Nations Unies
A/HRC/17/31/Add.2

Assemblée générale

Distr. générale
23 mai 2011
Français
Original: anglais

Conseil des droits de l'homme
Dix-septième session
Point 3 de l'ordre du jour
Promotion et protection de tous les droits de l'homme, civils, politiques, économiques, sociaux et culturels, y compris le droit au développement

Rapport du Représentant spécial du Secrétaire général, chargé de la question des droits de l'homme et des sociétés transnationales et autres entreprises, John Ruggie

Additif

Droits de l'homme et droit des sociétés: tendances et observations tirées d'une étude transculturelle menée par le Représentant spécial*, **

Résumé

Le droit des sociétés et des valeurs mobilières oriente directement les actes des entreprises et leur façon d'agir. Pourtant, leurs incidences sur les droits de l'homme sont encore mal comprises. On considère souvent qu'il s'agit de deux sphères distinctes du droit et des politiques, avec des communautés de pratiques.

Au début de 2009, le Représentant spécial du Secrétaire général sur la question des droits de l'homme et des sociétés transnationales et autres entreprises a élaboré le projet sur le droit des sociétés (le projet). Le projet a associé plus de 20 grands cabinets juridiques du monde entier (appendice I) qui ont fourni une aide gracieuse afin de déterminer dans quelle mesure le droit des sociétés et des valeurs mobilières de 39 pays (appendice II) encourage ou entrave le respect des droits de l'homme par les entreprises, et de quelle manière. Les cabinets ont examiné des questions telles que la constitution et la cotation des sociétés: les obligations des administrateurs; l'information; et la participation des acteurs concernés (voir l'appendice III pour le questionnaire type du projet de recherche). Le Représentant spécial a également organisé plusieurs consultations d'experts afin d'examiner les principales conclusions tirées et les prochaines mesures à prendre. Selon le Représentant

* La soumission tardive de ce document s'explique par le souci d'y faire figurer des renseignements aussi à jour que possible.

** Compte tenu de sa longueur, l'annexe au présent rapport est distribuée telle qu'elle a été reçue.

spécial, le projet est la première étude de fond plurijuridictionnelle des liens existant entre le droit des sociétés et des valeurs mobilières et les droits de l'homme.

Les études menées dans chaque pays ont indiqué qu'à travers le monde le droit des sociétés et des valeurs mobilières a des liens avec les droits de l'homme. Cela signifie simplement que les incidences d'une activité sur les droits de l'homme sont susceptibles de nuire aux intérêts à court ou à long terme de l'entreprise qui l'exerce lorsqu'elles ne sont pas dûment identifiées, gérées et signalées; cette entreprise ainsi que ses dirigeants et ses employés risquent alors de contrevenir à diverses règles promouvant la gouvernance d'entreprise, la gestion des risques et la protection du marché. Même lorsque l'entreprise en question ne court pas elle-même un risque, plusieurs États reconnaissent par le biais de leur droit des sociétés et des valeurs mobilières que les pratiques responsables des entreprises devraient éviter toute répercussion sociale ou environnementale négative, y compris dans le domaine des droits de l'homme.

En dépit de ces liens, le projet a également mis en évidence deux autres tendances. La première est le manque de clarté quant à ce que doivent faire les dirigeants dans le domaine des droits de l'homme, mais également quant à ce qu'ils sont autorisés à faire. La deuxième est la coordination limitée entre les autorités de réglementation du secteur privé et les organismes publics chargés de faire respecter les obligations en matière de droits de l'homme. Il en résulte que dans la plupart des juridictions examinées, les dirigeants et leurs employés n'ont guère d'informations sur la façon dont ils peuvent contrôler le respect des droits de l'homme par leur entreprise.

Les principales tendances se dégageant de chaque partie du projet sont les suivantes:

Constitution et cotation d'une société: aucune des études n'a permis d'identifier de législation exigeant expressément que les personnes morales lors de leur constitution reconnaissent une responsabilité envers la société en général. Certaines études ont toutefois fait valoir que cette responsabilité pouvait découler de l'obligation de constituer une société à des fins légitimes et légales, en particulier dans les États dotés d'une forte protection juridique des droits de l'homme. Généralement, la cotation n'est pas liée à la reconnaissance d'une responsabilité envers la société en général, bien que certaines règles en la matière encouragent les entreprises à examiner et à tenir compte de l'incidence de leurs activités sur les droits de l'homme, principalement du point de vue de l'environnement, sur le plan social et en matière de gouvernance.

Obligations des administrateurs: les études laissent entendre que les administrateurs sont rarement expressément tenus de prendre en compte les intérêts des non-actionnaires, tels que les employés, les clients ou les communautés touchées par les activités de leur société. Toutefois, la plupart des études indiquent que dans la mesure où en ne s'intéressant pas aux répercussions de ses activités sur les droits de l'homme, une entreprise risquait de contrevenir à la loi ou d'entacher sa réputation, ce qui nuirait potentiellement à ses intérêts à long terme, les administrateurs devraient considérer que prendre en compte les répercussions éventuelles des activités de leur entreprise fait partie de leurs devoirs de vigilance et de diligence. Selon la plupart des études, il est permis aux administrateurs de tenir compte des répercussions des activités de leur entreprise pour autant que cela soit conforme aux intérêts supérieurs de celle-ci.

Information: dans la plupart des juridictions étudiées, les entreprises doivent divulguer toutes les informations «importantes» sur leurs opérations et leur situation financière. La plupart des études donnaient à penser que lorsque les répercussions sur les droits de l'homme atteignaient ce seuil d'importance, l'entreprise était tenue de divulguer les informations en question. Néanmoins, les études ont également confirmé que la réglementation donnait peu d'indications aux entreprises quant au moment où le seuil en question pouvait être atteint.

Les études ont mis en évidence le fait que certains États commençaient à exiger des rapports sur la responsabilité sociale pour certains types d'entreprises, généralement les entreprises cotées et les entreprises publiques. Ces dispositions ont tendance à être axées sur la communication d'informations sur les politiques plutôt que sur les répercussions des activités, et les informations concernant la responsabilité sociale des entreprises ne font pas nécessairement l'objet des mêmes exigences en matière d'accessibilité et de vérification que les rapports financiers.

Participation des acteurs concernés: dans les juridictions examinées, il existe généralement peu d'obstacles majeurs aux efforts consentis par les parties prenantes pour tenir compte des préoccupations relatives aux droits de l'homme dans les propositions de convocation des assemblées générales annuelles. Il existe toutefois des obstacles procéduraux. En ce qui concerne les obligations des administrateurs de fonds de pension, la plupart des études ont indiqué qu'un administrateur devrait tenir compte de l'impact sur les droits de l'homme d'un investissement si, en l'absence d'une telle prise en compte, le fonds pouvait être exposé à un risque juridique ou voir sa réputation entachée. Récemment, les gouvernements ont encouragé les administrateurs de fonds de pension à tenir compte de l'incidence de leurs investissements sur les droits de l'homme.

Autres questions liées à la gouvernance des entreprises: bien que des différences existent dans les juridictions examinées quant à la manière dont les codes et directives en matière de gouvernance des entreprises traitent des questions relatives à la responsabilité sociale des entreprises, le dénominateur commun à ces codes et directives est qu'ils commencent à tenir compte de ces questions; ceux-ci sont rarement entièrement «volontaires» dans la pratique et reposent de plus en plus sur des initiatives internationales en matière de responsabilité sociale des entreprises visant à élaborer des directives pertinentes. Néanmoins, ils font encore rarement directement référence aux droits de l'homme.

Le Représentant spécial espère que le projet stimulera la discussion entre les principaux acteurs concernés, tels que les juristes s'occupant des droits de l'homme, les experts du droit des sociétés et des valeurs mobilières, les représentants d'entreprises et les autorités de réglementation publiques, et qu'il débouchera sur des travaux de recherche supplémentaires sur d'autres juridictions que les 39 pays examinés.

Annexe

Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises

Human rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative

Contents

I. Introduction[1]

A. The Special Representative's Mandate

1. The Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises was appointed in 2005 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 Special Representative proposed a policy framework to the United Nations Human Rights Council (Council) for managing business and human rights challenges.

2. Now known as the UN "Protect, Respect and Remedy Framework" (Framework), it rests on three differentiated yet complementary pillars:

(a) the state duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication;

(b) the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved; and

(c) the need for greater access to remedy for victims of business-related abuse, both judicial and non-judicial.

3. 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 Special Representative's mandate until 2011, asking him to "operationalize" the Framework. Since 2008 the Framework has also enjoyed extensive uptake[2] from other stakeholders, including international and national governmental organizations, business, civil society, investors and others.

4. In response to the Council's request, the Special Representative released in March 2011 a set of Guiding Principles for Business and Human Rights (Guiding Principles).[3] The Guiding Principles seek to provide for the first time an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity. The Council will consider formal endorsement of the Guiding Principles at its June 2011 session.

5. The Guiding Principles are the product of six years of research and extensive consultations involving governments, companies, business associations, civil society, affected individuals and groups, investors and others around the world. They *highlight what steps states should take* to foster business respect for human rights; *provide a blueprint for companies* to know and show that they respect human rights, and reduce the risk of causing

---

1 The Special Representative is immensely grateful to the law firms participating in the Corporate Law Project, without which this research would not have been possible (see appendix I). The willingness of so many firms to provide their services pro bono in order to expand the common knowledge base indicates their recognition that human rights are relevant to their clients' needs.

2 For applications of the Framework, see http://www.business-humanrights.org/Links/Repository/1003710.

3 Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

or contributing to human rights harm; and constitute a set of *benchmarks for stakeholders* to assess business respect for human rights. The principles are organized under the Framework's three pillars.

6. The broad range of stakeholders with whom the Special Representative consulted in preparing the Guiding Principles included corporate lawyers, both in-house and from leading law firms. In particular, the human rights due diligence process under the corporate responsibility to respect, as described above, was the subject of detailed discussions with corporate law professionals.

