

3. CREATING AN ACCOUNTABLE MARKETPLACE

3.1 The Key Issues

This section explores some of the latest national developments within the legal environment of accountability for business, which States directly shape within their jurisdictions. States' ability to create and secure an accountable business environment is exerted through a number of forms of control, including over:

- the way corporations govern their business – framed through corporate governance requirements and securities laws, in particular looking to explicit directors' duties (section 3.2);
- the way corporations disclose their human rights policies, practices and performance, framed through reporting requirements (section 3.3); and
- the social and human rights criteria of stock exchanges and indices, operated or regulated by States, including increasing disclosure requirements (section 3.4).

In early 2009, the UN Special Representative on Business and Human Rights (SRSG) began a project to review corporate law in 39 national jurisdictions, noting: "Corporate law directly shapes what companies do and how they do it. Yet its implications for human rights remain poorly understood. The two have often been viewed as distinct legal and policy spheres, populated by different communities of practice."³³ The SRSG issued in May 2011 a report on trends and observations from his cross-national study,³⁴ and near the end of the research summarised two key findings:³⁵

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

2. At the same time, there is a lack of clarity in corporate and securities law regarding not only what companies or their officers are required to do regarding human rights, but in some cases even what they are permitted to do. Moreover, there appears to be only limited (to non-existent) coordination between corporate regulators and government agencies tasked with implementing human rights obligations. As a result, companies and their officers appear to get little if any official guidance on how best to oversee their company's respect for human rights.

³³ You can find the original project framing documents, research template and country-specific Reports on a special portal of the Business and Human Rights Resource Centre. Available at: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-note-re-corp-law-reports-sep-2010.pdf>.

³⁴ UN SRSG, A/HRC/17/31/Add.2, "Human rights and corporate law: trends and observations from a cross-national study conducted by the special representative", 23 May 2011. Available at: <http://www.business-humanrights.org/media/documents/ruggie/report-human-rights-and-corporate-law-23-may-2011.pdf>

³⁵ The Harvard Law School Forum on Corporate Governance and Financial Regulation, "Review Links Corporate and Securities Law and Human Rights" 27 July 2010. Available at: <http://blogs.law.harvard.edu/corpgov/2010/07/27/review-links-corporate-and-securities-law-and-human-rights/>

Since the endorsement of the UN Guiding Principles in 2011 and the publication of the SRSG's findings from the corporate law project, there have been notable efforts within various national laws and policies to more explicitly address some of the gaps identified. The following section seeks to illustrate those recent developments, excluding most developments up to 2011, which are concisely laid out in the SRSG's report.

3.2 Directors' Duties

Directors are required to oversee decisions regarding a company's business activities, including ensuring activities do not harm or cause damage to third parties. The scope of directors' duties is usually set out in a country's corporate law statutes and complemented by case law and regulatory guidance. They can also be reaffirmed in corporate governance codes, companies' organizational documents, directors' employment contracts, as well as stock exchange listing rules. The SRSG's corporate law research also suggested that by and large directors are required to consider the human rights impacts of subsidiaries, suppliers and other business partners if the company could face risks in relation to their impacts.³⁶ In many jurisdictions directors can also be held criminally liable if they commit a crime in connection with their role, separately to any liability the company might face.

In his 2011 report the SRSG identified that certain human rights-related duties may be implied from the broader duty to act with due care, loyalty and in the best interests of the company, such as in the **U.S.** where 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 necessary steps to ensure that these risks are addressed.³⁷ This is because of the potential legal and reputational risks that a company may face if it fails to take such impacts into account.³⁸ Some jurisdictions impose more explicit duties to third parties on company directors, such as in the **UK** where the 2006 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."³⁹ This Act has had a standard setting effect whereby organisations have advocated for similar explicit duties to be enacted in the corporate and securities laws of other countries, such as in **Hong Kong**.⁴⁰

More recently, explicit responsibility for and focus on social impacts by company boards have been mandated. For example, the **Philippines'** 2011 Corporate Social Responsibility Act requires corporations to "consider the interests of society by taking responsibility for the impact of their activities on customers, employees, shareholders, communities and the environment in all aspects

³⁶ UN SRSG, A/HRC/17/31/Add.2, "Human rights and corporate law: trends and observations from a cross-national study conducted by the special representative" (23 May 2011), pg. 21. Available at: <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31-Add2.pdf>,

