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# OESO Richtlijnen MNE's 2011

reinforcing the licence to operate  
Jan Eijsbouts, Maastricht University

NCP Stakeholders Meeting

Utrecht, 29 November 2011

## Corporate citizenship

“A company should behave like a good citizen in business. The law does not (and cannot) contain or prescribe the whole duty of a citizen. A good citizen takes account of the interests of others besides himself and tries to exercise an informed and imaginative ethical judgement in deciding what he should and should not do. This, it is suggested, is how companies should seek to behave.”

(Report “The responsibilities of the British public company” by the CBI Company Affairs Committee, 1973, named the Watkinson Report after the Committee’s Chairman)

## De Triple-P MVO-normen nader bezien

- **People:** medewerkers (eg mensenrechten, ILO conventies, arbeidsrecht, medezeggenschap) en derden (mensenrechten van individuen en gemeenschappen)
- **Planet:** uitputting natuurlijke hulpbronnen (voedsel, grondstoffen incl water en energie) en bescherming van het milieu (water, lucht en bodem; klimaat)
- **Profit:** ondernemen op een manier die fatsoenlijk en netjes is en als zodanig door de samenleving wordt ervaren (sustainable business model, geen omkoping, eerlijke mededinging, correcte financiële boekhouding en verslaglegging)

NB deze normen zijn veranderlijk naar plaats en tijd

## MVO/CSR definities

CSR is a **concept**, whereby companies integrate social and environmental concerns in their business and in their interactions with their stakeholders on a **voluntary** basis (EU Commission, 2001)

CSR is the **responsibility** of enterprises for their impacts on society : need for processes maximising shared value for owners and other stakeholders (society at large) and preventing/ mitigating adverse impacts (25 October 2011)

MVO is ondernemen op een manier die fatsoenlijk en netjes is en als zodanig door de maatschappij wordt ervaren (A. Burgmans)

# De ISO 26000 guidelines definition (2010)

CSR is the responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behavior that

- (a) Contributes to sustainable development, health and the welfare of society
- (b) Takes into account the expectations of stakeholders
- (c) Is in compliance with applicable law and consistent with international norms of behavior; and
- (d) Is integrated through the organization and practiced in its relationships

# Definitie MVO – normatief (“licence to operate”)

MVO is de verantwoordelijkheid van de ondernemer om te voldoen aan de gerechtvaardigde verwachtingen van de samenleving ten aanzien van de maatschappelijke effecten van zijn ondernemen, zoals economische, sociale en milieu gevolgen, voor alle stakeholders.

Sommige van deze verwachtingen zijn gecrystalliseerd in hard law, ter beoordeling van de rechter, andere in soft law, zelfregulering of in ongecodificeerde ethische normen, ter beoordeling van de rechter (open normen) of de court of public opinion.

## Definitie MVO – proces

MVO als proces behelst de systematische en gestructureerde wijze waarmee de onderneming alle relevante aspecten van de MVO normen in de dagelijkse bedrijfsvoering op alle niveaus tot gelding laat komen, deze uitdraagt aan haar werknemers, toeleveranciers, andere stakeholders en de samenleving, de effectiviteit bewaakt, bij de tijd houdt en verantwoording aflegt aan de maatschappij.

# Corporate Governance and CSR

“Corporate governance is concerned with holding the balance between economic and social goals and between individual and communal goals. The governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society.”

A. Cadbury, foreword in World Bank, Corporate Governance, a Framework for Implementation, Washington 2000

# The anatomy of Corporate Governance and CSR

## Stakeholders

**Rules (norms)**

- International law
- Company/security Laws
- Listing Requirements
- Governance codes
- Soft law/selfregulation
- Societal expectations

Shareholders  
 Employees  
 Customers  
 Creditors  
 communities  
 Society at large  
 (NGO's)

**Tools**

- Reports / disclosures
- Shareholders meeting
- Consultations  
dialogue
- Investigations
- Claims

## COMPLIANCE-duty of care

- Public Law
- Soft laws
- selfregulation
- Company values
- Codes of Conduct
- Authority Schedules

