

## Business and Human Rights Law and Policy

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### *What's in store for 2020?*

The start of a new year is a good time to reflect on developments in global business and human rights (BHR) law and policy. There were significant changes in the relationship between business and society last year. Early signs suggest that the pace of change will pick up this year, particularly with respect to human rights.

We expect some of the new political and investor focus on the treatment of stakeholders (customers, employees, suppliers and communities) to translate into new legislative proposals and an increased willingness by courts around the world to hear human rights related claims against business. The global BHR legal and regulatory landscape is certain to become more complex in 2020.

The fast-evolving environment will create new risks for multinational corporations and financial institutions, and opportunities for those able to adapt before the rest. First movers will be examining their own and their business partners' adverse impacts on human rights more closely than ever before, and seeking more transparent and innovative ways to avoid or address those impacts.

With business and human rights becoming an increasing priority for policy makers, regulators and investors, we share our thoughts on the ten major BHR trends that we expect will be of concern to the boards and general counsels of many multinational businesses during the year ahead.

In summary, we expect to see:

1. A greater focus on the treatment of stakeholders
2. Enhanced corporate disclosure regarding human rights issues
3. An evolving and uneven legal and regulatory landscape
4. The EU as the global leader on human rights issues
5. More claims against multinationals in home country courts
6. The development of practical and innovative solutions to BHR problems
7. A turn to alternative dispute resolution processes
8. Trade and investment law emerging from the shadows
9. An appreciation of human rights and the environment as intertwined issues
10. A spotlight on technology and human rights



## *1. A greater focus on the treatment of stakeholders*

In 2019, the U.S. Business Roundtable, an association which represents the chief executives of some of the world's largest companies, revisited the long-held view that 'corporations exist principally to serve their shareholders'. Instead, the Roundtable proclaimed a commitment to all stakeholders, including customers, employees, suppliers and communities, as well as shareholders. At the beginning of 2020, the theme of the World Economic Forum's 50th annual meeting, was "stakeholders for a cohesive and sustainable world", suggesting a further shift towards stakeholder capitalism by global business leaders.

It appears that the long tail of the global financial crisis, and the mistrust of business and frustration with government that it engendered, has prompted some prominent business leaders to recognise the importance of obtaining a social licence to operate from stakeholders. We expect that the new focus on stakeholders will intensify, including among investors, in 2020. This will, in turn, embolden employees, consumers and the wider public to scrutinise the actions of companies and seek to hold them to account if they violate the terms of their social licences.

## *2. Enhanced corporate disclosure regarding human rights issues*

Although respect for human rights is a crucial term of any social licence, it is notoriously hard to measure and most of the current alphabet soup of ESG (environment, social and government) metrics and standards fall short in that regard. The Corporate Human Rights Benchmark, a not-for-profit organisation, has made a start on assessing the largest publicly traded companies on a set of human rights indicators, and we expect to see other indices and rating agencies (such as Moody's, S&P, Sustainalytics and MSCI) focus more on human rights in 2020.

It is still too early to tell which of the many ESG reporting frameworks will become the global gold standard. However, the Sustainability Accounting Standards Board (SASB) – which accounts for social capital, including issues related to human rights – got a boost at the beginning of the year when BlackRock's chairman and CEO, Larry Fink, came out in favour of using it alongside the Task Force for Climate-Related Disclosures (TCFD) as the definitive ESG reporting frameworks.

There have been major changes in recent years to corporate reporting requirements concerning non-financial issues, including human rights. This year, large UK companies must include a statement in their directors' report summarising how the directors have had regard to the wider factors that they are required to consider in seeking to promote the success of the company, including the interests of the company's employees, the need to foster the company's business relationships with suppliers, customers and others, and the impact of the company's operations on the community and the environment. This statement also needs to explain the effect that these considerations have had on the principal decisions taken in the financial year. There is also the new EU regulation on sustainability related disclosures, which is discussed further below.

These new reporting requirements respond to the clamour by investors, civil society, regulators and central banks for better quality and more comprehensive data on ESG factors. But they present challenge for companies, coming as they do at a time when third parties are increasingly seeking to hold companies to account for any failings with respect to those same factors. There is also the potential for shareholders and investors to bring legal claims in relation to alleged errors or omissions in such disclosures.





