

UPDATE TO JOHN RUGGIE'S CORPORATE LAW PROJECT: HUMAN RIGHTS REPORTING INITIATIVES

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In early 2009, Shift's Chair and the former Special Representative of the UN Secretary-General for Business and Human Rights, Professor John Ruggie, established the Corporate Law Project.¹ The project involved more than 20 leading corporate law firms from around the world assisting pro bono to identify whether and how corporate and securities law in 39 jurisdictions encourages or impedes companies' respect for human rights.² The former Special Representative also convened several expert consultations to discuss key findings and next steps.

This pro bono research fed into the report: "*Human rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative*" presented by Prof. Ruggie as an addendum to his final report to the UN Human Rights Council in May 2011.³ This Human Rights and Corporate Law Report explored issues of incorporation and listing, directors' duties, reporting and stakeholder engagement.

In particular, with regard to reporting, the 2011 report found that in most surveyed jurisdictions, companies must disclose all information that is "material" or "significant" to their operations and financial condition. Where the human rights impact(s) reaches that threshold, most country surveys suggested that the company would be required to disclose it. Nevertheless, the surveys also confirmed that there is limited regulatory guidance for companies on when the human rights impact(s) might reach that threshold.

The country surveys also highlighted the fact that some States are starting to require corporate social responsibility (CSR) reports for particular types of companies, typically listed companies and State-owned enterprises. Such provisions tended to focus on the reporting of policies rather than on impact, and CSR reports may not be subject to the same accessibility and verification requirements as financial reports.

Since the research for the 2011 report was conducted, there have been a number of notable developments with regard to reporting on human rights, spurred by the convergence of key

¹ For further information on the project, see *Business & Human Rights Resource Centre: Corporate Law*, available at <http://www.business-humanrights.org/SpecialRepPortal/Home/CorporateLawTools>.

² United Nations, *Leading corporate law firms advise UN Special Representative on business and human rights*, available at <http://www.reports-and-materials.org/Corporate-law-firms-advise-Ruggie-23-Mar-2009.pdf>.

³ *Human rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Addendum, A/HRC/17/31/ Add.2, 23 May 2011, available at <http://www.shiftproject.org/publication/human-rights-and-corporate-law-trends-and-observations-cross-national-study> (hereinafter, Human Rights and Corporate Law Report).

international standards and other guidance around the provisions of the UN Guiding Principles on Business and Human Rights, combined with growing demands from investors, shareholders, labor, consumer and civil society organizations for accurate information regarding companies' social and environmental impacts.⁴ Shift therefore provides this note to update the research related to reporting, and in particular question 16 of the Human Rights and Corporate Law Report: "Are companies required or permitted to disclose the impacts of their operations (including human rights impacts) on non-shareholders, as well as any action taken or intended to address those impacts, whether as part of financial reporting obligations or a separate reporting regime?"⁵

Although this note provides an update where recent regulations and/or stock exchange requirements encourage or compel human rights-related information to be disclosed by companies, it is not intended to describe the effectiveness of those reporting requirements in practice. Where the language updates a specific paragraph in the Human Rights and Corporate Law Report, the paragraph updated is indicated in square brackets.

1. Regulatory Requirements

A number of governments and inter-governmental organizations have recently adopted requirements relating to human rights reporting.

Developments in the European Union and EU Member States

On 16 April 2013, the **European Commission** adopted a proposal to amend directives on reporting in order to increase the relevance, consistency and comparability of information disclosed by companies across the European Union. The proposal provides that large EU companies (i.e., those that have over 500 employees and a balance sheet total of over EUR 20 million or a net turnover of over EUR 40 million, which is approximately 18,000 companies in total) would be required to disclose a statement in their annual reports with information relating to at least environmental, social and employee matters, respect for human rights, and anti-corruption and bribery matters.⁶ Within these areas, the statement would include (i) a description of the company's policies, (ii) results of those policies and (iii) the risks related to these matters and how the company manages those risks.⁷ If the company does not have policies in relation to one or more of these matters, it would need to provide an explanation for why it does not. The European Commission's proposal notes that companies may rely on national, EU-based or international frameworks, including the UN Guiding Principles on Business and Human

⁴ For instance, the Guiding Principles have been incorporated or reflected in the OECD Guidelines for Multinational Enterprises, the ISO 26000 Guidance Standard on Social Responsibility, the revised Sustainability Framework and Performance Standards of the International Finance Corporation, and the European Commission's 2011 Communication on Corporate Social Responsibility.

