

National Action Plan on Business and Human Rights

Chapter 1 Introduction

The Netherlands encourages the business community to respect human rights. The aim is to prevent companies from abusing human rights either directly or within supply chains. Below, the Dutch government sets out existing policy, presents the results of the consultations on the Ruggie Framework and describes the additional steps it is taking or plans to take. The guiding principle is that businesses have a social responsibility to apply the same human rights norms both in the Netherlands and elsewhere.

What is the Ruggie Framework?

In 2008, Professor John Ruggie, the UN Special Representative on Business and Human Rights, presented the Protect, Respect and Remedy Framework for the relationship between business and human rights. The Framework led in 2011 to publication of the United Nations Guiding Principles on Business and Human Rights (hereafter referred to as the UN Guiding Principles), which were unanimously endorsed by the UN Human Rights Council on 16 June 2011.¹

The principles affirm:

- states' existing obligations to respect, protect and fulfil human rights and fundamental freedoms (first pillar: the State Duty to Protect);
- the responsibility of business enterprises to respect human rights (second pillar: Business Responsibility to Respect);
- the need for rights and obligations to be matched to appropriate and effective remedies when breached (third pillar: Access to Remedy).

Business responsibility to respect human rights was incorporated into the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises under Dutch chairmanship.

Ruggie points out that the UN Guiding Principles are applicable to all states and all business enterprises. They were drafted to achieve the rights of individuals and communities and thus to contribute to the sustainability of globalisation. Though Ruggie distinguishes between the responsibilities of states and business enterprises, they are connected. For example, Dutch companies expect the Dutch government to help draft local legislation that complies with international labour standards.

Reasons for this action plan

Putting the UN Guiding Principles into practice is an important priority for the Netherlands. In its Communication on Corporate Social Responsibility (CSR), the European Commission invited the member states of the European Union to develop a plan for national implementation of the UN Guiding Principles.² The House of Representatives made a similar request. The action plan was subsequently announced in the National Action Plan on Human Rights that was sent to the House on 10 December 2013.

The Ministry of Foreign Affairs is responsible for coordinating the process leading to the action plan. In mid-2012, an interministerial working group was formed representing the Ministries of Economic Affairs, Finance, Security & Justice, and Social Affairs & Employment. The group compared the UN Guiding Principles with current policy and, on the basis of interviews and consultations with representatives of the business community, civil society organisations, implementing organisations and other experts, identified the most important viewpoints and ideas on the action plan.

¹ John Ruggie (2011). Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework.

² A renewed EU strategy 2011-2014 for Corporate Social Responsibility, Brussels, 25 October 2011, COM (2011) 681 final.

Chapter 2 Current policy

The Netherlands already pursues an active policy to promote respect for human rights by the business community and to prevent companies from abusing human rights either directly or in their supply chains. The government expects companies operating abroad, in particular in countries where legislation or enforcement falls short, to pursue the same standards for CSR and human rights as they would in the Netherlands.

As the government pointed out in *A World to Gain*,³ its policy document on aid and trade, International Corporate Social Responsibility (ICSR) is a prerequisite for sustainable, inclusive growth. Companies bear a social responsibility for what goes on in their supply chains and for ensuring fair work under satisfactory conditions of employment. To prevent abuses in terms of working conditions, child labour, environment, corruption and human rights in their supply chains, the government expects companies to act in accordance with the OECD guidelines wherever possible. The government also holds them accountable for doing so.

In its letter 'CSR Pays Off'⁴ the government identifies its tasks in relation to ICSR. They are:

- to ensure that CSR frameworks are as clear as possible and that companies are informed about them;
- to promote a level playing field for Dutch business;
- to hold other government authorities to account for their responsibilities, e.g. through economic diplomacy;
- to promote a transparency and stakeholder dialogue;
- to set a good example – by pursuing sustainable procurement policies, for instance.

The letter 'CSR Pays Off' also focuses on promoting business responsibility to respect human rights, the second pillar of the Ruggie Framework.

We can achieve the most if parties with different interests and target groups have a shared agenda and work together. Where the government can offer added value, it will bring parties and interests together. For example, through sector risk analysis it can check high-risk Dutch sectors for due diligence, enabling companies, civil society organisations and other stakeholders in these sectors to join forces. This will be examined in more detail in chapter 3.

The policy letter 'Respect and Justice for All'⁵ endorses the importance of integrated implementation of the Ruggie Framework and points to the responsibility of the business community in this respect. Credibility is an important element of Dutch human rights policy. The Netherlands Institute for Human Rights can monitor whether relevant legislation complies with the Netherlands' human rights obligations. It has entered into a dialogue with companies and non-state actors on this issue. The Institute monitors policy, provides independent advice and researches human rights issues.

Agreements to improve working conditions in the agriculture and horticulture sectors

The government has made agreements with the Dutch Federation of Agriculture and Horticulture and the grocery retail industry's sector organisation on tackling abuses with conditions of employment and working conditions in the agriculture and horticulture sectors. The agreements apply to mushroom and strawberry production, the glasshouse horticulture sector and tree nurseries, all of which are high-risk sectors. Supermarkets will no longer source products from growers using employment agencies that do not possess the relevant Netherlands Standardisation Institute (NEN) certificate. In choosing their suppliers, supermarket buyers will devote specific attention to conditions of employment and working conditions. They will receive information on this matter from the Social Affairs and Employment Inspectorate. The Ministry of Social Affairs and Employment is now amending legislation so that imposed fines can be made public.

³ *A World to Gain. A New Agenda for Aid, Trade and Investment*. House of Representatives 33 625, no 1, April 2013.

⁴ *Corporate Social Responsibility Pays Off*. House of Representatives 26 485, no 164, June 2013.

