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Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises

CORPORATE LAW PROJECT

OVERARCHING TRENDS AND OBSERVATIONS

July 2010

This paper is based on surveys of over 40 individual jurisdictions conducted with the pro bono assistance of more than 20 leading corporate law firms from around the world, using a common research template provided by the SRSG.

EXECUTIVE SUMMARY

Corporate and securities law directly shapes what companies do and how they do it. Yet its implications for human rights remain poorly understood. The two are often viewed as distinct legal and policy spheres, populated by different communities of practice.

Accordingly, in early 2009, the Special Representative of the UN Secretary-General (SRSG) on Business and Human Rights announced his Corporate Law Project (CL Project). It involved more than 20 leading corporate law firms from around the world helping on a pro bono basis to identify whether and how corporate and securities law in over 40 jurisdictions currently encourages companies to respect human rights. The firms were asked to prepare jurisdiction-specific surveys based on a research template provided by the SRSG, exploring subjects such as incorporation and listing; directors' duties; reporting; and stakeholder engagement. Several expert consultations have been held to discuss the firms' work and options for, as well as challenges to, legal and policy reform in this area.

To the SRSG's knowledge this project is the first in-depth, multi-jurisdictional exploration of the links between corporate and securities law and human rights.

The CL Project forms part of the SRSG's work to operationalize what is now commonly known as the UN Protect, Respect and Remedy Framework for business and human rights. The Framework was welcomed unanimously by the UN Human Rights Council in 2008 and it enjoys broad support from all stakeholder groups. It rests on three differentiated yet complementary pillars: the **state duty to protect** against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the **corporate responsibility to respect human rights**, which in essence means to act with due diligence to avoid infringing on the rights of others; and **greater access by victims to effective remedy**, judicial and non-judicial. The CL Project focuses on the role of states regarding corporate and securities law and policy, but it is also relevant to the concerns of the other two pillars.

This paper outlines the overarching trends that emerged from the participating firms' surveys on individual jurisdictions. It does not present views on legal and policy reform options in this area, nor does it independently assess the firms' interpretation of existing law.

The surveys indicate that current corporate and securities law does recognize human rights to a limited extent. Put simply, where human rights impacts may harm the company's short or long term interests if they are not adequately identified, managed and reported, companies and their officers may risk non-compliance with a variety of rules promoting corporate governance, risk management and market safeguards. And even where the company itself is not at risk, several states recognize through their corporate and securities laws that responsible corporate practice should not entail negative social or environmental consequences, including for human rights.

Yet despite these links, the CL Project also highlights two other patterns. One is a lack of clarity in corporate and securities law regarding not only what companies or their officers are required to do regarding human rights, but in some cases even what they are permitted to do. The other is the limited (to non-existent) coordination between corporate regulators and government agencies tasked with implementing human rights obligations. As a result, companies and their officers appear to get little if any guidance on how best to oversee their company's respect for human rights.

The following is a brief summary of the main trends from each section of this paper:

Incorporation and listing: The surveys suggest that most jurisdictions bestow some form of limited liability and separate legal personality on companies at incorporation. Exceptions to the applicability of these concepts are rare, with regulators and courts extremely reluctant to "pierce the corporate veil" except in limited situations, such as fraud. Moreover, none of the surveys indicate that incorporation laws expressly require companies to recognize a duty to society at the point of incorporation, although some contend that this could be implied from obligations to incorporate for a proper or lawful purpose, especially where the state has strong laws guaranteeing human rights protection. The act of listing is also generally not linked to any recognition of a duty to society, although some listing rules are starting to encourage companies to consider and act on human rights-related impacts, mainly using environmental, social and governance language.

Directors' Duties: The surveys indicate that in most jurisdictions directors owe their duties to the company and have an over-arching duty to act in the company's best interests, which generally means the shareholders' interests as a whole. Some jurisdictions are moving towards the "enlightened shareholder value" approach, which means incorporating sustainability concerns into assessments of the company's best interests, given the potential legal and reputational risks to its' long term success of not doing so.

The surveys suggest that directors are rarely expressly required to consider non-shareholders' interests, such as those of employees, customers or community members impacted by the company's activities. Nevertheless, most surveys contend that if not considering human rights impacts could lead to the company breaching the law or encountering reputational risk, and thus potentially damaging the company's long-term interests, directors should consider them as part of their ordinary duties to act with due care and diligence. Most surveys also say that directors are permitted to consider such impacts provided that their consideration of these risks accords with the company's best interests. But they also highlight that regulators generally provide little guidance as to how to make such balancing decisions, even where states have express legislative provisions allowing directors to consider social or environmental issues.

In instances where directors should consider non-shareholder impacts, including human rights impacts, such duties appear to remain at the oversight level and subject to wide directorial discretion. For example, to fulfill these duties directors might be expected to help develop processes and policies to prevent and address negative human rights impacts, but they would not be responsible for implementing those policies and practices on a day-to-day basis.

Reporting: The law firms' surveys indicate that in most jurisdictions companies must disclose all information that is "material" or "significant" to their operations and financial condition. Where a human rights impact reaches that threshold, the companies generally would be required to disclose it. But the surveys also confirm that there is limited regulatory guidance on when a human rights impact might reach that threshold.

The surveys highlight that some countries are starting to require separate corporate social responsibility (CSR) reports for particular types of companies, typically listed companies and state-owned enterprises. Such provisions tend to focus on reporting of policies rather than impacts, and they are not subject to the same accessibility and verification requirements as financial reports. Stock exchanges and voluntary corporate governance guidelines are increasingly encouraging companies to report on their environmental and social policies but again, express references to human rights are rare.

Stakeholder Engagement: The surveys suggest that there are generally few substantive impediments to shareholders including human rights concerns in shareholder proposals for annual general meetings. Moreover, in some jurisdictions there appears to have been a recent shift of regulators being less likely to agree to the requests made by some companies to block such proposals. But there are procedural barriers. For example, share quotas to circulate proxy proposals may be a constraining factor for minority shareholders wishing to raise human rights concerns (such as socially responsible investors, employees and community members impacted by the company's activities).

The law firms' surveys indicate that pension fund trustees are rarely expressly required to consider the human rights impacts of their investments, although some are asked to say whether they have a socially responsible investment policy. Nevertheless, most surveys say that if not considering such impacts could expose the fund to legal or reputational risk, then a trustee would need to consider them. While it is rare for legislation to expressly allow trustees to consider such impacts, there has been some governmental encouragement to do so.

Other Corporate Governance Issues: The surveys suggest that while there is variation in the ways in which corporate governance codes and guidelines address CSR issues, there is also a commonality in that they *are* starting to deal with these issues; they are rarely entirely "voluntary" in practice; and they increasingly rely on international CSR initiatives to help frame any relevant guidance. Nevertheless, direct references to human rights in relevant codes and guidelines remain rare.

According to the surveys, it is rare to require representation of any constituencies on boards apart from shareholders. Where such requirements exist, typically they involve employees or, in the case of state-owned enterprises, the government. It is also rare to see requirements for gender or racial representation on company boards, although it is common for general non-discrimination laws to apply to board appointments. In states where mandatory gender representation has been considered there have been some constitutional challenges on the basis that such requirements represent impermissible positive discrimination.

The SRSG hopes that the Corporate Law Project will encourage further scholarship moving beyond the 40-plus jurisdictions considered in this project, as well as stimulate discussion among the key, although often disparate, actors involved, including human rights lawyers and advocates, corporate and securities law experts, company representatives and government regulators.

The SRSG is exploring what guidance he might provide on the issues considered in the CL Project in his final Guiding Principles to be presented to the UN Human Rights Council in June 2011.

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INTRODUCTION

SRSG's mandate and the UN Framework

The Special Representative of the UN Secretary-General (SRSG) on Business and Human Rights was appointed in 2005 by then UN Secretary-General Kofi Annan with a broad mandate to identify and clarify standards of corporate responsibility and accountability regarding human rights, including the role of states. In June 2008, after extensive global consultation with business, governments and civil society, the SRSG proposed a policy framework to the UN Human Rights Council (Council) for managing business and human rights challenges.

It rests on three differentiated yet complementary pillars: the **state duty to protect** against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the **corporate responsibility to respect human rights**, which in essence means to act with due diligence to avoid infringing on the rights of others; and **greater access for victims to effective remedy**, judicial and non-judicial. You can read more about the Framework in the SRSG's 2008, 2009 and 2010 reports to the Human Rights Council, available at his website:
http://www.business-humanrights.org/SpecialRepPortal/Home.

The Council unanimously welcomed the Framework, marking the first time the Council or its predecessor had ever taken a substantive decision on business and human rights. The Council also extended the SRSG's mandate until 2011, asking him to "operationalize" the Framework—to produce Guiding Principles for the implementation of what is now called the UN Framework for business and human rights. There has already been considerable uptake of, and support for, the UN Framework by all relevant stakeholders, including international business associations and civil society.

The SRSG's Corporate Law Tools Project

How this project fits into the UN Framework

A key aspect of the UN Framework's first pillar, the state duty to protect, is that states should foster corporate cultures respectful of rights both at home and abroad, through all available avenues. In particular, the SRSG has been exploring the opportunities and obstacles that corporate and securities law and policy can provide in this regard.

Corporate and securities law directly shapes what companies do and how they do it. Yet its implications for human rights remain poorly understood. The two are often viewed as distinct legal and policy spheres, populated by different communities of practice.

For this reason, in early 2009, the SRSG announced his "Corporate Law Tools" project (CL Project). It involved more than 20 leading corporate law firms from around the world helping on a pro bono basis to identify whether and how corporate and securities law in over 40 jurisdictions currently encourages companies to respect human rights. Law firms were chosen based on their expertise in corporate law as well as experience in working with corporate clients on human rights-related issues. Jurisdictions were selected to ensure a broad geographical spread and a mix of common law, civil law and other legal traditions. They also reflected the participating firms' expertise.

The CL Project comprises an important element of the SRSG's work on the state duty to protect. It not only provides necessary information about current state practice but has facilitated discussion to consider what, if any, policy recommendations to make to states in this area.

However it is just one element of the SRSG's work on the state duty to protect, which also looks at other areas of the law and national policies which might help states to encourage companies to respect human rights.

The project also supports the SRSG's work on the corporate responsibility to respect and access to effective remedy. Regarding the former, the term "responsibility" to respect rather than "duty" indicates that respecting rights is not an obligation current international human rights law generally imposes directly on companies, although elements may be reflected in domestic laws. Internationally, it is a standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Council.

To discharge the responsibility, companies should conduct ongoing human rights due diligence whereby they become aware of, prevent, and address adverse human rights impacts. This includes complying with local laws, even where they are poorly enforced. Therefore, an understanding of national laws, including corporate law, remains vital to ensure companies understand and comply with their national legal obligations.

In relation to access to remedy, several aspects of corporate law, including company disclosure as well as mechanisms for stakeholder engagement may assist to prevent escalation of disputes. And in discussing obstacles to legal accountability of transnational companies for human-rights related abuse by their subsidiaries and other business partners, the SRSG has seen increasing debate about the particular challenges posed by complex corporate groups and about the relationship between corporate and individual liability.

The Research Template

The firms were asked to prepare jurisdiction-specific surveys based on a research template exploring subjects such as incorporation and listing; directors' duties; reporting; and stakeholder engagement. The firms were asked to discuss how corporate regulators and courts apply the law, without including normative views as to legal and policy reform in this area. A copy of the research template, as well as a list of all included jurisdictions and participating firms, is at the end of this report.

To avoid confusion, it was agreed that "corporate and securities law" for this project includes laws and policies expressly designed to regulate a company's life-cycle. For instance, those laws and policies, usually administered by corporate and securities regulators~~,~~ including stock exchanges, which regulate or provide guidance on incorporation and listing; directors' duties; financial and other reporting; shareholder and non-shareholder engagement; and other aspects of corporate governance. Of course, not all aspects of states' corporate and securities laws could be covered.

Moreover, while the participating firms were asked to discuss other areas of national law, such as labor law, environmental law, criminal law, tort law and constitutional law to the extent that they provide context to obligations under corporate and securities law, these laws were not the CL Project's intended focus.

At the time of writing, 13 surveys were available on the project's website (UK; France; South Africa; Canada; India; Singapore; Japan; Indonesia; Papua New Guinea; New Zealand; Australia, China and Argentina): http://www.business-humanrights.org/SpecialRepPortal/Home/CorporateLawTools.
The remainder of the surveys will be posted when the editorial process is completed.

All surveys are entirely the work of the participating firms and do not necessarily represent the SRSG's views.

Consultation to date

At the time of writing, two stand-alone consultations had been held to inform the SRSG as part of the CL Project. The first, attended by participating law firms, was hosted in New York by Weil, Gotshal & Manges in June 2009. It explored current state practice, including implementation and enforcement in this area. A summary report is available at: http://www.reports-and-materials.org/Ruggie-corporate-law-tools-meeting-summary-30-Jun-2009.pdf.

