

# The functioning of the Dutch National Contact Point during the specific instance procedure

O funcionamento do Dutch National Contact Point durante procedimento de instância específica

**Sander van 't Foort and Hanneke Palm**

*Sander van 't Foort: Bachelor in Business Administration (BBA) and Master of Laws (LLM). Pursues a PhD at Nyenrode Business University.  
E-mail: sfoort@hotmail.com*

*Hanneke Palm : Master of Laws (LLM / LLMleg), Human rights law advisor at the Dutch Ministry of Justice  
E-mail: hannekepalm@gmail.com*



## **ABSTRACT**

*This article investigates the functioning of the Dutch National Contact Point during the specific instance procedure based on shared experiences of parties involved in a specific instance procedure, the stipulations of the Organisation of Economic Development and Cooperation's Guidelines for Multinational Enterprises and the Dutch Government Decree 2014. National Contact Points function as a unique implementation mechanism of the Guidelines for Multinational Enterprises by providing mediation and conciliation services during specific instance procedures. The recent debate in the Netherlands on the functioning of the Dutch National Contact Point and the lack of rigorous up-to-date research necessitate further research on this topic. Hence, this article shares more in-depth knowledge about the functioning of the Dutch National Contact Point, contributes to the ongoing debate in Parliament and in the Organisation of Economic Development and Cooperation on the functioning of National Contact Points, and presents suggestions for further improvement. This research is grounded on sound desk research and empirical research. The authors conducted 19 interviews covering 70% of the total population. Based on their research, the authors found that the Dutch National Contact Point has to improve its timeliness, visibility and impartiality. The authors believe that applying the recommended changes may propel the necessary change to improve the functioning of the Dutch National Contact Point during the specific instance procedure and may ultimately engender a ripple effect to other National Contact Points that try to follow suit.*

## **KEY WORDS**

*Alternative Dispute Resolution – OECD – Specific Instance*

## RESUMO

Este artigo investiga o funcionamento do Dutch National Contact Point durante procedimentos de instância específica, baseando-se em experiências compartilhadas de partes envolvidas, nas determinações dos Organisation of Economic Development and Cooperation's Guidelines for Multinational Enterprises e no Decreto de 2014 do governo holandês. Os National Contact Points funcionam como um mecanismo de implementação dos Guidelines for Multinational Enterprises provendo serviços de mediação e conciliação durante procedimentos de instância específica. O debate recente na Holanda sobre o funcionamento do Dutch National Contact Point e a falta de pesquisas rigorosas e atualizadas indica a necessidade de investigações adicionais sobre esse tópico. Assim, este artigo compartilha conhecimento mais aprofundado sobre o funcionamento do Dutch National Contact Point, contribui para o debate em curso no Parlamento e na Organisation of Economic Development and Cooperation, sobre o funcionamento de Contact Points nacionais, e apresenta sugestões para aprimoramentos. Esta pesquisa está amparada por pesquisa bibliográfica e empírica consistente. Os autores conduziram 19 entrevistas, cobrindo 70% da população total. Com base em sua pesquisa, os autores concluíram que o Dutch National Contact Point tem de melhorar a sua pontualidade, visibilidade e imparcialidade. Acreditam que, aplicando-se as mudanças recomendadas, pode-se impulsionar a mudança necessária para a melhoria do funcionamento do Dutch National Contact Point durante procedimentos de instância específica e pode, ao final, inspirar efeitos positivos em outros Contact Points nacionais que tentarem seguir esse exemplo.

## PALAVRAS-CHAVE

Resolução Alternativa de Conflitos – OECD – Instância Específica

## 1. Introduction<sup>1</sup>



Since 1984,<sup>2</sup> each government that ratifies the *Declaration on International Investment and Multinational Enterprises* and the accompanying decisions of the Organisation for Economic Co-operation and Development (OECD) makes a binding commitment to establish a National Contact Point (NCP). The NCPs are tasked to further the effectiveness of the *OECD Guidelines for Multinational Enterprises* (hereafter: the Guidelines) amongst businesses, trade unions, non-governmental organisations (NGOs) and the interested public.<sup>3</sup> The Guidelines are recommendations for responsible business con-

1. The preliminary findings of our research were presented during an international conference in Aarhus in 2013 and during a conference at T.M.C. Asser Instituut in The Hague in 2014. Authors thank all respondents for participating in our research and for the feedback offered on the draft article. The preliminary findings of our research were published in S. van 't Foort, 'UN Guiding Principle 31 en de specifieke instance-procedure' in: N. Teesing (eds), *Duurzame handel in juridisch perspectief* (The Hague Boom Juridische Uitgevers 2014) 207-216.

2. The Investment Committee proposed that adhering countries must make appropriate facilities available for handling 'matters and problems' arising with regard to the Guidelines and emphasized the usefulness of 'contact points', which in our opinion can be seen as a first step into developing an NCP (OECD (1979), *Report of the Committee on International Investment and Multinational Enterprises on the Review of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises* (C(79)102(final), par. 9, 25 and 79). The 1984 decision of the OECD Council accompanying the Guidelines explicitly coins the terms 'National Contact Point' and adds more tasks to the existing repertoire of tasks, e.g. that the NCP 'can contribute to the solution of problems' that may arise in relation to the Guidelines (OECD (1984), *Second Revised Decision of the Council on the Guidelines for Multinational Enterprises* (C/MIN(84)6(FINAL)), par. 1).

