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

CORPORATE LAW TOOLS PROJECT

JURISDICTION: INDIA

FIRM: AMARCHAND & MANGALDAS & SURESH A. SHROFF & CO (AMSS)

DATE: SEPTEMBER 2009

This report was submitted to the SRSG as part of his corporate law tools project, as explained in his press release of 23 March 2009: http://www.reports-and-materials.org/Corporate-law-firms-advise-Ruggie-23-Mar-2009.pdf. It is the sole work of AMSS and does not necessarily represent the SRSG's views. The SRSG is grateful to AMSS for providing this report and for participating in the corporate law tools project.

If you have any questions about this report, please contact Vandana Shroff, Partner at AMSS, at vandana.shroff@amarchand.com. If you have questions more generally about the corporate law tools project, please contact Vanessa Zimmerman, (Legal Advisor to the SRSG), at vanessa_zimmerman@hks.harvard.edu .

A NOTE FROM THE UN SPECIAL REPRESENTATIVE ON BUSINESS AND HUMAN RIGHTS

OCTOBER 2009

This report forms part of a project on corporate law and human rights under my mandate as Special Representative of the UN Secretary-General on Business and Human Rights: the "Corporate Law Tools Project". I am delighted that nineteen leading corporate law firms from around the world are participating in the project, and thank them for their engagement. The willingness of so many firms to provide their services pro bono in order to expand the common knowledge base indicates that corporate law firms worldwide appreciate that human rights are relevant to their clients' needs.

It is important at the outset though to understand how this project fits into my wider work. I was appointed in 2005 by then UN Secretary-General Kofi Annan with a broad mandate to identify and clarify standards of corporate responsibility and accountability regarding human rights, including the role of states. In June 2008, after extensive global consultation with business, governments and civil society, I proposed a policy framework for managing business and human rights challenges to the United Nations Human Rights Council (Council).

The Framework of "Protect, Respect, Remedy" rests on three differentiated yet complementary pillars: the **state duty to protect** against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the **corporate responsibility to respect** human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and greater **access for victims to effective remedy**, judicial and non-judicial. You can read more about the Framework in my 2008 and 2009 reports to the Human Rights Council, available at: (2008) http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf; (2009) http://www.business-humanrights.org/Links/Repository/715771.

The Council unanimously welcomed the Framework and extended my mandate by another three years, tasking me with "operationalizing" the Framework—that is, to provide "practical recommendations" and "concrete guidance" to states, businesses and others on the Framework's implementation. There has already been considerable uptake of the Framework by all relevant stakeholders: unanimous backing in the Council; strong endorsements by international business associations and individual companies; and positive statements from civil society.

A key aspect of the first pillar, the **state duty to protect**, is that states should foster corporate cultures respectful of rights both at home and abroad, through all available avenues. In particular, I have been exploring the opportunities and challenges that corporate and securities law can provide in this regard. 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.

The Corporate Law Tools Project will allow me to explore this area further by mapping in over 40 jurisdictions how national laws and policies dealing with incorporation and listing; directors' duties; reporting; stakeholder engagement; and corporate governance more generally currently require, facilitate or discourage companies from respecting human rights. I have asked the firms to explore not only what laws currently exist, but also how corporate

regulators and courts apply the law to require or facilitate consideration by companies of their human rights impacts and preventative or remedial action where appropriate.

The project thus formally comprises part of my work on the **state duty to protect**. It will assist me to understand whether and how national corporate law principles and practices currently encourage companies to foster corporate cultures respectful of human rights. I will in turn consider what, if any, policy recommendations to make to states in this area, following consultation with all relevant stakeholders. However it is just one element of my work on the state duty to protect, which also looks at other areas of the law and national policies which might help states to encourage companies to respect human rights.

The project will also support my work on the corporate responsibility to respect and access to remedy. In relation to the responsibility to respect, I have explained that in addition to compliance with national laws, the baseline responsibility of companies is to respect human rights. To discharge the responsibility, I have recommended that companies conduct ongoing human rights due diligence whereby they become aware of, prevent, and address adverse human rights impacts. The responsibility exists even where national laws are absent or not enforced because respecting rights is the very foundation of a company's social license to operate. It is recognized as such by virtually every voluntary business initiative, including the UN Global Compact, and soft law instruments such as the International Labour Organization Tripartite Declaration and the OECD Guidelines on Multinational Enterprises. Nevertheless, an understanding of national laws, including corporate law, is still relevant to ensure companies understand their national legal obligations. Moreover, corporate law may provide guidance as to what constitutes appropriate human rights due diligence.

For the original press release for this project listing all applicable jurisdictions and participating firms, please see: http://www.reports-and-materials.org/Corporate-law-firms-advise-Ruggie-23-Mar-2009.pdf. The template I asked the firms to follow for the project is available at: http://www.reports-and-materials.org/Ruggie-template-for-corporate-law-tools-project-May-2009.pdf; and a summary report of a June 2009 meeting of the participating firms is available at http://www.reports-and-materials.org/Ruggie-corporate-law-tools-meeting-summary-30-Jun-2009.pdf.

An overarching trends paper will soon be available, bringing together the main themes from all of the firms' reports. That paper as well as all reports will be available as completed at: http://www.business-humanrights.org/SpecialRepPortal/Home/Materialsbytopic/Corporatelaw/CorporateLawTools.

My thanks again to all participating firms.

John G. Ruggie
Special Representative of the UN Secretary-General on Business and Human Rights.

AM MEMORANDUM

To:
Professor (Mr.) John G. Ruggie
SRSG to United Nations on Business and Human Rights
United Nations

RE: UN SRSG on Business and Human Rights Corporate Law Tools Project

1. We, Amarchand & Mangaldas & Suresh A. Shroff & Co. ("**AMSS**"), have been appointed by the Special Representative of the UN Secretary-General ("**SRSG**") on Business and Human Rights, Professor John Ruggie, as the sole Indian law firm advising on '*The Corporate Law Tools*' ("**CLT**"). The CLT project is aimed at understanding '*whether and how national corporate law principles and practices currently encourage companies to foster corporate cultures respectful of human rights*'[1]. We have been mandated by the SRSG to provide our responses, as per Indian law, to certain queries, as laid out in this memorandum.

2. We are pleased to set our responses to such queries in the ensuing document.

Qualifications

3. This memorandum has been prepared solely for the purpose of responding to the queries laid out herein, and consequently, should not be treated as a substitute for specific legal advice concerning individual matters, situations or concerns. Given the nature and purpose of this review, to the extent it contains conclusions or analysis, such conclusions or analysis are intended solely to identify potential issues for further consideration. These are not legal opinions, and must not be regarded as substitutes for specific legal advice.

4. This memorandum or any part thereof or the information included herein is not meant to be published, disseminated, distributed, populated or passed on in any way whatsoever to any third party, unless previously authorized by AMSS.

5. Whilst reasonable care has been taken in the preparation of this memorandum, AMSS, its partners, associates or employees shall not be accountable or liable except for gross negligence.

6. We are not experts in, and are not qualified to advice on, the laws of any jurisdiction other than India, nor do we purport to be generally familiar with laws of countries other than India. We have not made any other investigation

[1] UN SRSG on Business and Human Rights Corporate Law Tools Project - Instructions, February 2, 2009, p.1.

of, nor prepared this memorandum on the basis of any other such laws and do not express any opinion on the laws of any jurisdiction other than the laws of India.