⁵ Human rights and corporate law report at p. 28.

⁶ *Proposal for a Directive amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups* (April 16, 2013), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013PC0207:EN:NOT>.

⁷ Id. at 6.

Rights.⁸ Shift, with its Chair Prof. John Ruggie, has submitted amendments to the European Commission’s proposal to enhance its alignment with the UN Guiding Principles.⁹

In the **United Kingdom**, the Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013 (the Regulations) – which amend the Companies Act and became effective on 1 October 2013 – require quoted companies to prepare a strategic report as part of their annual report. Specifically, the strategic report must – to the extent necessary for an understanding of the development, performance or position of the company’s business – include information about (i) environmental matters, (ii) the company’s employees, and (iii) social, community and human rights issues, including information about any policies of the company in relation to those matters and the effectiveness of those policies.¹⁰

[Update to para. 133 of the 2011 report]

A **Danish** reporting regulation, adopted in 2008 and under which companies reported for the first time in 2010, requires the largest companies in Denmark (approximately 1,100 in total) to supplement their management’s review with a report on corporate social responsibility.¹¹ In June 2012, the Danish Parliament specifically included reporting on policies for respecting human rights within the legal requirement to report on CSR. Accordingly, Denmark’s largest companies are now also to provide information on their policies for respecting human rights in their financial reports, or to state that they have no such policies.¹² The comments to the law (while in draft format), as well as the “CSR Kompass”, provide guidance on implementation, and specifically reference the UN Guiding Principles.¹³

[Update to para. 130 of the 2011 report]

In **France**, listed companies have been required since 2001 to provide non-financial reports regarding social, environmental and governance aspects.¹⁴ The Grenelle II Act of 2010, integrated into the French Commercial Code in 2012, requires a larger number of companies to provide information in their annual reports “on how they take into account the social and environmental consequences of

⁸ Id. at 7.

⁹ Shift, *Shift and John Ruggie Submit Amendments to EC Reporting Directive* (October 2013), available at <http://www.shiftproject.org/news/shift-and-john-ruggie-submit-amendments-ec-reporting-directive>.

¹⁰ *The Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013*, available at <http://www.legislation.gov.uk/ukdsi/2013/9780111540169/contents>.

¹¹ Corporate social responsibility is defined as the way that “businesses voluntarily include considerations for human rights, societal, environmental and climate conditions as well as combating corruption in their business strategies and corporate activities.” Danish Financial Statements Act no. 1403 of 27 December 2008 (available in English in draft form at http://csr.gov.dk/file/319999/proposal_report_on_social_resp_december_2008.pdf).

¹² See *Act on Establishing a Mediation and Complaints Institution for Responsible Business Conduct 2012*, available at <https://www.retsinformation.dk/Forms/r0710.aspx?id=142515>. See also IHRB, *From Principles to Practice: The European Union operationalizing the United Nations Guiding Principles on Business and Human Rights*, available at <http://www.ihrb.org/pdf/2012-05-07-Danish-EU-Presidency-Conference-Report.pdf>.

¹³ Guidance material to draft law on Establishing the Mediation and Complaints Institution for Responsible Business Conduct 2012, including remarks, available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=141092>; see also CSR Kompass, available at <http://www.csrkompasset.dk>.

¹⁴ Article 116 of the NRE Act (Law on New Economic Regulations), available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT00000223114>.