3. OECD (2011) *OECD Guidelines for Multinational Enterprises*, 2011 edition, OECD Publishing, 71-72.

duct and are not legally enforceable. Governments encourage enterprises active in their territories to observe the Guidelines wherever they operate.<sup>4</sup>

An NCP's main goal is to promote the Guidelines and to handle inquiries. When receiving notifications from individuals, non-governmental organisations and/or businesses who have issues relating to the implementation of the Guidelines, an NCP provides a platform for mediation and conciliation for resolving these issues. In addition, an NCP informs the business community, worker organisations and other parties of the facilities it provides and it acts as a forum for discussion of all matters relating to the Guidelines.<sup>5</sup>

The Dutch government is a member of the OECD, ratified the *Declaration on International Investment and Multinational Enterprises* and has established an NCP. The Dutch NCP was active for a few years during the 1980s,<sup>6</sup> followed by multiple inactive years, and had its renaissance in 1998.<sup>7</sup> The Dutch NCP is an independent entity since 2007 and belongs to the five most active NCPs in the world.<sup>8</sup> The Dutch NCP consists of four independent members (with various backgrounds in for example business, the academic world and trade unions) and four representatives from the involved ministries as advisory members. The NCP is supported by a secretariat from the Ministry of Foreign Affairs.<sup>9</sup> The idea was that by having independent members in the Dutch NCP, the problem-solving processes would become more accessible, transparent and independent.<sup>10</sup>

In 2014, the *Government decree establishing the Dutch National Contact Point for the OECD Guidelines for multinational enterprises* (hereafter: Government Decree) has extended the Dutch NCP's mandate. Compared to the Government Decree 2011, the Government Decree 2014 ushers in a more explicit role for the Dutch NCP to interpret the Guidelines, provi-



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4. OECD (2011) *OECD Guidelines for Multinational Enterprises*, 2011 edition, OECD Publishing, 17.

5. OECD (2011) *OECD Guidelines for Multinational Enterprises*, 2011 edition, OECD Publishing, 3, 18 and 68; Also see the Dutch NCP's website: <[www.oesorichtlijnen.nl/en/national-contact-point](http://www.oesorichtlijnen.nl/en/national-contact-point)> accessed 22 March 2015.

6. The Dutch NCP was formally established in 1980 (*Kamerstukken II* (Parliamentary Documents), 2000/01, 26 485, nr. 11, 1).

7. *Kamerstukken II* 1999/00, 26 485, nr. 8, 2.

8. Government decree establishing the Dutch National Contact Point for the OECD Guidelines for multinational enterprises (*Stcrt.* 2007, nr. 41); *Kamerstukken II* 2010/11, 26 485, nr. 101, 8 ('Letter from the State Secretary of Economic Affairs, Agriculture and Innovation').

9. Articles 3-5 Government decree establishing the Dutch National Contact Point for the OECD Guidelines for multinational enterprises (*Stcrt.* 2014, nr. 19014). See also: Dutch NCP (date unknown), *NCP Members*, <[www.oesorichtlijnen.nl/en/national-contact-point/npc-members](http://www.oesorichtlijnen.nl/en/national-contact-point/npc-members)> accessed 30 December 2014.

10. J. Thompson-Sepmeijer, 'Nieuwe aanpak MVO' (*Rijksoverheid*, 11 July 2007) <[www.rijksoverheid.nl/documenten-en-publicaties/persberichten/2007/07/11/nieuwe-aanpak-mvo.html](http://www.rijksoverheid.nl/documenten-en-publicaties/persberichten/2007/07/11/nieuwe-aanpak-mvo.html)> accessed 30 December 2014.

des more leeway for the NCP to facilitate dialogues within the purview of the Guidelines without receiving a formal notification, makes it possible for the NCP to consult more ministries, and formalises stakeholder consultations initiated by the NCP. The Dutch government can now request the Dutch NCP to conduct company-overarching research and the Dutch NCP may assist parties in concluding so-called ‘International Corporate Social Responsibility Covenants’ (ICSRC)<sup>11</sup> by assessing the provisions of the ICSRC in the light of the Guidelines.<sup>12</sup> The Government Decree aims to strengthen the role of the NCP as a non-judicial grievance mechanism.<sup>13</sup>

The functioning of the Dutch NCP has been both lauded and criticised over time. The former Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises of the United Nations, John Ruggie, commended the Dutch NCP for its innovative institutional structure by calling it the ‘golden standard’.<sup>14</sup> A similar message was voiced by the Dutch Minister of Foreign Trade and Development Cooperation, calling the Dutch NCP ‘an international best practice’.<sup>15</sup> In a particular specific instance, Accountability Counsel,<sup>16</sup> a US-based NGO, acknowledged that the Dutch NCP is regarded as ‘a leader amongst NCPs’ with a ‘good reputation’, but also believes that the Dutch NCP’s reasoning and interpretation sometimes ‘stymied the full and effective implementation of the OECD Guidelines’.<sup>17</sup> Amnesty International and Friends of the Earth International held the most critical view after being involved in a specific instance with Shell, proclaiming that there existed ‘grave shortcomings in the Dutch NCP procedure’.<sup>18</sup>



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11. Government Decree NCP 2014 (*Stcrt.* 2014, nr. 19014), 4. ICSRCs comprise the agreements made between one or more sectors with other parties, such as governments or other stakeholders, to tackle concrete problems within the ambit of Corporate Social Responsibility (‘people, planet and profit’) that could not have been tackled by the sector acting alone (Social-Economic Council (2014), *IMVO-convenanten*, 19-20).

12. *Kamerstukken II* 2013/14, 26 485, nr. 190 ,5.

13. *Kamerstukken II* 2013/14, 26 485, nr. 179, 18.

14. *Kamerstukken II* 2010/11, 26 485, nr. 101, 8 (‘Letter from the State Secretary of Economic Affairs, Agriculture and Innovation’).

