



Business & Human Rights

NautaDutilh Client Memo / May 2, 2011

Business & Human Rights

an update on recent developments

Introduction: setting the landscape

In recent years, issues relating to corporate social responsibility (CSR) have increasingly been finding their way onto the agendas of the boards of Dutch companies. There appears to be a growing awareness within the Dutch business community, especially within Dutch multinational companies with businesses and operations abroad, that the notion of CSR is something to be addressed and, moreover, to be internalized and operationalized. For companies, acknowledging that they are obliged to adhere to certain CSR standards does not only make sense from the perspective of corporate citizenship in the countries in which they operate, but - as evidenced by the growing efforts in the field of CSR by a number of leading Dutch multinationals - it also makes sense from a purely business perspective. Given the potential financial implications that may result from issues such as environmental calamities (oil spills), labour controversies (child labour) and unlawful business practices (corruption scandals) and the interest of mitigating these risks, companies are realizing more and more that CSR in general and issues relating to human rights in particular are factors to be taken into account.

The increasing importance of CSR is demonstrated by a number of initiatives regarding disclosure requirements with respect to CSR-related topics. For instance, the revised 2008 Dutch Corporate Governance Code specifically requires the management board and supervisory board of listed Dutch companies to formulate a policy regarding aspects of CSR that are relevant for the company's business, a brief description of which is to be included in the company's annual report. Also, there are growing tendencies within the investor community to push for CSR-related disclosures, for instance through publication of so-called 'ESG' guidelines (Economic, Social, and Governance Issues) by institutional investors. Finally, in a recent public consultation at the EU level regarding possible disclosure requirements of non-financial information by companies, the majority of respondents indicated that better information was needed on a company's CSR policy, risks arising from social and environmental issues, and adherence to CSR standards such as the UN Global Compact and the OECD Guidelines on Multinational Enterprises. Thus, there appears to be a growing trend to push for more disclosure of CSR-related information by companies.

In addition to various initiatives in the field of disclosure, there are also a number of initiatives regarding the substantive and procedural implementation of aspects of CSR into the actual business of companies. The most prominent of these initiatives is the project that is being carried out at the level of the United Nations since 2005 by the UN Secretary General's Special Representative for Business and Human Rights, professor John Ruggie (Harvard University). In 2008, Ruggie proposed the 'Protect, Respect, and Remedy Framework' report which set out a general policy framework, aimed at both businesses as well as governments, for enhancing business' commitment to respect human rights. As a follow-up, Ruggie set out to draft a set of specific principles which aimed to operationalize the general policy framework of the 2008 report. This resulted in the publication of the 'Guiding Principles for Business and Human Rights' in March 2011. These principles aim to provide more specific guidance to governments and companies as to what actions to take to implement the Protect, Respect,

and Remedy Framework. The Guiding Principles will be considered for official endorsement during the UN Human Rights Council's forthcoming session in June 2011.

As a separate offshoot of the 2008 Protect, Respect, and Remedy Framework, a number of the large Dutch multinational companies that are part of the Dutch Global Compact Network combined their efforts in the field of CSR to form the Business and Human Rights Initiative. As a result of these companies' efforts, the Business and Human Rights Initiative in June 2010 published the 'How to do Business with Respect for Human Rights' report. This report contains detailed guidance on specific elements of integrating human rights issues into business operations, such as a breakdown of the specific human rights to be considered and human rights impact assessments. In all, both the Guidelines as well as the How to do Business report provide useful guidance on how to approach human rights from a business perspective. This memorandum aims to highlight a number of general themes from a business point of view contained in these initiatives. No exhaustive description of their contents is intended, the goal is merely to raise awareness of their existence and to provide some perspective on possible future developments in the field.

The Ruggie Framework: Protect, Respect, and Remedy

The 2008 Protect, Respect, and Remedy Framework and the Guiding Principles stem from a mandate that was issued to professor Ruggie by the United Nations in 2005 on the issue of human rights and transnational corporations and other business enterprises. Originally, the goal of the mandate was to map various human rights standards and practices across the globe and to identify instances of human rights abuses to get a clear view of the issues at hand. The research conducted by Ruggie was intended to provide factual direction to the divided debate between businesses and human rights advocacy groups on the issue of business' commitment to human rights. In 2007, Ruggie was asked by the UN to submit a number of recommendations further to his research, which he did in his 2008 report to the UN Human Rights Council. His report and the recommendations contained therein were unanimously endorsed by the council in its June 2008 session and have since gathered strong support not only from human rights interests groups, but also from business communities and governments.

Ruggie's general policy framework evolves around three pillars:

1. States have a duty to protect against human rights abuses, including those by businesses;
2. Companies have a responsibility to respect human rights; and
3. There is a greater need for access to effective remedy in cases of corporate-related human rights abuses.

Ruggie was subsequently requested by the UN Human Rights Council to extend his research into specific issues related to each of the three pillars and to submit an additional set of recommendations to 'operationalize' the 2008 framework. To that end, Ruggie has directed a

wide range of research activities over the past three years and has extensively consulted with business leaders, government representatives, NGO representatives and legal experts. For instance, in order to assess the adequacy of existing standards of company law to enhance respect for human rights (first pillar), a cross-border survey was conducted by law firms worldwide to produce a comparative analysis of the current embedment of human rights in company law across various jurisdictions. All of the research conducted by or for the mandate can be accessed online.

