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Corporate governance in India in the context of the Companies Bill 2009: Part 3: Proposals

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**I.C.C.L.R. 131* Introduction

The first part of this article traced the evolution of corporate governance in India over the past decade from the code issued by the Confederation of Indian Industry, through the work of committees established variously by the Government and the stock exchange regulator, to the recent draft legislation, reintroduced to Parliament in August 2009 as the Companies Bill 2009. Concluding that by the end of this process India had, on paper at least, corporate governance arrangements to rival the best in the world, it nevertheless pointed to two questions raised by recent events both domestically and internationally. First, were these arrangements compromised by the fact that they were inspired by jurisdictions where serious questions had now been raised about the adequacy of their own corporate governance systems? Secondly, were India's existing and proposed arrangements nevertheless saved by the fact that efforts had been made to adapt concepts borrowed from elsewhere to the particularities of the domestic context? These questions were examined in the second part of the article. There the problems now besetting corporate governance arrangements in the United Kingdom and the United States were considered, revealing that the assumptions underlying the operation of those systems had been called into question by the events of the global financial crisis. This provided the backdrop to the examination of the particularities of the Indian context. There the key features of the Indian model were considered in turn, a process which revealed a mixed picture. The fact that the model had borrowed aspects of both the UK and US models rather than drawing only on one appeared to produce a potentially stronger system incorporating more robust regulatory arrangements to accompany market monitoring. On the other hand, however, a variety of problems emerged notably associated with implementation and enforcement, which indicated that the situation was less good than might appear on paper. Furthermore, the fact that any similarity between UK and US markets on one hand and the Indian on the other disappeared under closer scrutiny indicated that caution will need to be exercised by the Indian Government as it steers the Companies Bill through Parliament. There are undoubtedly problems that remain to be solved, but the very jurisdictions which have provided inspiration in the past and which have indeed been regarded as representing international best practice are themselves now having to consider reform. Far from this being a moment for delay and indecision, however, the argument of this third and final part of the article is that India has an opportunity to make careful and realistic reforms which would send a clear signal of intent to both domestic and international investors that their interests are taken as seriously as their financial support. A series of proposals are, therefore, offered that seek to meet the problems identified in the foregoing two parts of the article. Some of these proposals are present already in the Companies Bill or otherwise in contemplation but experience suggests that they may not be implemented even if passed into law or may be subject to undue delay. Some of the proposals are new and would require amendment of the Bill, but would nevertheless not represent radical innovations in the Indian context. The proposals offered accordingly represent a list of priorities for the Parliamentary Standing Committee (and the Parliament more generally) now charged with making decisions about legal reform that will be vital to the next stage of India's development in a world that will surely emerge re-shaped by the global financial crisis.

Priorities for Indian Corporate Governance in the Context of the Companies Bill 2009

Having gained a clearer picture of the particularity of the Indian context and thus of the sorts of issues that the various committees have sought to respond to or accommodate as they have considered the most appropriate approach to corporate governance in the country, it is now possible both to assess the adequacy of the developments to date, not least those in the Companies Bill 2009, and to make recommendations for further reform, not least because a unique opportunity in this regard exists ***I.C.C.L.R. 132** given the presence of the Bill in the Indian Parliament. India is consequently well placed to avoid falling into the trap of responding only to the immediate crisis as has been the case in the United Kingdom and especially the United States in the past. For example, some studies suggest that the changes wrought by the Sarbanes-Oxley Act, while responding to the problems immediately evident in the aftermath of the Enron and other scandals, left large areas of corporate governance untouched notwithstanding that reform of these would predictably have had a greater beneficial effect.[1] It is important, then, not to fixate on the problems most obviously exposed by the Satyam scandal, but to look at the issue of corporate governance in India in the round when considering what the response should be. It should be noted that the same studies that were critical of Sarbanes-Oxley have drawn the lesson from that experience that while the response to crisis will often have the quality of a knee-jerk reaction, "their motivating impact can be leveraged and their bad effects alleviated by *good statutory design* ".[2] With this in mind, the following sections propose new reforms and support existing proposed reforms that appear most adequately to accommodate the particularities of the Indian context revealed in Part 2 of this article and which could thus usefully be prioritised in the Companies Bill as it proceeds through Parliament.

Encouraging institutional investor engagement with corporate governance

One of the most striking aspects of the foregoing examination of developments in corporate governance in India, as well as in the jurisdictions from which it has drawn most inspiration, is the growing awareness of the extent to which institutional investors do not engage in the monitoring of governance which it has traditionally been assumed that they have a rational self-interest in doing. India has already taken action in this regard insofar as cl.49 of the listing agreement is policed by the SEBI rather than institutional investors as is the case with the Combined Code in the United Kingdom. As sensible as this undoubtedly is at one level, there are at least two objections. First of all, it places an immense burden on the SEBI, which the reported level of non-compliance suggests it is struggling to cope with.[3] This may be due to the fact that the SEBI is regarded by some of those it is supposed to be regulating as ineffective insofar as it has often seen its decisions overturned on appeal and insofar as there is a perception that it has not been dealing with the most problematical cases.[4] Nor should the SEBI feel alone in experiencing these problems. One need only consider the fact that the SEC in the United States (and indeed the FSA in the United Kingdom[5]) is under pressure for having failed to foresee the problems being stored up by banks and other financial institutions notwithstanding the information that they were expected to monitor[6] --a fact that makes the United States' response to the financial crisis in terms of placing further responsibilities on the SEC all the more risky.[7] Accordingly, while there is no doubt that the SEBI would benefit from more resources,[8] there must be a serious question as to whether it would ever be possible to resource it to a point where it would be sufficient in and of itself to ensure that appropriate standards of corporate governance are applied across all listed companies. The second objection to relying on the SEBI to too great an extent is the fact that it essentially allows institutional investors to abdicate their responsibilities. If there really is a desire to develop open, transparent and engaged capital markets, then the idea that institutional investors have responsibilities with respect to governance as opposed to simply opportunities for profit must surely be taken seriously. Observing that in the Indian context PFIs have not shown much enthusiasm for constructive engagement with the companies in which they have a financial stake, just as has apparently been the case for example with private sector institutional investors in the United Kingdom, it is certainly logical to look for solutions that do not rely upon their involvement, but this is if nothing else to turn away from a ***I.C.C.L.R. 133*** potentially very capable monitoring source as well as one that occupies a potentially powerful position vis-à-vis boards.9 It is not so much, then, that a solution must be either regulatory or market-based, as that appropriate corporate governance arrangements could most usefully employ a complementary mix of both. Indeed, given the precise nature of the Indian context discussed in Part 2 of this article, it is suggested that such a hybrid is actually well adapted and to a great extent reflects the preferences of the various committees discussed earlier in Part 1.