15. *Kamerstukken II* 2013/14, 26 485, nr. 190, 3.

16. Accountability Counsel is a US-based NGO that ‘defends the environmental and human rights of marginalized communities around the world’ (Accountability Counsel, ‘Mission, History, Partners and Supporters’ (date unknown) <[www.accountability-counsel.org/about/mission/](http://www.accountability-counsel.org/about/mission/)> accessed: 3 January 2014).

17. Accountability Counsel, *A Case Study of the Dutch NCP* (2013) 1 and 9.

18. This citation was translated from Dutch. Original citation: “De zaak onderstreept een ernstig probleem in het NCP-proces: het bedrijf kreeg de gelegenheid om veel voorwaarden te stellen aan de dialoog, en het NCP is niet in staat gebleken om de klacht inhoudelijk te behandelen. Vanwege deze ernstige tekortkomingen in het Nederlandse NCP-proces, geloven Amnesty International en Friends of the Earth International niet dat het contactpunt kan bijdragen aan een zinvolle oplossing van problemen met een bedrijf als Shell” (*Amnesty International*, ‘OESO-klachtmechanisme: Beweringen Shell over ‘sabotage’ in Nigerdelta ongefundeerd’ (*Amnesty International*, 17 June 2013) <[www.amnesty.nl/nieuwsporaal/pers/oeso-klachtmechanisme-beweringen-shell-over-sabotage-in-nigerdelta-ongefundeerd](http://www.amnesty.nl/nieuwsporaal/pers/oeso-klachtmechanisme-beweringen-shell-over-sabotage-in-nigerdelta-ongefundeerd)> accessed: 1 November 2013).

Since the last decade, a paucity of reports has delved into the functioning of the Dutch NCP during the specific instance procedure. Commissioned by the Dutch government, Good Company conducted research on the functioning of the Dutch NCP in 2006.<sup>19</sup> This report only has limited relevance as it was drafted before the fundamental institutional change of the Dutch NCP took place (2007) and before the Guidelines were updated (2011). An in-depth peer review of the Dutch NCP conducted by five other NCPs was published in 2010.<sup>20</sup>

The review elucidates very useful recommendations, but the findings are almost five years old. More recent findings are presented by BSR, who was commissioned by various companies, such as E.ON, Essent, GDF Suez, Nuon and EPZ, to evaluate the specific instance procedure in the light of a number of effectiveness criteria (see section 3.2).<sup>21</sup> A major drawback is that this report based its findings on just five interviews, only limitedly covering the total population and therefore severely limiting the generalizability of its findings.



## 2. Research question, methodology and reading guideline

The update of the Guidelines in 2011, the extended mandate of the Dutch NCP in 2014, the recent debate in the Netherlands on the functioning of the Dutch NCP and the lack of rigorous up-to-date research form the motives for this research. With this research we hope to gain more insight in the functioning of the Dutch NCP, to contribute to the ongoing debate in Parliament and in the OECD on the functioning of NCPs, and to present suggestions for improvement. We hope that our research provides useful recommendations that may propel the necessary change to improve the functioning of the Dutch NCP during the specific instance procedure and that it ultimately may engender a ripple effect to other NCPs that try to follow the example of the Dutch NCP.

The main research question of this article is: *How does the Dutch NCP func-*

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19. *Kamerstukken II*, 2006/07, 30 800 XIII, nr.30. Good Company wrote a second evaluation report in 2010. This report only evaluates the promotional activities of the NCP and not the functioning of the NCP during the specific instance procedure (*Kamerstukken II*, 2010/11, 26 485, nr.101).

20. *Kamerstukken II*, 2010/11, 26 485, nr.101.

21. *Kamerstukken II*, 2013/14, 26 485, nr.195.

tion considering the experiences of the parties involved in the specific instance procedure in relation to the criteria set out in the Guidelines and the Government Decree?

Data were collected through desk research and semi-structured interviews. We made use of parliamentary documents, the websites of the OECD and the Dutch NCP and all the relevant documents that can be found on these sites. We only interviewed parties that were involved in a specific instance from 2007 until August 2013. These two points in time represent the date when the Dutch NCP became more independent and the start of our qualitative research. It must be stressed that any specific instance that was not mentioned on the Dutch NCP's website, e.g. specific instances whereby the Dutch NCP performed a facilitating role, are excluded from this research as well as all concluded or pending specific instances after August 2013.<sup>22</sup> Future research will have to address the best practices, lessons learned and critical success factors that can be derived from these specific instances.

The total population of parties involved in the specific instances amounts to 27 (see Appendix 1). In total four (out of four) independent members, four (out of four) advisory members, and two (out of three) members of the secretariat of the Dutch NCP were interviewed.<sup>23</sup> Three (out of four) multinational companies (MNCs) and six (out of twelve) NGOs were interviewed (see Table 1). Six NGOs and one MNC decided not to participate or did not reply to our (repeated) request to participate. In total two specific instances were excluded, 'Dutch company vs. Local community (Anonymous)' and 'Shell vs. Dobos', because these notifications were not taken into further consideration by the NCP. Two other specific instances were omitted, Shell vs. Friends of the Earth (Philippines) and Shell vs. Stroitel/Sakhalin Environmental Watch, because the parties declined to participate or did not respond to our request.<sup>24</sup> The authors regret that this research does not include Shell, since Shell has been involved in multiple specific instances during the past years.



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22. The following specific instances were not included: *Nuon Energy NV v FNV Eemshaven*; *POSCO, ABP/APG, GPF v Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance, ForUM*; and *Rabobank v Milieudefensie/Friends of the Earth*.