⁵ *Respect and Justice for All*. House of Representatives 32 735, no. 78, June 2013.

Chapter 3 Results of the consultations and government response

During the consultations, 50 representatives of the business community, civil society organisations and implementing organisations and other experts were asked for their ideas and viewpoints on implementation of the Ruggie Framework. To ensure that they could provide their input as independently as possible, they were interviewed by an external expert. The aim was to acquire a balanced overview, reflecting the opinions of all relevant organisations.

The results of the interviews and possible options for the action plan were discussed at three meetings, the first with the representatives of civil society organisations and other experts, the second with the members of the business community and the third with the implementing organisations. The people attending all three meetings were clearly interested in and committed to the subject, and there was broad consensus about the importance of the UN Guiding Principles. But opinions on implementation and priorities differed.

This chapter presents the most significant results of the consultations, and the government response to them. The following five main points emerged:

1. An active role for the government
2. Policy coherence
3. Clarifying due diligence
4. Transparency and reporting
5. Scope for remedy

There is a broad consensus about points 1 to 3, but opinions differ on points 4 and 5.

1. An active role for the government

The consultations led to the conclusion that the government should take more responsibility for implementing the Ruggie Framework. The general view is that the government mainly sees itself as a facilitator, with a reactive role. The people interviewed had regularly encountered the government's reluctance to participate in multi-stakeholder or sector initiatives. They also felt that it took too long before the government adopted a standpoint, or agreed to provide the necessary assistance. The government should adopt a proactive stance in order to fulfil its duty to protect. Views differed on exactly how responsibilities should be fulfilled.

As the government pointed out in its policy letter 'CSR Pays Off' and as is discussed under point 3 below on due diligence, the challenge in the next few years will be timely identification of risks in Dutch companies' supply chains. The government wants to work on structural solutions within international chains, not incident management.

Cooperation with the Dutch textile sector

At a conference held on 20 June 2013, the sector organisations representing Dutch textile companies presented an action plan to tackle abuses in the production of clothing. The plan aims for structural improvements in CSR in the textile and clothing sector worldwide. The OECD guidelines and the Ruggie Framework are the guiding principles.

By the end of 2014 at least 50% of the companies affiliated to the sector organisations should have signed the action plan and/or should be participating in a project aimed at achieving the action plan's goals. The Minister for Foreign Trade and Development Cooperation has called on textile companies to commit to the plan. She has entered into dialogue with the sector on its implementation, and on opportunities to conclude a voluntary CSR agreement on textiles, for which the action plan forms a good starting point.

Level playing field

During the consultations, the representatives of the business community urged the government to play an active role in ensuring an international level playing field for companies. Civil society organisations support this notion, with a strong emphasis on universal human rights norms.

The Netherlands believes that the OECD has an important role to play in reaching agreements on a level playing field. In order to contribute to a level playing field and to give the OECD Guidelines for Multinational Enterprises more authority, the government has appointed a special representative. For the next four years, this official will chair the working group on CSR, and lead the OECD Guidelines Proactive Agenda.

Promoting a level playing field is one of the government's main tasks in relation to ICSR, and the Netherlands works through the multilateral institutions to achieve this aim. In multilateral forums

such as the EU, OECD, ILO and UN, the Netherlands consistently calls for attention to the UN Guiding Principles, and urges member states to adopt them as the guiding principles of their policy. The Netherlands is also committed to universal ratification of the ILO's fundamental labour standards: the ban on child labour and forced labour, equality of opportunity and treatment, and freedom of association. The ILO's eight fundamental and four priority conventions support the system of universal labour standards and are crucial for a level playing field.

The OECD Guidelines Proactive Agenda

The Proactive Agenda was added to the OECD Guidelines in 2011 to elucidate the guidelines for specific sectors or situations, together with all the countries involved. In the context of the Agenda, the OECD is working with the financial sector on clarifying application of the guidelines. It is also working with the various interested parties in the extractive sector on a guide to using stakeholder engagement in their CSR policies. With the FAO, it is working on a guide for the agriculture sector on fulfilling CSR requirements such as responsible investment in agriculture supply chains and land. In the spring of 2014 a high level forum will be organised with the ILO on CSR in the textile sector. A multi-stakeholder approach to conflict minerals has proved highly successful in preventing funds being channelled into the civil war in the DCR.

Human rights and trade missions

For many of the people interviewed, raising the issue of human rights during trade missions is an example of a proactive approach that can enable the government to fulfil its Duty to Protect.

For the government, it is essential to encourage ICSR during trade missions, and it has now become a permanent feature of them. The government expects companies represented in a trade mission to look into the possible adverse effects of their operations on communities, including on human rights, in the country in question, and to pursue policies to mitigate them⁶.

Trade mission to Indonesia

Between 20 and 22 November 2013, Prime Minister Mark Rutte led a trade mission to Indonesia. He was accompanied by the Minister for Foreign Trade and Development Cooperation and the Minister for Agriculture. During talks with the Indonesian President Susilo Bambang Yudhoyono, Mr Rutte raised the issue of human rights. He also opened a forum on sustainable production and trade, organised in collaboration with the Sustainable Trade Initiative. The Minister for Foreign Trade and Development Cooperation took part in this forum and talked with representatives of Indonesia's government, civil society organisations and private sector on the importance of sustainable production of and trade in palm oil and pulp for the paper industry.

2. Policy coherence

It became apparent from the consultations that the government sometimes conveys conflicting messages about CSR and human rights – for example about the most important norms, and which ministry is responsible for which part of the policy. For civil society and implementing organisations, coherence is essential. During the consultations, specific attention was requested for international policy coherence and incorporation of the UN Guiding Principles in trade and investment agreements.

