451. Corporate social responsibility: from soft law to hard obligations through strategic litigation

M.E. COENRAADS AND J.E.S. HAMSTER

The absence of legislation and regulations in the area of corporate social responsibility is no hindrance to the rapid development of this new area of law. What is soft law at present is quickly becoming hard law.
The development of judge-made law and the use of soft-law instruments in developing open norms and new standards will form the core of the new legal rules for corporate social responsibility.
We perceive a trend where NGOs intentionally engage in confrontation, as well as creating and seeking cases that lend themselves to the development of law. Companies and their corporate bodies are the target group for these new legal rules. They will therefore undeniably be confronted with this activist push for the development of law.

1. Introduction

Corporate social responsibility has long been a voluntary matter for businesses. It has traditionally focused mainly on the positive contribution a business can make: education for children of local plantation workers in India, free dental treatment for coffee farmers in Guatemala.[1] This is no longer the case. The big challenge of today lies in developing a sustainable economy in which businesses must reconcile their profit motive with responsibility for their negative impact on people and the environment.[2] This demands a fundamental rethink of the role and position of businesses towards their stakeholders.[3]

Corporate social responsibility today is less about marketing, and more about corporate governance and compliance. It focuses on preventing a negative impact, instead of promoting positive impact stories.[4] At its heart, it is therefore fundamentally legal in nature. Not all businesses are sufficiently aware of this. But NGOs are, and are using it.

Only recently, ClientEarth successfully prevented the construction of a coal-fired power station in Poland by buying shares in the energy company responsible, and getting the board decision to build the power station quashed through the courts on corporate law grounds.[5] ClientEarth rightly rejoiced in its press release: 'Major court win shows power of corporate law to fight climate change'[6] Instead of fighting against corporate law, ClientEarth exploited it effectively to its own advantage.

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Why are so many businesses insufficiently aware of this? They would seem to be lulled to sleep by the fact that standards for corporate social responsibility are laid down in Guidelines, Principles, covenants and other instruments that are explicitly non-binding, while the legislator is deafeningly quiet where the development of legislation in this area is concerned.[7]

Businesses would be wise to take their responsible business obligations seriously, to think about the legal scope of their obligations and implement this in strategy and policy

This is naive. We take the view that standards for corporate social responsibility will develop in the void left by the legislator. Our message to businesses is that they would be wise to take their responsible business obligations seriously, to think about the legal scope of their obligations and implement this in strategy and policy. Only in that way will they be well prepared for an activist legal campaign, in court and through the company's internal bodies.

1 A. Carrol, *'A history of Corporate Social Responsibility: Concepts and Practices'* in: A. Crane et al., The Oxford Handbook of Corporate Social Responsibility, Oxford: OUP 2008.

2 European Commission, *A renewed EU strategy 2011-2014 for Corporate Social Responsibility,* COM (2011) 681 p. 6.

3 For a pertinent analysis of the scope of the problem, see; J. Winter '*Ontmenselijking van de grote onderneming*' in: *Ondernemingsrecht*, p. 3.

4 That does not alter the fact that the fundamental debate about the positive contribution of businesses to society is of course also raging: see C. Mayer, *Firm Commitment: Why the corporation is failing us and how to restore trust in it,* Oxford: OUP 2013.

5 See ClientEarth v Enea, 2018, http://climatecasechart.com/non-us-case/clientearth-v-enea/?cn-reloaded=1.

6 Seee ClientEarth, Major court win shows power of corporate law to fight climate change, 1 August 2019, https://www.clientearth.org/major-court-win-shows-power-of-corporate-law-to-fight-climate-change.

7 As Van Dam summarised in his inaugural lecture in Rotterdam: *'Hard Law is de verantwoordelijkheid van de juridische afdeling, soft law is de verantwoordelijkheid van* CSR', or: *'Soft Law is voor de softies, hard law is voor de stoere jongens*'. C. van Dam, *Enhancing Human Rights Protection: a Company Lawyer's Business* (inaugural lecture at Erasmus University, available through https://repub.eur.nl/pub/78743/Professor-Cees-van-Dam-Oratie-NL.pdf).

2. The court as legislator in corporate social responsibility

Slowly but surely, there is a growing awareness among corporate lawyers and civil-law experts that the development of a new corporate social responsibility is first and foremost a legal question.[8] The fact is, however, that only a fraction of this subject is covered by legislation and regulations brought about through the legislator.[9] In the Netherlands, the only example is the recently adopted Child Labour (Duty of Care) Act (*Wet Zorgplicht Kinderarbeid*), which is not likely to enter into force until 2022.
On the topic of sustainability, although the Climate Act entered into force on 1 September 2019, this Act serves merely as a framework for actual and concrete policy measures, which to date hardly exist at all.[10]

2.1. Legislative void in the area of corporate social responsibility demands first and foremost the intervention of the courts