One proposal that may be useful here is a variant of an idea that has been suggested by MacNeil and Li in response to the perceived shortcomings of the "comply or explain" approach in the United Kingdom. Noting that institutional investors appear to be focused on performance rather than governance and thus essentially to be indifferent to the inadequacy of explanations for departures from the Combined Code, they propose making the Code a schedule to the Companies Act.10 In this way, companies that were subject to its requirements would either have to accept the provisions of the Code as they stood or would have to have explicit agreement from shareholders in advance for any proposed departure.11 The idea is accordingly that institutional investors (or their fund managers) would no longer be able to ignore departures and explanations for them on the basis that the minimal requirement for the two-part disclosure statement has been met,12 but would have to become actively involved in considering such explanations ex ante with a view to reaching a decision on whether to vote in favour of them or against them. This is a subtle idea insofar as it really asks no more of companies or their shareholders than they were apparently agreeable to under the Combined Code. Nevertheless, by making the Code an element of company law, it appears to make it more difficult, first, for companies to offer only perfunctory explanations for departures from Code provisions and, secondly, for institutional investors to ignore governance in favour of a concentration only on performance.

There is, however, a fly in the ointment here. While the Combined Code as it stands states that "Institutional shareholders have a responsibility to make considered use of their votes",13 that they "should take steps to ensure that their voting intentions are being translated into practice" (in other words that fund managers to whom functions have been delegated are actually performing them)14 and that they "should, on request, make available to their clients information on the proportion of resolutions on which votes were cast and non-discretionary proxies lodged",15 there is quite simply no legal requirement for them to do any of this. Shareholders are quite at liberty to abstain, whether as a deliberate policy or out of sheer indifference and, absent any contractual provision, there is no statutory requirement forcing them to reveal to their clients the voting information mentioned in the Code.16 The weak link in the Combined Code has accordingly been located. The "enforcement mechanism" for the provisions in s.1 of the Code directed at boards is supposed to be the institutional shareholders, but in the apparent absence of those shareholders' self-interest in carrying out that role, it is now obvious that there is no "enforcement mechanism" for the provisions in s.2 directed at institutional investors. It might be argued that it is incumbent on the clients of institutional investors to seek information about voting activities, but insofar as these clients are private individuals then the capacity for such monitoring simply does not exist and where other institutions may be such clients then it is clear that a problematical circularity exists.

Accordingly, if MacNeil and Li's idea is to have any bite, there will need to be some greater pressure on institutional shareholders to perform the role that is envisaged for them. It is noteworthy that there have been some developments in this direction in the United

Kingdom. Thus the Companies Act 2006 contains a provision that gives the government power to make "regulations requiring institutions … to provide information about the exercise of voting rights".17 This power has not yet been exercised and it thus essentially serves as a warning to the institutional investment community to put its house in order on a voluntary basis or the government will intervene. In this regard, the International Corporate Governance Network has recently produced a statement of principles for institutional investors, which makes it clear that they "should develop and publish a voting policy so that beneficiaries and investee companies can understand what criteria are being used to reach decisions". It further states that "Asset managers should have appropriate arrangements for reporting to beneficiaries on the way in which ***I.C.C.L.R. 134** voting policy has been implemented and on any relevant engagement with companies concerned". Importantly, the statement of principles continues to the effect that "As a matter of best practice [asset managers] should disclose an annual summary of their voting records together with their full voting records in important cases".18 In the United Kingdom the Institutional Shareholders Committee's has moved somewhat in the same direction especially with regard to voting,19 although its statement of principles includes less unequivocal language than the ICGN's when it comes to disclosure.20 The financial crisis has put institutional shareholders back in the spotlight in relation to their apparent lack of engagement with banks and thus their failure to raise questions about excessively risky strategies. The recent Walker Review into corporate governance in the financial sector in the United Kingdom does not make encouraging reading in this respect, noting for example that "levels of voting against bank resolutions rarely exceeded 10 per cent"21 and concluding that the problems encountered "would have been tackled rather more effectively had there been more vigorous scrutiny and persistence by major investors acting as owners".22 The recommendation, accordingly, is that the Institutional Shareholders' Committee's Statement of Principles should be rebadged as Principles of Stewardship and become the responsibility of the Financial Reporting Council in common with the Combined Code.23 The FRC would encourage adoption of these principles as a matter of best practice and institutions affected would have to disclose their commitment on a "comply or explain" basis.24 This undoubtedly takes things further than they stand at present, but the question remains of what the ultimate enforcement mechanism is for the performance of institutional investors. In other words, to whom, for example, are they explaining any departure from the rebadged principles of stewardship and who will be in a position to discipline them if these explanations are inadequate? The Review's author acknowledges this gap and proposes that some "independent and credible monitoring … will need to be established to provide assurance that clear and informative disclosures are being made" and suggests that this would be under the auspices of the FRC.25 Whatever form this ultimately takes, however, it is unlikely to have a mandatory character and it is not clear in any case what sort of sanction might be envisaged in the event that the new monitoring body identified any shortcoming. At the time of writing, the Walker Review is out for consultation, but if the immediate reaction of the opposition political parties is any indication,26 then there would appear to be a greater probability than ever before that the powers under s.1277 of the Companies Act 2006 will be utilised and that the whole issue of transparency in the voting of institutional investors will be the subject of mandatory regulatory requirements.27

If there is a lesson for India in all of this, it is surely that the Companies Bill 2009 should be seen as an opportunity to deal with the correctly identified problem of poor institutional shareholder engagement, whether public or private sector, as a means of bolstering the role played by the SEBI. This could be done by placing the provisions that are currently in cl.49 of the listing agreement in a schedule to the Bill and thus requiring companies to obtain ex ante shareholder agreement for departures from them. The SEBI could continue to perform its existing role in terms of checking compliance ***I.C.C.L.R. 135** under the listing agreement. The difference would be that it would now be checking compliance with corporate governance arrangements that had been explicitly agreed to by shareholders. This in turn would require provisions in the Bill mandating the disclosure of voting records, while all of these developments would presuppose the existence of an analogue of what will become in the United Kingdom the Principles of Stewardship for institutional investors.

Taken together this looks like a fairly comprehensive change to the status quo, but it is actually much less demanding than might appear to be the case at first sight: the stewardship principles would essentially be no more that what has been called for for at least a decade by the CII insofar as they have expressed their expectations of what is required from institutional investors; the addition of a schedule to the Bill would be no more than the adoption of a mirror image of cl.49 directed initially at the ex ante agreement of shareholders as opposed to solely the ex post compliance checking of the SEBI; and the provisions mandating disclosure of institutional shareholder voting records would be no more than the adoption of the minimum provision required to close the circle of corporate governance monitoring. In short, if all the parties involved in corporate governance are doing what they ought to do, then they will feel no burden from any of these proposals.

The advantage for India of adopting these changes in the context of the Companies Bill would be that it would be taking the chance to be at the forefront of corporate governance reform rather than playing catch-up with the hitherto entrepreneurial jurisdictions, such as the United Kingdom and the United States. It would also be adopting measures that are well adapted to the particular problems identified in the Indian context as well as signalling to global investors that it is setting a standard appropriate to the future development of investment.