³⁷ Ibid, pg. 17

³⁸ As recently exemplified, for example, in the 2012 invocation of Yahoo!'s directors duties by a Chinese activist and company shareholder. The activist and shareholder originally sued the company in US federal court in 2007 for human rights abuses occurring in China, which settled, but is now suing the company for potential mismanagement of the Human Rights Fund handling the settlement payouts, contending: "Yahoo! and its shareholders were put at risk and the purpose of the fund was undermined" and is "seeking production of documents to allow shareholder to take appropriate action in the event that Yahoo!'s Board of Directors did not properly discharge their fiduciary duties". See:

<http://www.businesswire.com/news/home/20120206006580/en/Milberg-LLP-Human-Rights-Activist-File-Suit>

³⁹ See above, UN SRSG, A/HRC/17/31/Add.2, "Human rights and corporate law: trends and observations from a cross-national study conducted by the special representative" (23 May 2011), pg. 18. For further analysis of the practical implications of the provision in the UK context see the Corporate Responsibility Coalition, "Directors, Human Rights & the Companies Act: Is the new law any different?", 2011, at: http://corporate-responsibility.org/wp-content/uploads/2011/03/directorshumanrightsandthecompaniesact_march2011.pdf

⁴⁰ See e.g. Oxfam's submission to the 2010 Companies Ordinance review of Hong Kong at: http://www.oxfam.org.hk/en/news_1215.aspx

of their operations.”⁴¹ Softer in enforcement, but nonetheless explicit, the Monetary Authority of **Singapore** issued a revised Code of Corporate Governance in 2012 to broaden the responsibility of company boards to include sustainability and ethical guidance, encouraging them to ensure management embeds them in company processes and management systems.⁴² The amended code also affirms that the responsibility of the board of directors includes the consideration of environmental and social risks to the company. In **Indonesia**, Government Regulation no. 47/2012⁴³ regarding companies involved in natural resources states that social and environmental responsibility is the obligation of the Board of Directors and implementation must be disclosed in the Company’s annual report. In **India** the 2013 Companies Act similarly mandates companies to design and implement CSR policies and spend 2% of the previous three years’ average net profit on CSR projects and activities in order to establish a culture of sustainable development governance at board level.⁴⁴ **New Zealand** is also in the process of considering major revisions to its national health and safety regime, which would make it a statutory duty for directors and officers to ensure the business complies with health and safety requirements, guided by an updated code of practice and potentially requiring the formation of formal health and safety subcommittees to ensure it is addressed as a governance issue.⁴⁵ From 2012, the Board of Directors of all State-owned enterprises in **Sweden** are responsible for matters relating to ethical issues, the environment, human rights, gender equality and diversity.⁴⁶ They are obliged to define and decide on a few sustainability goals for their companies and follow up on these goals in yearly dialogues between the owner and Board.

3.3 Reporting on Corporate Activities

Express national requirements for formal company reporting on social and environmental impacts have increased in recent years. A major global inventory of sustainability reporting policies and guidance reports that in 2013 72% of the 180 sustainability reporting policies in the 45 countries reviewed are mandatory, up from 58% in 2006.⁴⁷ Sustainability reporting was afforded unprecedented international attention at the June 2012 UN Conference on Sustainable Development in Rio de Janeiro (Rio+20). At Rio, Governments, strongly supported by a number of businesses, affirmed the importance of corporate transparency and sustainability reporting, and the role they needed to play in advancing it, in Paragraph 47 of the outcome document “The Future We Want”.⁴⁸ Led by the Governments of **Brazil, Denmark, France and South Africa**, as

⁴¹ Congress of the Republic of the Philippines, “Committee Report No. 22 Regarding Senate Bill 2747” (16 March 2011). Available at: <http://www.senate.gov.ph/lisdata/109799357!.pdf> See also: <http://www.congress.gov.ph/press/details.php?pressid=5192>

⁴² Monetary Authority of Singapore, “Code Of Corporate Governance” 2 May 2012. Available at: http://www.mas.gov.sg/~media/resource/fin_development/corporate_governance/cgcrevisedcodeofcorporategovernance2may2012.ashx

⁴³ See: http://www.kemendagri.go.id/media/documents/2012/05/21/p/p/pp_no.47-2012.pdf. According to the KPMG et al Report “Carrots and Sticks” above, pg. 66, this goes into effect after receiving approval from the Board of Commissioners or the General Meeting of Shareholders.