7. This memorandum is addressed to and is solely for the benefit of the Special Representative of the SRSG (currently Professor John G. Ruggie) and his appointed agents, and shall not be disclosed to any third party without our prior written consent. No other person shall, save with our prior written consent, rely on this memorandum or any part thereof.

Executive Summary

Setting the Legal Landscape

The primary source of protection of human rights in India is found in the Constitution, which grants certain fundamental rights to all its citizens. These fundamental rights are enforceable against the State and its instrumentalities. The scope of fundamental rights has been expanded by the Courts so that they are in consonance with India's obligations under various international human rights conventions. There have also been instances where the Courts have punished the violators of fundamental rights despite the fact that they were private entities and did not satisfy the instrumentality of state test.

Regulatory Framework

India is a common law jurisdiction. Companies are broadly governed by the Companies Act, 1956 ("**Companies Act"**), which is proposed to be replaced shortly. Furthermore, the Securities and Exchange Board of India ("**SEBI**"), the Competition Commission of India and the Reserve Bank of India ("**RBI**") (in cases of foreign investments) are the other key regulators in India. However, the powers and functions of these authorities are by no means mutually exclusive and there are instances where their roles overlap, leaving the stakeholders responsible to more than one authority at times.

Incorporation and Listing

Indian companies can choose to be incorporated either with limited or unlimited liability, and have a separate legal personality. Companies can choose to list themselves on any of the numerous recognized stock exchanges. Both incorporation and listing do not specifically require companies to comply with any human rights obligations or duties to society vis-à-vis human rights. However, there is a requirement for companies to be incorporated with a lawful purpose.

Directors' Duties

Directors are in a fiduciary relationship *vis-à-vis* their companies. They are therefore required to act in a *bona fide* manner for the benefit of the company. In certain circumstances, the directors are required to extend their duty of care to the shareholders and other third parties (including creditors and employees). Whilst the Companies Act does not mandatorily require directors to consider non-business related impacts, the requirement may be read into the duties of directors not to carry out business in a manner which is prejudicial to public interest. Certain environment protection statutes also impose obligations on companies (and their directors) to consider and prevent environmentally harmful activities. Additionally, given that the Courts have been active to condemn cases of grave violation of fundamental rights by companies, it would be advisable for directors to be circumspect of any human rights violations in which their companies could get involved.

Reporting

The Companies Act requires companies to report their financial statements annually. Listed companies are required to submit corporate governance reports to the relevant stock exchanges on a periodic basis. Further, all actions of listed companies, their subsidiaries and business partners that are likely to have a material impact on the company's affairs (which may include actions impacting human rights) have to be reported to the stock exchanges. In the recent past, the government and the RBI have been encouraging companies and banks to report their social initiatives along with the financial statements.

Under the Companies Act there are no restrictions on circulating proposals which deal with impacts on non-shareholders. The same can either be raised by the board of directors during the general body meetings or by the shareholders by requisitioning for a general body meeting.

In relation to responsible investments by pension funds and institutional investors, while there is nothing that actively requires them to participate in socially beneficial investing, there is no restriction from doing so either, provided they are acting in the best interests of their subscribers.

Shareholders' Engagement

Going forward, while the Companies Act does not specifically empower non-shareholders to address the annual general meetings of companies or shareholders to ensure that companies consider non-shareholder related issues, the provision providing protection to minority shareholders may be utilized as a tool to encourage companies to take into account non-shareholder related considerations.

Other issues of corporate governance

Amongst the other relevant laws, the Indian Institute of Corporate Affairs has been set up by the government to address issues relating to corporate social responsibility. In order to encourage companies to consider the ethical, moral and social impacts of their actions, the Confederation of Indian Industries has issued a voluntary social code that business set-ups are encouraged to follow.

In relation to the composition of the board of directors, there are no laws requiring (a) the representation of affected communities or (b) non-discrimination on the basis of gender, race or ethnicity on company boards, although there is no bar from incorporating provisions relating to such representations into the articles of association of a company.

Setting the legal landscape

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

1.1 The Indian legal framework has in the last decade grown exponentially in terms of its sophistication and understanding of complex legal issues not least because of the rapid economic development of the country. However, whilst much of this legal evolution has been in the field of corporate and commercial law, there have been relatively fewer developments in the domain of human rights jurisprudence and legislation. The intersection of business law and human rights is still relatively narrow.

1.2 India has ratified various international treaties such as (i) the Universal Declaration of Human Rights dated December 10, 1948; (ii) the International Convention on Elimination of all Forms of Racial Discrimination dated December 21, 1965; (iii) the International Covenant on Economic, Social and Cultural Rights dated December 16, 1966; and (iv) the Convention on the Elimination of all Forms of Discrimination Against Women dated December 18, 1979[2] amongst others. India is however not a signatory to the Rome Statute of the International Criminal Court, 1998.

1.3 The Constitution grants certain "*fundamental rights*" primarily to all Indian citizens. These fundamental rights are the embodiment of all the human rights considered indispensable by the framers of the Constitution. They include, *inter alia*, equality before law, freedom of speech and expression, right to life, freedom to practice religion.

1.4 The fundamental rights are enforceable only against the State and its instrumentalities (hereinafter collectively referred to as the "**State**")[3] and in case of their breach a remedy in damages may be sought[4]. The Courts have expanded the protection offered by fundamental rights by reading principles of international conventions which are in harmony with the spirit of the Constitution into the existing fundamental rights.[5]

1.5 Further, Courts have been upholding claims against companies for fundamental rights violations. The Supreme Court in the context of a petition by the workers demanding to be heard in a winding up petition, observed, "*…the company is a species of social organization, with a life and dynamics of its own and exercising a significant power in contemporary society. The new concept of corporate responsibility transcending the limited traditional views*

[2] Article 253 of the Constitution empowers the Indian parliament to "*make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body*."
[3] See Article 12 of the Constitution of India.
[4] *D.K. Basu* v. *State of West Bengal*, (1997) 1 SCC 416.
[5] *Vishaka* v. *State of Rajasthan*, AIR 1997 SC 3011.

about the relationship between management and shareholders and embracing within its scope much wider groups affected by the trading activities and other connected operations of companies, emerged as an important feature of contemporary thought on the role of the corporation in modern society…."[6]. Thus, although fundamental rights under the Constitution are enforceable only against the State, the Courts have expanded its meaning by classifying government companies as State, thus making them liable for violation of fundamental rights[7].

1.6 Moreover, the Courts have in a few instances given relief to claims for violation of fundamental rights without going into the question of whether the violator could be classified as State. For instance, in the case of *M.C. Metha v. Union of India*[8], the Supreme Court has held that an errant company is liable for violation of the citizens' right to life under Article 21 of the Constitution.[9] In doing so, the Supreme Court did not directly address the question of whether such a company was classifiable as the "State," and it did not, shut the possibility of non-State entities being held liable for human right violations in future[10].

1.7 Further, the Protection of Human Rights Act, 1993 ("**Human Rights Act**") was enacted with the aim of providing better protection of "human rights"[11] through the efforts of the statutory bodies set up thereunder, i.e. the National Human Rights Commission (at the federal level) and the State Human Rights Commissions (at the provincial levels). However, the Human Rights Act is limiting with respect to business and human rights since the Commissions can only investigate human right violations against companies which qualify as the State under the Constitution.

