Letter of April 2016 from the Minister of Foreign Affairs, Bert Koenders, and the Minister for Foreign Trade and Development Cooperation, Lilianne Ploumen, in conjunction with the Minister of Security and Justice, to the House of Representatives, presenting the government's response to the study of the duty of care of Dutch companies in relation to international corporate social responsibility, conducted by the Utrecht Centre for Accountability and Liability Law of the University of Utrecht

Background to the study

In June 2011 the Human Rights Council of the United Nations endorsed the United Nations Guiding Principles on Business and Human Rights (UNGPs). The UNGPs were developed under the direction of UN Special Representative John Ruggie and are based on three pillars. The first pillar reaffirms the obligation of states to protect against human rights abuses by third parties, including business enterprises. The second pillar concerns the responsibility of business enterprises to respect human rights, even in cases where the state fails to perform its duty of protection. The third pillar is the need to provide victims of human rights abuses by business enterprises with greater access to redress and/or compensation.

The UNGPs do not impose legal obligations, but do have broad support (they were endorsed unanimously by the UN Human Rights Council) and form the authoritative international standard on business and human rights.

Although the UNGPs focus specifically on the protection of human rights, they have also influenced broader instruments for international corporate social responsibility (ICSR), such as the OECD Guidelines for Multinational Enterprises.[1] ICSR reflects the notion that business enterprises must take account of how their activities impact people and the environment.

The central concept borrowed by the OECD Guidelines from the UNGPs is due diligence. This means the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems. The OECD Guidelines also apply the concept of due diligence to ICSR fields other than human rights, such as environmental protection and fighting corruption. To apply due diligence properly, enterprises must make active efforts to identify and, where possible, prevent risks of violations of human rights and other ICSR standards by themselves or by parties in their supply chain. It is recognised here

[1] http://www.oesorichtlijnen.nl.

that the manner in which an enterprise runs and deals with risks depends on its specific characteristics, such as its size and position in the supply chain and the leverage it has over other enterprises with which it has dealings. Due diligence is an obligation to use best endeavours, not a guarantee that no abuses will occur. Due diligence is therefore not a once-only procedure but a process aimed at ongoing improvement.

In 2011 the European Commission emphasised the importance of the UNGPs in its CSR strategy[2] by inviting the EU member states to develop national action plans to implement them. In 2013 the Minister for Foreign Trade and Development Cooperation and the Minister of Foreign Affairs, in conjunction with the Minister of Economic Affairs, presented the National Action Plan on Business and Human Rights[3] (NAP) to parliament.

In preparing the NAP, the government sought the views of all stakeholders (experts, businesses and civil society) on how the UNGPs should be implemented. These consultations revealed differences of opinion among the stakeholders on whether the corporate duty of care in respect of ICSR was adequately regulated in Dutch law. One of the action points in the NAP was therefore that an independent organisation should carry out a study into the regulation of the duty of care of Dutch enterprises.

The Ministry of Security and Justice and the Ministry of Foreign Affairs subsequently requested the Research and Documentation Centre (WODC) to commission this study. The study was started by the Utrecht Centre for Accountability and Liability Law of the University of Utrecht on 1 December 2014 and was overseen by a committee consisting of independent academics (Professor Maarten Kroeze (chair) of Erasmus University Rotterdam and Stephan Rammeloo of the University of Maastricht) and representatives of the Ministry of Security and Justice and Ministry of Foreign Affairs. In the course of the study, it was decided to widen the scope of the study to include not only business law and civil liability law but also criminal law. The WODC presented the report to the government in January 2016.

Summary of study and conclusions from the government response

The study deals with the question of 'how and to what extent the duty of care of Dutch businesses in relation to CSR is regulated or applied in Dutch statute and case law and how this relates to the UNGPs and the situation in neighbouring countries'. The study also

[2] http://eurlex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011DC0681.

[3] Parliamentary Paper 26485 no. 174.

considers how this legal situation influences the foreign investment climate in the countries concerned. In view of the question, the study is mainly of a descriptive nature.

The researchers conclude that although, just as in neighbouring countries, there is no statutory provision specifically requiring enterprises to observe due care, either in their own activities or in relation to those of their subsidiaries or supply chain partners, towards people and the environment in host countries, injured parties are able, under general civil liability law, to hold the businesses concerned liable in law. Both civil liability law and criminal law are focused on enforcement rather than prevention. Preventing damage requires a business policy designed for this purpose. The ICSR agreements are at present the most important instrument available to the government in this respect.

The study shows that, when it comes to ICSR-related legislation and case law, the Netherlands neither leads nor lags behind the other countries in the study.