7. More recently, the Special Representative is grateful to the many voices in the corporate governance field which provided feedback as he finalized the Guiding Principles. For instance, leading U.S. corporate lawyer Martin Lipton of Wachtell, Lipton, Rosen and Katz has remarked that the text of the "Guiding Principles insightfully marries aspirations with practicality. It identifies a host of tangible opportunities for Nations and businesses to contribute to the goal of preventing human rights abuses. … The draft report [of the Guiding Principles] does not raise issues of particular note regarding the liability of corporations beyond their responsibilities under national laws, or the role of existing governance structures such as corporate boards. In short, Guiding Principles encapsulates the Special Representative's stated commitment to 'principled pragmatism,' reflecting the world's fundamental human rights expectations in a balanced way that takes account of the varied, complex global business landscape."4

8. All information prepared for or by the Special Representative is available on his website.[5]

B. The Corporate Law Project

9. A key aspect of the UN Framework's first pillar, the state duty to protect, is that states should help foster corporate cultures respectful of rights both at home and abroad, through all available avenues.

10. 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.

11. For this reason, in early 2009, the Special Representative announced the creation of the "Corporate Law" project (CL Project). It involved more than 20 leading corporate law firms from around the world assisting on a pro bono basis to identify whether and how corporate and securities law in 39 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.

12. In combination with other projects on the state duty to protect, the CL Project contributed to the development of the Guiding Principles by providing information regarding current state practice as well as facilitating discussion to consider what, if any, policy recommendations to make to states in this area.

[4] http://www.business-humanrights.org/media/documents/ruggie/wachtell-lipton-rosen-katz-guiding-corporate-social-responsibility-24-nov-2010.pdf.

[5] http://www.business-humanrights.org/SpecialRepPortal/Home.

13. The project also supported the Special Representative's work on the corporate responsibility to respect and access to effective remedy. At the foundation of the former is good risk management. Indeed the Special Representative has recommended that to meet the responsibility to respect, companies undertake human rights due diligence. This process can be incorporated within broader enterprise risk–management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights–holders. Participants in the CL Project have provided important guidance on the elements of human rights due diligence in keeping with responsible corporate governance.

14. In relation to access to remedy, several aspects of corporate law, including company disclosure as well as 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 Special Representative has seen increasing debate about the particular challenges posed by complex corporate groups, as well as the relationship between corporate and individual liability.

C. The Research Template

15. Participating law firms in the CL Project 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. A copy of the research template, as well as a list of participating firms and jurisdictions analysed, is at the end of this paper.

16. For the purposes of this project, "corporate and securities law" is understood to include 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 as well as 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 corporate and securities laws could be covered.

17. While 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.

18. All surveys are available at the CL Project website[6]. They are the sole work of the participating law firms and the Special Representative takes no position on any views expressed or implied in them.

D. Consultations

19. Three consultations have been held to inform the Special Representative as part of the CL Project. The first,[7] attended by participating law firms, was hosted in New York by the U.S. firm of Weil, Gotshal & Manges in June 2009. It explored current state practice, including implementation and enforcement in this area. The second[8] was a multi-

[6] http://www.business-humanrights.org/SpecialRepPortal/Home/CorporateLawTools.

[7] http://www.reports-and-materials.org/Ruggie-corporate-law-tools-meeting-summary-30-Jun-2009.pdf.

[8] http://www.reports-and-materials.org/Corporate-law-tools-Toronto-meeting-report-5-6-Nov-2009.pdf.

stakeholder expert consultation convened by York University's Osgoode Hall Law School in Toronto in November 2009. Participants from twenty countries around the world discussed potential policy and legal reform in this area. The third,[9] hosted by Hogan Lovells in New York in April 2010 brought together external and in-house corporate counsel to discuss the legal implications of human rights due diligence, including the opportunities it offers for effective risk management as regulated by corporate law.

20. The role of corporate and securities law has also been discussed at other consultations held by the Special Representative, including as part of a series of meetings and an online discussion to discuss the draft Guiding Principles.

E. Aim of this Paper

21. This paper summarizes overarching trends from the participating firms' surveys of individual jurisdictions. It is organized according to the CL Project's research template. Readers seeking more detail about featured examples are invited to read the jurisdiction-specific surveys available on the CL Project's website.

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

23. The paper is based on the findings from a total of 39 surveys: final surveys for thirty-six jurisdictions as well as three draft surveys for which the Special Representative did not receive final versions: Angola, Colombia and Sudan.

II. Setting the legal landscape

24. Questions 1 through 5 of the research template asked firms to provide context for the detailed exploration of corporate and securities law that followed. These questions explored the human rights obligations which are already placed on companies and their directors and officers through laws other than corporate and securities laws (question 1); the jurisdiction's legal tradition (question 2); whether corporate and securities laws are regulated federally or provincially (question 3); key corporate and securities regulators and their respective powers (question 4); and whether the state has a stock exchange (question 5).

25. Most surveys identified an array of relevant laws and policies in their answers to question 1, including constitutional, environmental, employment/anti-discrimination, criminal, tort/delict and privacy laws. Although the CL Project focused on corporate and securities law, the Special Representative 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** (U.S.), directors' duties are informed by the wider legal liability landscape, which includes such statutes as the Alien Tort Statute, used so far in over 40 cases to sue companies in tort in US courts for human–rights related abuse abroad.

[9] http://www.reports-and-materials.org/Ruggie-summary-of-corporate-and-external-counsel-meeting-30-Apr-2010.pdf.

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

27. The nature of questions 1 through 5 facilitated highly jurisdiction-specific responses, making it difficult to identify overarching trends. Nevertheless, one pattern emerged, of a tendency for corporate and securities regulation to be separate from the enactment, implementation, and enforcement 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. The surveys also explored 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 these agencies and those tasked with implementing the state's human rights obligations.

28. The surveys were broadly consistent with the Special Representative's findings regarding state roles and practice in the business and human rights domain as a whole. The Special Representative 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.

III. Incorporation and listing

A. Introduction

29. Historically in some jurisdictions, the corporate form, including its related benefits such as the limited liability for its members and a legal personality separate from that of its members, was viewed as a privilege in exchange for serving a public purpose. To learn more, the research template asked firms to highlight the jurisdictions in which such links were made in the past or indeed exist today. It also inquired as to whether similar requirements or expectations exist in relation to listing. The template further asked firms to elaborate on concepts such as separate legal personality and limited liability, as well as the availability of socially responsible investment indices, as part of an exploration into the role stock exchanges play in encouraging more socially responsible behavior.

B. Question by Question Analysis

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

30. 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.

31. Some form of "separate legal personality" and "limited liability" exist in all of the 39 jurisdictions included in the CL Project. According to the surveys, 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.

32. 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.

33. For example, in **India**, the courts have lifted the corporate veil in cases of fraud or improper conduct on the part of the company's shareholders. **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 being used to perpetuate a fraud, or to enable a legal or fiduciary obligation to be evaded. In **Algeria**, in the event of fraud, the legal personality of the company is deemed to have never been granted and all of the company's acts are considered null and void. In **South Africa**, the Companies Act creates exceptions to limited liability for reckless or fraudulent actions. Nevertheless, several surveys highlighted that courts are extremely reluctant to "pierce the corporate veil" and will do so only in exceptional circumstances. For instance, in **Denmark**, although piercing the veil has been discussed in theory, case law is limited to very specific circumstances and does not seem to establish a general rule regarding this matter.

34. 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 them, or where dividends are paid in the absence of available profits. 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 abuse, and shareholders who use the company to try to avoid debts may be held jointly and severally liable for the company's debt. In **Sweden**, shareholders are jointly and severally liable for the obligations of a company under a liquidation requirement when these shareholders continue the company's activities despite the existence of this order.

35. In addition, some jurisdictions allow recourse against shareholders without fault in cases of environmental damage or breaches related to tax or labor obligations. In **Brazil**, shareholders may be held liable for environmental damage caused by the company, regardless of the shareholders' fault, if the company's assets are insufficient to cover such damages. Further, controlling shareholders of publicly–traded corporations and shareholders of closely held corporations can be held liable for labor obligations in the course of a company's bankruptcy proceeding, again regardless of fault. In **Colombia**, founders of a limited liability company are jointly and severally liable for tax and labor obligations regardless of fault, 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?

36. The surveys showed that it is uncommon for a state to expressly require companies to recognize a duty to society as a condition of incorporation or listing. In the **U.S.**, 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 recognize such a duty.

37. Nevertheless, in several jurisdictions, incorporation does require companies to establish that they are operating for a lawful purpose. Some surveys suggested 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 which violate those laws may be denied the rights to incorporate. However, several surveys also highlighted that they do not know of such arguments being made in practice. Moreover, they indicated 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 that it is not incorporating for activities which amongst other impacts may negatively affect human rights.

38. Examples of requirements to incorporate with a lawful purpose include **Indonesia**, where incorporating companies must not have goals and objectives, or conduct activities that are contrary to law, public order or morality. The survey for Indonesia contended that as Indonesia's Law No. 39 of 1999 concerning Human Rights provides that certain international human rights instruments form part of domestic law, there may be an implied duty for incorporating companies to avoid any activities that would violate such instruments. In **Finland**, incorporating companies have a general duty to comply with all applicable laws, which the survey argued includes 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 survey suggested may include activities at odds with human rights.

39. 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 French survey argued that 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 (UK)**, companies are now allowed unrestricted purposes under the Companies Act 2006. The survey for the UK contended that companies could therefore include respect for human rights in those purposes, but are not obliged to do so. Regardless of the company's stated purpose, the Secretary of State under the Insolvency Act may petition a court for a company to be wound up if he considers it "expedient in the public interest", and the court may grant this action if it is determined to be just and equitable to do so.

40. Some reports highlighted that companies themselves may include social purposes, including expressions of the company's commitment to human rights, in their constitutive documents. In some jurisdictions legislators are providing a regulatory vehicle for doing so. For instance, the survey for the **U.S.** noted that in the state of Oregon, legislation expressly permits a corporation's articles of incorporation to include a provision "authorizing or directing the corporation to conduct the business of the corporation in a manner that is environmentally and socially responsible." The survey noted that the statute does not require a company to consider social issues or to reference them in its articles of incorporation. However, it contended that the statute implicitly recognizes the legitimacy of, and provides encouragement to, Oregon companies operating in an environmentally and socially responsible manner. The survey further explained that while the most commonly used New York and Delaware corporation statutes do not specifically address whether constitutive documents may include corporate social responsibility (CSR) provisions, there appears to be nothing to prevent a company incorporated in those States from including such provisions.