The Guiding Principles

In November 2010, Ruggie published a draft version of the Guiding Principles for public consultation. On March 21, 2011, the final version of the Guiding Principles was published. The Guiding Principles consist of 29 specific provisions, addressed at either governments (pillar 1), business (pillar 2) and both (pillar 3). The Guiding Principles do not intend to impose new legal obligations, but instead aim to elaborate on the implications of existing standards and practices for states and businesses and to integrate them within a single, logically coherent and comprehensive template. Still, even though the provisions of the Guiding Principles are more specific than the recommendations of the 2008 Protect, Respect, and Remedy Framework and are thus better suited for practical implementation, they do not lend themselves to box-ticking exercises or off-the-shelf implementation. Thus, governments and businesses alike will have to consider how they wish to translate the Guiding Principles into specific tailor-made actions.

As mentioned above, the Guiding Principles contain recommendations aimed at governments and policy makers, but also contain a number of provisions which may have direct implications for businesses in the sense that they elaborate on the meaning of the corporate responsibility to respect human rights. These provisions include the following:

1. Principle 11 stipulates that businesses should respect human rights, that they should avoid infringements thereon and that they should address adverse human rights impacts. The corporate responsibility to respect human rights is not limited to human rights issues related to a company's own activities, but also extends to human rights impacts that are directly linked to services by a company's business relationships (Principle 13b).
2. As a matter of principle, the corporate responsibility to respect human rights applies to all business enterprises, regardless for instance of their industry, their size and the scope of their activities. Nonetheless, the exact scope of the corporate responsibility and the means through which this responsibility is met may vary depending on specific circumstances (Principle 14).
3. Companies should draw up a statement of policy with regard to their commitment to their corporate responsibility. This statement should stipulate human rights expectations of the companies' personnel, business partners and other relevant parties and should be reflected in operational policies and procedures throughout the companies' business enterprises. Further, the statement should be publicly available and is to be communicated both internally as well as externally to business partners and other relevant parties (Principle 16).

4. Companies should put an ongoing monitoring procedure in place to assess actual and potential human rights impacts (human rights due diligence). The procedure should also provide for a procedure concerning responses to actual impacts, integration of the impact assessment findings in the internal decision-making process, a tracking system to monitor the adequacy of these responses and a process of information flows. This human rights due diligence process should not only cover the companies' own products and activities, but should also extend to services provided by business partners (Principle 17). The human rights due diligence process is further elaborated in Principles 18-21.

5. Companies should provide for a remediation process or at least should full cooperate in external remediation processes in cases of human rights violations (Principle 22).

How to do Business with Respect for Human Rights

Following the publication of the Protect, Respect, and Remedy Framework in 2008, ten large Dutch companies (AkzoNobel, Essent, Fortis Bank Nederland (currently ABN AMRO), KLM, Philips, Rabobank, Randstad, Shell, TNT, and Unilever) joined forces to form the Business and Human Rights Initiative within the Dutch Global Compact Network. Goal of the Business and Human Rights initiative was to translate the 2008 Ruggie Framework into specific guidance on how to embed human rights into their respective day-to-day business operations. As part of this exercise, the participating companies performed thorough self-assessments, exchanged specific inhouse knowledge on human rights-related topics, and drew up the 2010 report 'How to do Business with Respect for Human Rights' with a goal towards sharing their insights and findings.

The How to do Business Report predates the publication of the Guiding Principles and the Business and Human Rights Initiative was thus not able to benefit from the more specific guidelines contained in the Guiding Principles. Still, the How do to Business Report is a very useful reference guide to Dutch businesses, mainly because it offers a comprehensive overview of the human rights landscape for Dutch companies as viewed from both a legal- as well as a business perspective, and because it allows Dutch companies to benefit from the combined wealth of expertise and experience of the companies participating in the Business and Human Rights Initiative in factoring human rights issues into business organisations and business operations. Specifically, the How to do Business Report contains an elaborate section on proposals for designing and implementing the human rights due diligence process as envisaged by the Guiding Principles. In all, the How to do Business Report presents a useful addition from a Dutch perspective to the Ruggie project.

The Way Forward

We have witnessed a lot of activity in the field of business and human rights in recent years. The project undertaken by the United Nations, culminating in the Protect, Respect, and Remedy Framework and the Guiding Principles, occupies a prominent spot in all of these developments. As the How to do Business Report demonstrates, business leaders are also increasingly rising to the fray to address the issue of CSR in general and human rights in

particular within their own organisations. There are ample grounds to assume that this trend will continue in the near future. Also, even though the Guiding Principles are not binding, the growing public focus on CSR and the growing governmental support of the Ruggie project may eventually lead to some of the Guiding Principles evolving into international legal standards. Either way, the rising awareness of the impact of CSR-related issues on business means that businesses will be faced with new challenges in this regard, such as properly integrating CSR into all aspects of their businesses and monitoring compliance throughout their operations on an ongoing basis. Thus, companies would be advised to closely monitor future developments in this field.

Short Profiles



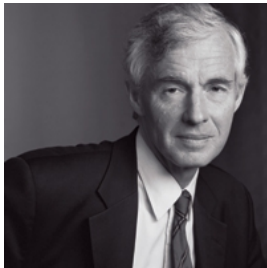
Geert Raaijmakers

Partner

T. +31 20 71 71 992

M. +31 65 36 80 843

E. geert.raaijmakers@nautadutilh.com



Willem Calkoen

Partner

T. +31 10 22 40 189

M. +31 65 34 90 451

E. willem.calkoen@nautadutilh.com



Frans Overkleeft

Associate

T. +31 20 71 71 573

M. +31 65 14 38 736

E. frans.overkleeft@nautadutilh.com

Office Addresses

Amsterdam

Strawinskylaan 1999
1077 XV Amsterdam
The Netherlands

T. +31 20 717 10 00
F. +31 20 717 11 11
E. info@nautadutilh.com
I. www.nautadutilh.com

Rotterdam

Weena 750
3014 DA Rotterdam
The Netherlands

T. +31 10 224 00 00
F. +31 10 414 84 44
E. info@nautadutilh.com
I. www.nautadutilh.com