



## CORPORATE LAW TOOLS PROJECT MEETING

NEW YORK – 30 JUNE 2009

### BACKGROUND

In June 2008, after extensive global consultation with business, governments and civil society, the SRSG proposed a policy framework for managing business and human rights. It is based on three complementary pillars: the **state duty to protect** against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the **corporate responsibility to respect** human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and greater **access by victims to effective remedy**, judicial and non-judicial. The UN Human Rights Council (HRC) unanimously welcomed the Framework, and extended the SRSG's mandate by three years with the task of operationalizing it.

The SRSG has emphasized that under their **duty to protect**, states should foster corporate cultures respectful of rights, including via business-focused domains which historically have been kept institutionally separate from human rights. This includes corporate and securities law. Corporate law directly shapes what companies do and how they do it. Yet its implications for human rights remain poorly understood. Traditionally, the two have been viewed as distinct legal and policy spheres, populated by different communities of practice. Nevertheless, in his 2008 and 2009 HRC reports the SRSG highlighted recent developments which suggest that regulators and legislators are beginning to link corporate governance with management of social, environmental and ethical impacts, including human rights.<sup>1</sup>

To build on this knowledge, the SRSG announced in early 2009 that nineteen leading corporate law firms from around the world would provide pro bono support in identifying whether and how national corporate law principles and practices in over forty jurisdictions currently foster corporate cultures respectful of human rights.<sup>2</sup> The firms agreed to look at a range of corporate law topics as they relate to business and human rights, including incorporation and listing; directors' duties; reporting; and stakeholder engagement.<sup>3</sup> They were asked to explore not only what laws currently exist, but also how corporate regulators and courts apply the law to require

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<sup>1</sup> See A/HRC/8/5 (2008), at paras: 29- 32; and A/HRC/11/13 (2009) at paras: 24 – 27. Both reports are available on the SRSG's website: <http://www.business-humanrights.org/SpecialRepPortal/Home>.

<sup>2</sup> Press release (with a full list of participating firms) available at: <http://www.reports-and-materials.org/Corporate-law-firms-advise-Ruggie-23-Mar-2009.pdf>.

<sup>3</sup> The research template provided to the firms is available at: <http://www.reports-and-materials.org/Ruggie-template-for-corporate-law-tools-project-May-2009.pdf>.

or facilitate consideration by companies of their human rights impacts and preventative or remedial action where appropriate. This project is termed the “Corporate Law Tools Project” (CLT project), because its goal is to look at how governments may use corporate law as a tool to fulfill their state duty to protect and also support companies in fulfilling their responsibility to respect: “law” is used loosely to include hard law as well as corporate governance codes and guidelines; and “corporate” encompasses corporate and securities regulation.

The firms’ reports will be posted on the SRSB’s website this Fall, accompanied by a summary report highlighting key trends. To further assist the SRSB as he decides what recommendations he might make to states and other actors in this area, York University’s Osgoode Hall Law School, with support from the UN Office of the High Commissioner for Human Rights and the assistance of local sponsors, will convene an expert multi-stakeholder consultation in support of this project in November 2009 in Toronto.

## AIMS OF THE MEETING

The SRSB convened the participating firms in the CLT project on 30 June 2009 in New York, kindly hosted by Weil, Gotshal and Manges LLP, to discuss emerging trends, overarching conceptual issues and challenges in preparing individual reports. Thirteen of the nineteen participating firms attended, representing twenty-four jurisdictions from civil and common law countries.<sup>4</sup>

Ira Millstein, senior partner at Weil, Gotshal & Manges LLP welcomed the participants. Mr. Millstein spoke of his firm’s submission to the SRSB in 2008 to address concerns that the Framework sought to impose new obligations on companies under corporate law.<sup>5</sup> He reiterated his view that the Framework imposed no new legal duties, but reflected a growing social consensus that human rights considerations are increasingly important to companies and their stakeholders, which is in fact already reflected in US corporate law. Mr. Millstein said that such expectations will continue to feature prominently in the law and that the SRSB is playing an important role in raising awareness amongst states and business of such developments. He concluded that because close attention is now being paid to the inadequacy of risk management in the wake of the financial collapse, it makes particularly good business sense for companies to think about their human rights risks and act on them.