⁴⁴ The Companies Bill 2012, as passed by the Lok Sabha, pg. 80. Available at: http://www.mca.gov.in/Ministry/pdf/The_Companies_Bill_2012.pdf

⁴⁵ See <http://www.lexology.com/library/detail.aspx?g=67914c31-ea25-431a-8381-ac19497bd433>. The taskforce making the proposals has also been asked to advise the Government on the merits of introducing corporate manslaughter into New Zealand’s health and safety regime.

⁴⁶ KMPG, the Centre for Corporate Governance in Africa, GRI and UNEP, “Carrots and Sticks: Sustainability reporting policies worldwide – today’s best practice, tomorrow’s trends”. 2013 edition, pg. 75. Available at: <https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

⁴⁷ KMPG et al, “Carrots and Sticks: Sustainability reporting policies worldwide – today’s best practice, tomorrow’s trends”. 2013 edition, pg. 8. Available at: <https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

⁴⁸ A/RES/66/288*, “Annex: The future we want” (11 September 2012). Available at: <http://www.uncsd2012.org/thefuturewewant.html>. Paragraph 47 reads: “We acknowledge the importance of corporate sustainability reporting, and encourage companies, where appropriate, especially publicly listed and large companies, to consider integrating sustainability information into their reporting cycle. We encourage industry, interested governments and relevant stakeholders, with the support of the UN system, as appropriate, to develop models for best practice and facilitate action for the integration of sustainability

well as **Norway** and **Colombia**, a “group of friends” of Paragraph 47 was formed to implement the outcome document’s intentions. A formal Charter was established, declaring:

Based on several national experiences, we are of the view that the development of models of best practice on policy and market regulation on corporate sustainability reporting is an important step towards making sustainability reporting widespread practice. Policy and regulation will level the playing field and create enabling conditions for the business sector to contribute to sustainable development.⁴⁹

Most sustainability reporting policies and regulation tends to focus on large companies (though there has been a notable increase in the voluntary uptake of reporting by SMEs⁵⁰). For example, much legislative activity on both financial and non-financial reporting has been taking place at the **European Union** level as well as within individual Member States. In April 2013, the Accounting and Transparency Directives of the European Commission were amended to require the disclosure of payments to Governments on a country and project basis by listed and large non-listed companies with activities in the oil, gas and mining industries, as well as in logging of primary forests, known as country-by-country reporting (CBCR).⁵¹ Since then, the European Commission has proposed legislation that would require large companies to report relevant and material⁵² information on policies, results, risks, and risk management efforts pertaining to respect for human rights, as well as other environmental, social, and governance issues, through a “comply or explain” approach.⁵³ The European Parliament has also been very active in this area, adopting in February 2013 two reports stressing the importance of sustainability reporting.⁵⁴ In December 2013, the European Parliament’s Legal Affairs Committee voted in favour of the proposal. The Parliament then enters into negotiations with the Commission and Council on the future of the non-financial reporting reform and Member State implementation.⁵⁵

Certain EU Member States already have in place non-financial reporting requirements similar to or more stringent than the EU proposal. For example, in **Denmark** the 2008 revised Financial Statements Act requires large companies to report on their social responsibility policies, including any guidelines or principles for social responsibility, how those are implemented and through what

reporting, taking into account experiences from already existing frameworks and paying particular attention to the needs of developing countries, including for capacity-building.”

⁴⁹ Charter of the Group of Friends of Paragraph 47 on Corporate Sustainability Reporting. Available at: <https://www.globalreporting.org/SiteCollectionDocuments/para47/Group-of-Friends-of-Paragraph-47-Charter.pdf>.

⁵⁰ See e.g. GRI, “Small, Smart and Sustainable — Experiences of SME Reporting in Global Supply Chains,” GRI, Amsterdam, 2008: <https://www.globalreporting.org/resourcelibrary/Small-Smart-Sustainable.pdf>.