Despite the apparent logic of this first conclusion regarding the direction of future reform, an important issue remains to be discussed here, namely whether what is being proposed is either a set of mandatory rules or a set of default rules or some hybrid. This is important for at least two reasons. First of all, it is an observable fact that the mandatory quality of the cl.49 provisions inspired by the Sarbanes-Oxley Act was much better received in India than was that of their equivalents in the United States.28 Any deviation from that approach will accordingly need to be explained, as there is a clear risk that it runs counter to what the regulated area is conceptually ready for. Secondly, the law and economics movement has pointed out that the decision to opt for default ormandatory rules has to be taken in recognition of the likely impact on costs--simply put, mandatory rules are understood to be inefficient insofar as they represent a constraint on contractual freedom, whereas default rules offer the prospect of greater efficiency insofar as they allow parties the freedom to produce a solution that is individually tailored to their requirements.29 This debate has been a feature of the development of corporate governance on both sides of the Atlantic, with the United Kingdom making a virtue of the flexibility of the default provisions of the Combined Code and explicitly avoiding a "one size fits all" approach,30 while even the most moderate critics of the Sarbanes-Oxley Act have bemoaned the compliance costs and pointed to the United Kingdom as an example of the more flexible approach they see as desirable.31 It looks, therefore, as if there is no contest and that default rules must be the preferred choice. It has been pointed out, however, that such an approach is by no means without cost. Any departure from the default position will impose an informational burden, and therefore costs, on the parties as they seek to consider all of the possible implications of their proposed individual alternative.32 The optimal solution is accordingly that only those parties who are best able to do so depart from the default position--at least to any great extent beyond what is generally regarded as familiar territory--while those who lack the resources to cope with the informational burden involved will adhere to the default position. The proposal set out above--that a mirror image of cl.49 should appear in a schedule to the Companies Bill--essentially means that default rules are being introduced into the Indian context and that companies will be able to propose and shareholders will be able to agree to departures from the default position. A "mandatory" ***I.C.C.L.R. 136** element remains in that SEBI will be responsible for monitoring compliance from the point of view of the listing authority, but significantly it will be monitoring compliance with the agreed position, not with mandatory rules imposed by a third party.

In the context of Indian corporate governance, it might be suggested that the companies affected, insofar as they are publicly listed on stock exchanges, will all be of sufficient size and sophistication to be able to cope with the informational burdens associated with the development of variations to the default rules. This, on the other hand, may be regarded as dangerous naivety. It is worth recalling, however, that the evidence suggests that there is already significant departure from the supposedly *mandatory* provisions of cl.49.33 At present, the expectation is apparently that such departures might be accepted by the SEBI insofar as there is a reasonable excuse,34 but as was discussed above, this appears to place a significant and unrealistic burden on the regulator. Accordingly, the new proposal looks preferable insofar as it requires shareholders to review and agree such deviations in advance, with the regulator monitoring compliance with what should be a properly discussed and agreed position. In other words, this approach encourages a ramping up of governance capacity on the part both of companies who seek to depart from the default position and of their institutional shareholders. Again, it might be objected that the track record of PFIs--and indeed private sector institutional investors--in corporate governance renders this a pious hope, but recall that the above proposal includes legal requirements to disclose voting records. Thus institutional shareholders may choose to adopt a supine position in response to company proposals regarding deviations from the norm in corporate governance, but they will have nowhere to hide if that unwillingness to engage proves in due course to have contributed to governance failures. This is not to deny that there will be a significant challenge for PFIs in particular to come up to speed, but a solution to this problem involves reform of the law in relation to government companies generally--a matter that is discussed further below.35 Finally, almost paradoxically, the hybrid approach proposed here, insofar as it clarifies roles and responsibilities, could also deal with a perceived lack of clarity between the roles of the SEBI and the Ministry of Corporate Affairs in the regulation of listed companies.36

Directors' duties in relation to NEDs

The adequate operation of the proposal outlined above, aimed as it is at encouraging the engagement of institutional investors and tapping into their monitoring potential, will also depend upon the presence on Indian boards of committed and qualified independent NEDs. The need for and role of such directors has been a feature of the debate on corporate governance in a number of jurisdictions and has most recently resurfaced in the United Kingdom in the context of the Walker Report on corporate governance in banks and other financial institutions.37 A number of issues that have caused concern in India have also been contentious in the United Kingdom, for example the question of whether there are enough suitably qualified and motivated people to fulfil all the positions opened up by the requirements of the Combined Code.38 One issue, however, that seems to have caused particular concern in India is the fact that NEDs are subject to the same duties as executive directors. Recall, for example, that the Chandra Committee called for there to be exemptions for NEDs from a wide range of civil and criminal liabilities.39 Furthermore, there is evidence that the Satyam scandal has raised fears in the minds of many independent NEDs, sparking something of a mass exodus from Indian boardrooms.40

It is worth taking a moment here to consider the arguments for and against such an approach. From the point of view of NEDs, it is certainly the case that the liabilities that may be incurred as a result of taking on such a position are potentially very serious indeed. Those who favour a reduced exposure to those liabilities for NEDs as compared to executive directors do so on the basis that a non-executive does not occupy a position with the company that implies full-time, ongoing, day-to-day engagement with its business, but rather performs a more intermittent role characterised by a concern with ***I.C.C.L.R. 137** strategy and oversight. Accordingly, they are concerned that a NED may find him- or herself exposed to liabilities that arise from failures or problems among managerial staff. This concern has a superficial appeal until one considers the situation from the perspective of the shareholders. Their expectation is that the non-executives will perform an important role in protecting their investment and ensuring that the board and indeed the company as a whole is properly run and focused on its key objectives. And, of course, this is very much the understanding of the role of the NED that the Combined Code has taken up and developed. There are accordingly very serious risks associated with any attempt to water down the liabilities to which a non-executive might be exposed. In the ultimate, these would include the creation of a situation where NEDs were no more than window-dressing, employed with the pious hope that they might keep the company on the right track but with no particular incentive to do so and certainly no particular sanction in the event of failure. This is particularly an issue where there is evidence that the role of NED has traditionally been understood as a sinecure and where there has been little interest in performing the monitoring role envisaged or in asking tough questions of management.41 In short, the seriousness of a jurisdiction's commitment to corporate governance would profoundly be called into question should it seek to insulate NEDs from the consequences of poor performance. It was, therefore, reassuring that the Irani Committee rejected this idea and recommended that the issue be dealt with on the basis of a knowledge test.42

Interestingly, while the Companies Bill reflects the Irani Committee's recommendation that directors' duties be set out in statute, rather than relying on their traditional common law expression, it does not directly address this question of a knowledge test. The closest it comes is in the statutory expression of a duty of skill and care, but even here there is a question as to just how sophisticated this test is and what impact it might have, if any, on the differential treatment of executive and non-executive directors. Clause 147(3) states that "A director shall exercise his duties with due and reasonable care, skill and diligence". In the absence of anything further, it would appear that the existing Indian common law reasonableness test remains.43 By contrast, in the United Kingdom, the Companies Act 2006 took the opportunity to set out in detail a two-part test inspired by s.214 of the Insolvency Act 1986 that was first enunciated as an expression of the common law by Hoffmann J. in 199144 and subsequently supported by the Law Commissions.45 Thus s.174 of the 2006 Act reads as follows:

"(1) A director of a company must exercise reasonable care, skill and diligence.

