STRATEGIES FOR ENHANCING DEMOCRACY BY ELIMINATING LEGAL BARRIERS TO DEVELOPMENT

INTRODUCTION

1. The purpose of this paper is to raise for consideration by Ministers various issues upon which they may wish to reflect and share experience so that the collective goal of ensuring that the law and legal infrastructure in member countries can rise to the challenge of facilitating development.

2. While canvassing various legal issues relevant to development, the main focus of this paper is on development and in particular two issues – land and competition. The issue of competition law comes before this meeting at the request of Law Ministers and Attorneys-General of Small Commonwealth Jurisdictions following their meeting in 2000.

3. The Commonwealth Fancourt Declaration on Globalisation and People Centred Development and the UN Millennium Declaration laid the foundation for countries to overcome the frontiers of poverty and underdevelopment and both organisations called on all nations to work to reduce the growing gap between rich and poor, and to enhance international support to democracies fighting poverty.

4. The links between democracy and good governance on the one hand and poverty and development on the other hand are inevitably apparent from the perspective that "*...poverty must be seen as the deprivation of basic capabilities [to choose a life one has reason to value] rather than merely lowness of incomes...*" (*Development as Freedom*, Oxford University Press 1999, p.86 per Amartya Sen) . The basic capabilities envisaged by this concept of poverty, need not be just material but would also include non-material capabilities such as political freedoms (as espoused in the Harare Declaration) and the sense of security that individuals enjoy.

5. These links were recognised in the Coolum Declaration in which Heads of Government called on the Commonwealth Secretary-General to constitute a high-level expert group to focus on how democracies might best be supported in combating poverty and recommend ways in which we could carry forward the Fancourt Declaration.

6. Law Ministers are aware of the inextricable linkages between a wholesome and independent legal system on one hand and the ability of a country to attract and sustain investment on the other. State capacity building is a critical aspect of creating conditions for development and encouragement for inflows of investment. Each organ of state has its individual role to play in promoting economic growth and in fostering investment initiatives. The reality is that many governments lack the capacity to fulfil this role which is sometimes evidenced by inadequate coordination of objectives between the various departments of government. The non-existent or inadequate policy and legal frameworks for growth invariably evidence this deficiency in capacity. It is strongly arguable that Law Ministers must be much more proactive and vigilant in ensuring that the appropriate legislative foundation is in place.

7. While ministers acting collectively in any one country need to develop national strategies to support development and reduce poverty, there are areas which in many, if not most, Commonwealth countries, fall within the responsibilities of law ministers. A perusal of the World Development Reports over the past couple of years makes clear the role of the legal sector and the importance of the justice system in securing sustainable development targets.

8. Law Ministers, over the years, have considered the question of improving access to justice. The World Development Report 2002 notes, in the chapter on the judicial system, that one of the main findings was that –

> *"the simplification of procedural elements is associated with greater judicial efficiency; both costs and delays are reduced. In many developing countries procedural complexity reduces judicial efficiency ...[and] facilitates corruption in the absence of transparency."*

This remains a critical area for work by law ministers and the research by the World Bank should provide compelling reading for those ministers concerned with the efficiency and effectiveness of, particularly, the courts exercising commercial jurisdiction.

9. The World Development Report for 2003 (already issued) deals, in part, with institutions for sustainable development. It says that –

> *"In many areas, government plays a central role in organising dispersed interests: meeting national goals and balancing competing interests. If a government finds itself unbound by rules (e.g. by a constitution or equivalent with the separation of powers it brings) how can it commit itself as a partner? The private sector will be less willing to invest and do business if instability and risks of expropriatory consequence have not been curtailed. Unless institutions succeed in separating the powers of government and providing meaningful checks and balances, communities and the private sector will be less forward looking, and environmental and natural assets will be hurt through inappropriate investment and conservation."*

10. This Report goes on to ask the vital question "Why would a politician or leader not take steps to strengthen the judiciary and protect property rights? Because a leader who takes steps to build stronger institutions would reap benefits from the stronger economy and better environment only in the long run, and this requires a stable setting with broad political support."

The following parts of this paper deal with –

- the relevance of land and its ownership to development;
- competition law;
- corporations law including company law and corporate governance issues.

A. THE RELEVANCE OF LAND AND ITS OWNERSHIP TO DEVELOPMENT

11. A well functioning democracy can empower the poor and be a significant force for development and poverty reduction. Land remains the fundamental source of life, livelihood and income, and the foundation of both environment and productive activities. Facilitating access to land coupled with certainty of ownership, or tenure for its occupation, possession, and use, is therefore central to understanding how instrumental land is to development.

12. In order to raise capital, the rural farmer and sophisticated businessman alike needs land, be it owned or leased or held communally, as collateral for credit. The ability to raise capital opens up a wide array of options for an individual to utilise it in the way s/he wishes to increase her/his capabilities to enjoy the life s/he chooses.

13. Land law not only creates property rights in land and the ability to alienate those rights, by way of sale, lease, or mortgage, but it also sets out regulations that affect those rights, including environmental legislation; laws creating public rights in land; laws forming the institutions that make allocative and other decisions with regard to customary and public land; and laws enacted to facilitate the operation of property rights systems, such as land registration laws.

14. For users of land, the terms and conditions on which the law makes land accessible to them influence their approach to its use and their incentives to cultivate it carefully, or mine it. The terms and conditions reflect basic allocative decisions of the society and impact on the incidence of poverty and prosperity. They set the patterns and conditions for transactions in land in ways that help determine efficiency of land use and influence emerging patterns of land distribution.

15. Most developing countries however, find themselves in the midst of profound transitions in this area. Some countries are still working with colonial era statutes, which are outdated and require review and reform. In the Caribbean, key land issues which have been identified for past and ongoing projects include:

- The poor, indigenous peoples and women often lacking equitable and sufficient access to land;
- Informal communities surrounding cities needing secure land rights;
- The clarification of land rights to improve otherwise sluggish land markets, limited access to capital, and stagnant economies;
- The need for modern documentation technology when updating inadequate property record systems;
- Improvement on management of state lands so that environmental degradation can be curbed;
- Community of management of natural resources to ensure community access to those resources and provide models for sustainable resource management.