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### *3. An evolving and uneven legal and regulatory landscape*

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In 2019, governments came under increasing pressure to regulate, as reflected in the theme of the 2019 UN Forum on Business and Human Rights: “Time to act: Governments as catalysts for business respect for human rights.” While only twenty governments having adopted national action plans (NAPs) to implement the 2011 UN Guiding Principles on Business and Human Rights (UNGPs), more are expected to do so this year. Civil society organisations (CSOs) are calling on governments to hurry up or move on to adopting the legally binding international instrument on business and human rights that is being drafted at the UN.

While politics always is uncertain, it seems very likely that governments will enact more BHR legislation in 2020, especially in relation to human rights due diligence and disclosure. Numerous legislatures are preparing laws similar to the UK, Californian and Australian Modern Slavery Acts, the French corporate ‘Duty of Vigilance’ law, and the EU and U.S. conflict minerals legislation.

Some governments are planning to arm their BHR regulation with harsher penalties and more ‘teeth’. For example,

Dutch legislation due to come into force requires certain companies to declare that they have carried out supply chain due diligence on the risk of child labour or face potential criminal sanctions. The UK government is considering strengthening the Modern Slavery Act by adding an enforcement mechanism that can apply civil penalties calculated as percentage of turnover. Citizen-led initiatives are putting increasing pressure on national governments to adopt more stringent BHR regulation in Switzerland, Germany, Finland and elsewhere.

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### *4. The EU as the global leader on human rights issues*

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The EU, already in the lead on climate change, looks set to pull further ahead on human rights as well under the new Finnish EU Presidency. Finland’s Minister of Employment proclaimed that “the market economy and human rights are the shared values of the European Union” at the Finnish EU Presidency’s Conference in December 2019. In the same month, the EU published a new regulation on sustainability related disclosures, that will, from 2021, require the financial services sector to identify, address and report on the principal adverse impacts of investment decisions on “sustainability factors”, including respect for human rights. Moreover, the European Commission is studying

regulatory options to require all EU businesses to undertake due diligence for human rights and environmental impacts in their own operations and throughout their supply chains.

Although some may decide to wait, it seems likely that many more European corporations and financial institutions will attempt to do human rights due diligence on their own and their suppliers’ operations, and report on their findings, this year. The effort will inevitably shine a spotlight on the risks of operating in countries with low human rights and environmental standards, and lead more European business leaders to encourage governments in both home and host countries to act to create a level playing field globally.

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### *5. More claims against multinationals in home country courts*

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Last year, the UK and U.S. Supreme Courts both issued landmark judgments in relation to BHR. The UK Supreme Court decided that a claim for negligence and breach of statutory duty against a Zambian mining company and its English parent relating to alleged environmental harm could be heard by the English courts. The Court pointed to a number of factors including the parent’s sustainability





report as arguably suggesting an assumption of responsibility for the activities of its subsidiaries.

The U.S. Supreme Court decided that international organisations, including those that fund projects with significant environmental and social impacts in the developing world, could be sued in the U.S. in relation to those impacts if their actions fell within one of the exceptions to the Foreign Sovereign Immunities Act (FSIA), including the exception for “commercial activities.” Also in 2019, the first civil case was filed under the French Duty of Vigilance Law in connection with the alleged environmental and social impact of a pipeline project in Uganda.

These developments foreshadow an increase in litigation before home country courts with respect to the activities of subsidiaries, suppliers and borrowers in host countries. In recent months, a number of very significant new BHR cases have in fact been threatened or filed in the UK and U.S. against some of the world’s largest multinational corporations. In several cases, claimants alleging that companies are profiting from human rights abuse, including child and forced labour, are trying to hold them liable and requesting restitution under the common law theory of unjust enrichment.

These are among the BHR cases to watch in 2020, together with the new cases under the French Duty of Vigilance Law, several cases under the U.S. Alien Tort Claims Act (including one which the U.S. Supreme Court has recently signalled an interest in hearing) and a number of other significant transnational tort and criminal cases that will proceed in various courts around the world this year.

## *6. The development of practical and innovative solutions to BHR problems*

The trends outlined above have prompted companies to search for practical ways to know and show that they meet their responsibility to respect human rights around the world. Last year, companies continued developing a range of tools to strengthen accountability and increase transparency in their business relationships. Some of these tools are quite traditional, such as the reform of contracts to incorporate enforceable commitments that cascade down supply chains, while others leverage new technologies, such as distributed ledger technology (or ‘blockchain’) to trace, verify and ensure custody in transactions instantly. Some new tools are being developed collectively, such as initiatives to reform purchasing practices and encouraging collective bargaining by

suppliers’ employees, while others are being developed for particular companies, such as sophisticated costing tools to identify labour and social compliance costs at specific factories.