(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with--

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and

(b) the general knowledge, skill and experience that the director has."

In other words, the test has both an objective and a subjective element. A closer look at this test might, however, only serve to increase the concerns of those who fear that NEDs are excessively exposed given their position on the board coupled with only intermittent involvement with the company: whereas the subjective test by itself at one time would have served precisely to protect disengaged NEDs from onerous liabilities,46 coupled with the objective test it can only serve to heighten and never reduce the standard to which a director will be held.

It would accordingly appear that while the United Kingdom's recent Companies Act might provide a clearer and more satisfactory test of skill and care than that appearing in the Indian Companies Bill from the point of view of shareholders, there is still nothing that would reassure NEDs about the risks that they may be running by accepting such positions on the boards of Indian companies.

In this regard it is perhaps most instructive to look at the recent Australian case law where there has been more consideration of the specific question of the standard to which NEDs will be held. Thus there has been recognition that although both executive and non-executive directors are subject to the same standard, nevertheless what will be required of them in specific circumstances will depend upon what role and function each has been entrusted with in a given company.

I.C.C.L.R. 138 In *AWA Ltd v Daniels,* for example, Rogers C.J. said that:

"In contrast to the managing director, non-executive directors are not bound to give continuous attention to the affairs of the corporation. Their duties are of an intermittent nature to be performed at periodic board meetings, and at meetings of any committee of the board upon which the director happens to be placed. Notwithstanding a small number of professional company directors there is no objective standard of the reasonably competent company director to which they may aspire. The very diversity of companies and the variety of business endeavours do not allow of a uniform standard."47

On the other hand, this should not be read as meaning that NEDs can essentially abdicate responsibility either to other directors or to management or expert advisers where what is at issue are matters that they "knew or should have known about", as the Supreme Court of New South Wales has recently held in the case of *ASIC v MacDonald.*48

It is accordingly submitted that NEDs under such an approach would not be held to an unduly high standard but that they would be expected to do the jobs they are employed by the shareholders to do. The Companies Bill could usefully, however, incorporate wording more closely modelled on the UK Companies Act in order to offer more guidance to the courts (and specifically to the future National Company Law Tribunal (NCLT), which would then be in a position to develop the jurisprudence on this point). Beyond that, it is also noteworthy that the courts in the United Kingdom, Australia and India now have a good deal of material to look at in reaching conclusions about what should reasonably be expected from NEDs in the shape respectively of the Combined Code, the Corporate Governance Principles and Recommendations49 and the CII Code.50 In the same way that directors are expected to look to these documents for guidance or instruction on how they are to carry out their functions, it is no more than reasonable that the courts should look to these too in any case where there is a question as to what a director ought to have known or done.

A statutory derivative action

A further development that appears desirable if institutional investors are to be able to play the role envisaged for them above is the implementation of a statutory derivative action. This was called for by the Irani Committee,51 but does not appear in the Companies Bill. While institutional investors have come in for criticism for their apparent failure to monitor and challenge the governance of companies involved in the financial crisis, especially in relation to risk management, they have equally responded that there are jurisdictions where there is a need for shareholders to be further empowered if they are to be able to perform as expected.52 India certainly falls into this category insofar as a number of factors conspire to make the position difficult for minority shareholders including: the persistence of close control even among listed companies; the significant presence of government companies subject to exceptions and dispensations; and the well-documented delays that bedevil the court system. Factors such as these only exacerbate the problem that exists for shareholders in any situation where there is concern that duties have been breached to the detriment of the company: the company is the proper claimant but the day-to-day decision-making, including on whether or not to litigate, is in the hands of the board. In all of these circumstances, whereas a derivative action exists at common law in India, there would be definite advantages to this being set out clearly on a statutory basis--just as was done in the United Kingdom.53 It must be acknowledged that concerns have been expressed in India that the other innovation recommended by Irani and implemented in the Bill--namely class actions--will be open to abuse, not least because of the considerable delays in the Indian court system.54 Such concerns would only be ***I.C.C.L.R. 139** magnified in the context of a statutory derivative action. It is worth noting, however, that the UK approach sets out clear and rigorous tests that have to be met before permission will be given to continue a derivative claim.55 And in the Indian context any such concerns must surely be outweighed by the evidence reviewed above which points to significant informational asymmetries and agency problems.56 Insofar as the United Kingdom's statutory approach has been identified as being based on a paternalistic understanding of such imbalances as opposed to an idealised understanding of the market as a level playing field,57 then such an approach is surely all the more justified in the Indian context. On the other hand, the concerns that have also been expressed that the advent of class actions will lead to significant delays certainly apply equally to the proposal for a statutory derivative action and only serve to emphasise the need for the NCLT.

The establishment of specialist courts

The plans for the establishment of the NCLT and Appellate Tribunal set out in the Companies Bill 2009 were discussed at length in Part 1 of the article58 and will not be reviewed again here. Suffice it to say that the reform proposals discussed above all to a greater or lesser degree depend for their effectiveness on the existence of functional and reliable courts, capable of timely consideration and enforcement of company law in relation to corporate governance. Insofar as reform of the whole court system will be a mammoth task--desirable though it would undoubtedly be--the conclusion must be that the rapid establishment of the NCLT should be a priority for the Government. The benefits for India, an emerging economy competing for capital in the context of very challenging global economic conditions, are clear--not least when the issues facing company law and corporate governance in the country's great rival China are taken into consideration.59 India could then finally derive the competitive advantage that comparative lawyers have seen to be missing despite its common law system,60 as the specialist court would be well placed to provide the space for the empirical development of the law adapting to changing circumstances that is supposed to be a defining characteristic of a common law system.61 The alternative is that investors will increasingly seek to circumvent the Indian court system by contracting for arbitration in another jurisdiction.62 At the time of writing, however, a final ruling is still awaited from the Supreme Court on the constitutionality of the proposal for the NCLT. The objection raised by the Madras Bar Association relates to the transfer of power from the High Court to the NCLT and the Appellate Tribunal. The matter has now been referred to a Constitution Bench of the Supreme Court given its "seminal importance" and the fact that it is "likely to have a serious impact on the very structure and independence of the judicial system".63 While concerns regarding the novelty of the proposals, not least the involvement of technical as well as judicial members, are understandable, it is to be hoped that an important opportunity to solve a fundamental problem will not be missed. The qualification requirements for members of the NCLT and the Appellate Tribunal discussed previously should serve to allay fears regarding the impact of the proposals: note, for example, that the president of the NCLT must have been a High Court judge of at least five years' standing.64