The SRSB thanked Mr. Millstein for the firm’s support and for hosting the event. He explained the importance of considering corporate law as one tool available to states to help encourage companies to respect rights, as well as exploring the ways in which corporate law could impede corporate respect for rights. In that way the CLT project falls directly under his work regarding the state duty to protect, with clear links to the corporate responsibility to respect. He thanked all of the participants once again for donating their time to the project.

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<sup>4</sup> A participants’ list is provided at the end of this report.

<sup>5</sup> Submission available at: <http://www.reports-and-materials.org/Weil-Gotshal-legal-commentary-on-Ruggie-report-22-May-2008.pdf>.

## SESSION 1: TESTING ASSUMPTIONS

There were four substantive sessions, starting with a discussion of some foundational assumptions in this area and moving on to address common challenges in implementing new legal obligations as well as next steps for the SRSG in pushing this debate forward. These sessions were held under the Chatham House Rule of non-attribution.

Session 1 aimed at testing underlying assumptions of the CLT project, for example that corporate law and human rights have traditionally been kept institutionally and conceptually separate, and that greater integration between corporate and securities law and human rights would encourage more companies to consider, and act on, their human rights impacts.

Presenters outlined the current state of corporate law in their respective jurisdictions. They generally agreed that corporate law in many jurisdictions already requires, or at least allows, companies to consider human rights in some way, but does not necessarily do so in “human rights language.” Some presenters from common law jurisdictions emphasized the difference between common law (essentially case-law) and statutory approaches, including the imposition of new legislative obligations. One presenter argued that case-law was the appropriate means for integrating human rights considerations into corporate law as it can better adjust organically in line with society’s expectations, whereas statutory responses could have unexpected and potentially negative ramifications. However, several participants countered that statutory changes may have many of the same drivers as case-law and are more likely to enhance certainty.

Various presenters also highlighted that especially in federal states, there may not be a monolithic approach to human rights and corporate law. A variety of legal and semi-legal regimes might apply to a single corporate entity. These responsibilities engage human rights in ways that are often indirect or implicit. For instance, obligations might be imposed on companies at the national or local level in the form of anti-discrimination, employment and fair housing laws. Even if the corporate law does not impose direct human rights obligations as such, it may require companies to report on breaches of these laws, or in some cases hold officers accountable for failing to abide by them.

The group discussed when companies might be required to report on human rights impacts – ostensibly when such impacts can be viewed as “material”. The participants also discussed when companies could or should report on such impacts, even without materiality. Some attendees expressed concern that where such reporting is not required for all companies, companies reporting voluntarily could face competitive disadvantages and even greater exposure to liability. There was a sense that courts and regulators could play an important role in helping to mitigate such risks including by defining “materiality” as including human rights impacts. However, some participants viewed regulators as having greater potential than courts to help develop guidance and concrete standards.

Some participants worried that the standardization of corporate rules and regulations could prompt “tick box” approaches to legal compliance, which focus on the company being able to prove that it is adhering to the letter of the law even if it hasn’t truly changed its behavior in line with the law’s purpose. Some argued that to prevent this situation, any new obligations, particularly regarding disclosure, should be process rather than outcome oriented. In this

regard, others raised examples of recent requirements in some jurisdictions for companies to prove that they have ethical “corporate cultures” in order to avoid liability or limit sanctions where liability has been established. They suggested that promoting cultural change may go a long way to preventing “tick box” approaches.

The discussion then turned to the importance of markets, citing that corporate governance standards, including expectations regarding social and environmental issues, have been imposed as a listing condition in several jurisdictions. Within the market, shareholder engagement (where such engagement is supported, or at least not hindered by, the regulator) could also be influential, as well as the use of indices for socially responsible behavior. However, some participants were concerned that companies may choose to list elsewhere if other jurisdictions have lower compliance costs. Others countered that companies will stay “where the money is.”

Some participants highlighted the concern that privately-owned companies, particularly small and medium enterprises would not be influenced by market expectations and rules and therefore it could be difficult to hold them to the same standards. Moreover, several participants from emerging economies noted that the market may play a limited role in those jurisdictions, as major companies tend to be state or family owned. In such jurisdictions, public embarrassment or shaming, facilitated by the media, could achieve a similar effect to market regulation. Some participants suggested that whether or not there is a functioning market, maintaining a social license to operate can be as crucial to non-listed companies in emerging markets as for listed companies in developed markets.