[their] activity and [their] social commitments in favour of sustainable development.”¹⁵ The number of companies subject to this requirement has been expanded beyond listed companies to include companies with over 500 employees. The topics to be reported on include human rights, social impacts, and relations with stakeholders – as part of the company’s commitments to sustainable development.¹⁶ The requirement follows a “comply or explain” approach, whereby companies who omit information deemed non relevant describe why they choose not to disclose this information. The French Ministry of Foreign Affairs refers to the UN Guiding Principles as one of “the main international guidelines on CSR reporting” that companies can refer to.¹⁷ [Update to para 130 of the 2011 report]

In **Sweden**, since 2008 the government provides guidance to state-owned enterprises on how they should prepare their sustainability reports, based on the principle of “comply or explain”. In so doing, the government makes clear that issues relating to sustainable development include “ethical issues, the environment, human rights, gender equality and diversity.”¹⁸ [Update to para. 137 of the 2011 report]

Developments beyond the European Union

Since 1 July 2013, the **United States** requires U.S. companies investing over \$500,000 in Myanmar or investing with the country’s energy monopoly, Myanmar Oil and Gas Enterprise, to publicly disclose information on their policies and procedures, including relating to human rights, worker rights, anti-corruption, land acquisition, grievance mechanisms and the environment.¹⁹ The reporting requirements refer to the UN Guiding Principles for further information on human rights principles and practices and grievance processes.

On 22 July 2012, the U.S. Securities and Exchange Commission adopted a rule mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act to require listed companies to publicly disclose their use of conflict minerals that originated in the Democratic Republic of the Congo or an adjoining country.²⁰ The rule was upheld by a federal court,²¹ and companies will file their first disclosure reports relating to conflict minerals on May 31, 2014 for the 2013 calendar year.

¹⁵ Article L225-102-1 of the French Commercial Code, available at

[http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=033BE9CFFB7EE9714BE206672BFC057F.tpdjo06v_3?cidTexte=LEGITEXT000005634379&idArticle=LEGIARTI000006224809&dateTexte=.](http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=033BE9CFFB7EE9714BE206672BFC057F.tpdjo06v_3?cidTexte=LEGITEXT000005634379&idArticle=LEGIARTI000006224809&dateTexte=)

¹⁶ Implementing decree published on April 26, 2012.

¹⁷ Ministère des Affaires étrangères - France, Office of the Ambassador at large for Corporate social Responsibility, *The French legislation on extra-financial reporting : Built on consensus*, available at http://www.diplomatie.gouv.fr/en/IMG/pdf/Mandatory_reporting_built_on_consensus_in_France.pdf.

¹⁸ Regeringskansliet (Swedish Government), *Guidelines for external reporting by state-owned companies* at 1 (2007) <http://www.government.se/content/1/c6/09/41/25/56b7ebd4.pdf>.

¹⁹ U.S. Department of State, *Reporting Requirements on Responsible Investment in Burma*, available at

<http://www.humanrights.gov/wp-content/uploads/2013/05/Responsible-Investment-Reporting-Requirements-Final.pdf>.

²⁰ U.S. Securities and Exchange Commission, 17 CFR Parts 240 and 249b, *Release No. 34-67716; File No. S7-40-10 on Conflict Minerals*, available at <http://www.sec.gov/rules/final/2012/34-67716.pdf>.

²¹ Jones Day, *U.S. District Court Upholds SEC’s Conflict Minerals Rule* (July 2013), available at <http://www.jonesday.com/us-district-court-upholds-secs-conflict-minerals-rule-07-29-2013/>.