The second was a multi-stakeholder expert consultation convened by York University's Osgoode Hall Law School in Toronto in November 2009. Participants discussed potential policy and legal reform in this area and a summary report is available at: http://www.reports-and-materials.org/Corporate-law-tools-Toronto-meeting-report-5-6-Nov-2009.pdf.

The role of corporate and securities law has also been discussed at other, broader consultations held by the SRSG, including at a recent meeting of Corporate Counsel, and he will continue to consult widely on this issue.

Acknowledgments

The SRSG is immensely grateful to all participating law firms, without whom this project would not have been possible. The willingness of so many firms to provide their services pro bono in order to expand the common knowledge base indicates that corporate law firms worldwide appreciate that human rights are relevant to their clients' needs. He also would like to acknowledge the advice and assistance of Larry Cata Backer; Aaron Dhir; Nora Gotzmann; Daniel Guzman; Sara Seck; John Sherman; Meredith Tapper; Chad Travis; Anna Triponel; and Natalie Zerial.

Aim of this Paper

This paper summarizes overarching trends from the law firms' surveys of individual jurisdictions. This paper is organized according to the project's research template. Readers wishing to read about featured examples should go to the corresponding template answer in the jurisdiction-specific report.

This paper does not present views on legal and policy reform options in this area, or critique the firms' interpretation of existing law. And references to such laws should not be taken as the SRSG endorsing them or considering them to be best practice. Moreover, no external sources were consulted – all material is taken from the firms' surveys. Readers should note that the broad trends identified in this paper are based on the SRSG's understanding of the law firms' surveys and do not necessarily represent the firms' views.

The SRSG is exploring what further guidance he might provide on the issues considered in the CL Project in his final Guiding Principles to be presented to the UN Human Rights Council in June 2011.

SETTING THE LEGAL LANDSCAPE

Questions 1 through 5 of the research template contextualize the more detailed exploration of corporate and securities law which the rest of the document requests. These questions ask which human rights obligations are already placed on companies through laws other than corporate and securities laws (question 1); what the jurisdiction's legal tradition is (question 2); whether corporate and securities laws are regulated federally or provincially (question 3); what the key corporate and securities regulators are and their respective powers (question 4); and whether the state has a stock exchange (question 5).

Most surveys listed an array of different types of laws and policies in their answers to question 1, from constitutional law to labor, environmental, employment/anti-discrimination, criminal, tort/delict and privacy laws. As stated above, this project focuses on corporate and securities law. However, the SRSG appreciates that the significance of certain corporate law provisions may be strengthened or weakened by the existence, or absence, of other domestic legal obligations on the corporation to respect human rights. For example, in the United States, directors' duties are informed by the wider legal liability landscape, which includes such statutes as the Alien Tort Claims Act, used so far in over 40 cases to sue companies in tort in US courts for human-rights related abuse abroad.

Thus, in answering question 1, the firms were asked to provide a general, concise picture as to the jurisdiction's business and human rights legal landscape.

The introductory nature of questions 1 through 5 means that the responses were highly jurisdiction-specific, making it difficult to identify overarching trends. Nevertheless, one pattern does emerge, of a tendency for corporate and securities regulation to be separate from implementation, enforcement and awareness-raising of other laws and policies encouraging business respect for human rights. This is evident from the surveys' examination of the (often lack of) interrelationship between corporate and securities law, and more specific human rights-related laws and policies. And the surveys also indicate the organizational structure of the key corporate and securities regulators in each jurisdiction, providing an insight into the opportunities and challenges of promoting greater interaction between those agencies and those tasked with implementing the state's human rights obligations.

The surveys are broadly consistent with the SRSG's findings in relation to state roles and practice in the business and human rights domain as a whole. The SRSG has found that the area exhibits substantial legal and policy incoherence at the national level, often replicated internationally. The most widespread is what he has called "horizontal" incoherence, where economic or business-focused departments and agencies that directly shape business practices conduct their work in isolation from and largely uninformed by their government's human rights agencies and obligations, and vice versa. Such agencies may include those dealing with corporate and securities law.

INCORPORATION AND LISTING

Introduction

In some jurisdictions, the corporate form, including its related benefits such as limited liability and separate legal personality, was historically viewed as a privilege in exchange for serving a public purpose. This section of the template aims to discover in which jurisdictions such links were made in the past or indeed exist today. It also asks about similar requirements or expectations in relation to listing, due to the increasing role stock exchanges play in encouraging more socially responsible behavior. Given the relevance of the complexities of the corporate form to the business and human rights domain, the research template asks for an elaboration of concepts such as separate legal personality and limited liability, including exceptions to the applications of these concepts. Finally, drawing again on the role of stock exchanges, the final question in this section asks about socially responsible investment indices. It aims to get a sense of how, in addition to listing rules, stock exchanges may be promoting more socially responsible behavior.

Question by Question Analysis

Question 6: Do the concepts of "limited liability" and "separate legal personality" exist?

This question assesses whether jurisdictions provide all or some companies with "separate legal personality" and "limited liability" and, if so, to what extent exceptions to the application of these concepts exist. Under the doctrine of separate legal personality, a company has the legal capacity to exercise certain rights and assume certain obligations separate to the rights and duties of its owners. The principle of limited liability provides that a company's liabilities do not extend to any of the shareholders' or directors' personal property.

Some form of "separate legal personality" and "limited liability" exist in all of the 39 jurisdictions for which the SRSG has received final survey reports. The surveys provide that all of these jurisdictions have a governing statute that describes: (i) the types of permissible business forms; (ii) the creation and operation of each form; and (iii) the type of liability that applies to each form. All jurisdictions have similar permissible business forms with limited liability, and the most common is the limited liability company. Most jurisdictions have a body of common law or statutory provisions describing limited exceptions to these concepts, whereby the company's owners may be held directly liable for the company's liabilities, an action known as "piercing the corporate veil."

Typically, such exceptions are limited to situations involving fraud, the intentional avoidance of statutory or contractual obligations, or some other act of bad faith. For example, in **India**, the courts have lifted the corporate veil in cases of fraud or improper conduct. **Japan** allows the corporate veil to be pierced where a company is being used to commit fraud or to avoid statutory or contractual obligations. Likewise, in **Australia** courts may "lift the corporate veil" where a company's structure is used to perpetrate a fraud, or to enable a legal or fiduciary obligation to be evaded. Nevertheless, several surveys highlight that courts are extremely reluctant to "pierce the veil" and will do so only in exceptional circumstances.

Some jurisdictions have express statutory exceptions to limited liability and separate legal personality. In **Singapore,** the Companies Act has express exceptions for instances where debts are contracted without any reasonable or probable expectation that the company would be able to pay its debts, or where dividends are paid in the absence of available profits. In **South Africa**, the Companies Act creates exceptions to limited liability for reckless or fraudulent actions. Likewise, in **China**, under the Company Law, shareholders that abuse their rights must compensate the company or other shareholders for any losses caused by such abuses, and shareholders who use the company to try to avoid debts will be held jointly and severally liable for the company's debt.

In addition, some jurisdictions appear to allow recourse against controlling shareholders without fault in cases of environmental damage or breaches related to tax or labor obligations, or against shareholders when fraud is present. For example, in **Brazil**, controlling shareholders may be liable (in proportion to their respective capital stakes) for environmental damages if the company's assets are insufficient to cover such damages, irrespective of any guilt on the part of the company or the shareholders. Additionally, controlling shareholders have been held liable for their company's labor obligations in almost every situation in which the company does not have sufficient assets to cover such obligations. In **Colombia**, founders of a limited liability company are jointly and severally liable for tax and labor obligations regardless of guilt, whereas it appears that shareholders would only be liable for tax and labor obligations to the extent that fraud is present.

Question 7: Did incorporation or listing historically, or does it today, require any recognition of a duty to society, including respect for human rights?

The surveys suggest that most countries do not expressly require any recognition of a duty to society for incorporating or listing. In the **United States**, for example, incorporating in Delaware, New York or a state that has adopted the Model Act, does not specifically require recognition of a duty to society, and there is no specific requirement that a corporation wishing to list on a securities exchange recognizes such a duty.

Nevertheless, the surveys provide that in several jurisdictions, incorporation does require companies to establish that they are operating for a lawful purpose. Some surveys suggest that where the jurisdiction has strong constitutional or other legal protections vis-à-vis human rights, this could imply that a company incorporating to carry out activities clearly at odds with human rights, and thus with the law, may be denied the rights to incorporate. However, several surveys also highlight that they do not know of such arguments being made in practice. Moreover, many surveys say that it is unclear whether a company would simply need to show that it is not incorporating for the sole purpose of abusing human rights, or whether it would also need to show more indirectly that it is not incorporating for activities which amongst other impacts may negatively affect human rights.

Examples of requirements to incorporate with a lawful purpose include **Indonesia**, where incorporating companies must not have goals, objectives or business activities that are contrary to law, public order or morality. Indonesia's Human Rights Law provides that certain international human rights instruments form part of domestic law. Accordingly, the report for **Indonesia** contends that there may be an implied duty for incorporating companies not to perform any activities that would violate such instruments. In **Finland**, incorporating companies have a general duty to comply with all applicable laws, which the report contends include the Constitution’s human rights provisions. In **Japan,** the legal affairs bureau may reject an application for incorporation if the business objective is deemed illegal, which the report indicates may include activities at odds with human rights. In **Colombia,** the report contends that the fact that a company's constitution can be challenged if it is contrary to the state constitution suggests that there may be an implied duty not to violate rights in line with any state constitutional requirements.

Similarly, many jurisdictions broadly require that incorporating companies respect the "public order.” For example, in **France**, corporations must pursue a purpose respectful of the public order. The report for France suggests that the French courts may cancel a contract for failure to pursue such a purpose, but that there are no such precedents for pursuing a purpose in violation of human rights, environmental or social norms. In **China**, the Company Law requires corporations to "observe social morals and commercial ethics, act with integrity and good faith, accept the supervision of the government and the public, and undertake social liability.” In **Singapore**, under the Companies Act, the registrar may refuse to incorporate a company if the company is likely to carry out an activity that is prejudicial to the public peace, welfare or good order. In the **United Kingdom**, the Secretary of State under the Insolvency Act may petition a court for a company to be wound up he if considers it "expedient in the public interest" to do so, and the court may grant this action if it is determined to be equitable. However, the report suggests that the extent to which human rights violations would merit such an action is unclear.

Regarding listing, the surveys suggest that that stock exchanges are increasingly paying attention to social issues and that companies that fail to consider them could risk delisting or other censure. For example, in **China**, rules for the Shenzhen and Shanghai Stock Exchanges require listed companies to commit themselves to environmental protection and community development whilst pursuing economic interests and protecting shareholders' interests. In **Luxembourg**, listed companies must have "high standards of integrity" and behave in a “responsible manner.” In **New Zealand,** market participants and advisors must observe "proper ethical standards" and act with "honesty, integrity, fairness, due skill and care, diligence and efficiency.” In **Malaysia**, the listing rules provide guidelines for CSR, but the report suggests they are not regularly enforced and contain no penalties for non-compliance.

Question 8: Do any stock exchanges have a responsible investment index, and is participation voluntary? (See e.g. the Johannesburg Stock Exchange’s Socially Responsible Investment Index.)

This question assesses in which jurisdictions companies are required or encouraged to participate in socially responsible investment (SRI) indices. Such indices generally list corporations which satisfy certain environmental, social and governance criteria. These criteria are usually based on prevailing international standards, such as the UN Principles for Responsible Investment (UN PRI). Additionally, an SRI index can focus on companies engaged in certain industries, doing business in specific regions or of a certain size. The SRSG sought to further explore the extent to which national stock exchanges are utilizing such indices, either through voluntary or mandatory means.

The surveys suggest that most jurisdictions do not operate SRI indices through their national stock exchanges, apart from a few exceptions, detailed below. And even where such indices exist, it appears that human rights are not specifically contemplated as indicators for ranking.

For example, in **Brazil**, the Bovespa Corporate Sustainability Index tracks the economic, financial, corporate governance, environmental and social performance of leading companies listed on the São Paulo Stock Exchange. The index aims to acknowledge companies actively engaging in social responsibility, and to encourage ethical corporate responsibility in all companies. Similarly, in **South Africa**, the Johannesburg Securities Exchange (JSE) SRI Index was launched in 2004 pursuant to the second King Report on Corporate Governance. Public companies listed on the FTSE/JSE All Share Index who wish to feature on the SRI Index must meet minimum criteria which are based on the UN PRI. In June 2009, the **Indonesian** Stock Exchange and Biodiversity Foundation KEHATI launched the KEHATI-SRI Index. This index tracks the performance of Indonesian companies with good sustainable business practices according to international environmental, social and governance criteria. In addition, stock exchanges in **Denmark**, **Finland**, **Norway** and **Sweden** each participate in the OMX GES Ethical Nordic Index and the OMX GES Nordic Sustainability Index, and have similar ethical and sustainability indices specific to each country. Companies listed on these exchanges are rated based on the "GES Global Ethical Standard" and the "GES Controversial," which are based upon international guidelines for environmental, social and governance issues in accordance with the UN PRI. For example, companies that produce or sell weapons, tobacco, alcohol, pornography or that are involved in gambling are not included.