1.8 Additionally, there are a slew of legislations (apart from the corporate legislations) which regulate the management and functioning of companies and which may have an impact on human rights protection. These include the Consumer Protection Act, 1986, the Competition Act, 2002, a host of labour protective legislations (such as the Contract Labour (Regulation and Abolition) Act, 1970, the Minimum Wages Act, 1948, the Factories Act, 1948) and environmental protection laws (like the Environment (Protection)

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[6] *National Textile Workers Union* v. *P.R. Ramakrishnan*, AIR 1983 SC 75.
[7] *R.D. Shetty* v. *International Airport Authority*, (1979)3 SCC 489; *Som Prakash Rekhi* v. *Union of India*, (1981)1 SCC 449. The relevant factors to consider whether an entity is an instrumentality of the State was laid down in the case of *Ajay Hasia* v. *Khalid Mujib*, (1981)1 SCC 722: These tests are: (i)Whether the entire share capital is held by the Government, if it is, it will go a long way in indicating that the corporation is an instrumentality of the State; (ii)Whether the corporation enjoys monopoly status conferred by the State or is State protected; (iii) Whether the functions of the corporation are governmental functions or functions closely related thereto; (iv) If a department of the government has been transferred to the corporation; (v) Volume of financial assistance received from the State; (vi) Quantum of state control; and (vii) Whether any statutory duties are imposed upon the corporation.
[8] (1987)1 SCC 395.
[9] Article 21 provides that: "*Protection of Life and Personal Liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.*"
[10] *Ashok* v. *Union of India*, AIR 1997 SC 2298; *Bandhua Mukti Morcha* v. *Union of India*, AIR 1984 SC 802; *Bodhisattwa Gautam* v. *Subra Chakraborty*, AIR 1996 SC 922; *Mr. X* v. *Hospital Z*, (1998) 8 SCC 296; *M.C. Mehta* v. *Kamal Nath*, (2000)6 SCC 213; *Lata Wadhwa* v. *State of Bihar*, AIR 2001 SC 3218.
[11] Human rights have been defined in the Human Rights Act to mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the international covenants (as defined in the Human Rights Act) and enforceable by the courts in India.

Act, 1986, the Air (Prevention and Control of Pollution) Act, 1981, the Water (Prevention and Control of Pollution) Act, 1974 and the Public Insurance Liability Act, 1991).

Regulatory Framework

2. *To what legal tradition does the jurisdiction belong, i.e. civil/common law, mixed?*

2.1 India, which was an erstwhile colony of Great Britain until August 1947, by and large, follows the legal tradition of common law. Common law principles evolved during the substantive pre-independence era constitute the bedrock of Indian jurisprudence today, and common law judgments passed after 1947 still have persuasive value in Courts today. Where there are lacunae in the codified laws, the Courts adopt the principles of common law unless they are repugnant with the "*immutable principles of justice, equity and good conscience*"[12].

3. *Are corporate/securities laws regulated federally, provincially or both?*

3.1 Corporate/securities laws are regulated at the federal level (i.e. at the Union Parliament level) in India[13].

4. *Who are the government corporate/securities regulators and what are their respective powers?*

4.1 Businesses structured as companies are primarily governed by the Companies Act, 1956 (the "**Companies Act**"), the Securities and Exchange Board of India Act, 1992, (the "**SEBI Act**") and the Foreign Exchange Management Act, 1999 (the "**FEMA**").

4.2 Setting up and management of companies is governed by the provisions of the Companies Act. The Central Government (the "**Government"**) through the Ministry of Corporate Affairs has been given wide powers to require compliance of its provisions, including powers such as investigating the internal affairs of companies, penalizing non-compliant companies and taking action against mismanaged companies and their agents (which includes the directors). Other authorities under the Companies Act include the Registrar of Companies, Regional Director and the Company Law Board ("**CLB**').

4.3 Securities and Exchange Board of India ("**SEBI**") which is the security markets regulator is entrusted with the function of regulating businesses in the security markets and protecting the interest of the investors. SEBI has substantial powers, including imposition of civil penalties, criminal sanctions and ordering the delisting of listed companies.

[12] *Air Carrying Corporation* v. *Shibendra Nath Bhattacharya,* AIR 1964 Cal 396; *Namdeo* v. *Narmadabai*, AIR 1953 SC 228
[13] As per Schedule VII of the Constitution (which sets out the balance of power between the Union Government and the various State Governments). The Schedule empowers the Union Legislature to enact legislations relating to both companies as well as securities.

4.4 Foreign investments into companies in India are regulated together by the Government and the Reserve Bank of India ("**RBI**") under the provisions of FEMA. Both the agencies have been empowered under FEMA to, *inter alia*, regulate the foreign exchange market in India along with SEBI. For any violation under FEMA, RBI can impose a penalty of up to three times the amount of money involved in the contravention.

4.5 Further, on May 15, 2009 an anti-trust authority, named the Competition Commission of India, was constituted under the Competition Act, 2002, with the power to penalize companies that enter into anti-competitive agreements having appreciable adverse effects on the competition within India and companies that abuse the position of dominance that they have in the relevant market[14].

5. *Does the jurisdiction have a stock exchange(s)?*

5.1 There are numerous recognized stock exchanges in India. As of September 18, 2008, there were 20 recognized stock exchanges. The most significant amongst them are the National Stock Exchange and the Bombay Stock Exchange, which serve as the benchmark of the economic and financial temperament of investors in India. India also has a derivative exchange, i.e. the Multi-Commodity Exchange of India ("**MCX**") which is an electronic multi-commodity futures exchange.

Incorporation and listing

6. *Do the concepts of "limited liability" and "separate legal personality" exist?*

6.1 It is clarified at the outset that all references to companies hereafter are to both private companies and public companies (both listed as well as unlisted companies) unless expressly mentioned.

6.2 Companies incorporated under the Companies Act as well as partnerships formed under the Limited Liability Partnership Act, 2008 are body corporates having separate legal personalities distinct from that of their members/partners, as the case may be.

6.3 With respect to liability, a company can be incorporated to have either limited[15] or unlimited liability. For a company with limited liability, its members will be liable only to the extent of the nominal/face value of the shares held by them. However, the Courts can 'lift the corporate veil' to hold members liable beyond their limited liability. This occurs usually where (i) the

[14] See Sections 3 and 4 of the Competition Act, 2002.
[15] As per Section 12 of the Companies Act.

Companies Act itself contemplates lifting the corporate veil[16], (ii) fraud or improper conduct is intended to be prevented, or (iii) a taxing statute or a beneficent statute is sought to be evaded.

6.4 The corporate veil is sometimes lifted to hold a parent company liable for its subsidiary. It has been held that "*the separate legal personality is the bedrock of company law and piercing the 'veil' of the company is permissible only in exceptional circumstances.....The mere fact that the holding company has a subsidiary company, however does not imply that whenever claims are made against the subsidiary company, the corporate veil is to be pierced in order to make the holding company liable for the debts incurred by the subsidiary company*." [17] However, where, for instance, in *State of U.P.* v. *Renusagar Power Co*[18] a wholly-owned subsidiary was completely controlled by its holding company and even its day-to-day affairs were controlled by the holding company, the Supreme Court held that the holding company would in these circumstances be liable to pay the duties on behalf of its subsidiary.

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

7.1 There is no statutory provision or obligation for companies to respect human rights at the incorporation stage. However, the pre-condition for incorporation is that the company should be set up for a lawful purpose[19]. Therefore we believe that any objectives of a company which represent a derogation of human rights, either explicitly or otherwise, would not be permissible given the protection of human rights in Indian law as set out in question 1. In other words, the incorporating company would likely not be seen as incorporating with a lawful purpose. However, the same has not yet been tested in a Court of law.