Another development in the U.S. relates to the California Transparency in Supply Chains Act of 2010 which requires retailers and manufacturers doing business in California to disclose their efforts to eradicate slavery and human trafficking from their direct supply chains for goods offered for sale.²² [Update to para. 135 of the 2011 report]

In **India**, the government launched the ‘National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business’ (revised in 2011) to encourage Indian companies to disclose their responsible business practices.²³ Principle 5 of the guidelines state that “[b]usinesses should respect and promote human rights ... tak[ing] into account the ‘Corporate Responsibility to Respect Human Rights’, as referred [to] in the United Nations ‘Protect, Respect, Remedy’ Framework.”²⁴ The guidelines further provide a suggested framework for companies’ business responsibility reports, including encouraging a “[s]tatement on the policy of the business entity on observance of human rights in their operation” as well as a “[s]tatement on complaints of human rights violations filed during the reporting period.”²⁵

In **Norway**, legislation passed in April 2012 requires large companies to provide information on how they integrate social responsibility into their business strategies, including any policies, principles, procedure and standards that are followed.²⁶ The Norwegian government specifies that “respecting human rights; upholding core labour standards and ensuring decent working conditions; taking environmental concerns into account; combating corruption; and maximising transparency” are central when it comes to corporate social responsibility.²⁷

Finally, in 2012, the governments of **Brazil, Denmark, France and South Africa**, later joined by **Norway and Colombia**, came together in an initiative to commit to corporate sustainability reporting, in support of Paragraph 47 of the UN Conference on Sustainable Development (Rio+20) outcome document.²⁸ These governments agree on the importance of corporate transparency and sustainability reporting, and that they have a role to play in advancing it.

²² *The California Transparency in Supply Chains Act of 2010* (effective on January 1, 2012), available at <http://www.state.gov/documents/organization/164934.pdf>.

²³ *The National Voluntary Guidelines (NVGs) on Social, Environmental and Economical Responsibilities of Business* (2011 revision by Ministry of Corporate Affairs), available at http://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf.

²⁴ Id.

²⁵ Id.

²⁶ Prop 48 L (2012-2013) 2012 Oslo: Royal Norwegian Ministry of Finance, <http://www.regjeringen.no/nb/dep/fin/dok/regpubl/prop/2012-2013/prop-48-l-20122013.html?id=709311>.

²⁷ *White Paper on Corporate social responsibility in a global economy*, Report No. 10 (2008-2009) to the Storting, available at http://www.regjeringen.no/pages/2203320/PDFS/STM200820090010000EN_PDFS.pdf.

²⁸ Paragraph 47 of the outcome document *The Future We Want* notes: “[w]e 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 as well as 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 reporting, taking into account the experiences of already existing frameworks, and paying particular attention to the needs of developing countries, including for capacity building.”

2. Stock Exchange Requirements

Stock exchanges are increasingly requiring listed companies to publicly disclose environmental, social and governance (ESG) information, and, in some cases, human rights-related information as well.

The Sustainable Stock Exchanges Initiative was launched in 2010 to promote reporting on environmental, social, and corporate governance risks and opportunities by publicly traded companies. It “is an initiative aimed at exploring how exchanges can work together with investors, regulators, and companies to enhance corporate transparency, and ultimately performance, on ESG (environmental, social and corporate governance) issues and encourage responsible long-term approaches to investment.”²⁹ Eight exchanges belong to the Sustainable Stock Exchanges Initiative, namely from the **U.S.** (NYSE Euronext and NASDAQ OMX, BSE Ltd.), **Brazil** (BM&FBOVESPA), **South Africa** (the Johannesburg Stock Exchange), **Egypt** (The Egyptian Exchange EGX), **Turkey** (Borsa Istanbul) and **India** (MCX Stock Exchange Ltd. MCX-SX and Bombay Stock Exchange BSE Ltd.).

Since 31 March 2012, the Securities and Exchange Board of **India** (SEBI) requires that the 100 largest listed companies submit business responsibility reports as part of their annual reports.³⁰ Other companies are to be included in this requirement in “a phased manner.” As detailed above, the Indian government encourages companies to include information relating to human rights in these business responsibility reports.³¹

Bursa **Malaysia** in 2010 launched its Business Sustainability Program to encourage Malaysian publicly listed companies to integrate sustainability into their business strategies. In its guidance to company directors on sustainability, Bursa Malaysia includes human rights as one of the common sustainability issues impacting companies and industries, and as one of the information needs for stakeholders (including non-governmental organizations, suppliers, and the community at large).³²