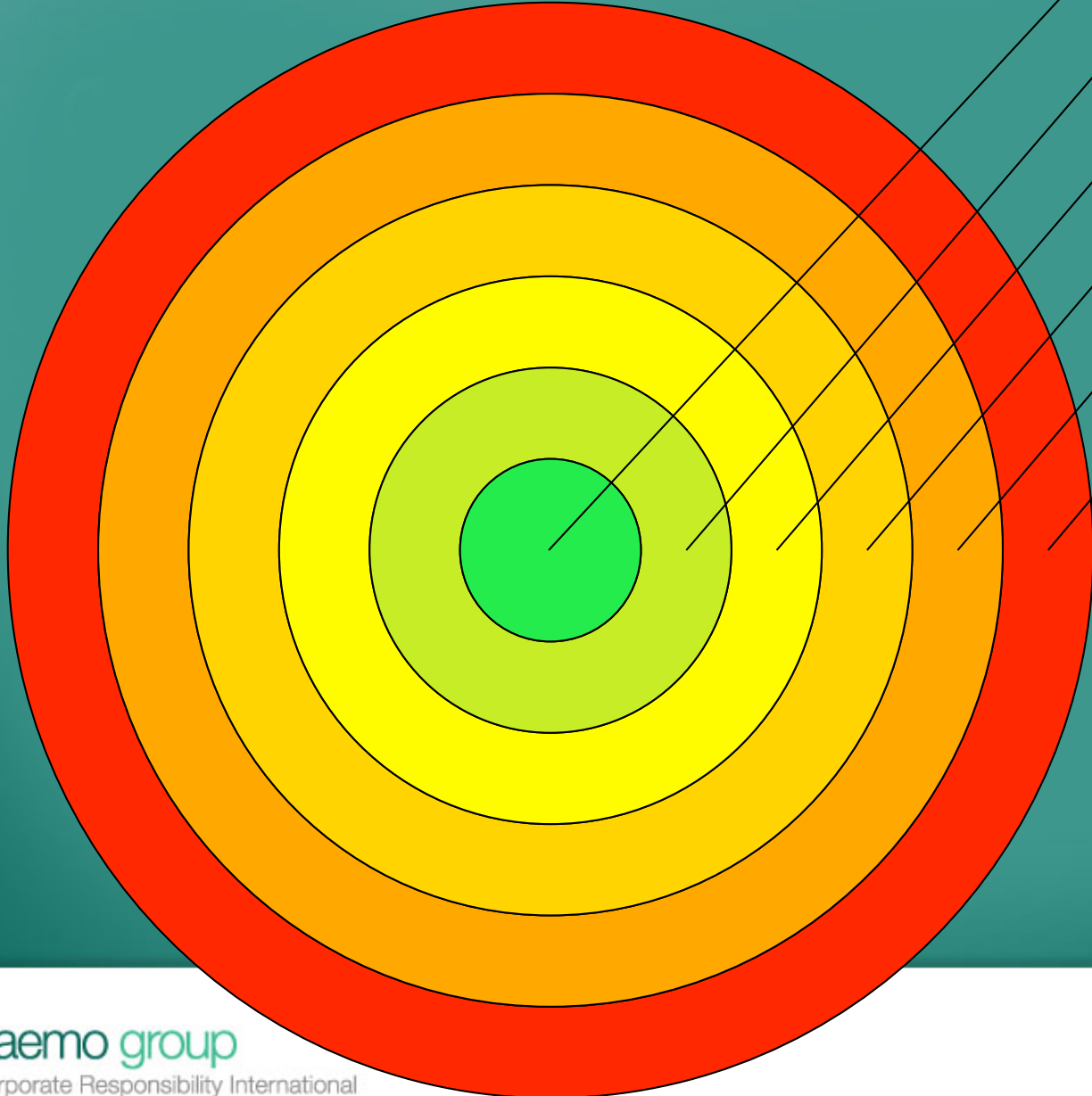
**Board(s)  
 Management**

## COMPLIANCE-process

- Strategy
- culture
- Organisation  
policy
- Enterprise Risk Management
- Internal Controls
- Letter of Representation
- Complaints Procedure

**Business Activities**  
 Management  
 Employees

# The Concentric Circles of CG/CSR Regulation



Decent business

Selfregulation  
Softlaw

Mandatory  
Transparency

Corporate Law

Tortlaw

Administrative &  
Criminal Law



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# A closer look at the CSR regulatory mix