The 'void' in the area of corporate social responsibility can be partly explained by a political inability, also internationally, to draft legislation. At an international level, attempts to conclude a binding treaty on business and human rights have failed for decades to achieve anything.[11] The special UN rapporteur in the area of business & human rights, Professor Ruggie, then chose to draft a set of principles, the UN Guiding Principles on Business and Human Rights, *w*hich have no binding force. Similarly, the member states of the OECD got no further than drafting Guidelines.[12] Moreover, specifically for the Netherlands, the absence of binding legislation is the result of a deliberate political choice for an alternative, and less classic set of legislative instruments. Framework legislation, delegation and self-regulation are favourite instruments in the era of the participatory society, and are also eminently suited to the Dutch 'polder' culture. Corporate social responsibility is the perfect area where the legislator has chosen for this alternative set of instruments. In its first National Action Plan for Human Rights and the Business Community (*Nationaal Actieplan Mensenrechten en Bedrijfsleven*) of 2013, the government announced that it wishes to develop separate sector covenants between businesses, the government and public organisations.[13] Voluntary agreements were made in these so-called 'IMVO' covenants on preventing and remedying misunderstandings.[14] In addition, there are countless Principles, codes of conduct and other private initiatives that have been brought about without the intervention of the courts.[15] What's more, this alternative form of lawmaking is often a solution if the legislator is unable, in a fragmented political landscape, to draft legislation in the classic sense. A relevant example is the Child Labour (Duty of Care) Act, which due to fundamental differences of opinion in parliament has in fact been stripped of all content and is no more than a framework law, in which the actual standards will be set through a governmental order.
This patchwork of governmental, semi-governmental and private initiatives gives a diffuse picture of the existence, validity, content and scope of responsible business standards. The Principles and Guidelines drafted by the OECD and UN have no direct legal effect, but can play a role in developing open standards of Dutch private law. The same applies for governmental decisions. In case law it is regularly decided that private codes of conduct and covenants do actually impose obligations on parties that have signed up to them.[16] The Council of State observed that the logical consequence is that the court will hand down judgments of a lawmaking character:

> 'If the legislator does not provide sufficient direction, the courts will usually be asked to provide this clarity. In the absence of clear standards in the law, the court will be forced to do more in the way of lawmaking than clarifying the law itself. It is unavoidable that the court will hand down judgments of a lawmaking character that go beyond the importance of the dispute between the parties, in order to provide certainty to those other than the parties concerned.'[17]

We will not go into the question here whether the legislator should provide more direction: although the answer would appear obvious, from a public administration and political perspective there are good arguments for the legislator to

8 It therefore concerns what was traditionally known as CSR, *Corporate Social Responsibility*, but which is now also known as ESG policy, where ESG stands for *Environmental, Social and Governance*, in OECD terms called RBC, *Responsible Business Conduct*, or BHR policy, which stands for *Business & Human Rights*. In this article, we bring all these together under the term *responsible business*. M.W. Scheltema, *'Corporate counsels en Business & Human Rights: een goede relatie*?', TOP 2019/207, p. 22.

9 At a European level too, legislative initiatives have been limited to the matter of reporting, one particularly notable example of which is EU Directive 2014/95 of the European Parliament and of the Council of 22 October 2014 as regards disclosure of non-financial and diversity information by certain large undertakings and groups (OJEU 2014, L330/1).

10 Initiatiator Jesse Klaver responded to questions from the Upper House on how the government intended to achieve the ambitious climate objectives: *'daar gaat deze wet niet over.'* (This Act doesn't deal with that) *Parliamentary Papers I,* 34534, no. 11.

11 J. Ruggie, Institute for Human Rights and Business, Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsor, presentation for the Institute for Human Rights and Business on 9 September 2014, http://www.ihrb.org/commentary/quovadis-unsolicited-advice-business .html; J. Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights', U.N. Doc. A/HRC/8/5.

12 The Directives are attached to the 'Declaration on international investment and multinational enterprises', in which the Directives are recommended by the participating states to multinational corporations which operate in or from their territory. Such a Declaration is not binding in an OECD context, although it is expected that the member states will do their utmost to adhere to the provisions in such documents. See OECD Legal Instruments, https://www.oecd.org/legal/legal-instruments.htm.

13 National Action Plan for the business sector and human rights, https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/brochures/2014/05/28/nationaal-actieplan-bedrijfsleven-en-mensenrechten/nationaal-actie- plan-bedrijfsleven-en-mensenrechten.pdf.

14 So far, IMVO covenants have been signed in the following sectors: clothing and textiles (4 July 2016), banks (28 October 2016), gold (July 2017), forest management (22 March 2017) food (June 2018), insurance (July 2018), natural stone (10 May 2019) and the pensions sector (December 2018).

15 Examples are the Equator Principles and the IFC Environmental and Social Performance Standards in de financial sector, and the Voluntary Principles on Security and Human Rights in the oil and gas industry.

16 See Supreme Court 18 April 2014, EcU:NL:HR:2014:942, *NJ* 2015/20 *(Achmea/Rijnberg);* c. Menting *Industry Codes of Conduct in a Multi-Layered Dutch Private Law,* (dissertation Tilburg University) 2016.

17 Council of State, *Jaarverslag 2018,* The Hague 2019, p. 26.

step back, and it is in fact so far advanced that no reversal can be expected in the coming decades.[18]

2.2. Dutch courts will heed the call for development of law

The existence of judge-made law as a genuine factor in our rule of law has long felt to be undesirable in classic constitutional doctrine: after all, in our *trias politica* (separation of powers), formally speaking the courts are not lawmakers and are merely *'la bouche de la loi'*.[19] The work of Paul Scholten firmly put an end to this movement in the Netherlands in the 1930s.[20] There is little doubt, at an international level too, that courts do act as an 'occasional legislator'.[21]

This is in keeping with the Dutch legal tradition. Many significant doctrines of the law of obligations have been developed by the Supreme Court.[22] Even with the development of the new Dutch Civil Code (DCC), the legislator intentionally left the development of doctrines to the courts.[23] Private law, and liability law in particular, lends itself well as an instrument for 'putting things in order' in the public domain.[24] The same applies for Dutch corporate law, and in particular for prevailing corporate governance in the country.[25] For this reason alone, it will not be surprising that courts feel they have the freedom to develop standards. Vranken aptly describes the Dutch view on this:

'Indeed, lawmaking by the courts is essential. The contribution of the court to lawmaking is regarded as indispensable in a modern society. (...) Legislation and case law are 'partners in the business of law' and must also be so.'[26]