7.2 In relation to listing, the Companies Act and SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 lay down the conditions for listing. However, the eligibility criteria under these laws do not address social and/or environmental standards[20].

7.3 Further, upon listing, companies are bound by the listing agreement which the company enters into with the relevant stock exchange (the "**Listing Agreement**")[21]. The Listing Agreements entered into by various stock exchanges have to be substantially based upon the model format of the listing agreement prescribed by SEBI. The Listing Agreement does not require companies to comply with any human rights compliances or duties to society

[16] For example see Section 45 of the Companies Act dealing with 'Reduction of Membership Below the Statutory Minimum'; Section 147 of the Companies Act dealing with 'Improper Use of Name' and Section 542 dealing with 'Liability For Fraudulent Conduct of Business'.
[17] *S.A.E. (India)* v. *E.I.D. Parry (India) Ltd.,* [1998]18 SCL 481 (Mad.).
[18] AIR 1988 SC 1737.
[19] See section 12 of the Companies Act.
[20] Clauses 26 and 27 of the SEBI (Issue of Capital and Disclosure Requirement) Regulations, 2009.
[21] For a copy of the Listing Agreement, please see <http://www.bseindia.com/about/downloads.asp>, last visited on March 19, 2009.

vis-à-vis human rights. However, in recognition of the impact such companies can have on the finances of the larger public, Clause 49, which deals with corporate governance, was brought into the Listing Agreement, and requires companies to appoint a specified minimum number of independent directors onto their boards. The Listing Agreement also requires a range of disclosures from the company (including the filing of a corporate governance report)[22]. However, the slant of the disclosures is towards material information which can have a bearing on the performance/operations of the company, including price-sensitive information. More details about reporting obligations are provided in paragraph 16 below.

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.)*

8.1 The S&P ESG India Index is an investable index of companies whose business strategies and performance demonstrate a high level of commitment to meeting environmental, social and governance standards[23]. The index has been created by a consortium of Standard and Poor's, CRISIL and KLD Research and Analytics, Inc. The S&P ESG Index chooses from a pool of the top 500 Indian companies listed on the National Stock Exchange on the basis of their total market capitalization. The companies then are further narrowed down based on information publicly published by the companies themselves and also from independent sources.

8.2 Separately, the MCX facilitates trading in carbon-credit futures with a view to create visibility and marketability of the environmentally friendly technologies utilized by companies[24].

8.3 While the constituents of the FTSE4Good or the Dow Jones Sustainability Index are not publicly available, a press release on the website of the Tata group of companies states that after September 22, 2008 Tata Consultancy Services Limited and Tata Steel Limited are the only two companies to feature on the Dow Jones Sustainability Index[25].

Directors' Duties

9. *To whom are directors' duties generally owed (i.e. to the company, non-shareholders etc.)?*

9.1 It is a well-established judicially developed principle of Indian law that a director has fiduciary duties towards the company and must act in a *bona fide*

[22] Any serious or intentional breach of the Listing Agreement may invite serious penalties from SEBI or the relevant stock exchange, and in certain cases may lead to a de-listing. Breach of the listing rules are punishable with imprisonment for a period which may extend to ten years, or with fine, which may extend to rupees twenty-five crores (Rs. 2,50,000,000) or both.
[23] <http://www.csrwire.com/press/press_release/21256-Standard-Poor-s-ESG-India-Index-Launched>, last visited on July 16, 2009.
[24] *MCX , 1st derivatives exchange in Asia to launch Carbon Credits contract,* Press Release by MCX, January 21, 2008. *See* <http://www.mcxindia.com/PressRelease/MCX_PR_21jan08.pdf>, last visited on March 24th 2008.
[25] <http://www.tata.com/company/releases/inside.aspx?artid=iy8ZgDv1Ee0= >, last visited on September 02, 2009

manner for its benefit. However, it must be noted that the same has not been statutorily codified. The Supreme Court in *Official Liquidator* v. *P. A. Tendolkar*[26], has laid down the following general principles in relation to the fiduciary duties of directors:

(a) a director need not exhibit in the performance of his duties a greater degree of skill than may be reasonably expected from a person of his knowledge and experience;

(b) a director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee of the board upon which he happens to be placed; and

(c) in respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.

9.2 *Duty towards Shareholders*

It has been disputed whether the directors owe a duty towards the shareholders of the company. As a general rule, the duty of the directors is towards the company[27]. A recent judgment has, however, stated that directors are "trustees of the shareholders of the company."[28] In general, the standard of conduct expected of a director depends on the facts and circumstances of the case. However, the Courts have carved out certain exceptions to this general rule, making the directors liable to the shareholders in certain situations. An illustrative list is given below:

(a) Where there is misapplication of the company's funds or property[29];

(b) Where the directors take upon themselves the task of advising the shareholders who may be their family members[30];

(c) Where the directors undertake to be responsible towards the shareholders by way of a special contract[31]; and

(d) Where the directors have taken upon themselves the burden of giving advice to the shareholders at the time of a takeover bid.

9.3 *Duty towards Creditors*

[26] [1973] 43 Comp Cas 382 (SC).
[27] *Sangramsinh P. Gaekwad and Ors.* v. *Shantadevi P. Gaekwad*, AIR 2005 SC 809.
[28] *Reliance Natural Resources Ltd.* v. *Reliance Industries Ltd.,* [2008] 82 SCL 303 (Bom).
[29] *M.A. Malik* v. *S. Thiruvengadaswami Mudaliar*, AIR 1950 Mad 208.
[30] *Sangramsinh P. Gaekwad and Ors.* v. *Shantadevi P. Gaekwad*, AIR 2005 SC 809.
[31] ibid.

Section 542 of the Companies Act imposes both an unlimited pecuniary liability and imprisonment on the directors if it is found that during the course of winding up of the company, they carried on the company's business in a manner that defrauded the creditors. Note that the Courts have held that "*where a company is insolvent, the interests of the creditors intrude*"[32].

9.4 *Duty to employees*

There is no general duty that the directors owe to their employees. However, the Companies Act imposes a limited duty on directors to ensure that certain monies of employees are safely invested. At the stage of winding up, the interest of the workers have to be taken into consideration.[33]

In addition to the above, there are a host of labour protection legislations affording protection to the rights and interests of workers and employees and provided in more detail in paragraphs 14.1(c), 14.2 and 14.3[34]. If a company contravenes the provisions of these labour legislations, then, subject to limited due diligence defences, every person in charge of and responsible to the company for the conduct of its business (including directors of the company) are deemed to be guilty[35].

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?*

10.1 There is no specific duty on directors to avoid legal risk and damage to the company's reputation. As long as directors have exercised their fiduciary duties towards the company (and in limited cases to third parties as discussed in paragraphs 9.2 to 9.4 above), there is no separate duty which makes it incumbent on the directors to avoid legal risk and damage to the company's reputation. If the directors truly and reasonably believe, at the time of making their decision that the action is in the company's best interests[36], then it is likely that the Courts would not hold the directors liable for breach of trust, even if it resulted in damage to the company's reputation or resulted in it being exposed to a legal risk. However, the same has not been tested by the Courts, and will necessarily be dictated by the facts and circumstances of the case at hand.