16. The task of providing an adequate legal environment for the effective and productive use of land and more importantly its use for collateral, is complicated and sometimes frustrated in many countries by problems in one or more of the following areas:-

- **Systems of land title and registration in use in countries** marked by the absence of any or any effective system of land titling and registration to make owners easily identifiable and to speed up the process of formalising security of tenure: e.g in St Vincent and the Grenadines, problems within an antiquated registration system were found to pose a major constraint to landholders' access to registration and tenure security;
- **Leasehold interests** where there is a lack of enabling legislation which permits the extension of tenure for leasehold interests in lands which have been improved for commercial and/or industrial purposes; (e.g. the case of sugarcane farmers in Fiji) or where the tenure of leasehold interest expires before the term of a mortgage does (a problem that often arises in jurisdictions like Australia) or where there are problems of management of leaseholds on state lands and need for greater tenure security (e.g Antigua and St Kitts)
- **The means of dealing with traditional ownership of land** where parallel and often overlapping formal and informal or traditional ownership systems of land rules exist. The informal systems may be deeply grounded culturally, as with customary land tenure systems. In some countries, e.g. Samoa, alienation of customary land by sale or mortgage is prohibited under the Constitution unless authorised by statute. In others, there are relatively recent initiatives in self-governance by communities when the State has failed to provide effective rules governing land use. Whilst these systems may have well defined ambits in law, there may be in fact overlaps between them which often represent struggles for power over resources.

- **Equitable succession laws** where even although they exist, the social norms prevent or hinder the observance of such laws (e.g. India)

- **Women's property rights** where there is need to legislate and implement laws which allow or recognise women's rights to access, use and own land; (e.g. Africa)

- **Land ownership and environmental sustainability** to ensure that economic growth is environmentally sustainable and that the quality of poor people's environments is maintained. Land and resource use must be sustainable if it is to continue to bring economic returns in the long run, and maintain vital environmental services such as watershed and climate regulation. Poor people's direct rights of access to environmental resources on which they depend are also critical. A clearly defined framework of both individual and collective rights and responsibilities in relation to the use and control of land resources is fundamental to sustainability.

Systems of land title and registration in use in countries

17. The titling of land and the prompt registration of titles in a public registry is considered to be the best way to protect ownership rights to land and therefore the best form of tenure security. In private property tenure systems, more commonly known as freehold property or estate in fee simple, land titling and registration signifies the formalisation of ownership rights. Where private property as a tenure form does not prevail however, land titling is of little consequence or advantage because landholders acquire tenure security through a range of local institutional mechanisms (e.g. membership in a household, community or extended family). This explains why titling programmes in some areas either have little impact, unintended effects or quickly become outdated (e.g. title documents are not kept up to date when property is transferred).

18. The most commonly recognised benefit from the titling and registration of land, besides the tenure security acquired by the property owner, is the use of those secure property rights as collateral to solicit credit. Formal lending agencies such as banks, often require not only that property being used as collateral be titled, but that the title be registered. In fact the rationalisation for the cost of titling and registration programmes, is that they put capital into the hands of people with little wealth and a low income, leading to increased investment and productivity by these families. Titling and/or registration of ownership rights to land, increases the productivity of land because:-

- increased tenure security provides incentives to invest time, labour and capital in the land (making improvements) and agricultural production (buying inputs);

- titled land can be used as collateral to secure credit (capital) for investment, thus making credit more abundant; and

- titling facilitates land transfers, resulting in land moving into the hands of more productive farmers and individuals.

19. Tenure security can however be undermined by the absence or inaccuracy of ownership or lease documents. The process of registration may not be efficient so that there are lengthy delays in a purchaser or lessee or licencee acquiring formal title or secure access to a particular land. This can lead to delays in lending institutions approving and processing applications for credit until the security for any advances is in place. Where customary land is concerned, progress of any alienation can be fraught with protracted litigation to determine who the titleholder is to the land.

20. There are renewed demands for land titling from governments and national elites seeking to acquire land for development, linked to an interest in attracting commercial investment and modernising agricultural production in the hope of competing more effectively in globalised markets.

21. Such difficulties can be allayed by: taking firm steps to effect titling activities, e.g the Government of Jamaica, in 1989, undertook the Jamaican Land Titling Project to establish a land management system that would order and secure tenancy in rural farming areas by issuing titles to beneficiaries on Government Land Settlements and in 2001 undertook a pilot programme to prepare a cadastral map for certain parcels of land in the parish of St Catherine and to undertake tenure regularisation of these parcels; providing the legal structure necessary for implementation of a national Land Registration and Titling Programme and a modern land registry as in St Lucia's land legislation of 1984; instituting measures to document legal descriptions or other means of identifying land; training conveyancers or other persons who are tasked with the preparation of ownership or lease documents to minimise mistakes or inaccuracies; introduce systems which ensure the swift processing of title documents for registration; and reviewing procedures in those Courts which deal with customary land issues to streamline lengthy litigation.

Leasehold interests

22. Whereas leasehold interests of freehold land can easily be alienated as collateral, it is still subject to difficulties which need to be addressed. The situation is not simple either when it comes to leasehold interest in customary and communal lands, although a lease is the most convenient way of enabling customary land to be utilised for a commercial purpose. Some common difficulties associated with the practical operation of leases are:-.

- The problem of mortgages or charges on leasehold land which are taken out by lessees but are still outstanding at the time when the lease comes to an end, either by expiry of time or by premature termination by one party or the other. The mortgagee or chargee will normally try to foreclose on the mortgage or charge and take over the development or place someone on the land who can develop it to service the outstanding amount of the loan.

- There may be people who were at the time the lease was granted, holding secondary rights to the land under custom, such as rights of passage or usufruct but were not identified. As a result, the owners of the land who are identified receive rent in respect of the leasehold, while those holding secondary rights to the land may not.

- Discontent in respect of rent payments. This situation arises where the rent is paid only to the chief or heads of families and never finds its way to the hands of all those who are entitled to it.

- The lessees may have cultivated and developed the land to such a scale where skilled or semi skilled labour is required for sustaining cultivation, development, and the operation of heavy equipment and machinery, for which the owner has no expertise in;

- There is the question of compensation for lessees who have made permanent improvements to the land where the landowners are unlikely to have the means to pay compensation.

- The placing of customary land in the hands of a statutory body established under legislation which removes all powers of control and management from the customary landowners. (e.g. the Native Land Trust Board in Fiji set up under the Native Land Trust Act, Cap 134).

- Mortgaging of leasehold interest in customary land is prohibited under the constitution of a country as in many Pacific Island countries unless authorised by statute.

- The absence of lease documents resulting in unauthorised transfers of land by tenants without any documents in their own names, or the failure of tenants to obtain formal credit for short terms loans if the landlord refused to give something in writing to attest to the fact that the tenant is farming a given plot or set of plots. This type of situation is a popular cause for prevailing tensions between tenants and landlords in Guyana. There, the reluctance of landlords to rent out land for longer periods of time leads to non-use of land and squatting and, because of the high turnover of tenants, no one has an interest in caring about and preserving the land.