In most countries, large companies can choose to participate voluntarily in third-party SRI indices, such as the FTSE4 Good Index or the Dow Jones Sustainability Index ("DJSI") World, which are typically operated by private entities. The DJSI World evaluates the 2,500 largest companies on the Dow Jones Global Index on environmental, social and financial issues, and lists only the top 10 percent in each sector. The FTSE4 Good Index requires that listed companies meet certain corporate social responsibility standards based on international norms established by NGOs, government bodies, consultants, academic entities, the investment community and the business sector. There are also country-specific indices operating in this space. For instance, the **Saudi Arabian** General Investment Authority launched the Saudi Arabian Responsible Competitive Index which assesses leading Saudi Arabian businesses based on company strategy, management, stakeholder engagement processes and social, environmental, and economic performance systems. In **Japan**, the Morningstar Socially Responsible Investment Index selects companies by assessing their social responsibility in the areas of corporate governance, employment, consumer services, environment and social contributions.

Furthermore, in a few jurisdictions, such as **Indonesia** and **Singapore**, companies participate in indices that operate similarly to SRI indices but which are based on criteria other than social or environmental responsibility, such as Islamic law.

Conclusion

The surveys suggest that most of the jurisdictions featured in this project have similar approaches to the concepts of separate legal personality and limited liability – namely, it is rare for the "corporate veil" to be pierced. Moreover, it remains unclear the extent to which available exceptions to these concepts may be applied to situations of human rights related abuse.

The surveys provide that most jurisdictions do not expressly require any recognition of a duty to society or respect for human rights as a condition of incorporation or listing. However, several surveys suggest that the requirements or expectations to incorporate or list for a lawful purpose, or in accordance with the public order, may indirectly have the same effect, depending on the national legal context regarding business and human rights.

Finally, while the number of stock exchanges using SRI indices seems to be slowly increasing, the surveys suggest that they tend not to include express human rights indicators.

DIRECTORS' DUTIES

Introduction

The template questions related to directors' duties assess the extent to which directors are required, allowed or encouraged to consider the human rights impacts of the company's activities, as well as the discretion they are given in making these considerations. Directors are regularly required to make challenging decisions regarding a company's business activities, including those related to the company's human rights impacts. Thus this section aims to explore what guidance corporate laws around the world provide to directors on this issue.

The surveys suggest that the scope of directors' duties is usually set out in a country's statutory corporate law and complemented by case law and regulatory guidance. The way a state envisions a director's role in a company is revealing of that state's general approach to the role of business in society. A "shareholder approach" whereby directors' actions must aim at maximizing shareholders' position as owners above all, contrasts with a "stakeholder approach," whereby directors are required to take a range of stakeholders, not just the shareholders, into account in their decision-making. A hybrid approach, commonly known as the "enlightened shareholder value approach," has recently appeared in certain jurisdictions. Here, directors may or must consider other stakeholders within the context of maximizing shareholders' value as owners.

Question by Question Analysis

Question 9: To whom are directors' duties generally owed?

This question aims to explore the types of duties directors generally owe and to who these duties are owed, including clarification on whether duties are owed to non-shareholders. In doing so, it seeks to identify more generally whether the particular jurisdiction has a shareholder, stakeholder or hybrid approach to directors' duties, which would in turn contextualize other answers in this section. In several cases, the SRSG encouraged firms to further define the terms "stakeholder" and "third party" so that where duties are owed to such persons or groups, it is clearer whether they could encompass persons affected by alleged human rights related abuse.

Although directors' duties vary in scope among jurisdictions, the surveys suggest one overarching trend: the requirement for directors to act in the company's best interests, which generally means acting for the shareholders as a whole. The surveys identify that this is generally the directors' primary duty and usually incorporates elements of due care, loyalty and due diligence, with the understanding that the director is to perform these duties in good faith. Some jurisdictions also have more specific duties, such as the duty of secrecy (**Spain, China and Papua New Guinea**), the duty not to misappropriate company property (**China**) and the duty to establish internal control systems (**India**).

The surveys suggest that in some jurisdictions, the company's best interest is explicitly stated to correspond to the shareholders' interests as a whole as the company's owners (**Luxembourg** and the **U.S.**). In other jurisdictions, this can be implied (**Germany**, **South Africa, Italy, Australia, Chile** and **Algeria**), or can be confirmed by soft law (**Spain**). In **Spain**, for example, the Unified Code for Corporate Governance interprets the company's best interests as including the shareholders' common interests.

According to the surveys, in at least four jurisdictions, statutory and/or case law indicates that the company's best interests can correspond to the interests of a range of actors, extending beyond those of the shareholders if such consideration promotes the company's long term success – in other words, adopting the "enlightened shareholder" approach mentioned above. In **Singapore**, case law indicates that the company's best interests can correspond not only to the interests of the company itself but also to the interests of its shareholders and employees, creditors, or the group to which the company belongs. In **Canada**, the Supreme Court has said that directors' duties are owed to the corporation and not to outside stakeholders, but that in considering the corporation's interests, directors may look to the interests of shareholders, employees, creditors, consumers, government and "the environment" to inform their decisions." In the **Netherlands**, it is generally considered that a director is to act in the interest of the company in the broadest sense, i.e. the combined interests of its shareholders, employees, creditors and even society at large. In the **UK**, as detailed further in question 11 below, the Companies Act provides that in promoting the success of the company, directors must have specific regard to "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."

In other jurisdictions, the "enlightened shareholder value" approach requiring non-shareholders to be taken into account has been expressly rejected. In **Hong Kong,** for instance, the government is currently conducting public consultations in relation to the rewriting of the Companies Ordinance. Preliminary consultations indicated only limited support for incorporating the "enlightened shareholder value" approach into directors' duties. Objections included that such duties would place too heavy a burden on directors, that they may be difficult to comply with and that the concept of "enlightened shareholder value" was not widely accepted in Hong Kong.

Directors in a number of jurisdictions, primarily common law jurisdictions, owe separate duties to shareholders (as opposed to the company as a whole) under specific circumstances (**South Africa,** the **U.S., Australia, Hong Kong, India, New Zealand**, and **Japan** which is a civil law system influenced by common law). Such duties tend to apply when directors are in a special position of trust vis-à-vis the shareholders. Generally, directors in common law jurisdictions also owe special duties to creditors when the company is insolvent (or approaching insolvency in some cases). In a few civil law jurisdictions (**Denmark, Sweden and Italy**), directors owe a specific duty to creditors regarding the maintenance of the company's capital and assets, which applies whether or not the company is insolvent. However, the surveys highlight that civil law systems generally only impose limited directors' duties in relation to shareholders and creditors in their own right.

In a few jurisdictions it appears that directors can owe special duties to third parties. This area merits further exploration. The surveys suggest that confusion exists in a number of jurisdictions as to whether directors genuinely owe separate fiduciary duties to third parties under corporate law or whether this is based on general tort principles not to cause damage to third parties. The question also remains as to which "third parties" or "stakeholders" duties may be owed to, and whether these could include suppliers, customers or other persons or groups affected by the company's activities.

Directors' duties are usually found in corporate statutes. They can also be found in other sources, including case law, the company's organizational documents, directors' employment contracts, or listing rules. For example, in **Russia** specific directors' duties are generally included in the company's organizational documents. In **Luxembourg**, directors of listed companies have more duties than those of privately held companies under the Transparency Law and the Market Abuse Law. In the **U.S.**, as in many other jurisdictions, it is clear that if a company includes duties relating to social or environmental issues in its constitution then the company may have recourse if those duties are not fulfilled.

Question 10: Are there duties to avoid legal risk and damage to the company's reputation? If so, are they duties in their own right or are they incorporated into other duties?

This question intends to ascertain whether directors owe a specific duty to avoid legal risk and damage to the company's reputation, including potential harms resulting from corporate human rights violations. If there is no such duty, it asks whether the obligation can be implied from other existing duties.

None of the surveys highlight a separate, self-standing duty to avoid legal risk and damage to the company's reputation. Nevertheless, many surveys argue that such a duty could be implied from existing duties, such as the duty to act in the company's best interests and the duty to properly manage the company. For example, in the **UK**, in fulfilling the duty to promote the success of the company, the Companies Act requires that a director have regard (amongst other matters) to the desirability for the company to "maintain a reputation for high standards of business conduct." However, the report for the UK contends that directors may be able to justify some reputational risk if they believe that their approach will nevertheless secure the company's long-term value.

The surveys highlight that case law also may play a role in promoting the existence of a duty to avoid legal risk as well as damage to reputation. For example, in two jurisdictions, courts have indicated that directors owe a duty of care to employees not to run the company in a manner which damages its reputation to the extent that employees become unemployable (**UK** and **Malaysia**). Some voluntary codes of conduct seem to follow similar reasoning. For example, in **France**, the Cultural Diversity Charter initiated by companies and the government (and with over 2,000 signatories) refers to the importance of complying with non-discrimination laws in order to "prevent a loss of reputation."

Nevertheless, several surveys highlight that the possibility of holding directors accountable for failing to avoid legal risk and reputational damage may be limited due to the difficulty of proving harm, which must generally be quantifiable in terms of economic loss. It may be especially hard to prove that reputational damage caused the loss claimed, especially in jurisdictions where the share price cannot be used as an indicator because of the prevalence of privately owned companies (see in particular surveys for **Brazil** and **Algeria**). Some surveys also note that the directors' wide discretion in exercising their duties allows them to weigh the costs and benefits of actions taken which could impact the company's reputation, thus making it difficult to establish that they acted unreasonably (**Australia** and **Singapore**).

Finally, some surveys suggest that a specific duty to avoid legal risk and reputational damage could form part of risk management. The duty of risk management generally requires directors to establish a monitoring system for the early recognition of risks that may endanger the company's operations. This duty is increasingly mentioned in soft law guidelines, and in some cases hard law, as forming a part of the director's general duty to act in the company's best interests. For example, in some **U.S.** states, directors are responsible for assessing significant risks (including, as appropriate, actions that may infringe human rights) and for taking the steps necessary to identify, measure, monitor and control these risks. In **Germany**, the "Minimum Requirements for Risk Management," non-binding guidelines applicable to banks and insurance companies, explicitly refer to reputational risks. In **Luxembourg**, a law based on the EU's Third Money Laundering Directive imposes a risk-based approach of due diligence on listed investment institutions' directors (pension funds and management companies). Avoiding legal risk and reputational damage is specifically listed as a duty for directors in listed investment institutions.

Question 11: More generally, are directors required or permitted to consider the company's impacts on non-shareholders, including human rights impacts on the individuals and communities affected by the company's operations? Is the answer the same where the impacts occur outside the jurisdiction? Can or must directors consider such impacts by subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction? (See e.g. s. 172 UK Companies Act 2006)

The three subsets of this question intend to assess whether directors are required or permitted to consider the company's impact on non-shareholders, including human rights impacts, wherever they might occur, including situations where the company's subsidiaries or other business partners may be contributing to the impacts. The question was inspired in part by the SRSG's previous exploration of section 172 of the UK Companies Act, which requires directors to "have regard" to such matters as "the impact of the company's operations on the community and the environment" as part of their duty to promote the success of the company. The SRSG sought to find out whether other jurisdictions have similar provisions and if so, the boundaries of such provisions.

In nearly all of the jurisdictions surveyed, the surveys highlight that corporate law does not ***explicitly require*** directors to consider the company's impact on non-shareholders, including human rights impacts. Moreover, even where there is such a duty, it tends to be framed within the requirement to act in the company's best interest, and as pointed out in question 9, may not always be specific as to the types of non-shareholders to be considered.

A significant number of surveys suggest that considering non-shareholder interests, including human rights impacts on non-shareholders, is ***implicitly required*** as part of the duty to act in the company's best interests. This is because of the potential legal and reputational risks that a company may face if it fails to take account of such impacts, and is especially the case where national laws lay out human rights-related duties for companies. The most relevant laws in this respect are labor laws, occupational health and safety laws, consumer protection laws, environmental laws, and privacy laws, as well as constitutional protections.

In any case, the surveys argue that in most jurisdictions, directors are ***permitted*** to consider the interests of non-shareholders as long as this is in accordance with the company's best interests. Directors may even be encouraged to do so by statute, case law, corporate governance guidelines, and other regulatory guidance. This appears to be a relatively recent trend, with most of the guidance from these sources dating from the past decade.

Requirements to Consider Non-Shareholders

The surveys suggest that in some limited cases there are express requirements for directors to consider social and environmental impacts on non-shareholders, although the term "human rights" does not appear.