## SESSION 2: IMPLEMENTATION AND ENFORCEMENT

Even in jurisdictions with corporate laws or policies that seem to mandate or at least strongly encourage companies and their officers to take steps to respect human rights, there are questions about effective implementation and enforcement. Session 2 aimed to explore some of these issues, including whether new corporate law obligations to directly or indirectly consider human rights impacts are backed up by implementation and enforcement measures; the pros and cons of providing companies and their officers with wide discretion in this area; and the role which regulators and other government agencies may play in helping such actors to comply with new laws and policies.

The session began with an acknowledgement that implementation and enforcement are key to any effective integration of human rights into corporate law.

One presenter surveyed implementation and enforcement across the jurisdictions included in the CLT project and highlighted the role of corporate governance codes in encouraging better behavior by corporations, especially in the European Union. These codes, which apply mainly to publicly listed companies, may not always have binding legal force but do tend to impact on companies’ behavior given the reputational and other risks of non-compliance, including delisting. And some codes incorporate legal duties of “comply or explain” which can do much to encourage companies to think about why they are not complying with a particular standard.

Nevertheless, some countries have moved towards stronger enforcement measures where softer ones were not seen as effective. For example, the consequences for non-compliance with mandatory social reporting obligations had been strengthened in one country after the failure of companies to comply with more ambiguous measures. And even then there was skepticism that

the stronger provisions would make a difference. Participants said frankly that corporate lawyers who want to act professionally *and* in their clients' best interests may struggle with telling their clients to strictly abide by the law when there is little risk of sanction for non-compliance.

Another presenter called for greater care to be taken in defining key concepts used in new statutory instruments. For instance, it was suggested that the word "stakeholder", increasingly visible in new statutes when talking about the interests a company should consider, may have different meanings in different jurisdictions. This can lead to greater uncertainty for companies and in fact, "stakeholders" themselves. And it also begs the question of in whose favor these laws are being, or should be, enforced?

On the issue of discretion afforded to corporate officers in fulfilling their duties, presenters agreed that the difference between common and civil law jurisdictions is fading. In most jurisdictions, there exists the common requirement that directors act in the "company's best interest," even if it is interpreted differently, including in relation to consideration of human rights. In some countries this responsibility is interpreted to mean that directors are permitted and in some cases required, to consider the impacts of the company on non-shareholders, including social impacts that would extend to human rights. However, such provisions or interpretations tend to be formulated within the context of furthering the company's long term success, which is generally still based on profit generation.

Another presenter noted the important role of regulators in helping to guide companies and their officers where they do have significant discretion. However, this could be undermined where regulators act without independence or transparency, especially when social and environmental issues, including human rights, are politically unpopular.

Participants echoed the presenters' emphasis on enforcement. In particular, one attendee from an emerging economy said that it was difficult to enforce corporate governance principles generally in their jurisdiction, let alone corporate consideration of social and environmental issues, including human rights. Accordingly, not only are clearer laws needed, but also institutions that are empowered to enforce them. And given the significant role that stock exchanges can play, emerging economies should be supported as they establish such institutions.

Participants also discussed the role that some national constitutions may play in helping to ensure that corporate law provisions are interpreted in line with respect for human rights, thereby potentially opening up new causes of action against companies for failing to respect rights. However, there may be considerable financial and procedural impediments to launching such actions and not all constitutions contain such levers.

Regarding the discretion that is and should be provided to companies in considering human rights, some participants worried that constraining discretion by imposing specific obligations on companies to consider, act on and report human rights impacts might do more harm than good. They worried about second-guessing business judgments which could impair creative action. And they wondered if such obligations might make companies less likely to invest in emerging economies with higher risks of human rights abuses. However, others pointed to increased certainty from such obligations and the fact that some reduced discretion, just as in other areas

where companies manage risky situations, may help companies to avoid liability and improve their performance.

On the issue of the types of guidance that might best help companies to navigate any express or implied duties under corporate law to consider human rights, attendees agreed that it is crucial for such guidance to be tailored the market. The training or guidance tools that might work in a highly sophisticated economy will likely be inappropriate for an emerging economy and vice versa. Regulators and other relevant actors should therefore base guidance tools on the jurisdiction's unique economic and developmental setting, and also consider whether different types of information are necessary for publicly *versus* privately owned companies, as well as large *versus* small and medium companies.