23. The aforesaid problems may be addressed by giving consideration to -

- whether the State should intervene by law to regulate, support or restrict the way in which decisions are made and actions are taken by owners of customary land as to the management and use of these lands;

- whether a system such as that adopted in Fiji amounts to compulsory acquisition of property by the State or at least a deprivation of property without the safeguards required by the constitutions of many countries;

- whether assistance and in what form can be given to countries where there are backlogs of cases concerning customary land;

- whether enabling legislation could or should be put in place to permit the tenure of leasehold interest to be extended beyond the expiry date where such interest is subject to a mortgage or charge which has not run its full term

- whether action plans be implemented to, inter alia, convert leasehold to freehold and raise rents toward market rates as was done for Guyana in 1995 with the support of the Inter-American Development Bank.

The means of dealing with traditional ownership of land

24. The troubling aspect of dealing with traditional ownership of land is the all pervading sense of affinity to the land: as a source of power and symbol of status within a family, village or community; as a form of identity, security and a source of life and sustenance; and as embodying culture, custom and tradition. Any attempts therefore to introduce measures which impinge on those values are usually incongruous with the accepted social norms. The situation typified by Kenya's experience (as is also in other countries), has been the attempted replacement of customary tenure by formal regimes, through programmes of individual registration and titling. These have generally failed proving culturally and socially inappropriate. Land registers have been difficult to maintain, since customary norms and practices have proved remarkably persistent as an everyday basis for land allocation, transfer and inheritance.

25. There is also an emerging re-assertion and contestation of the role of traditional chiefs, for instance in South Africa, in circumstances where they may be at risk of abusing their considerable powers as authorities over land allocation. In some cases this role is favoured politically by the state.

26. In countries where alienation of customary land is prohibited by way of sale or mortgage under their constitutions, a change of the present laws so as to allow customary land to be mortgaged would obviously necessitate amendments to constitutions. However, it is doubtful whether this could be done, given the nature of customary land tenure. For example, the standard form of mortgage, giving the mortgagee the power to sell the land in the event of the mortgagor's default, strikes at the very essence of customary land tenure. Any referendum for constitutional change along those lines

would almost certainly be defeated. On the other hand, a mortgage specially designed for customary land forbidding the mortgagee to sell the land in the case of default would be valueless as collateral.

27. However, although customary land cannot be used as collateral, a financial institution funding a development would perhaps be satisfied if it could gain control of the land by acquiring a leasehold interest with the ability to grant a sublease, or by acquiring a sublease itself, depending on how the financial arrangements were to be structured.

28. In future developments of customary land, the ability of the lessee to grant a sublease could be vital to funding prospects and it would take only simple amendments to legislation, enabling the alienation of customary land for specific purposes, to put the issue beyond doubt by including a specific power to sublease. The same position would pertain to a purported assignment of lease.

29. Where management of customary land is placed in the hands of a statutory body, it may well be advised to engage in more consultative processes with the landowners. The re-assertion of the role of traditional chiefs, **with** powers **and** authorities over land allocation may be tempered by appropriate mechanisms put in place whereby such decisions are monitored by an independent body.

Equitable Succession Laws

30. It is generally the case as in many African countries, that a woman does not inherit land from her father because if she were to marry, the land would be transferred to her husband's lineage.

31. She would not have any capital to purchase land and does not share title with her husband. Her temporary use rights are not recognised for a reasonable duration through a lease or other formal contract so that she can have more leverage. If she were granted those rights she could then plan her investment, sell or mortgage this land to have some working capital, or exchange, lend, or rent it.

32. Gender equality in laws governing inheritance of property could contribute significantly to a woman's economic equality and autonomy of choice.

Women's Property Rights

33. Women's right to land is a critical factor in social status, economic well being, and empowerment. Land is a basic source of employment, the key to agricultural input, and a major determinant of a farmer's access to other productive resources and services. But the land is also a social asset, crucial for cultural identity, political power, and participation in local decision-making processes. Women's access to natural resources, such as water, fuelwood, fish and forest products, is also crucial for food security and income, particularly as land becomes increasingly scarce and access becomes a growing problem for women and men alike.

34. Although women own only about 2% of all land, the UN Economic and Social Council Commission on the Status of Women states that "land rights discrimination is a violation of human rights" and urges States " to design and revise laws to ensure that women are accorded full and equal rights to own land and other property". Similarly the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) states in Article 14 that " State parties shall take all appropriate measures to eliminate discrimination against women in rural areas...and ...shall ensure to such women the right...to have access to...and equal treatment in land and agrarian reform..."

35. The approaches of governments around the world to gender equality in access to land and natural resources are highly variable.

36. A typical rural woman's view to rights to land and natural resources is characterised by local institutional arrangements through which she gains access to a variety of resources. For example, she has rights to use a rice field and a garden plot by virtue of her membership in a household. She has rights to collect water and fuelwood from nearby common lands by virtue of her membership in a community and, by virtue of her status as a woman within a lineage or extended family, she may also have the rights to harvest certain trees crops. Membership in these institutions provides use rights; the way she operates within them, her behaviour, provides the leverage to exercise these rights. The control of these institutions over her access to land is also an important means of coercing her to conform to certain types of behaviour.

37. A woman's secure access to land, alone, is not enough without access to associated support services such as credit, capital, appropriate technologies, access to markets and information.

38. One way to make a meaningful link between land ownership and development is to introduce land reform that combines market, property rights, and reforms in a comprehensive supporting institutional framework to enshrine rights and security of individuals. For the most part so far, approaches are aimed at improving the access of landless and poorer farmers generally to land and natural resources. Very few among these target women specifically, although South Africa, by a process of reform through restitution to redress discriminatory legislation, is a notable exception.

39. Broadening property rights to a human rights issue reveal some of the shortcomings in past approaches and highlights policies previously used for increasing access for the poor, which might also be fruitful for increasing women's rights to land. Secure access to land and natural resources will depend in part on better access for women to associated support services, cash, labour, markets, and information.

40. The case for addressing gender inequalities in land access is extremely strong given the growing feminization of agriculture in Asia. 86 percent of all rural female workers are in agriculture in India but they rarely hold titles to the land they cultivate. A large percentage of rural households in Asia are *de facto* female-headed due to widowhood, marital breakdown or male out-migration. Most self-employed rural women are unwaged workers on male-owned family farms. Although women's equal rights to land have been enshrined in law in most parts of South East Asia, social recognition and legal enforcement of women's rights remain major challenges. Difficulties are particularly acute for women who are divorced, separated or widowed.