⁵¹ See: http://ec.europa.eu/internal_market/accounting/country-reporting/

⁵² It falls outside the scope of this report to present in detail the latest developments around materiality. For recent commentary see e.g. ICAR, “Knowing and Showing: Using U.S. Securities Laws to Compel Human Rights Disclosure”, 2013. Available at: <http://accountabilityroundtable.org/analysis/launch-of-knowing-and-showing-using-u-s-securities-laws-to-compel-human-rights-disclosure/>; and AccountAbility, “Redefining Materiality”, 2003. Available at: http://www.accountability.org/images/content/0/8/085/Redefining_Materiality_Full_Report.pdf

⁵³ See: http://ec.europa.eu/internal_market/accounting/non-financial_reporting/. Justifying the proposal, the Commission has stated: “Over the years, we have seen the limits of a voluntary approach. Today, around 2,500 large EU companies disclose environmental and social information regularly. Regulating the disclosure of some minimum requirements, whilst avoiding an undue administrative burden, in particular for the smallest companies, is the right decision at this time.” Available at: http://europa.eu/rapid/press-release_MEMO-13-336_en.htm

⁵⁴ European Parliament, “Resolution of on corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth”, 2012/2098(INI) (6 February 2013). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-49>; and “Resolution on Corporate Social Responsibility: promoting society’s interests and a route to sustainable and inclusive recovery” 2012/2097(INI) (6 February 2013). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0023&language=EN>

⁵⁵ See further: http://ec.europa.eu/commission_2010-2014/barnier/headlines/speeches/2013/06/20130612_en.htm

systems and procedures. Companies need to report if they have not formulated any social responsibility policies.⁵⁶ From 2013, the Danish Parliament has also required specific disclosure on whether or not the company has policies to ensure respect for human rights in their operations and activities. A website called “CSR Compass”, specifically referencing the UN Guiding Principles, has been created to support companies’ implementation of the requirements, which was informed by representatives from the **Norwegian, Finnish, Swedish and Icelandic** Governments and industry associations.⁵⁷ In **France**, provisions for implementing two key laws⁵⁸ were adopted in 2012. By the end of 2013, all companies with over 500 employees will be required to prepare annual CSR reports reflecting the main international guidelines on non-financial reporting. Following the “comply or explain” approach, companies will need to include all actions taken by the company and its subsidiaries, and verify the report by an accredited independent third party. A recent amendment to the **UK** Companies Act came into effect in October 2013 requiring companies to prepare a strategic report as part of their annual report that includes information about environmental matters, employees, as well as social, community and human rights issues, related policies and their effectiveness (to the extent necessary to understand the company’s business development and performance).⁵⁹

The **U.S.** has also recently been active in mandating specific reporting requirements, particularly in relation to company supply chains. The International Corporate Accountability Roundtable comprehensively describes the US system in a report focusing on U.S. securities law.⁶⁰ Firstly, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010⁶¹ features specialised disclosure provisions. Section 1502 requires some annual report issuers to disclose their connections with conflict minerals, and conduct an assessment of their supply chain activities to determine whether those minerals originated in the **Democratic Republic of Congo** or adjoining countries. The rule requires a report that includes a description of the measures taken to exercise due diligence on the source and “chain of custody” of the minerals, and must be independently audited and certified. Section 1504 requires annual report issuers that commercially develop oil, natural gas, or minerals to disclose certain payments made to the US or a foreign Government. The SEC has also issued interpretive guidance for disclosures related to climate change⁶² and to cyber-security information⁶³ directing disclosure of certain social and human rights-related information. Though environmentally focused, a 2009 U.S. Executive Order 13514 shows the cascading effect within the supply chain that reporting requirements on human rights could have.⁶⁴ It requires all federal agencies to measure and report on their sustainability performance, including

⁵⁶ Three years of consecutive studies confirm that the Act has significantly increased the number of large companies publishing CSR reports, from about 50% to 95%. See: Danish Business Authority, “CSR and Reporting in Denmark: Impact of the third year subject to legal requirements for reporting CSR in the Danish Financial Statement Act”, 2011. Available at:

www.dcca.dk/graphics/publikationer/CSR/CSR_and_Reporting_in_Denmark_2nd_year_2011.pdf.

⁵⁷ See: <http://csrcompass.com/parties-behind-initiative>

⁵⁸ France: Ministry of Environment, Grenelle I Act (3 August 2009) and Grenelle II Act (12 July 2010). In 2011 a governmental evaluation of the cost of reporting in compliance with the Grenelle II requirements was undertaken, showing that complying with reporting obligations was affordable and did not represent an additional financial burden. See further, KMPG et al, “Carrots and Sticks: Sustainability reporting policies worldwide – today’s best practice, tomorrow’s trends”. 2013 edition, pg. 62. Available at: <https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

⁵⁹ Government of the United Kingdom, The Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013. Available at:

http://www.legislation.gov.uk/ukdsi/2013/9780111540169/pdfs/ukdsi_9780111540169_en.pdf.