Adoption of international accounting standards

Beyond the specifically legal reforms listed so far, a crucial step for India in improving its corporate governance will be the adoption of international accounting standards. The Birla and Irani Committees both called for this, noted that the ICAI has been involved in work in this direction and called for a speedy conclusion to the process. As things stand, a concept paper on convergence with international financial reporting standards was issued on October 10, 2007 by a task ***I.C.C.L.R. 140** force established by the Accounting Standards Board in consultation with the president of the ICAI. At the time of writing, drafts of new reporting standards are out for consultation. The situation is no doubt complicated by the current upheaval in international reporting standards more broadly, especially the ongoing arguments over the role of mark-to-market in exacerbating the financial crisis of the last couple of years,65 but this should not be seen as an excuse not to move this process forward expeditiously. While some within the corporate governance and accounting worlds may have expressed surprise that the auditors of Satyam were unable to see what that company was doing,66 there is perhaps some cover for the auditors from the observation that "Indian accounting standards provide *considerable flexibility* to firms in their financial reporting and differ from International Accounting Standards (IAS) in several ways that often make interpreting Indian financial statements a challenging task".67 An earlier survey of members of the Indian Accounting Association similarly concluded that the present system of financial reporting was not useful for decision making by investors.68 The World Bank review of accounting and audit in India highlighted the fact that "certain IFRS and IFRS concepts are yet to be adopted, less detailed disclosures are required in some Indian Accounting Standards, and certain Indian Accounting Standards are narrower in scope than equivalent IFRS"69 and continued in an equally troubling tone that "Vague statements were noticed in some reviewed financial statements that raise a question on the validity of the auditor's opinion on 'true and fair view'".70 Some commentators do, however, see reasons for optimism given the presence of a number of factors favouring the adoption of international standards, including: the pressure to adopt such standards as a result of entering into joint ventures with partners from developed economies; the exposure of recent graduates to international accounting standards on MBA and accounting courses at both domestic and foreign universities; and the increasing presence of international faculty at Indian universities.71 It must be conceded, however, that the picture is mixed and the World Bank review also highlighted problems with regard to the education and training of accountants.72 It is accordingly clear that the simple adoption of international standards by the ICAI will not be the end of the process.

Government companies

Insofar as the logic of the proposed reforms discussed so far is accepted, the question of the differential--indeed preferential--treatment of government companies comes to the fore. While some claim that state-owned enterprises are actually in the vanguard in relation to the implementation of corporate governance requirements,73 others have demonstrated that compliance with cl.49 of the listing agreement is actually very poor among those state-owned enterprises affected.74 There is one encouraging sign in this regard in the shape of guidelines on corporate governance for government companies issued by the Department for Public Enterprise.75 This recognises that:

"It is imperative that ethics, probity and public accountability are maintained in the functioning ***I.C.C.L.R. 141*** of all public enterprises. In other words good Corporate Governance practices should be inbuilt in the management system of Public Enterprises."76

In order to achieve this the guidelines provide, first, that listed state-owned enterprises must follow the requirements set down by the SEBI,77 that is, cl.49, and, secondly, that other SOEs should follow a series of requirements that are clearly inspired by that clause of the listing agreement. As encouraging as this development undoubtedly is, there are indications that things are not going as well as might be hoped. First, the guidelines state that they are to be experimental for one year,78 but there is no indication on the website of the Department for Public Enterprise as to whether a review has been carried out, whether the experiment has been judged a success or whether any developments are deemed appropriate.79 Secondly, the official communication from the Department at the time of the issuing of the guidelines indicated that the Department "would also grade the CPSEs on the basis of their compliance of [*sic*] the corporate governance guidelines".80 Again, the Department's website, fully two years after the guidelines were issued, is silent as to whether this has been carried out.81 Thirdly, and surely most problematically, a recent decision from the SEBI regarding an alleged breach of cl.49 by GAIL (India) Ltd, a listed state-owned enterprise, would appear to have revealed a significant loophole in the regulations for listed companies that operates so as to exclude SOEs from liability in circumstances where the reason for the apparent breach can be laid at the door of the Government as shareholder rather than at that of the company itself.82 In this case, GAIL was alleged to have violated cl.49(1)(A) of the listing agreement which requires that at least half of the board be composed of independent directors.83 The company submitted that it was a Government Company under s.617 of the Companies Act 1956 with the President of India holding a stake of 57.35 per cent through the Ministry of Petroleum and Natural Gas.84 It further submitted that its articles of association stated that where the President of India held a stake of 51 per cent or more, then he or she had the sole power to appoint directors.85 It was also submitted that a Search Committee had been established by the Government with a view to identifying a pool of independent directors who could be considered for positions on the boards of relevant government companies and that recommendations for such positions would then be made by the relevant ministry after obtaining the approval of the Appointment Committee of Cabinet (ACC).86 Accordingly, the board of GAIL had no role in the appointment of independent directors, but had to rely in this regard upon the President of India acting through the Ministry of Petroleum and Natural Gas, with the prior approval of the ACC. The company pointed out that it had frequently written to the Ministry requesting that it ensure that the required directors were appointed,87 but that the Ministry had in turn written to the chairman of the SEBI to the effect that compliance with the relevant part of cl.49 would require more time.88 The company accordingly concluded its submissions with the claim that the admitted non-compliance with cl.49(1)(A) of the listing agreement was “not deliberate and was beyond the control and powers of the Company”.89 The adjudicating officer, Biju S., agreed and concluded that the GAIL's failure to comply with cl.49 of the listing agreement “was not on account of any commission or omission” on its part.90 In short, there is yet another indication that government companies enjoy a privileged position in comparison to those in the private sector, a fact that raises important questions about the willingness of the government to deal meaningfully with corporate governance problems and equally about the seriousness with which private sector companies may be expected to take corporate governance in view of these manifest double standards. This and the other problems affecting government companies discussed throughout this article will clearly have to be addressed with some urgency if there is not to be a continuing inherent blemish on Indian corporate governance going forward. Far from allowing the exemption of government companies from corporate governance and general company law requirements,91 the Companies Bill 2009 should be seen as an opportunity to bring them into line with the requirements set for the private sector.