41. Rights are defined, not just in law, but also in practice through a diversity of competing legal and moral systems and are strongly influenced by power dynamics at all levels. These informal struggles can undercut the formal instruments of law, for example through court interpretations, which narrow or broaden definitions of right holders. These raise a few issues for further consideration.

42. What mechanisms need to be in place to increase accountability in and encourage/compel the plurality of duty holders, including governments, formal and informal institutions to uphold the universal standards of gender equality in rights to land?

43. What practical means exist to help transform the "international norm" of gender equality in rights into a current customary norm and moral force at each of these levels?

44. In addition to promoting general principles of gender equality in rights to land and natural resources in national Constitutions, what accompanying measures are needed to strengthen women's claims vis-a-vis those duty holders who do not uphold their rights? What supporting institutions are required on the ground to guarantee that these principles have some effect and how should their functions be prioritised?

45. Given that customary systems range from fairly democratic and functional systems to conservative and abusive, what strategies exist for supporting well functioning customary systems while strengthening the channels for change in those that are not?

46. Apart from individual property rights for all women, what other options might be just as empowering or more appropriate in specific situations (i.e. severe land scarcity) such as joint rights or temporary and partial interests (i.e. resource leasing, sharecropping, formalisation of use rights, clarification of content and capacity of property rights)?

Land Ownership And Environmental Sustainability

47. If people have weak, temporary or unclear rights to the land they are using, they have little incentive to invest in it, using cash or labour, for land development or conservation of its natural resources. Confidence, investment and sustainable use are improved if land users know they have security of tenure over the long term.

48. As populations and markets in land and natural resources grow, land tenure systems, whether customary and formal, need to be robust and flexible, to prevent land degradation and the marginalisation of poor people. "Open access" tenure regimes, in which land can be freely accessed by all without social or legal sanctions, have led to the classic "tragedy of the commons" scenario, in which resources are over-exploited and degraded because the users have no incentives to harvest sustainably.

49. Common property or individualised forms of tenure, on the other hand, restrict land use or ownership to defined and recognised users. Environmental problems frequently arise when common property or communal land management systems break down as a result of population growth and land acquisition or of disposal by state or private individuals for other purposes. Often it is the poor, without formally recognised land rights, who are obliged by development processes to subsist on diminishing supplies of land and formerly abundant natural resources.

50. Land use and ownership may need to be regulated through social and legal mechanisms that take account of land suitability for different uses, production systems and types of development. Where land and land rights are traded or development concessions awarded, prices or rental values need to reflect the full environmental and social costs of private use. Land policies, laws and institutions have an important role in helping ensure that land and environmental resources are not degraded, or the costs of poor land use externalised to neighbouring land users or wider society. In urban and peri-urban areas particularly, effective zoning of land for housing, conservation and development can help improve tenure security and environmental quality for the poor and control unbridled speculation. Participatory approaches to land use planning can assist in matching land allocation and management to social needs, and in addressing potential conflicts amongst land users. Participation in planning can strengthen the confidence of people in the development process and in their tenure rights, and help direct investments to areas where they will be of greatest social benefit.

RECOMMENDATIONS ON LAND ISSUES

51. Law Ministers may wish to:

- recognise the strong link between land and development and poverty reduction;
- consider whether there is a need for land reform and/or review of current land reforms in their respective jurisdictions;

- discuss the question whether there is a need to institute an adequate legal environment which reviews and regulates: land titling and registration; the tenure of leasehold interests which have been used as collateral; the means of dealing with traditional ownership of land; assures equitable succession laws with respect to land; promulgation of women's property rights and the relevance of land ownership to environmental sustainability;

- consider the usefulness, relevance and/or applicability to their jurisdictions, of principles governing land which have been proposed for Kenya's new constitution (*Annex A*);

- advise the Secretariat of their views on any programmes which should, as a matter of priority, be the subject of work by the Secretariat and by Senior Officials of Law Ministries.

B. COMPETITION

52. Competition has long been acknowledged as an important force bringing about economic development and growth. There are many potential barriers to competition. In developing countries the main institutional barriers to domestic competition are government regulation on exit and entry of firms. Private institutions also cause barriers to competition. For example, the monopolisation of domestic distribution channels can mean that even when a good can be imported freely, there still may not be competition in the domestic market for that good. Domestic institutions that promote competition include competition laws and authorities. These were introduced by governments to tackle private barriers to product market competition and to ensure that, in sectors characterised by monopolies, prices do not diverge too much from costs. Some of the more prominent examples of private barriers to product market competition are monopolies, cartels and vertical restraints (for example contracts between producers and their distributors that prevent distributors from carrying competitors' products.)[1]

53. The enactment of competition laws in developing and transition countries is a relatively recent phenomenon and in these countries the World Bank assessment is that enforcement is not very active. This, it is said, is due in part to the lack of complementary institutions that would facilitate enforcement, such as courts or well-established information processing systems for the regulator.

54. There are many actions that governments can take to build more effective competition laws and authorities. Competition agencies need the statutory authority to force firms to supply the necessary information. They need legal enforcement powers so that they can make decisions on competition cases without referring the simpler ones to the courts. "Where courts do not work, as in many developing countries, giving competition authorities the power of enforcement is even more crucial."[2]. Governments also need to ensure the independence of competition agencies and, indeed, in most developing countries, these agencies are independent of any ministry.

55. At the Commonwealth Heads of Government Meeting in Durban in 1999, the Commonwealth Secretariat was asked to continue its support on multilateral trade issues to Commonwealth developing countries, especially small states, in building their capacities for negotiating, updating legislation and strengthening domestic trade policy institutions. They also called on the Secretariat to explore ways and means to promote consensus on international trade, which includes competition law.

56. The term competition law is used in different contexts in different countries. It can be defined to include all policies relevant to competition in the market, including trade policies,

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1 World Development Report 2002, Chapter 7

2 ibid

regulatory policies, and policies adopted by governments to address anti-competitive activities of enterprise, whether private or public[3].

57. Anti-competitive practices include:

- practices undertaken by a single firm (when a firm enjoys a dominant position);
- anti-competitive mergers and acquisitions;
- horizontal restraints (i.e. arrangements between competitors to restrain competition, including price fixing, restraint of output, market allocation, import cartels, export cartels, international cartels, conscious parallelism (competing suppliers generally set the same prices, but without an explicit agreement) and collusive tendering (bid rigging etc.); and
- vertical restraints (i.e. anti-competitive arrangements between firms along the production-distribution chain, including exclusive dealing, reciprocal exclusivity, refusal to deal, discriminatory pricing, territorial restraint, (a supplier sells to distributors only on condition that the distributor does not market the product outside a specified territory), transfer pricing that may involve over-invoicing or under-invoicing of intermediate inputs between foreign affiliates. Under–invoicing can be used to facilitate predatory pricing etc. These practices have adverse effects on market access. Concerns have arisen within circumstances where vertical restraints prevent foreign firms from having access to distribution networks that are controlled by domestic suppliers[4]).