⁶⁰ ICAR, “Knowing and Showing: Using U.S. Securities Laws to Compel Human Rights Disclosure”, 2013, on which this paragraph is drawn. Available at: <http://accountabilityroundtable.org/analysis/launch-of-knowing-and-showing-using-u-s-securities-laws-to-compel-human-rights-disclosure/>.

⁶¹ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 §§1502-04, 15 U.S.C. §78a et seq. (2013). Available at: <http://www.sec.gov/spotlight/dodd-frank.shtml>

⁶² SEC, “Commission Guidance Regarding Disclosure Related to Climate Change”, 2010. Available at: <http://www.sec.gov/rules/interp/2010/33-9106.pdf>

⁶³ SEC Division of Corporation Finance, “CF Disclosure Guidance: Topic No. 2: Cybersecurity”, 13 October 2011. Available at: <http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm>

⁶⁴ Available at: http://www.whitehouse.gov/assets/documents/2009fedleader_eo_rel.pdf

assessing their supply chains, driving contractors, suppliers and any business working with the federal Government to report on their environmental impacts in order to satisfy the requests of the agencies they serve.⁶⁵ More recently, in May 2013, the U.S. State Department issued rules requiring disclosure of policies and processes used to oversee new investments in **Myanmar/Burma** – specifically, those regarding human rights, worker rights, anti-corruption, land acquisitions, the environment, and grievance mechanisms.⁶⁶ At the State level, in 2011, **California** became the first state to pass a law preventing companies under scrutiny for ineffective compliance with the reporting requirements of Section 1502 of the Dodd-Frank Act from eligibility to bid on state procurement contracts.⁶⁷ **Maryland** passed a similar law in 2012, and Massachusetts is presently considering legislation to follow suit.⁶⁸ In 2010 **California** enacted the Transparency in Supply Chains Act, requiring disclosure related to company efforts to monitor supply and eradicate slavery and human trafficking within their supply chains.⁶⁹

Recently in **Norway** the Parliament passed legislative amendments requiring large companies to provide information about what they do to integrate considerations for human rights, labour rights and social issues, the environment and anti-corruption in their business strategies, in their daily operations, and in their relations with their stakeholders, which entered into force in June 2013.⁷⁰ The report must at least contain information about policies, principles, procedures and standards that are followed to integrate these considerations. In an effort to incentivise uptake of international reporting standards the Ministry of Finance can exempt companies that prepare a public report according to GRI's Framework or Global Compact Principles.⁷¹

South Africa was one of the first countries in the world to require integrated reporting by listed companies, first formalised in 2002 and updated in 2009. Since its introduction in 2010, over 450 companies on the Johannesburg Stock Exchange have been required to produce an integrated financial and sustainability report.⁷² The King Code of Governance recommends that organisations should adopt integrated reporting, albeit on a “comply or explain” basis.⁷³ Furthermore, disclosure

⁶⁵ KMPG et al, “Carrots and Sticks: Sustainability reporting policies worldwide – today’s best practice, tomorrow’s trends”. 2013 edition, pg. 36. Available at: <https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

⁶⁶ See: <http://www.humanrights.gov/2012/07/11/burmaresponsibleinvestment/>. The European Union also adopted a resolution May 23, 2013 that reinstated Burma/Myanmar’s access to generalized tariff preferences, which included provisions that call on large European companies doing business in Burma/Myanmar to report on their human rights due diligence policies and procedures and calling on the European Commission to monitor the commitments made by European businesses in light of corporate social responsibility principles. See Resolution on Reinstatement of Burma/Myanmar’s Access to Generalized Tariff Preferences, EUR. PARL. DOC. B7-0198 (2013). Available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0218+0+DOC+XML+V0//EN>

⁶⁷ Since then, initiatives such as “Know the Chain” have been created to encourage uptake of this reporting standard: <https://www.knowthechain.org/>

⁶⁸ Maryland Conflict Minerals Bill, B.H. 2898, 188th Leg. (March 2013). Available at <https://malegislature.gov/Bills/188/House/H2898>.