The government recognises that it must be consistent on the subject of human rights and business and in pursuing and implementing policy at both national and international level. The policy letter 'CSR Pays Off' clarifies the CSR framework. The OECD Guidelines provide an overarching framework for what the Dutch government expects of companies in terms of ICSR. The Guidelines incorporate other relevant provisions such as the ILO labour standards⁷ and the UN Guiding Principles on business responsibility to respect. State-controlled companies are expected to comply with the Guidelines and to report on their CSR policies.⁸ To monitor their progress, these companies are always included in the Transparency Benchmark. Companies in which the government invests in a different way, for example through export licences, are also expected to comply with the Guidelines.

CSR and human rights are always on the agenda during both preparations and annual follow-up days for attachés and diplomats assigned to the missions. An e-learning course is currently being

⁶ Corporate social responsibility in economic missions, House of Representatives 26 485, no. 166, July 2013.

⁷ The International Labour Organization (ILO) has developed a number of fundamental labour standards, set out in conventions. They include right of association and the right to collective bargaining, protection against child labour and forced labour, and equality of opportunity and treatment, supplemented by a few standards relating to working times, wages and employment security.

⁸ Policy document on state-controlled companies, House of Representatives 28 165, no. 165, October 2013.

developed for both civil servants operating at international level and implementing organisations to provide clear and reliable information on the subject of human rights and business.

Sustainable procurement policy

Under the social conditions of national sustainable procurement policy, companies supplying the government with goods and services are required to respect human rights.⁹ These social conditions have been included in all central government EU contract award procedures since 1 January 20013, and the municipal, provincial and water authorities are being encouraged to apply them, too. Suppliers can fulfil these conditions in various ways – by joining a reliable multi-stakeholder supply chain initiative (quality mark or certification institute) or, if they have any doubts, carrying out a risk analysis.

The consultations showed that sustainable procurement policy is not regarded as effective in implementing social and human rights criteria. Companies are often unaware of risks. Government suppliers should perform a risk analysis to show that they respect human rights in accordance with the UN Guiding Principles. In its 2014 evaluation of the sustainable procurement policy social conditions, the Ministry of the Interior and Kingdom Relations will examine whether this policy is in line with the OECD Guidelines and the UN Guiding Principles, and whether central government policy can also be applied by the municipal, provincial and water authorities.

International forums

During the consultations it was emphasised that the Netherlands should work in multilateral forums such as the EU and the UN for adoption of the UN Guiding Principles as the reference framework, in the interests of international policy coherence. Some groups remarked that the Dutch sector and multi-stakeholder initiatives should be upscaled to international level, since this would increase their effectiveness. Both the business community and civil society organisations endorsed the need for a European approach to business and human rights – the business community in the interests of a level playing field, and civil society organisations for reasons of greater effectiveness.

In its 2011 Communication on CSR, the European Commission placed the initiative with the EU member states. It called for measures to promote CSR and for national action plans based on the UN Guiding Principles. The report on priorities in the implementation of the UN Guiding Principles has not yet been published.

The government regards the UN Guiding Principles as an integral part of its foreign and human rights policy. The government can play a role in sector and multi-stakeholder initiatives by forging direct links with government authorities in other countries and by raising issues in multilateral forums and through the embassies. The government is committed to keeping CSR and human rights on the European agenda. In the run-up to the EU Presidency in the first six months of 2016, the Netherlands will consult with like-minded member states on Europe's commitment to achieving a level playing field and to increasing the effectiveness of multi-stakeholder initiatives. Among the subjects the government will focus on the need for collaboration to achieve ICSR, with a view to greater social impact, the creation of a level playing field for business and implementation of the UN Guiding Principles. The Netherlands and a group of like-minded countries will play a pioneering role with the aim of getting the other EU member states on board.

As a shareholder in the international financial institutions, the Netherlands calls for more systematic attention for human rights and effective internal monitoring mechanisms to safeguard observance of human rights in projects. It is, for example, urging more systematic attention for human rights in the review and update of the World Bank safeguard policies. The Netherlands is also helping to promote human rights through programmes of multilateral institutions. The ILO's Better Work programme is a good example.

Better Work

The Better Work programme was launched by the ILO and the International Finance Corporation (IFC) to improve working conditions in the textile sector in a number of countries. The programme receives public-private funding. By organising and supporting collaboration between employers and employees at factory level it has achieved visibly improved, safer working conditions in Cambodia, Haiti, Indonesia, Jordan, Lesotho, Nicaragua and Vietnam. Better Work focuses on direct interventions in factories, converting global labour standards into concrete action by promoting social dialogue on the work floor.

⁹ Sustainable development and policy, House of Representatives 30 196, no. 33, May 2008.

Trade and investment agreements

Incorporating the OECD Guidelines and UN Guiding Principles in trade and investment agreements was one of the suggestions made during the consultations.

The government is committed to including clear provisions on the relationship between trade, investment and sustainability in trade and investment agreements. Within the EU, the Netherlands urges the inclusion in these agreements of a section on trade and sustainable development, with monitoring and enforcement mechanisms. The aim is for parties to reaffirm their commitment to fulfilling their ILO obligations to eliminate child labour and forced labour and to working together to this end. Agreements also need to be made on cooperating on and promoting CSR, through the OECD Guidelines, for instance. For the Netherlands, involvement of civil society organisations is an essential component of any agreement.

The EU's aim is for every trade agreement to be linked to a broader partnership and cooperation agreement reaffirming states' human rights obligations. Where human rights are abused, the trade agreement could ultimately be suspended.