58. Most competition laws prohibit the above mentioned anti-competitive business practices. In India, for example, Whirlpool had launched an advertising campaign that offered mostly inexpensive, but also a few valuable gifts (such as a car and an apartment) to buyers of its refrigerators. Following a complaint by a competitor that this scheme would tempt people to buy Whirlpool products in the hope of winning a prize, the Monopolies and Restrictive Trade Practices Commission of India declared the scheme illegal in February 1997[5].

59. Competition law applies to all firms operating in a national territory and supplying a particular market, whether through domestic sales, imports, foreign affiliates or non-equity forms of foreign direct investment. They do not, in principle, discriminate between national and foreign firms or between foreign firms from different national or regional origins when it comes to competitive analysis. However, many competition laws make reference to such objectives as controlling the concentration of economic power, promoting the competitiveness of domestic industries, encouraging innovation, and supporting small and medium-size enterprises[6].

60. In summary, competition law monitors the competitive behaviour of domestic and foreign firms with a view to protecting all firms operating in a territory, facilitating transparency and improving the investment atmosphere. It is further seen as:

- protecting consumers from the undue exercise of market power;
- protecting economic efficiency, in both a static and dynamic sense;
- promoting trade and integration within an economic union or free trade area;
- facilitating economic liberalization, including privatization, deregulation and the reduction of external trade barriers;

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3 *Business Guide to the World Trade System*, UNCTAD/WTO and Commonwealth Secretariat, 1999, p. 286.

4 Supra note 1, p. 191.

5 Supra note 1, p. 154.

6 Supra note 1, p. 190.

- preserving and promoting the sound development of a market economy;
- promoting democratic values, such as economic pluralism and the dispersion of socio-economic power;
- ensuring fairness and equity in marketplace transactions;
- minimizing the need for more intrusive forms of regulation or political interference in a free market economy; and
- protecting opportunities for small and medium-sized businesses[7].

61. At the international level, the WTO Agreement also deals with competition issues. The General Agreement on Trade in Services (GATS), for example, recognizes that anti-competitive business practices may restrain and thereby restrict trade, and provides for consultations aimed at eliminating anti-competitive business practices (Article IX). It also calls on each member to ensure that any monopoly supplier of a service in its territory does not, in supply of the monopoly services in the relevant market, act in a manner inconsistent with members obligations under non-discrimination principles (Article VIII).

62. Similarly, the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) took into account concerns, especially by developing countries, about anti-competitive practices involving the use of intellectual property rights[8]. Article 8(2) recognizes that "appropriate measures ..... may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology". Article 40, in particular, deals with the control of anti-competitive practices in contractual licenses, and provides for consultations between member states and the supply of publicly available non-confidential information to the requesting member state. This area of the law is of particular relevance to the developing countries, whose bulk of technology transfer contracts is likely to involve foreign companies, and any enforcement action against alleged anti-competitive practices in these cases may require access to information outside their jurisdictions.

63. The Set of Multilaterally Agreed Equitable Principles and Rules for Council of Restrictive Business Practices, adopted in 1980 by the United Nations Conference on Trade and Development (UNCTAD), sets out as an important objective to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries. It also seeks to attain greater efficiency in international trade and development, inter alia through promoting of competition, control of concentration of economic power and encouragement of innovation. It aims to protect and promote social welfare in general and, in particular the interest of consumers. It calls upon governments to adopt, improve and effectively enforce appropriate competition legislation and implementation of juridical and administrative procedures[9].

64. In the framework of the OECD, international cooperation in the field of competition policy has taken place since 1967 under successive versions of a Council Recommendation Concerning Cooperation Between Member Countries on Anti-competitive Practices Affecting International Trade. It calls on member governments to make best efforts in the following aspects:

- timely notification of the initiation of investigations to member countries whose interests may be affected;
- coordination of actions when two or more member countries proceed against the same anti-competitive practice;

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7 Supra note 1.

8 Supra note 1, p. 45.

9 Supra note 1, p. 225.

- cooperation in developing or applying mutually satisfactory and beneficial remedies for dealing with anti-competitive practices, and, to that effect, supply each other with relevant information;
- consultation when a country considers that an investigation by another country may affect its important interests, or when enterprises situated in another member country have engaged in anti-competitive practices that substantially adversely affect its interests, and giving sympathetic consideration to the views expressed by the affected country; and in this context;
- commitment to take whatever remedial action is considered appropriate.

65. It also recommends a set of detailed guiding principles for the implementation of notifications, exchanges of information, cooperation in investigations and proceedings, consultations and conciliation of anti-competitive practices affecting international trade[10].

66. In terms of cooperation, many countries have concluded bilateral agreements, for example the United States and the European Union in 1991. This agreement provides for notification by either party of enforcement activities affecting important interests of the other party and for the exchange of information, both of a general nature relating to competition policy in each country and relating to specific anti-competitive conduct. The agreement contains provisions for cooperation and coordination of enforcement activities in situations where both parties have an interest in pursuing enforcement activities with regard to the situation. In order for them to avoid conflicts over enforcement activities, the agreement requires each party to take into account the important interests of each party in its enforcement activities, particularly with respect to decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation, the nature of the remedies or penalties sought, and sets forth a number of principles which the parties have to take into account in seeking to minimize the adverse effects on the other party of their enforcement activities[11].

67. There is also a cooperation and coordination agreement between the Australian Trade Practices Commission and the New Zealand Commerce Commission, implemented in 1994. This agreement provides for the notification of enforcement activities that may affect important interests of the other party. It also facilitates the exchange of information of a general nature, as well as coordination of enforcement activities and exchanges of information about specific enforcement matters, including obtaining information and documents on behalf of the other party[12].

68. Mutual legal assistance in criminal matters arrangements and laws can also be used, in appropriate cases, to further co-operation between countries.

69. Although the broad trade issues undoubtedly fall within the ministerial responsibility of a minister other than the Attorney-General or Law Minister, and competition law responsibility is a moveable feast, it is clear that there are significant legal issues to be resolved at least in partnership. Certainly when it comes to contemplating appropriate compulsory powers to be conferred on competition authorities, and the potential impact of competition laws on the courts, the input of the Law Minister is essential. In all of these areas, the affording of natural justice to the parties and the maintenance of the fundamentals of the rule of law is an imperative.