It is explicitly argued these days that the court, as one of its tasks, must bridge the gap between the law and an ever-changing society.[27] In doing so, the court needs 'courage', so says the former President of the Supreme Court to his colleagues in his valedictory address.[28] It will therefore not come as any surprise that the courts are well aware of their social role. This awareness is particularly apparent among the courts when the legislator is not able to anticipate a social trend properly and promptly, or to offer point of references for answering a relevant question.[29] The concept of the separation of powers means that the court will not want to pre-empt the legislator, but that is not the case if the legislator is nowhere to be found, either intentionally or otherwise.[30]

2.3 Strategic litigation strengthens the judicial development of standards

The fact that the courts are being increasingly confronted with the request to act as an 'occasional legislator' is no coincidence. NGPs have discovered strategic litigation as a tool to achieve their objectives. There are good reasons why NGOs and Greenpeace have exchanged their rubber dinghies for gowns. In the most important arena in which they wage their battles, the public arena, they need to garner publicity through sensational actions. They will make it to the front pages with a rubber dinghy, but will also achieve this a court case against Shell, and it will probably be more long-lasting.

Strategic litigation can best be described as a form of litigation where the 'subsidiary effects' of a court case are not merely an added bonus, but often the main objective of the proceedings.[31] On the one hand these are publicity side-effects. Getting a problem on the agenda, creating publicity, mobilising citizens, eliciting promises; this is where strategic litigation is similar to the rubber dinghy. Court proceedings too ('Shell dragged before the court') create in any case a semblance of justification in the eyes of the general public.

Strategic litigation cuts both ways; there are the desired publicity effects, and there is a chance of bringing about genuine change through the judicial development of a new framework of standards

18 'It seems unlikely that this trend, in which both the European and national legislature has shifted more and more in the last decades from parliament to administration, from public to private regulations and from 'government' to 'governance', will soon be irreversible.' R.A.J. van Gestel, '*Leidt terugtred van de wetgever tot een opmars van rechterlijke rechtsvorming en afbraak van democratische waarden*?', *Regelmaat* 2019/3 p. 239, 2019.

19 Instead of a traditional triangular relationship, today one talks about *legal pluralism* and a *dialogue* between the courts and the legislator, between international and national courts or between national courts themselves, see the review by Koopmans of G.J. Wiarda, *3 typen van rechtsvinding,* Deventer: Tjeenk Willink; M.G. IJzermans, *'Legitimiteit door dialoog in de rechtszaal*', *RMThemis* 2016, p. 13; see also A. Meuwese & M. Snel (2013), 'Constitutional dialogue: An overview, *Utrecht Law Review* 2013/2, p. 12.

20 P. Scholten, *Mr. C. Assers Handleiding tot de beoefening van het Nederlandse Burgerlijk Recht. Algemeen Deel,* Zwolle: W.E.J. Tjeenk Willink 1931, p. 77; Although some scholars still hold from a constitutional viewpoint that a constitutional anchoring of the lawmaking task of the highest courts of justice would be desirable: C.A.J.M. Kortmann *'De rechtsvormende taak van de rechte*r'. Response to '*Rechtsvorming door de rechter is onvermijdelijk*' by A. Hammerstein and '*Een 'rechtsvormende taak' van de rechter*? *Een kritische noot van C. Schutte*', in: *Ars Aequi* 2009/11, p. 765-766.

21 R. Posner, 'How Judges Think', Harvard: Harvard University Press 2008, p. 78; J.B.M. Vranken, *'Toeval of beleid? Over rechtsvorming door de hoogste rechters*' *NJB* 75(1), p. 1-5. A. Hammerstein, *'Rechtsvorming door de rechter is onvermijdelijk*', *Ars Aequi* 2009/10, p. 672-675; M. Feteris, 'Development of the Law by Supreme Courts in Europe', *Utrecht Law Review* 13(1), p. 155-169.

22 Think of contract interpretation *(Haviltex),* unlawful act *(Linden-baum/Cohen*) etc.

23 See Parliamentary History Book 6, p. 1440-1448 concerning the precontractual phase and Parliamentary History Book 6, p. 917 concerning the effect of agreements on third parties.

24 I. Giesen, *'Het privaatrecht als instrument in het publieke domein*' in: *NJB* 2018/1645.

25 For the activist court in business law, see: M.R. Mok, *'De activistische rechter en het ondernemingsrecht*' in: J.B. Huizink et al. (ed.), *A-T-D, Opstellen aangeboden aan Prof. mr. P. van Schilfgaarde,* Deventer: Kluwer 2000, p. 299-314; C.D.J. Bulten & C.J.H. Jansen, *'Rechterlijk activisme: waar liggen de grenzen van rechtsvorming door de Ondernemings- kamer?*', *Ondernemingsrecht* 20. Similar essays can be found for every area of law.

26 J.B.M. Vranken, *Algemeen deel***. Een vervolg,* Deventer: Kluwer 2005, p. 9-10.

27 H.D. Tjeenk Willink, speech at the symposium '*Toegang tot de rechter*' upon the retirement of G.J.M. Corstens as President of the Supreme Court on 28 October 2014.

28 G.J.M. Corstens, '*Bescheidenheid en moed*', address upon his retirement as President of the Supreme Court on 30 October 2014.

29 For the Netherlands, see, for example, explicitly Supreme Court 31 January 1990, *BNB* 1990/228; *NJ* 1990/403 and Supreme Court 30 June 1998, *NJ* 1998/799 concerning the crown witness (ground 5.2.3 conclusion); see C.A.J.M. Kortmann *'De rechtsvormende taak van de Hoge Raad*', *Trema* 6, p. 250; P.P.T. Bovend'Eert, *Rechterlijke organisatie, rechters en rechtspraak,* Alphen aan den Rijn: Kluwer 2008, p. 293-295.