The study does identify a number of issues requiring attention. The researchers point, for example, to practical and procedural hurdles to holding companies liable, such as high costs, evidential problems and restrictions on instituting class actions.

The researchers also conclude that Dutch criminal law provides many and varied ways of redressing violations of ICSR-related standards by Dutch enterprises, even if the violation has taken place entirely or partly abroad. In view of the limited number of cases brought before the criminal courts, the researchers conclude that when the Public Prosecution Service deploys its scarce investigation and prosecution resources it is disinclined to prosecute corporate violations of human rights, for example if there is no evidence of criminal liability.

The researchers note that, unless otherwise required by law or articles of association, enterprises tend to put their own corporate interests first and heed the interests of people and the environment only where they are conducive to or compatible with these corporate interests. The researchers identify this as an issue requiring attention because it follows from the UNGPs that legislation should promote respect for and not hinder human rights.

In response to these and other matters raised in the study and in view of the undertaking to inform parliament about what measures can be taken to monitor and supervise compliance with the ICSR agreements, the government gives the following undertakings:

- The study's findings on the duty of care will be expressly taken into account in the review of the civil law of evidence, including the parties' burden of proof in proceedings. The government will therefore bring the study to the attention of the expert group set up to conduct the review.

- The government is preparing a change in the law that will make it possible in certain circumstances to bring a class action for damages. This may be relevant for victims of business-related human rights violations for which Dutch enterprises are liable. In this context too, the government will expressly take into account the findings of the study on the duty of care.

- In its periodic consultations with the Public Prosecution Service (OM), the government will raise the issue of how to increase knowledge and awareness within the OM of the UNGPs and possible ways of prosecuting firms that commit human rights violations. Various guidelines drawn up externally for public prosecutors can be used for this purpose (see below under 'Criminal law').

- The government will urge the European Commission and the EU Special Representative for Human Rights[4] to ensure that, when the EU Action Plan on Responsible Business Conduct is drawn up, implementation of the third pillar of the UNGPs receives due attention. For this purpose, the government will also seek political support from other EU member states.

- The government is consulting with the Social and Economic Council (SER) about how compliance with the ICSR agreements can best be monitored.

The government also welcomes the fact that the Corporate Governance Code is being reviewed by the private organisations concerned. The proposal of the Corporate Governance Code Monitoring Committee puts greater emphasis on long-term value creation and takes into account risks and opportunities regarding both financial and non-financial aspects of doing business, including the effects on human rights.

The various parts of the study and the government's assessment of them are examined in more detail below.

[4] One element of the Special Representative's mandate is to 'contribute to better coherence and consistency of the Union policies and actions in the area of protection and promotion of human rights, notably by providing input to the formulation of relevant policies of the Union.'

Civil liability law

The study confirms that the Netherlands has a wide array of measures at its disposal for implementing and refining the standards of conduct set out in the UNGPs. For example, civil liability law is identified by the researchers as playing an important role in the third pillar of the UNGPs, namely access to remedy. To some extent it can also play a role in the first pillar, the state duty to protect human rights. At the same time, the researchers conclude that there is still little case law on the use of civil liability law in matters involving violations of ICSR standards. The researchers consider that this is mainly due to obstacles of a practical and procedural nature, for example the high cost of litigation, evidentiary problems and restrictions on the right to institute class actions.

Preparations for a review of the law of evidence, including the parties' burden of proof, are currently under way. An expert group is drawing up a report advising on how the law of evidence in civil proceedings could be modernised, including the right of inspection (right to inspect or take a copy of or extract from documents). An initial stakeholder meeting was recently held to discuss the general principles of a modern law of evidence based on the first draft of the expert group's report. A second meeting has been scheduled to deal specifically with the right of inspection. Various NGOs have been invited to participate in these meetings. The government will expressly take into account the results of the duty of care study in the legislative process and will also bring the study to the attention of the expert group.

A recent development that has a bearing on the restrictions on the institution of class actions is the tabling of a private member's motion (the Dijksma motion) to introduce the possibility of class actions for damages in the Netherlands.[5] A draft bill to implement the motion was published in July 2014. The period for online consultation on this bill ended on 15 October 2014. A stakeholder meeting was held on 9 April 2015. Following the meeting, a group of lawyers with experience of representing both defendants and plaintiffs in such proceedings considered various aspects of the draft legislation and made a series of recommendations in late 2015. These recommendations received widespread support during a second stakeholder meeting in November 2015. A bill is currently being drafted on the basis of the recommendations. The government will once again expressly take into account the results of the duty of care study in this legislative process. The bill is expected to be presented to the Advisory Division of the Council of State before the summer.

[5] Parliamentary Paper 33000 XIII no. 14.