70. The Secretariat has prepared, for consideration of Ministers, a draft model law on competition which could be of assistance to member countries looking to deal with this issue. It draws on the laws of Commonwealth countries and on work done in international fora. The model

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10 Supra note 1, p. 223.

11 *WTO Annual Report, Special Study on Trade and Competition Policy*, Geneva, 1997, p. 53.

12 Ibid., p. 54.

law can be considered at the conclusion of the general discussion on the law and development agenda item.

COMMERCIAL LAWS

71. Effective statutory provision in the areas of company and competition law, as well as legislation to complement effective corporate governance will yield positive results. The bottom line is that the creation of a financial environment without the appropriate legal support cannot uphold itself. Law Ministers are therefore challenged to cause the enactment of the legal foundation appropriate to their countries' growth and development through investment.

72. Law Ministers and Attorneys-General of Small Commonwealth Jurisdictions considered the issue of "Corporations and the Law" at their 2000 meeting. They considered a number of issues in the knowledge that company law is a subject receiving attention on a number of fronts at the current time. This paper deals with some, but by no means all, of the issues which are the subject of increasing transnational concern in the field of company law. Of particular and widespread concern seem to be the subjects of:

- the duties of directors;
- the effect of recent national and international anti-corruption strategies;
- the increasing introduction of corporate criminal liability;
- disqualification of directors; and
- shareholders' remedies

each of which has been the focus of court decisions, treaty development and learned writing.

73. Some small Commonwealth jurisdictions have considered the question whether their existing company law meets the modern day needs of their communities and have reached the conclusion that the traditional UK legislation, and that based on it, is no longer adequate. Indeed, the UK itself is reviewing its company law.

74. An example of a recognition of the importance of sound economic and corporate governance policies is found in the NEPAD prioritisation of eight codes and standards which it believes will achieve the desired levels of good economic and corporate governance. Many of these subjects fall without the responsibility of law ministers but the question of corporate governance (which is one of the NEPAD priority subjects) is squarely one for consideration in the context of developing a sound legal commercial environment.

Company Law

75. In most jurisdictions the fiduciary and general duties of directors are found both in the common law and in statute law. In addition to legal control, self-regulation (for example by corporate governance codes, listing rules and accounting standards) plays a major part in modern company law.[13]

76. Governments have the option to take no action and allow the courts to clarify this area of the law. However, the courts have failed to provide clear guidance to directors on the level of skill and care expected of them, particularly in relation to the responsibilities and liability of executive and non-executive directors. A statutory clarification of directors' duties ought to lead to improved corporate governance practices and market confidence. Clarification of directors duties should also

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[13] Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties. Law Commission, UK, September 1999, Law Com No 261

lead to a reduction in agency costs by addressing the uncertainty of directors in decision making and thereby enabling them to take calculated business risks to maximise company profits. Allowing directors to delegate and rely on judgments of employees of the company or other experts gives recognition to the complexity of management of large corporations and removes impediments to decision making and the efficient management of a corporation's business.

77. The question of the statutory definition of a director's duty of skill and care is also topical. There are various ways of classifying directors' duties of care. The middle road, and that now recommended by the UK Law Commission[14], is a dual subjective/objective test where the director owes a duty to his company to exercise the care, diligence and skill that would be exercised by a reasonable person in the same circumstances, having both the knowledge and experience that may reasonably be expected of a person in the same position as the director and the director's knowledge and experience. The dual approach has the advantage that it allows account to be taken of the responsibilities of directors of different types and in different situations.

78. Law Ministers may wish to recognise publicly that there is merit in statutorily defining director's duties because such elucidation can lead to improved "corporate governance" practices (discussed below), market confidence and ultimate certainty in the investment climate of a member state.

79. Changes in public opinion on white collar crime and a perceived increase in the incidence of corporate crime have led to more concentrated efforts at enforcing corporate obligations by bringing criminal prosecutions. Corporations have been prosecuted for anti-competitive conduct, environmental crimes, conspiracy, fraud, bribery, tax crimes and customs offences. In addition, effective anti-money laundering laws impose corporate criminal liability. The prospect that criminal behaviour of a corporate agent will be attributed to the corporation should motivate corporate officers and directors to deter criminal activity within the company. Corporate criminal liability is vicarious with corporations generally being able to be held liable for intent-based as well as strict liability offences and both crimes of commission and crimes of omission.

80. Any legislation promulgated for the purpose of disqualification of directors should be aimed at the protection of society from persons who are deemed unsuitable and additionally to indicate to the potential investor that there are legal remedies available. As was discussed at the meeting of Small Commonwealth Jurisdictions, Law Ministers may find it useful to enact the appropriate legislation so as to provide adequate protection for potential investors and to ensure that the corporate sector of their economies is not under threat from persons who abuse the fiduciary position in which they are placed.

81. The issue of shareholders remedies was again discussed in considerable detail at the Jersey meeting. There it was revealed that the limiting common law rule in *Foss v. Harbottle* - under which only the company itself, acting in accordance with the will of the majority of its members, may bring proceedings – can operate to unduly limit the remedies that are available to shareholders. Legislation can effectively abolish the common law derivative rights under the exceptions to the proper plaintiff rule in *Foss v. Harbottle*. The common law personal action exception to the rule has remained however, since under this action, a member is not bringing or intervening in proceedings on behalf of a company. The United Kingdom Law Commission has viewed that the rule in *Foss v. Harbottle* is unduly complicated and needs to be replace by statutory derivative action.

82. Law Ministers may wish to consider the desirability of reviewing the laws of their countries to the extent that the rule in *Foss v. Harbottle* is sufficiently mischievous to present a climate of insecurity for shareholders and ultimately investors.

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[14] ibid.

Corporate Governance

83. There are also parallel global developments in the area of company administration as evidenced by the May 1999 OECD approved Principles of Corporate Governance covering the rights of shareholders, the role of shareholders in corporate governance, disclosure and transparency and responsibilities of the board. These Principles (*Annex B*) emphasise, *inter alia*, the role of the board in monitoring and managing potential conflicts of interest of management, board members and shareholders including misuse of corporate assets and abuse in related party transactions. The development of corporate governance models is important and fits well with governmental concerns to simplify their corporation laws. Successful development of and acceptance of corporate governance models ought to increase the economic effectiveness of companies and result in better corporate citizenship. If these goals are reached corporation laws will be able to be facilitative rather than prescriptive.