The **Indonesian** Capital Market and Financial Institution Supervisory Agency (Bapepam-LK) requires listed companies to include information on the activities and budget spent to enforce social and environment responsibility in their annual corporate reports.³³ This includes information relating to labor issues, social and community development, and the health and safety of the consumer.³⁴

In 2011, **Singapore** Exchange (SGX) introduced a Sustainability Reporting Guide for its listed companies. The exchange “encourages the company to disclose its sustainability policy, including mitigation of risks, performance data and other material information which deepens stakeholders’ understanding of

²⁹ Sustainable Stock Exchanges Initiative, available at <http://www.sseinitiative.org>.

³⁰ Securities and Exchange Board of India, SEBI Board meeting of November 24, 2011, available at <http://www.sebi.gov.in/sebiweb/home/detail/22104/yes/PR-SEBI-Board-meeting>.

³¹ *The National Voluntary Guidelines (NVGs) on Social, Environmental and Economical Responsibilities of Business* (2011 revision by Ministry of Corporate Affairs), available at http://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf.

³² 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.

³³ 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/BI/2012, ed. (2012).

³⁴ Id. at Appendix, point h.

corporate performance. Sustainability reporting complements financial disclosure to give a comprehensive account of how the company has performed. Companies should provide a balanced and objective view of their performances by including both positive and negative impacts.”³⁵

The Stock Exchange of **Thailand** (SET) released guidelines on social responsibility and reporting in 2012, including an ‘Approach to Social Responsibility Implementation for Corporations.’³⁶ This guidance encourages listed companies to produce sustainability reports, and refers to human rights as one of the core subjects of social responsibility in ISO 26000. It also defines CSR as extending beyond philanthropy, and encourages Thai companies to operate in a socially responsible way with consideration to impacts on the company, society and the environment.³⁷

In **Brazil**, the São Paulo Stock Exchange (BM&FBOVESPA) since 2012 asks its listed companies to state whether they publish a regular sustainability report and where it can be accessed, or explain why they do not.³⁸ The stock exchange notes that this “encourages companies to progressively adhere to the practice of reporting to their investors information and results which are related to environmental, social, and corporate governance (ESG) issues.”³⁹

In **South Africa**, the Johannesburg Stock Exchange since 2010 requires its 500 listed companies to produce integrated reports, which combine financial data with reporting on ESG issues, or explain why they cannot. The King Report on Corporate Governance in South Africa of 2009 (King III, effective on March 1 2010 and amended in 2012) includes an integrated report disclosure checklist.⁴⁰

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³⁵ Singapore Exchange (SGX), *Guide to Sustainability Reporting for Listed Companies* at 5, available at http://rulebook.sgx.com/net_file_store/new_rulebooks/s/g/SGX_Sustainability_Reporting_Guide_and_Policy_Statement_2_011.pdf.

³⁶ ASEAN CSR Network, *Thai stock exchange publishes guidance documents on CSR*, available at <http://asean-csr-network.org/c/news-a-resources/csr-news-from-around-asean/73-thai-stock-exchange-publishes-guidance-documents-on-csr>; see also <http://www.set.or.th/en/index.html>

³⁷ Mia Overall and Komchai Thaiying, *The Stock Exchange of Thailand (SET) Releases Guidelines on Social Responsibility and Reporting*, available at http://syntao.com/CSRNews/CSRNews_Show_EN.asp?ID=15403.

³⁸ BM&FBOVESPA, *Sustainability Report or Similar Document*, available at <http://www.bmfbovespa.com.br/en-us/markets/equities/companies/sustainability-report.aspx?Idioma=en-us>.

³⁹ Id.

⁴⁰ Institute of Directors in Southern Africa, *King Report on Corporate Governance in South Africa of 2009* (amended in 2012), available at http://c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/94445006-4F18-4335-B7FB-7F5A8B23FB3F/King_Code_of_Governance_for_SA_2009_Updated_June_2012.pdf.