For instance, in the **UK**, as noted above, the Companies Act requires directors, in promoting the success of the company, to have regard to, among other things, (i) the interests of the company's employees, (ii) the need to foster the company's business relationships with suppliers, customers and others, and (iii) the impact of the company's operations on the community and the environment. The report contends that "to have regard to" means that the directors must give proper consideration to these factors, but does not mean that directors have to give primacy to, or cannot act inconsistently with, these non-shareholders' interests. The impact of decisions on shareholders continues to be key.

The report for **Germany** highlights that directors have to consider stakeholders' interests alongside shareholders' interests in their policy-making and decision-making processes. Although an explicit reference to stakeholders' interests cannot be found in any current statute, the Companies Act of 1937 did refer to directors' duties to employees and common welfare. This was deleted in a 1965 reform of the Companies Act because of agreement that the need to consider these interests was self-evident. However, the report for Germany provides that the government is considering reintroducing this reference given the salience of the issue as highlighted by the recent global financial crisis.

In other jurisdictions, the surveys suggest that a duty to consider impacts on non-shareholders, including human rights impacts, can be implied from the duty to act in the company's best interests and within that duty, to abide by the law. For example, the report for **Brazil** argues that corporate law can be read as requiring directors to pursue the company's purposes of generating profits while considering the public at large. The report for **South Africa** explains that while South Africa's new Companies Act does not have a similar provision to the UK Act, a reading of the South African Act's provision defining directors' duties together with the Act's purposes (which includes respecting South Africa's Bill of Rights) gives rise to a requirement for directors to consider the company's impacts on non-shareholders, including human rights impacts. The report for the **U.S.** highlights existing directors' duties to implement appropriate information, reporting and internal control systems, as well as to assess the risks that are significant to their organizations and ensure that management is taking the steps necessary to identify, measure, monitor and control these risks. It then suggests that where certain human rights violations impose a meaningful risk to the corporation, boards of U.S. corporations are well-advised by existing case law to become aware of, and then implement appropriate mechanisms to control for such risks.

According to the surveys, the implication that directors should consider the company's human rights impacts is even stronger where failure to do so would mean that the company breaches a legal provision. This could include labor laws, occupational health and safety laws, consumer protection laws, environmental laws, and privacy laws.

Even where the surveys suggest that there may be some instances in which directors should consider non-shareholder impacts, including human rights impacts, such duties appear to remain at the oversight level and remain subject to wide directorial discretion. For example, to fulfill these duties directors might be expected to help develop processes and policies to prevent and address negative human rights impacts, but not implement such policies and practices on a day-to-day basis.

Permission or Encouragement to Consider Non-shareholders

As highlighted above, permission or encouragement for directors to consider the interests of non-shareholders, including those potentially affected by human rights impacts, may be found in a wide range of sources guiding directors' decision-making, including legislation in some jurisdictions.

For example, the **Indonesian** Code of Good Corporate Governance indicates that directors have scope to consider non-shareholders' interests. The **Japanese** Charter of Corporate Behavior of the Nippon Keidanren insists on the necessity for companies to take into account consumers, members of society as a whole, as well as the environment. In **Russia**, non-binding corporate governance guidelines recommend that a company's executive bodies consider the interests of third parties, including the company's employees and state and municipal bodies. In addition, these guidelines advise large companies whose operations are of significant economic and social importance for a particular city or district ("city-forming enterprises") to take into account the interests of the local population as well as the economic consequences of any decisions.

In **Australia**, a number of commentators and parliamentary reports have indicated that it will generally be in the company's best interests for the directors to consider the human rights impacts of the company's operations. In **Singapore**, the Companies Act refers to the interests of the company's employees as one of the "matters the directors of a company are entitled to have regard in exercising their powers." In the **U.S.**, constituency statutes adopted by thirty U.S. states explicitly permit directors to consider the effect of board action or inaction on other constituencies, including employees, customers, suppliers, creditors, the community and the economy of the state and nation. These constituency statutes vary in terms of the weight a director may give to non-shareholder interests in determining what is in the company's best interests. They have been used by courts to safeguard directors' decisions to take into account the interests of non-shareholders.

Impacts Occurring Outside of the Jurisdiction

The surveys suggest that where there is a requirement or permission to consider impacts on non-shareholders, this will *generally* apply whether or not the impacts occur inside or outside of the jurisdiction where the company is incorporated.

Most of the surveys provide that corporate law, whether statute or case law, is generally silent on the question of impacts outside the jurisdiction. Thus, they argue that the general assumption would be that the situation is the same no matter where the impacts occurred– i.e. the director would be required or allowed to consider impacts on non-shareholders abroad if s/he was required or allowed to consider them if they occur at home, provided it remained in the company's best interests to consider the impacts. For instance, the surveys for **Belgium**, **France, the UK** and **Germany** make this argument. In particular the report for **Germany** maintains that the fact that the Stock Corporation Act specifically provides that directors of controlling companies have the same duties of care and responsibility across the corporate group implies that they owe the same duties for impacts occurring outside the jurisdiction as a result of corporate group activity.

The report for **Papua New Guinea** notes that given that the Companies Act is silent on geographical application, it may be implied that it only applies within PNG's boundaries, airspace, ships and aircraft. It also suggests, however, that this does not mean that the interests of the company have the same geographical limitations: directors may consider impacts on non-shareholders wherever they occur so long as such consideration promotes the company's interests.

On legal compliance, the surveys suggest that holding a director responsible for failing to oversee the company's adherence to a particular national law overseas will depend on whether that law had extraterritorial application. For example, the report for **Denmark** explains that the Planning Act, which imposes a number of requirements on companies, is limited to activities within the Danish jurisdiction. Accordingly, in holding a director accountable for failing to oversee the company's compliance with that law, it is arguable that only the company's activities within Denmark would be relevant. Similarly, in **Kenya**, environmental reports that include consideration of impacts on non-shareholders are only concerned with projects undertaken within Kenya. In contrast, several surveys highlight that legislation regarding corporate criminal liability for international crimes tends to cover international crimes at home and abroad.

Finally, the surveys note that when voluntary guidelines impose additional expectations on directors, these guidelines usually provide for application to the company's activities abroad. According to the Confindustria Guidelines in **Italy**, ethical codes are usually addressed to all persons working with the company and its group, including subsidiaries and suppliers. These Guidelines recommend that ethical codes also apply in all foreign countries where the company is active. The Charter of Corporate Behavior of the Nippon Keidanren in **Japan** encourages directors to consider the company's impacts on non-shareholders outside the jurisdiction. The Charter states that "members shall observe laws and regulations applying to their overseas activities and respect the culture and customs of other nations and strive to manage their overseas activities in such a way as to promote and contribute to the development of local communities."

Impacts by subsidiaries, suppliers and other business partners

The surveys suggest that directors are generally not obliged to consider human rights impacts by subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction, unless the company could face risks linked to their acts and/or omissions in relation to this behavior, including as a result of a direct violation of an applicable law.

However, there are a limited number of jurisdictions where directors are required to consider the human rights impacts of their subsidiaries, suppliers and other business partners. In the **UK**, directors must promote the success of the company by having regard, among other things, to the need to foster the company's business relationships with suppliers, customers and others. Coupled with the obligation to have regard to "the desirability of the company maintaining a reputation for high standards of business conduct," the report for the UK suggests that directors may need to consider social and environmental impacts by these entities, whether occurring inside or outside of the jurisdiction. In **France**, the Commercial Code requires companies to report on the social impacts of the company's and its subsidiaries' activities both in France and abroad. The report for France suggests that this requirement may encourage directors to consider the social impacts of the company's foreign subsidiaries.

In any case, the surveys suggest that directors generally *can* consider the human rights impacts of subsidiaries and other business partners provided such consideration accords with the company's interests.

Question 12: If directors are required or permitted to consider impacts on non-shareholders to what extent do they have discretion in determining how to do so?

This question assesses to what extent directors have discretion in considering human rights impacts on non-shareholders, particularly where such consideration is expressly or implicitly required or allowed. In particular, especially where there is broad discretion, the SRSG wanted to explore whether any regulatory guidance is available to directors in making the difficult balancing decisions involved in such considerations.

As highlighted above, the overwhelming trend amongst the surveys is that whether directors are required or permitted to consider the company's impacts on non-shareholders they are usually given broad discretion in their decision-making. This is particularly so in relation to the steps a director may decide are appropriate at an oversight level to prevent and address human rights impacts. In other words, even when they are asked to "consider" certain impacts, they have broad discretion in deciding what, if anything, to do about them and such actions are generally limited to oversight.

Discretion When Directors are Required to Consider Impact on Non-Shareholders

In the jurisdictions where directors are required to consider impacts on non-shareholders, either expressly or implicitly, the surveys suggest that directors have a large degree of discretion as to how to consider such impacts. In the **UK**, for example, the report notes that there is wide discretion as to the manner in which the directors may determine the company's impact on non-shareholders as no strict guidelines exist. Nevertheless, the government has confirmed that "having regard" to particular non-financial matters does mean more than simply giving them "lip service."

In **Germany**, when considering the human rights impacts on non-shareholders, directors are free to determine how to proceed. The report for Germany remarks that it is not yet clear whether shareholders' interests have to take priority over non-shareholders' interests in conflicting cases. In the **Netherlands**, the report suggests that conceptually the shareholders and other stakeholders' interests are on equal footing, meaning that depending on the circumstances each interest has the potential to be paramount.

According to the surveys, discretion may be narrower where a directors' duty is linked to a particular legal provision, often outside of the corporate law. For example, in **Kenya**, environmental law imposes an obligation on directors to report on the impacts of various projects on non-shareholders. This process is heavily prescribed and therefore there is limited directors' discretion regarding the scope and contents of the reporting. The report for **Angola** makes a similar point in relation to production sharing and mining agreements which may place duties on directors to consider certain non-shareholders' interests. However, directors may have a certain amount of discretion and negotiating power during the drafting of these agreements.

Discretion When Directors are Permitted to Consider Impact on Non-Shareholders

Unsurprisingly, there is often even broader discretion where directors are simply permitted to consider impacts on non-shareholders, provided such consideration aligns with the company's interests. For instance, the surveys mention that directors can usually choose to adopt a corporate social responsibility program, adopt a voluntary code, develop internal company policies, or create a committee specifically focusing on these issues, including human rights.

In common law jurisdictions where the business judgment rule applies, the surveys indicate that the courts will allow directors considerable discretion in determining whether a decision is in the company's best interests (e.g. **Australia, Canada** and the **U.S**.). The U.S. report explains that the business judgment rule provides directors with the benefit of the presumption of propriety of their decision-making in that role, and therefore, the shareholder bears the burden of proving any breach of such duty.

Finally, statutes providing express permission to consider impacts on non-shareholders, such as the **U.S.** constituency statutes, provide some guidance on the weight a director may give to non-shareholder interests but generally still provide broad discretion to the director.

Question 13: What are the legal consequences for failing to fulfill any duties described above? Who may take action to initiate them? What defenses are available?

The three subsets of this question explore the extent to which directors can be held liable for breaching any of the duties listed above. In particular, the SRSG was interested in learning more about which parties, including non-shareholders, are capable of bringing a complaint, and the procedural hurdles that they might face in doing so. The SRSG is also pursuing related issues under his access to judicial remedy work.

The legal consequences for failing to fulfill any duties described above?

The surveys generally provide that directors who breach their duties under corporate law may be subject to a civil claim by the company, including by the shareholders on its behalf, as well as criminal and administrative penalties in some situations. The range of penalties usually vary from injunctive relief, damages, pecuniary penalties, recovery of property or profits derived from a transaction, a declaration that a transaction is void, and/or removal of the director from his/her position. Several surveys also refer to the ability of third parties to take civil action against directors, but it was often unclear who might be classified as a "third party" and whether the action would be brought as a breach of a fiduciary duty under corporate law or would be an action in tort under negligence.

The surveys generally provide that whether the director is held individually or jointly liable (with the other directors) depends on the circumstances of violation of directors' duties. The general rule seems to be that individual directors are personally liable for the consequences of breaching their directors' duties. However, in some jurisdictions if the breach was approved by the board, all directors may be held responsible unless they objected to or voted against the resolution which resulted in the breach. (e.g., **China, Saudi Arabia, the UAE** and **Mozambique**)

Who may take action to initiate them?

According to the surveys, it is most common for the company to take action for breach of directors' duties, as such duties are generally owed to the company. The action on behalf of the company can usually be brought by a specific percentage of shareholders (20% in **France**, 50% in **Germany**, **Italy** and **Colombia**, 10% in **Indonesia**, and 5% in **Spain** and **Chile**) (so-called derivative claim), new or former management members, or other directors in instances of multiple director governance. The surveys list a number of procedural hurdles involved in derivative claims, including the need for shareholders to apply to a court for permission to bring an action in the company's name (**UK, New Zealand** and **Singapore**) or to the board to demand that the board bring such an action (**U.S.** and **New Zealand**). Practical deterrents to such a claim also include the costs involved for the lawsuit, especially considering that damages will generally be awarded to the company and not the shareholders.

