



Ministry of Foreign Affairs

*IOB Evaluation*

# NCP 2012-2018

Evaluation of the Dutch National Contact Point  
for the OECD Guidelines

IOB evaluation no. 434 | NCP 2012-2018 | IOB evaluation no. 434 | NCP 2012-2018 | IOB evaluation no. 434 | NCP 2012-2018 | IOB evaluation

Due Diligence

A close-up photograph of a file folder tab. The tab is made of light brown cardboard and has a white rectangular label with the words "Due Diligence" printed in a black, typewriter-style font. The background is a blurred office setting with other file folders.

*IOB Evaluation*

# NCP 2012-2018

Evaluation of the Dutch National Contact Point  
for the OECD Guidelines

**Authors:**

*Sander van 't Foort, Aikaterini Argyrou, Tineke Lambooy – Nyenrode Business University  
Suzanne Kluft, Johan Vonk and Peter Wilms – APE Public Economics*

# Preface

The OECD Guidelines for Multinational Enterprises require OECD countries to set up National Contact Points (NCPs). These NCPs are expected to promote responsible business conduct internationally (respecting the Guidelines) and to resolve complaints about irresponsible business conduct (alleged violations of the Guidelines: specific instances). One of the most active NCPs, and often mentioned as an example for other NCPs worldwide, is the Dutch NCP. In 2007 the Dutch NCP became an independent entity with independent members and a budget of its own, though entirely funded by the Dutch government. Its secretariat is based at and staffed by persons seconded by the Ministry of Foreign Affairs (MFA).

This report evaluates the functioning of the Dutch NCP between 2012 and 2018, reviewing all of its activities. It analyses all specific instances handled in this period and makes a comparison with the performance of other NCPs (in Germany, the United Kingdom, Norway and Denmark). Furthermore, the evaluation takes an in-depth look at four interesting cases of complaints involving Heineken, ABP/APG, Shell and Atradius DSB. The analysis is based on extensive desk and literature research and more than 30 (telephone) interviews with members and staff of the NCP, NGOs, trade unions, companies and other relevant stakeholders. The report confirms the professional reputation of the Dutch NCP and makes some recommendations to further enhance its effectiveness and efficiency.

The evaluation was coordinated by Alexander Otgaar, Martine de Groot and Otto Genee (IOB). The research was conducted by Tineke Lambooy, Sander van 't Foort and Aikaterini Argyrou from Nyenrode Business University and Peter Wilms, Suzanne Kluft and Johan Vonk from APE Public Economics. Wendy van der Neut and Josine Polak (IOB) provided internal quality support. The research activities were carried out between September 2018 and March 2019.

| 3 |

Two external experts advised on the report as independent members of the reference group: Liesbeth Enneking (Erasmus School of Law) and John Morrison (Institute for Human Rights and Business). Other reference group members were Maartje van Putten (chair and independent member of the NCP), Sylvia Tuin (Ministry of Foreign Affairs/secretariat of the NCP), Hannah Tijmes (Ministry of Foreign Affairs/ advisory member of the NCP) and Dorine Wytema (Ministry of Infrastructure and Water Management/ advisory member of the Netherlands NCP).

IOB wishes to thank the researchers, the interviewees and the members of the reference group for their valuable inputs and comments. Final responsibility for the content of this report rests with IOB.

**Wendy Asbeek Brusse**

*Director Policy and Operations Evaluation Department (IOB)  
Netherlands Ministry of Foreign Affairs*

# Table of contents

List of abbreviations and acronyms	6
Executive summary	7
Background	7
Evaluation methodology	8
Evaluation results: Conclusions and recommendations	9
General recommendations	12
<b>1. Introduction</b>	<b>14</b>
1.1 Background	14
1.2 The Dutch NCP	15
1.3 Purpose and limitations of the evaluation	16
1.4 Evaluation questions	17
1.5 Structure of the evaluation report	17
<b>2. Theoretical framework</b>	<b>18</b>
2.1 Defining effectiveness	18
2.2 Effectiveness factors	21
<b>3. Evaluation methodology</b>	<b>23</b>
3.1 Overview of evaluation methodology	23
3.2 Doctrinal research	24
3.3 Case studies of specific instance procedures	25
3.3.1 <i>Selection of cases</i>	25
3.3.2 <i>Collection of data and the selection of interview respondents</i>	25
3.3.3 <i>Case study analysis</i>	26
3.4 Stakeholder interviews	26
3.4.1 <i>Analysis</i>	26
3.5 Telephone survey among NGOs and trade unions	26
3.6 Efficiency: budget analysis and comparison	27
<b>4. Findings on the tasks of the NCP</b>	<b>28</b>
4.1 Tasks of the Dutch NCP	29
4.1.1 <i>Promotional activities</i>	29
4.1.2 <i>Enquiries</i>	30
4.1.3 <i>The specific instance procedure</i>	31
4.1.4 <i>Other activities</i>	39
4.2 Budget and staff	40
4.2.1 <i>Capacity</i>	40
4.2.2 <i>Efficiency</i>	41
<b>5. Findings on the effectiveness criteria</b>	<b>44</b>
5.1 Visibility	45
5.1.1 <i>NCP activities and visibility</i>	45
5.1.2 <i>Visibility of the Dutch NCP among NGOs and trade unions</i>	45
5.1.3 <i>Visibility of the Dutch NCP among companies</i>	45
5.2 Accessibility	46
5.2.1 <i>Accessibility strengths</i>	46
5.2.2 <i>Accessibility weaknesses</i>	46

5.3	Transparency	47
5.3.1	<i>Publishing initial assessments and final statements</i>	47
5.3.2	<i>Transparency vs confidentiality</i>	47
5.4	Accountability	48
5.4.1	<i>Activities and spending</i>	48
5.4.2	<i>Decisions</i>	48
5.5	Impartiality	49
5.5.1	<i>Checks and balances</i>	49
5.5.2	<i>Trust and acceptance mediator</i>	49
5.6	Predictability	50
5.6.1	<i>Procedural predictability</i>	50
5.6.2	<i>Predictability on outcomes of the procedure</i>	50
5.7	Equitability	51
5.7.1	<i>NGO and trade union perspective: power imbalances</i>	51
5.7.2	<i>MNE perspective: fishing expeditions</i>	51
5.8	Compatibility with the Guidelines	51
5.8.1	<i>Procedural compatibility</i>	51
5.8.2	<i>Compatibility with the content of the Guidelines</i>	52
<b>6.</b>	<b>Discussion</b>	<b>53</b>
6.1	Accessibility and capacity	53
6.2	The visibility scope	54
6.3	The forward-looking approach	54
6.4	Mediation or adjudication	54
6.5	The court of public opinion	55
6.6	RBC sector agreements	55
6.7	Sector assessments	55
<b>7.</b>	<b>Conclusions and recommendations</b>	<b>56</b>
7.1	Conclusions	57
7.2	Recommendations	60
<b>8.</b>	<b>Annexes</b>	<b>63</b>
	Annex I: References	63
	Annex II: Case study respondents and interview template	65
	Annex III: Stakeholder interview respondents and interview template	66
	Annex IV: Telephone survey with NGOs and trade unions	68
	Annex V: Evaluation Team	69
	Annex VI: Managementsamenvatting	69
	Achtergrond	69
	Evaluatiemethode	70
	Resultaten van de evaluatie: conclusies en aanbevelingen	70
	Algemene aanbevelingen	74

# List of acronyms and abbreviations

## Abbreviations

<b>(A)DSB</b>	(Atradius) Dutch State Business
<b>BHOS</b>	<i>Buitenlandse Handel en Ontwikkelingssamenwerking</i> – Foreign Trade and Development Cooperation
<b>DRC</b>	Democratic Republic of Congo
<b>EL&amp;I</b>	<i>Ministerie van Economische Zaken, Landbouw &amp; Innovatie</i> – Ministry of Economic Affairs, Agriculture & Innovation (during the Rutte II cabinet), currently the Ministry
<b>EZK</b>	<i>Ministerie van Economische Zaken en Klimaat</i> – Ministry of Economic Affairs and Climate Policy
<b>FTE</b>	Full-time equivalent
<b>ICSR</b>	International corporate social responsibility
<b>IenW</b>	<i>Ministerie van Infrastructuur en Waterstaat</i> – Ministry of Infrastructure and Water Management (known as the Ministry of Infrastructure and the Environment)
<b>IOB</b>	<i>Directie Internationaal Onderzoek en Beleidsevaluatie</i> – Policy and Operations Evaluation Department
<b>IRBC</b>	International responsible business conduct
<b>MFA</b>	Ministry of Foreign Affairs
<b>MNEs</b>	Multinational enterprises
<b>MNO's</b>	<i>Multinationale ondernemingen</i> – Multinational enterprises (MNEs)
<b>MVO</b>	<i>Maatschappelijk Verantwoord Ondernemen</i> – Responsible Business Conduct (RBC)
<b>NCP</b>	National Contact Point
<b>NGO</b>	Non-governmental organisation
<b>NJGMs</b>	Non-judicial grievance mechanisms
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>PRKN</b>	Permanent Representation of the Kingdom of the Netherlands
<b>RBC</b>	Responsible business conduct
<b>SER</b>	<i>Sociaal Economische Raad</i> – Social and Economic Council of the Netherlands
<b>SOMO</b>	<i>Stichting Onderzoek Multinationaal Ondernemen</i> – Centre for Research on Multinational Corporations
<b>SZW</b>	<i>Ministerie van Sociale Zaken en Werkgelegenheid</i> – Ministry of Social Affairs and Employment
<b>ToR</b>	Terms of Reference
<b>TUAC</b>	Trade Union Advisory Committee to the OECD
<b>UN</b>	United Nations
<b>UNGPs</b>	UN Guiding Principles on Business and Human Rights
<b>UK</b>	United Kingdom
<b>USA</b>	United States of America
<b>VBDO</b>	<i>Vereniging Beleggers voor Duurzame Ontwikkeling</i> – Dutch Association of Investors for Sustainable Development
<b>VNO-NCW</b>	<i>Verbond van Nederlandse Ondernemingen en het Nederlands Christelijk Werkgeversverbond</i> – Confederation of Netherlands Industry and Employers
<b>WPRBC</b>	Working Party on Responsible Business Conduct



# Executive summary



## Background

The Policy and Operations Evaluation Department (IOB) of the Ministry of Foreign Affairs (MFA) has commissioned an evaluation of the Dutch National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (MNEs) (abbreviated as ‘the Guidelines’). APE Public Economics and Nyenrode Business University were assigned to conduct the NCP evaluation. The NCP evaluation is part of a large-scale 2020 review of Dutch sustainable trade and investment policies and complements the IOB evaluation of the Dutch International Responsible Business Conduct (IRBC) policy.<sup>1</sup>

<sup>1</sup> IOB (2019), *Mind the governance gap, map the chain: Evaluation of the Dutch government’s policy on international responsible business conduct (2012-2018)*, Ministry of Foreign Affairs, The Hague.



## Establishing an NCP

The Guidelines comprise a set of guiding principles and standards for responsible business conduct (RBC). They target MNEs operating in or from the OECD member countries and additional non-OECD adhering countries.<sup>2</sup> OECD member countries need to set up an NCP in their country tasked with addressing complaints filed by stakeholders or affected people concerning non-compliant behaviour with the Guidelines by an MNE. Those NCPs need to follow OECD instructions outlining how they intend to pursue their activities. Non-OECD countries adhering to the Guidelines are also obliged to establish an NCP but are free to organise it as they see fit. Generally, an NCP is appointed and tasked with furthering the effectiveness of the Guidelines through:

- Promotional activities;
- Handling enquiries;
- Offering good offices to parties after a notification of alleged non-compliance with the Guidelines in a specific instance, in order to help the parties resolve the issue (i.e. the specific instance procedure).<sup>3</sup>

In the Netherlands, the Dutch NCP's mandate was expanded in 2014 by government decree<sup>4</sup> to include:

- Actively adopting a leading role in the interpretation of the Guidelines, for example by testing the conformity of a sector agreement on RBC with the Guidelines;
- Conducting sector-wide assessments regarding the overall observance of the Guidelines by Dutch business sectors at the request of the government;
- Facilitating the dialogue concerning observance of the Guidelines, even in case no formal specific instance has been submitted;
- Consultation with the stakeholders brought together in the 'NCP+ platform';
- Obtaining advice from all ministries, not only from its advisory members (the advisory members are the Ministries of Foreign Affairs (MFA), Economic Affairs and Climate Policy (EZK), Social Affairs and Employment (SZW) and Infrastructure and Water Management (IenW)).

| 8 |



## Evaluation methodology

The main evaluation questions posed are:

- How effective and efficient has the Dutch NCP been in fulfilling its tasks as defined in the 2014 Decree?
- To what extent has the Dutch NCP been able to act in line with the four core criteria for NCPs and the four guiding principles for handling notifications of specific instances, as defined by the Guidelines?

The four core criteria for NCPs outlined in the Guidelines are *visibility, accessibility, transparency and accountability*. The four guiding principles for the specific instance procedure are *impartiality, predictability, equity and compatibility* with the Guidelines. The scope of the evaluation includes all activities of the Dutch NCP.

The following research methods were used to answer the evaluation questions:

- **Doctrinal research** concerning the specific instances handled in the period 2012–2018 by the NCPs of the Netherlands, the United Kingdom, Germany, Denmark and Norway;
- **Case studies** of four specific instances handled by the Dutch NCP, including interviews with both parties and a Dutch NCP member who had been appointed to handle such cases;
- **Stakeholder interviews** with Dutch NCP's stakeholders, e.g. OECD Watch, VNO-NCW, SER, TUAC and the Ministry of Foreign Affairs;
- **A small-scale telephone survey** among NGOs and trade unions based in the Netherlands concerning the visibility of the Dutch NCP;

<sup>2</sup> According to the OECD, there are 34 OECD member countries, and 12 non-OECD countries which have adhered to the Guidelines. The names of the countries are available at: OECD, About the OECD Guidelines for Multinational Enterprises: <https://mneguidelines.oecd.org/about/>, accessed 24 April 2019.

<sup>3</sup> OECD (2011), Decision of the Council on the Guidelines for Multinational Enterprises, 25 May 2011, Paris, Para. I.1

<sup>4</sup> Government Decree NCP 2014 (Stcrt. 2014, no. 19014).





- **An efficiency benchmark** comparing the activities and expenditure of the Dutch NCP to those of the Danish and Norwegian NCPs;
- **A review** of relevant academic and non-academic literature.



## Evaluation results: Conclusions and recommendations

### Effectiveness

The research revealed that expenses made by the Dutch NCP for purely promotional purposes began to decline after 2014. Nonetheless, the NCP organises annual conferences. The NCP also publishes its initial assessments and final statements consistently, and these activities also contribute to promoting the Guidelines and the effectiveness of the NCP as a non-judicial grievance mechanism (NJGM). While civil society stakeholders indicate to be familiar with the Guidelines and the NCP, interviewees suggest that many companies are not yet familiar enough with the Guidelines. This is supported by research conducted in 2016, which included a survey among companies concerning their awareness and knowledge of the OECD Guidelines.

The evaluation showed that the Dutch NCP's activities have mostly revolved around the handling of notifications in specific instance procedures. In the evaluation period (2012-2018), the Dutch NCP received 12 notifications, two of which were not accepted for further examination or for which case an agreement was reached outside of the specific instance procedure. Of the remaining 10 cases, nine required mediation meetings. During the review period (2018-2019), two procedures were ongoing, five were concluded with an agreement, and in three cases no agreement was reached. For all completed procedures, an initial assessment and a final statement was published. A follow-up meeting or evaluation has taken place for four of the agreements to evaluate the implementation of the commitments included in the agreements. The agreements usually included the commitment to implement policy changes on the part of the company, for example regarding its due diligence processes, reporting and disclosure. Generally, the agreements were forward-looking in their approach. One case resulted in financial compensation for the complainants (because the parties involved agreed on this point). The share of agreements reached by the Dutch NCP is larger than the share of agreements reached in instances of other NCPs. The Dutch NCP also acts in accordance with the Guidelines insofar as it publishes its final statements, including an overview of the proceedings, the agreement and recommendations.

As for the overall proceedings and facilities offered by the Dutch NCP in the specific instances, the parties are generally positive. Parties to the mediation process often have expectations that are hard, if not impossible, to meet. Thus, when asked if they are satisfied with the process, parties to a notification are not always positive. Complainants aim for stronger statements, and ideally determinations of violations. However, without its own research and fact-finding, the possibilities for the Dutch NCP to act accordingly remain limited. Complainants have been dissatisfied by the adoption of a forward-looking approach (i.e. focussing on how to avoid future violations), and the fact that complaints were only partially accepted. The Guidelines laid the foundation for the development of sector agreements in several sectors. These sector agreements generally include references to the Guidelines. The Dutch NCP has contributed to the development of sector agreements by reviewing draft texts to assess whether they are consistent with the Guidelines. Additionally, upon request of the Dutch cabinet, the NCP has conducted research into the Dutch oil and gas sector and the sector's compliance with the Guidelines. This research was published after the evaluation period, hence the content of that research report has not been included in this evaluation report.

As part of its task to handle enquiries, the Dutch NCP has incidentally facilitated a dialogue between various parties, which was not based on a formal notification (e.g. CPL vs the Palestine Committee).



In order to enhance the Dutch NCP's **effectiveness**, this evaluation report recommends that more staff be appointed to the Dutch NCP. This will allow the Dutch NCP's independent members to focus more on their core tasks. If more staff were appointed, this could include a director or secretary to spearhead the secretariat, supported by a personal assistant, and a number of case managers to coordinate specific instances.

## Efficiency and timeliness

For most specific instances handled during the period 2012-2018, the Dutch NCP has taken longer than the indicated time frames to complete the specific instance procedures. Although the Dutch NCP communicates the timelines *a priori* to (prospective) parties in the procedure, many stakeholders perceive the process as very long and time-consuming. However, taking more time for a case may be warranted if trust needs to be built between parties. The fact that the Dutch NCP is suffering from a lack of personnel support is another reason why it took a long time to handle the cases. Work that otherwise might have been allocated to the secretariat had to be performed by the Dutch NCP's independent members themselves. This is less efficient, as it decreases the amount of time those members can spend on fulfilling their core tasks.

Compared with the other NCPs examined in this evaluation study, the Dutch NCP handles a relatively high number of notifications in relation to its budget. This is certainly the case if the extra 10 pending notifications are also taken into account (please note that we do not have any knowledge about the number of pending notifications at the other NCPs that we investigated). A comparison of expenditures by the five examined NCPs on all tasks revealed that the Dutch NCP mainly spends its budget on handling specific instances whereas the other NCPs spend less time on that and also spend a large part of their time on promotional activities.

| 10 |

## OECD criteria

The Dutch NCP has increased its visibility by communicating the outcomes of specific instances and information from its stakeholder meetings on its website. Disseminating press reports about specific instances, leading to publications in Dutch newspapers, may better inform the general public about the NCP's activities. Due to the limited capacity of the NCP's secretariat, however, these types of activities were not frequently initiated in the evaluation period. The Dutch NCP currently prioritises spending its time on handling the specific instance procedure notifications above promoting the Guidelines, for example by organising events.

To increase the visibility of the Dutch NCP on the ground, it is recommended that the Dutch embassies actively promote the Guidelines and NCPs by referring to them more often when they are in contact with Dutch companies and their local partners. For instance, when the embassies support a Dutch company by introducing a new investment or trade relationship. Supported by the NCP's secretariat, embassies could also organise events specifically centred on the Guidelines and the specific instances. Embassies play an important role in countries where possible violations of the Guidelines take/took place. Furthermore, via (international) chambers of commerce, the Guidelines can also be promoted among the business community.

The **accessibility** of the Dutch NCP in terms of the notifications it receives is relatively high. NGOs and trade unions know how to find and how to contact the Dutch NCP when considering filing a notification. Furthermore, the Dutch NCP is accessible in that it is more likely to accept a complaint compared to other NCPs. Also beneficial to accessibility was the funding of travel and lodging costs of complainants by the Dutch NCP in one case, which was perceived as very important to the progress that was made. It is recommended to further improve accessibility by means of allocating a budget that will financially support parties when they do not have sufficient funds at their disposal.



The specific instance procedure was found to be rather formal. The formalities involved present a barrier to smaller and less professional parties, hence possibly hampering accessibility.

With respect to enquiries from victims or other interested parties about the content or development of the Guidelines, NGOs indicated that they will generally not contact the Dutch NCP but instead will refer to other organisations that provide information on the topic of the Guidelines.

It is recommended that the Dutch government improves the accessibility of the NCP by strengthening the NCP financially and by providing additional human resources. This includes funds for third-party mediators to support the NCP members in accepting and resolving the cases, as they currently leave cases pending for some time before accepting them due to a lack of resources. Increasing funding for the NCP would also provide more room to involve experts to conduct (local) fact-finding missions. The Danish and Norwegian NCPs, for instance, spend more budget on involving external consultants. The Dutch NCP could follow these examples. The reason for strengthening the NCP financially and with more staff is to increase the accessibility of the NCP by enabling it to accept cases swiftly after their submission and hence improve how they handle their overall caseload.

The Dutch NCP acts in a **transparent way**, in that it publishes statements on the progress of the specific instance procedures. Both parties can provide input on the documents before they are published. The initial statement provides information on the initial assessment of ongoing cases. The Dutch NCP is found to maintain sufficient balance between applying confidentiality and creating transparency. Mediation under the specific instance procedure often requires a level of confidentiality for it to be successful. This is in line with the Guidelines.

As regards to **accountability**, the Dutch NCP has not published annual reports since 2013, but only reported to the OECD on its activities. There is currently not enough staff available to produce additional annual reports. Hence, it is recommended that the NCP prepares and publishes an annual report with information on events and instances. This should contribute to the accountability of the Dutch NCP and could also be used for promotional purposes. Financial information should also be included.

Accounting for its actions and disclosing results to the public can sometimes be difficult because the Dutch NCP is confronted with a trade-off between confidentiality and transparency in mediation processes. As one case study revealed, a decision of the NCP may be based on information that cannot be shared with the public.

In terms of accountability, a change in the mediation processes was implemented as a result of the amendment of the 2014 Decree, i.e. that the NCP does not have to submit draft statements with the minister before such a statement is published. Although the level of accountability towards the minister has decreased, this procedural change has improved the independent position of the Dutch NCP.

Generally, the Dutch NCP is seen as **impartial**. Contributing factors are the way in which the Dutch NCP is organised and the fact that the members are considered professionals and experts in the field of RBC. The Dutch NCP invests in creating trust between the parties and facilitates this process where needed.

In general, it is recommended that the Dutch NCP establishes a clear demarcation between the mediation procedure and the process of drafting a statement (creating 'Chinese walls'), especially in the cases in which the mediation process did not lead to an agreement. In practice, the Dutch NCP can appoint a third party or extra staff to draft the initial assessment and/or the final statement leaving the mediation task to the independent members (or vice versa). This prevents having to involve mediators in the drafting of a statement. This may improve the Dutch NCP's **impartiality**.

The participating parties perceive the specific instance procedure as conforming to the norms of due process. The process often takes more time and effort than most stakeholders had expected, meaning that the **predictability** of the process could be improved. The predictability in terms of outcome of the procedure remains hard to achieve, as parties often have opposite expectations and a different



interpretation of the Guidelines about what the specific instance procedure is for. Hence, in terms of **predictability** and **transparency**, it is recommended that the Dutch NCP keeps track of its own decisions and those of other NCPs. A document with lessons learned can be drafted and made publicly available through an online publication after each case or on an annual basis. In addition, to increase the **predictability** of the outcome of a specific instance, expectations should be managed, preferably at an early stage – during the confidential bilateral meetings, for instance. Clarity on the intentions and expectations of both parties seems essential to prevent disappointment after the process (e.g. remedy or not, forward-looking or not).

**Equitability** needs to be ensured so that parties can engage in the process on fair terms and an equal footing. In some instances, the Dutch NCP is considered equitable, but there is still room for improvement. NGOs and trade unions emphasised that the power imbalances between them and MNEs need to be addressed.

**Compatibility with the Guidelines** assures that the Dutch NCP acts in accordance with the Guidelines. In practice, the Dutch NCP follows the Procedural Guidance during specific instances and also dares to innovate. The preliminary final statement, confidential bilateral meetings and the issuance of a statement when a party withdraws from a specific instance are all examples of procedural innovations. Content-wise, the Dutch NCP also pushed the barriers of the Guidelines in multiple cases, such as the *Bresser* and *POSCO* cases. Possible incompatibilities relate to the terminology used and competence questions.