Free trade agreement between the EU, Peru and Colombia

The free trade agreement between the EU, Peru and Colombia seeks to reaffirm respect for human rights and ensure sustainable economic development. Title IX on Trade and Sustainable Development contains provisions on supervision and implementation, based on labour and environmental standards, with agreements on promoting and implementing internationally recognised ILO labour standards. The Colombian government undertakes to consult civil society organisations each year on implementation of this Title of the trade agreement. These organisations may also issue recommendations on their own initiative.

Existing Dutch bilateral trade agreements provide parties with the policy space to take non-discriminatory measures to protect public interests such as human rights, working conditions and the environment. The Lisbon Treaty gave the EU exclusive competence on direct foreign investment. With this shift, which does not apply to every aspect of investment, the EU now negotiates investment treaties together with the member states. Each EU investment agreement will most likely contain a separate section on environment, labour, sustainability and transparency, dealing with these issues in greater detail. The Netherlands is very much in favour of including such sections in all future EU investment protection agreements.

3. Clarifying due diligence

A point raised during the consultations was that the government should clarify the UN Guiding Principles, using language companies understand. Companies feel that the government has failed to say what it expects of them in terms of due diligence.

Due diligence is a core concept of the UN Guiding Principles, as set out by Professor Ruggie. It may be defined as follows:

- Identifying and assessing human rights impacts: taking proactive, ongoing steps to understand how existing and proposed activities may cause or contribute to human rights impacts.
- Taking action and tracking effectiveness of response.
- Externally communicating how the business has addressed adverse impacts: it is possible that these impacts are not the direct result of a business's own operations, but are caused elsewhere within the supply chain.
- Due diligence is not a one-off activity but an ongoing process.

In the 2011 update of the OECD Guidelines, the recommendation to apply due diligence was extended to the CSR domain. In all its communications with and conditions for the business community, the government uses the OECD Guidelines as its framework of reference for ICSR. Companies must take account of the potential social impact of their activities. Due diligence is thus the most important new element in the CSR policies of companies operating internationally and/or within international supply chains. Corporate responsibility for applying due diligence is part of good business practice. But what the most effective due diligence process entails depends on the size of the company, the nature of its trade relations and the sectors and countries in which it operates.

Raising companies' awareness

The aim of the information strategy described in the policy letter 'CSR Pays Off' is to raise companies' awareness of the need for due diligence. As an earlier study showed, SMEs operating internationally mainly need practical information.¹⁰ There are various aids for companies wishing to apply due diligence, and new ones are currently being developed, by the Social and Economic Council (SER), for instance. The government also has a role to play in making information and aids accessible. The knowledge centre CSR Netherlands plays an important role, while NL Agency and the embassies are major sources of information for companies operating at international level.

The government supports the SER with a grant for workshops to help companies shape the human rights component of their CSR policies, and to assist them in charting and prioritising the risks they face. These workshops are organised by SHIFT, a non-profit organisation set up with Professor Ruggie's support to help companies and government authorities put the UN Guiding Principles into practice. The SER has also been given a grant to investigate whether the ISO 31000 risk management standard is applicable to CSR due diligence.

It is essential for companies to have access to all available information on due diligence. The European Commission has published human rights guidance for three business sectors: ICT companies, oil and gas companies and employment and recruitment agencies. These guides advise companies on how they can implement their responsibility to respect human rights in their everyday operations. At each step, the guides give a short account of what the UN Guiding Principles expect of them, and present a whole range of strategies and examples to help them put the principles into practice. The European Commission has also published a guide for SMEs¹¹ and has developed a number of case studies. As mentioned above, the OECD has published a guide on responsible supply chains for conflict minerals and is working on a guide for responsible investment in agriculture supply chains. In 2010 Global Compact Netherlands published the results of a pilot study of application of the Ruggie Framework in ten Dutch companies.¹² A follow-up publication is currently being discussed with Global Compact Netherlands.

CSR Risk Check

Using a grant from the Minister for Foreign Trade and Development Cooperation, CSR Netherlands has developed the CSR Risk Check¹³ for companies wishing to apply due diligence. Based on the sector and country in which a company is operating, this internet tool provides an indication of possible social impacts. CSR Netherlands works with the agency responsible for carrying out Sector Risk Analyses to harmonise the information on which the two instruments are based. This information will be used in the course of 2014 to compile sectoral world maps on which colour coding will be used to indicate whether a certain theme (e.g. child labour, discrimination of women) plays a role in a given country or region.

One of the suggestions made during the consultations was to involve educational institutions in transferring knowledge, so that on graduating future entrepreneurs and managers will be aware of business responsibility for social impacts. The government feels that this would provide added value, and is now investigating which courses should take knowledge of business ethics and CSR on board.

Awareness-raising by embassies

Embassies are the spider in the web linking companies, government authorities and civil society organisations. They are thus in an excellent position to inform Dutch companies abroad about the OECD Guidelines and the UN Guiding Principles. In the past few years, many embassies have worked to promote human rights within the framework of international enterprise. In March 2012, the embassy in Astana (Kazakhstan) organised a roundtable meeting on CSR. It was a great success, not least because it was attended by delegations from many Kazakh companies and government agencies as well as by ministry representatives and members of parliament.

The embassies bring Dutch and local entrepreneurs and civil society organisations together and are active in providing information on CSR, human rights themes, the OECD Guidelines and National Contact Point (NCP) procedures. They can also identify country-specific risks. The CSR passport, a

¹⁰ Good Company (2010). Evaluation of the NCP's promotional tasks 2007-2010. Parliamentary Papers 26 485, no. 101.

¹¹ European Commission (2012). My Business and Human Rights: a guide to human rights for small and medium-sized enterprises.

¹² Global Compact (2010). How to do business with respect for human rights.

¹³ <http://www.mvorisicochecker.nl>

booklet for embassy staff with information on the OECD Guidelines, human rights and due diligence, is currently being updated.