I.C.C.L.R. 142 **Conclusions**

The final part of this article has offered proposals as to priority areas in relation to corporate governance for the Parliamentary Standing Committee (and the Parliament generally) as it considers the Companies Bill 2009. The aim has been to focus on areas that have emerged, first, from the deliberations of the various committees to have considered these issues in India over the past decade (which were reviewed in the first part of the article), and secondly, from the evaluation of those deliberations offered in the second part. Even if the logic of the arguments presented is accepted, however, earlier observations about the difficulties facing legal concepts “transplanted” from one jurisdiction to another surely counsel caution and modesty as to the predictability of any success attending such an enterprise. The perhaps more realistic notion of such concepts as “legal irritants” shows clearly that there can really be no strong predictability regarding the likely success or failure of such a reform agenda.92 There is an inevitable experimentalism about any legislative effort--a fortiori when the inspiration for that effort lies in another jurisdiction or jurisdictions.93 Add to that the views of Mark Roe, who appears increasingly fatalistic about our abilities to head off failures in corporate governance given the inevitable problems that attend the separation of ownership and control that is a side-effect of development and growth, and one may well wonder whether all the effort is worthwhile.94 The answer, it is suggested, lies somewhere between the extremes of optimism and pessimism. It is surely delusional to suggest that any reform of corporate governance will prevent any future failure; but it is equally unreasonable to conclude, accordingly, that there is no point in trying. Robert Clark surely offers the most reasonable approach when he suggests that whatever else legislators do they should mandate that there be ongoing evaluation of any reforms in order that their success or failure may be quickly identified and the results fed back into the legislative process as appropriate.95 If there is a final proposal to emerge from this article, therefore, it is precisely that the Indian Government should take the opportunity to amend the Companies Bill 2009 to mandate such ongoing evaluation, rather than simply launching reforms in the hope that they will produce the desired effect.

For any or all of this to happen, however, there is going to have to be the political will to make changes, many of which are by no means new, but which have sat unimplemented for a number of years. Insofar as that is the case, there must be doubt as to whether the truly innovative proposals will be implemented even if they are passed into law. Even those who are relatively optimistic about Indian corporate governance (at least in comparison with other emerging economies) point out that the “weakest link in the Indian growth story is the State”.96 And yet, where the Government *has* focused on reform and provided sufficient support it has been successful, most notably given present interests the establishment of the National Stock Exchange in competition to the recalcitrant Bombay Stock Exchange.97 This alone ought to provide reassurance that if the political will is there, then significant progress can be made--and economists confirm that the growth that India has experienced is positively correlated to policy and legal reforms.98 Those seeking to predict India's position in the decades ahead highlight the need for administrative, legal and governance reform but point out that gradual rather than rapid change is the most likely scenario.99

In short, India has a chance with the Companies Bill 2009 to take a lead in corporate governance innovation rather than following developments in the United States or the United Kingdom. This may also be an auspicious time to take on this task. The evidence of the impact on the global financial crisis on emerging economies such as India is inconclusive: some indicators point to decoupling from developed trading partnerswhile others suggest a closer correlation between the respective business cycles.100 Whatever the truth ***I.C.C.L.R. 143** of the situation it cannot harm India's prospects going forward to send a clear signal of intent with regard to corporate governance to the global financial market and at the very least to build on the favourable position that it appears to occupy in relation to other emerging economies.101

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1. Robert C. Clark, “Understanding and Resolving Crisis-Generated Corporate Governance reform” (2005) 1(4) *Corporate Governance Law Review* 456.

2. Clark, “Understanding and Resolving Crisis-Generated Corporate Governance reform” (2005) 1(4) *Corporate Governance Law Review* 456, 457 (emphasis added).

3. See J. Paterson, “Corporate Governance in India in the Context of the Companies Bill 2009 (Part 2: Evaluation)” [2010] I.C.C.L.R. 89 [section 3(b)(i)].

4. Ajay Shah, Susan Thomas and Michael Gorham, *India's Financial Markets: An Insider's Guide to How the Markets Work* (Chicago: Elsevier and IIT Stuart Center for Financial Markets Press, 2008), pp.210-211.

5. See Paterson, “Corporate Governance in India in the Context of the Companies Bill 2009 (Part 2: Evaluation)” [2010] I.C.C.L R. 84 [section 2(a)].

6. See, for example, the criticism of the SEC's abilities in the run up to the financial crisis levelled by the Senate Banking Committee's Subcommittee on Securities, Insurance, and Investment. Jenny Anderson, “Fears That the Market Watchdog Is Losing Its Bite”, *New York Times,* April 8, 2008.

7. US Department of the Treasury, *Financial Regulatory Reform: A New Foundation --Rebuilding Financial Supervision and Regulation* (Washington: Department of the Treasury, 2009).

8. See World Bank, *Report on the Observance of Standards and Codes, Corporate Governance Country Assessment: India* (Document of the World Bank, 35084, April 2004), s.IV.A.

9. See World Bank, *Report on the Observance of Standards and Codes, Corporate Governance Country Assessment: India,* April 2004, s.III.4.

10. Iain MacNeil and Xiao Li, “‘Comply or Explain’: market discipline and non-compliance with the Combined Code” (2006) 14 *Corporate Governance* 486, 493.

11. MacNeil and Li, “‘Comply or Explain’’ (2006) 14 *Corporate Governance* 486, 493.

12. FSA, Listing Rules 9.8.6(5) and (6).

13. Combined Code s.E.3, Main Principle.

14. Combined Code s.E.3, Supporting Principles.

15. Combined Code s.E.3, Supporting Principles.

16. See Paul Myners, *Institutional Investment in the United Kingdom: A Review* (London: HM Treasury, March

2001), Ch.5, where a comparison is drawn in this regard between the UK and the US.

17. Companies Act 2006 s.1277. For the institutions to which this applies, see s.1278.

18. International Corporate Governance Network, "Statement of Principles on Institutional Shareholder Responsibilities" (July 2007), para.4.4.iii.

19. "Institutional shareholders and/or agents should vote all shares held directly or on behalf of clients wherever practicable to do so. They will not automatically support the board; if they have been unable to reach a satisfactory outcome through active dialogue then they will register an abstention or vote against the resolution. In both instances it is good practice to inform the company in advance of their intention and the reasons why." Institutional Shareholders' Committee, *The Responsibilities of Institutional Shareholders and Agents--Statement of Principles* (June 2007), s.4.

20. "Transparency is an important feature of effective shareholder activism. Institutional shareholders and agents should not however be expected to make disclosures that might be counterproductive. Confidentiality in specific situations may well be crucial to achieving a positive outcome." Institutional Shareholders' Committee, *The Responsibilities of Institutional Shareholders and Agents,* June 2007, s.5.

21. David Walker, *A Review of Corporate Governance in UK Banks and other Financial Industry Entities* (London: HM Treasury, 2009) (Walker Review), para.5.9.

22. Walker Review, 2009, para.5.10.

23. See Sir Adrian Cadbury, *Report of the Committee on the Financial Aspects of Corporate Governance* (London: Gee, 1992) (Cadbury Committee); Financial Reporting Council, The Combined Code on Corporate Governance, June 2008 (Combined Code).

24. Walker Review, 2009, recommendations 16-20.

25. Walker Review, 2009, para.5.39.

26. In stark contrast to the positive response from the Government, the FSA and the Confederation of British Industry, the Liberal Democrats called for "mandatory" rules while the Conservatives described the Walker Review as "totally inadequate". See *http://news.bbc.co.uk/1/hi/business/8152587.stm* [Accessed January 13, 2010] and also "Reaction to the Walker Report", *Financial Times,* July 16, 2009.