## Looking forward

| 12 |

Currently, the Dutch NCP lacks the capacity to fully fulfil all of its tasks and ensure that the specific instance procedures are completed within the time frame set by the Guidelines. This decreases the effectiveness of the NCP. The current governance structure makes it difficult to expand capacity at short notice. The current governance structure does not impede the Dutch NCP from adhering to the guiding principles for specific instances (*impartiality, predictability, equity and compatibility with the Guidelines*). In terms of other activities, the Dutch NCP has declined to partake in upcoming peer reviews of other NCPs due to the lack of capacity, although the NCP indicated that it generally is eager to contribute to international peer reviews. The operational budget is not a constraint.



## General recommendations

- The creation of a Helpdesk is recommended for the **handling of enquiries**, which is a core task of the NCP. Currently, the independent members of the NCP are unable to spend sufficient time performing this core task. Responding to enquiries seems to be a task which the NCP could perform more efficiently by hiring staff that can specifically carry out this task. The Helpdesk can be available for enquiries from all types of stakeholders and can be positioned as part of the Dutch NCP's secretariat. Stakeholders can be stimulated to send their enquiries to the Helpdesk before filing a formal notification. In this manner, the Helpdesk can also serve as a gateway to a formal notification, possibly teasing out potential notifications that may be handled by the NCP. Establishing a Helpdesk can help to increase the accessibility of the Dutch NCP, because an adequate and fast response can be provided to enquiries.
- When drafting a Terms of Reference in a mediation process, clear expectations on the **follow-up** by the parties must be agreed upon – for instance, with regard to sharing information and campaigning. Monitoring the compliance and the implementation of the agreed commitments of all parties on an (bi-)annual basis also contributes to the implementation of the Guidelines in specific instances.



- It is recommended that the Ministry of Foreign Affairs introduces a proposal for an amendment of the Procedural Guidance in the Working Party on Responsible Business Conduct (WPRBC) or Investment Committee in order to improve the **functional equivalence** between NCPs. For instance, a proposal that includes a requirement that in a case in which multiple NCPs are involved, NCPs should reach a common understanding and issue a final statement for such case; the final statement should be uniform in order to avoid different final statements across the various NCPs (which currently happens sometimes). In case the involved NCPs do not succeed in reaching a common approach, an option could be for the NCPs involved in the case to invite the WPRBC or the Investment Committee to provide advice. Functional equivalence is important for the **predictability** and **accountability** of NCPs.
- It is recommended that the Dutch NCP continues to promote **functional equivalence** by promoting peer learning. Improving functional equivalence might also be assisted by publishing preliminary statements (i.e. as was done in the POSCO case).
- Regarding a complaint concerning an **RBC sector agreement**, parties should follow the complaint mechanism, if any, in the agreement. If the sector agreement does not have a specific mechanism in place, and the complaint relates to compliance with the Guidelines, a specific instance can be started with the NCP. In the event that the agreement has a complaint mechanism and the parties have followed that mechanism but one or more of them is not confident about the outcome, currently the NCP is not mandated to serve as an appeal facility. The research found that several parties are in favour of establishing a procedure that makes the NCP available as an appeal facility. However, currently not all interviewees agreed with this idea.

**Case:** Both Ends versus Atradius DSB.

**Complaint:** Displacement of native people in the harbour of Suape, Brazil, where the company Van Oord was dredging, the activities of which were insured by Atradius DSB.



# Introduction

## 1.1 Background

In preparation of a large-scale review in 2020 of the sustainable trade and investment policies of the Dutch Ministry of Foreign Affairs (MFA), the Ministry of Foreign Affairs' Policy and Operations Evaluation Department (IOB) has commissioned an evaluation of the Dutch National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (MNEs) (abbreviated as 'the Guidelines'). This evaluation forms part of the 2020 review and is complementary to the IOB evaluation of the Dutch International Corporate Social Responsibility (ICSR) policy.<sup>5</sup> Observance of the Guidelines is one of the Dutch ICSR policy's primary goals. The Dutch NCP constitutes an important instrument in respect of the observance of the Guidelines.

The Guidelines were originally drafted in 1976 and have been updated periodically. The latest version of the Guidelines dates from 2011. The Guidelines comprise a set of guiding principles and standards for

<sup>5</sup> IOB (2019), Mind the governance gap, map the chain: Evaluation of the Dutch government's policy on international responsible business conduct (2012-2018), Ministry of Foreign Affairs, The Hague.

responsible business conduct (RBC). They target MNEs operating in or from OECD member countries and several adhering countries. NCPs were first introduced in 1979, but a more detailed description of their intended role and procedures was not given until the 2000 review of the Guidelines.<sup>6</sup>

All governments that adhere to the Guidelines are required to establish an NCP. The pertinent OECD Council's Decision of 2011 states:

*'Adhering countries shall set up National Contact Points to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances.'*<sup>7</sup>

The Guidelines leave ample room for adhering countries to organise their NCP as they see fit.<sup>8</sup> The Dutch NCP is an independent body, operating from and supported by the Ministry of Foreign Affairs. IOB has commissioned APE Public Economics and Nyenrode Business University to conduct the evaluation of the Dutch NCP, covering its activities in the period from 2012 to 2018. An overview of the evaluation team can be found in Annex V.

## 1.2 The Dutch NCP

The legal obligation for the Dutch government to establish an NCP was promulgated by the OECD Council in its Decision in 1984.<sup>9</sup> The first instance recorded by the Dutch NCP was the Ford Motor Company case in the early 1980s. The case was concluded with a statement.<sup>10</sup> Starting out as a purely governmental body, the Dutch NCP was a committee containing members from various ministries. In 2007, the Dutch NCP was reorganised in order to assume a more independent role.<sup>11</sup> Since then, the Dutch NCP has consisted of four independent members, including an independent chair, as well as four advisory members from the civil service (i.e. from the Ministries of Foreign Affairs (MFA), Economic Affairs and Climate Policy (EZK), Social Affairs and Employment (SZW) and Infrastructure and Water Management (IenW)).<sup>12</sup> The Dutch NCP moved from operating under the auspices of the Ministry of Economic Affairs, Agriculture & Innovation<sup>13</sup> (EL&I) to the Ministry of Foreign Affairs in 2013.<sup>14</sup>

Together with the NCPs from Norway, Denmark and Lithuania, the Dutch NCP is one of the four NCPs with an 'independent agency' structure, which means that it (partly) operates independently from the government.<sup>15</sup> The four independent members of the Dutch NCP act independently of the Dutch government and have various backgrounds (i.e. working experience at academic institutions, political parties, business organisations and trade unions).<sup>16</sup> The independent members are appointed for four years with the possibility of re-election.<sup>17</sup>

<sup>6</sup> OECD (2016), *Implementing the Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015*, p. 11.

<sup>7</sup> OECD (2011), *Decision of the Council on the Guidelines for Multinational Enterprises*, 25 May 2011, Paris, Para. I.1.

<sup>8</sup> *Ibid.*, p. 71.

<sup>9</sup> OECD Council (1984), *Second Revised Decision of the Council on the Guidelines for Multinational Enterprises*, Paris.

<sup>10</sup> Blanpain, R. (1983), *The OECD Guidelines for Multinational Enterprises and Labour Relations 1979-1982. Experience and Mid-Term Report*, Kluwer: Deventer, pp. 177-194.

<sup>11</sup> Sections 4, 5 and 7 Government Decree NCP 2007 (Stcrt. 2007, no. WJZ 7020203).

<sup>12</sup> Sections 4 and 5 Government Decree NCP 2007 (Stcrt. 2007, no. WJZ 7020203). Cf. Articles 3 and 4 Government Decree NCP 2014 (Stcrt. 2014, no. 19014). More information can be found on the Dutch NCP's website at: <https://www.oecdguidelines.nl/ncp/ncp-members> accessed 24 April 2019. Note that the four ministries have been known under different names during the evaluation period.

<sup>13</sup> The Ministry of Economic Affairs and Climate Policy under the current cabinet.

<sup>14</sup> Government Decree NCP 2013 (Stcrt. 2013, no. 27671).

<sup>15</sup> OECD (2018), *Annual Report on the OECD Guidelines for Multinational Enterprises 2017*, OECD, Paris, p. 28.

<sup>16</sup> More information can be found on the Dutch NCP's website at: <https://www.oecdguidelines.nl/ncp/ncp-members> accessed 24 April 2019.

<sup>17</sup> Article 3 Government Decree NCP 2014 (Stcrt. 2014, no. 19014).

The independent members are supported by four advisory members from the four ministries (see previous paragraph). Formally, the advisory members represent their ministers.<sup>18</sup> No requirements are established for the advisory members when it comes to their term of appointment or the possibility of re-election. Advisory members provide strategic advice, for example on pertinent legislation when dealing with a specific instance. They also function as liaisons between the NCP and relevant experts within the ministries of the advisory members that can be consulted by the NCP. The advisory members attend all NCP meetings including the NCP+ meetings (see Section 4.1.1) and have the opportunity to provide input for the agendas. Their activities are not restricted to specific instances but are extended to all types of NCP activities within the broader scope of RBC.<sup>19</sup>

The two main tasks, i.e. the principal mandate of the Dutch NCP, are defined by the government decree of 2014 (the 2014 Decree).<sup>20</sup> These concern: (i) promoting and interpreting the Guidelines in order to encourage enterprises to observe the Guidelines; and (ii) handling notifications of alleged non-compliance with the Guidelines ('specific instances') and facilitating dialogue to resolve these instances. Civil society organisations and other stakeholders can submit a complaint to the Dutch NCP about a company and its activities, after which the Dutch NCP can facilitate a mediation process or give recommendations should the company decline to take part or in case the mediation process does not lead to a joint result. The OECD Council's Decision provides a framework of core criteria for the NCPs' activities in general, and for the specific instance procedures specifically.

In 2014, the mandate of the Dutch NCP was revised. The 2014 Decree was issued by the minister for Foreign Trade and Development Cooperation (BHOS), expanding the ways in which the Dutch NCP might further the effectiveness of the Guidelines in addition to its two main tasks. The 2014 Decree makes the following changes to the mandate of the Dutch NCP.<sup>21</sup>

| 16 |

The Dutch NCP can actively adopt a leading role in the interpretation of the Guidelines. The example of sector agreements is given, e.g. the Dutch NCP can test the conformity of a sector agreement with the Guidelines. Additionally, the Dutch government can request the Dutch NCP to conduct sector-wide assessments regarding the overall observance of the Guidelines by Dutch business sectors.

The Dutch NCP can facilitate the dialogue concerning observance of the Guidelines, even if no formal specific instance has been submitted. The consultation of stakeholders in what is called the 'NCP+ platform' is now formalised and will take place every three months, i.e. four times a year.

The Dutch NCP is free to obtain advice from all ministries, not only from the advisory members, i.e. the Ministries of Foreign Affairs, Economic Affairs and Climate Policy, Social Affairs and Employment, and Infrastructure and Water Management.

### 1.3 Purpose and limitations of the evaluation

As the Guidelines prescribe to all adhering countries that they must facilitate an NCP, the current evaluation does not serve to answer the question *whether* the Dutch government should support the Dutch NCP, but rather *how*. The evaluation focuses therefore on the question whether the Dutch NCP has been effective in fulfilling its tasks, and on the sub-questions which internal and external factors influence its effectiveness and efficiency. Accordingly, the evaluation aims to produce an overview of lessons learned and accordingly to provide recommendations regarding the manner in which the Dutch NCP performs its tasks, and the way in which it is organised and supported by the Dutch government. The scope of the evaluation covers the activities performed by the Dutch NCP between 2012 and 2018. The research conducted for the assessment in this report ended in late February 2019.

<sup>18</sup> Article 4 Government Decree NCP 2014 (Stcrt. 2014, no. 19014).

<sup>19</sup> Based on input received from the NCP's secretariat on 2 April 2019.

<sup>20</sup> Government Decree NCP 2014 (Stcrt. 2014, no. 19014).

<sup>21</sup> Ibid, p. 5.



This evaluation report does not include a discussion on issues such as linkages with other (non-judicial) grievance mechanisms, e.g. the Dutch national human rights institution or grievance mechanisms established at internationally operating Dutch banks. The topics of policy coherence with private sector instruments employed by the Dutch state such as state support concerning export credits, subsidies and other financial instruments, is not part of this evaluation report either.

## 1.4 Evaluation questions

The purpose of the NCP assessment leads to the following main evaluation questions:

*How effective and efficient has the Dutch NCP been in fulfilling its tasks as defined in the 2014 Decree?*

*To what extent has the Dutch NCP been able to act in line with the four core criteria for NCPs and the four guiding principles for handling notifications of specific instances as defined by the Guidelines in 2011?*

The main evaluation questions are supported by the following sub-questions:

### Effectiveness

1. What activities have been undertaken by the Dutch NCP to promote and interpret the content and the meaning of the Guidelines? How has this developed over the years? Have these activities been effective?
2. How many notifications have been handled by the Dutch NCP? What notifications? How has the Dutch NCP facilitated dialogue? What were the results? Have issues been solved adequately?
3. What other activities have been undertaken by the Dutch NCP in view of its redefined mandate (pursuant to the 2014 Decree)? What has been the role of the Dutch NCP in the development of sector agreements? What sector-wide assessments have been conducted? How often has the Dutch NCP facilitated dialogue in a situation in which no formal specific instance had been submitted?

| 17 |

### Efficiency and timeliness

4. To what extent has the Dutch NCP dealt with the issues raised (through formal notifications or otherwise) in an efficient and timely manner?
5. How do the results (outputs and outcomes) of various activities compare to the amount of time and budget allocated?

### OECD criteria

6. How does the Dutch NCP perform in terms of visibility, accessibility, transparency and accountability? What has been done to improve its performance on these criteria?
7. To what extent has the Dutch NCP respected the guiding principles for specific instances: impartiality, predictability, equity and compatibility with the Guidelines?

### Forward-looking questions

8. Does the current governance and funding structure facilitate the Dutch NCP to fulfil its tasks effectively, efficiently, timely and in line with the OECD criteria?
9. Which aspects of the functioning of the Dutch NCP could be improved and how?

## 1.5 Structure of the evaluation report

Chapter 2 contains an elaboration of the theoretical framework, used for testing effectiveness. Chapter 3 presents the methodology that was applied to find answers to the evaluation questions. Chapters 4 and 5 present the findings concerning the sub-questions related to effectiveness, efficiency and timeliness. The findings regarding the sub-questions pertaining to the specific OECD criteria for NCPs are integrated into these chapters. Chapter 6 is dedicated to answering the forward-looking questions and to offering some recommendations.

**Case:** Sakhalin Environment Watch and Stroitel versus Royal Dutch Shell.

**Complaint:** Decreased value of land and threatened livelihoods and cultural heritage of local people, allegedly caused by the establishment of an oil and gas plant by Royal Dutch Shell.



# Theoretical framework

## 2.1 Defining effectiveness

Neither the Guidelines nor the OECD Council's Decision on which the Guidelines are based, define the concept of 'effectiveness'. This makes it particularly difficult to reach any conclusion on the effectiveness of the functioning of NCPs.<sup>22</sup> The OECD Council's Decision does stipulate that NCPs are primarily tasked to further the effectiveness of the Guidelines. Achievement of this aim can be stimulated by 'undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances'<sup>23</sup>, with several criteria that need to be met.

<sup>22</sup> S. Van 't Foort and T.E. Lambooy (2018), Effective or not? The crucial role of effectiveness in specific instances, in: *Guidelines for Multinational Enterprises: A Glass Half Full. A Liber Amicorum for dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018*, OECD, Paris.

<sup>23</sup> OECD (2011), Decision of the Council on the Guidelines for Multinational Enterprises, 25 May 2011, Paris, Para. I.1.

To ensure functional equivalence between NCPs, in accordance with the Procedural Guidance accompanying the OECD Council's Decision, an NCP needs to act in a manner that is consistent with the core criteria of visibility, accessibility, transparency and accountability.<sup>24</sup> Furthermore, when resolving disputes, an NCP should act in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines.<sup>25</sup>

The criteria put forward by the OECD Council resemble those stated in UN Guiding Principle (UNGPs) 31 of the UN 'Protect, Respect and Remedy' framework,<sup>26</sup> but they are not identical. UNGP 31 enumerates a number of effectiveness factors for non-judicial grievance mechanisms (NJGMs).<sup>27</sup> The specific instance procedure of NCPs is mentioned as an example of a state-based NJGM.<sup>28</sup> As a state-based NJGM, the effectiveness factors of UNGP 31 also apply to the way in which NCPs handle specific instance procedures.<sup>29</sup> UNGP 31 defines the following factors: legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility and a source of continuous learning.<sup>30</sup> When compared to the criteria of the OECD, we note that the factors 'legitimacy' and 'a source of continuous learning' are only found in UNGP 31 and not in the OECD Council's Decision. Conversely, 'visibility', 'accountability' and 'impartiality' are found in the OECD Council's Decision but not in UNGP 31. We decided to ignore the criteria of UNGP 31 and to focus on the criteria outlined in the OECD Council's Decision.

A final comment on effectiveness needs to be made when it comes to the role of remedy. As part of its 'Effective NCPs now! Remedy is the reason' campaign<sup>31</sup> and 'The state of remedy'<sup>32</sup> and 'Remedy remains rare' reports,<sup>33</sup> OECD Watch emphasises that NCPs need to provide remedies in order to be effective. There is also a focus on remedy in the literature.<sup>34</sup> Providing remedy is not specifically mentioned in the Guidelines nor in the OECD Council's Decision as a necessary output of NCPs or an element of their effectiveness.<sup>35</sup> However, providing remedies often constitutes an element of dispute resolution. This was also confirmed by the former chair of the OECD Working Party on Responsible Business Conduct (WPRBC), Roel Nieuwenkamp. He acknowledged that remedy can certainly be considered an appropriate output of resolving a dispute submitted to an NCP in a specific instance procedure.

<sup>24</sup> OECD (2011), Decision of the Council on the OECD Guidelines for Multinational Enterprises, 25 May 2011, Paris, Procedural Guidance, Section I, Preface.

<sup>25</sup> OECD (2011), Decision of the Council on the OECD Guidelines for Multinational Enterprises, 25 May 2011, Paris, Procedural Guidance, Section IC, Preface.

<sup>26</sup> J. Ruggie (2011), *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNHRC (A/HRC/17/31).

<sup>27</sup> Ibid.

<sup>28</sup> J. Ruggie (2008), *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Protect, Respect and Remedy: a Framework for Business and Human Rights*, UNHRC (A/HRC/8/5), para. 98-99.

<sup>29</sup> UN Working Group on Business and Human Rights (2017), *The National Contact Point (NCP) System – aligning NCP processes with the UN Guiding Principles on Business and Human Rights*, available at: <http://blog.journals.cambridge.org/2017/11/28/the-national-contact-point-ncp-system-aligning-ncp-processes-with-the-un-guiding-principles-on-business-and-human-rights/> accessed 27 February 2019.

<sup>30</sup> J. Ruggie, (2011), *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNHRC (A/HRC/17/31).

<sup>31</sup> OECD Watch (2017), *Our campaign demands for policymakers*, pp. 2-3, available at: [https://www.somo.nl/wp-content/uploads/2018/04/OECD-Watch\\_-\\_Campaign\\_demands.pdf](https://www.somo.nl/wp-content/uploads/2018/04/OECD-Watch_-_Campaign_demands.pdf) accessed 27 February 2019.

<sup>32</sup> OECD Watch (2018) *The State of Remedy under the OECD Guidelines Understanding NCP cases concluded in 2017 through the lens of remedy*, Amsterdam, available at: <https://www.oecdwatch.org/2018/06/18/the-state-of-remedy-under-the-oecd-guidelines-2/> accessed 27 February 2019.

<sup>33</sup> OECD Watch (2015), *Remedy Remains Rare. An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct*, Amsterdam, available at: <https://www.oecdwatch.org/wp-content/uploads/sites/8/2015/06/Remedy-Remains-Rare.pdf> accessed 27 February 2019.

<sup>34</sup> For example, B. Maheandiran, (2015), 'Calling for Clarity: How Uncertainty Undermines the Legitimacy of the Dispute Resolution System Under the OECD Guidelines for Multinational Enterprises', *Harvard Negotiation Law Review*, Vol. 20, 205, p. 211.

<sup>35</sup> R. Weber (2018), 'Development of Coherent Procedural Rules for OECD Guidelines' Mediation', in: N. Bonucci and C. Kessedjian, *40 years of the OECD Guidelines for Multinational Enterprises*, OECD, Paris.

Remedies can be established in many forms, from physically taking away the damage caused in the context of violating the Guidelines to offering an apology to the victim(s) or determining the amount of financial compensation that should be paid.<sup>36</sup> This interpretation is in line with the UN Guiding Principles on Business and Human Rights (UNGPs) and Remedy framework, in which NCPs are acknowledged as NJGMs. Since we decided not to cover the UNGPs in this evaluation report, we will not discuss the UN ‘Protect, Respect and Remedy’ framework either. However, we will discuss the topic of remedy when addressed by respondents in our research.

Even though the OECD Council’s definition of effective NCPs as a mechanism that ‘furthers the effectiveness of the Guidelines’ is considerably vague, in this evaluation report we will adhere to it nonetheless and apply the criteria put forward by the OECD Council. Thus, we will test to what extent the Dutch NCP acts in accordance with the criteria of visibility, accountability, transparency, accessibility, impartiality, predictability, equitability and compatibility with the Guidelines. For the purpose of this research, we also include efficiency and timeliness as additional factors in defining effectiveness, since both are mentioned in the Procedural Guidance that forms part of the OECD Council’s Decision.<sup>37</sup>

In this evaluation report, three main tasks of an NCP are distinguished: (i) promoting the Guidelines; (ii) handling enquiries; and (iii) resolving disputes that arise within the framework of the Guidelines. Specifically for the Dutch NCP, we add to these tasks the possibility to interpret the Guidelines when sector agreements are concluded and when sector investigations take place.<sup>38</sup>

Regarding its task of undertaking promotional activities, we define effectiveness as ‘making the Guidelines available for all stakeholders and raising awareness of the Guidelines, concerning their existence, contents and implementation, while taking into consideration the core criteria stipulated in the OECD Council’s Decision’.<sup>39</sup>

| 20 |

An NCP handles an enquiry effectively when it ‘responds to enquiries about the Guidelines from stakeholders, including other NCPs and governments of non-adhering countries<sup>40</sup>, in a timely and clear manner, while taking into consideration the core criteria stipulated in the OECD Council’s Decision’.<sup>41</sup>

When it comes to an NCP’s task of resolving disputes submitted in specific instance procedures, we define effectiveness as ‘reaching agreements between parties within the framework of the Guidelines, thereby taking into consideration the core criteria stipulated in the OECD Council’s Decision (especially those relating to specific instances: impartiality, predictability, equitability and compatibility with the principles and standards of the Guidelines)’.<sup>42</sup>

<sup>36</sup> R. Nieuwenkamp (2017), Outcomes from OECD National Contact Point cases: More remedy than you may think! Available at: [www.permanentrepresentations.nl/latest/news/2017/12/5/blog---outcomes-from-oecd-national-contact-point-cases-more-remedy-than-you-may-think](http://www.permanentrepresentations.nl/latest/news/2017/12/5/blog---outcomes-from-oecd-national-contact-point-cases-more-remedy-than-you-may-think) accessed 27 February 2019. Interview on 13 February 2019 as part of the evaluation.

<sup>37</sup> OECD (2011), Decision of the Council on the OECD Guidelines for Multinational Enterprises, 25 May 2011, Paris, Procedural Guidance, Section IC, Preface.

<sup>38</sup> In conformity with Article 2 Government Decree NCP 2014 (Stcrt. 2014, no. 36720), consultations with other stakeholders, for example via the NCP+, and other NCP activities are not listed as tasks and are therefore not enumerated in this section.

<sup>39</sup> Definition is based upon: OECD (2011), Decision of the Council on the Guidelines for Multinational Enterprises, 25 May 2011, Paris, Procedural Guidance, Par. I.B.1-2.

<sup>40</sup> Countries that do not adhere to the OECD Guidelines.

<sup>41</sup> Definition is based upon: OECD (2011), Decision of the Council on the Guidelines for Multinational Enterprises, 25 May 2011, Paris, Procedural Guidance, Par. I.B.3.