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*

[32] *Andrew Yule and Co. Ltd.* v. *Descon Ltd.,* [2009] 147 Comp Cas 434 (Cal).
[33] Section 529-A of the Companies Act*;* also see *National Textile Workers Union* v. *P.R. Ramakrishnan*, AIR 1983 SC 75; *In re: Indian Petrochemicals Corporation Limited*, Gujarat High Court, 2007.
[34] Factories Act, 1958; Contract Labour (Regulation and Abolition) Act, 1970; the Minimum Wages Act, 1948; Employees' Provident Funds and Miscellaneous Provisions Act, 1952; Employees' State Insurance Act, 1948; Equal Remuneration Act, 1976; Industrial Disputes Act, 1947; Payment of Bonus Act, 1965; and Payment of Wages Act, 1936.
[35] For example, see Section 25 of the Contract Labour (Regulation and Abolition) Act, 1970.
[36] *Nanalal Zaver* v.*Bombay Life Assurance Co. Limited,* AIR 1950 SC 172. Also see below paragraph 12. 2.

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)

11.1 The Companies Act does not expressly require the directors to consider non-business related impacts. However, the requirement to consider non-shareholder related impacts, including the company's impacts outside India, may be read into the duties of directors stated in paragraph 9 above, given that the shareholders or the creditors of a company can file a complaint with the CLB for mismanagement on the ground that the affairs of the company are being conducted in a manner prejudicial to public interest or interests of the company. This interpretation is further supported by the approach of Courts towards violations of human rights by companies (as set out in paragraphs 1.4 to 1.6 above). However, please note that the reaction of the Courts will necessarily be dictated by the facts and circumstances of the case at hand.

11.2 It is pertinent to note that the directors of a company owe no duty to its allied companies such as their group companies or subsidiaries whether located inside or outside India. The board is neither bound nor permitted to act as per the dictates of even its holding company[37] and it must always act in the best interests of the company. Therefore, a director of a parent company is not required to consider human right related impacts of its subsidiaries unless these would be relevant to best interests of the parent company

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?*

12.1 In relation to the amount of discretion that is given to directors in exercise of their powers, the Bombay High Court held that if the directors truly and reasonably believed at the time that their decision was in the company's best interests, they are not chargeable with a breach of trust merely because in promoting the interest of the company they were also promoting their own[38]. This was reiterated in *Needle Industries (India) Ltd.* v. *Needle Industries Newey (India) Holding Ltd.*[39] Therefore, Indian law has impliedly adopted the common law doctrine of "proper purpose"[40] to judge the validity of directors' actions[41].

12.2 Given the broad discretion that directors are permitted to exercise while making decisions for the company, it is unlikely that that their duties to the company will unduly hamper them from considering codes of conduct that may be for the benefit of the stakeholders other than the shareholder, provided

[37] *Fergusons Sias* v. *Jai Manga Ram Mukhi*, (1998) 93 Com Cases 750.
[38] *Nanalal Zaver* v.*Bombay Life Assurance Co. Limited,* AIR 1950 SC 172.
[39] *Needle Industries (India) Ltd. and Ors.* v. *Needle Industries Newey (India) Holding Ltd.,* AIR 1981 SC 1298.
[40] *Hogg* v. *Cramphorn Ltd.,* (1967) 1 Ch.254*; Piercy* v. *S. Mills & Co. Ltd.,* (1920) 1 Ch.77.
[41] *Dale and Carrington Invt. (P) Ltd. and Anr.* v. *P.K. Prathapan and Ors,* (2005) 1 SCC 212.

they can show they reasonably believed they were acting in the company's best interests in doing so. Further, given that the Courts have been active to condemn cases of grave violation of fundamental rights (please refer to paragraphs 1.4 to 1.6 above) by companies, it would be advisable for directors to be circumspect of any human rights violations in which their companies could get involved.

13. *What are the legal consequences for failing to fulfill any of the duties described above; and who may take action or initiate them? What defenses are available?*

13.1 A complaint may be filed with the CLB for oppression or mismanagement, where the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner that is oppressive to any members or to the interests of the company. On receipt of the complaint, the CLB is given wide powers to pass "any order that it thinks fit".[42] Section 402 of the Companies Act provides that the CLB has the power to, *inter alia*, terminate, set aside or modify any agreement between the company and the managing director, other directors and the mangers. Where directors act dishonestly, they can also be held liable for breach of trust or misfeasance[43] including criminal breach of trust under the Indian criminal statute, namely the Indian Penal Code[44]. The Courts have held that where the conduct of the directors is shown to be in breach of their duty of care to the company, the directors are liable to compensate the company for loss caused by their conduct to the company[45].

13.2 Under Section 399 of the Companies Act, a statutory minimum number of members of the company (or more) are entitled to make an application for oppression or mismanagement[46]. However, where there are lesser members, an application may be made to the Government which has the discretion to waive the statutory minimum requirement. With respect to suits against directors under common law, tort law etc. it has been held that an action against a defaulting director may be brought by the company itself (or where the breach of duty complained of is a breach of fiduciary duty an action may be brought by a member suing in a derivative action on behalf of the members of the company) [47].

13.3 Section 633 of the Companies Act empowers a Court to relieve directors from liability under the Companies Act where they have acted honestly and reasonably despite having been found guilty of negligence, default, misfeasance, breach of duty or breach of trust. A director cannot be

[42] Sections 397 and 398 of the Companies Act.
[43] See section 408 of the Indian Penal Code, 1860. Also see *Tristar Consultants* v. *Vcustomer Services India Private Limited,* AIR 2007 Delhi 157.
[44] *R.K. Daslmia* v. *Delhi Administration,* AIR 1962 SC 1821.
[45] *Official Liquidator* v. *Ram Swarup;* AIR 1997 All 72; *Official Liquidator of Shubh Laxmi Savings and Finance Private Limited* v. *Brij Mohan Gogna,* [2007] 135 Comp Cas 547 (Raj).
[46] Only (i) in the case of a company having a share capital, not less than one hundred members or on-tenth of the total number of members, whichever is less, or (ii) in case of a company not having a share capital, not less than one-fifth of the total number of its members may apply to the CLB for oppression or mismanagement.
[47] *Hrushikesh Panda* v. *Indramani Swain*, AIR 1987 Ori 79.

indemnified or exempted against liability which may be attracted as a result of any negligence, default, misfeasance, breach of duty etc. However, indemnity (including D&O insurance) may be provided to directors if the outcome of proceedings against the directors is in their favour, or if they are acquitted or discharged pursuant to the provisions of Section 633 of the Companies Act[48].

14. *Are there any other directors' duties, which might encourage a corporate culture respectful of human rights?*

14.1 It is primarily environmental and labour legislations that more directly impose various obligations on companies to consider non-shareholder impacts, including those related to human rights. Default by companies in complying with certain provisions of these statutes entails penalties on the errant companies and (in certain cases) on the directors. We therefore believe that an indirect duty is imposed, through the environmental and labour legislations themselves and the Companies Act (as discussed in questions 9, 10 and 11 above), on directors to ensure compliance with these provisions. A short summary of the obligations imposed by such statutes has been set out below:

(a) The Environment (Protection) Act, 1986, the Air (Prevention and Control of Pollution) Act, 1981, the Water (Prevention and Control of Pollution) Act, 1974 and the Biological Diversity Act, 2002 (the "**Environmental Legislations**") impose obligations on companies to comply with the standards set by the Government for controlling emissions and effluent discharges, preventing pollution and damage of air and water and obligations to follow the safeguards for the prevention of accidents that may result in deterioration of the environment etc. The Environmental Legislations specify that failure to comply with the provisions would be a punishable offence and the directors may be liable (subject to certain due diligence defenses). The Courts have been considerably keen on disciplining corporations, acting through their directors, who violate the Environmental Legislations, and have been developing a steady pro-environmental jurisprudence by holding errant corporations liable at the cost of bending some procedural and technical requirements under the laws.[49] Further, recently the National Green Tribunal Bill, 2009 was presented before Parliament which essentially seeks to set up an overarching decision making body to deal with substantial environment related questions arising under the Environmental Legislations.