In the year to come we expect companies to continue developing these and other tools, and seeking to address obstacles to their effectiveness. For example, we expect that proponents of blockchain as a supply chain management tool will give further consideration to data labelling criteria, data governance at entry, effective certification or verification schemes, and data privacy and cyber security issues. Also, we expect more companies to recognise that human rights issues usually cannot be solved by individual companies acting alone and step up their efforts to develop common objectives and approaches to certain countries, sectors and suppliers. Companies are likely to report more on their efforts to address human rights challenges, while worrying that this will increase their exposure to claims that they have assumed a duty of care and thus can be held liable for their failings by third parties.





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## *7. A move to alternative dispute resolution processes*

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2019 saw the launch of several prominent initiatives focused on resolving BHR disputes or promoting access to remedy for BHR related harm outside of courtroom litigation. The Office of the UN High Commissioner for Human Rights (the OHCHR) undertook a study of non-state and non-judicial remedy processes as part of its Accountability and Remedy Project (a first draft of its report is due in early 2020), while a group of lawyers and academics released The Hague Rules on Business and Human Rights Arbitration. Several major corporations established operational-level grievance mechanisms (OGMs), or published information about them on their websites for the first time, as suggested by the UNGPs.

We expect more companies to turn to consensual methods of resolving BHR related disputes and providing non-judicial remedies in the coming year. Although, companies are reforming contracts to replace aspirational language with firmer human rights commitments and they often include arbitration clauses to make those commitments enforceable, it is less clear if they will employ the new Hague Rules specifically. It is also unclear if other new non-judicial consent based

mechanisms, such as the binding dispute resolution mechanism contained in the new Dutch Agreement on Sustainable Garment and Textiles, will produce significant awards this year. We believe, however, that companies will continue establishing OGMs this year, as they are under mounting commercial and legal pressure to address grievances early in light of the trends described above. The pressure to establish OGMs is particularly great for companies that operate in countries where claimants face practical barriers to accessing effective judicial remedies.

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## *8. Trade and investment law emerging from the shadows*

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Last year, the shift in emphasis from shareholders to stakeholders led to an increased focus on the social and environmental impacts of globalised trade and investment. This rebalancing was evident in the 2019 U.S.-Canada-Mexico Agreement (U.S.CMA), which contains weaker trade liberalisation and investment protection provisions and stronger labour and environmental standards than the agreement it replaced. Several new bilateral investment treaties (BIT) include provisions on investor social and environmental responsibility as a counterpart to investment protection,

and arbitral tribunals took investor conduct into account in determining the level of damages.

The new Dutch Model BIT contemplates potential liability for investors in their home States for significant damage, personal injury or loss of life caused in the host State and a commitment to promote equal opportunities and participation for women and men in the economy.

2020 is likely to be a momentous year in trade and investment law and policy, with the UK venturing out on its own following Brexit and the investor-state dispute settlement system undergoing a redesign in the EU and other parts of the world.

The fifty-five governments that make up the OECD-hosted Freedom of Investment Roundtable will discuss ways to integrate the corporate responsibility to respect human rights into international investment policy at a conference in March 2020. While the UK government has yet to announce its position, the President of the European Commission has committed to ensure that every new EU trade agreement will have a dedicated sustainable-development chapter and high labour standards. It will be interesting to see if any new agreements follow the example of U.S.CMA to provide for rapid





response arbitral mechanisms to address alleged violations of labour standards. Proponents of these agreements suggest that they will allow for more effective collective bargaining in host countries.

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### *9. An appreciation of human rights and the environment as intertwined issues*

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The implications of environmental degradation and climate change for the full enjoyment of human rights were considered in a number of law and policy contexts last year. There have been an estimated 1,300 climate change court cases in 28 countries in recent years, including cases that produced landmark decisions last year in the Netherlands, Pakistan, and Colombia holding that governments that fail to take adequate measures against climate change violate the fundamental rights of their citizens. While there have not been any successful court cases against companies for climate change yet, in December 2019, the Philippines Commission on Human Rights concluded that major fossil fuel companies may be held legally responsible for the impacts of their carbon emissions.

