department of Planning for similar reasons, and the company appealed this in front of the Court, which upheld the decision.

5. Actions for liability of greenhouse gas emitters:

Another trend is formed by cases seeking to assign liability to particular greenhouse gas emitters for damages caused by climate change. It is very hard for such lawsuits to succeed under the traditional concept of tortious liability, which requires proof of causation, as climate change is caused by a mix of greenhouse gases in the atmosphere from various contributors. As a consequence, such actions against big CO^2 emitters have not been successful so far, though it is possible that this may change in the future. Of particular note is the case of *Lliuya v. RWE AG*, where a Peruvian farmer sought damages from RWE, a Germany energy producer, to cover the costs of protecting his Peruvian town against the risk of floods due to melting glaciers. His claim was that by emitting substantial amounts of greenhouse gases, RWE was partly responsible. The claim was rejected in first instance[28] but on appeal, the Landgericht Essen deemed the complaint admissible. This decision is novel as the court accepted that in theory, a company could incur liability for climate-related damages caused by its greenhouse gas emissions. However, significant difficulties remain: in the evidentiary phase, it must now be proven that Mr Lliuya's house is threatened by climate change-related events and that RWE's emissions contributed to that risk; it must also be established that RWE's *"co-causation share in the causal chain"* can be measured and calculated.[29]

Impact on corporations

The case law cited in previous sections of this article provides examples of how corporations have been targeted by legal actions related to their climate policies, disclosure practices, licenses or past greenhouse gas emissions. While many of these cases have been unsuccessful, often due to obstacles linked to the nature of the judicial power such as standing, deference and evidence of causation, the proliferation of such cases is showing no signs of slowing down. On the contrary, victories such as *Urgenda, Future Generations* and *Gloucester Resources Limited* galvanize petitioners' hopes of triggering action through the courts. But even unsuccessful cases, or cases which do not proceed to a consideration of their merits, can have a profound impact on corporate behaviour, as illustrated in *Abrahams*.

Litigation risks for companies do not only come from the outside: shareholders themselves sometimes introduce actions seeking to prevent or compel the company to adopt a certain course of action. This was for instance the case in the above-cited *Abrahams v. Commonwealth Bank of Australia*.[30] *ClientEarth v. Enea* constitutes another example of successful shareholder activism: a shareholder of a Polish utility company brought an action to obtain the annulment of a resolution approving the construction of a new coal-fired plant on the ground that it was harmful to the company's economic interest because of climate-related financial risks, including the rise of carbon prices, the availability of cheaper renewable energies, and EU-driven changes in state subsidies for coal power. The Polish court held in favour of the plaintiff.[31]

In addition to the above, non-compliance with climate-related obligations, or even the appearance of ill will when it comes to contributing to climate change mitigation and adaptation measures, may entail reputational damages for companies, which may in turn impact consumer behaviour. As a consequence, companies must be ready to reckon with a future in which climate change is a main preoccupation for policymakers and civil society.

Climate change reporting: gaining prominence inside and outside the boardroom

Matthew Townsend and Sara Feijao of A&O

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Environmental, social and governance (**ESG**) issues are a growing concern for large companies across the world given the increased scrutiny by investors, central banks, regulators and consumers. Climate change in particular is currently dominating the ESG agenda globally.

In 2015, over 190 countries adopted the Paris Agreement, in which they committed to keeping global average temperature increase in the 21st century to well below 2 degrees Celsius above pre-industrial levels and to strive to limit the increase to 1.5 degrees. This would require global emissions of greenhouse gases to reduce to net zero by 2050. However, recent studies indicate that the global temperature is on course to increase by 3-4 degrees Celsius by the end of the century unless "transformative action" is taken soon by governments, industry and the financial sector globally. With the UN COP25 climate summit currently underway in Madrid, the UN Secretary General, Antonio Guterres, has warned that "life itself" will be endangered if the world does not urgently ramp up its efforts to tackle climate change.

There is a growing consensus, including from investors and the wider financial sector, that companies which incorporate climate change risks and opportunities into their business strategies and operations are likely to fare better in the long term. This in turn has led to greater demand from investors for better climate disclosures from companies, an increase in climate change reporting requirements from regulators and the development of a plethora of voluntary reporting standards over recent years. This article examines some of the key drivers and trends in the growing prominence of climate change reporting for corporates, and some of the main obstacles that hinder the effective implementation of a global climate disclosure regime.