84. The term "corporate governance" evokes many concepts within an economic system, *viz:*

- the promotion of corporate fairness, transparency and accountability;
- a system by which business corporations are directed and controlled thereby detailing the various rights and responsibilities of the participants in a corporation[15]; and
- the relationship of a company to its shareholders on one hand, and on the other, to society as a whole whereby the government, associations of employers and workers and corporations are designated " social partners".[16]

85. Within the context of the priority mandates of the Commonwealth Secretariat for the elimination of poverty, promotion of sustainable development and the enhancement of the appropriate legislative framework in member states, it is suggested that the multi definitions of corporate governance are relevant. This posture was further underlined in the Coolum Communiqué where the Heads of Government reiterated the importance of good corporate governance and urged foreign investors to act in accordance with national laws, legal requirements and social obligations.

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15 Definition adopted by OECD

16 See for example the Charter of Civil Society for the Caribbean Community - Article 1

Land Principles for the New Constitution

1. All land belongs to the people of Kenya.
2. The people will hold such land in accordance with systems of tenure defined by legislation.
3. Non-citizens of Kenya would be prohibited from acquiring land except on the basis of leasehold tenure.
4. Land in Kenya shall be classified as public, private or commons.
5. Public land shall be clearly delineated and held in trust for the people in Kenya in terms of legislation defining the nature and extent of such trust.
6. Private land may be acquired and held by individuals or other jural persons in accordance with systems of tenure defined legislation.
7. The commons shall be clearly delineated and vested in communities or agents thereof in accordance with systems of tenure defined by legislation.
8. Property rights lawfully acquired shall be protected and may be freely by alienated without discrimination as to gender subject only to such restriction as are inherent in the tenure systems creating them.
9. All land however acquired or held are subject to the inherent power of the state to acquire or regulate such land in the public interest or for the public benefit.
10. There shall be established a Land Commission whose functions will include -
    - Holding title to public land
    - Periodic review of land policy and law
    - Developing principles for the sustainable use and management of land
    - Exercising residual land administration functions.
11. Parliament shall make law within two years of its first sitting under this constitution providing for: -
    - The incorporation of the above principles
    - Mechanisms for resolving land disputes under different tenure categories
    - An expeditious and cost-effective system of land alienation (transfers and transmissions)
    - Equitable distribution of land including the resolution of problems of landlessness, or spontaneous settlements in urban areas.
    - The investigation and resolution of historical claims especially within the Coast, Rift Valley and North Eastern Provinces and other areas.
    - The introduction of tax on idle and underutilized of land, and
    - The coordination and simplification of land laws.

Report of the Constitution of Kenya Review Commission, 18 September, 2002

OECD PRINCIPLES OF CORPORATE GOVERNANCE
(Extracts)

1. The Principles contained in this document build upon experiences from national initiatives in Member countries and previous work carried out within the OECD, including that of the OECD Business Sector Advisory Group on Corporate Governance. During their preparation, a number of OECD committees also were involved: the Committee on Financial Markets, the Committee on International Investment and Multinational Enterprises, the Industry Committee, and the Environment Policy Committee.

Preamble

2. The Principles are intended to assist Member and non-Member governments in their efforts to evaluate and improve the legal, institutional and regulatory framework for corporate governance in their countries, and to provide guidance and suggestions for stock exchanges, investors, corporations, and other parties that have a role in the process of developing good corporate governance. The Principles focus on publicly traded companies. However, to the extent they are deemed applicable, they might also be a useful tool to improve corporate governance in non-traded companies, for example, privately held and state-owned enterprises. The Principles represent a common basis that OECD Member countries consider essential for the development of good governance practice. They are intended to be concise, understandable and accessible to the international community. They are not intended to substitute for private sector initiatives to develop more detailed "best practice" in governance.

3. Increasingly, the OECD and its Member governments have recognised the synergy between macroeconomic and structural policies. One key element in improving economic efficiency is corporate governance, which involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. Good corporate governance should provide proper incentives for the board and management to pursue objectives that are in the interests of the company and shareholders and should facilitate effective monitoring, thereby encouraging firms to use resources more efficiently.

4. Corporate governance is only part of the larger economic context in which firms operate, which includes, for example, macroeconomic policies and the degree of competition in product and factor markets. The corporate governance framework also depends on the legal, regulatory, and institutional environment. In addition, factors such as business ethics and corporate awareness of the environmental and societal interests of the communities in which it operates can also have an impact on the reputation and the long-term success of a company.

5. While a multiplicity of factors affect the governance and decision-making processes of firms, and are important to their long-term success, the Principles focus on governance problems that result from the separation of ownership and control. Some of the other issues relevant to a company's decision-making processes, such as environmental or ethical concerns, are taken into account but are treated more explicitly in a number of other OECD instruments (including the Guidelines for Multinational Enterprises and the Convention and Recommendation on Bribery) and the instruments of other international organisations.

6. The degree to which corporations observe basic principles of good corporate governance is an increasingly important factor for investment decisions. Of particular relevance is the relation between corporate governance practices and the increasingly international character of investment. International flows of capital enable companies to access financing from a much larger pool of investors. If countries are to reap the full benefits of the global capital market, and if they are to attract long-term "patient" capital, corporate governance arrangements must be credible and well understood across borders. Even if corporations do not rely primarily on foreign sources of capital, adherence to good corporate governance practices will help improve the confidence of domestic investors, may reduce the cost of capital, and ultimately induce more stable sources of financing.

7. Corporate governance is affected by the relationships among participants in the governance system. Controlling shareholders, which may be individuals, family holdings, bloc alliances, or other corporations acting through a holding company or cross shareholdings, can significantly influence corporate behaviour. As owners of equity, institutional investors are increasingly demanding a voice in corporate governance in some markets. Individual shareholders usually do not seek to exercise governance rights but may be highly concerned about obtaining fair treatment from controlling shareholders and management. Creditors play an important role in some governance systems and have the potential to serve as external monitors over corporate performance. Employees and other stakeholders play an important role in contributing to the long-term success and performance of the corporation, while governments establish the overall institutional and legal framework for corporate governance. The role of each of these participants and their interactions vary widely among OECD countries and among non-Members as well. These relationships are subject, in part, to law and regulation and, in part, to voluntary adaptation and market forces.

8. There is no single model of good corporate governance. At the same time, work carried out in Member countries and within the OECD has identified some common elements that underlie good corporate governance. The Principles build on these common elements and are formulated to embrace the different models that exist. For example, they do not advocate any particular board structure and the term "board" as used in this document is meant to embrace the different national models of board structures found in OECD countries. In the typical two tier system, found in some countries, "board" as used in the Principles refers to the "supervisory board" while "key executives" refers to the "management board". In systems where the unitary board is overseen by an internal auditor's board, the term "board" includes both.