30 J.B.M. Vranken, *Algemeen deel**,* p. 120 (no. 184) and p. 146 (no. 223); see the note by C.J.H. Brunner under Supreme Court 28 February 1992, *NJ* 1993/566 *(IZA/ Vrerink).* See also P.C. Kop, *'Rechtsvorming door de burgerlijke rechter?*', in: *NJB* 2011, p. 1044.

31 T.R. Bleeker & R. Stolk, *'Toegang tot de rechter: strategisch procederen in het milieurecht*', *Milieu & Recht* 2018/67.

On the one hand, strategic litigation must indeed have a legal objective, albeit one that goes beyond the specific dispute. For the parties to such strategic proceedings, it comes down to the development of case law and establishing the truth. This is more fundamental than merely judging the specific case. In doing so, strategic litigation cuts both ways; there are the desired publicity effects, and there is a chance of bringing about genuine change through the judicial development of a new framework of standards.[32]

3. The new responsible business standards: what standards do we mean?

3.1. External standards: duty of care in the light of soft law and self-regulation

First and foremost, the aim of the new responsible business standards is to protect the interests of third parties. The key question here is to what extent a business, in its actions, must answer to third parties concerning the impact of its activities on people and the environment. To the extent that there is an impact, the next question is: what action should the business then take with regard to that impact?

Enneking et al. concluded in 2016 in no uncertain terms that an independent responsibility rests upon businesses to prevent as far as possible their activities from having negative consequences for the human rights of third parties, and to remedy any violations.[33] Concerning the question as to the scope of this duty of care, the importance of many soft-law instruments that have emerged regarding responsible business should not be underestimated. Codes of conduct are not a 'law' in the sense of Art. 79 of the Judiciary (Organisation) Act (*Wet op de rechterlijke organisatie*), but there is no doubt that soft-law standards can have an impact on the open standards of Dutch private law. Dozens of examples can be found in case law, and the picture that emerges is that costs of conduct and soft-law principles can be carried through into Dutch law in different ways. A far-reaching example can be found in a judgment in which the District Court of Amsterdam ruled:

'[the applicant] based its request on rule of conduct 10 of the GBL. Such a code of conduct is not a law in the sense of Article 79 of the Judiciary (Organisation) Act. However, HDI-Gerling has not denied that it has committed itself to the GBL, so that the request will be assessed against these rules.'[34]

Similar to this are far-reaching judgments that give self-regulation an independent legal status, such as by classifying them as customary law under Art. 6:248 DCC[35], or as a contractual provision from which third parties can derive direct rights.[36] Secondly, they can give substance to the social propriety standard in tort law.[37] More specifically, they play a major role in the interpretation of standards of care and duty of care in liability law. The District Court of Noord-Nederland took the fact that the defendant declared it adhered to the private Good Manufacturing Practices as a 'point of reference' for the standard of care to be applied. [38] The Arnhem-Leeuwarden Court of Appeal assumed an unlawful act by an estate agent against a third party for violation of the VBO Code of Conduct.[39] Finally, we draw attention to the role of non-binding rules of conduct in the interpretation of agreements.[40]

Not participating in IMVO covenants and other initiatives does not automatically mean that a business is off the hook. If the majority in a sector abides by a particular code, that code can indeed have indirect effects towards businesses that have not signed up to it. [41] The Arnhem-Leeuwarden Court of Appeal refers to the 'elaborating' of a standard.[42] It therefore leaves no doubt that soft law and self-regulation instruments are relevant to a greater or lesser extent to interpreting open standards in private law in the area of responsible business.[43] That means that, in the absence of specific legislation, businesses should not expect not to be bound by responsible business obligations.

In the area of Business & Human Rights, the first cases on the liability of parent companies for human rights violations abroad have already been brought. [44] The key legal question is whether the parent company has any duty of care towards victims of human rights violations, and whether they have fulfilled this duty of care. The question about carrying through and elaborating on soft laws and self-regulation in the duty of care towards victims of human rights violations is at the heart of that debate. After all, NGOs will argue that this duty of care will have to be fulfilled based on the human rights due diligence standards as laid down in the UN Guiding Principles and the OECD Guidelines, and where they are also referred to in the IMVO covenants.

More far-reaching is the debate whether any form of supply chain liability can be adopted: does a Dutch company have obligations to prevent and mitigate human rights violations by parties with whom they do business? Also with respect

32 None of this is a secret. NGOs openly discuss their strategies and attempts via the courts to force change and generate publicity. See, for example, the recording of the meeting 'Saving the climate through court', in Pakhuis De Zwijger on 23 September 2019, in which many different NGOs discussed their litigation strategies and shared these with the public. The accompanying podcast is equally informative. https://dezwijger.nl/programma/saving-the-climate-through-court.

33 Enneking et al, *Zorgplichten van Nederlandse ondernemingen inzake internationaal maatschappelijk verantwoord ondernemen,* The Hague: BJU 2016, p. 41 (summary) and p. 659.

34 Court of Rotterdam, 11 April 2016, ECLI:NL:RBROT:2016:2802, marginal 4.2.

35 Court of The Hague, 10 July 2007, ECLI:NL:RBSGR:2007:BA9210.

36 Court of Arnhem, 26 March 2008, ECLI:NL:RBARN:2008:Bc8904.

37 Court of Limburg, 10 September 2014, ECLI:NL:RBLIM:2014:7819.

38 Court of Noord-Holland, 23 April 2014, ECLI:NL:RBNHO:2014:3627, marginal 4.24; see also Court of Noord-Holland 20 May 2015, ECLI:NL:RBNHO:2015:11544, marginal 4.14.