23. During one interview an advisory member of the NCP and its policy advisor were interviewed simultaneously. One of the interviewed members of the secretariat just left the NCP at the start of our research.

24. Specific instances covered by this research are: *G-Star v SKK/LIW* (India); *SHV Makro v Shehri-CBE* (Pakistan); *Shell v Local communities & Sherpa* (Ireland); *Nidera v Argentinean NGOs, SOMO & Oxfam Novib*; *Shell v Friends of the Earth/Amnesty International* (I) and (II).

**TABLE 1 OVERVIEW RESPONDENTS AND RESPONSE RATE**

	Number of respondents	Total population	Response rate
MNCs	3	4	75%
NCP	10	11	91%
NGOs	6	12	50%
Total	19	27	70%

All the interviews were transcribed and then coded in Nvivo for further qualitative analysis. We applied the coding method of Charmaz, because it is less prescriptive than other coding methods and offers more flexibility. Charmaz discerns two phases of qualitative analysis: (i) initial coding; and (ii) focussed coding.

During the initial coding phase the raw data is divided into conceptual units of data, using labels derived from theories and from the actual wordings used by participants (e.g. 'duration initial assessment' and 'duration mediation'). The conceptual units of data (labels) are then reanalysed during the focussed coding phase.<sup>25</sup> During this second phase, we merged different labels to fit a larger amount of data, deleted irrelevant labels and tried to establish relationships between the various labels in order to inductively ground our findings in the data (e.g. merging 'duration initial assessment' and 'duration mediation' into 'duration specific instance').

The findings of all interviews are shared anonymously. All respondents were asked to describe the specific instance procedure and any best practices, lessons learned and critical success factors. Participants were not informed about the criteria as laid down in section 3.2. The respondents had the possibility to provide feedback on the transcriptions and this article.

In the following sections we will discuss the role of the Dutch NCP during the specific instance procedure and the core criteria that apply to the Dutch NCP as set out in the Guidelines and Government Decree (section 3).

Section 4 describes the experiences of all the parties involved in the specific instance procedure. This article ends with some concluding remarks of the authors (section 5) with regard to the functioning of the Dutch NCP.

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25. M. Saunders, P. Lewis and A. Thornhill, *Research Methods for Business Students* (Harlow Pearson Education Limited 2012) 578-571.



## 3. The role of the Dutch NCP during the ‘specific instance procedure’

### 3.1 Specific instance procedure of the Dutch NCP

A clear description of the specific instance procedure can be found on the website of the Dutch NCP.<sup>26</sup> The Procedural Guidance to the OECD Guidelines and its commentaries contain in-depth information.<sup>27</sup> Additional information can be found in the Government Decree.<sup>28</sup> In the context of this article it suffices to provide a brief description of the various phases in the Dutch specific instance procedure.

The first phase of the specific instance procedure includes the NCP’s confirmation of receipt of a notification to file a specific instance issued by a party (hereafter: the applicant), followed by the initial assessment of the notification. During the initial assessment the NCP assesses, amongst others, whether the issue is ‘material and substantiated’ and whether consideration of this notification will contribute to the purposes and effectiveness of the Guidelines.

During the second phase, called the ‘further consideration/dialogue phase’, the Dutch NCP determines which of its members will deal with the instance. In general, two members specifically are appointed. The NCP then discusses the issue with the parties and contributes to finding a solution, in correct terminology: it offers its ‘good offices’ to help the parties involved. Terms of reference for further dialogue are established and mediation or any other form of problem solving will be agreed by the parties and the NCP. It is possible that parties agree to involve an outside mediator, but that has not been the case until now.

If an agreement is reached, the third phase commences with drawing up a final statement by the NCP. The written agreement between the parties is the basis for the final statement. After an unsuccessful mediation or dialogue the Dutch NCP also draws up a final statement as prescribed in the

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26. See for more information: <[www.oecdguidelines.nl/notifications/contents/specific-instance-procedure](http://www.oecdguidelines.nl/notifications/contents/specific-instance-procedure)> accessed: 15 January 2015.

27. OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011 edition). See <<http://mneguidelines.oecd.org/text/>> for a copy of the new Guidelines including the Procedural Guidance.

28. Government Decree NCP 2014 (*Stcrt.* 2014, nr. 19014).



procedural guidance of the OECD.<sup>29</sup> In the latter case the final statement emphasises the Dutch NCP's views on the facts, the interpretation of the Guidelines, and the Dutch NCP recommends on further action by the parties to implement the Guidelines. After providing the different parties with the opportunity to react on the final statement, the final statement will be sent to the Minister of Foreign Trade and Development Cooperation (hereafter: 'the Minister'). The Minister will have the opportunity to offer his or her view, but may not alter or influence the final statement in any way. As from December 2014, the Minister does not offer his or her view anymore. The final statement is now published on the Dutch NCP's website, after sending the final statement to the Minister and the involved parties.<sup>30</sup>

During the fourth and final phase, the progress of the instance is monitored by requesting information of the involved parties relating to the implementation of the final statement. The Dutch NCP publishes a brief evaluation of this implementation a year after the publication of the final statement. This phase is known as the follow-up phase.<sup>31</sup>

## 3.2 Core criteria relating to the role of the Dutch NCP

### 3.2.1 According to the Guidelines

The Guidelines explicitly mention the following NCP roles: (i) the furthering of the effectiveness of the Guidelines; (ii) enhancing the profile of the Guidelines; and (iii) the potential role of monitoring and the resolving specific instances.<sup>32</sup> The Guidelines also mention different criteria pertaining to the different roles of the NCP, which are explained in further detail in the commentaries to the Guidelines and can for a great deal also be found in the Ruggie Framework for Business and Human Rights.<sup>33</sup> Core criteria according to the Guidelines relating to the objective of 'functional equiva-

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29. Notice that the Guidelines do not use the words 'final statement' at all, but just use the word 'report' in the instance of a successful mediation or 'statement' in the instance of an unsuccessful mediation (OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011 edition) 73).