Sector Risk Analysis

An issue raised during the consultations was that the government should help companies to take a proactive approach in identifying risks to human rights.

As announced in the CSR policy letter, Sector Risk Analysis has been introduced to identify the sectors that present the greatest risk of adverse social impacts and where priority should be given to strengthening company policy in relation to them. This forms part of the Dutch government's due diligence towards the business community. In this way, it is helping the business community to fulfil its responsibility to apply due diligence on CSR. Both the business community and civil society organisations will be closely involved in the analysis. The government will enter into dialogue with the sectors identified in the analysis to explore how the situation can be improved. Human rights issues may also be raised. The government will report to the House of Representatives on progress with the project in early 2014.

Where specific issues relating to human rights and the Dutch business community play a role, the government will enter into dialogue with the companies concerned.

Landgrabbing in Brazil

Several Dutch financial institutions were recently linked through an investment partner to landgrabbing in Brazil. The Minister for Foreign Trade and Development Cooperation immediately contacted the Dutch and Brazilian institutions concerned, and had talks with high-level representatives of ABN AMRO Bank, the ABP Pension Fund, Aegon, the Entrepreneurial Development Bank (FMO), ING Bank, the Dutch Banking Association, the Federation of Dutch Pension Funds, PFZW pension fund and Rabobank. They discussed the need for greater transparency with regard to loans and investments, and had a constructive exchange of views on participation of Dutch financial institutions in multi-sector consultations on better land and land-use rights.

The government has reached agreement with a number of sectors on the subject of due diligence. Agreements with, for example, the textile sector and energy companies are now in preparation. The government is willing to remove obstacles identified by the companies concerned. It will support them in upscaling initiatives to international level – e.g. through the Better Coal Initiative dialogue – and will work for a level playing field for Dutch companies. The contents of these voluntary CSR agreements will depend on the nature of the problem, the degree to which the sector is organised and whether companies commit to achieving certain results or making certain efforts. The Minister for Foreign Trade and Development Cooperation and the Minister of Economic Affairs have requested the SER to advise them on effective CSR agreements with the business community. The SER is expected to issue its recommendations in early 2014. The sectors with which the government plans to enter into voluntary agreements will be announced in mid-2014.

Upscaling the Better Coal Initiative and the textile sector in Bangladesh

The Better Coal Initiative was launched by the business community and civil society organisations, and the government is actively promoting participation by other European countries. The Minister for Foreign Trade and Development Cooperation has underscored the importance of this initiative and called on other countries to give it their support. To ensure greater effectiveness, the government is also committed to upscaling initiatives relating to the textile sector in Bangladesh, together with other countries and international organisations.

Due diligence by government

A point raised in the consultations was that the government should also apply due diligence to its own activities, for example in providing support for companies in the form of grants or other types of finance for activities abroad, export credit insurance and trade missions. In all these cases, the government requires the companies concerned to apply due diligence.

For some time now the government has applied ICSR frameworks for risk assessment (due diligence) to all applications for support. These frameworks differ, depending on the goals and the nature of the instrument in question. For example, the ICSR framework for trade missions differs from the frameworks for project grants or export credit insurance. Assessment is based on the risk profile of the project or instrument, so that high-risk projects are subject to more thorough assessment than projects with fewer risks.

Companies should always take responsibility for their activities and the ICSR assessment frameworks provide guidance in this respect. Participation in a voluntary CSR agreement will of

course help companies wanting support from the government to fulfil the requirements set out in the frameworks.

ICSR in relation to export credit insurance

Under CSR policy on export credit insurance, both the government and companies are required to take responsibility for CSR. Companies using export credit insurance sign a declaration that they will seek to abide by the OECD Guidelines. The export credit agency Atradius DSB is responsible for carrying out a due diligence risk analysis of applications for insurance. The companies concerned are responsible for supplying the necessary information. If they are unable to do so, insurance will not be provided for the export transaction.

International agreements on the due diligence procedure for export credit insurance are set out in the OECD's common approaches for export credit agencies.¹⁴ The common approaches apply to all OECD member states and, in terms of assessment of environmental and social impact, safeguard a level playing field between the member states' export credit agencies. In the context of the common approaches, the OECD member states represented in the Export Credit Group have agreed that projects with potential adverse environmental and social impacts will always be screened for compliance with the IFC Performance Standards. The OECD Export Credit Group, in which all member states with export credit facilities are represented, is working on a strategy for assessing project-related human rights. The Netherlands plays an active part in this group, which is responsible for improving risk assessment.

Legally binding measures

The consultations failed to produce consensus on whether the obligations of Dutch companies in relation to CSR are adequately regulated by law, or whether more specific provisions are necessary. An independent committee will be asked to look into this matter, taking the following issues into consideration:

- relevant Dutch legislation and interpretations in case law;
- the situation in neighbouring countries (level playing field);
- the effects of legislation on companies and the business climate.

4. Transparency and reporting

During the consultations, various parties pointed out that companies should be encouraged and/or required to report on their human rights policy and the results achieved. At the same time, they stressed that level of reporting should be proportionate to what it yields, and that account needs to be taken of the administrative burden on the business community.

The UN Guiding Principles devote attention to the importance of transparency and reporting. The responsibility to respect human rights calls not only for internal processes to identify and mitigate risks of adverse impacts ('knowing'), but also for communication on these risks with the parties directly involved and other stakeholders, such as investors ('showing'). In this way, companies can account for their policies and facilitate dialogue with all stakeholders.

Transparency and stakeholder dialogue

Transparency and stakeholder dialogue are essential elements of CSR and the government sees it as its task is to promote both. Companies are expected to show that they respect human rights. They can do so in various ways, for example in meetings or consultations with stakeholders, or by issuing formal, public reports. For the government, it is important that the information requested leads to effective communication with the relevant stakeholders.