Certain large listed companies are already under an existing obligation to disclose information regarding climate change but the patchwork of legal requirements globally is still heavily fragmented. In the UK, for example, the Companies Act 2006 requires quoted companies to set out the impact of the company's business on the environment, and any

"Companies are also having difficulty choosing which of the various reporting frameworks, standards and benchmarks to adhere to when disclosing data."

environment-related policies and their effectiveness. In the EU, under the Non-Financial Reporting Directive, certain large "public interest entities" (which includes large traded companies) must include a non-financial information statement in their strategic reports, setting out the due diligence processes in place in respect of environmental matters, a description of the principal environmental risks and steps taken by the company to mitigate those risks.

There is also a growing body of regulation impacting asset managers and institutional investors. The EU has proposed a package of legislation on sustainable finance, which includes a framework (taxonomy) to facilitate sustainable investments, as well as new disclosure and transparency requirements. This is part of the EU's Action Plan on Sustainable Finance, which aims to encourage the integration of ESG factors into investment decisions with a view to meeting the EU's commitments under the Paris Agreement. In the UK, certain pension schemes are now required to set out their policies on ESG factors such as climate change, and in the future some of these pension schemes will be required to publish a statement setting out how they have acted in relation to these factors.

However, it is important to take note of some of the key obstacles hindering implementation of an effective climate-related disclosure framework. Globally, the data disclosed by companies on ESG-related factors such as climate change varies in both quantity and quality. As a result, the data provided is often unhelpful for investors seeking to use ESG factors to inform their investments. Another obstacle is the fragmented nature of different reporting standards at both the national and global level, hindering investors' efforts to undertake comparative analyses or benchmarking exercises. Although there are initiatives aimed at promoting comparability between the various frameworks, such as the Corporate Reporting Dialogue, these initiatives are largely in their infancy, and the proliferation of various ESG indices and ratings provided by third parties such as Moody's, S&P, Sustainalytics and MSCI can sometimes add to the confusion.

Companies are also having difficulty choosing which of the various reporting frameworks, standards and benchmarks to adhere to when disclosing data. There is a tension between disclosing more data than what is legally required in order to meet investors' expectations, and the need to prevent disclosure from exposing a company to the types of climate change litigation currently in progress in the US and elsewhere around the world.

Having said that, one standard in particular, the Task Force on Climate-related Financial Disclosures' (**TCFD**) recommendations, is rapidly gaining traction as the leading global climate reporting framework. The TCFD, which was set up in 2015 by the G20 Financial Stability Board, is supported by the top lenders, investors, credit rating agencies, accounting firms, as well as various national regulators across the world. It recommends the inclusion of climate disclosures in annual financial reports and is based on four core elements: governance, strategy, risk management and metrics and targets. The TCFD recommendations have the added advantage of not being sector or jurisdiction specific.

However, as things currently stand, there is still no holistic framework of regulation providing a sufficient incentive for corporates to systematically factor climate-related risks and opportunities into their business strategies and operations. This climate change implementation gap will have implications for companies (and others including the financial sector) that have not adequately priced-in climate change risks and opportunities. The PRI, an independent body supporting the implementation of the UN Principles for Responsible Investment, has predicted that there will be an "inevitable policy response" by 2025 as a result of the current lack of governmental action on climate change, and that this response is likely to be "forceful, abrupt and disorderly". In the EU, we may possibly see that climate implementation gap filled sooner as a result of the imminent Green Deal for Europe, which is expected to be published before the end of the year.

Regardless of when the "inevitable policy response" materialises, the direction of travel is clear: the drive for greater transparency and accountability on the part of corporates, in particular in respect of climate disclosures but also on other ESG issues such as human rights in supply chains and diversity, will in all likelihood increase. Companies need to ensure that they are taking action now, not only in order to manage ESG-related risks and investors' expectations, but to also drive stronger long-term performance.

FOR MORE INFORMATION, PLEASE CONTACT:

BHRR Editorial Board
BHRR@allenovery.com

Andrew Denny
Tel +44 20 3088 1489
andrew.denny@allenovery.com

Matthew Townsend
Tel +44 20 3088 3174
matthew.townsend@allenovery.com

Suzanne Spears
Tel +44 20 3088 2490
suzanne.spears@allenovery.com

Kenneth Rivlin
Tel +1 212 610 6460
ken.rivlin@allenovery.com

Gauthier van Thuyne
Tel +32 2 780 2575
gauthier.vanthuyne@allenovery.com

Olga Owczarek
Tel +44 20 3088 1824
olga.owczarek@allenovery.com

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