30. Article 7 Government decree establishing the Dutch National Contact Point for the OECD Guidelines for multinational enterprises (amended) (*Stcrt.* 2014, nr. 36720).

31. This phase is not mandatory according to the Guidelines. Cf. OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011 edition) 84-85.

32. OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011 edition) 71, 78 and 82.

33. We made use of OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011 edition) 71-72 and 79; J. Ruggie, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, [2011] Human Rights Council (A/HRC/17/31), Guiding Principle 31.



lence<sup>34</sup> are: visibility, accessibility, transparency and accountability. Core criteria pertaining to the NCP's role during the resolution of specific instances are: impartiality, predictability, equitability and compatibility.<sup>35</sup> Efficiency and timeliness can be seen as elements of accessibility and also play an important role during the resolution of specific instances.<sup>36</sup>

### 3.2.2 According to the Dutch government and the Dutch NCP

The Dutch government considers the promotion and interpretation of the Guidelines and responding to specific instances as the core tasks of the Dutch NCP.<sup>37</sup> Similarly, the Dutch NCP sees responding to specific instances as one of its core tasks as well as raising awareness of the Guidelines amongst businesses, trade unions and NGOs.<sup>38</sup> When regarding the different criteria, the Dutch government only mentions visibility, accessibility, transparency and accountability as main criteria for the functioning of an NCP.<sup>39</sup> The Dutch NCP applies the same criteria as the Guidelines, i.e. vi-

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34. In 2011 the Guidelines were updated to, *inter alia*, foster 'functional equivalence' of NCPs. The concept of 'functional equivalence' is used to ensure that all NCPs operate in a comparable manner. To enhance their 'functional equivalence', each NCP has to meet the core criteria of accessibility, visibility, transparency and accountability (OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011 edition) 4 and 71).

35. Description according to the Guidelines:

*Visibility.* [...] adhering governments agree to nominate NCPs, and also to inform the business community, worker organisations and other interested parties, including NGOs, about the availability of facilities associated with NCPs in the implementation of the Guidelines. Governments are expected to publish information about their NCPs and to take an active role in promoting the Guidelines, which could include hosting seminars and meetings on the instrument. These events could be arranged in cooperation with business, labour, NGOs, and other interested parties, though not necessarily with all groups on each occasion.

*Accessibility.* Easy access to NCPs is important to their effective functioning. This includes facilitating access by business, labour, NGOs, and other members of the public. Electronic communications can also assist in this regard. NCPs would respond to all legitimate requests for information, and also undertake to deal with specific issues raised by parties concerned in an efficient and timely manner.

*Transparency.* Transparency is an important criterion with respect to its contribution to the accountability of the NCP and in gaining the confidence of the general public. Thus, as a general principle, the activities of the NCP will be transparent. Nonetheless when the NCP offers its "good offices" in implementing the Guidelines in specific instances, it will be in the interests of their effectiveness to take appropriate steps to establish confidentiality of the proceedings. Outcomes will be transparent unless preserving confidentiality is in the best interests of effective implementation of the Guidelines.

*Accountability.* A more active role with respect to enhancing the profile of the Guidelines – and their potential to aid in the management of difficult issues between enterprises and the societies in which they operate – will also put the activities of NCPs in the public eye. Nationally, parliaments could have a role to play. Annual reports and regular meetings of NCPs will provide an opportunity to share experiences and encourage "best practices" with respect to NCPs. The Committee will also hold exchanges of views, where experiences would be exchanged and the effectiveness of the activities of NCPs could be assessed.

*Impartial.* NCPs should ensure impartiality in the resolution of specific instances.

*Predictable.* NCPs should ensure predictability by providing clear and publicly available information on their role in the resolution of specific instances, including the provision of good offices, the stages of the specific instance process including indicative timeframes, and the potential role they can play in monitoring the implementation of agreements reached between the parties.

*Equitable.* NCPs should ensure that the parties can engage in the process on fair and equitable terms, for example by providing reasonable access to sources of information relevant to the procedure.

*Compatible with the Guidelines.* NCPs should operate in accordance with the principles and standards contained in the Guidelines. (OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011 edition) 79 and 82).

36. Cf. OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011 edition) 79 with 72.

37. Article 2 Government decree establishing the Dutch National Contact Point for the OECD Guidelines for multinational enterprises (*Stert.* 2014, nr. 19014).

38. Dutch NCP, 'NCP', (*OECD Guidelines*, 2015) <[www.oecdguidelines.nl/ncp](http://www.oecdguidelines.nl/ncp)> accessed: 18 January 2015.

39. Government decree establishing the Dutch National Contact Point for the OECD Guidelines for multinational enterprises (*Stert.* 2014, nr. 19014), 4.



sibility, accessibility, transparency and accountability, using similar definitions, although it does not explicitly mention the criteria of impartiality, predictability, equitability and compatibility.<sup>40</sup>

## 4. Experiences of all the parties involved in the specific instance procedure

The following sections describe the experiences of all parties involved in the specific instance procedure relating to the criteria mentioned in section 3.2, i.e. visibility, accessibility, transparency, accountability, impartiality, predictability, equitability, compatibility, efficiency and timeliness, and also include a few experiences that are not directly linked to these criteria. These experiences are included, because they are necessary for a better understanding of the functioning of the Dutch NCP. The most salient findings will be shared in the following sections and summarised in Tables 2-4.