⁶⁹ Available at: <http://www.state.gov/documents/organization/164934.pdf>

⁷⁰ Royal Norwegian Ministry of Finance, Prop 48 L (2012---2013) 2012. Available at:

<http://www.regjeringen.no/nb/dep/fin/dok/regpubl/prop/2012---2013/prop---48---l---20122013.html?id=709311>. See also: <https://www.globalreporting.org/information/news-and-press-center/Pages/Regulating-for-a-more-sustainable-future-New-Norwegian-CSR-regulation-entered-into-force.aspx>

⁷¹ KMPG et al, “Carrots and Sticks: Sustainability reporting policies worldwide – today’s best practice, tomorrow’s trends”. 2013 edition, pg. 33-34. Available at:

<https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

⁷² See further KPMG et al, “Carrots and Sticks: Sustainability reporting policies worldwide – today’s best practice, tomorrow’s trends”. 2013 edition, pg. 34, on which these findings have been drawn. Available at: <https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

⁷³ Institute of Directors in Southern Africa, 2009. King Code of Governance for South Africa 2009 (King III). Available at: www.iodsa.co.za/resource/collection/94445006-4F18-4335-B7FB-7F5A8B23FB3F/King_Code_of_Governance_for_SA_2009_Updated_June_2012.pdf.

of information on specific topics to regulatory authorities and/or the public is required by laws under the supervision of relevant Government departments such as the Department of Trade and Industry (black economic empowerment) and the Department of Mineral Resources and Department of Energy (social and labour plans). More recently, proposed amendments to the 2002 Mineral and Petroleum Resources Development Act and proposed amendments in the 2012 Mineral Resources and Petroleum Bill require certain companies to disclose social and labour plans to Government, describing how they will address the social impacts of their operations during and after operation.⁷⁴ In **India** the Ministry of Corporate Affairs launched in 2011 the National Voluntary Guidelines on Social, Environmental and Economical Responsibilities of Business⁷⁵, aiming to encourage Indian businesses to disclose their responsible business practices based on a comply or explain approach. Since then, the Securities and Exchange Board of India mandated that from March 2012 the 100 top listed companies must submit Business Responsibility Reports as a part of their annual reports, providing information about their performance against the social, environmental and economic principles within the Guidelines.⁷⁶

At a non-binding level, a number of other countries issue reporting guidelines to encourage reporting practices, including in **Australia, Brazil, Colombia, Chile, Ivory Coast** and **Singapore**. **Brazil** for example revised and launched its national Action Plan for Sustainable Production and Consumption⁷⁷ in 2011 requiring participating companies to disclose how socio-environmental issues are integrated in their planning schedules and decision-making processes, and their plans for doing so.⁷⁸ Pronouncement no. 13 was also issued in 2012 setting up annual report guidelines stipulating that annual reports should include information on financial, social, environmental and governance aspects of the business, including an overview of its past performance, main risks and opportunities, and the corporate strategy in place to address these items in the short, medium and long-term.⁷⁹

3.4 Stock Exchange and Index Requirements

At the time of the SRSg's 2011 report on the corporate law project, he had found that most jurisdictions do not have separate indices related to environmental and social performance through their national or regional stock exchanges. However, the number had slowly grown over the five years prior to 2011. In the limited cases where the SRSg found such indices to exist, human rights were generally not specifically included in ranking criteria.⁸⁰

An increasing number of stock exchanges are themselves private companies, but are regulated (often heavily) by States. Numerous exchanges are increasingly considering social issues when it comes to their listing requirements, including in **Brazil, China, Indonesia, Luxembourg, Malaysia,**⁸¹ **Mexico, New Zealand, Norway, the Philippines,**⁸² **Singapore,**⁸³ **South Africa,**

⁷⁴ See: www.info.gov.za/view/DownloadFileAction?id=181151

⁷⁵ Ministry of Corporate Affairs of India, 2011. "National Voluntary Guidelines (NVGs)". New Delhi: Ministry of Corporate Affairs of India. Available at:

http://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf

⁷⁶ See further, KPMG et al, Carrots and Sticks: Sustainability reporting policies worldwide – today's best practice, tomorrow's trends. 2013 edition, pg. 33. Available at:

<https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

⁷⁷ Approved by Ministerial Decree 44, of 13 February 2008 and revised and launched on 23 November 2011.

⁷⁸ See further KPMG et al, "Carrots and Sticks: Sustainability reporting policies worldwide – today's best practice, tomorrow's trends". 2013 edition, pg. 26. Available at:

<https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

⁷⁹ It also recommends including a GRI Content Index, and information on adherence to initiatives such as the UN Global Compact, and inclusion in sustainability indexes.