The surveys highlight that in some jurisdictions, an action brought on behalf of the company can also be brought by a range of actors additional to those listed above, providing that certain conditions are met. Additional actors include minority shareholders (**Algeria, Italy** and **Argentina**), creditors (**Spain**), the director of the federal corporate statute (**Canada**), the director of the national securities commission (**Australia**), or the supervisory board (**Indonesia** and **Germany**).

In the few jurisdictions where shareholders may be owed duties personally by directors, the surveys indicate that these shareholders will be able to bring an action in their own right only if they have suffered damage personally. Most surveys agree that proving that damage can be quite difficult, particularly as it is generally intertwined with any damage suffered by the company.

The surveys suggest other third parties, such as members of a community affected by a company's operations or employees, would generally only be able to bring an action against a director under general tort principles, contract or criminal law. An exception is in the new **South African** Companies Act, which allows any person to launch a derivative action for breach of directors' duties even if they are not a shareholder provided they have the court's leave to do so, which will depend on showing that the action is necessary to protect their legal rights.

Where directors owe specific duties to third parties, however, these parties will be able to bring an action against the directors based on such duties. For example, in **Italy**, where directors owe a duty to creditors to monitor the maintenance of the company's capital and assets, the creditors may sue the directors where the company's assets are not sufficient to repay the creditors.

Available defenses

The surveys highlight that the defenses available to directors in a claim for breach of directors' duties include expiration of the statute of limitations (the alleged breach happened too long ago), the prudent person defense (also known as the reasonable person defense – basically dependent on whether the director can prove that a reasonable person in his/her position would have made the same decision), the business judgment rule, and shareholder ratification. As explained above, in common law jurisdictions (e.g. the **U.S., Canada** and **Australia**) and in some civil law jurisdictions (e.g. **Finland**, **Italy** and **Japan**), the courts will give directors deference under the business judgment rule by presuming that they were in the best position to assess the alternatives at the time the decision was made.

Some jurisdictions also have specific defenses. In **Papua New Guinea**, the director has a defense if s/he could not reasonably have been expected to take steps to ensure that the board/company complied with the requirements of corporate law. In **Russia**, directors may have a defense that the duties being claimed were not enumerated – this is because specific duties in Russia must generally be spelt out in the company's organizational documents.

Question 14: Are there any other directors' duties which might encourage a corporate culture respectful of human rights?

This question seeks to explore whether there might be any other specific duties for directors, both within and outside the corporate law, which might help encourage directors to foster a corporate culture respectful of human rights. This question is intentionally broad to encourage a diverse array of information.

Several surveys indicate the presence of directors' duties additional to those discussed above that may contribute to corporate cultures more respectful of human rights. For example, in **Algeria**, a general standard elaborated by the courts requires directors to act with the standards of a "bonus paterfamilias" or good family father. This is similar to the reasonable person standard found under common law. The report for **Algeria** provides that, for the moment, the courts apply this standard from a business perspective, meaning that the standard is intended to protect the company, and not society.

Further, the surveys highlight that corporate governance guidelines (explored further in question 22) may send a strong message to directors to foster responsible corporate behavior, though again, explicit references to human rights are rare.

For example, in **Japan**, the Charter of Corporate Behavior asks top management to listen to their stakeholders, both internally and externally (including local communities), and to promote the development and implementation of systems that will contribute to the implementation of business ethics. In **Saudi Arabia**, the Corporate Governance Regulations (imposed by the stock exchange on public joint stock companies) requires the board to outline a written policy that regulates the relationship with stakeholders with a view to protecting their respective rights. One of the items that must be covered in the policy is the company's "social contributions," which will include any non-commercial activity with a community focus undertaken by the company. In **South Africa**, additional expectations for directors are contemplated under the latest King corporate governance report. They include: (i) ensuring that the company acts as, and is seen to be, a responsible corporate citizen; (ii) cultivating and promoting an ethical corporate culture; (iii) considering sustainability as a business opportunity; (iv) ensuring the integrity of financial reporting; and (v) ensuring that the company implements an effective compliance framework and effective processes.

Some surveys in answering this question note that regulators in their jurisdictions can choose to restrict who can be a director, depending on certain moral standards. For example, in the **UAE**, a person may not be a director of a public joint stock company if s/he has been convicted of a "crime of honor or honesty" (unless pardoned or rehabilitated).

Finally, some of the surveys note that new duties are being contemplated for directors regarding whistle-blowing procedures which may promote more transparent corporate cultures, including in relation to human rights. For example, in **Germany**, the BaFin regulator has recommended implementation and improvement of such internal communication structures in insurance companies as part of its guidelines on risk management. In **Spain**, whistle-blowing is also limited to financial and accounting matters, although the corporate governance code recommends that listed companies establish whistle-blowing mechanisms (used essentially to denounce financial and accounting irregularities).

Question 15: For all of the above, does the law provide guidance about the role of supervisory boards in cases of two tier board structures? For all of the above, does the law provide guidance about the role of senior management?

This question assesses the role of supervisory boards, if any, in encouraging a company to respect human rights, including the extent to which the same duties are owed by members of the supervisory and management boards. It also queries the role of senior management.

Supervisory boards

The surveys suggest that practices regarding two-tier board structures vary significantly amongst jurisdictions. For example, in **Sweden**, the **UK**, **Canada**, **the U.S., Australia, New Zealand, Hong Kong, India, Malaysia**, **Papua New Guinea**, **Singapore, Nigeria** and **South Africa**, there are generally no two-tier board structures. In other jurisdictions, two-tier board structures vary from being: (a) allowed for public companies but rarely used (**Algeria, Belgium, Finland, Luxembourg** and **Spain**); (b) compulsory (**Indonesia** for limited liability companies**, Germany** for listed companies, **the Netherlands** for some listed companies, **Russia** for companies with more than 50 shareholders and the **UAE** for limited liability companies); (c) not required but commonly used (e.g. **Japan**); and (d) not required but provided as an over-arching alternative to more specific committees (**Italy**).

The surveys suggest that in most jurisdictions with two-tier structures, the supervisory board controls the management board, which is responsible for the company's day-to-day business. The supervisory board remains responsible for determining general corporate strategy, supervising the management board and inspecting all company transactions. It may also be tasked with specific functions, such as supervising the budget or annual report (**UAE**). In most cases it appears that the supervisory board members are directors with the same duties as the management board. There are some exceptions, such as **China** and **Japan**, where the supervisory board is made up of shareholder and worker representatives and non-voting statutory auditors respectively.

Some surveys contend that the existence of a supervisory board *may* contribute to fostering a corporate culture respectful of human rights, especially where that board is given a particular corporate governance role, including in relation to the company's CSR activities. For example, in **Russia**, the 2002 Corporate Governance Code issued by the Federal Financial Markets Service suggests that the supervisory board develops internal ethical guidelines reflecting the company's social responsibility, in particular, affirming its duty to maintain high standards of quality for its products and to comply with environmental and safety regulations. In the **Netherlands**, the management board has to submit the CSR policy to the supervisory board for approval. In **Indonesia**, companies operating on the basis of Islamic law must also have a Shari'ah Supervisory Board to advise the directors and supervise the company's activities.

The surveys also suggest that, at times, the make-up of supervisory boards may make them more "qualified" to advise on human rights related issues. For example, in **Germany**, regulators encourage diversity and international experience of supervisory board members. In **Finland**, state-owned or municipally held companies have supervisory boards which may include politicians to provide guidance on questions of policy and, at times, highlight the company's impacts on society and non-shareholders generally.

Finally, even where supervisory boards do not exist, the surveys note that other board committees can be influential in fostering more socially responsible corporate cultures. Indeed, there are a few jurisdictions where such committees are mandated. For example, the **South African** Companies Act entitles the relevant minister to order, where it is in the public interest to do so, that "a company or a category of companies must have a social and ethics committee." Additionally, **South African** corporate governance guidelines provide for a number of board committees, including an employment equity and skills retention committee and an environmental, health and safety committee. In **India**, a provision in the draft Companies Bill 2008 would requires companies having more than 1,000 security holders to constitute a 'Stakeholders Relationship Committee' to consider and resolve stakeholder grievances, though the term "stakeholders" is yet to be defined.

Senior management

The surveys highlight that there is generally a lack of guidance in the law about the extent to which senior management owes the same duties as directors. However, there are some interesting examples about senior management's role. For example, in the **U.S.**, the report provides that both the directors and senior management owe a fiduciary duty to the corporation and should shape their actions to minimize the reputational risk to the corporation. In **Argentina**, the general or special managers may be found liable towards the company and third parties for the performance of their office to the same extent and in the same form as directors. In **China**, senior executives and supervisors owe the same duties and face the same consequences as directors. In **Canada**, senior officers are bound by the same duty of care and duty of loyalty and good faith as directors.

In **Russia**, although senior management's duties are laid out in the company's internal documents, there has also been guidance from the government that that senior management owes some duties regarding the development of corporate governance and enhancement of social responsibility. Laws outside of the corporate law may also impose specific duties on senior management. In **India,** for example, environmental and labor laws impose liability on persons who lead the company's operations, which can include managers.

In addition, in certain jurisdictions, directors' duties can extend to those who are seen to control the directors, including parent companies. In **Australia**, directors' duties extend to senior management and may extend to third parties who constitute 'shadow directors' or 'shadow officers' - a person in accordance with whose instructions or wishes the company's directors are accustomed to acting. A shadow director has been found by courts to include a parent company of the relevant company.

Conclusion

The overwhelming message from the surveys is that directors are generally permitted to consider impacts on non-shareholders, including human rights impacts, provided they are acting in the company's best interests. Moreover, in a growing number of jurisdictions directors are explicitly or implicitly required to do so at an oversight level in order to act with the expected due care and diligence, especially where failing to consider such impacts might expose the company to reputational, legal or other risk.

Accordingly, many of the surveys argue that a prudent director would do well to consider and act on human rights related impacts.

The surveys show that it is rare for provisions requiring or allowing consideration of impacts on non-shareholders explicitly to refer to human rights – such provisions are more likely to refer to environmental, social or community impacts. However, for some jurisdictions the surveys do suggest the need for regulators and directors alike to read the corporate law in light of the national constitution, including provisions safeguarding fundamental human rights.

Another emerging trend is the lack of guidance for directors to decide how to balance the interests of non-shareholders and shareholders. The surveys suggest that where such guidance is provided, it is more likely to be in soft law instruments such as corporate governance guidelines. Even then, there seems to be insufficient guidance on when, how and why directors should consider impacts on non-shareholders, including human rights impacts.

The surveys suggest several practical questions which may warrant further exploration by those working in this field. For instance, when directors are allowed to take non-shareholders into account, up to what extent have they done so? Does litigation reveal that shareholders are ready to bring suits against directors who may have passed up on a profitable opportunity in order to respect human rights? Or for failing to take human rights into account when such failure leads to reputational harm? What are the practical obstacles to shareholders taking such actions? What are the implications of the fact that non-shareholders usually cannot take action for a breach of directors' duties under corporate law?

Finally, an additional theme emerging from the surveys is the role of shared learning in this area, namely the extent to which parliaments are looking at the evolution of corporate law in other jurisdictions to influence their own revisions. For example, in **Hong Kong**, although the public consultations to re-draft the Companies Ordinance recently rejected the "enlightened shareholder value", the government did consider the equivalent **UK** approach as a potential model. Similarly, the recent **South African** review also took into account **UK** developments.

REPORTING

Introduction

The SRSG has spoken of the importance of companies tracking as well as reporting their human rights impacts under the corporate responsibility to respect. Reporting can be essential for the company in knowing whether its policies are being effectively implemented. It can also facilitate stakeholders to better engage with individual companies, assess risk and compare performance within and across industries. The questions in this section of the template are designed to explore the role of state-based regulation and guidance in encouraging, and in some cases requiring more transparent reporting by companies on their human rights impacts.

Question by Question Analysis

Question 16: Are companies required or permitted to disclose the impacts of their operations (including human rights impacts) on non-shareholders, as well as any action taken or intended to address those impacts, whether as part of financial reporting obligations or a separate reporting regime?

This question's aims are two-fold. First, it intends to explore further whether states have specific regimes for CSR reporting, including reporting on human rights impacts, and whether such reporting is mandatory or voluntary. Second, even where such regimes do not exist, it aims to explore whether ordinary financial reporting regimes either require or permit companies to report on their impacts on non-shareholders, including human rights impacts.

Mandatory CSR reporting regimes

The surveys highlight that only a few countries expressly require mandatory disclosure of social or environmental actions or impacts on non-shareholders, either in a company's annual report or in a separate report. In some situations reporting requirements may follow the "comply or explain" model. This allows companies to decide whether or not to repot certain information, but the company must explain if it does not do so and failure to either report or give reasons for not reporting will generally result in some form of negative consequence.

For example, **Denmark** requires its largest companies to include CSR sections in their annual reports, including efforts to promote human rights and a sustainable environment. Companies that are members of the UN Global Compact or UN PRI need not comply with the requirements, thereby arguably incentivizing companies to join these initiatives.