27. Such a development would confirm Alan Dignam's assessment that the self-regulatory nature of the UK's approach to corporate governance has been subject to progressive dismantling since the arrival of the New Labour government in 1997. Given that he sees this process as indicative of a reduction in trust between the state and the financial sector, recent events can surely only have confirmed the perception that earlier trust had indeed been misplaced. See Alan Dignam, "Capturing Corporate Governance: the end of UK self-regulating system" (2007) 4(1) *International Journal of Disclosure and Governance* 24.

28. See Vikramaditya S. Khanna and Bernard S. Black, "Can Corporate Governance Reforms Increase Firms' Market Values? Evidence from India" (2007) 4 *Journal of Empirical Legal Studies* ; ECGI--Finance Working Paper No.159/2007; U. of Michigan Law & Economics, Olin Working Paper No.07-002; University of Texas Law, Law and Econ Research Paper No.86; 1st Annual Conference on Empirical Legal Studies; EFA 2007 Ljubljana Meetings Paper. Available at SSRN: *http://ssrn.com/abstract=914440* [Accessed January 13, 2010]; cf. the more sceptical approach in the US discussed previously. See Paterson, "Corporate Governance in India in the Context of the Companies Bill 2009 (Part 2: Evaluation)" [2010] I.C.C.L R. 85-86 [section 2(b)].

29. See Ian Ayres and Robert Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules" (1998) 99(1) *Yale Law Journal* 87.

30. See, for example, Sir Ronald Hampel, *Committee on Corporate Governance: Final Report* (London: Gee, 1998), para.1.11.

31. Committee on Capital Markets Regulation, *Interim Report of the Committee on Capital Markets Regulation* (November 30, 2006), p.4.

32. See Ayres and Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules" (1998) 99(1) *Yale Law Journal* 87.

33. See Paterson, "Corporate Governance in India in the Context of the Companies Bill 2009 (Part 2: Evaluation)" [2010] I.C.C.L R. 89 [section 3(b)(i)].

34. See Paterson, "Corporate Governance in India in the Context of the Companies Bill 2009 (Part 1: Evolution)" [2010] I.C.C.L R. 44 [section 2(b)].

35. See section “Government companies” below.

36. See Shah, Thomas and Gorham, *India's Financial Markets,* 2008, p.44. See also World Bank, *Report on the Observance of Standards and Codes, Corporate Governance Country Assessment: India,* April 2004, s.III.2.

37. See Walker Review, 2009, Ch.3.

38. As regards the UK, see, for example, Walker Review, 2009, Ch.3. As regards India, see, for example, “India Inc needs 18,000 qualified Independent Directors”, *Economic Times,* January 18, 2009.

39. See Paterson, “Corporate Governance in India in the Context of the Companies Bill 2009 (Part 1: Evolution)” [2010] I.C.C.L R. 46 [section 2(c)].

40. Abha Bakaya, “Independent directors on quitting spree”, *Economic Times,* April 20, 2009.

41. See Nandini Rajagopalan and Yan Zhang, “Corporate Governance Reforms in China and India: Challenges and Opportunities” (2008) 51 *Business Horizons* 55, 62. See also World Bank, *Report on the Observance of Standards and Codes, Corporate Governance Country Assessment: India,* April 2004, s.III.3.

42. See Paterson, “Corporate Governance in India in the Context of the Companies Bill 2009 (Part 1: Evolution)” [2010] I.C.C.L R. 51 [section 3(b)(v)].

43. Recall that the jurisprudence has been described as “sparse”. World Bank, *Report on the Observance of Standards and Codes: Corporate Governance Country Assessment--India,* April 2004), p.11.

44. *Norman v Theodore Goddard* [1992] B.C.L.C. 1028 Ch D.

45. Law Commissions, *Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties* (1999), Law Commission No.261 and Scottish Law Commission No.173, Cm.4436.

46. The classic statement of the original subjective test is by Romer J. in *City Equitable Fire Insurance Co, Re* [1925] Ch. 407 CA.

47. *AWA Ltd v Daniels* (1992) 7 A.C.S.R. 759 at 867.

48. *Australian Securities and Investments Commission v Macdonald (No.11)* [2009] NSWSC 287 at [259]-[261].

49. ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations,* 2nd edn (Sydney: Australian Securities Exchange, August 2007).

50. For a discussion of the challenges facing courts in referring to extra-legal codes in the application of company law, see Simon Goulding, Lilian Miles and Alexander Schall, “Judicial enforcement of extra-legal codes in UK and German Company Law--including observations on OLG Schleswig Holstein, NZG 2004, 669 (*Mobilcom II*) and LG München I, NZG 2004, 626 (*Hypovereinsbank*)” (2005) 1 E.C.F.R. 21.

51. See Paterson, “Corporate Governance in India in the Context of the Companies Bill 2009 (Part 1: Evolution)” [2010] I.C.C.L R. 51 [section 2(e)(ix)].

52. See International Corporate Governance Network, “Statement on the Global Financial Crisis”, November 10, 2008. It is worth noting that there are likely to be economic benefits from implementing the sort of change proposed here. Among the findings reported by Ghosh and Revilla is the fact that the provision of legal protection for minority shareholders assists in the attainment of market liquidity and efficiency. See Swati Ghosh, and Ernesto Revilla, “Enhancing the efficiency of securities markets in East Asia” (World Bank Policy Research Paper 4129, February 2007). And it may be that the Satyam scandal has prompted change in this regard inasmuch as the SEBI has recently introduced guidelines governing its offering of legal aid to investor associations wishing to raise actions. See Securities and Exchange Board of India (Aid for Legal Proceedings) Guidelines (2009).

53. See Companies Act 2006 ss.260-269.

54. See the discussion on this issue among corporate lawyers on the Indian Corporate Law blawg: *http://indiacorplaw.blogspot.com/2009/06/shareholder-activism-and-class-action.html* [Accessed January 13, 2010].

55. See Companies Act 2006 ss.263 and 268.

56. See Paterson, “Corporate Governance in India in the Context of the Companies Bill 2009 (Part 2: Evaluation)” [2010] I.C.C.L R. 90 [section 3(b)(iii)].

57. See Joseph Lee, "Shareholders' derivative claims under the Companies Act 2006: market mechanism or asymmetric paternalism" [2007] I.C.C.L.R. 378.

58. Paterson, "Corporate Governance in India in the Context of the Companies Bill 2009 (Part 1: Evolution)" [2010] I.C.C.L R. 47-48 [section 2(e)(ii)].

59. See, for example, Yuwa Wei, "Maximising the external governance function of the securities market: a Chinese experience" [2008] I.C.C.L.R. 111.

60. See Robert W. McGee, "Corporate Governance in Asia: Eight Case Studies" (Florida International University, College of Business Administration, School of Accounting, Working Paper, January 2008) and the discussion in Paterson, "Corporate Governance in India in the Context of the Companies Bill 2009 (Part 2: Evaluation)" [2010] I.C.C.L R. 88 [section 3(b)(i)].