(b) Under the Public Insurance Liability Act, 1991 ("**PILA**"), which was enacted to provide immediate relief to the victims of an accident involving a hazardous substance, a "no-fault" liability is imposed upon

[48] See Section 201 of the Companies Act.

[49] In the case of *Uttar Pradesh Pollution Control Board* v. *Modi Industries,* AIR 1988 SC 1128 the Supreme Court observed, *"it would be a travesty of justice if the big business house of Modi Industries Ltd. is allowed to defeat prosecution launched against them and avoid the trial on a technical flaw which is not incurable for their alleged deliberate and willful breach of the provisions"*; also see *K.K. Nandi* v. *Amitabha Bannerjee*, 1983 Cri.L.J. 1479; *Mahmud Ali* v. *State of Bihar*, AIR 1986 Pat 133; *Trans Asia Carpets Ltd.* v. *State of Uttar Pradesh*, 1992 Cri.L.J. 673.

the owner of the hazardous substance and requires the "owner" (which in some cases includes the director) to compensate the victims irrespective of any neglect or default on the owner's part.

(c) There are numerous labour legislations enacted to ensure the protection of workers[50]. For instance, the Contract Labour (Regulation and Abolition) Act, 1970 imposes an obligation on establishments hiring contract labourers to ensure that the contract labourers' welfare and health is taken care of; the Minimum Wages Act, 1948 which requires certain employments to pay, at the least, a statutorily fixed rate of wages to its employees; the Factories Act, 1948 which regulates the laws relating to labour in factories, specifically addresses issues relating to the health, safety, working hours, leave and wages of the workforce. The shops and establishments legislations are enacted provincially by every state in India and govern the conditions of work and employment in shops, commercial establishments, residential hotels, restaurants, eating houses, theatres, other places of public entertainment and other establishments.

14.2 Breach of any of the provisions of the Environmental Legislations and labour legislations by companies will result in fine and imprisonment being imposed on its officers who are directly in- charge of and responsible for the conduct of the business of the company (which may include the directors and managers of the company)[51].

14.3 A valid defence for the directors in such a situation would be to prove that the actions in breach of the legislations took place without their knowledge or that they exercised all due diligence to prevent such contraventions[52].The term 'due diligence' has not been statutorily defined nor have the Courts elaborated upon the import of the term specifically in this context. However, in a different context, the Supreme Court of India[53], after drawing upon the meaning of the word from many legal dictionaries held that*"due diligence"* means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs." However, in contrast to the rest of the legislations, under the PILA the owners of the factory are made strictly liable and they cannot avail of any defenses.

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[50] Factories Act, 1958; Contract Labour (Regulation and Abolition) Act, 1970; the Minimum Wages Act, 1948; Employees' Provident Funds and Miscellaneous Provisions Act, 1952; Employees' State Insurance Act, 1948; Equal Remuneration Act, 1976; Industrial Disputes Act, 1947; Payment of Bonus Act, 1965; and Payment of Wages Act, 1936.

[51] It has further been stated that a person '*in-charge*' must mean that the person should be in overall control of the day-to-day business of the company, *Haryana Pollution Control Board* v. *Bharat Carpets Limited,* [1993 For.L.T.97].

[52] See Section 27 of the SEBI Act; Section 40(2) of the Air (Prevention and Control of Pollution) Act, 1981 which deems the officer in charge guilt for any violation under the Air (Prevention and Control of Pollution) Act, 1981; Also see Section 47 of the Water (Prevention and Control of Pollution) Act, 1974, Section 57 of the Biological Diversity Act, 2002, and Section 16 of the Environment (Protection) Act, 1986; Also, the proposed Civil Nuclear Liability Bill, 2008 (not yet introduced by the Government before the Union Parliament) is said to make the operator (namely the company running the operations) solely responsible for any nuclear accident and will be liable to pay at least Rs. 30,000,000 (Rupees Thirty Million) as compensation to the affected for a single accident.

[53] *Chander Kanta Bansal* **v.** *Rajinder Singh Anand*, AIR 2008 SC 2234.

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?*

15.1 Indian law does not have a two-tier board structure. Moreover, there is no distinction under Indian law between the senior and the subordinate management.

15.2 A distinction is made however in the Companies Act between a whole time director and other directors. However, in terms of duty, standard of care and skill, no distinction is made between the two. Similarly while there is no distinction under the Companies Act between executive and non-executive directors[54], leading corporate law authors feel that non-executive directors have a duty to keep themselves abreast with the business activities and financial status of the company, regularly attend board meetings and oversee the activities of the whole time directors and leading executives of the company. If these duties are conscientiously fulfilled, the Courts may be inclined to apply a different standard from that applied to a whole time director[55]. Such exemption from liability for non-executive directors would, however, depend on the facts of the case[56].

15.3 The SEBI Act, Environmental Legislations and labour statutes imposes liability on persons who are in-charge of the operations of the company (see paragraph 14.2 above), which can include its directors, managers, secretaries or other officers, although the senior management of companies do not owe any fiduciary duty to the company. It is likely that non-executive directors such as nominee directors and independent directors would not be held liable under these legislations since they are unlikely to be involved in the day to day affairs of the company and hence will not qualify as "persons in-charge". It must be noted that this proposition remains to be tested by the Courts.

Reporting

16. *Are companies required or permitted to disclose the impacts of their operations (including human right 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?*

16.1 Under the Companies Act, every company is required to file its annual returns[57], balance sheet and profit and loss account[58] at the end of every financial year with the Registrar of Companies. The annual returns are

[54] The terms executive and non-executive director have not been defined under the Companies Act or any other legislation as in some other countries, however the commercial understanding of a 'non-executive director' is one who is not involved in the daily/ hands-on management of the company.

[55] Palmer's Company Law, 25th ed., 1992, p. 8042.
[56] *J. H. Doshi* v. *Registrar of Companies*, [1989] 65 Comp Cas 553 (Bom).
[57] Section 159 of the Companies Act.
[58] Section 220 of the Companies Act.

required to contain details of the company's members, debenture holders, indebtedness, management etc. and the balance sheet should contain details of the state of affairs of the company. Moreover, these should be accompanied with the auditors' report and the board's report.[59]

16.2 The board's report is required to contain, amongst others, details relating to the energy conservation measures taken by the company, investments made for reduction in the company's energy consumption etc. Apart from this, the Companies Act does not mandate companies to make disclosures about their social responsibilities or impacts on non-shareholders. While the Companies Act does not require companies to report any material changes, under the Listing Agreement, public listed companies are required to keep the stock exchanges informed of events such as strikes, lock-outs, closure on account of power cuts as well as all material events which will have bearing on the performance/operations of the company and information that is price sensitive[60]. Under the SEBI Act, Rules and Regulations various financial reports and returns need to be filed with SEBI.