### 4.1. Best practices

#### 4.1.1 According to MNC respondents<sup>41</sup>

According to MNC respondents there are just a few best practices. Facilitating an adversarial process, whereby both parties are heard, whilst remaining impartial during the process as well as enabling parties to validate the facts before issuing a final statement are the only ‘best practices’ mentioned. Whether these best practices are really considered as such could be questioned, because the respondent ends its answer ambiguously commenting that the specific instance procedure was ‘fine’.

#### 4.1.2 According to NGO respondents<sup>42</sup>

NGOs considered the impartiality of the NCP and the (increased) transparency during the specific instance procedure as best practices. The Dutch NCP has really pushed the envelope to improve the transparency of the specific instance procedure over the last years. Clear expectations of the



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40. Dutch NCP, ‘Core criteria’ (OECD Guidelines, 2015) <[www.oecdguidelines.nl/ncp/contents/core-criteria](http://www.oecdguidelines.nl/ncp/contents/core-criteria)> accessed: 18 January 2015.

41. One respondent does not mention any best practices, another mentions a few ‘best practices’ and the last respondent says that the Dutch NCP did not play any success role whatsoever.

42. Two of the six respondents do not mention any best practice.

procedure have led to increased transparency. The NCP is also admired for and commended on how they treated an NGO during a particular specific instance. The NCP members treated NGO in a respectful manner without any bias and did not demonise the NGO.

#### 4.1.3 According to Dutch NCP respondents<sup>43</sup>

Within the purview of the criteria of section 3.2, timeliness and visibility surface as best practices mentioned by the Dutch NCP. The Dutch NCP is said to act expeditiously, quickly responding to notifications. Improved visibility is reached by convening useful and informational stakeholder meetings, providing parties, such as small to medium-sized enterprises (SMEs), with useful information on the Guidelines.<sup>44</sup>

**TABLE 2 BEST PRACTICES OVERVIEW**

	MNCs	NGO	Dutch NCP
Facilitating an adversarial process, whereby both parties are heard, whilst remaining impartial during the process.	✓		
	1 out of 3 respondents		
Enabling parties to validate the facts before issuing a final statement.	✓		
	1 out of 3		
(Increased) transparency during the specific instance procedure.		✓	
		2 out of 6	
Impartiality of NCP members.		✓	
		1 out of 6	
Timeliness (quickly responding to notifications).			✓
			1 out of 10
Visibility through stakeholder meetings.			✓
			1 out of 10



## 4.2 Lessons learned

### 4.2.1 According to MNC respondents<sup>45</sup>

A central issue that was frequently mentioned is timeliness. Sometimes the Dutch NCP is too slow with publishing messages on its website. One res-

43. All NCP members share at least one best practice.

44. Please notice that this best practice is not directly linked to the specific instance procedure and strictly speaking falls outside the scope of this research.

45. All MNCs share at least one lesson learned.

pondent underscores the weight of this factor, arguing that timeliness considerably affects the perceived professionalism of the Dutch NCP.

Another remarkable finding is that all respondents from MNCs see the Dutch NCP as a platform for NGOs. During one interview, the interviewee perceives the specific instance procedure as a procedure that can only be initiated by NGOs. When rebutted by the interviewer that this perception is in fact incorrect, the interviewee replies that in practice the specific instance procedure still functions as ‘a tool for NGOs’. ‘Here [meaning the NCP] NGOs can attack companies that are not operating correctly’ was a more cynical statement of another respondent. The specific instance is seen as just another avenue to be exploited by NGOs to justify their claims.

#### 4.2.2 According to NGO respondents<sup>46</sup>

Again, timeliness is addressed as a major concern. The specific instance procedure took too long and this is mainly caused by the fact that the Dutch government takes too long to reply to final statements. Timeliness is not considered an issue to everyone. One respondent states that ‘during the process, the time involved was fine [...] This is a long game so there wasn’t any huge hurry to get a resolution’.

Another lesson learned is that the final statement sometimes shows some bias towards the multinational. It has been argued that the Dutch NCP cannot function fully impartially, due to the dependence on the secretariat taken together with the fact that the secretariat falls under the Ministry of Foreign Affairs. Some NGOs affirm that the Dutch NCP praised the MNC more than the NGO in its final statement.

A final ‘lesson learned’ that does not relate to the abovementioned criteria (see section 3.2), but is worth mentioning, relates to the effectiveness of the specific instance procedure. To some NGOs the specific instance procedure does not make any difference or has a minimal effect. One respondent poignantly argues that ‘the [NCP] concept is extremely good, the idea is good, the way in which they operate is commendable, but it all leads to a cul-de-sac’ (dead end). Introducing a sanction mechanism or other compulsory mechanisms or giving final statements ‘more weight’ may solve this

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46. All NGOs share at least one lesson learned.



effectiveness issue. In practice, some NGOs perform a cost-benefit analysis before deciding between notifying an allegedly non-observance of the Guidelines or setting up a campaign. Sometimes a campaign orchestrated by an NGO is deemed more effective than initiating a specific instance procedure.

#### 4.2.3 According to Dutch NCP respondents<sup>47</sup>

Timeliness was addressed by four respondents, but only by one respondent as a possible lesson learned. The specific instance procedure may take long, but an NCP can strategically choose to prolong the procedure for legitimate reasons. A longer specific instance procedure could be detrimental to a company's reputation and could lead to more uncertainty, but these drawbacks may be outweighed by potential benefits. Time is instrumental in bringing parties together, allows parties to come out of their entrenched foxholes and enables them to stop shooting at each other. Extending the specific instance procedure sometimes yields better results for all parties involved. One respondent stresses that reaching a solution precedes a timely procedure.