41. Regarding listing, the surveys highlighted that it would be very rare for a stock exchanges to include respect for human rights as a stand-alone criterion for listing. However, stock exchanges are increasingly considering social issues more broadly. For example, in **China**, rules for the Shenzhen and Shanghai Stock Exchanges require listed companies to commit to environmental protection and community development whilst pursuing economic goals 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 include provisions on CSR reporting and the stock exchange has also developed a CSR framework with accompanying guidance for directors. In **Sweden**, companies applying for listing at NASDAQ OMX Stockholm may be rejected if the listing is not considered to be appropriate or if it for any reason may harm the confidence in the securities market.

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.)

42. Further exploring the role of stock exchanges, this question asked 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 commonly based on prevailing international standards, such as the UN Principles for Responsible Investment (UN PRI). Additionally, an SRI index may focus on companies engaged in certain industries or those conducting business in specific regions or of a certain size or ownership. The Special Representative sought to further explore the extent to which national stock exchanges are utilizing such indices, either through voluntary or mandatory means.

43. The surveys suggested that most jurisdictions do not operate SRI indices through their national stock exchanges, though the number has slowly grown over the last five years. In the limited cases where such indices exist, human rights are generally not specifically included in ranking criteria.

44. For instance, in **South Africa**, the Johannesburg Securities Exchange (JSE) SRI Index was launched in 2004 following the second King Report on Corporate Governance. Public companies listed on the FTSE/JSE All Share Index wishing to join the SRI Index must meet minimum criteria 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 based on international environmental, social and governance criteria.

45. Two indices that appear to relate more directly to human rights are **Brazil’s** Bovespa Corporate Sustainability Index and the various OMX Nordic Indices. Launched in 2005, the Bovespa Corporate Sustainability Index reflects the engagement of listed companies with sustainability. . A questionnaire is sent to the 150 top performing companies on the Sao Paulo Stock Exchange, which asks about the companies’ commitment to sustainable development and includes an express reference to the promotion of human rights and reduction of social inequalities. Stock exchanges in **Denmark**, **Finland**, **Norway** and **Sweden** each participate in three OMX Nordic Indices, including the OMX GES Ethical Nordic Index and the OMX GES Nordic Sustainability Index, which aim to include ethical companies. The OMX GES Ethical involves screening the listed companies based on “GES Global Ethical Standard” and “GES Controversial” analyses developed by GES Investment Services. “GES Global Ethical Standard” screens companies based on their compliance with international conventions and guidelines on human rights, corruption and the

environment while "GES Controversial" screens businesses for operations deemed controversial, such as the production of weapons, tobacco and alcohol. The OMX GES Nordic Sustainability Index on the other hand is a benchmark index comprising the 50 leading Nordic listed companies in terms of sustainability. The selected candidates undergo a sustainability assessment based on the model "GES Risk Rating" which includes compliance with the UN PRI and the Universal Declaration of Human Rights. The selected shares are rated in three categories: Environmental, Human Rights and Governance.

46. In most surveyed jurisdictions, large companies can choose to participate voluntarily in third-party SRI indices, such as the Dow Jones Sustainability Index ("DJSI") World or the FTSE4 Good Index, 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 the top 10 percent in each sector. The FTSE4 Good Index requires that listed companies meet certain CSR standards based on international norms established by non-governmental organizations, government bodies, consultants, academic entities, the investment community and the business sector.

47. There are also country-specific indices operating in this space which are not tied to stock exchanges. 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.

48. 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 respect with Islamic law.

C. Conclusion

49. Most of the surveyed jurisdictions have similar approaches to the concepts of separate legal personality and limited liability – it is rare for the "corporate veil" to be pierced. Moreover, there appears to be limited guidance available from courts and regulators as to the extent to which available exceptions to these concepts may be applied to situations of human rights related abuse.

50. Most surveyed 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 suggested that 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 appears to be slowly increasing, they tend not to include express human rights indicators.

IV. Directors' duties

A. Introduction

51. Directors are regularly required to oversee decisions regarding a company's business activities, including activities which impact the respect of human rights. The template questions related to directors' duties aimed to assess the extent to which directors are

required, allowed, or encouraged to consider the human rights impacts of their company's activities in exercising such oversight, as well as the discretion they are given in making these considerations.

52. The surveys indicated 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 can be revealing of that state's general approach to the role of business in society. A "shareholder approach" where directors' actions must aim at maximizing the value for shareholders above all, contrasts with a "stakeholder approach" where directors are required to take a range of stakeholders beyond 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.

B. Question by Question Analysis

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

53. This question explored the types of duties directors generally owe and to whom these duties are owed, including clarification as to whether duties can be owed to non-shareholders. In doing so**,** this question sought to identify whether the particular jurisdiction had a shareholder, stakeholder or hybrid approach to directors' duties, which would in turn provide context to the other answers in this section.

54. Directors' duties are usually found in corporate statutes. They can be reaffirmed in soft law, such as corporate governance codes. And they can be elaborated in case law, the company's organizational documents, directors' employment contracts, or stock exchange listing rules. For example, in **Russia** specific directors' duties can be 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.

55. Although directors' duties vary in scope among jurisdictions, the surveys suggested one clear trend: directors are generally required to act in the company's best interests, which commonly means acting for the shareholders as a whole. The surveys identified this as the directors' primary duty, which usually incorporates elements of due care, loyalty and due diligence, and good faith. Some jurisdictions also impose more specific duties on company directors, such as the duty of secrecy (**Spain, China and Papua New Guinea**), and the duty not to misappropriate company property (**China**). . Or certain duties may be implied from the broader duty to act with due care, loyalty and due diligence. The report for the **U.S.** highlighted that this duty includes oversight of risk management and compliance, which would necessitate periodic review by the board of corporate processes designed to prevent and detect violation of law or undue risk taking including human rights abuses. Other surveys too contended that duties based on risk management could require directors to oversee the avoidance of human rights risks.

56. The surveys provided that in a number of 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.

57. According to the surveys, in several jurisdictions, statutory and/or case law adopts the "enlightened shareholder" approach and 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. For instance, in **Singapore**, case law indicates that the company's best interests can correspond to the interests of the company's shareholders and employees, creditors, or the group to which the company belongs. In **Canada**, the Supreme Court has stated 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, governments and the environment to inform their decisions." In the **UK**, 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."

58. Highlighting the stakeholder approach, in the **Netherlands**, it is generally considered that a director is to act in the interest of the company in the broadest sense, which includes the combined interests of its shareholders, employees, creditors and even society at large.

59. In other jurisdictions, the "enlightened shareholder value" approach has been avoided. In **Hong Kong,** for instance, public consultations on the revised Companies Ordinance indicated limited support for incorporating the "enlightened shareholder value" approach, similar to that used in the UK Companies Act, into directors' duties provisions. Objections were based on concerns that this approach would place too heavy a burden on directors and that the concept of "enlightened shareholder value" was not widely accepted in Hong Kong.

60. Directors in a number of jurisdictions, primarily common law jurisdictions, owe separate duties to shareholders (as opposed to the company as a whole), and/or creditors under specific circumstances. This includes **South Africa,** the **U.S., Australia, Hong Kong, India, New Zealand** and **Japan**. Separate duties to shareholders 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, including **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 highlighted that civil law systems usually impose limited directors' duties in relation to shareholders and creditors in their own right.

61. Apart from the above, duties to third parties are generally based on general tort principles not to cause damage to third parties, rather than on specific directors' duties from corporate law. Furthermore, directors can be held criminally liable if they commit a crime in connection with their role, separately to any liability the company might face based on the directors' actions. Some surveys, (i.e. **Finland**), suggested that since directors are required to abide by criminal law, they also implicitly owe duties to the society and the general public through such laws.

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?

62. None of the surveys highlighted a separate, self-standing duty to avoid legal risk and damage to the company's reputation. Nevertheless, many surveys argued that such a duty can be implied from existing directors' 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 survey for the UK contended 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 survey for **Finland** indicated that although disregarding the company's reputation could be viewed as acting against the company's best interests, this argument has yet to be tested in court. Other surveys made similar observations.

63. Case law also may play a role in promoting the existence of a duty to avoid legal risk and damage to a company's reputation. For example, the survey for **Malaysia** noted that Malaysian courts have, based on UK case law, indicated that directors owe a duty to employees not to run the company in a manner which would damage the company's reputation to an extent that employees become unemployable. Some voluntary codes of conduct seem to follow a similar reasoning. For example, in **France**, the Cultural Diversity Charter initiated by companies and the government with over 2,000 signatories refers to the importance of complying with non-discrimination laws to "prevent a loss of reputation."

64. Nevertheless, several surveys highlighted 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. A number of surveys, including those for **Brazil** and **Algeria**, mentioned that shareholders may need to show that they or the company suffered economic loss from reputational damage to the company. According to the report for **Algeria** this may be especially hard to prove in the absence of active markets, where courts may lack objective criteria (such as a drop of a share price) to calculate damage linked to a reputational impact. Some surveys, such as those for **Australia**, the **UK** and **Singapore**, also noted that directors' wide discretion to weigh the costs and benefits of actions extends to reputational impacts. Indeed, the survey for the **UK** explained that directors' discretion under the Companies Act may mean that some degree of legal risk or potential reputational damage may be appropriate if the directors believe that the company's approach is the correct one, and that it will, for example, be exonerated in litigation and the long-term value of the company will rise.