### SESSION 3: DUE DILIGENCE

This session addressed whether human rights due diligence by companies could increase their liability, whether under corporate law or other areas of law, as the SRSB discussed in his 2009 report.<sup>6</sup> Some have suggested that by knowing a certain amount of information the company is exposed to an increased threat of litigation, including for any acts or omissions in relation to foreign subsidiaries.

The discussion initially considered types of risks that might arise from a company undertaking human rights due diligence, such as being sued for not meeting its promises, particularly representations made in human rights or corporate social responsibility policies; being criticized for conducting ineffective human rights due diligence; increasing disclosure obligations; and being held to higher standards of care than might otherwise have applied.

The participants agreed that in some cases those risks could materialize. However, many did not think they were any different to those that would confront companies dealing with other difficult situations that they are required to disclose information about and manage. And attendees agreed that as with other areas of law, it is rarely acceptable to “stick one’s head in the sand,” especially when inaction can be just as risky as action. Rather, being transparent about one’s commitments and being fully aware of risks and opportunities is likely to help companies in the long run. As noted above, this is especially the case in jurisdictions where an ethical corporate culture is relevant in establishing liability for companies, as well as in determining penalties once they have already been found liable.

One participant noted that a business association in their jurisdiction had established processes whereby companies sign up to a code of conduct that includes confidential disclosure of their due diligence activities, including in relation to human rights. A company’s failure to report to the association in line with these guidelines has consequences of its own but the company’s information stays confidential. Some participants agreed that coupled with other implications for non-compliance, private disclosure could encourage companies to pay greater attention to their human rights impacts while worrying less about increased liability from doing so. Others felt that public disclosure is an important factor in facilitating better company behavior and that in any case, such disclosure is increasingly required by corporate law.

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<sup>6</sup> See A/HRC/11/13 at paras: 80 – 84.

The discussion then turned to the added complexity of the modern corporate form, particularly joint ventures and parent-subsidiary structures. There was a sense that transnational companies would be reluctant to expose themselves to liability for the activities of their business partners abroad, and therefore would avoid assessing their human rights impacts and reporting on them. However, it was also highlighted that transnational companies may face increased liability as much for their omissions as for their actions in relation to such partners.

The participants also considered incentives that governments might provide for companies to engage in human rights due diligence. In particular, could the implementation of a human rights due diligence process lessen penalties for a corporation or negate liability? This conversation reiterated earlier discussions about whether companies are required under corporate law to consider, report and act on human rights impacts in the first place, and showed the strong links between the state duty to protect and the corporate responsibility to respect. Mixed into the discussion was also a concern that access to effective remedy could be impacted if corporations can avoid liability entirely where they act with due diligence, even if they are ultimately responsible for the harm.

There was agreement that corporate officers and legal counsel would continue to be concerned about human rights due diligence leading to greater liability. Awareness-raising amongst corporate lawyers of the benefits of due diligence and the legal risks of ignoring it could do much to allay those concerns, including the fact that elements of the due diligence process are increasingly becoming mandatory as part of general risk management. Several participants reiterated that legal duties aside, it makes good business sense to undertake human rights due diligence, as it helps companies identify risks proactively, before escalation of conflicts and costs occurs.

#### SESSION 4: NEXT STEPS

As noted above, the SRSB has found that governments, courts and regulators are beginning to introduce public interest considerations into corporate law, even if not necessarily couched in human rights language. This session explored participants' views on whether legal or policy reform is necessary and desirable in this area, the form it might take and what factors might enable or impede new measures. Where participants have already encountered such reform activities in their jurisdictions, they were also asked to provide their perspectives on key catalysts and stakeholders.

One presenter felt that regulators and companies must better understand why human rights are relevant to corporate law before there would be sufficient political momentum for reform in this area.

Another presenter noted that their jurisdiction already requires, at least implicitly, companies to consider their broader social impacts, including human rights. This is in part due to requirements for companies to "comply or explain" through listing rules and other corporate governance codes. The presenter's view was that publicly-listed companies in the jurisdiction were making progress in developing corporate cultures more respectful of rights. An outstanding issue is how to influence companies that are not listed, including small and medium sized companies, but one shouldn't underestimate the benefits of getting publicly listed companies to engage on these issues.