In **France** the Commercial Code requires public limited companies in some cases to issue extra-financial information in relation to the social (particularly in terms of employment) and environmental impacts of their activities and the activities of their subsidiaries. According to the report for France, interested third parties (including shareholders and auditors) have a right to petition a judge to order a non-compliant board to communicate all extra-financial information missing in the annual report. However, this right has not been exercised to date.

Indonesia's New Company Law requires all limited liability companies to include a section regarding the realization of social and environmental responsibility in their annual reports. Furthermore, the Indonesian Capital Market and Financial Institutions Supervisory Agency requires listed companies to submit annual reports about good corporate governance practices associated with CSR towards the community and the environment~~,~~ and has launched an "annual report award" to encourage improved disclosure by companies.

In **China,** listed companies must disclose any construction projects or investments that impact the environment. Moreover, the report for the **Netherlands** provides that the Dutch Civil Code requires a public company to include an analysis of both financial and non-financial performance indicators in its description of the overall state of the company in its annual report, and these non-financial indicators may include environmental affairs and human resources issues.

Finally, in the **UK**, the Companies Act requires listed companies to include a business review in the directors' report containing information regarding environmental matters (including the impact of the company's business on the environment), the company's employees, and social and community issues, including information about any policies of the company in relation to those matters and the effectiveness of those policies. The report for the UK does, however, note several exceptions to the application of this rule.

Some jurisdictions require companies engaged in certain business sectors, such as mining or banking, to disclose impacts on non-shareholders through industry specific legislation. For example, in **Canada** chartered banks are required to issue public accountability statements that include a discussion of philanthropic and charitable initiatives and community development programs. Furthermore, in **Nigeria** and **Kenya**, companies performing activities that may affect the environment, such as oil companies, must submit environmental impact assessment reports to get a license before the project can proceed. Similarly, according to the report for **Angola,** state-owned oil and diamond companies often require foreign companies in the petroleum and mining sector, through contracts with these companies, to make public social and environmental disclosures

The surveys reveal that some jurisdictions impose particular reporting requirements on state-owned enterprises. For example, **Sweden** requires state-owned companies to comply with the Global Reporting Initiative's guidelines for CSR disclosure, which include indicators related to human rights.

Voluntary reporting

Moreover, the surveys provide that in several jurisdictions voluntary reporting is often encouraged by regulators and stock exchanges. For example, the **Luxembourg** Stock Exchange Corporate Governance Code recommends that listed companies disclose and describe all corporate governance issues in their annual report, including whether the company has deviated from CSR principles. In the **Netherlands**, voluntary reporting guidelines issued by the Dutch Reporting Council recommend that companies include in their annual report or in a separate report certain economic, social and environmental issues.

In some jurisdictions industries self-regulate to require disclosure of impacts on non-shareholders. For example, in **Brazil**, the National Association of Investment Banks, a self-regulatory body of financial institutions, requires securities issuers to include information about their CSR policies in any offering prospectus.

Financial reporting

The surveys highlight that most jurisdictions require companies to disclose in annual reports any material risks facing the company, such as potential litigation and other significant information. The report for the **U.S.** explains that the courts have considered a fact to be "material" if "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote" or if it "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." Other surveys offer similar definitions.

Accordingly, a significant number of the surveys deduce that to the extent that human rights impacts may significantly affect a company's stock price or pose a risk to the company, companies should disclose such impacts in accordance with current laws. For example, **Colombia's** Regulation 400 requires a listed company to annually disclose any information related to the issuer or issued securities that would be relevant to an investment expert when deciding whether to buy, maintain or sell the securities. According to the report for Colombia, relevant information includes, among other things, any potential human rights-related litigation against the issuer, including any potential labor disputes with employees. Similarly, the report for **Brazil** highlights that listed companies must publicize facts that are considered relevant to the value of their shares, which would include environmental damage that can result in severe financial penalties or in the interruption of activities.

However, many of the surveys also suggest that any such reporting may also be constrained if it could somehow damage the company. For example, in **Papua New Guinea** the board of directors must only report material changes to the extent that doing so will not be harmful to the business of the company or any of its subsidiaries. In **New Zealand** a company also does not need to disclose information that would be "harmful to the business of the company," which is not clearly defined.

While most of the surveys content that material human rights related impacts should already be reported, they also highlight that the difficulty for companies is that there is often insufficient guidance from courts and regulators as to which human rights impacts would meet this threshold. The **U.S.** report notes in this regard recent interpretive guidance from the Securities and Exchange Commission on material risks related to climate change.

Question 17: Do reporting obligations extend to such impacts outside the jurisdiction; to the impacts of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?

This question explores whether, in the event that companies are expressly or impliedly required or allowed to report on human rights impacts, such requirements or permission would extend to impacts outside of the incorporating jurisdiction, as well as to impacts of subsidiaries, suppliers and other business partners.

The surveys provide only limited examples in which reporting regimes expressly require consideration of the company’s impacts abroad, including by foreign subsidiaries or business partners. For instance, in **Spain** annual financial reports must consider the company’s cross-border activities of a company~~,~~ and request consolidated financial statements from all group companies. In **Kenya**, a corporation must prepare a consolidated financial report that contains information regarding its entire group of related companies, whether they are foreign or domestic. In **South Africa,** a company must disclose information about the operations and impacts of foreign subsidiaries in the auditors' report included with the annual financial statements.

However, even if reporting of overseas activities is rarely expressly required, the surveys tend to argue that is very rare to see a territorial *restriction* attached to a reporting requirement, whether in relation to financial reports or separate CSR reporting regimes. Thus, several surveys suggest that to the extent that any foreign actions in relation to human rights pose a material risk or could significantly affect a company's share value, such actions should be reported in the same way they would be reported if they occurred inside the incorporating jurisdiction. For instance, the report for the **U.S.** contends that so long as a corporation is subject to U.S. securities laws and accompanying rules and regulations, the jurisdiction in which it conducts its activities does not alter its reporting obligations.

The surveys suggest that while group reporting requirements may necessitate parent companies to report on their subsidiaries' activities in some situations, it is rare for reporting to be required on the impacts of suppliers or other business partners. For instance, in the surveys of **Colombia**, **Nigeria**, **China**, **Hong Kong**, **Chile**, the **UAE**, and **Angola** it is suggested that reporting obligations would rarely extend to the actions of suppliers or business partners, and even if they did would be limited to general language describing the business environment and the risks associated therewith. Nevertheless, some surveys note that voluntary reporting guidelines are increasingly encouraging greater awareness of suppliers' and customers' activities, and also in rare cases suggest that companies pay as much attention to their activities abroad as to those at home.

Question 18: Who must verify these reports; who can access reports; and what are the legal consequences of failing to report or misrepresentation?

This question aims to explore the consequences for failing to report on impacts on non-shareholders or for misrepresenting key facts. It also asks about accessibility and verification, to assess in particular whether verification requirements for separate sustainability reporting regimes differ to requirements for financial reporting and why.

Verification

The surveys provide that in most jurisdictions annual reports and financial statements of companies must be verified by an independent certified auditor, and the reports of listed companies are typically subject to the review of a regulatory authority. Most jurisdictions also require that annual reports be approved internally by the board of directors, the shareholders or an internal audit committee.

The surveys also indicate that in most jurisdictions these verification requirements do not apply to mandatory sustainability reporting regimes. For example, in **Denmark** the management's review, which includes information regarding social responsibility (described in question 16 above), is not subject to verification. However, the report for Denmark indicates that the accountant verifying the annual report must state whether the information provided in the management's review is in accordance with the annual accounts. In **Indonesia**, the sections in a company's annual report regarding social or environmental responsibility are not subject to audit or verification.

There are some exceptions. For example, in **South Africa**, a company's audit committee must verify its integrated sustainability report. The board of directors of a company must then verify the accuracy of the report and in doing so may rely on the opinion of a credible independent assurance provider hired by the company.

Finally, the surveys highlight that reporting under environmental protection regimes does tend to involve verification by the relevant governmental agency. For example, in **Nigeria** environmental impact reports are verified by the Nigerian Environmental Protection Agency. In **Angola**, environmental reports by mining or petroleum companies are submitted to the Ministry of Environment and other relevant ministries.

Accessibility

The surveys highlight that many jurisdictions require companies to make their annual reports or financial statements accessible to the public, usually through the company's website or other electronic means. Additionally, in many jurisdictions reports filed with regulatory agencies or other government bodies are made publicly available. In some jurisdictions, corporations voluntarily make their annual reports, financial statements or other disclosure documents available to the public. Furthermore, many jurisdictions require listed companies to make certain information publicly available, usually through the company's or stock exchange's website, through other approved electronic means or through filing with a regulatory agency or other governmental body. In a few jurisdictions, company reports are only accessible by its shareholders.

However, similar to verification, the surveys suggest that it is quite rare to see requirements for CSR reports to be made publicly accessible. An exception is **Denmark**, where both the annual reports, which includes the management's report (discussed in question 16 above), and the green reports of a company must be made accessible to the public.

Nevertheless, the surveys note that corporations are increasingly voluntarily placing information relating to CSR in the public domain. For example, the report for the **U.S.** highlights that many corporations publish significant amounts of information through websites, brochures, periodicals, television, radio and other methods to inform the public of their CSR policies, including in relation to human rights. Similarly, the report for **Japan** suggests that CSR reports are typically freely accessible on a company's website. Some surveys do note, however, that companies may be reluctant to publish such CSR reports, particularly where they include certain commitments or aspirations, in case they face complaints by consumers or other stakeholders for failing to fulfill them.

Accountability

The surveys suggest that in many jurisdictions an individual (including a director) who knowingly makes material false statements or omissions in a company's annual report or financial statements will incur civil liability along with the company. It appears that it is predominantly the regulators or shareholders that may take action. For example, the report for the **U.S.** highlights that if a corporation misrepresents or omits important information, the Securities and Exchange Commission could file a civil action seeking monetary penalties, the return of illegal profits or the removal of an officer or director. Furthermore, U.S. courts recognize a private right of action for individuals or a class of individuals that made investment decisions relying on corporate disclosures containing material misstatements or omissions, allowing such individuals to sue a corporation directly for damages.

Most jurisdictions also impose civil liability on directors for failure to submit reports – such failure will often be seen as a breach of a director’s duty, in which case many of the same penalties discussed in question 13 above will apply. For example, in **New Zealand**, a company director who fails to prepare an annual report or who fails to make the annual report available to shareholders is likely to have breached the duty to act with reasonable care and in the best interests of the company. Likewise, in the **UK**, directors may face civil liability for failing to promote the success of the company by not complying with reporting requirements.

Additionally, the surveys provide that many jurisdictions also impose criminal liability, including prison time or fines, on directors or managers who intentionally make material false statements or omissions, or who fail to fulfill their reporting obligations. And in many jurisdictions administrative penalties may also apply, including cease and desist orders, suspension or revocation of broker-dealer and investment advisor registrations, censures, bars from association with the securities industry, civil monetary penalties and the return of illegal profits. The surveys also provide that in many jurisdictions, stock exchange listing rules include penalties for listed companies that fail to submit the required disclosures, including suspension or delisting.

The surveys indicate that where reporting on material human rights impacts is required as part of financial reporting, the consequences listed above would also apply to a failure to report on such impacts, or any misrepresentations. Importantly, however, the surveys highlight that the consequences for misrepresentation or a failure to report as described above tend not to apply to

CSR reports voluntarily filed by a company, even to those that are mandated by separate regimes. For example, the report for **Singapore** provides that since disclosure on environment or social issues is voluntary, there are no consequences for failure to report. Similarly, the report for **Luxembourg** indicates that because reporting on companies' social impacts remains voluntary there are few legal consequences for misrepresentation or failure to report.

However, in some instances a jurisdiction may hold the company or directors liable for false statements made in voluntary reports. For example, the report for **India** suggests that if false statements or misrepresented facts are placed in any CSR report, regardless of its voluntary nature, the company and its directors will be liable for false representation to anyone who relied upon that report to their detriment.

Conclusion

Most surveys agree that human rights impacts may in some cases reach the materiality thresholds applicable to ordinary financial reporting, but there is a lack of guidance for companies on how and when to make these determinations. The implication is that the absence of this guidance may actually place companies at risk of non-compliance with reporting obligations, as they may not be reporting material information due to a lack of understanding of its relevance.

The surveys also indicate that only a small number of jurisdictions have created express CSR reporting obligations. A greater proportion encourages such reporting through corporate governance guidelines and listing rules.

The surveys suggest a lack of clarity regarding the geographical scope of various reporting obligations and whether they extend to the acts of a company’s subsidiaries or other business partners. Some surveys argue that it can generally be implied that reporting obligations extend to foreign impacts and possibly to the actions of business partners to the extent that such actions would otherwise need to be disclosed under the rules described above.