The voluntary CSR agreements which will be reached with the sectors selected through the Sector Risk Analysis project will focus on transparency, dialogue with stakeholders and monitoring of agreements.

Reporting

As it points out in its policy letter 'CSR Pays Off', the government supports the European Commission's proposal to amend accounting legislation in relation to non-financial reporting. Large companies will be required to disclose information on human rights, environmental matters, social and employee-related matters and corruption. The proposal affects some 600 companies in the Netherlands, which together account for considerable social impact. The new Directive will ensure a level playing field at European level. What is more, it will place a limited administrative burden on

¹⁴ <http://www.oecd.org/tad/xcred/commonapproaches.htm>.

the business community, since it is non-prescriptive as regards information provision, and works on the basis of the 'apply or explain' principle.

The Netherlands pursues an active policy of encouraging social reporting through the transparency benchmark. This benchmark is carried out every year on the instructions of the Ministry of Economic Affairs to give the 500 largest Dutch companies a rating for transparency on sustainability and CSR. The benchmark's criteria have been updated and brought in line with international developments such as the UN Guiding Principles and the European Commission's proposal for a new Accounting Directive. The Transparency Benchmark will now apply to the 600 companies referred to in this proposal.

The government supports the growing number of international initiatives to promote transparency by means of tax disclosure. It takes an active part in discussions in the EU on a possible expansion of obligatory tax disclosure by companies operating internationally to include payments to countries where they are active. It urges attention for possible adverse economic consequences of making this information public, and for close harmonisation with existing transparency requirements.

The government continues to call companies' attention to the need to comply with the Corporate Governance Code and the principle that members of the management and supervisory boards should take account of CSR in fulfilling their duties. The government has pointed out that CSR should be part of the entrepreneurial spirit. It is therefore essential to devote serious attention to CSR within the existing structures and responsibilities of the management and supervisory boards. Their reports should also include more information on their CSR policies.

Burma

Since the economic sanctions were lifted, the international business community has shown considerable interest in investing in Burma. Despite positive developments and reforms, Burma still faces major challenges, including in the field of human rights.

On 1 July 2013, legislation came into force in the United States requiring companies investing more than \$500,000 in Burma to publish an annual report on their activities, including their due diligence policies. The Netherlands would like to exchange views and experience on this issue within the OECD. To promote responsible investment, the Netherlands supports the Myanmar Centre for Responsible Business, a local platform for the development and coordination of capacity for business and human rights among all relevant actors in Burma. The platform focuses on promoting and enabling responsible investment in Burma, in accordance with the UN Guiding Principles. To this end, it supplies knowledge, tools and training to enable companies, investors, government authorities and civil society organisations in Burma to fulfil their roles. Through dialogue and consensus, it is drafting criteria to enable companies and investors to pursue effective human rights policies.

During the consultations, attention was again requested for the Production and Supply Chain Information (Public Access) Act (WOK). With this legislation, consumers, members of the public, civil society organisations and other parties who ask companies about the origins of their products and services would be assured of an answer. On the basis of the results of a study by Panteia/EIM¹⁵ in 2009, the government then in office concluded that implementation of the WOK was technically feasible, but that it would entail high costs for the business community, and its enactment would probably run into international legal obstacles.

In this light, the government does not feel that this is the right time to enact such legislation, and points to the increasing availability of information on supply chains through instruments such as the Sustainable Trade Initiative and the Sector Risk Analysis project. The SER also devotes considerable attention to promoting supply chain transparency and responsibility in its ICSR committee. Moreover, it is possible to report to the NCP on companies that are insufficiently transparent for a constructive dialogue on CSR.

5. Scope for Remedy

The consultations showed that the government has a major role to play in creating scope for remedy to implement the 3rd pillar of the Ruggie Framework, and providing information on the matter. Suggestions varied from providing more information on existing access to remedy through the embassies, to promoting complaint mechanisms at company level and encouraging dialogue between companies and communities under the leadership of an impartial mediator or facilitator.

¹⁵ Panteia/EIM (2008). Study of the legal, technical and economic feasibility of the Production and Supply Chain Information (Public Access) Act and a survey of opinions.

The ACCESS Facility was mentioned as an initiative that could receive support as part of the action plan.

ACCESS Facility

The ACCESS Facility was set up in December 2012 with a view to knowledge building and improving access to effective dispute settlement between companies and communities either in or out of court. ACCESS supports and facilitates local dispute settlement mechanisms, since it is convinced that local solutions are the most effective and sustainable, and that companies and other interested parties will only use dialogue and mediation if they have confidence in both the design and function of the relevant mechanisms.

Since the government believes that the ACCESS Facility clearly provides added value, it has awarded start-up funding under the Human Rights Fund.

In his commentary on the 3rd Pillar of the Principles, Professor Ruggie points out that grievance mechanisms may take various forms, but their aim will always be to counteract or make good any abuses. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions, as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. The term grievance mechanism is used to indicate any routinised, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought.

Judicial mechanisms

On the basis of Dutch civil law, victims of abuses that have taken place in the Netherlands can claim compensation in the civil law courts. Where an unlawful act has been committed, the court may order the company not only to cease the abuse but also to compensate for the damage caused to the victim (article 6:162, Civil Code). Dutch criminal law provides limited scope for payment of compensation.

In 2009, Professor Alex Geert Castermans and Dr Jeroen van der Weide of Leiden University conducted research into the legal responsibility of Dutch parent companies for the involvement of their subsidiaries in human rights abuses.¹⁶In practice, companies often make use of a group structure. In these cases, the Dutch parent company is at the head of a group of subsidiaries, which may be located in various countries. Within a group too, each independent legal person is responsible for its own acts. Each legal person is therefore liable for any harm that may be caused by its actions.