⁸⁰ UN SRSg, A/HRC/17/31/Add.2, "Human rights and corporate law: trends and observations from a cross-national study conducted by the special representative" (23 May 2011), pg. 21. Available at:

<http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31-Add2.pdf>, pg. 13.

⁸¹ See: Bursa Malaysia, "Power Business Sustainability: A Guide for Directors" at 43 and 53, available at http://www.bursamalaysia.com/misc/sustainability_guide_for_directors.pdf.

Sweden, Thailand⁸⁴ and **Turkey**.⁸⁵ Exchanges' social criteria usually range from requirements for listed companies to have "high standards of integrity" to acting with "honestly, integrity, fairness, due skill and care, diligence and efficiency".⁸⁶

In 2011, the SRSO found two indices more explicitly focused on human rights worth noting. Firstly, **Brazil's** Bovespa Corporate Sustainability Index of the Sao Paulo Stock Exchange, which seeks feedback to a questionnaire from the top 150 companies on their sustainable development commitments, including human rights promotion and combating social inequality.⁸⁷ Moreover, at the Rio+20 conference the Sao Paulo Stock Exchange launched a comply or explain policy which by May 2012 has prompted 253 companies to publish social, environmental and corporate governance information, or explain why such information was not disclosed.⁸⁸ Secondly, the OMX GES Nordic Sustainability Index screens companies from **Denmark, Finland, Norway and Sweden** against the GES Risk Rating, which includes compliance with the UN Principles for Responsible Investment and the Universal Declaration of Human Rights, and rates the selected shares in three categories: human rights, environmental and governance.⁸⁹ Exchanges in **Finland** and **Sweden** also have their own GES indexes constructed to similar standards.⁹⁰

Many exchange and index requirements involve disclosure on social, ethical and environmental issues more generally. **South Africa** for example launched the Socially Responsible Investment Index of the Johannesburg Stock Exchange in 2004, requiring its listed companies to meet minimum criteria based on the UN Principles for Responsible Investment (PRI). The S&P ESG Index was launched in **India** in 2008, listing companies based on business strategies and performance which demonstrate a high level of commitment to meeting ESG standards and incorporating these into investment decisions.⁹¹ Since 2012 this has been required for the top 100 listed companies. **China** is another notable example, with the 2006 Social Responsibility Guideline for Listed Companies of the Shenzhen Stock Exchange – binding for the top 100 companies.⁹² And the 2008 Notice of Improving Listed Companies' Assumption of Social Responsibilities, issued under the Shanghai Stock Exchange – required for the 240+ companies on their Corporate Governance Index (as well as companies listed in both domestic and overseas markets, plus financial companies). More recently, the Stock Exchange of **Hong Kong** issued a 2012 guide of recommended reporting practice, forming an appendix to the existing listing rules for the exchange, and with a view to moving to a comply or explain approach from 2015. Since 2012 **Indonesia** similarly requires disclosure to its Capital Market Supervisory Agency by its publicly listed companies on policies,

⁸² www.congress.gov.ph/press/details.php?pressid=5192 and <http://www.senate.gov.ph/lisdata/109799357!.pdf>

⁸³ See: Singapore Exchange (SGX), "Guide to Sustainability Reporting for Listed Companies", available at: http://rulebook.sgx.com/net_file_store/new_rulebooks/s/g/SGX_Sustainability_Reporting_Guide_and_Policy_Statement_2011.pdf.

⁸⁴ ASEAN CSR Network, "Thai Stock Exchange Publishes Guidance Document on CSR" (30 July 2012) Available at: <http://bit.ly/12ZRotZ>

⁸⁵ See: "Corporate governance principles compliance report". Available at: <http://www.spk.gov.tr/displayfile.aspx?action=displayfile&pageid=56&fn=56.pdf&submenuheader=null>

⁸⁶ While a positive step, it is still not clear where the line would be drawn for delisting a company on human rights grounds. Sweden for example may reject a company applying if the listing is not considered appropriate or may harm the confidence in the securities market, yet there is no global pattern or threshold emerging by which delisting is deemed a necessary measure.

⁸⁷ See: <http://www.bmfbovespa.com.br/indices/ResumoIndice.aspx?Indice=ISE&Idioma=en-US>

⁸⁸ See BM&F Bovespa, "Listed Companies: Sustainability Report or Similar Document". Available at: www.bmfbovespa.com.br/en-us/markets/download/Relate-ou-Explicue-ingles.pdf.