39 Arnhem Court of Appeal, 11 August 2009, ECLI:NL:GHARN:2009:BJ5405, marginal 18, 21.

40 Court of Utrecht, 12 December 2012, ECLI:NL:RBUTR:2012:BY6869, marginal 2.32

41 President of the Court of The Hague 24 July 2004, ECLI:NL:RBSGR:2004:AQ5353; Amsterdam Court of Appeal, 2 March 2010, ECLI:NL:GHAMS:2010:BN1316, marginals 4.5-4.7

42 Arnhem-Leeuwarden Court of Appeal, 2 September 2014, ECLI:NL:GHARL:2014:6792.

43 See also S. Meijer et et al., 'Climate Change and the financial sector: soft law in public interest litigation' in: Beekhoven van den Boezem et al. (2019) *Sustainability and financial markets,* The Hague: Wolters Kluwer 2019, p. 114; Expert group on climate obligations of enterprises, *Principles on Climate Obligations of Enterprises,* The Hague: Eleven International Publishing 2010, p. 86; M. Scheltema, '*Corporate Counsels en Business and Human Rights: een goede relatie?*' in: *TOP* 2019/207, p. 23.

44 There are now hundreds worldwide; in the Netherlands there is Friends of the Earth Netherlands against Shell, see, for example, the decision of the District Court of The Hague of 30 January 2013, ECLI:NL:RBDHA:2013:BY9845; Esther Kiobel also against Shell, with a preliminary judgment on the jurisdiction of the District Court of The Hague, 1 May 2019, ECLI:NL:RBDHA:2019:4233. There is also mention of proceedings against FMO involving human rights violations, see '*nabestaanden vermoorde activiste dagen FMO voor de rechter*, *Financieel Dagblad* 17 May 2018.

to violations in the supply chain, the UN Guiding Principles stipulate that a certain duty of care (due diligence obligation) rests on the Dutch company.[45] Here too, this duty of care for the supply chain is laid down in the IMVO covenants: for example, the IMVO covenant for gold prescribes ongoing due diligence efforts concerning potentially adverse effects of a business's own activities or its relationships with third parties, including suppliers and other entities in the supply chain.'[46] NGOs and victims of human rights violations will argue that this gives substance to the business's duty of care under civil law.

In the financial sector, the pressing question is whether an investor has a duty of care concerning the activities of businesses in which he invests. To what extent should a pension fund explain whether it invests in a party which is involved in unsustainable palm oil? To what extent should he not make these kinds of investments and/or endeavour to mitigate their harmful impact? Again, the UN Guiding Principles and the IMVO covenants provide solid answers to these questions for the pensions sector and the banking covenant.[47] There are also international initiatives, such as the UN Principles on Responsible Investment[48] and the 'equator principles'[49], where the affiliated financial institutions commit themselves to assessing investments as to their social and environmental impact. Here too, there is little doubt how the NGOs arguments will be formulated.

Not participating in IMVO covenants and other initiatives does not automatically mean that a business is off the hook

Although this article focuses on the situation in the Netherlands, we see that precisely the same discussion is ongoing in other jurisdictions. In the United Kingdom, the Supreme Court ruled in the Vedanta judgment that regarding the question whether there is parent liability for human rights violations by foreign subsidiaries, a relevant factor is whether the business has committed itself publicly to oversee and supervise the activities of its subsidiaries.[50] 'In such circumstances', the Supreme Court concludes, 'its very omission may constitute the abdication of a responsibility which it has publicly undertaken'.[51] Although the legal reasoning is different, the conclusion is the same: when an internationally operating group voluntarily commits itself to a responsible business policy, this will have an impact on the legal obligations of that group.

On the subject of climate change, since this summer a clear trend has been evident where businesses commit themselves voluntarily to objectives that go much further than those laid down by governments. An example is the UN Climate Change Action Summit, where on the date of completing this article 867 multinationals with a joint market capitalisation of more than $2.3 trillion and 4.2 million employees have undertaken to take value chain measures in their activities in order to achieve far-reaching reductions in emissions. This step may be the result of pressure exerted by institutional investors and other shareholders on businesses in their portfolio, which we will return to later in this article. These voluntary commitments are not without obligation because they lead to new standards, which will also be enforceable under the law.

3.2 internal standards: corporate governance

The demand for business responsibility in a changing world is also trickling down into the internal relationships of the company. Corporate Governance deals not purely and simply with procedural rules on the relationship between and with parties involved in a company. The question is to what extend standards of responsible business can form part of the internal rules of conduct which the management, supervisory directors and shareholders must abide by and be accountable for.

The fact that non-binding corporate governance rules give substance to legal standards is no longer disputed by anyone. The Dutch Corporate Governance Code was once quietly promoted as a non-binding instrument, no more than establishing best practices. Things turned out differently. As far back as 2007 the Code was held by the Supreme Court to be 'an expression (…) of a general legal view prevailing in the Netherlands.'[52] As a result, the Code was no longer just an expression of best practices, but an instrument that laid down the requirements of reasonableness and fairness and the standards of good governance.[53] Interestingly enough, the code is applied without scruple by the Enterprise Court to non-listed companies[54]; talk about 'colouring in' and the indirect effects!

Are we going to see that responsible business standards will find their own way into business law through the connection with the Corporate Governance Code? It seems that this certainly cannot be ruled out. In the latest version of the Code, the 'long-term value creation for the company' has now been given a very prominent role as the first principle.[55] For the Dutch parliament, the principle of long-term value creation coincides with the principles of corporate social responsibility.[56] Raaijmakers and Buma aptly refer to this as the 'further merging of governance and responsible business'.[57] Best practice provision 1.1.1 is also perfectly clear, by demanding that attention must be given in the strategy to aspects of responsible business that are relevant to the company and its business, such as the environment, social and personal affairs, the chain in which the business operates, respecting human rights and tackling corruption and bribery.