Criminal law

As regards the criminal law, the researchers conclude that there are many and varied ways in which enterprises can be prosecuted in the Netherlands for human rights abuses or involvement in such abuses, even if they have occurred abroad. However, they note that few prosecutions are brought in practice and conclude that the OM does not seem to give priority to prosecuting business-related human rights abuses. The researchers also mention some legitimate reasons why the OM may decide not to prosecute. One reason would be that it does not expect to have sufficient evidence for a successful prosecution. Another would be that the violation of a given ICSR standard does not fall within the scope of a criminal provision.

In practice, the OM does take action under the criminal law wherever possible and expedient. It does so either by bringing a prosecution in the Netherlands or by providing legal assistance to other countries. A factor in any decision on the expediency of action under the criminal law is which country has the greatest interest in or best prospect of bringing a prosecution. Another factor is whether an alternative form of intervention (e.g. action by the tax authorities or cancellation of permits) would be more effective. These considerations play a role in deciding whether or not to prosecute.

Developments in the field of criminal law are also taking place at international level. For example, Amnesty International and the International Corporate Accountability Roundtable are developing guidelines for public prosecutors dealing with cases involving business-related human rights abuses.[6] The Office of the UN High Commissioner for Human Rights is identifying state best practices in this field for the UN Human Rights Council.[7] The Minister of Security and Justice will use his periodic consultations with the OM to focus attention on these instruments, and the UNGPs' broader relevance, and explore the options available in cooperation with the Ministry of Foreign Affairs.

Business law

According to the researchers, the interests of the enterprise take priority under business law unless provided otherwise either by law or in the articles of association. The interests of people and the environment play a role in this only in so far as they are conducive to or compatible with these corporate interests. The researchers identify this as an issue requiring

[6] http://www.commercecrimehumanrights.org.
[7] http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.

attention because, according to the UNGPs, legislation should promote respect for and not hinder human rights.

The government considers that Dutch legislation does not hinder respect for human rights. The general rule is that enterprises and their officials are expected to operate within the limits of the law in the countries where they are active. In carrying on their business activities, enterprises are required to comply with substantive law, for example environmental legislation. The focus of business law is, above all, internal. It regulates dealings between the organs and officers of the enterprise. Dutch enterprises often take the form of a public limited company (NV) or private limited company (BV). The board of directors and, if present, the supervisory board of an NVor BV company are obliged to perform their duties properly and be guided by the best interests of the company and the business connected with it. As the researchers confirm, the interests of the company go beyond the interests of the shareholders. They also include the interests of other stakeholders, for example employees and creditors.[8] The company's interests will generally be focused on ensuring the continuity of its business.[9] Although business law does therefore have a degree of external effect, this is limited to the stakeholders who have a direct relationship with the enterprise.

For the purposes of business continuity, the creation of value in the medium and long term and the licence to operate, an enterprise must ensure that its impact on people and the environment is taken into account in its objectives and decisions. If it does not do so, it can be held liable in tort if it acts in breach of the law or unwritten standards of care. As the researchers point out, civil liability law as described above is better suited than business law to addressing CSR violations.

The Corporate Governance Code applies to Dutch listed companies. The Code contains principles and best practice provisions designed to promote good corporate governance. The Code, too, is basically an instrument that has an internal focus: it regulates relations between

[8] In its judgment in the Cancun case, the Supreme Court held as follows: 'In performing their duties, directors should, in keeping with the provisions of article 8, Book 2, Civil Code, observe due care in relation to the interests of all those involved in the company and its business (…). This duty of care may mean that, in serving the interests of the company, directors have to ensure that they do not thereby unnecessarily or disproportionately harm the interests of any of those connected with the company or its business.'

[9] Cf. Supreme Court, 4 April 2014, ECLI:NL:HR:2014:799 (Cancun): 'What these interests entail depends on the circumstances of the case. If the company runs a business, the interests of the company are generally best served by promoting the lasting success of the business.'

the board of directors, supervisory board and shareholders (i.e. the general meeting of shareholders). Although the Code is an instrument of self-regulation under private law, compliance has a statutory basis (article 391, paragraph 5, Book 2, Civil Code). The Code is based on the principle that a company is a long-term alliance between its various stakeholders. The board of directors and the supervisory board are responsible for weighing up the interests of these stakeholders, with a view to ensuring the continuity of the enterprise.

The Code is currently being updated by the Corporate Governance Code Monitoring Committee at the request of the organisations concerned.[10] The Committee's consultation proposal[11] puts greater emphasis on long-term value creation. This means that the enterprises concerned must give consideration to risks and opportunities of both a financial and non-financial nature when doing business. In defining the non-financial aspects the Monitoring Committee has based its proposals on EU Directive 2014/95/EU on disclosure of non-financial and diversity information, which also deals explicitly with human rights.[12] A wide-ranging public consultation has been held on the updating proposal. The Monitoring Committee is drafting an updated Code with the help of the reactions received in the consultation stage and will then present it to the government.