9. The Principles are non-binding and do not aim at detailed prescriptions for national legislation. Their purpose is to serve as a reference point. They can be used by policy makers, as they examine and develop their legal and regulatory frameworks for corporate governance that reflect their own economic, social, legal and cultural circumstances, and by market participants as they develop their own practices.

10. The Principles are evolutionary in nature and should be reviewed in light of significant changes in circumstances. To remain competitive in a changing world, corporations must innovate and adapt their corporate governance practices so that they can meet new demands and grasp new opportunities. Similarly, governments have an important responsibility for shaping an effective regulatory framework that provides for sufficient flexibility to allow markets to function effectively and to respond to expectations of shareholders and other stakeholders. It is up to governments and market participants to decide how to apply these Principles in developing their own frameworks for corporate governance, taking into account the costs and benefits of regulation.

11. The following document is divided into two parts. The Principles presented in the first part of the document cover five areas: I) The rights of shareholders; II) The equitable treatment of shareholders; III) The role of stakeholders; IV) Disclosure and transparency; and V) The responsibilities of the board. Each of the sections is headed by a single Principle that appears in bold

italics and is followed by a number of supporting recommendations. In the second part of the document, the Principles are supplemented by annotations that contain commentary on the Principles and are intended to help readers understand their rationale. The annotations may also contain descriptions of dominant trends and offer alternatives and examples that may be useful in making the Principles operational.

I. THE RIGHTS OF SHAREHOLDERS

The corporate governance framework should protect shareholders' rights.

A. Basic shareholder rights include the right to: 1) secure methods of ownership registration; 2) convey or transfer shares; 3) obtain relevant information on the corporation on a timely and regular basis; 4) participate and vote in general shareholder meetings; 5) elect members of the board; and 6) share in the profits of the corporation.

B. Shareholders have the right to participate in, and to be sufficiently informed on, decisions concerning fundamental corporate changes such as: 1) amendments to the statutes, or articles of incorporation or similar governing documents of the company; 2) the authorisation of additional shares; and 3) extraordinary transactions that in effect result in the sale of the company.

C. Shareholders should have the opportunity to participate effectively and vote in general shareholder meetings and should be informed of the rules, including voting procedures, that govern general shareholder meetings:

i. Shareholders should be furnished with sufficient and timely information concerning the date, location and agenda of general meetings, as well as full and timely information regarding the issues to be decided at the meeting.
ii. Opportunity should be provided for shareholders to ask questions of the board and to place items on the agenda at general meetings, subject to reasonable limitations.
iii. Shareholders should be able to vote in person or in absentia, and equal effect should be given to votes whether cast in person or in absentia.

D. Capital structures and arrangements that enable certain shareholders to obtain a degree of control disproportionate to their equity ownership should be disclosed.

E. Markets for corporate control should be allowed to function in an efficient and transparent manner.

i. The rules and procedures governing the acquisition of corporate control in the capital markets, and extraordinary transactions such as mergers, and sales of substantial portions of corporate assets, should be clearly articulated and disclosed so that investors understand their rights and recourse. Transactions should occur at transparent prices and under fair conditions that protect the rights of all shareholders according to their class.
ii. Anti-take-over devices should not be used to shield management from accountability.

F. Shareholders, including institutional investors, should consider the costs and benefits of exercising their voting rights.

II. THE EQUITABLE TREATMENT OF SHAREHOLDERS

The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.

A. All shareholders of the same class should be treated equally.

i. Within any class, all shareholders should have the same voting rights. All investors should be able to obtain information about the voting rights attached to all classes of shares before they purchase. Any changes in voting rights should be subject to shareholder vote.
ii. Votes should be cast by custodians or nominees in a manner agreed upon with the beneficial owner of the shares.
iii. Processes and procedures for general shareholder meetings should allow for equitable treatment of all shareholders. Company procedures should not make it unduly difficult or expensive to cast votes.

B. Insider trading and abusive self-dealing should be prohibited.

C. Members of the board and managers should be required to disclose any material interests in transactions or matters affecting the corporation.

III. THE ROLE OF STAKEHOLDERS IN CORPORATE GOVERNANCE

The corporate governance framework should recognise the rights of stakeholders as established by law and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.

A. The corporate governance framework should assure that the rights of stakeholders that are protected by law are respected.

B. Where stakeholder interests are protected by law, stakeholders should have the opportunity to obtain effective redress for violation of their rights.

C. The corporate governance framework should permit performance-enhancing mechanisms for stakeholder participation.

D. Where stakeholders participate in the corporate governance process, they should have access to relevant information.

IV. DISCLOSURE AND TRANSPARENCY

The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.

A. Disclosure should include, but not be limited to, material information on:

i. The financial and operating results of the company.
ii. Company objectives.
iii. Major share ownership and voting rights.
iv. Members of the board and key executives, and their remuneration.
v. Material foreseeable risk factors.
vi. Material issues regarding employees and other stakeholders.
vii. Governance structures and policies.

B. Information should be prepared, audited, and disclosed in accordance with high quality standards of accounting, financial and non-financial disclosure, and audit.

C. An annual audit should be conducted by an independent auditor in order to provide an external and objective assurance on the way in which financial statements have been prepared and presented.

D. Channels for disseminating information should provide for fair, timely and cost-efficient access to relevant information by users.

V. THE RESPONSIBILITIES OF THE BOARD

The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.

A. Board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders.

B. Where board decisions may affect different shareholder groups differently, the board should treat all shareholders fairly.

C. The board should ensure compliance with applicable law and take into account the interests of stakeholders.

D. The board should fulfil certain key functions, including:

i. Reviewing and guiding corporate strategy, major plans of action, risk policy, annual budgets and business plans; setting performance objectives; monitoring implementation and corporate performance; and overseeing major capital expenditures, acquisitions and divestitures.
ii. Selecting, compensating, monitoring and, when necessary, replacing key executives and overseeing succession planning.
iii. Reviewing key executive and board remuneration, and ensuring a formal and transparent board nomination process.
iv. Monitoring and managing potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse in related party transactions.
v. Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for monitoring risk, financial control, and compliance with the law.
vi. Monitoring the effectiveness of the governance practices under which it operates and making changes as needed.
vii. Overseeing the process of disclosure and communications.

E. The board should be able to exercise objective judgment on corporate affairs iindependently, in particular, from management:

i. Boards should consider assigning a sufficient number of non-executive board members capable of exercising independent judgment to tasks where there is a potential for conflict of interest. Examples of such key responsibilities are financial reporting, nomination and executive and board remuneration.

ii. Board members should devote sufficient time to their responsibilities.

F. In order to fulfil their responsibilities, board members should have access to accurate, relevant and timely information.