65. Finally, some surveys suggested that a specific duty to avoid legal risk and reputational damage could form part of a director's duty to oversee risk management. This duty generally requires directors to establish a monitoring system for the early recognition of risks that may endanger the company's operations. Risk management duties are 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, as noted above, the survey for the **U.S.** contended that directors are responsible for overseeing the assessment of significant risks to the company, including, as appropriate, actions that may infringe human rights, and for taking the necessary steps to ensure that these risks are addressed. In **Germany**, the Minimum Requirements for Risk Management, non-binding guidelines applicable to banks and insurance companies, explicitly refer to avoiding reputational risks. In **Luxembourg**, a law based on the European Union's Third Money Laundering Directive, imposes a risk-based approach of due diligence on listed investment institutions. Avoiding legal risk and reputational damage is specifically listed as a duty for directors in listed investment institutions such as pension funds and management companies.

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)

66. This question was designed to build on the Special Representative'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 Special Representative sought to find out whether other jurisdictions have similar corporate law provisions and if so, their scope.

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

68. A significant number of surveys suggested 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 such impacts into account, 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.

69. The surveys further indicated that in most jurisdictions, even if not explicitly or implicitly required, directors are *permitted* to consider the interests of non-shareholders as long as this accords 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

70. In some limited cases, directors are explicitly required 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 survey for the UK contended 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 the company's long-term interests continues to be key.

71. The survey for **Germany** contended 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 current statutes, the Companies Act of 1937 referred to directors' duties to employees and common welfare. The survey said that it is generally agreed that this reference was deleted

in a 1965 reform of the Companies Act because of agreement that the need to consider these interests was self-evident. Nevertheless, the government is known to be considering reintroducing this reference given the issue's importance as highlighted by the recent global financial crisis.

72. In **Brazil**, article 154 of Brazilian Corporations Law states that "the director shall use the powers conferred to him by law and by the bylaws to achieve the company's corporate purposes and to support its best interests, satisfying the requirements of the public at large and the social role of the company." The survey for Brazil argued that it can therefore be implied that directors must pursue the company's purposes of generating profits while simultaneously taking into consideration the public at large and the company's social role. Brazilian scholars define "social role" as a combination of a set of principles, such as: (i) the labor conditions and relationships between the company and its employees regarding their professional and personal conditions; (ii) direct and indirect consumer interests regarding the company's products and services quality and price; (iii) competitors' interests in the name of fair commercial practices; and (iv) environmental preservation.

73. In other jurisdictions, the surveys suggested 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. The survey **South Africa** contended that while South Africa's recently revised Companies Act does not have a similar provision to the UK Companies 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) implies a requirement for directors to consider the company's impacts on non-shareholders, including human rights impacts. The survey for the **U.S.** highlighted existing directors' duties to oversee appropriate internal control systems. It emphasized that where certain human rights violations impose a meaningful risk to the company, boards of U.S. corporations are well-advised by existing case law to become aware of these risks and appropriately oversee mechanisms to address them.

74. 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 could breach domestic law. This could include labor laws, occupational health and safety laws, consumer protection laws, environmental laws, privacy laws and constitutional provisions. For instance, the survey for **Spain** noted that companies may be held responsible for breaches of the Constitution, which includes human rights protections. Thus directors should consider human rights as part of their duty to ensure the company abides by the Constitution.

75. Importantly, even where the surveys suggested that directors have an implicit duty to consider non-shareholder impacts, including human rights impacts, such duties remain at the oversight level and subject to wide directorial discretion. For example, to fulfil these duties directors might be expected to help develop processes and policies to prevent and address negative human rights impacts, but may not be required to implement such policies and practices on a day-to-day basis.

Permission or Encouragement to Consider Non-Shareholders

76. 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. 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 companies considering the interests of consumers, society as a whole, and the environment. In **Russia**, non-binding corporate governance guidelines recommend that companies' 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.

77. In **Singapore**, the Companies Act refers to the interests of the company's employees as one of the "matters to which 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 (depending on the statute) 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.

78. It may also be the case that the law does not expressly permit consideration of impacts on non-shareholders but that this may be implied. 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, and thus directors are generally permitted (and may even be required) to consider these impacts. The draft survey for **Sudan** argued that directors are permitted to consider impacts on non-shareholders as the law is silent regarding this issue.

Impacts Occurring Outside of the Jurisdiction

79. The surveys suggested 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.

80. Indeed, most of the surveys said that corporate law is silent on the question of impacts outside the jurisdiction and that accordingly, the general assumption would be that the situation is the same no matter where the impacts occurred. Thus, if a director was required or allowed to consider impacts on non-shareholders if they occurred at home, the same would apply to impacts abroad. For instance, the surveys for **Belgium**, **France,** the **UK** and **Germany** made this argument. The survey for **Germany** maintained 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.

81. The survey for **Papua New Guinea** noted that as the Companies Act is silent on geographical application, it may be implied that this Act only applies within Papua New Guinea's boundaries, airspace, ships and aircraft. 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.

82. Regarding legal compliance, the surveys suggested 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 has extraterritorial application. For example, the survey for **Denmark** explained 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**, regulation requiring environmental reports only applies to projects undertaken in Kenya – thus directors would only be required to follow

the company's compliance with that law in Kenya. In contrast, several surveys highlighted that legislation regarding corporate criminal liability for international crimes tends to cover international crimes at home and abroad. Thus the surveys said it could be possible to take action against a director under corporate law who allowed a culture of non-compliance with such laws, including in overseas operations. Further, companies operating overseas will be bound to comply with the laws of the countries in which they operate and directors will need to understand these obligations to fulfil their oversight duties.

83. Finally, the surveys noted that when voluntary guidelines suggest additional expectations for directors, they may provide for application to the company's activities abroad. For instance, according to the Confindustria Guidelines in **Italy**, ethical codes are to be respected by 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. This 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." The **Spanish** Unified Code for Corporate Governance (Código Unificado de Buen Gobierno) in this area highlights Principle 8 of the Basel Committee on Banking Supervision which states that "[t]he board and senior management should understand the bank's operational structure, including where the bank operates in jurisdictions, or through structures, that impede transparency (i.e. "know-your-structure")".

Impacts by Subsidiaries, Suppliers and Other Business Partners

84. In a limited number of surveyed jurisdictions it appears that directors may be expressly required to consider the social impacts of their subsidiaries, suppliers and other business partners, which may include their human rights impacts. For instance, the survey for **France** said that pursuant to the French Commercial Code, directors must consider the social impacts of foreign subsidiaries' activities when complying with reporting requirements.

85. Even where such consideration is not expressly required, by and large the surveys suggested that directors are required to consider the human rights impacts of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction, if the company could face risks in relation to these impacts, including as a result of a direct violation of an applicable law linked to its own acts and/or omissions. For example, 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. The survey for the UK contended that coupled with the obligation to have regard to "the desirability of the company maintaining a reputation for high standards of business conduct" as set forth in the UK Companies Act (2006), this means that directors may need to consider social and environmental impacts by these entities, whether occurring inside or outside of the jurisdiction. The survey for **France** argued that directors must consider impacts on non-shareholders by subsidiaries, suppliers and other business partners, wherever they occur, if they could affect the company's best interests.

86. Regardless of whether directors are required to consider impacts by subsidiaries, suppliers and other business partners, most of the surveys said that directors are generally *permitted* to consider the human rights impacts of subsidiaries and other business partners provided that such consideration accords with the company's best interests. For instance, the survey from **Sweden** indicated that what is in the company's best interests may be

determined according to the entire business group, including any subsidiaries operating abroad.

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?

87. This question assessed to what extent directors have discretion in considering human rights impacts on non-shareholders, particularly where such consideration is expressly or implicitly required. Where there is broad discretion, the Special Representative wanted to explore whether any regulatory guidance is available to directors to balance the various considerations involved.

88. 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 includes the steps a director may decide are appropriate at an oversight level to prevent and address human rights impacts.

Discretion When Directors Are Required To Consider Impacts on Non-Shareholders

89. In the jurisdictions where directors are required to consider impacts on non-shareholders, either expressly or implicitly, the surveys suggested that directors have a large degree of discretion regarding how to consider such impacts. In the **UK**, for example, the survey said that directors have wide discretion on how to determine the company's impact on non-shareholders as no guidelines exist. Nevertheless, the government has confirmed that "having regard" to particular non-financial matters means to "think about" and should entail more than a tick the box approach. The survey contended that this means that directors should give proper consideration to these matters. It also said that if "thinking about" about a particular impact on non-shareholders leads to the conclusion, as would be likely in many cases, that the proper course is to act positively to achieve the objective of the provision in the Companies Act, that is what the director should do.

90. In **Germany**, directors are free to determine how to proceed when considering impacts on non-shareholders. And as Germany employs the "stakeholder model" it can be unclear whether shareholders' interests have to take priority over non-shareholders' interests in conflicting cases. The survey for the **Netherlands** suggested that conceptually directors may put non–shareholder and shareholder interests on an equal footing – each interest has the potential to be paramount depending on the circumstances.

91. According to the surveys, discretion may be narrower where a directors' duty is linked to a particular legal provision. 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 draft survey for **Angola** makes a similar point in relation to compliance with production sharing and mining agreements. However, directors may have discretion and negotiating power during the drafting of these agreements.

Discretion When Directors Are Permitted To Consider Impacts on Non-Shareholders

92. The surveys suggested that where directors are permitted to consider impacts on non-shareholders, they have broad discretion, provided such consideration aligns with the company's best interests. For instance, the surveys mentioned that directors can usually choose to adopt a CSR program or a voluntary code, develop internal company policies, or create a committee specifically focusing on issues such as human rights.

93. In common law jurisdictions where the business judgment rule applies, such as in **Australia, Canada** and the **U.S**, the surveys indicated that the courts will afford directors

considerable discretion in determining whether a decision is in the company's best interests. The survey for the **U.S.** explained 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.

94. 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.

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

95. The three subsets of this question explored the extent to which directors can be held liable for breaching any of the duties listed above. In particular, the Special Representative 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 Special Representative also explored related issues under his access to remedy work.

What Are The Legal Consequences For Failing To Fulfil Any Duties Described Above?