Several presenters discussed the pros and cons of importing foreign standards in order to promote change. One said this had worked quite well in their jurisdiction, as foreign investors expected local companies to fulfill them, ultimately leading to more socially responsible behavior in order to retain a competitive edge. Another said that in their jurisdiction, taking on the standards of a country with a completely different political, economic and cultural background meant that they were too difficult to embed.

Participants thought that broad policy guidance from the SRSG would be helpful. However, they emphasized that law and policy reform in this area is heavily dependent on a jurisdiction's historical, political and economic context. This meant that model provisions would be unlikely to work across the board. More process-oriented recommendations could be helpful, particularly on the guidance that regulators and other relevant actors can provide to companies, and the broad subject areas legislators and regulators may wish to address when considering, and consulting on, policy and legal reform in this area.

Several participants agreed that voluntary corporate governance codes can be very effective in initiating reform in this area, as they may then act as catalysts for mandatory options, including judicial interpretations of existing law and statutory obligations. Voluntary codes may also be effective where corruption within government agencies and regulators is an issue. Other participants felt that statutory obligations would do more to increase certainty, particularly in relation to disclosure. Regardless, the participants agreed that law and policy reform should follow consultation with all relevant parties in order to increase its legitimacy and effectiveness, and get to the heart of systemic issues.

## SUMMING UP

The SRSG noted that one challenge facing the mandate is to make recommendations broad enough to apply to a variety of countries and business sectors without losing their meaning and relevance. Accordingly, it was important to further test the ideas discussed at the meeting and raise awareness of emerging trends to help developments in different jurisdictions reinforce each other. The participating firms were playing a vital role in this global collaboration, and were also helping to expand the networks of individuals and organizations thinking about these issues. The SRSG concluded by saying he looked forward to further robust discussion at the Toronto multi-stakeholder consultation.

For further questions about the CLT project, please contact Vanessa Zimmerman, Legal Advisor to the SRSG ([vanessa\\_zimmerman@hks.harvard.edu](mailto:vanessa_zimmerman@hks.harvard.edu)).

## LIST OF ATTENDEES

ORGANIZATION	ATTENDEES
<b>Firms</b>	
Carey & Allende – Santiago	Jorge Allende Jr. (Associate)
Clifford Chance - London	Rae Lindsay (Partner); Valeria Calafiore (Associate)
Cotty Vivant Marchisio Lauzeral – Paris	Arthur Dethomas (Partner)
Creel, Garcia-Cuéllar, Aiza & Enriquez – Mexico City	Alfonso Garcia-Mingo (Partner)
Ghellal & Mekerba - Algiers	Tarik Zahzah (Associate)
Linklaters – Rome	Luigi Sensi (Partner)
Mah-Kamariyah & Philip Koh – Kuala Lumpur	Philip Koh (Partner)
Mannheimer Swartling – Stockholm	Michael Karlsson (Partner)
Mernissi-Figes – Casablanca	Lamya Mernissi (Partner); Saad El Mernissi (Partner)
NautaDutilh N.V. – Amsterdam	Kees Koetsier (Partner)
Souza, Cescon-Avedissian, Barrieu e Flesch – Sao Paulo	Guilherme Forbes (Partner)
Stikeman Elliott - Toronto	Ed Waitzer (Partner); Aaron Fransen (Associate)
Weil, Gotshal & Manges LLP – New York	Ira Millstein (Partner); Holly Gregory (Partner); Oliver deGeest (Associate); Jessica Cunningham (Associate)
<b>SRSG's team/other</b>	
SRSG	Professor John Ruggie
SRSG's team	Vanessa Zimmerman
SRSG's team	Rachel Davis
SRSG's team	Christine Bader
SRSG's team	Andrea Shemberg
SRSG's team	Michael Wright
SRSG's team	Caroline Meledo
Harvard Corporate Social Responsibility Initiative	John Sherman
Osgoode Hall Law School (York University)	Assistant Prof. Aaron Dhir
University of Western Ontario	Assistant Prof. Sara Seck
Osgoode Hall Law School (York University)	Chad Travis

### APOLOGIES

- Abeledo & Gottheil – Buenos Aires
- Allens Arthur Robinson – Melbourne
- Amarchand & Mangaldas & Suresh A. Shroff & Co – Mumbai
- Brigard & Urrutia – Bogota
- Edward Nathan Sonnenbergs – Johannesburg
- Shalakany Law Office – Cairo