Under the rules of private international law, a dispute about harm is judged on the basis of the law of the country in which it has occurred. If it is the result of the actions of a foreign subsidiary of a Dutch parent company, any liability on the part of the parent company will also be judged under the law of the country where it has occurred. Should the subsidiary in question be located in another country, the liability of the Dutch parent company will be judged according to the law of that country. A Dutch civil court may declare itself competent if there is a sufficiently close relationship with a Dutch legal person.

In the consultations, a number of the people interviewed suggested providing more opportunities to gain an understanding of the legal and organisational structures of groups and the relations of control, and to promote transparency regarding the impact of their operations on human rights. The Minister of Security and Justice will inform the House of Representatives separately on the obligations of companies to provide information.

Non-judicial mechanisms

In the Guiding Principles, Professor Ruggie points out that non-judicial mechanisms can contribute to faster, potentially more effective and more direct remedy for victims. They are therefore an important addition to judicial proceedings, which are often time-consuming and costly.

The National Contact Point (NCP) supports companies in putting the OECD Guidelines into practice. Where there is a difference of opinion between companies and other stakeholders on the application of the Guidelines, any party may submit a complaint to the NCP. Should the complaint be deemed admissible, the NCP may attempt to act as an impartial mediator between the parties

¹⁶ Castermans, A.G. and J.A. van der Weide, 'De juridische verantwoordelijkheid van Nederlandse moederbedrijven voor de betrokkenheid van dochters bij schendingen van fundamentele, internationaal erkend rechten'. Leiden University, 15 December 2009.

reporting the abuse and the company in question. The NCP may be regarded as an overarching external remedy mechanism, since it is accessible to all stakeholders and is based on impartial mediation. At the end of a procedure, the NCP issues a final statement in which it describes the process and the relationship between the solution and the OECD Guidelines. Parties may reach agreement that remedy (including compensation) should be offered by the company. The NCP also issues a final statement in cases where parties fail to reach a solution. In that event, the NCP not only describes the process but also issues recommendations on the alleged breach of the OECD Guidelines, on the basis of its understanding of the facts. The purpose of these recommendations is to prevent future disputes. The NCP procedure is non-judicial. Its final statement is not an administrative law decision and there is therefore no scope for appeal.

At the request of the House of Representatives, a study was conducted into strengthening the functioning of the NCP. The Dutch NCP was compared with the NCPs in the UK, Norway and Denmark, and interviews were held with representatives of companies, trade unions and civil society organisations and government representatives involved in the work of the NCP. Specifically, the study examined whether the NCP should be authorised to carry out investigations into possible breaches of the OECD Guidelines by Dutch companies on its own volition, thus not only in response to complaints.

The people interviewed were reasonably satisfied with the functioning of the NCP. The way in which the NCPs are organised reflects each country's specific social and economic structure. For example, the Dutch decision not to opt for civil servants, but for independent members with a firm base in society differs from the British model in which a Steering Board oversees the work of the NCP, whose members are civil servants.

There is no essential difference between the nature of the statements the various NCPs may issue in response to complaints. The Danish NCP is the only NCP entitled to carry out investigations on its own volition into the involvement of companies in abuses in international supply chains. No criteria have been laid down for starting an investigation. When asked, the Danish NCP was unable to say on what grounds it would take the initiative to launch an investigation. To date, no such investigation has been launched.

The government is not in favour of the Dutch NCP having similar, unconditional powers to carry out investigations. The people interviewed also expressed little support for this idea. The Dutch NCP may carry out additional investigations in response to complaints. If the NCP were entitled to carry out its own investigations, the business community would ultimately lose confidence in its impartiality. Moreover, if an issue were to be investigated on the NCP's own volition, thus not in response to a complaint by an interested party, there would be no official 'other party' for the mediation procedure with the company in question.

It should be noted here that, in practice, the Dutch NCP already facilitates dialogue on CSR at the request of civil society organisations and/or companies, and thus not in response to a formal complaint submitted in accordance with the OECD Guidelines. The aim of those requesting facilitation is to bring about improvements, sometimes with a view to forestalling submission of an official complaint to the NCP.

Proactive investigation of possible risks in the Dutch business community's supply chains now takes place by means of Sector Risk Analyses, as described above. Voluntary CSR agreements will be concluded with a number of sectors on the basis of these analyses. In their letter requesting advice on how effective CSR agreements can be concluded with business sectors, the Minister for Foreign Trade and Development Cooperation and the Minister of Economic Affairs asked the SER to devote explicit attention to the role the NCP could play as facilitator or dispute settlement mechanism.

In very serious situations, where a recommendation by the NCP is needed to support the social dialogue, the government will acquire scope to ask the NCP to carry out a sector-wide investigation into CSR issues. To promote a level playing field, the results will be brought to the attention of all countries that adhere to the OECD Guidelines in the OECD working group on CSR. Given the NCP's limited capacity and the fact that the Sector Risk Analyses already ensure systematic identification of risks in Dutch sectors, such an investigation would probably be needed no more than once a year. The conditions under which the NCP may be requested to carry out these investigations will be specified in the amendments to the decree establishing the NCP, which will be submitted to the House of Representatives in the summer of 2014.

The study referred to above into the functioning of the NCP will lead to a number of other amendments to this decree. The preferred option is for the decree to put the consultations that the NCP regularly holds with civil society organisations, employers' organisations and trade unions onto

a formal footing, and indicate the issues on which the NCP should, in any event, consult its stakeholders. The Minister for Foreign Trade and Development Cooperation will submit a proposal on this subject, with explanatory notes, to the House of Representatives before the summer of 2014.