<sup>42</sup> Definition is based upon: OECD (2011), Decision of the Council on the Guidelines for Multinational Enterprises, 25 May 2011, Paris, Procedural Guidance, Par. I.C, Preface; S. Van 't Foort and T.E. Lambooy (2018), Effective or not? The crucial role of effectiveness in specific instances, in: Guidelines for Multinational Enterprises: A Glass Half Full. A Liber Amicorum for dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018, OECD, Paris.

When the Dutch NCP interprets the Guidelines in the context of sector agreements or sector investigations, it acts effectively when it ‘interprets the Guidelines in accordance with the Guidelines’ Commentaries and the OECD Investment Committee’s clarifications, in a manner that is compatible with the principles and standards of the Guidelines’.<sup>43</sup>

## 2.2 Effectiveness factors

As outlined above, NCPs must meet various criteria in order to fulfil their primary tasks effectively. The criteria are stipulated in the OECD Council’s Decision, more specifically in its Procedural Guidance, and therefore are well-known by the Dutch NCP. In regard of the criteria, we have adopted the OECD Council’s definitions.<sup>44</sup> They are as follows:

- **Visibility.** NCPs need 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 [...] [They] 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 [i.e. the Guidelines]’.<sup>45</sup>
- **Accessibility.** NCPs should be accessible. ‘This includes facilitating access by business, labour, NGOs, and other members of the public [...] 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.’<sup>46</sup> In practice, this may include supporting parties with translation or travel costs.
  - **Efficiency.** NCPs need to allocate their resources in an efficient manner. When dealing with specific issues, financial resources should be used sparsely.<sup>47</sup>
  - **Timeliness.** NCPs need to respond and provide assistance in a timely fashion. In meeting this requirement, an NCP needs to respect the indicative time frames as set out in the OECD Council’s Decision. ‘As a general principle, NCPs should strive to conclude the procedure within 12 months from receipt of the specific instance. It is recognised that this time frame may need to be extended if circumstances warrant it, such as when the issues arise in a non-adhering country.’<sup>48</sup>
- **Transparency.** NCPs should act transparently. ‘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.’<sup>49</sup>
- **Accountability.** NCPs need to be accountable for their actions. ‘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 [OECD Investment] Committee will also hold exchanges of views, where experiences would be exchanged and the effectiveness of the activities of NCPs could be assessed.’<sup>50</sup>

<sup>43</sup> Definition is based upon: Commentaries Government Decree NCP 2014 (Stcrt. 2014, no. 36720).

<sup>44</sup> With the exception of the definition of ‘efficiency’, because no definition exists in the Guidelines or OECD Council’s Decision.

<sup>45</sup> OECD (2011), Decision of the Council on the OECD Guidelines for Multinational Enterprises, 25 May 2011, Paris, Procedural Guidance, Commentary, Para. 9.

<sup>46</sup> Ibid.

<sup>47</sup> Not the official definition, because no definition exists in the Guidelines or OECD Council’s Decision.

<sup>48</sup> OECD (2011), Decision of the Council on the OECD Guidelines for Multinational Enterprises, 25 May 2011, Paris, Procedural Guidance, Commentary, Para. 41.

<sup>49</sup> Ibid, Para. 9.

<sup>50</sup> Ibid.

- **Impartiality.** ‘NCPs should ensure impartiality in the resolution of specific instances.’<sup>51</sup> In practice, this means that an NCP should not take biased decisions. NCPs that only take into account the arguments of one party, while refusing to weigh them against the arguments of the opposing party, run the risk of taking a biased decision.
- **Predictability.** ‘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 time frames, and the potential role they can play in monitoring the implementation of agreements reached between the parties.’<sup>52</sup>
- **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.’<sup>53</sup>
- **Compatible with the Guidelines.** ‘NCPs should operate in accordance with the principles and standards contained in the Guidelines.’<sup>54</sup> For instance, when interpreting the Guidelines in case of a child labour dispute, an NCP cannot decide to accept child labour, since this would contradict the ‘Employment and Industrial Relations’ chapter of the Guidelines.

<sup>51</sup> Ibid, Para. 22.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

*Case: Friends of the Earth versus Rabobank.*

*Complaint: Providing financial services to Burnitama Agri Group, operating in Indonesia in the palm oil industry, which was held responsible for alleged adverse environmental and human rights impacts on the local area and its inhabitants.*



# 3

## Evaluation methodology

### 3.1 Overview of evaluation methodology

This evaluation is based on the following research methods:

1. Doctrinal research concerning the specific instances handled in the period 2012–2018 by the NCPs of the Netherlands, the United Kingdom (UK), Germany, Denmark and Norway (NCP jurisprudence);
2. Case studies of four specific instances handled by the Dutch NCP;
3. Interviews with stakeholders and policymakers;
4. A small-scale telephone survey among NGOs and trade unions;
5. A benchmark analysis of the efficiency of the Dutch NCP; and
6. A review of relevant literature.

Our data collection process ended on 28 February 2019. In the remainder of this chapter the evaluation methodology is explained in more detail.

## 3.2 Doctrinal research

For the doctrinal research, we collected and analysed documents in relation to all specific instances which were submitted to the Dutch NCP in the period 2012–2018. The documents include initial assessments, final statements and any other available and relevant documents. Documents were retrieved from publicly accessible databases provided by the Trade Union Advisory Committee to the OECD (TUAC),<sup>55</sup> OECD Watch<sup>56</sup> and the OECD.<sup>57</sup>

In addition to the Dutch NCP, the doctrinal research included research on the specific instances submitted to the NCPs of the UK, Denmark, Germany and Norway, allowing us to compare the Dutch NCP's procedures and outcomes with those in the other countries. The other four NCPs were selected on the basis of their similarity with the Dutch NCP. The selected NCPs belong to the more progressive NCPs and are relatively independent in their set-up. Moreover, the other four countries are also comparable with the Netherlands in terms of being Western and modern countries, each with progressive RBC policies and supportive to the OECD and the implementation of the Guidelines.

In principle, the use of the doctrinal research method was applied to create an overview of the handling and outcomes of the specific instance procedures (jurisprudence).<sup>58</sup> In addition, the doctrinal analysis was conducted in order to find out how the Dutch NCP's proceedings developed and can be analysed from various perspectives, i.e. timewise; content wise; procedurally; with respect to the question of competence; in relation to the geographical area of the companies and the alleged violations.

The NCP jurisprudence was analysed using the template shown in Table 31. Each question in the template had to be answered for each specific instance. A matrix was prepared in which all the results were inserted. This overview of the results was used to draw conclusions and to develop descriptive statistics concerning the characteristics and the functioning of the Dutch NCP in handling specific instances.

<sup>55</sup> TUAC provided a database of 191 trade union cases submitted under the OECD Guidelines since 2000 which are sorted by company, date or case status available at: <http://www.tuacoecdmguidelines.org/cases.asp> accessed 27 February 2019.

<sup>56</sup> OECD Watch provides a case database on OECD Guidelines cases raised by civil society organisations at National Contact Points available at: <https://www.oecdwatch.org/cases> accessed 27 February 2019.

<sup>57</sup> OECD provides a database of specific instances handled by NCPs from 2000-2017 in over 100 countries including in the countries of interest for this research, i.e. UK, Germany, Denmark and Norway available at: <http://mneguidelines.oecd.org/database> accessed 27 February 2019.

<sup>58</sup> According to Hutchinson and Duncan (2012: 85), 'doctrinal research is research into the law and legal concepts'. The application of the doctrinal method in the examination of jurisprudence and legislation 'provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments'. T. Hutchinson and N. Duncan (2012), 'Defining and Describing What We Do: Doctrinal Legal Research', *Deakin Law Review* Vol. 17, No.1, 83-119.



**Table 3-1** *Template for the doctrinal research*

1.	Parties involved
2.	Countries (where are the parties or the parties' headquarters located?)
3.	When was the complaint made? Was an agreement reached? If so, what was the end date?
4.	What was the outcome? By which NCP? What does the outcome entail (outcome matches complaint, takes into account considerations)?
5.	Which NCP was competent to deal with the instance?
6.	Fact-finding or not?
7.	Did a hearing take place? Did the parties convene?
8.	What was the complaint about?
9.	Which norms of the Guidelines were referred to in the case? If applicable, what other norms were referred to, such as the Global Compact, the UN Guiding Principles, international treaties, regional treaties?
10.	Existing parallel (legal) procedures?
11.	Reference to similar decisions of the NCP or other NCPs (consistency with previous decisions)?
12.	Follow-up/enforcement?

### 3.3 Case studies of specific instance procedures

#### 3.3.1 Selection of cases

To gain in-depth insight into the specific instance procedures four instances were selected to examine as case studies. The cases are:

- The *Heineken* case (Three individuals<sup>59</sup> vs Bralima/Heineken);
- The *POSCO* case (Both Ends et al. vs ABP/APG);
- The *Shell* case (Friends of the Earth/Amnesty International vs Royal Dutch Shell); and
- The *Atradius* case (Both Ends vs Atradius Dutch State Business; hereafter: Atradius or Atradius DSB).

The objective of looking into the case studies was to gather lessons learned and best practices regarding the specific instance procedures. The selection of cases was purposeful.<sup>60</sup> The objective was to maximise the information that could be gathered in terms of outcomes, lessons learned and best practices.

Accordingly, the case selection was based on the process and outcome of the cases. Cases were selected because they provided a variation in the type of party involved, i.e. an MNE or state-related company (e.g. state agency Atradius DSB), or showed a variation in the outcome, i.e. an agreement reached or not. In three of the selected cases, the outcome of the case was an agreement with the MNE concerning measures to be implemented by the MNE in order to solve damages and/or to ensure future compliance with the Guidelines (i.e. the *Heineken* case, the *POSCO* case and the *Atradius* case). In one case (i.e. the *Shell* case), no agreement was reached.

#### 3.3.2 Collection of data and the selection of interview respondents

Apart from studying the relevant documents relating to the four cases, the case study methodology also included interviewing the parties involved.<sup>61</sup> Interviews were held on the basis of a semi-structured questionnaire (see Annex II). The interview reports were sent to the respondents for validation.

<sup>59</sup> These three individuals represented 168 former employees of Bralima.

<sup>60</sup> Patton defines the purposeful selection of cases in qualitative research as: 'strategically selecting information-rich cases to study, cases that by their nature and substance will illuminate the inquire question being investigated'. M.Q. Patton (2015), *Qualitative research & evaluation methods: Integrating theory and practice*. Thousand Oaks, Calif: Sage 4th ed.

<sup>61</sup> J.W. Creswell and C.N. Poth (2006), *Qualitative inquiry & research design: Choosing among five approaches*, Thousand Oaks, Calif: SAGE.

In each case, interviews were held with:

1. A representative of the defendant(s) (i.e. MNE);<sup>62</sup>
2. A representative of the alleged(s) (i.e. individuals and/or NGOs and/or trade unions); and
3. A Dutch NCP member, who had been assigned to the case.

By including respondents from all categories of people involved in a case, the research team obtained a plurality of views and aspects that could be triangulated and analysed. The interviews were conducted either in person or by Skype/phone.

### 3.3.3 Case study analysis

The data collected from the case study interviews were sorted and analysed by means of exploratory content analysis of the interview reports. Hence, the research team sorted and categorised the data included in the interview reports into a matrix that contained the eight effectiveness criteria on one axis and the respondents' responses on the other axis. The content of the matrix was compared, analysed and discussed in depth in a brainstorm session. The result was a set of identified similarities and differences in responses concerning the eight effectiveness criteria as well as regarding lessons learned and best practices.

## 3.4 Stakeholder interviews

Seven interviews were held with Dutch NCP's stakeholders, i.e. the former chair of the WPRBC, the chair of the Dutch NCP, a representative of the Social and Economic Council (SER), a non-Dutch representative of TUAC, a representative of the Confederation of Netherlands Industry and Employers (VNO-NCW), a representative of OECD Watch and a representative of the Ministry of Foreign Affairs. Their selection was based on their expertise and close relationship to the activities and specific instance procedures of the Dutch NCP.

| 26 |

### 3.4.1 Analysis

Interviews with stakeholders were conducted on the basis of a semi-structured interview questionnaire (see Annex III). The interview reports were sent to the respondents for validation. The research team sorted and categorised the data included in the interview reports into a matrix that contained the eight effectiveness criteria on one axis and the cases on the other axis. The content of the matrix was compared, analysed and discussed in depth in a brainstorm session by means of content analysis (see Section 3.3.3). The result was a set of identified similarities and differences in responses concerning the eight effectiveness criteria as well as regarding lessons learned and best practices. Recommendations of stakeholders were collected as input for Chapter 7 (Conclusions and recommendations).

## 3.5 Telephone survey among NGOs and trade unions

In order to gain insight into the visibility of the Dutch NCP, the evaluation included a small telephone survey among NGOs and trade unions. The survey focused on the awareness among NGOs and trade unions of the Guidelines and of the Dutch NCP's work, their participation and engagement in the Dutch NCP's activities and the considerations at play in starting a specific instance procedure or opting for other mechanisms or strategies. The survey sample contains respondents who represent Dutch NGOs and trade unions that have engaged with the Dutch NCP's activities (as participant in a specific instant procedure) as well as respondents who represent organisations that have not been involved with the Dutch NCP (see Annex IV). We selected those NGOs which operate in a field that the Guidelines relate to, in order to ensure the Guidelines and the Dutch NCP are relevant to their work.

<sup>62</sup> Not all companies were responsive to requests by the researchers for interviews for the case study research. For one case the research team proceeded by interviewing relevant parties that were available.

The content of each telephone interview was registered in a data collection sheet, listing the responses for each interview.

Research on the awareness of the Guidelines and of the Dutch NCP's activities among Dutch companies was available at the time of this evaluation, and thus not duplicated by us. That is: in 2016, a study was published by the Dutch Association of Investors for Sustainable Development (VBDO) on the commitment to and awareness of the Guidelines among Dutch companies listed at the stock exchange.<sup>63</sup> Their sample included 60 companies, of which 46 had been interviewed.<sup>64</sup> The VBDO study results were used to complement our results of the survey among NGOs and trade unions, in order to produce a broader view of the visibility of the Dutch NCP with stakeholders based in or working from the Netherlands.

### 3.6 Efficiency: budget analysis and comparison

To answer the research questions pertaining to the efficiency of the Dutch NCP, we conducted an analysis of the Dutch NCP's costs and expenditure and compared these with the costs and expenditure of two other NCPs, i.e. the NCPs of Norway and Denmark. The budgets of the three NCPs were subsequently compared with their activities, as listed in their annual reports or reported to the OECD. In this way, the inputs and outputs of the three NCPs could roughly be determined and compared.

The NCPs of Norway and Denmark were chosen because they are part of the sample of NCPs used for the doctrinal research and because, of those NCPs, only these two have a designated budget and publicly report on their finances. The scope of the analysis covers the period 2014–2017, as only for these years was it possible to retrieve pertinent information on spending and costs for all three NCPs. Annual reports providing an overview of activities for 2018 were not yet available at the time of the evaluation.

<sup>63</sup> VBDO (2016), Commitment to OECD Guidelines for Multinational Enterprises by Dutch stock listed companies including their awareness of the OECD Guidelines for Multinational Enterprises and of the possibilities and procedures provided by the Dutch NCP, available at: <https://www.vbdo.nl/wp-content/uploads/2018/07/VBDOReportOECDGuidelinesresearch-1.pdf> Association of Investors for Sustainable Development (VBDO)

<sup>64</sup> Ibid, p. 6. All 60 companies were analysed by means of desk research.

**Case:** FS FIVAS, the Initiative to Keep Hasankeyf Alive and Hasankeyf Matters versus Bresser.

**Complaint:** Loss of cultural heritage and the right to culture of local inhabitants, allegedly caused by the relocation of the Zeynel Bey Tomb in Turkey.



# 4

## Findings on the tasks of the NCP

This chapter focuses on the activities of the Dutch NCP. The Dutch NCP's activities are covered by evaluation questions 1, 2 and 3. Since timeliness and efficiency are closely tied to the activities of the Dutch NCP, evaluation questions 4 and 5 are also discussed in this chapter.

1. What activities have been undertaken by the Dutch NCP to promote and interpret the content and the meaning of the Guidelines? How has this developed over the years? Have these activities been effective?
2. How many notifications have been handled by the Dutch NCP? What notifications? How has the Dutch NCP facilitated dialogue? What were the results? Have issues been solved adequately?
3. What other activities have been undertaken by the Dutch NCP in view of its redefined mandate (pursuant to the 2014 Decree)? What has been the role of the Dutch NCP in the development of sector agreements? What sector-wide assessments have been conducted? How often has the Dutch NCP facilitated dialogue in a situation in which no formal specific instance had been submitted?
4. To what extent has the Dutch NCP dealt with the issues raised (through formal notifications or otherwise) in an efficient and timely manner?
5. How do the results (outputs and outcomes) of various activities compare to the amount of time and budget allocated?

## 4.1 Tasks of the Dutch NCP

Section 2.1 distinguished the three core tasks of NCPs, i.e.: (i) promotional activities; (ii) handling enquiries; and (iii) dispute resolution. In Section 4.1, the latter task of dispute resolution is discussed in more detail when compared to the other two tasks, because the Dutch NCP primarily focuses on this task by allocating most of its time to resolving disputes. Consequently, most of the information provided to us by the NCP and the interviewed stakeholders, as well as the information available in the public domain, concerns this task. Each task is discussed below (Sections 4.1.1 - 4.1.3), followed by a separate section which explains the evaluation findings.

| 29 |

### 4.1.1 Promotional activities

The Dutch NCP has the responsibility to make the Guidelines known and available by appropriate means, e.g. by providing online information with respect to the Guidelines and making a translated version of the Guidelines accessible. Prospective investors (inward and outward) should be informed about the Guidelines when appropriate. Moreover, the Dutch NCP is obliged to raise awareness of the Guidelines and to promote the specific instance procedure. In promoting the Guidelines, the Dutch NCP can cooperate with the business community, trade unions, NGOs and the public in general, and may also consult individuals.<sup>65</sup>

#### Findings

In the evaluation period, the Dutch NCP regularly organised and participated in events to promote its activities and the Guidelines. These events included training sessions, conferences, meetings and workshops. Furthermore, the Dutch NCP's members gave presentations at events organised by the NCP and at events initiated by other parties. Frequently, the Dutch NCP was asked by foreign government representatives to give a presentation about the content of their work and RBC. Requests were received from, among others, Japan and the European Union.

Every year, the Dutch NCP organised a conference for stakeholders and interested parties (the so-called "broad" stakeholder meeting). During this meeting, various themes, such as living wages and complexities in international value chains, were discussed with a broad range of stakeholders (e.g. representatives of NGOs, trade unions, academia and the business community).<sup>66</sup>

<sup>65</sup> ECD (2011), Decision of the Council on the Guidelines for Multinational Enterprises, 25 May 2011, Paris, Procedural Guidance, Paras. I.B 1-2 and Commentaries, Paras. 13-16

<sup>66</sup> Upon request, information can be shared on the evaluation of the stakeholder meetings from 2016-2019.

On a more frequent basis, four times a year, the NCP convened with a smaller group of stakeholders; known as the 'NCP+'. This group consists of the Dutch NCP's members together with representatives of the SER, OECD Watch, VNO-NCW and the trade unions. In general, the Dutch NCP+ comes together to discuss recent developments regarding the Dutch NCP. During these meetings, participants discuss recent notifications, without delving into the case specifics and the text of the notification. Sometimes, the NCP shares information on the progress that has been made in certain specific instances and elaborates on the next steps it intends to take. Stakeholders may also propose to discuss a specific topic and deliver a presentation about it. Often, NCP+ members are requested to provide suggestions or feedback. For instance, they can suggest potential speakers for the annual conference for stakeholders.

An overview of the promotional activities of the Dutch NCP is given in Table 4-1.

<b>Table 4-1 The Dutch NCP's promotional task</b>				<b>Table 4-2 The Dutch NCP's handling of enquiries</b>	
	<b>Stakeholder meetings organised</b>	<b>Promotional events organised</b>	<b>Participated in events</b>		<b>Enquiries received</b>
2014	2	-	4	2014	Not reported
2015	-	5	9	2015	21
2016	3	- <sup>67</sup>	11	2016	Not reported
2017	1	1	10	2017	36
2018	1	2	4	2018	35

According to multiple respondents, the Dutch NCP's activities focused less on promotional activities and more on specific instances in recent years, as the capacity of its staff was taken up by: (i) the increased caseload of specific instance procedures; and (ii) other activities, such as advisory work for the sector agreements and research into RBC aspects pertaining to the oil and gas sector. As a consequence, some promotional activities did not take place anymore.

| 30 |

#### 4.1.2 Enquiries

The Dutch NCP is obliged to respond to enquiries about the Guidelines. Such enquiries come from various parties, i.e.: (i) other NCPs; (ii) the business community, trade unions and worker organisations, NGOs, the public; and (iii) national governments of non-adhering countries.<sup>68</sup>

#### Findings

The enquiry function of the Dutch NCP has not been used frequently. Table 4-2 presents the data collected on this topic. The OECD reporting format concerning 2015 reveals that the Dutch NCP received 21 enquiries that year. Due to a different OECD reporting format in the other years, the number of enquiries to the Dutch NCP in the entire evaluation period could not be made available to us. As there is no reporting format available for 2017 and 2018, the NCP secretariat provided the pertinent data to us, noting 36 and 35 enquiries respectively.

A former NCP independent member recalled some occasions in which parties did not submit a formal notification for a specific instance but submitted an enquiry instead. An example thereof is a question submitted regarding the labelling of products produced on the West Bank of Palestine (CPL vs the Palestine Committee). Due to a confidentiality agreement concluded between the parties involved, the disclosure of the enquiries and the responses concerning this enquiry were restricted, and since this did not concern a specific instance, the enquiry was not registered on the Dutch NCP's website. Parties entered into an NCP-led dialogue. This enquiry and the follow-up process took the Dutch NCP a considerable amount of time – approximately one year.

<sup>67</sup> Two stakeholder meetings of the Dutch NCP had a promotional function as well.

<sup>68</sup> OECD (2011), Decision of the Council on the Guidelines for Multinational Enterprises, 25 May 2011, Paris, Procedural Guidance, Para. I.B 3 and Commentaries, Para. 17.

NGOs stated that for enquiries or information regarding the Guidelines, they would generally not turn to the NCP. As many of them are a member of OECD Watch and/or MVO Platform<sup>69</sup>, they receive information and updates through these channels and therefore find it easier to consult them with any questions they might have. The only enquiries made to the Dutch NCP that were mentioned by two respondents in the survey, concern enquiries regarding potential notifications. For example, an enquiry on whether a certain complaint falls under the scope of the Guidelines or whether submitting a complaint would be feasible at all. Such enquiries are not published by the NCP.

A broad range of enquiries were submitted to the NCP. Enquiries ranged from general questions about the application of the Guidelines to enquiries from students who wanted to receive more information about the NCP. Companies also consulted the NCP and sometimes asked about subsidies regarding the question of how to implement CSR within their company. Generally speaking, the enquiries are not sector-specific. NGOs sporadically use the enquiry mechanism to test whether a potential notification has a chance of being accepted. The NCP tries to answer all enquiries within one or two weeks. Evaluation of the type of enquiries received does not take place. The NCP does not publish the details of enquiries concerning a complaint (e.g. the company involved).

Besides the broad range of enquiries received from various stakeholders, an independent NCP member stressed that the Dutch NCP also received enquiries from other NCPs and ministries of new OECD countries. They consulted the Dutch NCP about the structures and procedures of an NCP, which laid an additional burden on the Dutch NCP's capacity.

#### 4.1.3 The specific instance procedure

According to the OECD Council's Decision, an NCP is obliged to contribute to the resolution of issues raised by trade unions, NGOs and other interested parties with regard to the implementation of the Guidelines by the business community. The Dutch NCP is expected to offer a forum for discussion and assist the parties in dealing with the issues raised in an efficient and timely manner, and in accordance with applicable law. The procedure for specific instances can be roughly divided into three steps, which will be explained in this section.<sup>70</sup>

<sup>69</sup> MVO Platform is a network of Dutch civil society organisations that promote responsible business conduct. See: [www.mvoplatform.nl](http://www.mvoplatform.nl).

<sup>70</sup> OECD (2011), Decision of the Council on the Guidelines for Multinational Enterprises, 25 May 2011, Paris, Procedural Guidance, Para. I.C Preface; Dutch NCP (2015), Specific instance procedure, pp. 2-3.