96. In most surveyed jurisdictions, directors who breach their duties under corporate law may be subject to a civil claim by the company, including by the shareholders on the company's behalf, as well as criminal and administrative penalties in some situations. The range of penalties usually includes 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. Commonly, only reasonably foreseeable damage will need to be indemnified by the directors though in **Morocco**, unforeseeable damages may be recovered in the case of fraud. Several surveys also referred to the ability of third parties to take civil action against directors under tort/delict principles, including negligence.

97. The surveys provided 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 is that individual directors are personally liable for the consequences of breaching their duties. However, in some jurisdictions including **China, Saudi Arabia,** the **United Arab Emirates (UAE)** and **Mozambique**, 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.

Who May Take Action To Initiate Legal Consequences?

98. 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 known as a derivative claim (e.g., 5% in **Spain**, **Brazil** and **Chile**, 10% in **Indonesia**, **Sweden** and **Finland**, 20% in **France**, and 50% in **Germany**, **Italy** and **Colombia**); new or former management members; or other directors. The surveys listed 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 it bring such an action (**U.S.** and **New Zealand**).

99. Practical deterrents to derivative claims may also include the costs involved for the lawsuit, especially considering that damages will generally be awarded to the company and not the shareholders. In some jurisdictions, such as **Sweden**, if the action is successful, the shareholders can claim compensation from the company to cover costs from any damages the company has been awarded from the directors.

100. The surveys highlighted that in some jurisdictions, other actors may also be entitled to bring a claim against directors, provided that certain conditions are met. These may include minority shareholders (**Algeria**, **Italy** and **Argentina**); creditors (**Spain** and **Luxembourg**); the corporate regulator (**Canada** and **Australia**); or the supervisory board (**Indonesia** and **Germany**). The conditions can vary, for instance, in **Luxembourg**, the creditors can institute the action on the company's behalf if the latter fails to do so and such failure harms the creditors.

101. In the few jurisdictions where directors owe individual duties to the shareholders (rather than to the company), these shareholders can generally bring an action in their own right if they have personally suffered damage. Most surveys agreed that proving that damage can be difficult, particularly as it is generally intertwined with any damage suffered by the company. For instance, in **Morocco**, the shareholders can seek compensation themselves for individual damage whereas actions can only be brought by the shareholders on the company's behalf if the shareholders have suffered a collective loss.

102. The surveys suggested that other third parties, such as employees or members of a community affected by a company's operations, would generally only be able to bring an action against a director under laws other than the corporate law, such as tort, 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, including constitutional rights. However, this would remain a derivative claim – any relief sought is on behalf of the company and any relief granted, including damages, would be in favour of the company.

103. 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

104. In the surveyed jurisdictions, defenses available 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 – 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 (such as the **U.S.**, **Canada** and **Australia**) and in some civil law jurisdictions (including **Finland**, **Italy** and **Japan**), the courts will give directors deference under the business judgment rule, or a variant thereof, by presuming that they were in the best position to assess the alternatives at the time the decision was made.

105. 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 as specific duties 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?

106. Several surveys indicated 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. However, the survey for Algeria also noted that the courts traditionally have applied this standard from a business perspective, meaning that the standard may be intended to protect the company, and not society.

107. Further, some surveys contended 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 ethical business conduct. 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.

108. 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 processes. In **Sweden**, NASDAQ OMX Stockholm has adopted the Swedish Code of Corporate Governance which applies to all Swedish and some foreign companies listed on NASDAQ OMX Stockholm on a “comply and explain” basis. In particular, this code sets out responsibilities for the board of directors to ensure that guidelines governing the company’s ethical conduct are established.

109. Some surveys noted that regulators in their jurisdictions can restrict director appointments, depending on certain 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). While such crimes are not expressly defined in the Commercial Companies Law, the survey for the UAE argued that they could include crimes relating to an abuse of human rights or corruption.

110. Finally, in some jurisdictions new directors’ duties are being contemplated regarding whistle-blowing procedures, which some surveys hypothesized may promote more transparent corporate cultures, including regarding human rights. In **Spain**, the corporate governance code recommends that listed companies establish whistle-blowing mechanisms (used essentially to denounce financial and accounting irregularities). Directors of companies operating in specific sectors may also receive targeted guidance. For example, in **Germany**, BaFin, Germany's financial services regulator, as part of its risk management guidelines, has recommended implementation and improvement of internal communication structures in insurance companies.

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?

111. This question assessed the role of supervisory boards, if any, in encouraging a company to respect human rights. It also queried the role of senior management in this regard.

Supervisory Boards

112. According to the surveys, 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 (e.g., Algeria, Belgium, Finland, Luxembourg and Spain);

(b) compulsory (e.g., Indonesia for limited liability companies; also companies operating on the basis of Islamic law require a Shari'ah Supervisory Board; Germany for listed companies; the Netherlands for some listed companies; Russia for joint stock 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 (e.g., Italy).

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

114. Some surveys contended 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 or CSR role. For example, in **Russia**, the 2002 Corporate Governance Code issued by the Federal Financial Markets Service suggests that the supervisory board develop 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.

115. Some surveys also suggested that the composition of supervisory boards may be a factor in their willingness and ability to advise on human rights-related issues. For example, in **Germany**, regulators encourage diversity and international experience for supervisory board members. According to the survey for **Finland**, in state-owned or municipally held companies the supervisory board typically consists of politicians providing guidance to the Board of Directors on questions of policy. The survey highlighted that it is not uncommon for a these supervisory boards to highlight to the management board the particular importance of the company's operations in relation to society.

116. Finally, even where supervisory boards do not exist, the surveys identified that board committees can be influential in fostering more socially responsible behavior. Indeed, there are a few jurisdictions where such committees may be 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, the South African corporate governance guidelines recommend 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 require companies having more than 1,000 shareholders to constitute a 'Stakeholders Relationship Committee' to consider and resolve stakeholder grievances, though the term "stakeholders" is yet to be defined.

Senior Management

117. A number of surveys said that senior management can be held to the same duties imposed on directors. For example, the survey for the **U.S.** highlighted that both the directors and senior management owe fiduciary duties 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 as directors. In **China**, senior executives and supervisors owe the same duties and face the same consequences for breach of duties as directors. In **Canada**, senior officers are bound by the same duty of care and duty of loyalty and good faith as directors. Several surveys supported the need for more guidance from regulators for senior managers on these duties.

118. In **Russia**, although senior management's duties are generally laid out in the company's internal documents, governmental guidance indicates that senior management also owe some duties regarding the enhancement of social responsibility. Laws outside of corporate law may also impose specific duties on senior management. In **India,** for example, environmental and labor laws impose liability on persons who are in-charge of the company's operations, which can include managers.

119. In certain jurisdictions, duties can extend to those who are seen to control the actions of 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.

C. Conclusion

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

121. Accordingly, many of the surveys argued that a prudent director would do well to consider and act on the company's human rights related impacts in accordance with their oversight role.

122. Another trend is the increasing need for directors to balance the company's short-term and long-term interests in considering impacts on non-shareholders, including in relation to human rights impacts. The surveys suggested that helpful guidance in this regard could be provided by regulators including in the form of soft law instruments such as corporate governance guidelines, but that such guidance was currently lacking in most jurisdictions.

123. An additional theme emerging from the surveys is the role of shared learning in this area, namely the extent to which law makers look at corporate law evolution 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” approach, the government did consider the equivalent UK legislation as a potential model. Similarly, the recent **South African** review also took into account developments in the UK.

124. It is rare for provisions requiring or allowing directors to consider impacts on non-shareholders to expressly refer to human rights. Rather, such provisions are likely to refer to environmental, social or community impacts. Regardless, several surveys argued that these provisions may need to be interpreted with a human rights lens, particularly where corporate law should be read in light of the national constitution, including provisions safeguarding fundamental human rights.

125. The surveys suggested several areas which may warrant further exploration to better understand current challenges and potential responses. For instance, when directors are required or allowed to take the interests of non-shareholders into account, up to what extent have they done so? Does litigation reveal that shareholders are willing and able to bring suits against directors who may have declined a profitable opportunity in order to respect human rights or, conversely, for failing to consider human rights when such failure causes 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?

V. Reporting

A. Introduction

126. The Special Representative has highlighted the importance of companies communicating on their human rights impacts (and how they are addressing them) under the corporate responsibility to respect human rights. This provides a measure of transparency and accountability to individuals or groups who may be impacted by the company’s activities and to other relevant stakeholders, including investors. Communication can take a variety of forms, including in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports. As the surveys showed, formal reporting is itself evolving, from traditional annual reports and corporate responsibility/sustainability reports, to include on-line updates and integrated financial and non-financial reports.

127. The questions in this section of the template were designed to explore the role of national regulation and guidance in encouraging, and in some cases requiring, more transparent communication, including formal reporting, by companies on their human rights impacts.

B. 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?

128. This question’s aim were two-fold: first, to explore 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, to look at 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

129. Only a few of the surveyed jurisdictions 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 comply with specific social or environmental requirements, and if it has chosen not to comply, the company must explain the reasons why in its report.

130. For example, since 2009 **Denmark** has required the largest companies to include CSR sections in their annual reports, including efforts by the companies 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 incentivizing companies to join these initiatives. In **France,** the Commercial Code requires public limited companies in certain cases to issue extra-financial information in relation to the social (particularly employment-related) and environmental impacts of their activities. Interested third parties, including shareholders and auditors, may petition a judge to order a board to communicate this information. In **Germany**, listed companies and so-called capital market-orientated companies are required to declare conformity to the Corporate Governance Code pursuant to the German Stock Corporation Act (AktG). In this declaration, the company is obliged to state whether and to what extent it complies with the recommendations laid down in the CG Code. In the **Netherlands**, the revised 2008 Dutch Corporate Governance Code specifically requires the management board and supervisory board of listed Dutch companies to formulate a policy regarding aspects of CSR that are relevant for the company's business, a brief description of which is to be included in the company's annual report.

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

132. In **China**, listed companies must disclose any construction projects or investments that impact the environment. The **Dutch** Civil Code requires listed companies to include in their annual reports an analysis of both financial and non-financial performance indicators in their description of the overall state of the company.