- Societal norms: (quasi) voluntary (courts of public opinion)
  - Selfregulation (individual): eg company codes of conduct
  - Selfregulation (collective): general or specific industry codes (eg Kimberley, Equator principles, Mining)
  - Soft law: eg OECD Guidelines, Corporate Governance Codes (non binding but with possible legal effect)
  - Hard Law (civil, administrative, criminal):
    - triple P sector legislation,
    - general corporate law (disciplining corporate conduct eg disclosure, directors duties and court ordered inquiry)
    - general civil law: contract law and tort law (remedies)
    - Specific criminal laws (disciplining and sanctions)
- NB societal norms may be used in open legal norms (good management, mismanagement, tort/onrechtmatige daad)

# Dutch Corporate Governance Code 2009

Principle II.1 Executive Directors responsible for:

- Realisation of the aims and objects, strategy, policies and results
- management of the risks connected with the company's activities
- Compliance with all relevant laws and regulations
- Financing of the company
- **Relevant aspects of corporate social responsibility**

NB accountability to Supervisory Board and GMS!

# Global Compact Principles

- Human Rights

- [Principle 1](#): Businesses should support and respect the protection of internationally proclaimed human rights; and
- [Principle 2](#): make sure that they are not complicit in human rights abuses.

- Labour Standards

- [Principle 3](#): Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- [Principle 4](#): the elimination of all forms of forced and compulsory labour;
- [Principle 5](#): the effective abolition of child labour; and
- [Principle 6](#): the elimination of discrimination in respect of employment and occupation.

- Environment

- [Principle 7](#): Businesses should support a precautionary approach to environmental challenges;
- [Principle 8](#): undertake initiatives to promote greater environmental responsibility; and
- [Principle 9](#): encourage the development and diffusion of environmentally friendly technologies.

- Anti-Corruption

- [Principle 10](#): Businesses should work against corruption in all its forms, including extortion and bribery.

# Ruggie “Protect, Respect and Remedy” Framework 2008 and Guidelines 2011

1. State Duty to Protect Human Rights
2. Corporate Responsibility to Respect Human Rights (Ruggie: **universal baseline expectation**; social license to operate means respect for internationally recognized human rights, even where the State does not Protect or does not enforce the law; Bill of Rights, ILO core Conventions)
3. Need for access to effective remedies: judicial and non-judicial (state based and company grievance mechanisms; mediation)

# Risks Based Human Rights Due Diligence

- I. Adopting a human rights policy;
- II. Understanding how activities may affect human rights through human rights impact assessments;
- III. Integration of human rights policy throughout the company (horizontal and vertical);
- IV. Tracking performance through monitoring and auditing;
- V. Having in place an effective grievance mechanism.