Climate change will remain high on the global political agenda again this year,

as was already evident from discussions in Davos in January. It is less clear whether last year's ambitious policy statements on the subject, such as the EU's Green Deal, will result in specific legislative proposals that address the link between human rights and the environment. We expect to see louder calls for climate justice – recognition that, unless steps are taken, the poorest countries and communities will suffer the most from climate change – and more collaboration between environmental and human rights activists to ensure that conservation does not come at the expense of human rights. The discussion will play out in domestic courts – with several high profile cases proceeding against companies and the government in the U.S. in particular – and at the international level – with the UN Committee on the Rights of the Child due to consider a petition by children accusing Argentina, Brazil, France, Germany and Turkey of perpetuating the climate crisis by failing to curb emissions and promoting fossil fuels.

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### *10. A spotlight on technology and human rights*

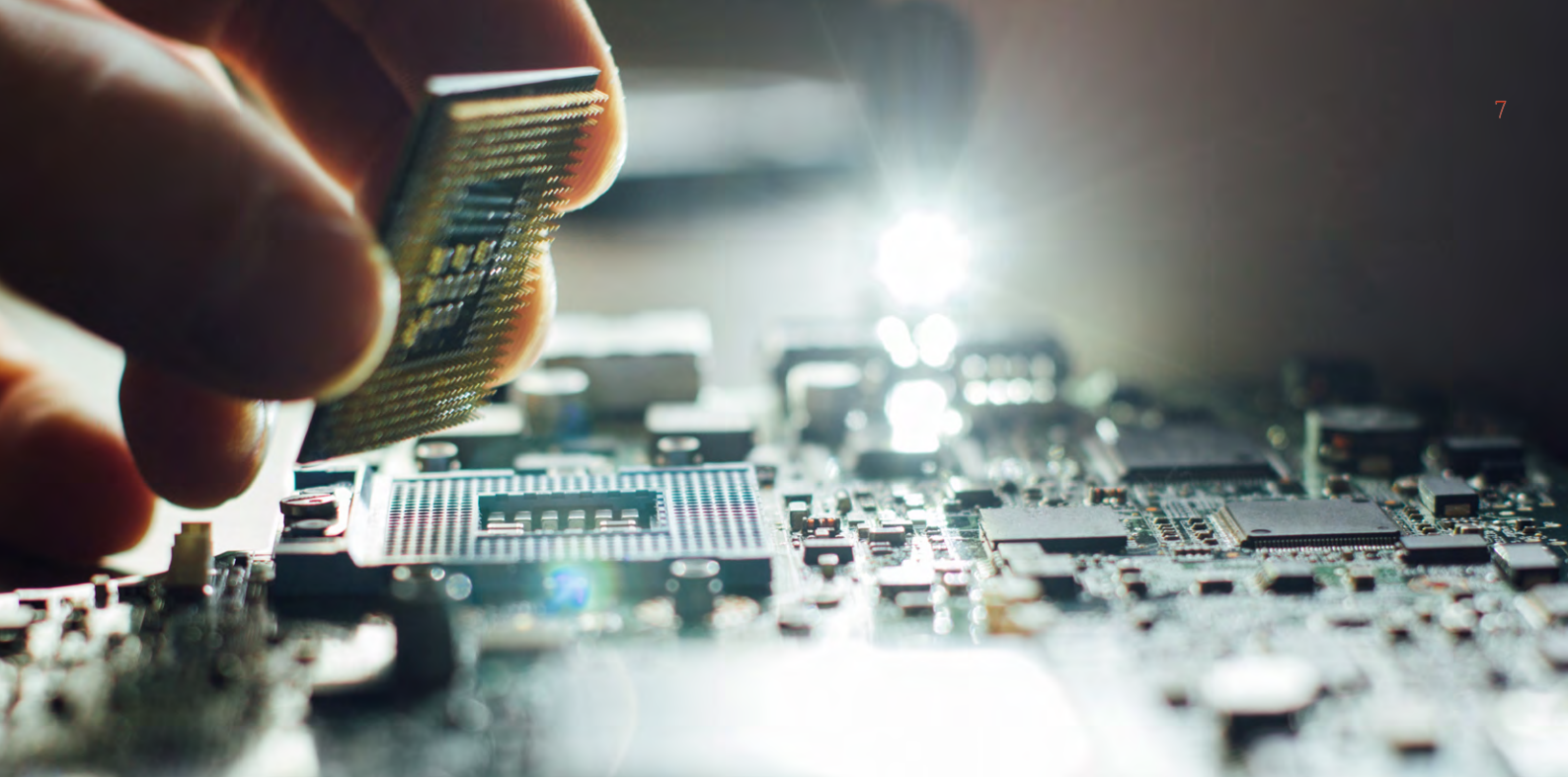
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There was a growing appreciation last year of the complex relationship between human rights and the technology, media and telecommunications (TMT)