133. Finally, the **UK** 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 policies of the company in relation to those matters and the effectiveness of those policies. There are, however, several exceptions to the application of this rule.

134. Some jurisdictions require companies engaged in certain business sectors or activities, such as mining or banking, to disclose impacts on non-shareholders through industry specific legislation. For example, in **Canada,** banks and insurance companies with equity of over $1 Billion (Canadian) are required to issue public accountability statements that include a discussion of philanthropic and charitable initiatives and community development programs. However, according to the survey for Canada, there is no requirement for these companies to disclose potential adverse community impacts.

135. In the **U.S.** the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act) requires companies to file annual reports as to whether certain "conflict minerals" used by the company originated in the Democratic Republic of Congo or

adjoining countries. The report, which should be publicly available, must also describe the measures taken to exercise due diligence as to the source and chain of custody of the minerals. This is designed to help determine whether the minerals used by the company financed or benefited armed groups identified as perpetrating serious human rights abuses in certain U.S. government reports. Preparation of the report does not depend on the use of the minerals being material to the company's business. The Dodd–Frank Act tasks the Securities and Exchange Commission with developing implementing regulations for this provision.

136. Furthermore, in **Nigeria** and **Kenya**, companies performing activities that may affect the environment, such as oil companies, must submit environmental impact assessment reports as part of licensing requirements. According to the draft survey for **Angola**, some state-owned oil and diamond companies include public social and environmental disclosure requirements as part of joint venture agreements with foreign companies.

137. The surveys revealed further 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 (GRI) guidelines for CSR disclosure, which include indicators related to human rights.

Voluntary Reporting

138. According to the surveys, regulators and stock exchanges in several jurisdictions encourage, voluntary CSR reporting even if it is not required. For example, the **Luxembourg** Stock Exchange's 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 (listed and non-listed) include in their annual report or in a separate report certain economic, social and environmental issues. The surveys for **Chile** and **Morocco** amongst others contended that voluntary disclosure of social and environmental policies is seen by many large companies in their jurisdictions as a matter of good practice.

139. In some jurisdictions, industries self-regulate to encourage their members to disclose non-financial information. 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

140. In relation to financial reporting, the majority of surveyed jurisdictions require companies to disclose in their annual reports any material risks facing the company, such as potential litigation and other significant information. The survey for the **U.S.** explained 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 offered similar definitions.

141. Accordingly, a large number of the surveys deduced that to the extent that human rights impacts may significantly affect a company's stock price or pose a risk to the company, such impacts should be disclosed in accordance with current reporting 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 draft survey for Colombia, relevant information could include, among other things, any potential

human rights-related litigation against the issuer, including any labor disputes. Similarly, the survey for **Brazil** highlighted that listed companies must publicize facts that are considered relevant to their share value, which would include environmental damage that could result in severe financial penalties or activities being interrupted. The survey for **Algeria** highlighted nonetheless that when there is not an active capital market, as is the case in Algeria, it may be difficult to evaluate the materiality of a human rights–related corporate action, potentially making it less likely that the company will report the impact.

142. While most of the surveys contended that material human rights related impacts should be reported in the same way as any other material impact, some also noted the insufficient guidance from courts and regulators as to which human rights impacts would meet this threshold, and therefore on what companies should report in this space. In this regard the Securities and Exchange Commission recently provided interpretive guidance on material risks related to climate change.

143. Moreover, several surveys mentioned that even reporting of material impacts may 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 company or any of its subsidiaries. In **New Zealand,** a company does not need to disclose information that would be “harmful to the business of the company.”

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?

144. The surveys provided only limited examples in which financial 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 and include consolidated financial statements from the whole corporate group. 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. The survey for **Botswana** indicated that if the operations of a company are outside Botswana then the reporting obligations of the company would extend to such impacts. According to the survey for **Mexico**, listed companies must report on such acts, facts or events, whether they occurred in Mexico or in other jurisdictions in which the company has operations that have an impact on the company, its holding companies and subsidiaries.

145. At the same time, it is also rare to see an express territorial *restriction* attached to a reporting requirement, whether in relation to financial reports or separate CSR reporting regimes. Thus, several surveys suggested that to the extent that foreign actions relating 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 that they would be reported if they occurred inside the incorporating jurisdiction. For instance, the survey for the **U.S.** explained that provided 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. In **Denmark**, the law requiring large companies to provide a report on CSR suggests that these companies report on matters outside of Denmark as well. The survey for **Brazil** emphasized that since the standard for reporting is materiality, the focus is not where the action took place but whether the action impacts the company’s share value.

146. The surveys suggested that while group reporting requirements may necessitate parent companies to report on their *subsidiaries'* activities in some situations, it is rare to see these requirements extend to reporting on the impacts of *suppliers or other business partners*. Nevertheless, voluntary reporting guidelines increasingly encourage greater awareness of activities in all aspects of the value chain, and also in some 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?

147. This question explored the consequences for companies that fail to report on impacts on non-shareholders, where such reporting is required, or more generally, for misrepresenting key facts. It also queried whether accessibility and verification requirements for separate CSR reporting regimes differ to requirements for financial reporting and if so, why.

Verification

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

149. The surveys also indicated that in most jurisdictions these verification requirements do not apply to mandatory CSR 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 independent verification. However, 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 and environmental responsibility are not subject to audit or verification.

150. Some exceptions exist. For instance, 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 so doing may rely on the opinion of a credible independent assurance provider hired by the company. Further, reporting under environmental protection regimes commonly involves 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

151. In many of the surveyed jurisdictions companies must make their annual reports or financial statements accessible to the public, usually through the company's website or other electronic means. Listed companies are also commonly required to make certain information publicly available, often 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 some jurisdictions, corporations voluntarily make their annual reports, financial statements or other disclosure documents available to the public.

152. Similarly to verification, the surveys suggested that it is rare for a state to require that CSR reports be made publicly accessible. An exception exists in **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. Special rules may be applicable to state-owned enterprises, as in Sweden where state-owned companies are required to make their CSR reports available on their websites.

153. Nevertheless, corporations are increasingly placing information relating to CSR in the public domain on a voluntary basis. For example, the survey for the **U.S.** highlighted that many corporations make available 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 survey for **Japan** suggested that CSR reports are typically freely accessible on a company's website. Some surveys noted, however, the importance of companies knowing that they are fulfilling, or can fulfil promises made in the policies they publicize, given some complaints by consumers and other stakeholders for misrepresentations as to the company’s CSR state of play.

Accountability

154. In most of the surveyed 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 alongside the company. It is predominantly regulators or shareholders that may take action. For example, the survey for the **U.S.** highlighted that if a corporation misrepresents or omits important information, the Securities and Exchange Commission can 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.

155. Most jurisdictions also make it possible to impose civil liability on directors for failure to submit annual reports. Such failure may 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 an action by the company or a derivative action by shareholders for breach of directors’ duties related to failure to comply with reporting requirements.

156. 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 fulfil their reporting obligations. And administrative penalties may 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. In many of the surveyed jurisdictions, stock exchange listing rules include penalties for listed companies that fail to submit the required disclosures, including suspension or delisting.

157. The surveys indicated 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.

158. In most instances companies or directors may still be held liable for false or misleading statements made in voluntary CSR reports, often based on tort law or other legislation preventing misleading and deceptive conduct in commercial dealings. For example, the survey for **India** suggested that if false or misrepresented statements are deliberately included in any report from the company, regardless of the voluntary nature of the report, the company and its directors will be liable for false representation to anyone who relied upon the false statements to their detriment.

159. Several surveys underscored that there are likely to be few legal consequences for failing to report where CSR reports are submitted on an entirely voluntary basis. For example, the survey for **Singapore** said that since disclosure on environment or social issues is voluntary, there are no consequences for failure to report. Similarly, the survey for **Luxembourg** indicated that because reporting on companies' social impacts remains voluntary, there are few legal penalties in the case of failure to report. The situation may be different in “comply or explain” type regimes where companies not only fail to report on social and environmental impacts but also fail to explain why they have omitted such information.

C. Conclusion

160. Most surveys agreed that human rights impacts may in some cases reach the materiality thresholds applicable to ordinary financial reporting, which would make it compulsory for companies to disclose such human rights impacts to their shareholders. Nonetheless, the surveys identified a lack of guidance for companies on how and when to make these determinations.

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

162. The surveys suggested 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 argued 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.

163. Finally, the surveys showed that most states do not subject CSR reports to the same verification, accountability and accessibility requirements as ordinary financial reporting, even where such reports are mandatory. Some surveys contended that this may change as CSR reporting regimes further develop.

VI. Stakeholder engagement

A. Introduction

164. This section canvassed the degree to which various groups (such as shareholders, institutional investors, and other interested parties) have the capacity to influence corporate decision-making in respect of human rights. Accordingly, each question addressed 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. Other mechanisms may also be relevant (including various reporting rules and policies as described above) – this section was intended as a preliminary exploration into this issue.

B. 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?

165. This question sought 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 required to circulate shareholder proposals as part of a larger package of management information in anticipation of the company's AGM. These materials provide shareholders with an understanding of the issues being addressed at the AGM to assist them in making decisions. Importantly, the surveys highlighted that emerging economies do not commonly use this mechanism. As such, the examples below are mainly limited to developed economies.

Procedural Limitations

166. The surveys indicated that the main impediment to circulating shareholder proposals dealing with human rights, in jurisdictions where the mechanism of shareholder proposals exists, are purely procedural and apply to all proposals, regardless of their subject matter. In other words, the laws of these jurisdictions are concerned more with who is introducing the proposal and how, than with its content.

167. These procedural rules, whether in civil or common law jurisdictions, tend to require a certain amount/percentage of capital equity in order to put forth a proposal. 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. In **Mexico**, requests to circulate proposals must be made by shareholders owning at least 33% of the company's equity. 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 may be less interested in discussing these matters.

Substantive Limitations

168. According to the surveys, 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 may 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 a defamatory matter.