### Step 1: the initial assessment

When the Dutch NCP receives a notification of alleged non-compliance with the Guidelines, it makes an initial assessment of whether the issues raised merit further examination. The Dutch NCP takes the following criteria, as outlined in the Commentaries to the Procedural Guidance of the OECD Council's Decision, into consideration:<sup>71</sup>

- Whether the Dutch NCP is the appropriate entity to assess the alleged violation;
- What the identity of the reporting party and its interest in the case is;
- Whether the issues raised in the complaint are material and substantiated;
- If there seems to be a link between the activities of the MNE and the issue in the specific instance;
- The relevance of applicable legislation and procedures, including court rulings;
- How similar issues are or are being resolved in other national or international procedures; and
- Whether consideration of the specific problem would contribute to the Guidelines' objectives and effectiveness.

The initial assessment outlines whether the complaint is taken into consideration entirely or if only part of the complaint will be considered further. The Dutch NCP can also refer (part of) the complaint to another NCP at this stage. Similarly, other NCPs can also refer their cases to the Dutch NCP.<sup>72</sup> Specific to the Dutch procedure are the confidential bilateral meetings between the claimant and the Dutch NCP and the defendant and the Dutch NCP, which are held prior to starting the 'good offices' phase. In these meetings, each of the parties has the opportunity to discuss separately with the Dutch NCP the specific instance and issues that have occurred. As part of its initial assessment, the Dutch NCP circulates its draft initial statement among the parties. They can provide input to the NCP. The Dutch NCP publishes its initial assessments online.

| 32 |

### Step 2: good offices

If the Dutch NCP rules that the notification will be considered further, the Dutch NCP offers its 'good offices' to help the parties involved to resolve the issues raised. The Dutch NCP consults with both parties prior to mediation, and if both parties involved agree to take part, the NCP further facilitates the mediation process. In starting out the mediation process, usually a Terms of Reference (ToR) document is agreed upon. The practice of using a ToR document is relatively new and the form, length and other details depend on what the parties request. This provides both parties with the opportunity to shape the dialogue. The Dutch NCP can conduct a fact-finding mission or conduct its own research into the complaint(s), to verify the complaint or get more clarity about its content. However, this is not common practice at the Dutch NCP. The Dutch NCP can also consult with other NCPs, should the issues of the complaint be raised with multiple NCPs.<sup>73</sup> Additionally, the Dutch NCP can seek the guidance of the OECD Investment Committee if there are any doubts on how to interpret the Guidelines in a particular case.<sup>74</sup>

### Step 3: the final statement

The Dutch specific instance procedure concludes with a final statement.<sup>75</sup> If an agreement is reached between the parties, the Dutch NCP's final statement contains an overview of the points that were agreed upon. If the mediation process did not result in an agreement, the final statement contains an overview of the process and can contain recommendations, or even a determination on the question whether the Guidelines have been violated or not. If the company decided not to partake in the mediation process, the Dutch NCP will still publish a final statement regarding the complaint.

<sup>71</sup> Dutch NCP (2016), *OESO-Richtlijnen voor Multinationale Ondernemingen*; OECD (2011), Decision of the Council on the Guidelines for Multinational Enterprises, 25 May 2011, Paris, Procedural Guidance Commentaries, Para. 25.

<sup>72</sup> For example, in the Mylan case, the US NCP referred the case to the Dutch NCP.

<sup>73</sup> For example, in the POSCO case, the Dutch NCP consulted with the Norwegian NCP and South Korean NCP and divided the issues raised in this case among them.

<sup>74</sup> For example, in the POSCO case, the Dutch NCP consulted the OECD Investment Committee on the issue of functional equivalence.

<sup>75</sup> The terminology in the Dutch NCP's specific instance procedure deviates from the terminology outlined in the Procedural Guidance of the OECD Council's Decision. Whereas the Procedural Guidance speaks of 'final statements' when parties did not reach an agreement and a 'report' when parties did reach an agreement, the Dutch NCP refers to them both as a 'final statement'.

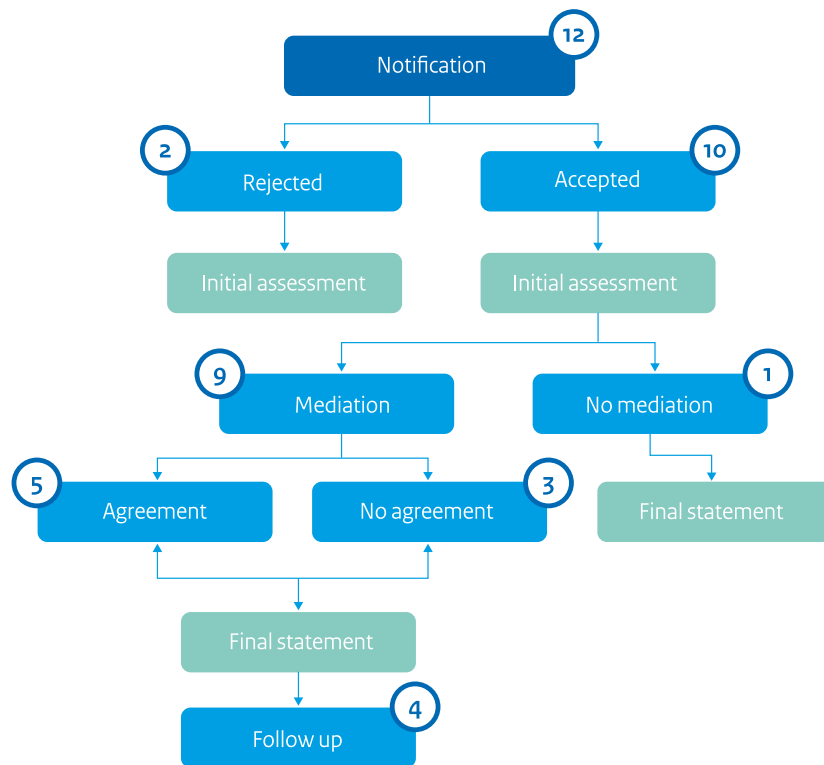


### Findings: the initial assessment

Figure 4-2 provides an overview of the steps followed in the specific instance procedure, including the number of notifications handled by the Dutch NCP in the period 2012-2018 and the results of the subsequent procedures.

Two instances are still ongoing: one in which mediation has started and one in which mediation was declined. In the latter case, a final statement is yet to be published.<sup>76</sup> Furthermore, the NCP indicates that five additional notifications were submitted in 2017, and another five in 2018. However, we do not currently have any publications on these notifications available for the evaluation as no initial assessments have been published yet. Hence, these additional 10 notifications have not been included in the figure; they are 'works in progress'.<sup>77</sup>

**Figure 4-1** Notifications and the specific instance procedures Dutch NCP (2012–2018)



\* Note: the total for the agreement and no-agreement categories do not add up to nine (mediation), as one case is ongoing.

Figure 4-2 provides an overview of the total number of specific instance procedures received by the NCPs of the five selected countries in the examined time period. The data show that the Dutch NCP received 12 notifications. This number is lower than the amount of procedures received by the NCPs of the UK (18) and Germany (14), but higher than the numbers reported by the NCPs of Norway (9) and Denmark (6). The 10 additional pending notifications received by the Dutch NCP in two years' time put the findings in a new perspective. Also in comparison with the workload of other NCPs this number of pending notifications can be described as substantial. For example, the UK NCP received most notifications (18) of the five examined NCPs between 2012 and 2018.<sup>78</sup>

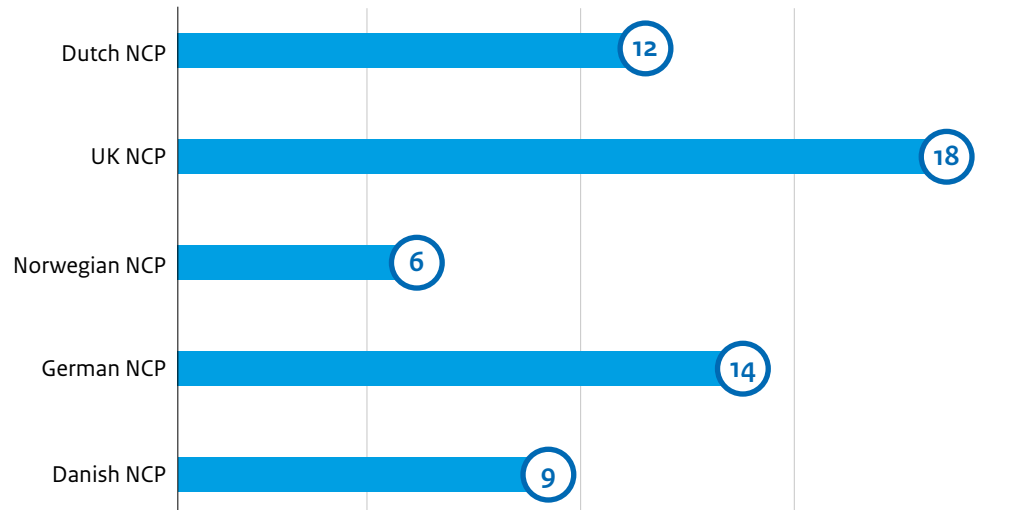
<sup>76</sup> Both cases are included in the findings of Section 4.1.3, except for the subject of the duration of the procedures (see Table 4-5) because no time frames can be provided in cases that are still pending completion.

<sup>77</sup> Incidentally, these notifications also include notifications submitted to other NCPs. The Dutch NCP also participates in these instances, but not always in the lead as the 'primary' NCP.

<sup>78</sup> Between 2000 and 2015, the UK NCP received the most notifications (45) of all NCPs across the world. OECD (2016), *Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015*, p. 41.

Based on these findings, it can be concluded that the additional 10 notifications received by the Dutch NCP in such a short period increased the number of notifications substantially in comparison to other NCPs and the workload related to that. We must note, however, that we do not have any knowledge on the number of pending notifications at the other four NCPs as they have not published any information about them.

**Figure 4-2** Number of notifications received per NCP between 2012 and 2018



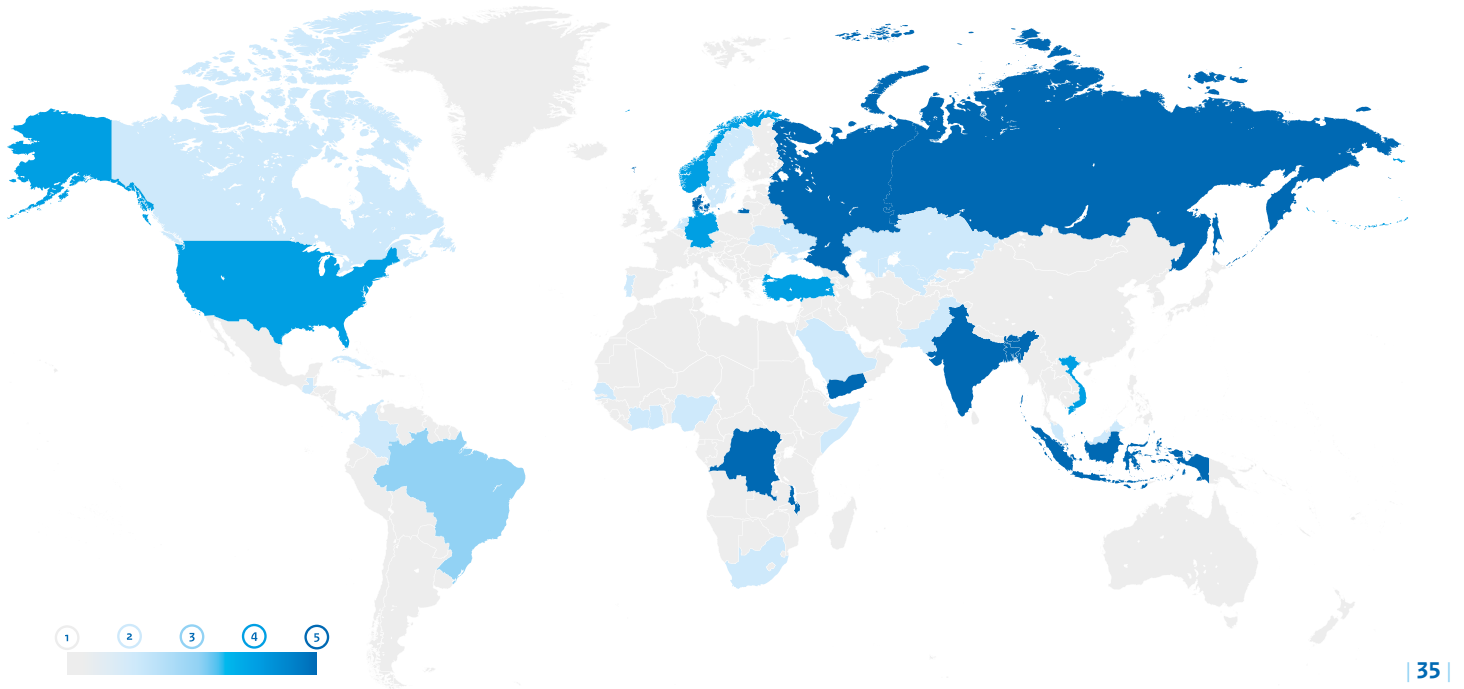
\* Note: the 10 pending notifications received by the Dutch NCP are not included in the figure

The majority of complaints handled by the Dutch NCP regarded alleged violations of the Guidelines related to (a combination of):

- Failure of the MNE to comply with the applicable general policies and mutual agreements in Chapter II of the Guidelines;
- Failure of the MNE to respect internationally recognised human rights standards as reflected in the content of Chapter IV of the Guidelines;
- Failure of the MNE to disclose relevant information pursuant to Chapter II of the Guidelines; and
- Failure of the MNE to contribute to sustainable development or adequately account for the protection of the environment, public health and safety as reflected in Chapter VI of the Guidelines. These are classified as environmental cases, but they often also involve alleged violations of human rights of those affected by the environmental harm.

A limited number of complaints related to alleged violations of the Employment and Industrial Relations Chapter of the Guidelines (Chapter V). These can generally be categorised as employment cases. The complaints that were submitted to the five NCPs pertain to alleged violations that took place in many different places in the world (see Figure 4-3).

**Figure 4-3** Aggregate geographical location of complaints submitted to the five NCPs in the sample of this study



The Dutch NCP handled alleged violations pertaining to the following countries: the Netherlands (2), Bangladesh (1), Russia (1), India (1), Indonesia (1), USA (1), Democratic Republic of Congo (1), Ukraine (1), Nigeria (1), Turkey (1) and not specified (1).<sup>79</sup>

#### Findings: good offices

In the majority of the 12 complaints handled by the Dutch NCP, the parties accepted the proposal to start mediation so that the NCP could offer its good offices. One of the measures that the Dutch NCP can take during this phase is the appointment of a third-party mediator. The final statement of the Heineken case, for example, reveals that the NCP appointed a 'third-party mediator'.<sup>80</sup> This third-party mediator came from the region and in part functioned as a fact-finder, who was responsible for getting to the heart of the issue. In the other cases included in the doctrinal research, no fact-finding mission took place.<sup>81</sup> The Procedural Guidance to the OECD Council's Decision emphasises the difficulties with regard to fact-finding missions, especially in non-adhering countries.<sup>82</sup> In the case studies, several interviewees acknowledged these types of difficulties in non-adhering countries. Reasons mentioned included political and societal sensitivities as well as possible infringements of state sovereignty when another country's NCP intends to conduct a fact-finding mission.

As part of its good offices, the NCP may also consult embassies. In the Heineken case, several Dutch embassies provided an important contribution to the provision of good offices. The parties developed a roadmap with concrete steps to facilitate the resolution of the case.

<sup>79</sup> The latter concerns global greenhouse gas emissions.

<sup>80</sup> Dutch NCP (2017), *Three individuals vs Bralima/Heineken*, final statement, p. 3.

<sup>81</sup> Fact-finding missions took place in instances before the period assessed in this report, i.e. before 2011 – for instance in the case *Shell Pandacan*, where a fact-finding mission was conducted in the Philippines.

<sup>82</sup> OECD (2011), *Decision of the Council on the Guidelines for Multinational Enterprises*, 25 May 2011, Paris, Commentaries, para. 39.

In 2018, IOB conducted a survey among Dutch embassies<sup>83</sup> as part of an evaluation of the Dutch international RBC policy.<sup>84</sup> Respondents were asked, among others, if they had ever referred parties adversely impacted by Dutch companies' activities or other stakeholders to the Dutch NCP. Only two of the 66 embassies in the sample (3%) once referred a party to the NCP. More embassies – but still a minority: 14% – engaged in activities to raise awareness about the NCP or other NCP-related activities, e.g. by organising network events with stakeholders (including labour unions and NGOs) and/or (Dutch) companies or by entering a dialogue with national government bodies on the functioning of the country's own NCP.

### Findings: outcomes regarding specific instance procedures

An overview of all cases for which initial assessments were published by the Dutch NCP is presented in Table 4-3.

Case	Short name	Complaint related to	Outcome procedure
1. Friends of the Earth/ Amnesty International vs Royal Dutch Shell II	Shell	Non-transparency concerning oil spills by Royal Dutch Shell in its reporting.	No agreement reached. Final statement published by the NCP.
2. FNV Eemshaven vs NUON	NUON	The alleged unequal payment of minimum wages for foreign construction workers employed by sub-contractor Mitsubishi.	Agreement was reached after mediation. Final statement published.
3. Sakhalin Environment Watch and Stroitel vs Royal Dutch Shell	Shell II	Decreased value of land and threatened livelihoods and cultural heritage of local people, allegedly caused by the establishment of an oil and gas plant by Royal Dutch Shell.	Complaint rejected. Initial assessment published.
4. Various NGOs vs POSCO India, ABP, APG, and the Norwegian Bank Investment Management (NBIM)	POSCO	Involvement of several institutional investors in funding POSCO, which was held responsible for alleged human rights violations in India.	Agreement was reached after mediation. Final statement published.
5. Friends of the Earth vs Rabobank, Bumitama Agri Group	Rabobank	Providing financial services to Bumitama Agri Group, operating in Indonesia in the palm oil industry, which was held responsible for alleged adverse environmental and human rights impacts on the local area and its inhabitants.	Partial agreement was reached after mediation. Final statement published.
6. Bart Stapert vs Mylan NV	Mylan	Medicine produced by Mylan used for executing death sentences in the USA.	Statement by Mylan after mediation process, declaring that the company will take steps to prevent future issues, but no joint agreement. Final statement published.
7. Both Ends vs Atradius Dutch State Business NV	Atradius	Displacement of native people in the harbour of Suape, Brazil, where the company Van Oord was dredging, the activities of which were insured by Atradius.	Agreement was reached on the topics included in the ToR for the mediation. Final statement published.

<sup>83</sup> Including two Permanent Representations at the OECD in Paris and the UN in Geneva.

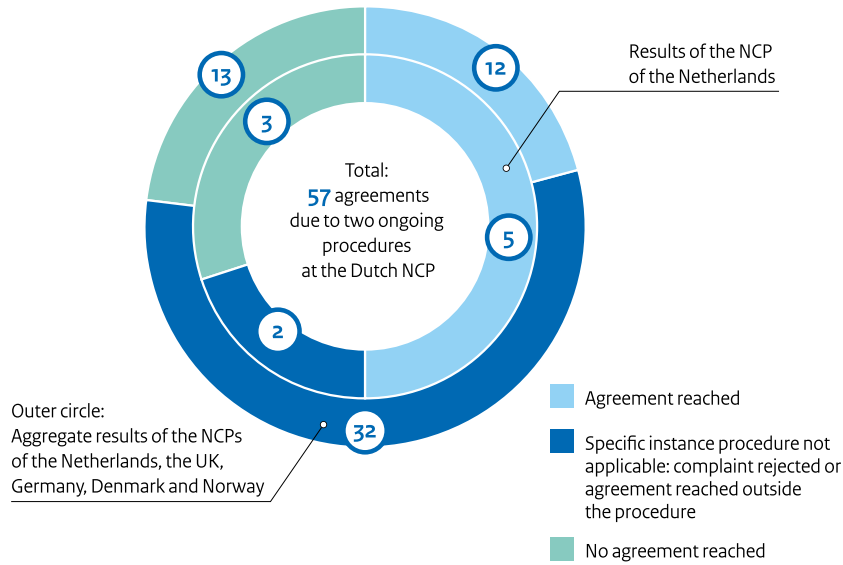
<sup>84</sup> IOB (2019), *Mind the governance gap, map the chain: Evaluation of the Dutch government's policy on international responsible business conduct (2012-2018)*. Ministry of Foreign Affairs, The Hague.

**Table 4-3 Notifications handled and outcomes by the Dutch NCP in 2012–2018**

Case	Short name	Complaint related to	Outcome procedure
8. Three individuals vs Heineken	Heineken	Financial compensation was claimed for collective lay-offs in the DRC by Heineken.	Agreement reached, including remuneration of affected parties. Final statement published.
9. UNI Global Union vs VEON*	VEON	Alleged asuaesnti-union activities by VEON, a telecom operator operating in Bangladesh.	Ongoing.
10. Individual from Ukraine vs Philips Lighting	Philips	Individual alleged that his human rights were infringed due to his dismissal by Philips.	Complaint rejected. Initial assessment published.
11. Oxfam Novib, Greenpeace, BankTrack, FoE vs ING*	ING	Publishing indirect greenhouse gas emissions by ING (i.e. all greenhouse gas emissions caused by its lending activities) and setting goals to align these emissions with thresholds set by the Paris Climate Agreement.	Ongoing.
12. FS FIVAS, the Initiative to Keep Hasankeyf Alive and Hasankeyf Matters vs Bresser	Bresser	Loss of cultural heritage and the right to culture of local inhabitants, allegedly caused by the relocation of a historic tomb in Turkey by Bresser.	No agreement was reached. Recommendations were made by the NCP. Final statement published.

\* Please note that the two ongoing procedures and the 10 recently filed additional notifications are not included in Figure 4-3, nor in the doctrinal research, and are therefore not included in the remaining findings in this chapter.

Five out of the 10 cases concluded by the Dutch NCP in the period 2012–2018 led to a (partial) agreement between the parties. In one case, financial remuneration was provided to the victims as part of the negotiated agreement. In three out of the 10 cases, no agreement was reached. In two other cases an agreement was reached outside of the specific instance procedure or the complaint was rejected. Figure 4-4 shows outcomes of the instances of the Dutch NCP compared with the other NCPs in the sample of the doctrinal research. The figure shows that the Dutch NCP reached agreements in the majority of the eight specific instances that have been accepted and finalised five (partial) agreements versus three no agreements; two were rejected and two are ongoing).

**Figure 4-4** Comparison of the agreements reached through mediation**Findings: follow-up statements**

In four of the five specific instances that resulted in an agreement, the Dutch NCP subsequently organised an evaluation meeting to discuss the progress that had been made on the agreement. The Dutch NCP published follow-up statements concerning such meetings approximately one year after publishing the final statement.

| 38 |

**Findings: timeliness**

The Guidelines state that an NCP should strive to conclude a specific instance procedure within 12 months of receiving the notification.<sup>85</sup> This has been translated by the Dutch NCP into the following time frames for the different phases of the procedure:

Phase	Time frame
1. Initial assessment	3 months
2. Good offices	6 months (after phase 2 is concluded)
3. Publication of final statement	3 months (after phase 3 is concluded)

The duration of the different phases was examined in the doctrinal research. The average duration of the specific instance procedure of the Dutch NCP was also compared with the findings regarding the other four NCPs examined in the doctrinal research. Results are presented in Table 4-5.

<sup>85</sup> OECD (2011), Decision of the Council on the OECD Guidelines for Multinational Enterprises, 25 May 2011, Paris, Procedural Guidance, Commentary, Para. 41.

**Table 4-5 Duration of specific instance procedures concluded from 2012 to 2018**

NCPs (no. of cases)	Average time to initial assessment (months)*	Average time until the end of mediation (months)*	Agreement (no.)	No agreement (no.)	Agreement n/a (no.)**
German NCP (14)	4.5	15.1	3	3	8
Denmark NCP (9)	3.5	14.2	1	1	7
Norwegian NCP (6)	5.0	14.4	1	1	4
UK NCP (18)	4.9	16.6	2	5	11
Dutch NCP (10)	5.7	17.0	5	3	2
<b>Average all NCPs (n=57)</b>	<b>4.8</b>	<b>16.0</b>			

\* In the cases in which only an indication of the relevant month was provided, the first day of that month was used in the analysis.

\*\* Because the complaint was not accepted for further consideration or an agreement was reached outside the specific instance procedure.