Finally, the surveys indicate that most states do not subject CSR reports to the same verification, accountability and accessibility requirements as ordinary financial reporting. Some surveys contend that this may change as regimes regulating such reporting further develop.

STAKEHOLDER ENGAGEMENT

Introduction

This section aims to canvass the degree to which various groups (i.e. shareholders, institutional investors, and other interested parties) have the capacity to influence corporate decision-making in respect of human rights. Accordingly, each question addresses a specific mechanism through which dialogue between the corporate entity and a stakeholder group could be achieved, including the extent to which corporate and securities law mandates or facilitates such dialogue. Of course there are other mechanisms which may also be relevant – this section is designed merely as a preliminary exploration into this issue.

Question by question analysis

Question 19: Are there any restrictions on circulating shareholder proposals which deal with impacts on non-shareholders, including human rights impacts?

This question seeks to provide greater insight into the limitations imposed on shareholders when they are making proposals at a corporation's annual general meeting ("AGM"), including those dealing with human rights. In certain jurisdictions a corporation is obligated to circulate shareholder proposals as part of a larger package of management information, in anticipation of the company's AGM. The idea is that these materials will allow for shareholders to have an understanding of the issues being addressed at the meeting and to use this information to help decide their proxy vote.

As first drafts were received, it became apparent that emerging economies do not commonly use this mechanism. As such, the examples below are mainly limited to developed economies. Accordingly, the SRSG is seeking further information on whether other mechanisms may be used in emerging economies to encourage dialogue on human rights issues between managers/directors and owners.

Procedural Limitations on Proposals

The surveys suggest that the main impediment to circulating shareholder proposals dealing with human rights (in jurisdictions where the mechanism exists) are purely procedural and apply to all proposals, regardless of their subject matter. In other words, the laws of these jurisdictions are not necessarily concerned with the proposal's content, but rather, are concerned with who is introducing it and how.

These procedural hurdles tend to require a certain amount/percentage of capital equity in order to put forth a proposal and feature in both civil and common law jurisdictions. For example, in **Morocco**, 5% of the corporation's total equity is required to make a proposal. In **France**, the threshold is 1% of capital equity. Similarly, in **Canada**, 1% of outstanding shares or a shareholding with a fair market value of at least $2,000 is required, and there are also more substantive restrictions, detailed below.

According to the surveys, it is often these procedural rules which pose the most substantial barriers to shareholders raising human rights issues at AGMs, particularly where larger investors are less interested in discussing these matters.

Substantive limitations

The surveys suggest that substantive limitations on the content of shareholder proposals are generally a feature that exists in larger scale economies.

The surveys indicate that substantive restrictions are unlikely to expressly preclude proposals dealing with "human rights" or even "environmental" or "social" issues. Rather, limitations are more generally worded. For example, in some jurisdictions, defamatory proposals are prohibited, which in some cases include proposals which could harm the company's reputation. For instance, in **South Africa**, a company need not circulate any resolution or statement if it is found that the right to submit a resolution is being abused to secure needless publicity for defamatory matter.

Another common substantive restriction is the requirement that proposals must be "relevant" to a company's management or business. For example, in **Sweden**, the content of the proposal is valid if the matter is relevant for the company and is of such a nature that it may be subject to a decision by the shareholders' meeting. Prior to recent amendments, **Canada's** corporate legislation provided that shareholder proposals could be excluded if they were "submitted...primarily for the purpose of promoting general...political...causes." Subsequent changes to the Canada Business Corporations Act have eliminated such specific substantive provisions and replaced them with a more general test that a shareholder proposal can be excluded if "it clearly appears that the proposal does not relate in a significant way to the business or affairs of the corporation."

The prevailing trend amongst the surveys is that considerations of "relevance" are specific to the circumstances at hand, and therefore, it is difficult to predict how a company, court or regulator will decide as the case may be. That being said, the surveys do indicate that recently regulators seem to be less willing to allow companies to block socially related proposals, including those dealing with human rights. It is important to remember though that such proposals are generally non-binding.

Finally, certain jurisdictions appear to be providing shareholders with an influential voice through other means. For instance, the report for **India** notes a unique system of "extraordinary meetings" whereby a prescribed minimum of shareholders can call a meeting and decide its agenda, with the Supreme Court effectively ruling that shareholders cannot be restrained from calling for meetings; are not bound to disclose to the board proposed resolutions in advance; and the reasons for the resolutions are not subject to judicial review.

Question 20: Are institutional investors, including pension funds, required or permitted to consider such impacts in their investment decisions?

The SRSG sought to further explore the extent to which institutional investors are permitted or required by the law to consider impacts on non-shareholders, including human rights-related issues, as part of their investment decisions. The surveys indicate that in most cases the trustees of institutional investors have significant discretion in their investment decisions, implying that they are usually *permitted* to make decisions based on human rights considerations.

However, the surveys also emphasize that within the overarching term of "institutional investors" there are entities with significantly different legal characteristics and mandates. For instance, a pension fund is not organized in the same manner, or necessarily with the same investment strategy, as a mutual fund. Thus, one investment vehicle might be at complete liberty to consider the human rights impacts of its investments, while another is bound by more comprehensive regulations. The surveys show how these nuances play out in the legislative approaches of certain jurisdictions. Pension funds are often more limited in their capacity to consider human rights impacts, as opposed to private investment firms that have the ability to dictate their investment mandate.

For instance, in **Australia**, pension funds arguably have less discretion than other institutional investors. Pension funds are subject to the "sole purpose" rule, which requires that all such funds be run for the sole purpose of benefiting the fund's members. According to the report for Australia, the courts have yet to pronounce on how this rule might apply in situations where a fund wishes to choose between investments based on social, including human rights, grounds, even if they are of equal financial value. This degree of uncertainty is currently receiving political attention in Australia, with relevant ministers calling for clarity that trustees can incorporate environmental, social and governance issues in formulating their investments.

In the **UK**, the government has recently provided some guidance on what pension funds *may* consider – confirming that pension fund trustees are not prohibited from considering social, environmental and ethical issues in their investment decisions, provided they act in the fund's best interests. This guidance stemmed from rejected calls to reform legislation governing pension funds to explicitly allow, and in some cases require, consideration of social and environmental issues, including human rights. In the **U.S.** the Department of Labor has guidelines which formalize the ambit of a fund manager's discretion. Under these guidelines the managers of employee benefit plans may "never subordinate the economic interests of the plan to unrelated objectives, and may not select investments on the basis of any factor outside the economic interest of the plan…." However these same guidelines provide that when there are competing investment strategies with equal financial returns, funds may choose between alternatives on the basis of factors other than economic interest.

As suggested above, the surveys provide that socially responsible investment funds often have more discretion than pension funds in their investment decisions. Indeed, several surveys note that some funds include requirements to consider social issues in their articles of association or constitutions.

The surveys also highlight that whether or not institutional investors are required to consider human rights impacts of the companies they invest in, they are increasingly expected to be more transparent about the extent to which they take sustainability and human rights concerns into account in their investment strategies. For instance, in **Belgium**, pension funds are required to prepare a report each year in which they explain to what extent social, ethical and environmental considerations are taken into account in their investment decisions.

Question 21: Can non-shareholders address companies' annual general meetings?

The surveys provide that most jurisdictions have relatively clear cut guidelines about the sorts of stakeholders that are allowed to address AGMs. This question seeks to understand the situations in which non-shareholders might be able to address AGMs.

Most surveys note that non-shareholders do not, as of automatic right, have the ability to address a company's AGM, though it is possible that such rights may be included in a company's constitution. One exception is **France**, where a number of non-shareholders are allowed to attend the AGM but only if certain procedural requirements are met. For instance, French law permits the attendance of bondholders and works council representatives, as well as experts and journalists in some instances.

A limited number of surveys suggest that there are ways in their jurisdictions to facilitate non-shareholders to address an AGM, but only in restricted circumstances. In almost all of these jurisdictions the ability of a non-shareholder to speak is contingent on a proxy designation on the part of an actual shareholder, or a special invitation from the company's management.

Conclusion

The surveys highlight that the discourse related to shareholder engagement on human rights issues, particularly the extent to which such issues may be raised at AGMs, is continuing to develop. Questions remain in particular in relation to when and how regulators, courts and companies will and may decide to allow or constrain such engagement.

Similarly, the surveys suggest growing dialogue about the role of investors in the business and human rights domain. As with the companies in which they invest, the surveys suggest that governments are starting to acknowledge that investors may benefit from guidance on how to navigate difficult social and environmental issues, including human rights.

The questions in this section of the template touch on three main avenues of stakeholder engagement – shareholder proposals; annual general meetings and other investor tactics such as divestment. The SRSG is aware that there are numerous other tools available and hopes to continue to explore the ways in which states may support further dialogue between stakeholders and companies, including employees, persons who claim their rights are affected by companies and consumers.

OTHER ISSUES OF CORPORATE GOVERNANCE

Introduction

This section aims to capture any other corporate governance policies and laws that might help encourage companies to respect human rights.

The first question explores the role of voluntary or quasi-voluntary corporate governance guidelines in encouraging companies to respect rights, and in acting as a catalyst for law and policy reform. The remaining two questions deal expressly with board composition. Company boards are increasingly under the scrutiny of not only regulators but also shareholders and the public at large. Accordingly , the SRSG sought to better understand current requirements on board composition which may directly or indirectly relate to encouraging a company to consider, and act on, its human rights impacts.

Question by question analysis

Question 22: Are there any other laws, policies, codes or guidelines related to corporate governance that might encourage companies to develop a corporate culture respectful of human rights, including through a human rights due diligence process?

Most of the surveys provide information about the extent to which their jurisdictions have national CSR policies or institutes. It is clear that most of these policies and institutes do not specifically deal with human rights, but several surveys suggest that consideration of human rights is implicit within these policies as well as the mandates of various institutes. For instance, the report for **India** notes that in 2008 the Ministry of Corporate Affairs set up the Indian Institute of Corporate Affairs as its official "think tank" so that it could holistically address all issues/ disciplines that impact corporate effectiveness, including CSR initiatives. The **UK** report refers to a Sustainable Action Development Plan published by the Department for Business, Enterprise and Regulatory Reform, which touches on a number of human rights issues.

Other policies appear to deal with human rights more directly. For instance, the report for **Canada** notes guides for business regarding CSR as well as a CSR action plan for the extractives industry. The latter specifically refers to human rights and recommends that relevant companies participate in the Voluntary Principles on Security and Human Rights. **Sweden's** Global Responsibility initiative encourages companies to implement the principles set out in the UN Global Compact and the OECD Guidelines for Multinational Enterprises, both of which contain human rights elements.

The surveys suggest that whether state or business-led, voluntary corporate governance guidelines may play a significant role in encouraging companies to act in a more socially responsible manner. For instance, the various King reports in **South Africa**, and the accompanying Code of Corporate Practices and Conduct identify several distinct features of good corporate governance, many of which might indirectly affect human rights practices of a given company. These features include transparency, responsible management and integrated sustainability reporting. The report for **Nigeria** notes the existence of a Code of Corporate Governance, which does not expressly reference human rights, but encourages companies to conduct their business in a transparent manner, maintain ethical standards and comply with the laws of Nigeria. Similarly, the report for **Italy** references the Borsa Italiana Corporate Governance Code, which operates as a secondary tool supporting and promoting CSR culture. The Code recommends transparency, fair management of directors' interests, independent directors, and adequate internal control systems and relationships with shareholders.

In **China** the Shenzhen Stock Exchange and the Shanghai Stock Exchange have each issued social responsibility compliance guides. The objectives of these guides are to encourage listed companies to protect the interests of stakeholders, fulfil their social responsibility and promote the sustainable development of society and the environment whilst pursuing economic aims.

The surveys suggest an emerging trend of business association codes touching on CSR. For instance, in **Hong Kong**, the Guidelines on Corporate Governance for SMES in Hong Kong, published by the Hong Kong Institute of Directors, seeks to ensure compliance with environmental and consumer protection and also acknowledges the importance of awareness of "social responsibility." In **Russia**, the Union of Industrialists and Entrepreneurs issued the Charter of Russian Business based on the UN Global Compact principles. The charter declares that the social mission of business is to achieve sustainable development in accordance with, among other things, the principles of protection of human rights. The report for **Morocco** discusses the work of the General Confederation of Moroccan Corporations (CGEM), a professional association created in 1947. The CGEM has launched a major promotional CSR campaign amongst its members, by adopting a CSR Charter which is divided into more than 40 objectives taken from international standards, including specific provisions aimed at rewarding positive human rights practices. Companies that can establish that they have a due diligence approach to fulfill these objectives are provided a label for their products attesting to their compliance.

Question 23: Are there any laws requiring representation of particular constituencies (i.e. employees, representatives of affected communities) on company boards?

This question aims to better understand whether states currently require non-shareholders to be represented on company boards as a way of ensuring or encouraging consideration of their interests. The firms were also asked to explore what requirements such constituencies must meet to take advantage of any such entitlements, and the effect that such requirements might have on the ability of such constituents to effectively participate on relevant boards.