Improving the visibility of the NCP is also accentuated as a lesson learned. Knowledge gaps exist about what an NCP is and what it can do. Even Dutch parliamentarians seem to have difficulties to come to grips with the conceptualisation of an NCP. A possible solution is found in the dissemination of information and convening stakeholder meetings.

A final lesson learned that is mentioned in the light of the criteria as mentioned in section 3.2 relates to the criterion of impartiality. As stated by some NGOs, in the past the effort that NGOs had put into the specific instance was not always acknowledged. For example, by praising the NGO less than other parties in a final statement, whilst the specific instance was initiated by the NGO and the NGO had invested considerable effort. The Dutch NCP has learned from the past and will mention NGOs' efforts and contributions in the specific instance procedure more explicitly in its final statement.

Even though not mentioned as a lessons learned, it is interesting to share NCP members' response to the perception of MNCs that the NCP functions as a platform for NGOs. Multiple NCP members confirm that some MNCs see or might see the NCP as a platform for NGOs. The fact that no



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47. Two NCP members do not mention any lessons learned and one member only mentions lessons learned that fall outside the scope of this research.

notifications are submitted by MNCs about NGOs may be conducive to this perception. It may also be the result of unfamiliarity with how NCPs work, because the Guidelines provide MNCs with ample opportunities to notify any non-observance of the Guidelines by NGOs. Stating that this is not possible is a wide-spread misconception.

A vexed issue addressed earlier by NGOs is whether compulsory mechanisms must be introduced to render the specific instance more effective. The NCP members that responded to this issue unanimously disagree with the NGOs' supposition. An informal approach through mediation is consonant with the voluntary approach of Corporate Social Responsibility (CSR) and emphasises that companies must be intrinsically motivated to act responsibly instead of being externally pressurised or coerced via a formal or judicial route. A distinction is made between the public arena and the judicial arena. NCPs are said to act in the public arena, referring to publicity and media, and not in the judicial arena, which is reserved for judicial bodies with judicial sanction mechanisms. Shifting to the judicial realm torpedoes any successful outcome of mediation. Mediation is forward looking and offers recommendations for future behaviour, whilst judicial procedures focus on judgements and penalisation. The added value of sanctions is therefore questioned. Naming and shaming and excluding parties from trade missions are already prevalent measures that could be taken and are arguably more effective than judicial sanctions. One must keep in mind what the purpose of sanctioning a party is, because sanctions may likely lead to parties weaning away from the NCP instead of engaging in a sustainable solution.

**TABLE 3 LESSONS LEARNED OVERVIEW**

	MNCs	NGO	Dutch NCP
Timeliness (i.e. procedure takes too long).	✓	✓	✓
	3 out of 3	4 out of 6	1 out of 10
NCP functions as a platform for NGOs.	✓		
	3 out of 3		
Final statements do not acknowledge effort invested by NGOs.		✓	✓
		3 out of 6	1 out of 10
Specific instances could be more effective by introducing compulsory mechanisms.		✓	X
		2 out of 6	7 out of 10
Visibility of the NCP and its procedures must be increased.			✓
			2 out of 10



### 4.3. Critical success factors<sup>48</sup>

#### 4.3.1 According to MNC respondents<sup>49</sup>

Impartiality of the mediators and confidentiality during the specific instance procedure are mentioned as critical success factors. For MNCs it is better to avoid any publicity until there is agreement on the final statement. Waiting to seek publicity may lead to more openness during the specific instance procedure and it contributes to the level of confidence in the NCP that it acts with due care during the specific instance procedure.

#### 4.3.2 According to NGO respondents<sup>50</sup>

Some NGOs reiterated the need for compellability. Compellability is seen as the missing crucial dimension of the specific instance procedure. Final statements must have a penalising effect, whenever necessary. Another critical element of a final statement is the verdict. Hence, a final statement must be based on judgements. When a final statement is based on judgements, mediation or conciliation has to be separated from issuing the final statement. An alternative is provided whereby the Dutch NCP issues the final statement and external mediators are appointed for the mediation phase.



#### 4.3.3 According to Dutch NCP respondents<sup>51</sup>

Visibility and timeliness are two cornerstones of the functioning of the NCP. Invisibility of the NCP can lead to misconceptions of how the NCP works – even in Parliament.<sup>52</sup> Reframing the NCP through the dissemination of factual information is needed for a better understanding of the NCP. Keeping up the pace during the specific instance procedure is also of the utmost importance. Staff of all parties must be made available to act in a timely manner.

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48. During the interviews the researchers made a distinction between best practices and critical success factors. Best practices cover all actions undertaken by a party involved in a specific instance that contributed to a successful outcome of a specific instance. A critical success factor is a factor that is absolutely pivotal to reaching a successful mediated outcome.

49. All MNCs mention at least one critical success factor.

50. Four of the six NGOs mention at least one critical success factor that falls within the scope of this research. However, these four NGOs also all point out critical success factors that fall outside the ambit of the criteria as stated in section 3.2.

51. Nine respondents shared at least one best practice. Two respondents shared best practices that fall outside the scope of this research.

52. According to one respondent.

A number of NCP members assert that the stature of the independent NCP members is essential. Together with independence and impartiality, stature constitutes the quality of the independent members. The quality of independent NCP members positively affects the level of trust, respect and openness and stimulates parties' willingness to discuss the issues at stake. To secure its impartiality, the NCP must not choose sides too early in the specific instance procedure. A fragile balance must be maintained and parties must not get the impression that the NCP favours one of the parties more than the other.