The data presented above show that the Dutch NCP accepts a larger share of notifications for further consideration. The other NCPs reject a relatively large share of the notifications they receive, or mediation does not take place. Most likely related to this is the fact that the Dutch NCP has an above-average time period before the initial assessment is concluded. The average running time for the procedures that include mediation does not diverge greatly between the NCPs, but the Dutch NCP does have an average running time that is above average. Of the relatively many notifications that the Dutch NCP accepts, five out of 10 were concluded with an agreement. This is a higher result than the other NCPs included in the sample.

| 39 |

The Dutch NCP currently states that it cannot meet its own time frames for the specific instance procedures. For the specific instances handled during the period under study, the average time needed for publishing the initial assessment was longer than three months. The duration of the entire specific instance procedures, in cases in which mediation was offered, exceeded the 12-month period in all but two instances. Respondents consulted in the evaluation and who were part of a specific instance procedure confirm that the procedure takes a lot of time and effort for all parties involved. In response to these critical remarks regarding the timeliness of the procedures, an independent member of the Dutch NCP concedes that time frames are exceeded sometimes. However, in some cases more time is needed to build trust among parties and to reach a favourable result for all parties involved.

#### 4.1.4 Other activities

Apart from the tasks assigned to NCPs in the OECD Council's Decision, the Dutch NCP has a few additional activities which emanate from its redefined mandate from 2014 (see Section 1.2.). In 2016, the Dutch NCP was requested by the Dutch cabinet: (i) to conduct a sector-wide assessment of the implementation of the Guidelines in the oil and gas sector; and (ii) to provide recommendations as to how the oil and gas sector can act in conformity with the Guidelines. The research was published after the evaluation period, hence the content thereof is not included in this evaluation.

Another activity laid down in the Dutch NCP's redefined mandate is its role in the development of the sector agreements. Several sector agreements have been concluded. A good example is the agreement on garments and textile, which contains multiple references to the Guidelines and has a binding grievance mechanism.<sup>86</sup> Some sector agreements also contain provisions that confirm the role of NCPs as mediators in case of alleged violations of the Guidelines.

<sup>86</sup> SER, Dutch Agreement on Sustainable Garment and Textile (2016), available at: <https://www.ser.nl/-/media/ser/downloads/engels/2016/agreement-sustainable-garment-textile.pdf> accessed 26 February 2019.

The Dutch NCP has played an active role in the development of sector agreements. It gave advice on the draft text of several sector agreements and informed actors involved about the role of the NCP. For example, the Dutch NCP had a meeting with the insurance sector to explain the role of the NCP in relation to the complaints mechanism of the sector agreement. There was also a meeting with the secretariat of the complaints mechanism of the agreement on garments and textile in order to learn from the NCP how to set up its procedure. Our survey shows that four of the eight respondents (NGOs and trade unions) were familiar with the role of the Dutch NCP in the sector agreements.

Cooperation with other NCPs has been part of the Dutch NCP's *modus operandi*. This is illustrated in a number of cases. For instance, in the *Mylan* case, the Dutch NCP consulted the US NCP. They jointly decided that the Dutch NCP should take on the case, instead of the US NCP, which actually was the competent NCP. In the *POSCO* case, the Dutch NCP collaborated with the Norwegian and Korean NCPs and published a preliminary final statement to give the other NCPs the opportunity to adjust their final statements to that of the Dutch NCP. In this manner, the Dutch NCP promoted functional equivalence and furthered the development of a worldwide NCP system. Assistance and advice to other NCPs was, for example, provided by the Dutch NCP in the *ArcelorMittal* case, which was handled by the Luxembourg NCP. Similarly, the Dutch NCP divided the tasks with the Brazilian NCP in the *Atradius* case.

The Dutch NCP was the first NCP to be peer reviewed in 2009. After 2009, the Dutch NCP was involved as reviewer in peer reviews of other NCPs (e.g. the Norwegian NCP in 2014), thereby advancing a coherent worldwide NCP system and functional equivalence. The Dutch NCP was recently asked to partake in more peer reviews, but it declined because its members did not have sufficient time available.

## 4.2 Budget and staff

### 4.2.1 Capacity

The Dutch NCP consists of four independent NCP members. They are supported by three full-time equivalent (FTE) employees of the Ministry of Foreign Affairs (policy staff), who together form the NCP secretariat. During the last year(s), the secretariat has not been able to function at full capacity due to illnesses and other organisational reasons. Recently the Dutch NCP was given two temporary external secretariat members, for up to 300 hours in total. Stakeholders support the supposition that working for the Dutch NCP requires specialist knowledge and it is therefore not desirable to assign someone without experience to support the NCP. The Ministry of Foreign Affairs states that it does not have the capacity to assign extra staff to the NCP secretariat.

The Dutch NCP also counts four advisory members. These are representatives from the Ministries of Foreign Affairs (MFA), Economic Affairs and Climate Policy (EZK), Infrastructure and Water Management (IenW), and Social Affairs and Employment (SZW). The advisory members provide input when asked by the NCP members, for example, on whether a complaint should be deemed admissible. Additionally, the advisory members ensure that the NCP remains connected with relevant policy developments.

Currently, staff capacity is a major obstacle for the NCP. Supporting staff capacity has effectively decreased. The NCP handles an increasing number of instances and is expected to find time to conduct additional tasks (such as the sector-wide assessment of the oil and gas sector). NCP members expect that the case load will only increase with the policy targets which the Ministry of Foreign Affairs has set regarding the Guidelines. The lack of support staff means that the NCP members have to take on additional tasks. NCP members are appointed for 26 hours per month. According to the NCP members, this does not accurately reflect the number of hours they actually allocate to the NCP; they indicate that currently the workload is at least double this number of hours. Two of the NCP members indicate that the appointment is currently a full-time job.



### 4.2.2 Efficiency

The Dutch NCP is financed by the Ministry of Foreign Affairs' programme for RBC. The Dutch NCP makes a working plan for each coming year in which its activities are outlined and an accompanying budget is estimated. The Dutch NCP secretariat salaries are part of regular expenses of the Ministry of Foreign Affairs and not included in the budget of the Dutch NCP. The Dutch NCP's members receive a monthly remuneration for their work, which is part of the expenses attributed to the Dutch NCP. The Dutch NCP does not deplete the entire available budget which was estimated beforehand as part of the working plan. Interviews with the Dutch NCP's members and various stakeholders have confirmed that the Dutch NCP lacks the capacity to fulfil all of its tasks and do so in a timely manner. Capacity in this case refers to the time and manpower available on the part of the four independent members (high-level expertise) and the secretariat (supporting but expertise also required).

A comparison was made of the costs and expenditure, as well as the activities of the Dutch NCP, with those of the Danish and Norwegian NCPs. This overview does not include the estimated budgets, but only the actual expenses made. Using public information on government salaries and the salary scales of the Dutch NCP's secretariat's employees, an approximation of the salary costs for the secretariat of the Dutch NCP was made. Table 4-6 presents an overview of a selection of activities and the total expenditure of the three NCPs. These activities relate mostly to the core tasks of the NCP: the promotional activities and the handling of specific instances.

The activities as included in Table 4-6 are based on the annual OECD reporting format as published by the NCPs and, where applicable, annual reports. The salaries and remuneration include both the costs for the Ministry of Foreign Affairs' employees in the NCP secretariat in terms of salaries as well as the remuneration received by the NCPs' independent members. The expenditure of the Danish and Norwegian NCPs has been calculated from the local currency using the average exchange rate for each year.

The Danish and Norwegian NCPs have been allocated a larger budget than the Dutch NCP. As mentioned before, however, the Dutch NCP does not deplete its budget. This is not reflected in Table 4-6 as this table includes only the NCP's expenditure against its output (activities). The comparison of the three NCPs again shows that the Dutch NCP considered more notifications in the evaluation period relative to the others. The doctrinal research shows that the Dutch NCP accepts more notifications than other NCPs<sup>87</sup>, but the other NCPs participate in, and organise, more events. The Dutch NCP members are appointed for 26 hours per month, though in practice they work more hours (see Section 4.2.1). In comparison, the Norwegian NCP members spend on average 8-16 hours a month, while the chair spends 16-24 hours a month.<sup>88</sup>

<sup>87</sup> Regarding cases for which good offices are offered to the parties.

<sup>88</sup> We were unable to retrieve this information for the Danish NCP.

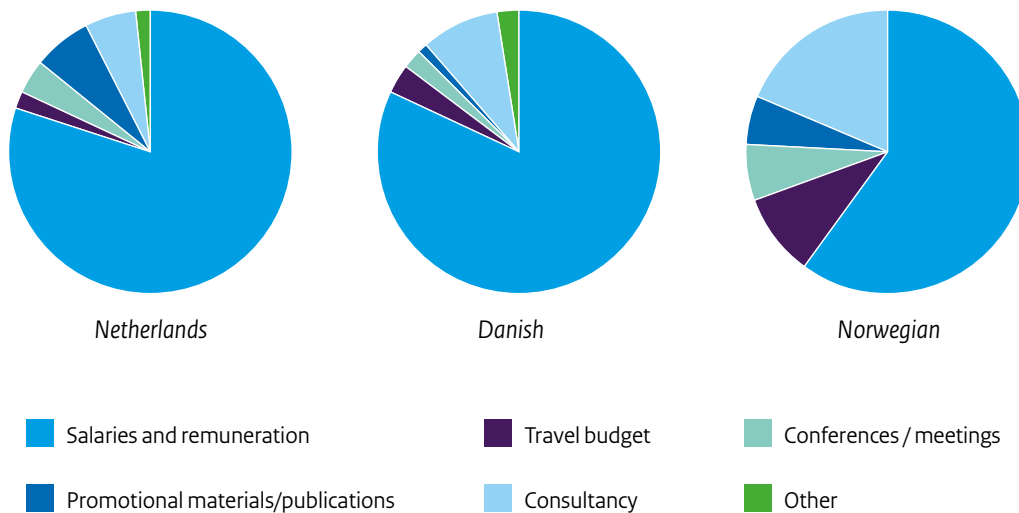
**Table 4-6 Comparison of the Dutch, Norwegian and Danish NCPs' activities and (average) expenditure 2014-2017**

	Staff	NCP members	Notifications handled	Number of promotional events organised	Number of events in which NCP participated	Salaries and remuneration	Travel budget	Conferences/meetings	Promotion materials / publications	Consultancy	Other	Total expenditure
<b>Dutch NCP</b>	2014	3 FTE	4		4	€ 254,881	€5,651	€9,208	€56,328	€19,596	€2,050	€347,714
	2015	3 FTE	4	5	9	€308,869	€5,478	€18,500	€6,595	€28,119	€17,972	€385,533
	2016	3 FTE	4	8	11	€310,160	€6,079	€16,846	€7,913	€12,679	€5,331	€359,008
	2017	3 FTE	4	1	10	€290,997	€12,644	€8,195	€2,390	€-	€266	€314,492
					AV	€291,227	€7,463	€13,187	€18,307	€15,098	€6,405	€351,687
<b>Norwegian NCP</b>	2014	2 FTE	4		4	€253,947	€46,053	€16,856	€15,909	€73,206	€-	€405,971
	2015	2 FTE	4	3	6	€252,178	€39,218	€28,119	€24,861	€155,349	€526	€500,251
	2016	2 FTE	4	4	15	€254,839	€34,946	€37,634	€10,968	€78,172	€-	€416,559
	2017	2 FTE	4	8	22	€318,757	€40,514	€33,119	€43,944	€36,013	€-	€472,347
					AV	€269,930	€40,183	€28,932	€23,920	€85,685	€131	€448,782
<b>Danish NCP</b>	2014	3 FTE	5	1	7	€295,302	€10,642	€1,020	€-	€55,561	€5,203	€367,728
	2015	3 FTE	5	2	8	€294,906	€11,039	€20,831	€6,879	€50,447	€1,502	€385,603
	2016	3 FTE	5	3	7	€295,302	€15,613	€6,195	€10,286	€8,567	€19,190	€355,152
	2017	3 FTE	5	4	9	€295,699	€11,902	€3,834	€4,989	€35,385	€19,944	€371,753
					AV	€295,302	€12,299	€7,970	€5,538	€37,490	€11,459	€370,059

\* The benchmark was created with the data retrieved from annual reports, NCP reports to the OECD and financial reports published on the NCPs' websites

The average expenditure by the three NCPs is presented in Figure 4-5. The Danish and Norwegian NCPs both spend more on consultancy than the Dutch NCP, and particularly for the Norwegian NCP this constitutes a large part of its total expenditure. Expenditure on external consultancy by the Norwegian NCP includes assistance in developing courses, information material and translations, generating expertise on the subject matter, and involving external mediators in specific instances. The Dutch NCP too has the possibility to engage in this type of external consultancy.

**Figure 4-5** Average expenditure of the Dutch, Norwegian and Danish NCPs 2014–2017



The Danish and Norwegian NCPs spend relatively more on travelling, again in particular the Norwegian NCP. This is largely for attending conferences and meetings abroad. The Dutch NCP shows an increase in spending on travel in 2017. These expenses were largely made to attend mediation meetings of a specific instance procedure that took place abroad.

As mentioned before, the Danish and Norwegian NCPs organise and participate in more events than the Dutch NCP. The focus of the Dutch NCP is on the mediation task, which is reflected both in the activities of the NCP, as well as its expenditure. This shows in a higher number of specific instances, as well as in lower spending on travel, events and, to a lesser extent, promotional materials, compared to the other two NCPs.

**Case:** FNV Eemshaven versus NUON.

**Complaint:** The alleged unequal payment of minimum wages for foreign construction workers employed by sub-contractor Mitsubishi.



## Findings on the effectiveness criteria

This chapter focuses on the effectiveness of the Dutch NCP according to the OECD criteria as mentioned in Section 2.2. The OECD criteria are part of evaluation questions 6 and 7.

6. How does the Dutch NCP perform in terms of visibility, accessibility, transparency and accountability? What has been done to improve its performance on these criteria?
7. To what extent has the Dutch NCP respected the guiding principles for specific instances: impartiality, predictability, equity and compatibility with the Guidelines?

## 5.1 Visibility

As mentioned in Section 2.2, NCPs are required to inform trade unions, NGOs, the business community, and other interested parties about their facilities and activities as well as to promote the Guidelines. In this section, we will examine the visibility of the Dutch NCP according to its stakeholders.

### 5.1.1 NCP activities and visibility

As discussed in the previous chapter, the Dutch NCP had little capacity for promotional activities during most of the evaluation period. This does not necessarily mean that the NCP has not been visible. There seems to be consensus among the interviewed stakeholders (NGOs and trade unions) that the exposure generated through high-profile specific instances has increased the visibility of both the Dutch NCP and the Guidelines. According to these respondents, initial assessments and final statements published on the Dutch NCP's website were often picked up in the news media.

The NCP has also increased its visibility through its role in the sector agreements. NGOs and trade unions indicate they have encountered the Dutch NCP in the process of drafting sector agreements. They also state that the Guidelines have been important to the sector agreements, as the sector agreements build on, and refer to the Guidelines.

### 5.1.2 Visibility of the Dutch NCP among NGOs and trade unions

The NCP and the Guidelines are well-known among NGOs and trade unions. Respondents of the survey were all familiar with the Guidelines and the activities of the Dutch NCP. Several of them indicated that checking corporate compliance with the Guidelines and offering assistance to companies to implement the Guidelines in their daily practices constitute an important part of their work, and thus knowledge of the Guidelines is inherent to their work. Several of the respondents had also been involved in specific instance procedures. Events that the respondents were familiar with mainly included the annual conferences organised by the Dutch NCP. The respondents were less aware of other events or promotional activities.

| 45 |

### 5.1.3 Visibility of the Dutch NCP among companies

Respondents in interviews, in the survey among NGOs and trade unions, and in the case studies generally expressed the view that the NCP and the Guidelines are less well-known among companies than among NGOs/trade unions. This is supported by the survey among companies, which was carried out by VBDO in 2016.<sup>89</sup> Of the sample of 60 stock-listed companies researched in the study by VBDO, 30% publicly committed to the Guidelines and 47% referred to it in publicly available information.<sup>90</sup> The objective of the Dutch government is to have 90% of MNEs in the Netherlands commit to and adopt the Guidelines by 2023.<sup>91</sup> Almost half of the 46 interviewed companies in the VBDO study were aware of the existence of the Dutch NCP.<sup>92</sup> The VBDO report stipulates several barriers that might prevent a company from committing to the Guidelines. According to the companies' responses, one of the main reasons for not committing to the Guidelines was unfamiliarity with the Guidelines.<sup>93</sup> Additionally, the VBDO report mentions that not knowing what the Guidelines entail, or what is necessary in order to publicly commit to the Guidelines, prevents companies from committing. Another barrier mentioned by VBDO is that the added value of committing to the Guidelines is not always clear, either in addition to other RBC frameworks, or in addition to existing internal policies that in some cases have already been based on the Guidelines.

<sup>89</sup> VBDO (2016), p. 8.

<sup>90</sup> The findings of VBDO were based on publicly available documents from 2014.

<sup>91</sup> Letter by the Minister for Foreign Trade and Development Cooperation to parliament, 2 July 2018, 26 485 no. 271.

<sup>92</sup> Ibid, p. 3.

<sup>93</sup> VBDO (2016), p. 10.

## 5.2 Accessibility

As mentioned in Section 2.2, NCPs are required to be accessible for trade unions, NGOs, the business community, and other interested parties, for specific instances and when asked for information. In this section, we will look at the accessibility of the Dutch NCP according to its stakeholders.

### 5.2.1 Accessibility strengths

In all 10 examined cases in the period 2012–2018 (see Table 4-3), the Dutch NCP was accessible to various types of claimants, i.e. allegedly harmed individuals from developing countries, individuals from the Netherlands, NGOs, and other types of civil society organisations, established inside or outside of the Netherlands. All of them had gained access and submitted notifications to the Dutch NCP. Eight notifications were accepted for further consideration, two notifications were not. NGOs indicate that the Dutch NCP uses broad criteria in accepting cases. For instance, the Dutch NCP does not limit the time period for filed notifications; it incidentally takes on cases concerning issues that took place a long time ago (e.g. 18 years in the *Heineken* case). A precondition for taking on these older cases is that affected parties have asked and tried for many years to get attention for the issue. Other criteria include: (i) the complaint should not be frivolous, but merit further examination; and (ii) must have substance. The Dutch NCP also takes into account whether the company or a court has taken on the case before and whether the allegers have tried time and again to receive redress, without any access to remedy. The Dutch NCP is also known for taking on more difficult cases, such as the ADSB case (relating to a state-owned export credit insurance company).

In particular, in one of the case studies, a representative of the business community perceived the Dutch NCP to be accessible for the complainants acknowledging the Dutch NCP's effort to ensure that they really facilitate the whole process. The same person found the Dutch NCP to be equally accessible for the MNE in the case – particularly when enquires were raised to the Dutch NCP. The representative of the business community characterised the Dutch NCP as 'very reachable', 'very accessible by email, during calls' and thus 'accessible'. In the same case, the accessibility of the claimants to the specific instance procedure was positively assessed. It was particularly acknowledged that the Dutch NCP collaborated very effectively with a Dutch embassy to offer a location for the mediation. This turned out to be key to make the complainants feel that their case was going to be seriously considered. The Dutch NCP was also commended, because it funded travel and lodging costs for the claimants.

| 46 |

The perception of the interviewed stakeholders is that the Dutch NCP is very open and accessible. For example, one stakeholder mentioned that if a national trade union asks the Dutch NCP to attend policy meetings or sectoral meetings, the Dutch NCP will attend and provide sufficient presentations on the Guidelines. Accordingly, national trade unions feel confident to invite the Dutch NCP for events, to comment and support the promotion of the Guidelines. An example was also provided by the same stakeholder regarding the high level of accessibility of the Dutch NCP in comparison to other NCPs, e.g. for responding to enquiries concerning the controversial issue of campaigning by NGOs and trade unions during the initial assessment phase of a specific instance submitted to the Dutch NCP about similar issues. The same stakeholder considered the Dutch NCP currently as 'the best' NCP in terms of confidence for enquiries, specifications or promotion questions.

### 5.2.2 Accessibility weaknesses

The accessibility of the Dutch NCP was questioned in terms of number of cases assessed and the use of resources to resolve future disputes. A representative of the business community stated that the Dutch NCP could be more restrictive in the initial assessment phase and not accept all submitted notifications. In his opinion, a good criterion to accept cases would be whether they contribute to the effectiveness of the Guidelines, or else less relevant cases will be taken on with the consequence of a possible case overload. The effectiveness of the Guidelines in this view refers to either new industries or if the case relates to formerly disputed issues.

A similar conception was communicated by one stakeholder who considers the Dutch NCP to be ‘understaffed’ and ‘under-resourced’ compared to the increased number of cases that the Dutch NCP currently handles. The stakeholder believes that more cases have been filed with the Dutch NCP due to its good reputation for resolving cases. However, this might constitute ‘a vicious circle of taking more and more cases’ that in the end will lead the NCP to spend ‘a lot of time’ on these procedures. According to this stakeholder, ‘good cases’ bring ‘good outcomes’ and they represent ‘the biggest promotion of all’, which is ‘the most effective way of looking [at] the Guidelines’. Other interviewees suggested that allocating more budget and staff to the NCP could solve the challenge of handling an increasing number of cases in an appropriate way.

The survey results indicated that some NGOs (i.e. four out of six respondents) are hesitant to file notifications, because they are unsure whether the time invested will weigh up to the results that can be achieved. One respondent mentioned that the process is very formal, which presents a barrier to smaller NGOs and people not used to this type of setting.

Respondents acknowledged a few significant accessibility barriers that can be further explored. They include: the communication language between parties from different countries, travelling costs to provide assistance in mediation abroad, and the costs and time involved in conducting research for fact-finding.

As shown in Section 4.1.2, the findings from the survey among NGOs and trade unions indicated that if the respondents have questions regarding the Guidelines, they will most likely go to MVO Platform or OECD Watch (i.e. three out eight respondents mentioned that), rather than to the Dutch NCP.

## 5.3 Transparency

As mentioned in Section 2.2, NCPs are required to act in a transparent manner. This general principle may only be set aside when confidentiality must be maintained. In this section, we will look at the factor of transparency as pursued by the Dutch NCP – according to its stakeholders.

### 5.3.1 Publishing initial assessments and final statements

The doctrinal research demonstrated that the Dutch NCP has been transparent with regard to publishing all of its initial assessments and final statements. Maintaining transparency is important for stakeholders as it contributes to the confidence in the Dutch NCP’s procedures. The stakeholders indicated that publishing initial assessments and final statements is good practice and that the Dutch NCP is one of the few NCPs that does so.

Thus, in general, a positive view is held of the level of transparency realised by the Dutch NCP. One stakeholder mentioned that publishing the initial assessment not only adds to the transparency of the NCP in general, but also benefits transparency concerning ongoing procedures. Otherwise the final statement would be the first information published on a notification. Parties interviewed in the case studies indicated that they were always asked for input on draft reports, which were shared by the Dutch NCP with both parties before they were published.

### 5.3.2 Transparency vs confidentiality

An important matter that arises in every specific instance procedure in which mediation takes place, is that of confidentiality. When entering into mediation, a confidentiality agreement is usually signed by the parties for the duration of the mediation. This mainly aims to prevent information from being (publicly) disclosed during the progress of the meetings, which might impede or harm the process. The confidentiality agreements also regard documents and information that may be shared as part of the mediation process. The agreement often ensures that the NGO or trade union will not use the information for their campaign or share it with the media. Though arguably beneficial for the chances of successfully reaching an agreement, confidentiality will always make the procedure less transparent. Some stakeholders indicated that the Dutch NCP manages to maintain a good balance between

transparency and confidentiality, as confidentiality can be necessary at times to make progress. Companies need to be confident that any information shared by them in the process will not be used in ways that it was not intended for. Should such guarantees not be given by the others involved, it might prove more difficult to convince companies to participate in the mediation at all. Nonetheless, it can be problematic if the NCP obtains certain information that the company concerned does not wish to be included in a final statement, which was the case in one case under study. Although confidentiality issues can be partly addressed by a non-disclosure agreement with the other parties to the specific instance and by means of a provision in the ToR for the mediation by the NCP, still the tension between confidentiality and transparency makes it difficult for the NCP to formulate recommendations or determinations and complicates transparency regarding the substantiation of conclusions.