61. Paul Davies and Jonathan Rickford, "An Introduction to the New UK Companies Act" [2008] E.C.F.R. 48, 51.

62. See Rajagopalan and Zhang, "Corporate Governance Reforms in China and India: Challenges and Opportunities" (2008) 51 *Business Horizons* 55, 63.

63. *Madras Bar Association v Union of India* (2007) 6 *Madras Law Journal* 1805 SC.

64. Companies Bill 2009 cl.369.

65. For a review of developments in this regard in 2008-09 in the US, for example, see Financial Accounting Foundation and the Financial Accounting Standards Board, "Recommendations of the Advisory Committee on Improvements to Financial Reporting to the United States Securities and Exchange Commission: A Response by the Financial Accounting Foundation and the Financial Accounting Standards Board", August 1, 2009.

66. Rahul Bajaj, who chaired the Confederation of Indian Industry committee that produced the country's first code of corporate governance, wrote recently: "I cannot understand how the auditors in Satyam did not realise what was happening." See Rahul Bajaj, "Corporate Governance" (2009) 58(1) *Chartered Accountant* 44.

67. Rajesh Chakrabarti, William L. Megginson and Pradeep K. Yadav, "Corporate Governance in India", *Journal of Applied Corporate Finance* (forthcoming--references are to pre-publication typescript), p.20 (emphasis added).

68. See Bhabatosh Banerjee, *Regulation of Corporate Accounting and Reporting in India* (Calcutta: World Press, 2002), Ch.8.

69. World Bank, Financial Management Unit, South Asia Region, *India: Report on the Observance of Standards and Codes--Accounting and Auditing* (Document of the Word Bank, Report No.32510-IN), para.57.

70. World Bank, *India: Report on the Observance of Standards and Codes* (Document of the Word Bank, Report No.32510-IN), para.61.

71. Sanjay Kallapur and Ranjani Krishnan, "Management Accounting in India" in Christopher S. Chapman, Anthony G. Hopwood and Michael D. Shields (eds), *Handbook of Management Accounting Research,* Vol.3 (Amsterdam: Elsevier Ltd, 2008), pp.1399-1410 at p.1408.

72. World Bank, *India: Report on the Observance of Standards and Codes* (Document of the Word Bank, Report No.32510-IN), paras 32-39.

73. See the speech by the Arun Balakrishnan, chairman and managing director of Hindustan Petroleum, to a seminar on the new Guidelines on State-Owned Enterprise Corporate Governance in India, June 2008, p.8. Available online at *http://www.hindustanpetroleum.com/Upload/En/ChairmansSpeech/Files/SOE¨Corporate¨Governance¨June08.pdf* [Accessed January 13, 2010]. He further states that "Public Sector Units, especially the centrally-owned ones, stand head and shoulders above the rest in terms of degree of quality of corporate governance": p.12.

74. See V.V.S.K. Prasad and T. Venkateswara Rao, "Corporate Governance: AComparative Study of Select Public Sector and Private Sector Companies in India" (April 16, 2009). Available online via *http://www.articlesbase.com* [Accessed January 13, 2010].

75. See Department for Public Enterprises, Guidelines on Corporate Governance for State-Owned Enterprises (June 2007) (DPE Guidelines).

76. DPE Guidelines, 2007, para.1.2.

77. DPE Guidelines, 2007, para.2.2.

78. DPE Guidelines, 2007, para.5.

79. See *http://www.dpe.nic.in* [Accessed January 13, 2010].

80. Office Memorandum No.18(8)/2005-GM, June 22, 2007 from the Joint Secretary of the Department for Public Affairs.

81. See *http://www.dpe.nic.in* [Accessed January 13, 2010].

82. Adjudication Order No.BS/AO- 57/2008. Order under s.23(i) of Securities Contracts (Regulation) Act 1956 read with r.4 of Securities Contracts (Regulation) (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules 2005 in the matter of adjudication Proceedings against GAIL (India) Ltd (GAIL (India) adjudication).

83. GAIL (India) adjudication, 2008, para.7.

84. GAIL (India) adjudication, 2008, para.10(a).

85. GAIL (India) adjudication, 2008, para.10(b).

86. GAIL (India) adjudication, 2008, para.10(a).

87. GAIL (India) adjudication, 2008, para.10(e).

88. GAIL (India) adjudication, 2008, para.10(f).

89. GAIL (India) adjudication, 2008, para.10(g).

90. GAIL (India) adjudication, 2008, para.15.

91. See Companies Bill 2009 cl.357.

92. A finding endorsed by studies of different approaches to the development of financial markets in transition economies, where "the easiest consequence to understand is the risk involved for the policy-making". See Daniele Checchi, "Creation of financial markets in (previously) centrally planned economies" (1993) 17 *Journal of Banking and Finance* 819, 846.

93. See Marco Ventoruzzo, "Experiments in Comparative Corporate Law: The Recent Italian Reform and the Dubious Virtue of a Market for Rules in the Absence of Effective Regulatory Competition" (2005) 2 E.C.F.R. 208. See also Holger Fleischer, "Legal Transplants in European Company Law--the case of fiduciary duties" (2006) 3 E.C.F.R. 378.

94. See Mark J. Roe, "The Inevitable Instability of American Corporate Governance" [2005] *Corporate Governance Law Review* 1.

95. See Clark, "Understanding and Resolving Crisis-Generated Corporate Governance Reform" (2005) 1(4) *Corporate Governance Law Review* 456.

96. Shah, Thomas and Gorham, *India's Financial Markets,* 2008, p.30.

97. See the discussion in Paterson, "Corporate Governance in India in the Context of the Companies Bill 2009 (Part 2: Evaluation)" [2010] I.C.C.L.R. 91-92 [section 3(b)(iv)].

98. Jakob B. Madsen, Shishir Saxena and James B. Ang, "The Indian growth miracle and endogenous growth", *Journal of Development Economics* (forthcoming).

99. Bibek Debroy, "The Indian Economy in 2040" (2004) 36 *Futures* 693, 700. See also Sundeep Waslekar and Semu Bhatt, "India's strategic future: 2025" (2004) 36 *Futures* 811.

100. For an up-to-date appraisal, see Jarko Fidrmuc, and Iikka Korhonen, "The Impact of the Global Financial Crisis on Business Cycles in Asian Emerging Economies", forthcoming, *Journal of Asian Economics* (forthcoming).

101. Shamila Jayasuriya, for example, finds that "countries that experienced lower post-liberalization volatility are in general characterized by favorable market characteristics such as higher market transparency and investor protection, and better quality of institutions such as a higher regard for rule of law and lower levels of corruption" and that India is precisely one of those countries that experienced lower post-liberalisation volatility. Shamila Jayasuriya, "Stock market liberalization and volatility in the presence of favorable

market characteristics and institutions" (2005) 6 *Emerging Markets Review* 170, 170, 182. It is important to bear in mind, however, the sort of countries that the comparison is drawn with. Those exhibiting higher post-liberalisation volatility were Colombia, Pakistan and Venezuela.