Foreign investment climate

In the course of the study, various experts were consulted about how ICSR legislation and the potential liability of foreign businesses affect the foreign investment climate in a country. Those interviewed were from the private sector (mainly companies familiar with the dilemmas that can be posed by ICSR and human rights), academia and NGOs. Most of them believed that the ICSR legislation is not a factor that influences enterprises when deciding whether to set up business in a given country. According to the experts, what is most important to enterprises is that the rules are consistent, clear and predictable. Factors which play a major role in determining the foreign investment climate in a country include the stability and reliability of the judicial and political system, the quality of the infrastructure and the tax

[10] The Confederation of Netherlands Industry and Employers (VNO-NCW), the Association of Securities-Issuing Companies (VEUO), the Association of Stockholders (VEB), Eumedion, the Dutch Trade Union Confederation (FNV), the National Federation of Christian Trade Unions in the Netherlands (CNV) and Euronext.

[11] http://commissiecorporategovernance.nl/?page=2791.

[12] This directive must be transposed into national legislation by 6 December 2016. This is being done by means of Bill 34383.

climate. The experts reach the same conclusion as legal scholars, namely that of the three areas of law covered in the study, business law is the one most closely connected with the foreign investment climate. They see less evidence of a link between the foreign investment climate and civil liability law (or modifications to it) and little if any evidence of a connection with criminal law. A few experts rightly point out that the foreign investment climate should not be a major consideration for the government in applying or modifying criminal law. The government views the conclusions about the foreign investment climate as support for its existing policy on ICSR and human rights.

Working through the EU

The researchers state that the foreign investment climate is affected only to a limited extent by ICSR legislation, particularly EU legislation such as Directive 2014/95/EU on disclosure of non-financial and diversity information (see above).

The government considers that a European approach would be a better way of creating a level playing field for Dutch and European enterprises. This does not alter the fact that measures to strengthen compliance with the UNGPs can also be taken at national level. This is why the government intends to work at both national and European level to secure effective compliance with the UNGPs, including the third pillar.

The European Commission has undertaken to start formulating a new EU Action Plan for Responsible Business Conduct (to succeed the EU's CSR strategy 2011-2014) even before the end of the Dutch EU Presidency.[13] The government will urge the European Commission and the EU's Special Representative for Human Rights to ensure that the action plan pays special attention to implementing the third pillar of the UNGPs. It will also seek support for this approach from other EU member states.

CSR supervisory authority

During the meeting on international corporate social responsibility (ICSR) between the Minister for Foreign Trade and Development Cooperation and the Permanent Committee for Economic Affairs on 3 December 2015, an undertaking was given to the House of Representatives – in consequence of the duty of care study – to address the broader issue of CSR supervision in a letter, partly with a view to the monitoring of the ICSR agreements. This undertaking is fulfilled below.

[13] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:en:PDF.

The government considers that the various intended tasks of monitoring and supervision come within the remit of existing institutions, with the exception of general supervision of compliance with the ICSR agreements. This is why the government will act to ensure supervision of compliance with the ICSR agreements.

Responsibility for advising on the implementation and supervision of compliance with the ICSR agreements can be given to the Social and Economic Council (SER) or other institutions. The specific tasks of whichever organisation is chosen will be recorded in the form of an agreement. The government aims, at any rate, to set the following fixed supervision tasks:

- monitoring and checking implementation of plans of action and/or progress reports of the participants;
- drawing up reports, particularly annual reports;
- verifying information that has been supplied.

Naturally, the organisation could also be given other tasks, such as investigating common ICSR risks in relevant production countries in order to simplify completion of the due diligence process. A provision of this kind has been included, for example, in the Dutch textile and clothing industry agreement.

These new supervisory tasks could be expanded to include other supervision-related tasks of existing institutions:

- Reports of alleged violations of the OECD Guidelines could be made to the National Contact Point (NCP).
- Enterprises could obtain advice from the NCP about implementation of the Guidelines.
- The NCP has a mandate to investigate sector-wide abuses at the government's request.
- After implementation of EU Directive 2014/95/EU on disclosure of non-financial and diversity information, large enterprises which are public-interest entities, including listed companies, will have to publish a non-financial statement. The Netherlands Authority for the Financial Markets supervises financial reporting of listed companies, which will include the non-financial statement.
- As is apparent from the duty of care study, ways of holding enterprises liable already exist under Dutch criminal and civil law.