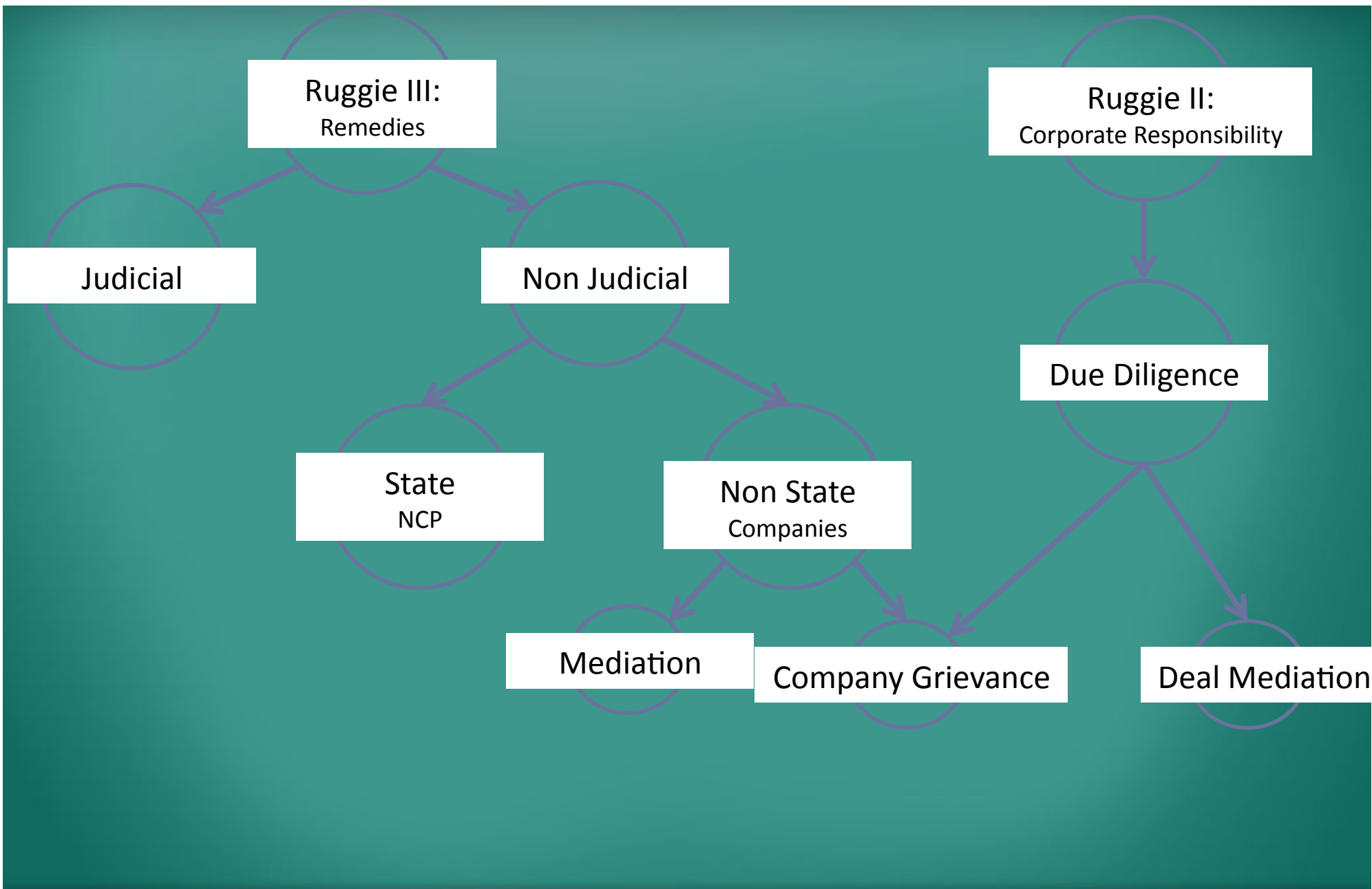
Goal: provide positive assurance that company has taken steps to become aware of, prevent, and mitigate adverse human rights impacts (“knowing and showing”)

# The OECD Guidelines Multinationals 2011

- Broadly accepted soft law instrument: business community, labour unions and civil society involved
- Non binding nature maintained: high ambition level
- Comprehensive, Ruggie Guidelines adopted
- Due diligence concept introduced on all aspects
- Global application
- National (NCP) and umbrella (CIME) support and “enforcement” system

# OECD Guidelines Multinationals 2011

- I. Concepts and principles
- II. General Policies
- III. Disclosure
- IV. Human Rights (Ruggie's corporate responsibility to respect)
- V. Employment and Industrial Relations
- VI. Environment
- VII. Combating bribery, bribe solicitation and extortion
- VIII. Consumer interests
- IX. Science & Technology
- X. Competition
- XI. Taxation



# Conflict Management

## The Pathology of Litigation

Litigation has become an inevitable stage in the life cycle - slightly beyond adolescence but before maturity. It is virtually impossible to survive litigation and remain solvent, but it is occasionally possible to endure it and remain sane. As a modern ordeal by torture, litigation excels. It is exorbitantly expensive, agonizingly slow and exquisitely designed to avoid any resemblance to fairness or justice. Yet, in strange and devious ways, it does settle disputes - to everyone's dissatisfaction.

**J.S. Auerbach, Welcome to litigation, 1981**



# Dispute Resolution Spectrum

**CONSENSUAL**

**Control with parties**

**LEGAL**

**Transfer of Control**

Direct  
Negotiation

ADR

Arbitration

Litigation



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# The Governance/CSR Gap bridged by ADR

- Loss of control
- Reduction of business dispute to legal case
- Limitation of possible solutions to legal remedies
- No optimal use of company resources (management time, capital)
- (Too) long uncertainty
- Socially irresponsible to deny other party the advantages of ADR?

## Elements of a Structured Conflict management Policy

- Knowledge of modern methods of conflict-management
  - Risk-analysis
  - Policy -statement
  - Multi-step dispute resolution agreement clauses
  - Reporting structure and –procedure
  - Case-analysis and resolution alternatives
  - Preparation (principled negotiation, Harvard method)
  - Evaluation



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