However, the Corporate Governance Code does not need to be the only set of governance standards through which principles of responsible business find their way into Dutch company law. There are also other guidelines for businesses which, in the same way as the Code, can

45 Principle 13, 15(b), 18 and 18-21 of the *UN Guiding Principles.*

46 IMVO Covenant for Gold, Art. 3.4.

47 IMVO Covenant for the Banking Sector, Art. 4; IMVO Covenant for pensions, Art. 3.

48 See Principle 2: 'We will be active owners and incorporate ESG issues into our ownership policies and practices.'

49 Equator Principles, https://equator-principles.com.

50 UK Supreme Court, *Vedanta Resources PLC and anor. v Lungowe and others* [2019] UKSC 20, to be found via https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf.

51 Vedanta decision, marginal 54.

52 Supreme Court 13 July 2007 *(ABN* Amro), ECLI:NL:HR:2007:BA7972, *NJ* 2007/434.

53 Repeated in Supreme Court 9 July 2010 (*ASMI),* ECLI:NL:HR:2010:BM0976, *NJ* 2010/544.

54 Supreme Court 29 June 2007, *(Bruil-Combex)* ECLI:NL:HR:2007:BA0033, *NJ* 2007/420; Netherlands Enterprise Court at the Amsterdam Court of Appeal (*Ondernemingskamer*) 2 November 2015, *(Meavita),* ECLI:NL:GHAMS:2015:4454.

55 The Dutch Corporate Governance Code 2016, to be found via https://www.mccg.nl/download/?download=1&id=3364, Principle 1.1.

56 See the Motion of the Lower House adopted on 12 February 2019, *Parliamentary Papers II 2018/19, 32637,* no. 349.

57 G.T.M.J. Raaijmakers & O.M. Buma, '*Terugblik en vooruitblik op de invloed van de Code Corporate Governance*', *Tijdschrift voor Ondernemingsrecht- bestuur* 2019/2.

develop business-law standards. The Stewardship Code published on 1 January 2019 by Eumedion, representing institutional investors, and entering into force on 1 January 2019, lays down in eleven principles the expectations concerning the contribution of institution investors to long-term value creation of their participations, as well as their responsibilities as shareholders.[58]
Finally, we refer in this context to the previously mentioned OECD Guidelines for Responsible Business Conduct. In one of the first decisions of the Enterprise Court concerning Batco, the Court judged that these Guidelines could be a relevant factor in assessing the question whether it was a case of mismanagement.[59] The dormant existence since then of the Guidelines in business-law case law can most likely be explained by the fact that mismanagement in the area of responsible business was not an issue in the past for shareholders and stakeholders. In the light of the current stewardship obligations of shareholders, and with a view to the gigantic reputational risks if a management board does not have its responsible business policy in order, this dormant existence could quickly end.[60]

4. The arena

4.1. Introduction

The development of new standards so desired by NGOs take place by means of conflict and confrontation. Firstly, because judicial opinion-forming only takes place in the context of a confrontation between parties. 'The rule is only made with the decision', noted Paul Scholten on this subject.[61] Secondly, because the new standard can only be brought about by kicking often enough against the old standard. Each fundamental ruling of the Supreme Court is preceded by case law from the lower courts which, until that point, is in conflict with the standard, and often several rulings of the Supreme Court itself in which it upheld the old standard.[62] What's more, there are enough parties who have an interest in maintaining the old standards: this development will therefore not proceed without any resistance. This battle does however coincide perfectly with that other main objective of NGOs in strategic litigation, namely to generate as much publicity as possible. In doing so, an NGO will naturally set to work 'strategically'. A case and a defendant will be chosen based on the extent to which they (i) will generate publicity and (ii) lead to lawmaking. This is not always fair. Well-known businesses that announce they attach great importance to responsible business and explicitly commit themselves to self-regulation are naturally the best 'prey': (i) proceedings against them generate the most attention, (ii) because of their specific commitments, the legal debate is easier to conduct and (iii), these businesses would hesitate to adopt a firm position against Greenpeace, ClientEarth and consorts.

4.2. General Meeting of Shareholders

The General Meeting of Shareholders is the ideal forum in which shareholders can call the management and the supervisory board to account for their policy regarding responsible business and the company's compliance with standards (hard law and soft law) and voluntary commitments. Institutional investors such as APG and PGGM already have their own policy on responsible investment (partly under pressure from their own investors, such as participants in a pension fund) and on this basis make investment decisions and monitor their portfolio companies' compliance with that policy. In 2019 the Association of Stockholders (VEB), which until recently was thought to stand up strictly for the interests of the private shareholders embodied in share prices and dividends, also drew more public interest. When it became known that a factor of a DSM subsidiary was emitting large quantities of nitrous oxide, a powerful greenhouse gas, in violation of the regulations, the VEB sent a letter to DSM with questions about the matter. The VEB opted for a corporate law approach, focusing on issues of annual reporting and corporate governance.[63] According to the VEB, investors can make investment decisions on the basis of sustainability policy communicated by the company, so compliance is also a question of investor relations.