## 5.4 Accountability

NCPs are required to be accountable for their actions, be it through national parliaments, regular meetings with other NCPs or via their annual reports. In this section, the topic of accountability of the Dutch NCP will be examined by sharing the views of the interviewed stakeholders.

There are essentially two ways of looking at an NCP's accountability. First, there is the NCP's accountability for its activities and spending. This can be ensured, as the Commentary on the Procedural Guidance suggests, e.g. by periodically reporting to parliament. Second, accountability can also refer to the decisions an NCP makes, mainly regarding the acceptance or rejection of a notification for further consideration.

| 48 |

### 5.4.1 Activities and spending

In terms of the overall accountability, the Dutch NCP has not published its own annual report since 2013. However, it has reported annually to the OECD. These reports include information on the number of promotional activities and specific instances handled and are published on the Dutch NCP's website. The annual OECD report of the Dutch NCP for the year 2017 was only recently published, together with the 2018 report. Both reports were not ready at the time of our evaluation. Moreover, the OECD reports do not include any type of financial reporting. The two NCPs which are included in the budget comparison (see Section 4.2) do publish information on their expenditure annually, either as part of their annual report or separately.

Since December 2014, when the 2014 Decree was amended (revised), the position of the Dutch NCP towards the minister has changed.<sup>94</sup> Under the revised Decree, the NCP has to send its decisions regarding specific instances to the minister as well as to the parties involved in a specific instance and it has to publish its decision, unless confidentiality restricts publication. Before December 2014, the minister used to read the decision first and add his/her findings regarding the decision, without changing the NCP's decision, before it was published. Since this requirement was removed, the nature of accountability from the Dutch NCP towards the minister has changed and the Dutch NCP's position has become more independent from the Ministry of Foreign Affairs.

Accountability of the Dutch NCP is strengthened in the 2014 Decree. Every four years, the minister needs to send a report about the Dutch NCP to parliament, to assist in the evaluation of the functioning of the NCP.<sup>95</sup>

### 5.4.2 Decisions

With regard to the accountability of the Dutch NCP and its decisions, the Dutch NCP publishes all its initial assessments. These usually contain an overview of the criteria that are considered as part of the assessment and the stance of the Dutch NCP, especially in recent years. In this way, the Dutch NCP provides insight into its decision-making process.

<sup>94</sup> Article 7 Government Decree NCP 2014 (Stcrt. 2014, no. 36720).

<sup>95</sup> Article 9 Government Decree NCP 2014 (Stcrt. 2014, no. 19014).



This does not mean that the specific instance procedure is always predictable, as will be elaborated upon under the criterion of predictability (see Section 5.6).

## 5.5 Impartiality

As mentioned in Section 2.2, NCPs are required to be impartial in the resolution of specific instances, for example by not taking biased decisions. In this section, the impartiality of the Dutch NCP according to its stakeholders is assessed.

### 5.5.1 Checks and balances

Generally, the respondents in the stakeholder interviews, case study interviews and the survey, consider the Dutch NCP as impartial. Part of this confidence comes from the structure of the Dutch NCP and the fact that its members are persons of stature. The Dutch NCP has developed internal mechanisms, checks and balances to safeguard and maintain impartiality.

In their internal structure, the Dutch NCP's members have developed a system according to which only two out of four members work on a case, whereas the other two members maintain a role that is tantamount to an objective observer. The cases are discussed among all four members to balance the Dutch NCP's assessment. In addition, the members' assignment to a case is subject to dialogue on potential problems regarding impartiality or conflicts of interest.

### 5.5.2 Trust and acceptance mediator

Stakeholders agree that trust is necessary for the specific instance procedure to function. Thus, the role of the Dutch NCP in the trust-building process is important. Although the Dutch NCP is generally perceived as impartial and stakeholders have developed trust in the Dutch NCP, stakeholders indicated that this is not always the case for NCPs in other countries. Stakeholders agree that it is important that the Dutch NCP understands both the civil society and business perspective.

| 49 |

Stakeholder interviews and the case studies indicated that it is important that the mediator is accepted by both parties. A best practice which was mentioned with regard to the UK NCP was the development of a short list of mediators from which the parties can choose the most suitable person for their case. In one case, the appointment of an assistant mediator who was accepted by both parties was also considered a best practice. The assistant mediator was equally familiar with the cultural and national background of all parties involved in the specific instance. This helped the mediators to understand cultural sensitivities that might be relevant to the notification, which is relevant to many cases as the alleged violations mostly took place abroad.

A critical comment made in one of the case studies by one interviewee from the business sector is that the Dutch NCP should be careful about encouraging NGOs to submit notifications. Although the Dutch NCP is responsible for furthering the implementation of the Guidelines, this interviewee was of the opinion that the Dutch NCP should not inform parties that they can submit a notification, because this interviewee believed that this could harm the NCP's impartiality. An independent NCP member acknowledged the sensitivity and complexity of balancing between informing parties about the Guidelines and the procedures to submit a notification versus giving parties too much encouragement to submit a notification to the possible detriment of the NCP's impartiality.

## 5.6 Predictability

As mentioned in Section 2.2, NCPs need to ensure the predictability of specific instances by offering clear and publicly available information. In this section, the predictability of the Dutch NCP according to its stakeholders is assessed.

With regard to the specific instance procedure, it is possible to differentiate between procedural predictability and predictability in terms of outcome of the procedure. Procedural predictability is ensured by providing clear information on the role of the Dutch NCP, the different stages of the procedure and providing an indication of the expected time frames. The predictability of the outcome of the procedure is more complicated, as every case is very different, and both parties often have different expectations of the specific instance procedure.

### 5.6.1 Procedural predictability

Respondents found the procedure to be sufficiently predictable in terms of the procedural steps that are followed. However, even though the Dutch NCP has already indicated that it cannot currently meet the time frames for the specific instance procedure and noted that every case is unique and hence difficult to predict, it was mentioned multiple times that the procedure takes up more time and effort than expected. Parties are sometimes frustrated by the time needed for the mediation process itself, the time and effort it takes to prepare for the meetings, and the time needed by the NCP to organise meetings, and to draft and publish its statements. One party felt that the speed of process could have been improved if the Dutch NCP had been more knowledgeable about the content of the case prior to the mediation meetings. Time was lost in this case on having to explain certain technical industry mechanisms, not only to the opposing party, but also to the Dutch NCP members. An NCP member refuted this statement, arguing that the Dutch NCP does not lack knowledge.

| 50 |

In one case, the NGO involved was disappointed with the company's change in commitment during the dialogue that began following the specific instance. Hence, no agreement was reached. The Dutch NCP indicated it was not possible to end the procedure without publishing a final statement. The NGO went on to respond to the information provided by the company for the final statement, as in their opinion this was largely inaccurate. It seems clear to parties what happens when the company does not want to partake, i.e. a final statement is published.

### 5.6.2 Predictability on outcomes of the procedure

A recurring theme throughout the interviews, and the evaluation in general, concerns the conflicting views and expectations of the NGOs or trade unions and the business representatives when it comes to the specific instance procedure. NGOs can be disappointed in the outcome of the procedure, as they expect or hope for either stronger final statements by the NCP, e.g. by establishing that a violation of the Guidelines has occurred, or by providing more extensive forms of remedy. The companies, however, expect the dialogue of the mediation procedure to focus on the future, on improving company activities or policies where needed. As a result, the companies want the NCP to adopt a forward-looking approach, i.e. focus less on the question whether or not the actual violations took place but discuss what can be done to ensure violations will not happen in the future. The NGO or trade union is often looking for acknowledgement of the violation and the subsequent provision of appropriate remedy to those affected.

These conflicting stances often create frustration with one or both of the parties involved. The tension is inherent to the different perspectives of the parties. The Guidelines leave room for both approaches in the specific instance procedure and a broad range of possibilities for defining remedy. In the Heineken case, financial remedy was provided as a result of an agreement reached by the parties in the mediation process. Intentions regarding financial compensation of the complainants were clear, and were also made clear to the company, after which both parties continued to partake in the process. This remains, internationally, a unique occurrence. In other cases, the forward-looking approach was adopted, sometimes to the ultimate disappointment of the NGOs involved.

Stakeholder representatives of both the business community and civil society indicate that it would be good for the NCP to create clarity on this matter at the start of the procedure, or even in general. As the Guidelines leave room for various interpretations, it is understandable that this matter remains case-specific.

## 5.7 Equitability

As mentioned in Section 2.2, NCPs are required to ensure that the specific instance procedure is fair and equitable, for example by ensuring that both parties have the same information. In this section, the equitability of the Dutch NCP according to its stakeholders is assessed.

The overarching objective of the Dutch NCP is to make all parties feel at ease and comfortable in ‘that they are listened to on an equal footing’ and treated equally during the processes. In one case, the example was given that all parties received the facilitation services of the Dutch embassy equally. The equitability of the Dutch NCP was also confirmed by the representative of the business community stating that ‘the NCP was equally accessible to the company, in case of any questions’.

### 5.7.1 NGO and trade union perspective: power imbalances

Stakeholders confirm that when an NCP does not or cannot provide equitability, they will not file a notification because it would not be worth the effort. Confidence and trust in the NCP are therefore important for stakeholders to proceed with filing a complaint. There are several dimensions to consider when creating the right circumstances in the mediation, where the NGO or trade union and the MNE feel they are equal. On the part of the NGOs, it is felt that NGOs have a less favourable position to start with, as MNEs are often powerful in the sense that they have ample financial means and lawyers at their disposal. The Dutch NCP has been known to advise against having only lawyers present at the mediation meetings, thus trying to increase the equitability of the parties

| 51 |

### 5.7.2 MNE perspective: fishing expeditions

Companies, on the other hand, feel that much is asked of them in the procedure. Business representatives that were involved in the procedure state that it is not helpful to feel pushed into a defensive stance to begin with. In one case, the business representative indicated that considerable demands are made of the company in terms of documentation, i.e. the NGOs plied the company with many questions or requests for documentation. If the requested information does not relate to the content of the complaint under discussion, then the Dutch NCP is expected to actively curb fishing for information and to ensure that parties stick to the matter at hand.

An independent member of the Dutch NCP recognised the vast amount of questions raised by NGOs during specific instances processes. In addition, the NCP member noted that in some instances new issues emerge during the procedure. These new issues add to the complexity of the case and the challenge the fairness of the procedure. It would be better to stick to the complaints lodged at the outset of the procedure according to the respondent.

## 5.8 Compatibility with the Guidelines

As mentioned in Section 2.2, NCPs are required to act in a manner that is compatible with the principles and standards enshrined in the Guidelines. In this section, we will look at the compatibility of the Dutch NCP with the Guidelines according to its stakeholders.

### 5.8.1 Procedural compatibility

There are multiple examples that illustrate how the Dutch NCP achieves procedural compatibility. For instance, the Dutch NCP follows the six points addressed in the Commentaries on the Procedural Guidance for its initial assessment (e.g. whether an issue is material and substantiated), adopts and applies the indicative time frames for specific instance procedures, and the Dutch NCP publishes its initial

assessments and final statements in conformity with the Procedural Guidance. Our research shows that the Dutch NCP does not shy away from procedural innovations. Section 4.1.4 discussed the preliminary final statement as a means of increasing functional equivalence. Section 4.1.3 mentioned the confidential bilateral meetings as a step prior to the good offices phase, to discuss the procedure and possible issues beforehand. Yet another example is issuing a final statement after the party that submitted the notification withdraws from the specific instance. All examples show that the Dutch NCP can create new procedural steps that are not found in the OECD Council's Decision or its Procedural Guidance when this benefits the implementation of the Guidelines.

Our research also shows a few procedural incompatibilities or, at least, inconsistencies. First and foremost is the question of competence. As a general rule, according to the Procedural Guidance, the NCP of the country in which the issues arise is competent. In the *Atradius* case, the issues took place in Brazil and in the Netherlands. Hence, issues pertaining to Van Oord were taken on by the Brazilian NCP and those of *Atradius* by the Dutch NCP. When compared to the *Mylan* case, we found that the issues took place in the US (i.e. execution of the death penalty), while the MNE was headquartered in the Netherlands. It would be in line with the Procedural Guidance if the US NCP would have taken on the case. Eventually, the Dutch NCP took on the case, because *Mylan* is a Dutch MNE. According to the information received in the interviews, it was clear that this apparent inconsistency is due to a practical approach of the Dutch NCP: after consulting with the other NCPs, the Dutch NCP accepted the case. Another incompatibility is the terminology used. As shown in Figure 4-1, the Dutch NCP mostly uses the term 'final statement' in cases where negotiations came to naught as well as when parties reached an agreement. Strictly speaking, when following the Procedural Guidance, in cases where an agreement is reached, an NCP issues a 'report' and in cases where negotiations fail, an NCP issues a 'final statement'. However, the Dutch NCP issued a 'final statement' in the *Heineken* case (and other cases) while an agreement was reached. The Dutch NCP came close to the terminology of the Procedural Guidance in the *Nidera* case (which dates from before evaluation period)<sup>96</sup> by labelling its decision a 'final report', because an agreement was reached.

### 5.8.2 Compatibility with the content of the Guidelines

In one of the interviews, the Dutch NCP was commended for its commitment to human rights, justice and the advancement of the Guidelines. The Dutch NCP has often been confronted with cases that did not exactly fit the content of the Guidelines or in which interpretation was needed. In other words, the NCP was required to interpret the Guidelines in order to further their implementation.

In the *Mylan* case, the Dutch NCP showed the broad application of the Guidelines to value chains and the important role of the financial sector to use their leverage. The application of the Guidelines to state agencies, such as export credit agencies, was a novelty firstly established in the *Atradius* case. The Dutch NCP also showed how the Guidelines may apply to minority shareholders, even if their leverage seems to be minute, in the *POSCO* case. In the *Heineken* case, financial compensation was awarded and more recently, the Dutch NCP once more pushed the barriers of the Guidelines by applying the Guidelines to include the right to culture in the *Bresser* case.

<sup>96</sup> This is case: CEDHA et al. vs Nidera.

*Case: Three individuals versus Heineken.*

*Complaint: Financial compensation was claimed for collective lay-offs at the Brelima brewery in the DRC.*



# 6

## Discussion

The findings of the evaluation lead to several discussion points. These can be grouped into several overarching themes, each of which relates to trade-offs that the Dutch NCP is faced with regarding its role and the specific instance procedure in particular.

### 6.1 Accessibility and capacity

In comparison with other NCPs, the Dutch NCP has a broad policy for accepting specific instances. The Dutch NCP has the reputation of not shying away from innovative or difficult cases (see Section 5.8.1). This reputation has increased the number of notifications submitted to the Dutch NCP and is, in that sense, beneficial to its accessibility.

The potential downside of the progressive approach of the Dutch NCP is the increasing number of cases, which puts a strain on available resources. The Dutch NCP is considered by stakeholders to be under-resourced and understaffed. This could arguably affect accessibility in a negative way, should the Dutch NCP not be able to take on additional cases. Of course, this also affects the NCP's other functions, such as its promotional activities. There are other NCPs, such as the Danish NCP, that have a stricter framework of criteria for accepting cases. For example, by limiting the time period after which a notification is still considered.

## 6.2 The visibility scope

A thorny issue concerns the scope of an NCP's visibility. In Section 5.1, it was found that the Dutch NCP is relatively well-known among NGOs and trade unions compared to its visibility among MNEs. Being more visible among Dutch MNEs and maintaining its visibility among trade unions and NGOs may be a no-brainer. It is more difficult when we try to determine the scope of the Dutch NCP's visibility when it comes to non-adhering countries. The *locus delicti* in a number of instances was a foreign non-adhering country. Should the Dutch NCP therefore also be visible in these countries so that it can be used by affected parties on the ground? Although our research does not offer a clear-cut answer, the role of international NGOs, such as SOMO and Oxfam Novib, may be very important. These parties act as a linking pin between the Dutch NCP and aggrieved local parties, and they indirectly assist in broadening the visibility of the Dutch NCP.

## 6.3 The forward-looking approach

The Dutch NCP's forward-looking approach can have both beneficial and potentially detrimental effects. The term 'forward-looking' means that the process is aimed at improving future policies, practices and procedures and – in essence – future relationships. It is likely that the forward-looking approach is an important factor which contributes to the relatively high number of cases at the Dutch NCP in which mediation takes place.

The Heineken case, on the other hand, made clear that cases aimed at financial compensation or other concrete forms of remedy are also a possibility and can be concluded successfully. From a civil society perspective, achieving remedy in such a concrete form for past violations would make the Dutch NCP truly effective. Yet focusing on alleged violations, remedy or remuneration more explicitly might make companies less willing to participate. The case studies have shown that a willing company is currently a critical success factor for reaching an agreement in the mediation process.

## 6.4 Mediation or adjudication

The findings illustrate the tension between mediation and adjudication. By definition, an NCP is not obliged to make determinations. However, the Dutch NCP is often expected to do so by civil society stakeholders regarding the alleged violation in the complaint, even though the Dutch NCP's fact-finding capabilities are limited. Both civil society and business representatives believe fact-finding by an independent party could be beneficial to the mediation process. NCPs are meant to offer good offices, meaning facilitating mediation or conciliation. This is a task that the Dutch NCP performs well compared to other NCPs.

Though the OECD Investment Committee has noted that NCPs are not meant for adjudication, the question is raised whether the Dutch NCP should develop a more adjudicative role. A lack of determinations might lead to disappointed NGOs and trade unions, and consequently a decline in the trust and confidence in the procedure. This might lead to a situation similar to when NCPs slumped into disuse in the 1990s. In contrast, such a change of role might have repercussions for the willingness of the MNEs to participate. Business representatives emphasise that starting a procedure aimed at financial

compensation should be approached cautiously. Companies will remain reluctant to admit to violations if there is a chance that this may have legal consequences. A more active, adjudicative role of the Dutch NCP might then cause the MNE's confidence and trust in the process to decrease.

## 6.5 The court of public opinion

The role of the media must not be underestimated. For example, there was considerable media coverage of the *Heineken* case, and Dutch and French newspapers regularly reported on the case as well. In a Dutch newspaper, the MNE publicly acknowledged the importance of the international media in the case.<sup>97</sup> This was corroborated by a local party in one of our interviews. In a similar vein, substantial media coverage was given to the *Mylan* case and the *POSCO* case – the latter especially in Norway. This begs the question whether the media play a vital role, without which the parties will not come to an agreement, or merely a subsidiary role. Media may have a role to play in shaping 'the court of public opinion', i.e. the perspective of the general public on the case. This may provide an impetus to reach an agreement, but it also has the potential to have an adverse effect. Naming and shaming may take on the form of pillorying companies and consequently may also decrease their willingness to participate in a specific instance. Outreach via the media by an NCP therefore remains a point for discussion.

## 6.6 Sector agreements

There is some discussion regarding the role of the Dutch NCP in sector agreements. In Section 4.1.4, it was made clear that the Dutch NCP plays an important role in sector agreements by providing input for the draft texts and by assisting the grievance mechanisms of the sector agreements in how to set up their grievance structure.

| 55 |

In the interviews it was proposed to single out the Dutch NCP as the grievance mechanism for all sector agreements. Instead, other respondents expressed their preference for the existing system whereby every sector agreement has its own grievance mechanism. Following that line of thought, the Dutch NCP can function as an 'appeal' mechanism, a last resort, in case the sector grievance mechanisms do not manage to redress the grievances. The latter option may be the most feasible, practically speaking, as some sector grievance mechanisms are already set up and running and, moreover, the case burden on the Dutch NCP will be lower if cases are first dealt with by sectoral grievance mechanisms.

## 6.7 Sector assessments

Upon request of the Dutch cabinet, the Dutch NCP conducted a sector-wide assessment of the implementation of the Guidelines in the oil and gas sector. Although such assessments may increase the visibility of the Dutch NCP, the desirability of using the NCP for conducting such assessments can be questioned. The sector-wide assessment of the oil and gas sector took up a considerable amount of the Dutch NCP's time and budget. In the end, the Dutch NCP had to hire an external party through a tender to conduct the assessment. This may have relieved the NCP a bit, but the fact remains that the entire process required a considerable amount of time and budget. Arguably, the NCP should focus on its three core tasks and should not concentrate on initiating new sector assessments. Alternatively, sector assessments can be conducted by consultancy firms, commissioned by the Dutch government. This should be weighed against the potential benefit of conducting sector assessments by the Dutch NCP insofar as this increases the exposure of the NCP and the Guidelines.

<sup>97</sup> O. Van Beemen (28 August 2017), *Heineken betaalt Congolezen na klacht mensenrechtenschending*, NRC Handelsblad, <https://www.nrc.nl/nieuws/2017/08/18/heineken-betaalt-congolezen-na-klacht-12563201-a1570284> accessed 27 February 2019.

**Case:** UNI Global Union versus VEON.

**Complaint:** Alleged asuaesnti-union activities by VEON, a telecom operator operating in Bangladesh.



## Conclusions and recommendations

In this chapter, main conclusions resulting from the evaluation are outlined by summarising the conclusions for each evaluation question. The last evaluation question is dedicated to providing recommendations that follow from the findings of the evaluation.



## 7.1 Conclusions

### Effectiveness

1. *What activities have been undertaken by the Dutch NCP to promote and interpret the content and meaning of the Guidelines? How has this developed over the years? Have these activities been effective?*

- The NCP's activities have mostly revolved around the handling of notifications and the managing of subsequent specific instance procedures. Since 2014, expenses made for purely promotional purposes have declined. The Dutch NCP has organised annual conferences and published its initial assessments and final statements consistently, which helped to promote the NCP as a grievance mechanism. The consensus among civil society stakeholders is that companies are not yet familiar enough with the Guidelines, which is supported by research from 2016 that included a survey among companies.

2. *How many notifications have been handled by the Dutch NCP? What notifications? How has the Dutch NCP facilitated dialogue? What were the results? Have issues been solved adequately?*

- The Dutch NCP received 12 notifications in the evaluation period, two of which were rejected for further consideration or where an agreement was reached outside of the specific instance procedure. Of the remaining 10 cases, nine led to mediation meetings taking place. During the review period, two procedures were ongoing, five were concluded with an agreement and in three cases no agreement was reached. For all procedures an initial assessment and final statement was published. A follow-up meeting or evaluation took place for four of the agreements. The agreements mostly pertained to policy changes, for example regarding the company's policies concerning due diligence, reporting or disclosure procedures, i.e. the agreements were forward-looking in approach. One case resulted in financial compensation for the complainants (because the parties involved agreed upon this point).
- The share of agreements reached by the Dutch NCP is large compared to the share of agreements reached in instances of other NCPs. The Dutch NCP also acts in accordance with the Guidelines insofar as it publishes its final statements, including an overview of the proceedings, the agreement and recommendations. As for the overall proceedings and facilities offered by the Dutch NCP in the process, the parties are generally positive.
- Parties to the mediation process often have expectations. As the expectations of the parties diverge, it appears difficult for the Dutch NCP, if not impossible, to guide the mediation process in such a way that all expectations are met. Thus, when asked if they are satisfied with the process, parties to a notification are not always positive. Complainants wish for stronger statements, and ideally determinations of violations. However, without its own research capacity and fact-finding, the possibilities for the Dutch NCP to do so remain limited. Complainants have been dissatisfied by the adoption of a forward-looking approach (i.e. focussing less on whether actual violations took place and instead discuss what can be done to avoid future violations) in many cases, or the complaint being only partially accepted.

3. *What other activities have been undertaken by the Dutch NCP in view of its redefined mandate (pursuant to the 2014 Decree)? What has been the role of the Dutch NCP in the development of sector agreements? What sector-wide assessments have been conducted? How often has the Dutch NCP facilitated dialogue in a situation in which no formal specific instance has been submitted?*

- Regarding the recent sector agreements, the Dutch NCP plays a visible role to stakeholders, especially during the drafting process. The Guidelines are considered to be the inspiration and foundation of the sector agreements, as the Guidelines are often referenced or sometimes built into them.

- The Dutch NCP has conducted research into the oil and gas sector and the sector's implementation of the Guidelines. This research was published after the evaluation period, hence the content of the report could not be included in this evaluation.
- As part of its task to handle enquiries, the Dutch NCP has incidentally facilitated a dialogue without a formal notification (e.g. CPL vs the Palestine Committee).

### Efficiency and timeliness

#### 4. *To what extent has the Dutch NCP dealt with the issues raised (through formal notifications or otherwise) in an efficient and timely manner?*

For most specific instances handled during the period 2012-2018, the Dutch NCP has taken longer than the indicated time frames to complete the specific instance procedures. Though the Dutch NCP currently communicates this beforehand to (prospective) parties in the procedure, many stakeholders see the process as lengthy and time-consuming. However, taking more time may be warranted if trust needs to be built between parties.