16.3 Recently, the Government has been encouraging companies to report their corporate social initiatives along with the annual reporting requirements[61]. In this context, a senior Government official is said to have observed, "*Though there will be no binding regulations on companies, MCA* (the Ministry of Corporate Affairs) *feels disclosure of CSR initiatives will help them obtain better image of themselves which they can leverage while going in for an initial public offering or launch of a financial product such as a mutual fund*."[62] Even the RBI is encouraging banks to put in place a plan of action towards helping the cause of sustainable development (i.e. maintenance of quality of environment and social systems) and further recommends that the progress made under these plans of action may be placed in the public domain along with regular financial reports[63].

16.4 Moreover, under the Environment Impact Assessment Regulations, 1994, issued under the EPA, any person who desires to undertake any new project in any part of India or the expansion or modernization of any existing industry or project that has been listed in the Schedule under the Environment Impact Assessment Regulations, 1994 will have to submit an application along with a environmental impact assessment report (prepared in accordance with the prescribed guidelines) to the Secretary, Ministry of Environment and Forests[64].

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[59] Section 217 of the Companies Act.
[60] Clause 36 of the Listing Agreement
[61] Government Wants to Promote Disclosure of Social Work by Cos, The Mint, Online Edition, June 13, 2008. <http://www.livemint.com/2008/06/12235912/Government-wants-to-promote-di.html>, last visited on March 22, 2009.
[62] *ibid.*
[63] RBI Circular: Corporate Social Responsibility, Sustainable Development and Non-Financial Reporting – Role of Banks, December 20, 2007, Circular no. RBI/2007-08/216 DBOD. No.Dir. BC. 58/13.27.00/2007- 08.
[64] In the case of *S. Jagannath* v. *Union of India,* (1997) 2 SCC 87 it was held, "… there must be a compulsory environmental impact assessment which would consider intergenerational equity and rehabilitation cost".

16.5 Many Indian companies have already inculcated the practice of publishing their 'sustainability reports'[65], further detailed in paragraph 22.8 below.

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

17.1 The Companies Act requires companies to submit the balance sheets (including the auditor's report and the board's report) and the profit and loss statements of their subsidiaries (which include their foreign subsidiaries) to the Registrar of Companies (in addition to submission of their own reports as stated in paragraphs 16.1 and 16.2 above)[66].

17.2 Under the Listing Agreement, companies are under an obligation to report all information to stock exchanges which will have bearing on the performance/operations of the company as well as price sensitive information. Therefore, if the actions of the company itself, its subsidiaries, suppliers and other business partners outside India, including actions impacting human rights, are likely to have a material impact, it is likely that they will have to be reported.

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

18.1 *Verification of the reports*
Under the Companies Act, the financial returns to be submitted (as detailed out in paragraphs 16 and 17.1 above) need to be authenticated by two directors and by the manager or secretary of the company (if any)[67] and verified by the auditors.[68] Listed companies have to make quarterly filings to the stock exchanges. These filings have to be approved by a committee of directors.

18.2 *Who may access these reports*
All reports required under the Companies Act may be accessed by the shareholders of the company and in case of public listed companies, the same information would be available for perusal by any member of the public many times on the stock exchange websites.

18.3 *Consequences for failing to report*
Any company that fails to submit the reports under the Companies Act (set out in paragraph 16.1 above) is liable (along with every officer who is in default) for a fine of Rs. 500 (Rupees Five Hundred) for each day that the default

[65] Few Indian companies that have been publishing their sustainability reports are ITC Ltd., Dr. Reddy's Labs Ltd. and the TATA Group companies.
[66] Section 212 of the Companies Act.
[67] Section 215 of the Companies Act.
[68] Section 227(2) of the Companies Act.

continues.[69] Additional penalties may be levied by SEBI in case a public listed company does not comply with the reporting requirements under the Listing Agreement.[70]

18.4 *Penalty for misrepresentation*
Under the Companies Act, if any person makes a statement in any return, report, certificate, balance sheet etc. (that is required for the purpose of the Companies Act) which is false (while knowing that it is false) or omits anything material (knowing that it is material), such person is be punishable with imprisonment for a term of up to two years and shall also be liable for a fine[71]. Additionally, outside of the Companies Act, if false statements or misrepresented facts are deliberately placed in reports (irrespective of the voluntary nature of the reports), the company and its directors will be liable for the tort of false representation to the persons who have relied upon the false statements[72].

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

19.1 There are no restrictions under the Companies Act on circulating proposals which deal with impacts on non-shareholders. The same can either be raised by the board of directors during the general body meetings or by the shareholders by requisitioning for a general body meeting[73].

19.2 Procedurally, in case of a company having a share capital, shareholders having shares worth at least 1/10 of the paid-up share capital of the company can requisition a meeting and in case of a company not having a share capital, such number of members who have at least 1/10 of the total voting power of the company may make a requisition. This requisition is to be acted upon by the board of directors who should then call for an extra-ordinary meeting within 21 days.

19.3 This provision does not prescribe or limit the nature of issues that can be raised by the shareholders in such meetings. Therefore, although till date typically shareholders have used this provision to safeguard the interests of the company, it can also be used as an effective tool by shareholders to encourage companies to take into account non-shareholder related considerations so long as these considerations fall within the ambit of the objects laid out in the memorandum of association of the company.

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

[69] Section 162 of the Companies Act.
[70] Section 23-A of the Securities Contract (Regulation) Act, 1956
[71] Section 628 of the Companies Act.
[72] See *Tristar Consultants* v. *Customer Services India Pvt. Ltd,* AIR 2007 Delhi 157.
[73] Section 169 of the Companies Act.

20.1 While there is no requirement on institutional investors, including pension funds, to consider human rights impacts in their investment decisions, there is no bar on them considering such impacts. For example, foreign institutional investors desirous of investing into India are required to comply with the SEBI (Foreign Institutional Investors) Regulations, 1995 and certain foreign exchange rules (which do not in any way either encourage or prohibit such institutional investors from taking into consideration human right related or any other similar impacts). However, there has been a growing trend of mainstream investors actively turning to socially beneficial investing[74]. IDFC Limited, an Indian company, is a member of the United Nations Principles for Responsible Investment under the 'investor manager' category.

20.2 Pension funds in India are regulated by the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 together with the Employee's Pension Scheme, 1995 issued by the Government (the "**Pension Fund Regulations**"). In terms of the Pension Fund Regulations, the employers are only permitted to make investments in specified banks and government bonds/ securities[75]. Recently, the Pension Fund Regulatory and Development Authority released a New Pension Scheme. Under the New Pension Scheme, the pension fund managers are permitted to invest in equity market instruments, government securities and credit risk bearing fixed income instruments. Pension funds are required to take investment decisions in the best interest of subscribers with emphasis on safety, prudence, optimum return and sound commercial judgment[76]. Thus, while there is nothing that actively requires pension funds to participate in socially beneficial investing under the New Pension Scheme, there is no restriction from doing so either, provided they are acting in the best interests of their subscribers.

21. *Can non-shareholders address companies' annual general meetings?*

21.1 The Companies Act does not expressly permit non-shareholders to address companies' general meetings. Indeed, given the fact that even proxies appointed by shareholders to vote on their behalf are not permitted to speak in the meetings[77] it is unlikely that a non-shareholder will be allowed to address the annual general meeting of a company.

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*

[74] Crossing the Divide- The business of social good, The Mint, Online Edition, May 11, 2009. <http://www.livemint.com/2009/05/11203031/Crossing-the-Divide--The-busi.html>, last visited on May 26, 2009.
[75] Paragraph 26 of the Employee's Pension Scheme, 1995 read with Paragraph 52 of the Employees' Provident Fund Scheme, 1952.
[76] Detained Investment Guidelines for All Citizens Under the New Pension Scheme, <http://pfrda.org.in/indexmain.asp?linkid=180>, last visited on September 2, 2009.
[77] See Section 176(1) of the Companies Act

respectful of human rights, including through a human rights due diligence process?