169. Another common substantive restriction is the requirement that proposals 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. **Canada's** corporate legislation previously provided that a shareholder proposal could be excluded where its primary purpose was for the promotion of general economic, political, racial, religious, social or similar causes. Relying on this limitation, the Supreme Court had restricted the circulation of a proposal calling on a company to terminate its investments and operations in South Africa during apartheid. Changes to the Canada Business Corporations Act in 2001 now mean that a proposal may only be excluded where it "clearly appears that the proposal does not relate in a significant way to the business or affairs of the corporation." The survey for Canada contended that a well drafted shareholder proposal, founded on the interplay between the long term reputational and commercial interests of a corporation in

not violating human rights, would likely require directors to consider putting such proposal forward at a meeting of shareholders.

170. 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 on a particular proposal. Some surveys suggested that regulators and courts now appear to be less willing to allow companies to block socially related proposals, including those dealing with human rights. Others noted the steady increase in human rights-related proposals in their jurisdictions in recent years. For instance, the survey for **Denmark** noted that the courts recently allowed shareholders of a listed company to raise questions at the AGM about the company's activities in the military sector as this did not impose a "groundless and unjustifiable burden" on the AGM. The survey for the **U.S.** highlighted that the number of shareholder proposals regarding the formation of committees on human rights and disclosure of human rights standards increased between 2003 and 2008 (from one proposal in 2003 to 25 proposals in 2008), but then slightly decreased after 2008 (16 proposals in both 2009 and 2010).

171. Finally, the surveys identified the use of alternative mechanisms for shareholder-board dialogue. For instance, the survey for **India** noted the system of extraordinary meetings whereby a prescribed minimum of shareholders can request the directors to call a meeting and decide its agenda. According to the survey for India the relevant legislation does not prescribe or limit the nature of issues that can be raised by the shareholders in such meetings. The survey contended that such meetings could be used as an effective tool by shareholders to encourage companies to take into account non-shareholder related considerations provided these considerations fall within the ambit of the objects laid out in the company's constitutive documents.

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

172. The Special Representative 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 indicated that in most cases the trustees of institutional investors are *permitted*, though not generally *required*, to make decisions based on human rights considerations, provided these decisions remain in the fund's best interests.

173. However, 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 demonstrated how these nuances play out in the legislative approaches of certain jurisdictions. For instance, according to the surveys, state-run 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.

174. In **Australia**, superannuation funds must be run for the "sole purpose" of benefiting the fund's members. The survey for Australia argued that if "purpose" is taken to mean the fund's goal, rather than the means by which it is to be achieved, human rights considerations would not be precluded provided they do not negatively impact the fund's profitability. This issue was recently the subject of political debate, with a government minister calling for the regulator to issue guidance to superannuation funds clarifying that fund trustees *can* incorporate environmental, social and governance issues in formulating their investment strategies.

175. 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.

176. Other surveys also suggested recent developments in the role of institutional investors in the CSR space. In the **UK**, the government recently confirmed 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 calls to reform legislation governing pension funds to explicitly allow, and in some cases require, consideration of social and environmental issues, including human rights. The survey for **Belgium** noted that the government is planning a legislative proposal to adopt a minimum SRI standard, which would require SRIs to make decisions with due consideration to Belgium's international human rights commitments. Belsif, a sustainable investment forum representing some of Belgium's largest financial institutions, supports this initiative. In **Brazil**, pension fund managers must consider ethical standards for the application of the fund's resources pursuant to a 2009 resolution issued by the Central Bank of Brazil.

177. The surveys also highlighted that regardless of whether institutional investors are required to consider the human rights impacts of the companies they invest in, there are increasing expectations for greater transparency as to their policies and processes in this area. For instance, in **Belgium**, pension funds are required to annually report as to what extent they consider social, ethical and environmental factors in their investment decisions. Several surveys also identified funds in their jurisdictions that had joined the UN PRI, or that were otherwise voluntarily reporting on these issues.

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

178. Most surveys noted that non-shareholders do not, as of right, have the ability to address a company's AGM, though it is possible that such rights may be included in a company's governing documents. One exception is **France**, where certain types of non-shareholders are allowed to attend the AGM if procedural requirements are met. For instance, French law permits the attendance at AGMs of bondholders and works council representatives, as well as subject matter experts and journalists in some cases.

179. In most jurisdictions, the ability of a non-shareholder to attend an AGM is contingent on a proxy designation on the part of an actual shareholder or a special invitation from the company's management.

C. Conclusion

180. The surveys highlighted that the nature of stakeholder engagement on human rights issues, particularly shareholder–board dialogue, is continuing to develop. Questions remain in particular as to when and how regulators, courts and boards will and may decide to allow or constrain such engagement.

181. Importantly, the surveys showed that emerging economies may not yet be utilizing mechanisms common to more developed markets, such as shareholder resolutions. Accordingly, further work may be useful on what engagement mechanisms may best suit emerging economies to encourage dialogue on human rights issues between boards, shareholders and other stakeholders.

182. The surveys identified growing dialogue about the role of investors in the business and human rights domain. It is apparent that investors are beginning to ask for more guidance on how to navigate social and environmental issues, including human rights. While some governments, regulators and courts are responding, according to the surveys there remains scope for greater guidance to be made available.

183. The questions in this section of the template touched on three main avenues of stakeholder engagement – shareholder proposals; the tools open to institutional investors; and the use of annual general meetings as a discussion forum more generally. The Special Representative is aware that there are other mechanisms available and encourages further exploration of the ways in which states may support further dialogue between companies and their stakeholders on human rights.

VII. Other issues of corporate governance

A. Introduction

184. Recognizing the role of good corporate governance more generally in contributing to socially responsible corporate cultures, this section aimed to capture any other corporate governance policies and laws that might help encourage companies to respect human rights.

185. The first question explored 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 asked expressly about board composition. Company boards are increasingly under the scrutiny of not only regulators but also shareholders and the public at large. Accordingly, the Special Representative sought to better understand current requirements on board composition which may directly or indirectly encourage a company to consider, and address, its human rights impacts.

B. 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?

186. Most of the surveys noted whether their jurisdictions have national CSR policies or institutes. For instance, the survey for **India** identified 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 that impact corporate effectiveness, including CSR initiatives. The **UK** survey referred to a Sustainable Action Development Plan published by the Department for Business, Enterprise and Regulatory Reform, which touches on a number of social issues. Most of the national CSR policies and institutes discussed by the surveys do not specifically deal with human rights. However, several surveys contended that human rights should be seen as relevant to their implementation, given that human rights considerations form part of socially responsible corporate behavior.

187. In a small number of jurisdictions, national CSR policies appear to deal with human rights more directly. For instance, the survey for **Canada** noted governmental guidance for business regarding CSR generally as well as a recent governmental framework for Canadian companies operating in the international extractive sector. The latter specifically 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 most recent **Belgian** federal action plan on sustainable development mentions respect for human rights by companies.

188. The surveys highlighted that voluntary corporate governance guidelines, whether state or business-led, 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, which the survey for South Africa contended may facilitate good corporate practices vis-à-vis human rights. These features include transparency, responsible management and integrated CSR reporting. Similarly, the survey for **Nigeria** noted in this regard the existence of a general Code of Corporate Governance as well as various industry-specific codes, developed by the Government with industry input, which do not expressly reference human rights, but encourage companies to conduct their business in a transparent manner, maintain ethical standards and comply with the laws of Nigeria. The sectoral codes are binding on companies in the particular sector. The survey for **Italy** referenced 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 and the Shanghai Stock Exchanges have each issued social responsibility compliance guides. Their objectives 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.

189. The surveys identified an emerging trend of business association codes touching on CSR, and elaborated on the implications of such codes for business respect for human rights. For instance, in **Hong Kong**, the Guidelines on Corporate Governance for SMEs, 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. This 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 survey for **Morocco** discussed 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. The Charter includes specific provisions aimed at rewarding positive human rights practices. Companies that can establish that they have adopted a due diligence approach to fulfill the Charter are provided a compliance label for their products. In **Algeria**, the first Algerian Code of Corporate Governance was launched in 2009 as a private initiative to address corporate governance issues currently facing Algeria, such as (the increasingly common) dissolution of companies with their founding members.

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

190. This question aimed to understand whether states currently require non-shareholders to be represented on company boards as a way of ensuring or encouraging consideration of their interests. It also sought to explore the requirements these constituencies must meet to take advantage of any such entitlements, and the effect that such requirements might have on their ability to effectively participate on relevant boards.

191. The surveys suggested that it is rare for jurisdictions to require that non-shareholders be represented on company boards. In the jurisdictions where non-shareholders do need to be included, 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 tend to arise once a company reaches a certain threshold number of employees.

192. For example, in **China** the supervisory board of a limited liability 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 survey for **Algeria** noted 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. According to the survey for **Mexico,** only the state-owned oil company, Petroleos Mexicanos, requires employee representation on the board. Under the Petroleos Mexicanos Law, of the company’s 15 directors, 5 shall be representatives of the Petroleum Workers’ Union.

193. 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. For example, the 1951 *Montan-Mitbestimmungsgesetz* regulations apply to companies in the coal, iron and steel industry with more than 1,000 employees. According to these regulations, half of the supervisory board in these companies must consist of employee representatives.

194. Other constituencies might also be granted representation on a corporate board, including creditors or government representatives. In **France**, where the government or one or more 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 management or supervisory board.

195. None of the surveys identified any requirements to include on company boards representatives from communities affected by the company’s operations.

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

196. This question stemmed from previous work[10] by the Special Representative identifying that a number of regulators around the world are currently considering the advantages and disadvantages of greater diversity on company boards, including in relation to gender. Moreover, the Special Representative’s work[11] on the UN treaty bodies highlighted that these institutions regularly recommend that states parties to the UN human rights treaties take steps to integrate gender considerations into decisions regarding private and public sector leadership. This includes calls to increase the presence of women on company boards.

197. The Special Representative has been asked by the Human Rights Council to specifically integrate a gender perspective into his mandate. As part of this work the Special Representative wanted to better understand which states currently require gender diversity

[10] http://www.reports-and-materials.org/Gender-meeting-for-Ruggie-29-Jun-2009.pdf.