4.3 Enterprise Court

An important arena we observe is the Enterprise Court. After all, the inquiry procedure is also aimed at the public interest – as is apparent from the mere fact that it is a petition procedure, which is intended for disputes other than strictly private property low.[64] The public order nature is also evident from the fact that the group of persons entitled to request an investigation includes a number of persons not directly involved in the legal entity, such as the trade unions and the Advocate General[65], and from the fact that a copy of the application is sent to external regulators – The Dutch Central Bank (DNB), the Authority for the Financial Markets (AFM) and the European Central Bank (ECB); all guardians of the public interest. It is also apparent from the fact that the Enterprise Court can take immediate measures that have not been requested[66], the fact that the investigation report can be made available for inspection at the Court Registry[67], and the fact that the parties to the proceedings, even on unanimous request, can no longer terminate the inquiry procedure once it has been ordered; from that moment on, interests are involved

58 See https://www.eumedion.nl/nl/public/kennisbank/best-practices/2018-07-nederlandse-stewardship-code-nl-versie.pdf.

59 Netherlands Enterprise Court at the Amsterdam Court of Appeal, 21 June 1979 *(Batco), NJ* 1980/71, with note by Maeijer: *'niet zonder betekenis [is] dat (...) BAT Industries de OECD-Guidelines als richtlijn voor haar beleid heeft aanvaard';* see also the article on this subject by Timmermans: L. Timmerman *'De OECD-gedragscode voor multinationale ondernemingen*', *TVVS* 6, p. 137-143.

60 We also refer in that respect to the role of the works council, and the recent suggestion by Van Slooten that the Directives can play an interesting role in participation law. J. van Slooten, '*De praktische betekenis van de OECD-Richtlijnen voor het medezeggenschapsrecht*', in: *Ondernemingsrecht* 55.

61 P. Scholten, *Mr. C. Assers Handleiding tot de beoefening van het Nederlandse Burgerlijk Recht. Algemeen Deel,* Zwolle: W.E.J. Tjeenk Willink 1931, p. 9.

62 Think of the '*Zutphense juffrouw*' ruling dated 10 June 1910 prior to Lindenbaum/Cohen, in which the Supreme Court strictly upheld legalism, despite the fact that the new standard (the broader interpretation of 'unlawful') had been announced for decades by Molengraaff and others, and also the Amsterdam District Court had ruled in the Lindenbaum/Cohen case that Cohen's actions were unlawful.

63 See https://www.veb.net/media/4906/20190603-dsm-brief.pdf.

64 See also in this connection the Unilever decision. We refer also to the right of each stakeholder to be part of the petition proceedings (Art. 282 DCCP and Art. 2.1.2.5 of the National procedurals rules for petition proceedings in commercial and insolvency cases before the Courts of Appeal (*Landelijk procesreglement verzoekschriftprocedures handels- en insolventiezaken Gerechtshoven*) (2019)).

65 On the grounds of Art. 2:345(2) DCC, even special pre-trial information rights are given to the Advocate General to prepare any application for an investigation in the public interest.

66 Supreme Court 30 March 2007, «JOR» 2007/138 *(ATR).*

67 Art. 2:353(2) DCC.

that extend further than those of the parties to the proceedings. All this is reflected in the fact that openness is one of the main aims of the enquiry procedure: according to the Supreme Court, this openness has a preventative effect.[68]

The interests of the company therefore transcend the private interests of the requesting party[69], so that the inquiry procedure seems to us to be an excellent procedure for raising issues of responsible business. After all, it has been argued above that such issues are increasingly regarded as questions of good corporate governance or, more precisely, basic principles of responsible business,[70], or fall within the general standard of due care set out in Article 2:8 DCC. In view of this public nature, the Enterprise Court appears to be an eminently suitable forum to call the company and its bodies to account for compliance with the standards of responsible business.

The requirements for access to the inquiry procedure do not seem to be a real obstacle; a coalition of shareholders can undoubtedly be recruited from among the investors who, as we have seen before, have called on the company to commit to voluntary standards of responsible business practice. The fact that these voluntary standards are not noncommittal will then become apparent as soon as these investors reinforce their call by applying to the Enterprise Court. Investors do not have to vote with their feet alone. It will also be interesting to see whether the trade unions will want to use their right to request an investigation to influence the company's policy in this area.

A similar discussion took place 15 years ago. In a contribution to the VCL volume 2003-2004, Willems dealt with questions of judge-made law, the enforceability of soft law through the inquiry procedure, and the usefulness of the inquiry procedure for interest groups. At that time, the discussion focused on the recently established Dutch Corporate Governance Code. In the fifteen years that followed, the Enterprise Court unmistakably demonstrated its lawmaking powers and firmly anchored the Dutch Corporate Governance Code in the Dutch legal system by means of judge-made law. A similar discussion is currently taking place with regard to the soft-law instruments of our time: those pertaining to responsible business practices. Inspiration can therefore be drawn from how the Enterprise Court set to work in the 'previous round'.

4.4 Civil procedure

We have already observed that private law is a useful instrument in bringing about changes in standards regarding responsible business, and that the Dutch courts see a role for themselves in this area. Both factors mean that the classic judicial process under private law is ideally suited to strategic proceedings.

This is strengthened by the accessibility of Dutch civil proceedings for these types of claims. In the first place, this relates to the possibility of class actions. In 1986 the Supreme Court recognised that an organisation may defend 'interests that as a rule affect large groups of citizens together, while the consequences of any damage to each of those citizens are often difficult to assess'. Since then, strategic litigation has been possible in the Dutch legal sphere in accordance with Art. 3:305a DCC. Whereas the provision for classic civil-law 'private interest' cases is not always equally effective in the absence of a possibility for compensation, it is particularly suitable for more cases of principle that are primarily aimed at establishing unlawful conduct rather than the resolution of the individual case.