22.1 *Investor Protection Fund*

Under Section 205-C of the Companies Act, the Government has established the Investor Education and Protection Fund which is to be utilized for the promotion of investors' awareness and protection of the interests of the investors. Under this provision, every company incorporated in India has to credit the Investor Education and Protection Fund with certain amounts including unpaid dividends, application money received for allotment of any securities due for refund and mature deposits with the companies. In relation to investments in the secondary market, the Investor Education and Protection Fund website advises potential investors to "invest based on sound reasoning and fundamentals of the company after taking into account all publicly available information", [78] which is broad enough to include any human rights violations that a company is making the headlines for.

22.2 *Government's Think Tank for CSR*

In May 2008, the Government (through the Ministry of Corporate Affairs) set up the Indian Institute of Corporate Affairs as its official 'think tank' so that it can holistically address all issues/ disciplines that impact corporate effectiveness including corporate social responsibility initiatives[79].

22.3 *Government mandate on Steel companies fulfilling CSR targets*

Further, based on the advice of the Ministry of Steel, all profitable steel public sector undertakings (i.e. companies in which the Central or State government have majority stake) have been earmarking at least 2% of their annual profits to be spent on "corporate social governance", a term which has not been further defined. These corporate social governance targets were made part of the memorandums of understanding between the Ministry of Steel and the public sector undertakings, which are not publicly available. For the year 2007-2008, a total budget of around Rs. 230,00,00,000 (Rupees Two Hundred Thirty Crores) had been allocated by 11 public sector undertakings for corporate social governance activities and 8 public sector units actually spend their entire allocated funds for that year, with some companies even bettering their original targets[80].

22.4 *Voluntary Social Code for Businesses*

In order to encourage companies to consider the ethical, moral and social impact of their actions, the Confederation of Indian Industries ("**CII**") has issued a Social Code for Business which *inter alia* requires companies to take

[78] http://iepf.gov.in/Do-Dont.asp, as on September 2, 2009.
[79] Notification F. No. H-33011/7/2008-IICA, Government of India, Ministry of Corporate Affairs, December 9, 2008 <http://www.mca.gov.in/MinistryWebsite/dca/latestnews/Vacancy_Circular_12dec2008.pdf>, last visited on March 22, 2009.
[80] 'Steel Ministry PSUs exceed target on Corporate Social Responsibility', April 18, 2008, Press Release by the Ministry of Steel, Press Information Bureau, Government of India. <http://pib.nic.in/release/release.asp?relid=37578>, last visited on May 26, 2009.

upon themselves corporate social responsibility ("**CSR**") that advocates harmonising economic progress with social and environmental considerations, adopting a specific written policy statement on CSR (social and environmental) and for companies to have an explicit strategy on social and environmental issues that can be seen in the form of an Annual Work Plan mainstreamed with its business process[81]. CII has also developed the CII Code for Desirable Corporate Governance, with the aim of developing and promoting a framework for corporate governance within Indian companies. As per the IFC report on *Integrating Environmental, Social And Governance Factors Into Investment Processes In Emerging Markets*, the CII Code for Desirable Corporate Governance has been adopted only by a few firms.[82]

22.5 *Insurance companies to mandatorily distribute policies in rural sectors*

The insurance sector regulator, namely the Insurance Regulatory and Development Authority, has developed a unique way of ensuring that every insurance company contributes to the country's social development. It does so by mandating that out of the total insurance policies written by the insurers in a particular year, a certain prescribed percentage of the policies have to be in the rural sector and a separate prescribed percentage should be in the social sector[83]. The "social sector" refers to the un-organised sector, informal sector, economically vulnerable or disadvantaged classes and other categories of persons including persons with disabilities, both in rural and urban areas. These obligations are to be complied with only for the first five years from the date when the insurers have begun to carry on their insurance business.

22.6 *Equal opportunities for the disadvantaged in companies*

In relation to affirmative action for employees within companies, the Persons with Disabilities (Equal Opportunities, Protection of Rights & Full Participation) Act, 1995 requires that a certain prescribed percentage of employment in government companies has to be for disabled persons. There has been discussion of late of the government setting up an Equal Opportunities Commission which is to act as a watchdog institution to ensure that the deprived sections of society have affirmative action even in private institutions, thereby introducing affirmative action in the private sector[84].

22.7 *Stakeholders' Committee under the Companies Bill, 2008*

The draft Companies Bill, 2008 which seeks to replace the Companies Act, does not cast any specific obligation on companies to be respectful of human rights. However, it does require companies having more than 1,000 security holders (at anytime in one financial year) to constitute a 'Stakeholders Relationship Committee'[85] to consider and resolve their grievances. Although there is no guidance on the meaning of 'stakeholder', it is likely that the term

[81] <http://www.cii.in/menu_content.php?menu_id=626>, last visited on September 29, 2009.
[82] Gaining Ground: Integrating environmental, social and governance factors into investment processes in emerging markets, Report by Mercer and IFC, March 2009, p. 29.
[83] Section 32-B and 32-C of the Insurance Act, 1938 and the Insurance Regulatory and Development Authority (Obligations of Insurers to Rural Social Sectors) Regulations, 2002; Also see Section 105-A of the Insurance Act, 1938 which deems the officer in charge guilt for any violation under the Insurance Regulatory and Development Authority Act, 1999.
[84] See <http://www.ndtv.com/news/india/affirmative_action_by_another_name.php>, last visited on July 10,2009.
[85] Section 158(12) of the Companies Bill, 2008.

refers to the security holders and creditors of the company, rather than other third parties such as representatives of communities affected by the company's activities. Please note however, that this provision is still in draft form and no clarity has been provided yet on its terms or scope.

22.8 *Membership to the United Nations Global Compact*
134 Indian companies are active members of the United Nations Global Compact, which is an initiative to encourage companies to be respectful of human rights, labour standards, environment and anti-corruption[86].

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

23.1 At present, there are no laws requiring the representation of employees or affected communities on the company boards; however, companies may incorporate such provisions into their articles of association. For public listed companies, there is a statutory requirement that their boards are composed of the minimum required independent directors. A director will be considered independent based on his/her material pecuniary relationship with the company.

24. *Are there any laws requiring gender, racial/ethnic representation; or non-discrimination generally, on company boards?*

24.1 There are no statutory laws specifically requiring non-discrimination on company boards on the basis of gender, race or ethnicity. The general non-discrimination laws, which stem from Article 14 of the Constitution, would only apply to discrimination by the State (as stated in paragraph 1.4 above). However, there is nothing preventing companies from incorporating such provisions into their articles of association.

24.2 While it is difficult to analyze with certainty whether a law requiring non-discrimination on company boards would be constitutional, it must be pointed out that such a law may be challenged on the ground of it being in violation of the right to carry on any occupation, trade or business under the Constitution, and that such a law is not reasonable in nature.[87]

[86] These are based on 10 principles of the UN Global Compact; see <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>, last visited on March 28, 2009.
[87] Articles 19(1)(g) and 19(6) of the Indian constitution. Note that such a petition may be brought by the shareholders of companies and not the companies themselves as this right has been granted to the citizens of India and a company despite being incorporated in India does not qualify as a citizen.