industries. TMT companies can help to promote and protect the enjoyment of human rights by empowering citizens and facilitating advocacy. However, some TMT companies are accused of posing threats to human rights in relation to the way they obtain, process and use data, or cooperate with governments that violate rights to privacy or freedom of expression. Some companies also have been accused of failing to stop online abuse from spilling over into real-world violence or of spreading false information that sows discord.

A 2019 report by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression highlighted these concerns. The Special Rapporteur urged governments to tackle hate speech in a way that empowers citizens, protects online freedom and recognises that the State bears the primary duty to protect human rights. Some governments appear to be responding. The UK government has announced plans for an Online Harms White Paper, a set of proposals designed to regulate online platforms in the UK, and Australia launched a consultation on a similar Discussion Paper. The President of the European Commission also committed to upgrade the Union's liability and safety rules for digital platforms, services and products with a new Digital Services Act.





In the United States, concerns about freedom of expression tend to impede regulation and Section 230 of the Communications Decency Act generally prevents litigation against internet platforms in relation to their content. Nonetheless, tech businesses themselves began to call for regulation and international cooperation on the issue of freedom of expression in 2019. Facebook CEO Mark Zuckerberg was among the first, calling for global regulations to establish baseline content, electoral integrity, privacy and data standards.

We expect to see more social pressure and regulatory proposals in this area during 2020. We are already seeing activity in the courts, including a claim in the U.S. against a telecommunications company for cooperating with a designated terrorist group. In response, more TMT companies are likely to publish reports explaining how they protect their customers from online harms, safeguard their privacy and security, and grapple with the patchwork quilt of laws on investigatory powers and content blocking around the world.

We also expect to see more TMT companies adopting human rights policies, doing due diligence on the human rights impacts of their activities, devising innovative techniques to address human rights problems at scale and engaging in collaborative efforts to support the right to free expression. Many members of the sector are aware that the spotlight will be on them again this year, as they seek to address human rights problems that companies have never had to solve before.

# Allen & Overy's Global Business and Human Rights Law Practice

Business and human rights (BHR) regulatory compliance and litigation risks are becoming core concerns for many businesses wherever they operate. Our team helps clients navigate increasingly complex and sometimes competing legal requirements in this area.

One of the few specialist BHR practices in the world, with nearly two decades of experience, our team supports clients throughout all stages of their businesses. We work with our clients as partners, investing time to understand your business objectives and needs and finding solutions to enable you to meet your responsibilities to respect human rights and aspirations to make a positive social impact.

We advise on regulatory and litigation risks, as well as implementation of the UN Guiding Principles on Business and Human Rights and other social and environmental performance standards. Key aspects of our practice include:

- designing human rights policies and compliance systems to respond to the evolving expectations of stakeholders, investors, business partners, courts and regulators;
- advising on effective governance practices, corporate culture and management structures;
- setting appropriate human rights performance targets, developing performance monitoring systems and assisting with corporate reporting and communications;
- representing clients in civil, criminal and administrative proceedings before State courts; proceedings before the OECD National Contact Points; as well in international commercial and investor-State arbitrations raising BHR issues;
- advising on human rights-related internal and external investigations, the management of crises, engagement with governments and civil society, and the defence of enforcement actions;
- providing transactional support and assisting with human right due diligence; and
- developing operational level grievance mechanisms and whistle blowing procedures.

Our broad and extensive geographical reach, together with a network of specialist local firms, means we can provide comprehensive advice in any domestic jurisdiction, and on public and private international law.

We publish the market-leading publication in BHR law, the Business and Human Rights Review, and can keep you abreast of the latest BHR initiatives, legislative developments and litigation around the globe.

*We would be pleased to tell you more about our practice and introduce you to other members of the team.*

## Related contacts



Suzanne Spears

Tel +44 20 3088 2490  
suzanne.spears@allenoverly.com



Andrew Denny

Tel +44 20 3088 1489  
andrew.denny@allenoverly.com



Olga Owczarek

Tel +44 20 3088 1824  
olga.owczarek@allenoverly.com

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