Secondly, the Dutch law of evidence is helpful. A claimant can bring proceedings with relatively empty hands, and therefore at relatively low cost, where there is no possibility for the defendant to nip the case in the bud, as can indeed happen in the UK and the US, if the claimant does not come up with enough evidence. Indeed, while some legal systems require a claimant to have gathered all his evidence upfront, in the Netherlands this possibility to gather evidence lies in the course of civil proceedings.[71] This means that merely issuing a summons and fulfilling the claimant's obligation to provide evidence can result in a continuous flow of interim judgments, and therefore publicity, often in favour of the collection of evidence by the claimant.[72] The proceedings about oil spills in the Niger Delta against Shell are a good example: including hearings and interim judgments, we counted more than eighteen media moments, in which the court ruled in two judgments that Shell had to provide access to certain documents, and subsequently ordered an expert investigation.[73]

4.5 Special grievance mechanisms under soft law and self-regulation instruments

Although it is clear that soft-law instruments and self-regulation are considered relevant for the interpretation of open standards in private law, the outcome of the above issues is by no means certain. Of course, NGOs will not always succeed in convincing a judge that a soft-law principle actually has such an impact on private law that a duty of care has been violated in the specific circumstances of the case. This additional legal obstacle is absent when the soft-law instrument itself is tested. So-called special grievance mechanisms offer a tremendous opportunity for interest groups to expose an alleged violation of human rights.

At the time of writing, several initiatives are being worked on for this type of semi-case law outside the frameworks of national procedural law.[74] For now, the most important examples of these complaint mechanisms are the so-called National Contact Points (NCP) set up on the basis of the OECD Guidelines in all participating countries, Interested parties can complain to such a National Contact Point about a violation of the OECD Guidelines by a company in a so-called Specific Instance Procedure. If, after an initial assessment, thee NCP determines that the complaint is worth further investigation, the NCP will offer its 'good offices' to help parties resolve the dispute.[75] If one

68 Supreme Court, 10 January 1990, *NJ* 1990/466, ground 4.1.

69 See J.H.M. Willems, '*Aspecten van class action en public interest litigation in de enquêteprocedure'*, in: Van Solinge, G. & M. Holtzer (red.), *Geschriften vanwege de Vereniging Corporate Litigation 2003-2004, Serie vanwege het Van der Heijden Instituut,* volume 75, Deventer: Kluwer 2004, p. 431-441.

70 Supreme Court 10 January 1990, *NJ* 1990/466.

71 See the advice by the expert group in '*Modernisering Burgerlijk Procesrecht*' p. 19 and p. 23, published on https://www.njb.nl/Uploads/2017/4/Advies-expertgroep-Modernisering-burgerlijk-bewijsrecht-april-2017.pdf.

72 Incidentally, it is for this reason that the expert group advises frontloading the process more in the Netherlands too, see p. 24.

73 For the timeline of the case published by Friends of the Earth Netherlands, see https://milieudefensie.nl/shell-in-nigeria/tijdlijn-rechtszaak-shell.

74 We refer, for example to the initiative for business & human rights arbitration, known as the 'Hague Rules', see https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration en https://www.cilc.nl/cms/wp-content/uploads/2019/01/Elements-Paper_INTER-NATIONAL-ARBITRATION-OF-BUSINESS-AND-HUMAN-RIGHTS-DISPUTE. font12.pdf. See also C. Cronstedt. & R. Thompson, 'A Proposal for an International Tribunal on Business and Human Rights, in: *Harvard International Law Journal,* 57 p. 66 and 68.

75 OECD Guidelines 2011, p. 72

of the parties does not accept this, or if parties fail to come to an agreement, the NCP will public a final statement even without such a mediation phase. In these final statements, NCPs, including the Dutch ones, are assessing with increasing regularity the alleged violation by the multinational.
Although the NCP cannot make 'binding' decisions, we advise companies to take the specific instance procedure very seriously. NGOs have discovered the NCP procedure because it gives them plenty of scope to maximise their point with minimal resources. The complaint does not need to be substantiated in the way that a civil claim needs to be substantiated. The OECD, but also the Dutch NCP itself, emphatically does not see the specific-instance procedure as a legal, or even a quasi-legal procedure, which means that many of the procedural guarantees of a civil action are omitted. Simply stating a violation will in most cases suffice to tempt the NCP in its initial assessment to conclude that the complaint requires further investigation, which provides a wonderful publicity moment for NGOs: 'human rights body deems complaint against […] to be well founded in the first instance'. That is not a doomsday scenario. When the Dutch NCP decided to deal with a complaint against ING, the NRC newspaper printed the heading without hesitation: 'OECD raps ING on the knuckles for climate policy'.[76]

Conclusion

Standards on responsible business are based not on classic legislation, but in private self-regulation and soft-law instruments. The non-binding character of these standards must not lead businesses to rest on their laurels; that would be very unwise. If we look more closely, we see an area of law that has arisen with specific and far-reaching rules of conduct for multinational companies. The development of these rules is further boosted by strategically operating interest groups, and supported by the courts that feel called upon to push forward the lawmaking in responsible business. This has major repercussions for businesses. If they want to avoid the negative publicity of action by the AGM, Enterprise Court, civil proceedings and NCP proceedings, and if they want to take action regarding the commitments they made under the assumption that they were non-binding, this requires a drastic change in behaviour. After all, this involves standards of conduct, such as proper supervision, careful risk analyses and timely intervention in the event of potential violations. This cannot be parked with the in-house counsel as a legal issue, but requires an organisation-wide change in strategy, policy and implementation, from the boardroom to the local procurement manager.

About the authors

M.E. Coenraads

Lawyer at DLA Piper.

J.E.S. Hamster

Lawyer at DLA Piper.

76 See https://www.nrc.nl/nieuws/2017/11/14/ing-krijgt-tik-op-de-vingers-van-oeso-om-klimaatbeleid-14003813-a1581083.