- As the Dutch NCP is restricted in its capacity, with regard to time and personnel in particular, work that otherwise might be carried out by the secretariat has to be done by the Dutch NCP's members themselves. This is less efficient, as it decreases the amount of time the members have for their core activities.

#### 5. *How do the results (outputs and outcomes) of various activities compare to the amount of time and budget allocated?*

| 58 |

- Considering that the total expenditure of the NCPs compared in this evaluation differ, it can be said that the Dutch NCP handles a relatively high number of notifications in relation to its budget. This is certainly the case if the extra 10 pending notifications are taken into account (bearing in mind that we do not have any knowledge about the number of pending notifications at the other NCPs that we investigated). Differences in expenditure can be explained as the Dutch NCP focuses on the resolution of disputes during specific instances whereas the other NCPs devote a substantial part of their time to promotional activities. Due to these differences it is more difficult to make a comparison of the efficiency of the specific instance procedures.

### OECD criteria

#### 6. *How does the Dutch NCP perform in terms of visibility, accessibility, transparency and accountability? What has been done to improve its performance on these criteria?*

- The Dutch NCP has increased its **visibility** by maintaining its website, publishing specific instance documents and organising stakeholder meetings. Activities to improve the visibility of the Dutch NCP have been held less frequently in recent years as a result of limited capacity. The Dutch NCP currently prioritises the specific instance procedure notifications above promoting the Guidelines through activities and events.
- The **accessibility** of the Dutch NCP in terms of the notifications it receives is relatively high (bearing in mind that we do not have any knowledge about the number of pending notifications at the other NCPs that we investigated). NGOs and trade unions considering filing a notification know how to find and how to contact the Dutch NCP. Furthermore, the Dutch NCP is accessible, because it has a broad policy concerning accepting complaints.

- Also beneficial to accessibility was the funding of travel and lodging costs of complainants by the Dutch NCP in one case, which was seen as very important to the progress made. The specific instance procedure is said to be rather formal, which might present a barrier to smaller or less professional parties.
- When it comes to enquiries about the content or development of the Guidelines, NGOs indicated that they will generally not contact the Dutch NCP but instead refer to other organisations that provide information on the topic of the Guidelines.
- The Dutch NCP is **transparent**, in that it publishes statements on the progress of the specific instance procedures. Both parties can provide input to the documents before they are published. The initial statement provides information on the initial assessment of ongoing cases.
- The Dutch NCP is perceived to adequately balance confidentiality and transparency. Mediation under the specific instance procedure often requires a level of confidentiality for it to be successful. This is in line with the Guidelines.
- **Accountability** can be difficult in a situation in which the Dutch NCP is confronted with a trade-off between confidentiality and transparency during the mediation process. As one case study showed, a decision may be based on information that cannot be shared with the public.
- The Dutch NCP does not currently publish an annual report, but only reports to the OECD on its activities. There is currently not enough personnel capacity to produce separate annual reports.
- As a result of the amendment of the 2014 Decree, the minister of BHOS no longer shares his or her findings concerning a draft statement before it is published. Although the level of accountability towards the minister has decreased, this procedural change has improved the independent position of the Dutch NCP.

*7. To what extent has the Dutch NCP respected the guiding principles for specific instances: impartiality, predictability, equity and compatibility with the Guidelines?*

- Generally, the Dutch NCP is seen as **impartial**. Contributing factors are the way in which the Dutch NCP is organised and that the members are considered to have stature. The Dutch NCP works to create trust between the parties and facilitates this process where needed. It is not beneficial to its perceived impartiality for the Dutch NCP to actively encourage parties to submit a notification.
- The due process of the specific instance procedure is clear to participating parties. The process does take more time and effort than most stakeholders had expected, meaning the **predictability** of this aspect could be improved. The predictability in terms of outcome of the procedure remains hard to achieve, as parties often have opposite expectations and a different interpretation of the Guidelines about what the specific instance procedure is for.
- **Equitability** needs to be ensured so that parties can engage in the process on fair terms and an equal footing. In some instances, the Dutch NCP is considered equitable, but there is still room for improvement. Companies are sometimes afraid of fishing expeditions by the other party and NGOs and trade unions emphasised the power imbalances between them and MNEs. Power imbalances exist, for instance, in terms of funds needed to prepare a notification of a specific instance and to participate in the process. A power imbalance also reveals itself in the actual situation: NGOs and trade unions cannot unilaterally change the behaviour of an MNE. Hence, in order to change the behaviour, it is necessary that the MNE participates in the mediation and agrees to implement another approach, for example.

- **Compatibility with the Guidelines** ensures that the Dutch NCP acts in accordance with the Guidelines. In practice, the Dutch NCP follows the Procedural Guidance during specific instances and also dares to interpret them. The preliminary final statement, confidential bilateral meetings and the issuance of a statement in case the mediation fails are all examples of procedural innovations. Content-wise, the Dutch NCP also pushed the barriers of the Guidelines in multiple cases, such as in the *Bresser* and *POSCO* cases. Possible incompatibilities relate to the terminology used and competence questions.

### Looking forward

#### 8. *Does the current governance and funding structure facilitate the Dutch NCP to fulfil its tasks effectively, efficiently, timely and in line with the OECD criteria?*

- Currently, the Dutch NCP lacks the capacity to fully fulfil all of its tasks and to ensure that the specific instance procedures are completed within the time frame set by the Guidelines. This decreases the effectiveness of the NCP. The current governance structure makes it difficult to expand capacity at short notice. The current governance structure does not impede the Dutch NCP from adhering to the guiding principles for specific instances (*impartiality, predictability, equity and compatibility* with the Guidelines). In terms of other activities, the Dutch NCP has declined to partake in upcoming peer reviews of other NCPs due to the lack of capacity. The operational budget is not a constraint.

## 7.2 Recommendations

### *Which aspects of the functioning of the Dutch NCP could be improved and how?*

| 60 |

- To enhance the Dutch NCP's **effectiveness**, more staff with relevant expertise should be appointed to the NCP. This will allow the NCP members to focus more on their core tasks. If more staff is appointed, a director or secretary could spearhead the secretariat, supported by a personal assistant, and a number of case managers that coordinate specific instances.
- To increase the **visibility** of the Dutch NCP on the ground, Dutch embassies could actively promote the Guidelines and NCPs by referring more often to them when they are in contact with Dutch companies and their local partners and by organising events. Embassies play an important role in countries where possible violations of the Guidelines take/took place. It would be good if the embassies' staff follows a more structured programme concerning the Guidelines and the NCP activities. Such a programme could be developed and executed by the NCP to improve the Dutch NCP's visibility as well as accessibility. The Dutch embassies could also collaborate more with Dutch NGOs with an international scope, such as SOMO and Oxfam Novib. Through these parties, the role of the Guidelines and the Dutch NCP and other NCPs could be promoted to make aggrieved parties – especially in non-adhering countries – aware of the Dutch NCP's facilities. Via (international) chambers of commerce, the Guidelines can also be promoted among the business community. Disseminating press reports about specific instances may better inform the general public about the NCP's activities.
- It is recommended that the Ministry of Foreign Affairs improves the **accessibility** of the Dutch NCP by strengthening the NCP financially and by providing additional human resources. This includes funds for third-party mediators and/or external parties assigned to conduct fact-finding missions (e.g. an accountant). The Danish and Norwegian NCPs, for instance, spend more budget on external consultants. The Dutch NCP could follow these examples and involve external experts. The reason for strengthening the NCP financially and with more staff is to increase the accessibility of the NCP by enabling it to better handle the caseload.

- It is recommended to further improve **accessibility** by allocating a budget to support parties when they do not have sufficient funds at their disposal, such as in the *Heineken* case.
- An annual report could contain more elaborate information on events and instances, and could therefore have a promotional function and also contribute to the **accountability** of the Dutch NCP. Financial information should also be included.
- In terms of **predictability** (and visibility), it is recommended that the Dutch NCP keeps track of its own decisions and those of other NCPs (*stare decisis et quieta non movere*<sup>98</sup>). After each case, a document with 'lessons learnt' can be drafted by an external expert (as often happens in court decisions in the form of a 'Note' or a 'Commentary') or in a 'case law overview' on an annual basis. Such expert opinions can be made publicly available through an online publication at the NCP's website or a special online journal (e.g. to be issued by the NCP, a group of NCPs or the OECD).
- To increase the **predictability** of the outcome of a specific instance, expectations should be managed, preferably at an early stage – for instance, during the confidential bilateral meetings. Clarity on the intentions and expectations of both parties seems essential to prevent disappointment after the process (e.g. remedy or not, forward-looking or not).
- It is recommended that the Dutch NCP establishes a clear demarcation between the mediation or conciliation procedure and the drafting procedure of a final statement in the event that no agreement has been reached after a mediation process. If necessary, 'Chinese walls' can be created in order to prevent confidentially shared information from finding its way into the final statement. In practice, the NCP can appoint a third party or extra staff for drafting the initial assessment and the final statement leaving the mediation task for the independent members (or vice versa). This prevents having to involve mediators in the drafting of a final statement. This may improve the NCP's **impartiality** and the **transparency** of the procedure.
- The creation of a Helpdesk is recommended for the **handling of the enquiries**. A Helpdesk can be staffed with external experts. This will increase the accessibility of the Dutch NCP, because an adequate and fast response can be provided whereas the NCP independent members currently do not have sufficient time for this core task. Also, responding to enquiries seems to be a task which can be performed by people other than the NCP's independent members, hence the allocation of funds is expected to be lower. The Helpdesk can process enquiries from all types of stakeholders and can be positioned as part of the Dutch NCP's secretariat. Stakeholders could be encouraged to send their enquiries to the Helpdesk before filing a formal notification. In this manner, the Helpdesk can also serve as a gateway to a formal notification, possibly teasing out potential notifications that may be handled by the NCP.
- When drafting a ToR in a mediation process, clear expectations on the **follow-up** by the parties must be agreed upon – for instance, with regard to sharing information and campaigning. Monitoring the compliance and the implementation of the agreed commitments of all parties on an (bi-)annual basis also contributes to the implementation of the Guidelines in specific instances.
- It is recommended that the Ministry of Foreign Affairs introduces a proposal for an amendment of the Procedural Guidance in the WPRBC or Investment Committee in order to improve the **functional equivalence** between NCPs. For instance, including a requirement that, in a case in which multiple NCPs are involved, NCPs should reach a common understanding and issue a final statement for such case that is uniform and does not differ across the various NCPs. In order to realise such an outcome, it would be desirable that the WPRBC or the Investment Committee intervene in case the involved NCPs do not succeed in reaching a common approach. Functional equivalence is important for the **predictability** and **accountability** of NCPs.

<sup>98</sup> The term can be translated as "let the decision stand and do not unsettle the established".

- It is recommended that the Dutch NCP promotes **functional equivalence** by promoting peer learning. Improving functional equivalence might also be enhanced by publishing preliminary statements (e.g. as was done in the POSCO case).
- Regarding a complaint concerning a sector agreement, parties should follow the complaint mechanism, if any, in the sector agreement. If the sector agreement does not have a specific mechanism in place, and the complaint relates to compliance with the Guidelines, a specific instance can be started with the NCP. In the event that the sector agreement has a complaint mechanism and the parties have followed that mechanism but one or more of them is not confident about the outcome, currently, the NCP is not mandated to serve as an appeal facility. The research found that several parties are in favour of establishing a procedure that makes the NCP available as an appeal facility. However, currently not all interviewees agreed with this idea.

# Annexes

## Annex I: References

- Blanpain, R. (1983), *The OECD Guidelines for Multinational Enterprises and Labour Relations 1979-1982. Experience and Mid-Term Report*, Kluwer: Deventer, pp. 177-194.
- Creswell, J.W. & Poth, C.N. (2006), *Qualitative inquiry & research design: Choosing among five approaches*, Thousand Oaks, Calif: SAGE.
- Dutch NCP (2016), *OEESO-richtlijnen voor Multinationale Ondernemingen*.
- Government Decree NCP 2014 (Stcrt. 2014, no. 19014).
- Hutchinson, T. & Duncan, N. (2012), Defining and Describing What We Do: Doctrinal Legal Research, *Deakin Law Review*, Vol. 17, No. 1, 83-119.
- IOB (2019), *Mind the governance gap, map the chain: Evaluation of the Dutch government's policy on international responsible business conduct (2012-2018)*. Ministry of Foreign Affairs, The Hague.
- Maheandiran, B. (2015), Calling for Clarity: How Uncertainty Undermines the Legitimacy of the Dispute Resolution System under the OECD Guidelines for Multinational Enterprises, *Harvard Negotiation Law Review*, Vol. 20, 205-244
- Nieuwenkamp, R. (2017), Outcomes from OECD National Contact Point cases: More remedy than you may think!, available at: [www.permanentrepresentations.nl/latest/news/2017/12/5/blog---outcomes-from-oecd-national-contact-point-cases-more-remedy-than-you-may-think](http://www.permanentrepresentations.nl/latest/news/2017/12/5/blog---outcomes-from-oecd-national-contact-point-cases-more-remedy-than-you-may-think) accessed 27 February 2019.
- OECD (2011), Decision of the Council on the Guidelines for Multinational Enterprises, 25 May 2011, Paris, Procedural Guidance Commentaries.
- OECD (2016), Implementing the Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015.
- OECD (2018), *Annual Report on the OECD Guidelines for Multinational Enterprises 2017*, OECD, Paris, p. 28.
- OECD Council (1984), Second Revised Decision of the Council on the Guidelines for Multinational Enterprises, Paris.
- OECD Watch (2015), Remedy Remains Rare. An Analysis of 15 Years of NCP cases and Their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct, Amsterdam, available at: <https://www.oecdwatch.org/wp-content/uploads/sites/8/2015/06/Remedy-Remains-Rare.pdf> accessed 27 February 2019.
- OECD Watch (2017), Our campaign demands for policymakers, available at: [https://www.somo.nl/wp-content/uploads/2018/04/OECD-Watch\\_-Campaign\\_demands.pdf](https://www.somo.nl/wp-content/uploads/2018/04/OECD-Watch_-Campaign_demands.pdf) accessed 27 February 2019.
- OECD Watch (2018), The State of Remedy under the OECD Guidelines Understanding NCP cases concluded in 2017 through the lens of remedy, Amsterdam, available at: <https://www.oecdwatch.org/2018/06/18/the-state-of-remedy-under-the-oecd-guidelines-2/> accessed 27 February 2019.

- Patton, M.Q. (2015), *Qualitative research & evaluation methods: Integrating theory and practice*. Thousand Oaks, Calif: Sage 4th ed.
- Ruggie, J. (2008), *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Protect, Respect and Remedy: a Framework for Business and Human Rights*, UNHRC (A/HRC/8/5).
- Ruggie, J. (2011), *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UNHRC (A/HRC/17/31).
- SER, Dutch Agreement on Sustainable Garment and Textile (2016), available at: <https://www.ser.nl/-/media/ser/downloads/engels/2016/agreement-sustainable-garment-textile.pdf> accessed 26 February 2019.
- UN Working Group on Business and Human Rights (2017), *The National Contact Point (NCP) System – aligning NCP processes with the UN Guiding Principles on Business and Human Rights*, available at: <http://blog.journals.cambridge.org/2017/11/28/the-national-contact-point-ncp-system-aligning-ncp-processes-with-the-un-guiding-principles-on-business-and-human-rights/> accessed 27 February 2019.
- Van 't Foort, S. & Lambooy, T.E. (2018), *Effective or not? The crucial role of effectiveness in specific instances*, in: *Guidelines for Multinational Enterprises: A Glass Half Full*. A Liber Amicorum for dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018, OECD, Paris.
- Van Beemen, O. (28 August 2017), *Heineken betaalt Congolezen na klacht mensenrechtenschending*, *NRC Handelsblad*, <https://www.nrc.nl/nieuws/2017/08/18/heineken-betaalt-congolezen-na-klacht-12563201-a1570284> accessed 27 february 2019.
- VBDO (2016), *Commitment to OECD Guidelines for Multinational Enterprises by Dutch stock listed companies including their awareness of the of the OECD Guidelines for Multinational Enterprises and of the possibilities and procedures provided by the Dutch NCP*, available at: <https://www.vbdo.nl/wp-content/uploads/2018/07/VBDOReportOECDGuidelinesresearch-1.pdf> accessed 27 February 2019.
- Weber, R. (2018), *Development of Coherent Procedural Rules for OECD Guidelines’ Mediation*, In: N. Bonucci and C. Kessedjian, *40 years of the OECD Guidelines for Multinational Enterprises*, OECD, Paris.



## Annex II: Case study respondents and interview template

<b>Table II-1 Case study interview respondents</b>	
<b>Case</b>	<b>Respondent</b>
Three individuals vs Bralima/Heineken	Heineken Global Business Conduct Counsel
	John Namegabe Bugabo, representative of former Bralima employees
	Maartje van Putten, chair and independent member of the Dutch NCP
Both Ends et al. vs ABP/ APG	Wiert Wiertsema, senior policy advisor, Both Ends
	Prafulla Samantara, president Lok Shakti Abhiyan
	Herman Mulder, former independent member of the Dutch NCP
Friends of the Earth vs Royal Dutch Shell	Paul de Clerck, programme coordinator Friends of the Earth
	Shell International BV
Both Ends vs Atradius	Wiert Wiertsema, senior policy advisor Both Ends
	Atradius DSB
	Astrid Bronswijk, head of export credit insurance, Ministry of Finance
	Ministry of Finance, senior legal advisor
	Herman Mulder, former independent member of the Dutch NCP

**Table II-2** *Topic list semi-structured interviews in the case studies*

- Introduction to the evaluation
- In what way are (or were) you engaged with the case?

**Visibility of the Dutch NCP**

- Were you aware of activities undertaken by the Dutch NCP?
- Are members of your organisation sufficiently aware of the Dutch NCP and its function?
- How can the visibility of the Dutch NCP be improved (if necessary) in your organisation?

**Enquiries and interpretation**

- Was the Dutch NCP accessible? What barriers exist to accessing the Dutch NCP and seeking its assistance?

**Specific instance procedure**

- In your view, was the Dutch NCP impartial, equitable and predictable in the specific instance procedure?
- In your view, was the Dutch NCP transparent during the procedure and on possible outcomes? Is the Dutch NCP able to achieve a good balance between transparency and confidentiality?
- What are the critical success factors or best practices in the case? What constitutes a successful case in the eyes of your organisation?
- What are important lessons learned for the Dutch NCP from the case?
- Do you think the Dutch NCP handled the case effectively? Why, or why not?
- If not, what, in your opinion, were the main obstacles preventing the Dutch NCP from operating as effectively and efficiently as expected?

## Annex III: Stakeholder interview respondents and interview template

**Table III-1** *Stakeholder interview respondents*

Senior policy officer at TUAC
Alexandra van Selm, Programme Director International Responsible Business Conduct, Social and Economic Council (SER)
Maartje van Putten, Chair of the Dutch NCP
Joseph Wilde-Ramsing, OECD Watch Coordinator
Winand Quaadvlieg, permanent International Delegate VNO-NCW
Hannah Tijmes, head Humanitarian Aid section, Ministry of Foreign Affairs
Roel Nieuwenkamp, former chair of the WPRBC, Dutch Ambassador to Argentina
Fred van Haasteren and Catelene Passchier, current independent members of the Dutch NCP

**Table III-2** *Topics addressed in the interviews with stakeholders and the Dutch NCP's staff and members*

<b>Topics addressed in the interviews with NCP staff/members</b>	<b>Topics addressed in the interviews with stakeholders</b>
Role of the (staff) member at the Dutch NCP	Past contact or involvement with the Dutch NCP
Promotional activities	Awareness
Visibility of the Dutch NCP	Visibility of the Dutch NCP and general awareness of procedures
Increasing the awareness of the Guidelines	Awareness of the Guidelines
Furthering the effective implementation of the Guidelines	Effective implementation of the Guidelines
Enquiries and interpretation	Enquiries and interpretation
Who accesses the Dutch NCP with enquiries?	Experience(s) with enquiries
Procedures for enquiries and interpretation	
Barriers to accessing the Dutch NCP and assistance	Perceived barriers to accessing the Dutch NCP
Transparency on procedures	Transparency on procedures
Reporting on activities	Results or output
Timeliness and efficiency	Timeliness and efficiency
Specific instance procedure	Specific instance procedure
Starting a specific instance procedure and potential barriers	Experience(s) with specific instances; perceived barriers to accessing the Dutch NCP and (received) assistance
Transparency during the procedure and on possible outcomes	Transparency during the procedure and on possible outcomes
Ensuring impartiality and equitability	Impartiality and equitability
Ensuring consistency in decision-making	Consistency in decision-making
Outcome and follow-up	Outcome and follow-up
Reporting on activities	
Organisational structure of the Dutch NCP	
Governance and staff capacity	
Funding structure	
Opportunities for improvement	
Involvement/consultation of stakeholders	Consultation of stakeholders by the Dutch NCP
International activities	International activities
Activities in support of other NCPs	Experience with Dutch NCP involvement outside the Netherlands
Development worldwide complaint system (functional equivalence)	Development worldwide complaint system (functional equivalence)

## Annex IV:

### Telephone survey with NGOs and trade unions

**Table IV-1** Respondents survey NGOs and trade unions

NGOs	Trade unions
ActionAid	CNV
BankTrack	FNV
Fairfood	
ICN (India Committee of the Netherlands)	
Oxfam Novib	
CSR Netherlands	

**Table IV-2** Survey questions for NGOs and trade unions What (type of) organisation do you represent?

#### Survey questions – visibility of the NCP

1. What (type of) organisation do you represent?
2. What is your position?
3. Is your organisation aware of the Guidelines? Do you engage in activities regarding the Guidelines?
  - (If applicable:) Are your organisation's members aware of the Guidelines?
  - How do you know about the Guidelines (via which medium)?
4. Is your organisation familiar with the Dutch NCP?
  - (If applicable:) Are your organisation's members familiar with the Dutch NCP?
  - How do you know about the Dutch NCP (via which medium)?
  - Have you/Has your organisation ever participated in an event organised by the Dutch NCP?
  - Are you aware of other promotional activities undertaken by the Dutch NCP?
5. Has your organisation ever made an enquiry at the Dutch NCP?
  - If no, why not?
  - If yes, what about?
  - Were you satisfied with the services you received from the Dutch NCP?
6. Has your organisation ever considered filing a notification of non-compliance with the Guidelines at the Dutch NCP?
  - If no, why not?
  - If yes, why and would you do this again, or alternatively: why did you decide against filing the notification?
7. Are there other mechanisms available to achieve the same or similar goal(s) that you or your organisation prefers to the Dutch NCP?
8. Is there anything you would like to add or are there additional remarks you would like to make?

## Annex V: Evaluation Team

Nyenrode Business University	APE Public Economics
Tineke Lambooy	Peter Wilms
Aikaterini Argyrou	Johan Vonk
Sander van 't Foort	Suzanne Kluft

## Annex VI: Nederlandse samenvatting

### Achtergrond

De directie Internationaal Onderzoek en Beleidsevaluatie (IOB) van het ministerie van Buitenlandse Zaken heeft opdracht gegeven tot een evaluatie van het Nationaal Contactpunt (NCP) OESO-richtlijnen voor Multinationale Ondernemingen. APE Public Economics en Nyenrode Business Universiteit hebben deze evaluatie uitgevoerd. Het onderzoek vormt een bouwsteen voor de doorlichting van het beleid voor duurzame handel en investeringen, gepland voor 2020, en geldt als aanvulling op de evaluatie van het Nederlandse IMVO-beleid.<sup>99</sup>

### De opzet van een NCP

De OESO-richtlijnen bestaan uit een aantal basisbeginselen en standaarden voor maatschappelijk verantwoord ondernemen (MVO), bedoeld voor multinationale ondernemingen die opereren in of vanuit OESO-landen of landen die geen lid zijn maar wel de richtlijnen onderschrijven.<sup>100</sup> Lidstaten van de OESO dienen in hun land een NCP op te zetten dat zich bezighoudt met klachten van belanghebbenden of partijen die gedupeerd zijn door een (multinationale) onderneming die zich niet aan de richtlijnen zou hebben gehouden. Hierbij volgen NCP's de instructies van de OESO over de wijze waarop zij hun taken worden geacht te vervullen. Van niet-OESO-landen die de OESO-richtlijnen wél onderschrijven wordt eveneens verwacht dat zij een NCP opzetten; zij kunnen dit echter naar eigen inzicht organiseren. Een NCP heeft over het algemeen de taak de effectiviteit van de OESO-richtlijnen te bevorderen door:

- Promotieactiviteiten te organiseren;
- Informatieverzoeken te behandelen;
- Ondersteuning te bieden aan partijen betrokken bij een melding waarbij een onderneming zich niet zou hebben gehouden aan de OESO-richtlijnen, met als doel de betrokken partijen te helpen de kwestie op te lossen (de zogeheten *specific instance procedure*).<sup>101</sup>

In 2014 nam het Kabinet een nieuw instellingsbesluit voor het NCP aan. Het mandaat van het NCP werd daardoor verruimd met de volgende taken:<sup>102</sup>

- Het voortouw nemen bij de interpretatie van de OESO-richtlijnen, bijvoorbeeld door te verifiëren of een sectorconvenant op het gebied van MVO ermee overeenkomt;
- Op verzoek van de overheid onderzoek doen naar de toepassing van de OESO-richtlijnen door verschillende bedrijfssectoren (in Nederland);
- De dialoog over de implementatie van de OESO-richtlijnen faciliteren, ook wanneer er geen melding is gedaan van een vermeende overtreding;
- Overleg voeren met belanghebbenden die deel uitmaken van het 'NCP+ platform';

<sup>99</sup> IOB (2019), Mind the governance gap, map the chain: Evaluation of the Dutch government's policy on international responsible business conduct (2012-2018). Ministry of Foreign Affairs, The Hague.