**TABLE 4 CRITICAL SUCCESS FACTORS OVERVIEW**

	MNCs	NGO	Dutch NCP
Impartiality of the mediators.	✓		
	1 out of 3		
Confidentiality during the specific instance procedure.	✓		✓
	1 out of 3		1 out of 10
Compellability of the specific instance.		✓	
		1 out of 6	
Final statements must include a verdict.		✓	
		1 out of 6	
Mediation or conciliation has to be separated with issuing the final statement.		✓	
		1 out of 6	
Visibility of the NCP.			✓
			1 out of 10
Acting in a timely manner.			✓
			1 out of 10
Quality of the independent members: independence, stature and impartiality.			✓
			3 out of 10



## 5. Concluding remarks and recommendations

The main objective of this article is to answer the question how the Dutch NCP functions considering the experiences of the parties involved in the specific instance procedure and the criteria set out in the Guidelines and the Government Decree. Section 4 presented a plethora of best practices,

lesson learned and critical success factors, including a few interesting findings that do not directly relate to the criteria set out in section 3.2. To narrow down the number of findings we only take stock of the best practices, lessons learned and critical success factors that are covered frequently by all parties and are related to the criteria of section 3.2. By focussing on perennial issues with high response rates and full coverage by MNCs, NGOs and the NCP, this research partly tries to answer the research question by signalling three core findings that are embedded in the qualitative data.

First, this research indicates that timeliness has a pervasive impact on the functioning of the Dutch NCP. Timeliness is seen as a best practice (10% of all NCP respondents) and as a critical success factor (10% of all NCP respondents), but must first and foremost be considered as a lesson learned (10% of all NCP respondents, 67% of all NGO respondents and 100% of all MNC respondents). Procedures tend to take too long in the perception of the majority of MNC and NGO respondents. Acting in a timely manner is of great importance to ensure that the procedure does not take too long. In practice, the NCP is not fast enough with publishing information on its website and the Minister takes too long to respond on final statements.<sup>53</sup> The importance of timeliness is underlined by the fact that it influences the perceived level of professionalism and it may damage an MNC's reputation. Adjusting the duration of the specific instance procedure to a length that is acceptable for most parties in the future almost seems to be inevitable. The Dutch NCP showed however that time is instrumental in bringing parties together, allows parties to come out of their entrenched foxholes and enables them to stop shooting at each other. Dealing with timeliness seems to be a tender balancing exercise between providing more time to reach an agreement and strictly adhering to time frames to reduce any reputational damage done to MNCs.

Second, this research shows visibility emerges as an important factor in the functioning of the Dutch NCP. Visibility is seen as a best practice (10% of all NCP respondents) and as a critical success factor (10% of all NCP respondents), but must primarily be considered as a lesson learned (20% of all NCP respondents and 100% of all MNC respondents). The lack of



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53. See section 3.1 for the amended specific instance procedure. From December 2014 onwards, the Minister no longer offers his or her view. Future research might show how this affects the timeliness of specific instances.

visibility of the NCP is illustrated by the striking fact that all respondents from MNCs perceive the Dutch NCP as a platform for NGOs and not for MNCs. This basic assumption of the MNC respondents is incorrect and shows that the Dutch NCP has to improve its visibility so that all parties are adequately informed. Furnishing stakeholders with factual information on what an NCP is and how it functions as well as convening informative stakeholder meetings may solve this issue.

Finally, this research indicates that impartiality is imperative for the functioning of the Dutch NCP. Impartiality is seen as a best practice (33% of all MNC respondents and 17% of all NGO respondents) and as a critical success factor (30% of all NCP respondents and 33% of all MNC respondents), but must primarily be considered as a lesson learned (10% of all NCP respondents and 50% of all NGO respondents). The NCP is praised for its impartiality during the specific instance procedure by MNCs and NGOs. Together with independence and stature, impartiality constitutes the quality of the independent NCP members and positively affects the level of trust, respect and openness and stimulates parties' willingness to discuss the issues at stake. The NCP must prevent the impression that it favours one of the parties more than the other in order to maintain its impartiality. This is exactly what happened when it issued final statements, whereby some parties received more praise than others. The NCP learned from this experience and in future will mention all efforts and contributions made in the specific instance procedure more explicitly in its final statement.

Based on the abovementioned three findings we recommend<sup>54</sup> the Dutch NCP to improve its visibility by informing parties – especially MNCs – about the specific instance procedure and its possibilities. We also recommend the Dutch NCP to adhere to predefined timeframes as often as possible, because too long procedures have shown to be a major burden – especially on multinationals. The NCP could choose to only publish information when it is clear that one of the parties has not met the recommendations as laid down in the Guidelines to reduce any reputational damage for MNCs. To improve the perceived impartiality, it is crucial for the NCP to pay equal attention to all parties proportionate to their efforts and contributions.

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54. It is important to note that an overarching finding in our research is that MNCs and NGOs tend to have very different experiences and expectations with regard to the functioning of the NCP. This should be kept in mind when implementing these recommendations.



# Appendix 1 – Parties involved in specific instances 2008 – August 2013

1. G-Star
2. SHV
3. Nidera
4. Shell
5. CEDHA
6. Oxfam Novib
7. Amnesty International
8. SOMO
9. Shell to Sea
10. Schone Kleren Campagne
11. Friends of the Earth
12. Landelijke India Werkgroep
13. Sherpa
14. Afri
15. Shehri-Citizens for a Better Environment
16. Accountability Counsel
17. Independent NCP member
18. Independent NCP member
19. Independent NCP member
20. Independent NCP member
21. Advisory NCP member
22. Advisory NCP member
23. Advisory NCP member
24. Advisory NCP member
25. Secretariat
26. Secretariat
27. Secretariat



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