The surveys suggest that it is rare for jurisdictions to require that non-shareholders be represented on company boards. And where this is the case, employees are the most commonly represented group. Although the requirements relating to employee representation are different in each jurisdiction, a common characteristic is that they arise once a company reaches a certain threshold number of employees.

For example, in **China** the supervisory board of a limited company or a joint stock limited company is composed of shareholders' representatives and staff representatives. The number of staff representatives is to be not less than one-third of the supervisory board and the specific proportion is to be determined by the company's articles of association. The report for **Algeria** provides that if there are more than 150 employees in the company, the participation committee should designate, either from its own members or externally, two directors to represent the employees at meetings of the board of directors.

A number of EU countries also have similar systems of employee board representation, including **Denmark**, **Finland, Luxembourg**, **Germany** and **Sweden**. In **Germany**, there are also industry-specific requirements in relation to employee representation. For example, the *Montan-Mitbestimmungsgesetz* of 1951 applies to companies in the coal, iron and steel industry with more than 1000 employees. According to these regulations half of the supervisory board in these companies has to consist of employee representatives.

There are also other constituencies which might be granted representation on a corporate board, including creditors or state government representatives. In **France**, where the government or one or more of its state-owned companies directly or indirectly hold at least 10% of the share capital of a company, one or more persons can be appointed to represent the state on the board of directors or the supervisory board.

Question 24: Are there any laws requiring gender, racial/ethnic representation; or nondiscrimination generally, on company boards?

This question stemmed from the SRSG's understanding that a number of regulators around the world are currently considering the pros and cons of greater diversity on company boards, including in relation to gender. Moreover, his work on the UN treaty bodies highlighted that they regularly recommend states parties to take steps to increase the presence of women in leadership positions, including company boards. To view the treaty bodies' series, visit: http://www.business-humanrights.org/SpecialRepPortal/Home/Materialsbytopic/Internationalorganizations/UNhumanrightsmechanisms. See in particular the report for the Convention on the Elimination of All Forms of Discrimination Against Women.

The SRSG has been asked by the Human Rights Council to specifically integrate a gender perspective into his mandate. There are other areas of the CL Project which lend themselves to a gender analysis which the SRSG hopes to further explore. However, as a first step he wanted to better understand which states currently require gender diversity of boards and have provisions in place to avoid discrimination on company boards. He extended the inquiry also to racial and ethnic representation to get a better sense of other diversity factors which might be mandated and encouraged~~,~~ and which might assist boards to take diverse perspectives into account when considering day-to-day operations, including human rights impacts.

The surveys indicate that there are very few jurisdictions which require gender or racial/ethnic representation on company boards. However, there are some exceptions, including examples of attempts at reform in this area. For instance, the report for **Finland** notes that state-owned companies are required to ensure that men and women are equally represented by the members of their governing bodies unless otherwise provided for by a specific reason. In **South Africa** the Financial Sector Charter provides that financial institutions should "undertake within the parameters of good corporate governance to promote increasing levels of influence of direct black owners at the board level." In **Malaysia,** certain corporations must show Malay Burniputra representation to qualify for certain projects. And as dealt with below, **France** has considered legislative reform in this area, while the report for the **U.S.** highlights that the Securities and Exchange Commission recently asked for comments on a proposed rule that would potentially require disclosure of board diversity information.

Several of the surveys highlight that the constitutionality of any gender/ethnic representation law would be a key consideration in any future law reform. For example, the report for **Papua New Guinea** notes that although there is no particular law regarding the gender or ethnic representation of a company's board, this kind of law could be possible. The Constitution enshrines the equality of all citizens and makes it clear that the making of laws that specifically benefit women or particular groups or areas is permitted.

Conversely, the report for **France** notes that there has been extensive treatment of the constitutionality of board representation reform. In 2006, draft legislation providing for the compulsory representation of women on company boards was declared unconstitutional by the Constitutional Council on the grounds that the Constitution does not allow the composition of a company's board to be governed by mandatory legal requirements based on gender. In 2008 new draft legislation was submitted to Parliament to limit *inter alia* the members of the board of directors and the supervisory board of one gender to 80%. The bill is still pending.

Ultimately, the most common characteristic amongst the surveys is the existence of anti-discrimination laws of general application. These laws generally require that persons are not discriminated against on the basis of their gender, religion, or race. A typical example of a constitutional basis for non-discrimination is found in **Japan**. Pursuant to the Japanese Constitution: "all of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin." The surveys commonly argue that such laws would by implication apply to any discrimination in the appointment of company boards.

Conclusion

The surveys suggest that while there is variation in the ways in which corporate governance codes and guidelines address CSR issues, there is also a commonality in that they *are* starting to deal with these issues, are rarely entirely "voluntary" in practice, and increasingly rely on international initiatives to help frame any relevant guidance. While human rights are rarely expressly referenced in these documents, many of the international initiatives that are featured contain human rights elements, potentially incentivizing companies to pay attention to human rights in some way.

On the issue of representation of constituencies on company boards, none of the surveys note requirements or encouragement in their jurisdictions for members of communities affected by corporate activities, including in relation to human rights impacts, to join company boards or stakeholder committees. While there are several examples of requirements for employee representation, several surveys say that more work is needed to explore whether such representation has ensured that employee concerns are heard and acted on more effectively, and how conflicts of interests have been dealt with.

Finally, while there have been some developments in terms of gender representation on company boards, particularly in European countries, they have been relatively few in number and when they have been attempted they have encountered considerable opposition in most cases, mainly based on constitutional concerns.

CONCLUDING REMARKS

This project highlights the diverse ways in which more than 40 states with very different legal, political, social and economic contexts regulate corporations. Predictably, these states have varied policies, laws and processes in place. But there are important similarities too, not least regarding the question this project set out to explore – the extent to which corporate and securities law encourages companies to respect human rights. Put simply, where human rights impacts may harm the company's short or long term interests if they are not adequately identified, managed and reported, companies and their officers may risk non-compliance with a variety of rules promoting corporate governance, risk management and market safeguards. And even where the company itself is not at risk, several states recognize through their corporate and securities laws that responsible corporate practice should not entail negative social or environmental consequences, including for human rights.

All stakeholders need to be aware of these connections: companies to comply with existing laws and regulations, and to avoid risk to both the company and others; states to help support companies in complying with the law and to hold them accountable where the fail to do so; and shareholders and non-shareholders alike to ensure that they know what they can and should expect from companies as well as regulators.

Yet despite these links, the project also highlights two other patterns. One is a lack of clarity in corporate and securities law, regarding not only what companies or their officers are required to do regarding human rights, but even what they are permitted to do. The other is the limited (to non-existent) coordination between corporate regulators and government agencies tasked with implementing human rights obligations. As a result, companies and their officers seem to get little if any guidance on how best to oversee their company's respect for human rights.

The SRSG's consultations on this project have shown that there is a spectrum of potential responses open to states individually and collectively to provide greater guidance to companies and stakeholders in this area, ranging from explanatory notes and awareness-raising programs through soft-law guidelines all the way through to prescriptive regulation. They also highlighted that it is vital to take into account different regulatory and market contexts to ensure that any potential policy or legal reform has a chance of meaningful implementation.

This project was an important first step in understanding the terrain as well as the gaps and opportunities in existing law and policy. As he has done throughout his mandate, the SRSG will use these foundations in considering what further steps might be appropriate in this area, making sure to continue to consult with all relevant stakeholders.

To the SRSG's knowledge this project is the first in-depth, multi-jurisdictional exploration of the links between corporate and securities law and human rights. The SRSG hopes that it will encourage further scholarship moving beyond the 40-plus jurisdictions considered in this project, as well as stimulate discussion among the key, though often disparate, actors involved, including human rights lawyers and advocates, corporate and securities law experts, company representatives and government regulators.

ANNEX A – RESEARCH TEMPLATE

Setting the legal landscape

1. Briefly explain the broader legal landscape regarding business and human rights.

Regulatory Framework

2. To what legal tradition does the jurisdiction belong, i.e. civil/common law, mixed?
3. Are corporate/securities laws regulated federally, provincially or both?
4. Who are the government corporate/securities regulators and what are their respective powers?
5. Does the jurisdiction have a stock exchange(s)?

Incorporation and listing

6. Do the concepts of “limited liability” and “separate legal personality” exist?
7. Did incorporation or listing historically, or does it today, require any recognition of a duty to society, including respect for human rights?
8. Do any stock exchanges have a responsible investment index, and is participation voluntary? (See e.g. the Johannesburg Stock Exchange’s Socially Responsible Investment Index.)

Directors’ Duties

9. To whom are directors’ duties generally owed?
10. Are there duties to avoid legal risk and damage to the company’s reputation? If so, are they duties in their own right or are they incorporated into other duties?
11. More generally, are directors required or permitted to consider the company’s impacts on non-shareholders, including human rights impacts on the individuals and communities affected by the company’s operations? Is the answer the same where the impacts occur outside the jurisdiction? Can or must directors consider such impacts by subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction? (See e.g. s. 172 UK Companies Act 2006)
12. If directors are required or permitted to consider impacts on non-shareholders to what extent do they have discretion in determining how to do so?
13. What are the legal consequences for failing to fulfill any duties described above; and who may take action to initiate them? What defenses are available?
14. Are there any other directors’ duties which might encourage a corporate culture respectful of human rights?
15. For all of the above, does the law provide guidance about the role of supervisory boards in cases of two tier board structures, as well as that of senior management?

Reporting

16. Are companies required or permitted to disclose the impacts of their operations (including human rights impacts) on non-shareholders, as well as any action taken or intended to address those impacts, whether as part of financial reporting obligations or a separate reporting regime?
17. Do reporting obligations extend to such impacts outside the jurisdiction; to the impacts of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?
18. Who must verify these reports; who can access reports; and what are the legal consequences of failing to report or misrepresentation?

Stakeholder engagement

19. Are there any restrictions on circulating shareholder proposals which deal with impacts on non-shareholders, including human rights impacts?
20. Are institutional investors, including pension funds, required or permitted to consider such impacts in their investment decisions?
21. Can non-shareholders address companies' annual general meetings?

Other issues of corporate governance

22. Are there any other laws, policies, codes or guidelines related to corporate governance that might encourage companies to develop a corporate culture respectful of human rights, including through a human rights due diligence process?
23. Are there any laws requiring representation of particular constituencies (i.e. employees, representatives of affected communities) on company boards?
24. Are there any laws requiring gender, racial/ethnic representation; or non-discrimination generally, on company boards?

ANNEX B – PARTICIPATING FIRMS

The following firms participated in the Corporate Law Project.

- Abeledo & Gottheil: www.abeledogottheil.com.ar
- Allens Arthur Robinson: www.aar.com.au
- Amarchand & Mangaldas & Suresh A. Shroff & Co: www.chambersandpartners.com/Asia/rankings36.aspx?fid=3408&solbar=1
- Brigard & Urrutia : www.bu.com.co
- Carey & Allende : www.careyallende.com
- Clifford Chance : www.cliffordchance.com
- Cotty Vivant Marchisio & Lauzeral : www.cvml.com
- Creel, Garcia-Cuéllar, Aiza & Enriquez : www.creelmx.com.mx
- Edward Nathan Sonnenbergs: www.problemsolved.co.za*
- Ghellal & Mekerba: www.ghellal.com
- Linklaters: www.linklaters.com
- Mah-Kamariyah & Philip Koh: www.mkp.com.my
- Mannheimer Swartling: www.mannheimerswartling.se
- Mernissi-Figes: http://www.legal500.com/firms/12638-mernissi-figes/offices/15672-casablanca
- NautaDutilh : www.nautadutilh.com
- Shalakany Law Office: www.shalakany.com
- Souza, Cescon-Avedissian, Barrieu & Flesch : www.scbf.com.br
- Stikeman Elliott: www.stikeman.com
- Weil, Gotshal & Manges LLP: www.weil.com

*ENS facilitated the involvement of 8 other African firms to assist with a number of African jurisdictions. Their contributions will be listed in the relevant jurisdiction surveys.

ANNEX C – JURISDICTIONS

The following jurisdictions were included in the CL Project.*

Africa

Algeria, Angola, Botswana, Democratic Republic of the Congo, Kenya, Liberia, Morocco, Mozambique, Nigeria, South Africa, Sudan.

Asia-Pacific

Australia, China (incl. Hong Kong), India, Indonesia, Japan, Malaysia, New Zealand, Papua New Guinea, Singapore.

Europe & Middle East

Belgium, Denmark, Egypt, Finland, France, Germany, Italy, Luxembourg, Netherlands, Russian Federation, Saudi Arabia, Spain, Sweden, United Arab Emirates, United Kingdom.

North America

Canada, Mexico, USA.

South America

Argentina, Brazil, Chile, Colombia.

*While every effort was made to include as large and diverse a sample as possible, ultimately the selection of jurisdictions was constrained by the project's research capacity.