[11] http://www.business-humanrights.org/SpecialRepPortal/Home/Materialsbytopic/Internationalorganizations/UNhumanrightsmechanisms.

of boards or more generally, have provisions in place to avoid discrimination in this space. He extended the inquiry also to racial and ethnic representation to get a better sense of other factors which might facilitate boards to consider diverse perspectives in their oversight roles, including in relation to human rights impacts.

198. The surveys indicated that there are very few jurisdictions *which* require gender or racial/ethnic representation on company boards. However, some exceptions do exist and the area seems to be developing, particularly through voluntary codes. For instance, the survey for **Finland** noted 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 a specific reason. More broadly, the new Corporate Governance Code provides that both genders should be represented on listed company boards. Companies are expected to report in their annual reports how they have complied with this provision, if at all. 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. The survey for the **U.S.** noted that if the nominating committee or the board has a diversity policy in identifying director nominees, the Securities and Exchange Commission rules require disclosure of how this policy is implemented and how the nominating committee or the board assesses the policy's effectiveness.

199. Several surveys pointed out that the constitutionality of any gender/ethnic representation law would be a key consideration in any future law reform. Unsurprisingly, the nature of the constitution will have a significant bearing on whether it will create limitations to such reform. For example, the survey for **Papua New Guinea** said that although there is currently no law regarding gender or ethnic representation on company boards, the Constitution would likely not preclude such a law as it permits laws that specifically benefit women or particular groups or areas. Recently legal requirements for gender representation on company boards have been widely debated in **Denmark**. The survey for Denmark recognized that these proposals have not been supported by all political parties, but also contended that they would most likely not be in breach of the Danish Constitution.

200. The survey for **France** noted that there has been extensive debate regarding 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 did not allow the composition of a company's board to be governed by mandatory legal requirements based on a particular gender. Accordingly, 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%. However, in the same year the Constitution was amended to allow Parliament to enact laws which favor equal access of men and women to elective offices and executive positions, paving the way for more targeted provisions. In January 2011 a bill was passed providing that within the next three years, 20% of the boards of directors and supervisory boards of listed companies must be women. Within the next six years, *both* listed and non–listed companies (with more than 500 employees and a €50 million turnover) must ensure that women make up 40% of their boards.

201. Ultimately, the most common characteristic amongst the surveyed jurisdictions is the existence of anti-discrimination laws of general application, prohibiting discrimination on the basis of factors such as gender, religion, ethnicity 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 argued that such laws would by implication apply to any discrimination in the appointment of company boards.

C. Conclusion

202. The surveys showed 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 and standards to help frame any relevant guidance. While human rights are rarely expressly referenced in the codes and guidelines themselves, many of the international initiatives discussed in them contain express human rights elements.

203. On the issue of stakeholder representation on company boards, none of the surveys identified express requirements, or even encouragement, in their jurisdictions for members of communities affected by corporate activities, to join company boards or related committees. While there are several examples of requirements for employee representation, some surveys did indicate 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.

204. 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, including based on constitutional concerns.

VIII. Concluding remarks

205. **This project highlighted the diverse ways in which 39 jurisdictions with different legal, political, social and economic contexts regulate corporations. Predictably, these jurisdictions have varied policies, laws and processes in place. Nonetheless, important similarities exist 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. Common to all of the surveys was this simple message: where human rights impacts may harm the company's short or long term interests, companies and their directors and officers may risk non-compliance with a variety of rules promoting corporate governance, risk management and market safeguards if these impacts are not adequately identified, managed and reported. 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 on human rights.**

206. **Another common theme was the acknowledgment that states do have a role to play in supporting companies to respect human rights, including through corporate and securities laws and policies. As with other areas of the Special Representative's work, the implication from the surveys was that states should not assume that businesses invariably prefer, or benefit from, state inaction, and they should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights.**

207. **Laws and policies that govern the creation and ongoing operation of business enterprises, such as corporate and securities laws, directly shape business behaviour. Thus they should be particularly well placed to contribute to the "smart mix" referred to above. Yet their implications for human rights remain poorly understood. For**

example, the project identified a lack of clarity in corporate and securities law regarding what companies and their directors and officers are permitted, let alone required, to do regarding human rights. Laws and policies in this area should provide sufficient guidance to enable companies to respect human rights, with due regard to the role of existing governance structures such as corporate boards.

208. **An area that warrants further attention in this regard includes communication by business enterprises on how they address their human rights impacts. As the surveys identified, such communication can range from informal engagement with affected stakeholders to formal public reporting. State encouragement of, or where appropriate requirements for, such communication is important in fostering respect for human rights by business enterprises. Incentives to communicate adequate information could include provisions to give weight to such self-reporting in the event of any judicial or administrative proceeding. A requirement to communicate can be particularly appropriate where the nature of business operations or operating contexts pose a significant risk to human rights. Policies or laws in this area can usefully clarify what and how businesses should communicate, helping to ensure both the accessibility and accuracy of communications.**

209. **Any stipulation of what would constitute adequate communication should take into account risks that the communication may pose to the safety and security of individuals and facilities; legitimate requirements of commercial confidentiality; and variations in companies' size and structures.**

210. **As noted above, the surveys suggested a lack of clarity amongst companies as to whether (and when) to classify human rights impacts as "material" for financial reporting purposes. Similar concerns were raised during the Special Representative's consultations. To address this issue, financial reporting requirements should clarify that human rights impacts in some instances may be "material" or "significant" to the economic performance of the business enterprise.**

211. **For corporate and securities law and policy to play some of the above-mentioned roles, it may be that the accompanying regulators need guidance of their own – in the form of capacity building from, or at least coordination with, those within the government tasked with implementing the state's human rights obligations.**

212. **The surveys showed that there is a spectrum of potential responses available to states individually and collectively to provide greater guidance to companies and other stakeholders in this area. They range from explanatory notes and awareness-raising programs through soft law guidelines to prescriptive regulation. States have to balance which responses will be most effective in the long and short term. In doing so the surveys highlighted the benefits of law and policy makers taking into account the particular regulatory and market contexts in which they are operating in order to ensure that potential policy or legal reform is implemented successfully. This includes the sophistication of the corporate regulatory regime and the market.**

213. **In a related vein, the surveys identified recent developments in soft law initiatives, including through corporate governance and risk management related codes, to guide responsible corporate behavior which may well act as catalysts for further policy and law reform. In particular where such initiatives are linked to listing requirements, there is often considerable market pressure to follow them even where there are no hard legal consequences for non-compliance.**

214. **These soft law initiatives also provide an opportunity to embed incentives and guidance for businesses to meet their responsibility to respect human rights. Those drafting and revising the documents under these initiatives are encouraged to consider how business and human rights fits into the picture, particularly when**

already incorporating principles relating to social, environmental or ethical issues. This could provide companies and other stakeholders with another important source of support in dealing with human rights challenges. And they can also assist with capacity-building and shared learning amongst states as they try to align these initiatives to provide more clarity and consistency for companies listed or incorporated across multiple jurisdictions.

215. **The surveys identified a number of states around the world that have just revised or are now revising their company and securities laws, many in response to the global financial crisis. Here too the surveys showed that states can learn, and are learning, from each other so as not to reinvent the wheel, including on social and environmental issues. And they seem to be increasingly recognizing the inter-connectedness of markets and the benefits of dealing with challenges in a more coherent manner – the various SRI indices in combined stock exchanges discussed in this paper provide an example of this inter-related approach.**

216. **To the Special Representative's knowledge, the CL project was the first in-depth, multi-jurisdictional exploration of the links between corporate and securities law and human rights. The Special Representative hopes that it will encourage further scholarship moving beyond the 39 jurisdictions considered in this project, as well as stimulate discussion among the key actors involved, including human rights lawyers and advocates, corporate and securities lawyers and experts, business representatives and government regulators.**

Appendix I

Participating firms

The following firms participated in the Corporate Law Project:

1. Abeledo & Gottheil: www.abeledogottheil.com.ar
2. Allens Arthur Robinson: www.aar.com.au
3. Amarchand & Mangaldas & Suresh A. Shroff & Co: www.chambersandpartners.com/Asia/rankings36.aspx?fid=3408&solbar=1
4. Armstrongs Attorneys, Notaries & Conveyancers: http://www.armstrongs.bw
5. Brigard & Urrutia: www.bu.com.co
6. Carey & Allende: www.careyallende.com
7. Clifford Chance: www.cliffordchance.com
8. Cotty Vivant Marchisio & Lauzeral: www.cvml.com
9. Creel, Garcia–Cuéllar, Aiza & Enriquez: www.creelmx.com.mx
10. Edward Nathan Sonnenbergs: www.problemsolved.co.za
11. FBLP & Associados, Advogados: http://www.fblp.co.mz/default.htm
12. Ghellal & Mekerba: www.ghellal.com
13. House of Legal Consultancy & Services Ltd: http://www.hlcs-law.com
14. Lourdes Caposso & Fernandes Advogados – Legal Counsel Firm: http://www.lcfadvogados.com
15. Linklaters: www.linklaters.com
16. Mah–Kamariyah & Philip Koh: www.mkp.com.my
17. Mannheimer Swartling: www.mannheimerswartling.se
18. Mernissi–Figes: http://www.legal500.com/firms/12638-mernissi-figes/offices/15672-casablanca
19. NautaDutilh: www.nautadutilh.com
20. Olaniwun Ajayi & Co: http://www.olaniwunajayi.net
21. Oraro & Co: http://www.oraro.co.ke
22. Souza, Cescon–Avedissian, Barrieu & Flesch: www.scbf.com.br
23. Stikeman Elliott: www.stikeman.com
24. Weil, Gotshal & Manges LLP: www.weil.com

Appendix II

Jurisdictions

The following jurisdictions were included in the CL Project:

Africa

Algeria, Angola, Botswana, Kenya, 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, Finland, France, Germany, Italy, Luxembourg, Netherlands, Russian Federation, Saudi Arabia, Spain, Sweden, United Arab Emirates, United Kingdom.

North America

Canada, Mexico, United States.

South America

Argentina, Brazil, Chile, Colombia.

Appendix III

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 fulfil 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?