In 2014, the Netherlands will organise a conference on judicial and non-judicial grievance mechanisms, together with the ACCESS Facility.

Project on improving the accessibility and effectiveness of non-judicial grievance mechanisms

Through the Human Rights Fund, the Netherlands is supporting SOMO's Grievance Mechanisms and Human Rights Programme.

The programme, which runs from 2012 to 2015, aims to improve the accessibility and effectiveness of non-judicial grievance mechanisms, such as the NCP and complaint procedures at company level. In September a training session was held in Jakarta for civil society organisations and trade union representatives, with the aim of equipping them more adequately with the knowledge and skills needed for these mechanisms. SOMO is also lobbying in a number of sector initiatives for stronger internal complaint mechanisms.

Companies' complaint mechanisms

When a company establishes that it is the cause of or contributes to a human rights abuse, it is expected to rectify the situation and/or provide compensation. Complaint procedures at company level could prove to be an effective means to this end. The procedure should be in line with the OECD Guidelines, and based on dialogue and commitment to seeking an acceptable solution. Complainants should still have access to other judicial or non-judicial complaint procedures, including the NCP's and the standard court system.

Legal aid fund

During the consultations, it was suggested that more financial support should be provided for alleged victims, enabling them to institute proceedings. A fund was proposed to contribute to the costs, including those incurred in collecting evidence and carrying out investigations. Alleged victims usually have fewer resources at their disposal to take a case to court than a company.

In the government's opinion, a fund is unnecessary, because the regular legal aid scheme provides scope for support in paying legal costs. In the event of claims for compensation from parent companies in the Netherlands, non-Dutch nationals are also entitled to legal aid.

Access to the courts is not as easy in every country. The Netherlands is therefore committed to strengthening countries' business climate and, in particular, national legal infrastructure, and providing victims in every country with adequate access to remedy mechanisms. It supports capacity development and enters into strategic partnerships with organisations such as the International Development Law Organisation (IDLO).

Legislation with extraterritorial application

The consultations revealed a difference of opinion on the question of whether the Dutch court system should be open to civil or criminal law proceedings against Dutch companies in the event of alleged human rights abuses on the part of their foreign subsidiaries. Some of the people interviewed felt that the Netherlands should push at international level for an international agreement with extraterritorial application to cover international offences, since this would ensure more harmony in terms of a level playing field. Others, however, stressed that the principle of extraterritoriality would result in the Dutch legal system placing itself above the legal system of the country in which the alleged abuse had been committed.

The government would point out that extraterritorial application alone is not enough. A court judgment must also be enforceable, and it is not up to the Netherlands to decide for other countries whether this is possible. The government is therefore not convinced that legislation with extraterritorial impacts will contribute to preventing human rights abuses by foreign companies in the countries in which they are active. There is also too little international support for an international, legally-binding instrument.

Chapter 4 Action points

In the previous chapter, the government discussed the additional steps it has taken or plans to take in response to the consultations. They are listed below.

Policy coherence

- In the run-up to the Dutch EU Presidency in 2016, the government will consult with like-minded member states on shared priorities and commitments in Europe.
- An e-learning course will be developed for ministries and implementing organisations enabling them to provide clear, reliable information on human rights and business.
- In its 2014 evaluation of the social conditions of sustainable procurement policy, the Ministry of the Interior and Kingdom Relations will examine whether this policy is in line with the OECD Guidelines and the UN Guiding Principles, and whether central government policy can also be applied by the municipal, provincial and water authorities.

Clarifying due diligence

- The government will enter into dialogue with educational institutions providing courses in management-related studies on including business ethics and/or CSR in their curriculums.
- The government supports the SER with a grant for workshops to help companies shape the human rights component of their CSR policies, and to assist them in identifying and prioritising the risks they face. The SER has also been given a grant to investigate whether the ISO 31000 risk management standard is applicable to CSR due diligence.
- The government has entered into talks with Global Compact Netherlands on a follow-up to its publication 'How to do Business with Respect for Human Rights' (2010).
- The Ministry of Foreign Affairs will shortly provide an interministerial training course for civil servants whose work calls for knowledge of the UN Guiding Principles, and a refresher or other course for implementing organisations on the significance of the OECD Guidelines for companies.
- In 2014 an independent committee will investigate whether the obligations of Dutch companies in relation to CSR are adequately regulated in Dutch law, and in accordance with the UN Guiding Principles. The committee will take into account the relevant case law, the situation in neighbouring countries and the business climate.

Transparency and reporting

- The voluntary CSR agreements reached with the sectors selected through the Sector Risk Analysis project will focus on transparency, dialogue with stakeholders and monitoring of agreements.
- The government will continue to call companies' attention to the need to comply with the principle contained in the Corporate Governance Code that members of the management and supervisory boards should take account of CSR in fulfilling their duties and that their reports should include more information on their CSR policies.

Scope for remedy

- The Netherlands has provided the ACCESS Facility with start-up funding.
- In 2014, the Netherlands will organise a conference on judicial and non-judicial grievance mechanisms, together with the ACCESS Facility.
- In very serious situations, where a recommendation by the NCP is needed to support the social dialogue, the government will acquire scope to ask the NCP to carry out a sector-wide investigation into CSR issues. The conditions under which the NCP may be requested to carry out these investigations will be specified in the amendments to the decree establishing the NCP, which will be submitted to the House of Representatives before the summer of 2014.
- In their letter requesting advice on how effective CSR agreements can be concluded with business sectors, the Minister for Foreign Trade and Development Cooperation and the Minister of Economic Affairs asked the SER to devote explicit attention to the role the NCP could play as facilitator or dispute settlement mechanism.