⁸⁹ UN SRSO, A/HRC/17/31/Add.2, "Human rights and corporate law: trends and observations from a cross-national study conducted by the special representative" (23 May 2011), pg. 14. Available at: <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31-Add2.pdf>

⁹⁰ See further: "Rules for Construction and Maintenance of the OMX GES Sustainability Indexes" at: https://indexes.nasdaqomx.com/docs/Methodology_OMXSUSTAIN.pdf

⁹¹ See further KPMG et al, "Carrots and Sticks: Sustainability reporting policies worldwide – today's best practice, tomorrow's trends". 2013 edition, pg. 33. Available at: <https://www.globalreporting.org/resource/library/Carrots-and-Sticks.pdf>.

⁹² Ibid, pg. 66.

types of programmes, and expenditure on environmental performance, labour practices, social and community empowerment and product responsibility.⁹³ Since February 2012 companies wishing to be considered for listing on the **Mexican** Stock Exchange's sustainable investment index companies are assessed by two independent third party organisations on environmental, social and corporate governance practices.

A recent report ranks stock exchanges by the sustainability reporting of their largest companies. Although these "first generation" sustainability indicators are more implicit than explicit about human rights, the ranking of the ten most active stock exchanges in terms of disclosure gives some indication also of human rights reporting. The Top 10 Stock exchanges ranked by sustainability reporting of large listed companies in 2013 were:⁹⁴

- Spain (BME Spanish Exchanges)
- Finland (Helsinki Stock Exchange)
- Japan (Tokyo Stock Exchange)
- Norway (Oslo Stock Exchange)
- South Africa (Johannesburg Stock Exchange)
- France (Euronext Paris)
- Denmark (Copenhagen Stock Exchange)
- Switzerland (SIX Swiss Exchange)
- Greece (Athens Stock Exchange)
- Netherlands (Euronext Amsterdam)

For example, **Switzerland**, and specifically Geneva, now hosts 80% of the all the world's trading in oil and it is note-worthy that the Swiss Government has cited this fact in explaining one reason why it has joined initiatives such as the Voluntary Principles on Security and Human Rights – an initiative which it chaired during 2013.⁹⁵

3.5 Summary Note

States are demonstrating an increasing willingness to legislate to make marketplaces more accountable – in particular, in mandating an explicit focus on and responsibility for social and human rights impacts by company directors and requiring explicit human rights content within formal corporate reporting. These are important initial steps across a number of jurisdictions that need to be built upon globally. The increasingly explicit State expectations for human rights awareness and disclosure by business represent a change in attitude that has not yet fully been understood or implemented by company executives and officers, including corporate legal counsels. For the time being at least, many companies are proceeding with caution. As such it is not yet clear whether greater transparency itself will enable convergence on what might be "adequate and appropriate" due diligence, driven by third party scrutiny, or whether States will also provide more specific directives about the required contours of due diligence (as has been the case on conflict minerals, trafficking and forced labour, and new US investments into Myanmar/Burma).

States need to do more to create a level playing field for business, providing more clarity around how much "knowledge" can reasonably be expected of business in proactively understanding their human rights risks and actual or potential impacts. Many of the existing requirements are cast in

⁹³ Ibid. See further: Capital Market and Financial Institution Supervisory Agency, Ministry of Finance, "Decision of the Head of Capital Market and Financial Institution Supervisory Agency" No. Kep-431/BU/2012, ed. (2012).

⁹⁴ CK Capital, "Trends in Sustainability Disclosure: benchmarking the world's stock exchanges" (October 2013). Available at: <http://static.corporateknights.com/StockExchangeReport2013.pdf>

⁹⁵ See for example comments made by Swiss Economics Minister in March 2013: http://www.swissinfo.ch/eng/swiss_news/Cabinet_refuses_to_legislate_on_commodity_sector.html?cid=35337284

very general terms, permitting the needed flexibility, especially in the early days of application, to respond to widely varied contexts. As regulators, businesses and civil society become more experienced with the issues and applying and reporting on their actions however, further clarity – especially around prevention requirements – will be needed to ensure that current marketplace approaches fully reach their potential to improve human rights outcomes.

There is an opportunity for States to fill the gap where their national stock exchanges do not yet include ESG indexes, and create such indices within their own national exchanges – incentivising a race to the top for companies in this area. This would support States efforts to encourage responsible investment and the continuous improvement of environmental, social and governance (ESG) standards, including with respect to human rights.