<sup>100</sup> Volgens de OESO zijn er 34 OESO-landen en 12 niet-OESO-landen die de *Richtlijnen* onderschrijven. De namen van deze landen zijn online beschikbaar bij de OESO op <https://mneguidelines.oecd.org/about/> (geraadpleegd op 24 april 2019).

<sup>101</sup> OECD (2011), Besluit van de Raad ten aanzien van de Richtlijnen voor multinationale ondernemingen, 25 mei 2011, Parijs, Para. I.1.

<sup>102</sup> Government Decree NCP 2014 (Stcrt. 2014, no. 19014).

- Advies inwinnen bij alle ministeries, niet alleen bij deelnemende ministeries (de vier deelnemende ministeries zijn Buitenlandse Zaken, Economische Zaken en Klimaat, Sociale Zaken en Werkgelegenheid, en Infrastructuur en Waterstaat).

### Evaluatiemethode

De hoofdvragen van de evaluatie zijn:

- Hoe effectief en efficiënt is het NCP geweest bij de uitvoering van zijn taken zoals vastgesteld in het Instellingsbesluit NCP uit 2014?
- In hoeverre heeft het NCP kunnen handelen volgens de vier kerncriteria voor NCP's en de vier basisprincipes voor het afhandelen van meldingen (specific instances), zoals gedefinieerd in de OESO-richtlijnen?

De vier kerncriteria voor NCP's die worden beschreven in de OESO-richtlijnen zijn *zichtbaarheid*, *toegankelijkheid*, *transparantie* en *verantwoording*. De vier basisprincipes voor het afhandelen van meldingen zijn *onpartijdigheid*, *voorspelbaarheid*<sup>103</sup>, *billijkheid* en *overeenstemming* met de *Richtlijnen*. Deze evaluatie betreft alle activiteiten van het Nederlands NCP.

De volgende onderzoeksmethoden zijn gebruikt bij het beantwoorden van de onderzoeksvragen:

- **Documentenonderzoek** rond de meldingen die in de periode 2012-2018 zijn ingediend bij de NCP's van Nederland, Groot-Brittannië, Duitsland, Denemarken en Noorwegen;
- **Onderzoek** naar vier meldingen die bij het NCP in Nederland zijn behandeld, op basis van onder meer gesprekken met beide partijen en een NCP-lid dat was aangesteld om de zaak te behandelen;
- **Interviews met belanghebbenden** rond het NCP, zoals OECD Watch, VNO-NCW, SER, TUAC en het ministerie van Buitenlandse Zaken;
- **Telefonisch onderzoek (op beperkte schaal)** onder Nederlandse ngo's en vakbonden over de zichtbaarheid van het NCP;
- **Vergelijkend onderzoek naar de doelmatigheid** door activiteiten en uitgaven van het NCP in Nederland te vergelijken met die van de NCP's in Denemarken en Noorwegen; en
- **Literatuuronderzoek** op basis van relevante academische en niet-academische bronnen.

### Resultaten van de evaluatie: conclusies en aanbevelingen

#### Effectiviteit

Uit het onderzoek blijkt dat de uitgaven van het NCP voor promotionele doeleinden sinds 2014 zijn gedaald. Het NCP organiseert desalniettemin ieder jaar een congres en publiceert voor alle meldingen zowel een voorlopige beoordeling als een slotverklaring. Deze activiteiten dragen bij aan een grotere bekendheid van de OESO-richtlijnen en vergroten de effectiviteit van het NCP als niet-juridisch klachtenmechanisme. Terwijl maatschappelijke organisaties aangeven dat ze bekend zijn met de OESO-richtlijnen en het NCP, stellen geïnterviewden dat veel bedrijven er nog te weinig over weten. Deze opvatting wordt ondersteund door onderzoek uit 2016, mede op basis van een enquête waarin bedrijven is gevraagd in hoeverre zij bekend zijn met de OESO-richtlijnen.

De evaluatie laat zien dat het NCP zich vooral heeft beziggehouden met het behandelen van meldingen. Tijdens de evaluatieperiode (2012-2018) kwamen twaalf meldingen binnen; twee daarvan werden niet in behandeling genomen, waarbij er in één geval een oplossing werd gevonden zonder een formele procedure op te starten. Bij negen van de overige tien gevallen leidde de melding tot bemiddeling. Gedurende de onderzoeksperiode (2018-2019) waren er twee lopende procedures, werden vijf procedures met een overeenkomst afgesloten en drie beëindigd zonder dat een overeenkomst was bereikt. Voor alle afgeronde procedures werd een voorlopige beoordeling en een slotverklaring gepubliceerd. Bij vier overeenkomsten werd een vervolgspraak of evaluatie gepland om de implementatie van de afspraken in de overeenkomst te evalueren. Die overeenkomsten hielden over het algemeen een belofte in van het bedrijf om een verandering in het beleid door te voeren, bijvoorbeeld op het gebied van *due diligence* (gepaste zorgvuldigheid), transparantie en rapportage. Doorgaans waren de overeenkomsten gericht op

<sup>103</sup> De Engelse term "predictability" wordt in het Nederlands ook wel vertaald als "navolgbaarheid".

toekomstige verbeteringen; in één geval was er sprake van financiële compensatie (omdat de betrokken partijen hierover afspraken hadden gemaakt). Het aandeel van procedures die het NCP in Nederland met een overeenkomst kon afsluiten is hoger dan bij NCP's in andere landen. Het Nederlandse NCP handelt daarbij conform de OESO-richtlijnen, in de zin dat het altijd een slotverklaring publiceert, inclusief een samenvatting van de gehele procedure, de overeenkomst en de aanbevelingen.

Betrokkenen zijn over het algemeen tevreden over de manier van werken van het NCP en de ondersteuning die het biedt bij meldingen. Partijen die betrokken raken bij bemiddeling hebben vaak hooggespannen verwachtingen die vaak moeilijk of soms geheel niet gerealiseerd kunnen worden. Op de vraag of ze tevreden zijn over het bemiddelingsproces waren de reacties daarom niet altijd positief. Indieneren van meldingen zijn doorgaans uit op krachtige verklaringen of, beter nog, op het vaststellen van ondervonden schendingen. Zonder capaciteit voor eigen onderzoek en waarheidsvinding blijven de mogelijkheden voor het NCP op dit vlak echter beperkt. Melders tonen zich ontevreden over de toekomstgerichte aanpak (een focus op hoe schendingen te voorkomen) en het feit dat klachten slechts ten dele gegrond werden geacht.

De OESO-richtlijnen vormen het uitgangspunt voor de IMVO-convenanten die inmiddels in meerdere sectoren zijn afgesloten. In deze convenanten wordt regelmatig verwezen naar de richtlijnen. Het NCP heeft bijgedragen aan de totstandkoming van sectorconvenanten door conceptteksten te controleren op consistentie met de OESO-richtlijnen. Op verzoek van het Kabinet heeft het NCP ook onderzoek gedaan naar de mate waarin de olie- en gasector zich aan OESO-richtlijnen houdt. Het onderzoeksresultaat is pas na de evaluatieperiode gepubliceerd en is dus niet meegenomen in dit rapport.

In het kader van de taak om informatieverzoeken te behandelen heeft het Nederlands NCP incidenteel een dialoog ondersteund die niet was voortkwam uit een formele melding (bijvoorbeeld CPL vs. het Nederlands Palestina Komitee).

| 71 |

Om de **effectiviteit** van het NCP te vergroten, wordt in dit evaluatierapport aanbevolen meer personeel aan te nemen. Dit geeft de individuele leden van het Nederlands NCP meer gelegenheid zich op hun kerntaken te richten. Extra personeel zou kunnen bestaan uit een directeur of secretaris aan het hoofd van het secretariaat, ondersteund door een assistent en een aantal casemanagers om specifieke gevallen af te handelen.

### Efficiëntie en doorlooptijden

Voor de meldingen die het Nederlands NCP heeft behandeld gedurende de evaluatieperiode (2012-2018), duurden de procedures over het algemeen langer dan volgens de OESO-richtlijnen wenselijk is. Hoewel het Nederlands NCP de doorlooptijden vooraf communiceert naar de (aanstaande) betrokken partijen, ervaren veel betrokkenen het proces als lang en tijdrovend. Het kan echter wenselijk zijn om meer tijd uit te trekken voor een zaak, bijvoorbeeld als dat nodig is om onderling vertrouwen te vergroten. Dat de procedures lang duren komt ook door het personeelstekort bij het NCP. Ook het gebrek aan personeel veroorzaakte vertraging in het behandelen van specifieke gevallen. Werk dat anders zou kunnen worden uitbesteed aan het secretariaat moest door de onafhankelijke leden van het NCP worden uitgevoerd. Dit is niet erg efficiënt omdat de leden daardoor minder tijd kunnen besteden aan hun kerntaken.

Vergeleken met de andere NCP's die voor deze evaluatie zijn onderzocht krijgt het Nederlandse NCP relatief veel meldingen te verwerken in verhouding tot het budget, helemaal wanneer de tien lopende zaken daarbij opgeteld worden (er is overigens geen zicht op het aantal lopende zaken bij de andere NCP's die zijn onderzocht). Een vergelijking van de manier waarop de vijf onderzochte NCP's hun budget besteden aan hun taakgebieden maakte duidelijk dat het Nederlandse NCP zijn budget vooral uitgeeft aan het behandelen van meldingen, terwijl andere NCP's juist veel tijd besteden aan promotieactiviteiten.

### OESO criteria

Het NCP heeft de **zichtbaarheid** vergroot door de uitkomsten van meldingen en informatie uit de stakeholderbijeenkomsten op de website te publiceren. Het uitzetten van persberichten over de meldingen, wat kan leiden tot berichtgeving in Nederlandse kranten, zou wellicht een betere aanpak kunnen zijn om het publiek te informeren over de activiteiten van het NCP. Vanwege de beperkte capaciteit op het secretariaat zijn er, gedurende de geëvalueerde periode, echter maar weinig persberichten verzonden. Het NCP besteedt de beperkte tijd liever aan het afhandelen van meldingen dan aan het verspreiden van informatie over de OESO-richtlijnen, bijvoorbeeld via evenementen. Om de zichtbaarheid van het NCP te vergroten, wordt aanbevolen dat Nederlandse ambassades de OESO-richtlijnen en NCP's onder de aandacht brengen door er vaker naar te verwijzen in het contact met Nederlandse bedrijven en hun lokale partners. Dit kan bijvoorbeeld in situaties waarbij ambassades een Nederlands bedrijf ondersteunen bij het doen van een nieuwe investering of het aangaan van een handelsrelatie. Met hulp van het NCP-secretariaat kunnen ambassades ook evenementen organiseren rond de OESO-richtlijnen of bepaalde meldingen. Ambassades spelen een belangrijke rol in landen waar (potentiële) schendingen van de *Richtlijnen* plaatsvinden. Daarnaast kunnen de *Richtlijnen* ook via (internationale) kamers van koophandel onder de aandacht worden gebracht bij lokale bedrijven.

De **toegankelijkheid** van het Nederlands NCP is relatief goed, gezien het aantal meldingen dat er binnenkomt. Ngo's en vakbonden kunnen de weg naar het Nederlands NCP vinden en nemen contact op als ze overwegen een melding te doen. Bovendien is het Nederlands NCP goed toegankelijk omdat het meer dan andere NCP's geneigd is klachten in behandeling te nemen. Daarbij heeft het ook geholpen dat het Nederlands NCP in één geval de reis- en verblijfkosten van de klagers voor zijn rekening heeft genomen; dit werd ervaren als heel belangrijk voor een vlotte voortgang van de procedure. Het is aan te bevelen om de toegankelijkheid verder te verbeteren door budget vrij te maken voor partijen die zelf niet over voldoende financiële middelen beschikken.

| 72 |

De procedure voor de behandeling van meldingen werd als vrij formeel ervaren. Dergelijke formaliteiten vormen op dit moment nog een drempel voor kleinere en minder professionele partijen en kunnen daarmee de toegankelijkheid van het NCP belemmeren. Wat betreft vragen van gedupeerden en andere betrokken partijen over de inhoud of de ontwikkeling van de OESO-richtlijnen laten ngo's weten dat ze over het algemeen geen contact zoeken met het NCP maar zich eerder wenden tot andere organisaties die hun informatie kunnen geven.

De Nederlandse overheid zou kunnen bijdragen aan de toegankelijkheid van het NCP door meer personeel en financiële ondersteuning beschikbaar te stellen. Daarmee zouden mediators van buiten kunnen worden aangetrokken om de NCP-leden te ondersteunen bij het afhandelen van zaken die nu vaak enige tijd blijven liggen omdat er te weinig middelen zijn. Met meer financiële middelen zou het NCP ook meer deskundigen kunnen aantrekken voor feitenonderzoek, al dan niet ter plaatse. De Deense en Noorse NCP's besteden bijvoorbeeld meer aan externe adviseurs. Het Nederlands NCP zou dat voorbeeld kunnen volgen. Met een ruimer budget en meer medewerkers zou de toegankelijkheid van het NCP verbeteren omdat zaken dan sneller afgehandeld kunnen worden nadat ze zijn aangemeld en de totale werklast daardoor beter te overzien is.

Het NCP kent een **transparante werkwijze**; het publiceert informatie over de voortgang van lopende procedures. De betrokken partijen worden in de gelegenheid gesteld hun input te geven voordat de documenten openbaar worden gemaakt. Het eerste bericht over een lopende zaak geeft informatie over de eerste beoordeling. Het NCP houdt een juiste balans tussen vertrouwelijkheid en transparantie. Om succesvol te kunnen bemiddelen bij lopende procedures is een zekere mate van vertrouwelijkheid nodig. Dat staat ook zo omschreven in de OESO-richtlijnen.

Sinds 2013 heeft het Nederlands NCP geen jaarverslag gepubliceerd, maar alleen aan de OESO verslag uitgebracht. Er is onvoldoende personeel om meer verslagen uit te brengen. Om goed **verantwoording** af te kunnen leggen is het echter wel nodig dat het NCP een jaarverslag publiceert over zijn activiteiten en procedures. Een jaarverslag, dat ook financiële informatie zou moeten bevatten, zou voor promotionele activiteiten gebruikt kunnen worden.



Publiekelijk verantwoording afleggen en openheid van zaken bieden kan soms lastig zijn omdat het NCP bij bemiddelingsprocessen een middenweg moet vinden tussen vertrouwelijkheid en transparantie. Uit een van de onderzochte meldingen bleek dat het NCP soms beslissingen neemt op basis van informatie die niet openbaar gemaakt kan worden.

Naar aanleiding van het Instellingsbesluit NCP uit 2014 is een verandering in het bemiddelingsproces doorgevoerd. Het NCP hoeft niet langer conceptverklaringen voor te leggen aan de minister voor ze gepubliceerd kunnen worden. Hoewel het NCP nu minder verantwoording aan de minister hoeft af te leggen, heeft het daardoor wel een meer onafhankelijke positie gekregen. Over het algemeen wordt het NCP als **onpartijdig** ervaren. Wat daaraan bijdraagt, is de wijze waarop het Nederlands NCP is georganiseerd en dat de leden worden gezien als professionals en deskundigen op het gebied van maatschappelijk verantwoord ondernemen. Het NCP zet zich in voor het creëren van vertrouwen tussen betrokken partijen en faciliteert, waar nodig, dit proces.

Het NCP zou er goed aan doen een duidelijk onderscheid te maken tussen het bemiddelingsproces en het opstellen van verklaringen daarover (met een 'Chinese muur' ertussen), vooral in situaties waarin de bemiddeling niet tot overeenstemming heeft geleid. Om dat te bereiken zou het NCP een medewerker of een externe partij kunnen aanstellen om de eerste beoordeling en/of de slotverklaring op te stellen, waarmee de taak van onafhankelijke NCP-leden beperkt blijft tot bemiddelen (of andersom). Zo wordt voorkomen dat bemiddelaars betrokken raken bij het opstellen van verklaringen en is duidelijker te zien dat het Nederlands NCP **onpartijdig** is.

De wijze waarop meldingen worden afgehandeld is volgens betrokken partijen conform de regels die daarvoor gelden. Het proces kost vaak meer tijd en moeite dan de meeste belanghebbenden hadden verwacht; de **voorspelbaarheid** van het proces is dus voor verbetering vatbaar. Wat betreft de uitkomsten van de procedures blijft het lastig om voorspelbaar te zijn; betrokken partijen hebben vaak tegenovergestelde verwachtingen en verschillende ideeën over wat de OESO-richtlijnen zeggen over het behandelen van meldingen. Om die reden is het voor de **voorspelbaarheid** en **transparantie** aan te bevelen dat het NCP zijn eigen beslissingen – en die van NCP's in andere landen – goed blijft monitoren (*stare decisis et quita non movere*<sup>104</sup>). Na iedere procedure of op jaarlijkse basis kan een document worden gepubliceerd waarin de al dan niet veranderende inzichten van het NCP staan beschreven. Bovendien is het wenselijk om verwachtingen liefst in een vroeg stadium al te sturen om de voorspelbaarheid van de uitkomst van een procedure te vergroten, bijvoorbeeld bij vertrouwelijke bilaterale besprekingen. Helderheid over de bedoelingen en verwachtingen van beide partijen helpt teleurstellingen achteraf te voorkomen (bijvoorbeeld: gaat het wel of niet om compensatie, gaat het wel of niet om verbeteringen voor de toekomst).

**Billijkheid** moet gewaarborgd worden opdat de partijen elkaar onder eerlijke voorwaarden en op voet van gelijkheid tegemoet kunnen treden. Het NCP wordt in een aantal gevallen als billijk gezien, maar er is ruimte voor verbetering. Ngo's en vakbonden benadrukken dat het machtsverschil tussen hen en MNO's een punt van aandacht blijft.

De mate van overeenstemming met de OESO-richtlijnen betreft de mate waarin het NCP handelt conform deze richtlijnen. Het NCP volgt tijdens de aangemelde procedures de Procedurele Aanwijzingen maar durft ook vernieuwend te zijn. Een slotverklaring vooraf, vertrouwelijke bilaterale besprekingen en berichten wanneer een van de partijen zich uit de procedure terugtrekt zijn voorbeelden van vernieuwingen in de procedure. Ook inhoudelijk heeft het Nederlandse NCP de grenzen van de OESO-richtlijnen meer dan eens opgezocht, zoals in de zaak Bresser en de zaak POSCO. Bij eventuele afwijkingen van de richtlijnen gaat het meestal om onduidelijkheden op het gebied van terminologie en bevoegdheid.

<sup>104</sup> Vrij te vertalen als "bij besloten zaken blijven en voorafgaande beslissingen behouden".

### Vooruitkijken

Het NCP heeft momenteel onvoldoende capaciteit om alle taken te vervullen en ervoor te zorgen dat meldingen worden afgehandeld binnen de tijd die daar volgens de OESO-richtlijnen voor staat. Dat doet af aan de effectiviteit van het NCP. De huidige bestuursstructuur maakt het lastig om die capaciteit op korte termijn te verruimen. De bestuursstructuur vormt geen belemmering voor het NCP om zich te houden aan de basisprincipes voor meldingen (onpartijdigheid, voorspelbaarheid, billijkheid en overeenstemming met de Richtlijnen). Het NCP ziet af van deelname aan de peer reviews van andere NCP's vanwege het gebrek aan capaciteit, maar heeft laten weten onder andere omstandigheden graag mee te willen werken aan internationale peer reviews. Het operationele budget vormt hierbij geen belemmering.

### Algemene aanbevelingen

- De opzet van een helpdesk om vragen en informatieverzoeken af te handelen – een van de hoofdtaken van het NCP – wordt aanbevolen. Op dit moment hebben de leden van het NCP te weinig tijd om deze taak behoorlijk uit te kunnen voeren. Het NCP zou daartoe beter in staat zijn met extra medewerkers die speciaal voor die taak worden ingehuurd. De helpdesk zou voor alle belanghebbende beschikbaar moeten zijn en deel uitmaken van het secretariaat van het Nederlands NCP. Belanghebbenden zouden aangemoedigd kunnen worden om hun vragen eerst voor te leggen aan de helpdesk voordat ze een officiële melding doen. Op die manier krijgt de helpdesk ook een soort poortwachtersfunctie voor formele meldingen en kan het eventuele zaken voor het NCP er alvast uitfilteren. Een helpdesk verbetert ook de toegankelijkheid van het NCP omdat daarmee een snel en adequaat antwoord op vragen mogelijk wordt.
- Wanneer een ToR wordt opgesteld voor een bemiddelingstraject, moeten er ook duidelijke afspraken komen over de **follow-up**, bijvoorbeeld over welke informatie openbaar mag worden gemaakt en over het voeren van campagnes. Een (twee)jaarlijkse controle om te bekijken of de betrokken partijen zich aan de afspraken houden draagt ook bij aan de implementatie van de OESO-richtlijnen bij specifieke meldingen.
- Het ministerie van Buitenlandse Zaken zou een voorstel kunnen doen bij de OESO-Werkgroep voor Maatschappelijk Verantwoord Ondernemen (WPRBC) of het Investeringscomité om de Procedurele Aanwijzingen voor NCP's aan te passen, zodat de **functionele gelijkwaardigheid** tussen de verschillende NCP's verbetert. Dat voorstel zou onder meer kunnen betekenen dat er, wanneer meerdere NCP's bij een zaak betrokken zijn, eerst overeenstemming wordt bereikt voor er een slotverklaring wordt gepubliceerd; de slotverklaring zou voor iedere NCP hetzelfde moeten zijn en niet – zoals nu nog wel eens het geval is – onderling verschillen. Mocht het zo zijn dat de betrokken NCP's niet tot overeenstemming kunnen komen, dan zouden ze eventueel de OESO-Werkgroep of het Investeringscomité om advies kunnen vragen. Functionele gelijkwaardigheid is van belang voor de **voorspelbaarheid** en **verantwoordelijkheid** van NCP's.
- Het NCP doet er goed aan te blijven werken aan **functionele gelijkwaardigheid** door te stimuleren dat NCP's van elkaar leren (*peer learning*). Ook het publiceren van verklaringen vooraf – zoals bijvoorbeeld gebeurde bij de zaak POSCO – kan bijdragen aan functionele gelijkwaardigheid.
- Wanneer er een klacht komt over een IMVO-convenant, dienen betrokken partijen de klachtenprocedure te volgen die in het convenant wordt omschreven. Als er geen klachtenprocedure in het convenant is opgenomen en de klacht naleving van de OESO-richtlijnen betreft, kan een procedure bij het NCP worden gestart. Heeft het IMVO-convenant wél een klachtenprocedure en is die ook gevolgd, maar is een van de betrokken partijen het niet eens met de uitkomst, dan heeft het NCP op dit moment nog geen mogelijkheid om een hoger beroep af te handelen. Tijdens dit onderzoek kwam naar voren dat meerdere partijen er voorstander van zijn als het NCP daarvoor in de toekomst wél beschikbaar zou zijn, maar momenteel vinden niet alle geïnterviewden dat een goed idee.

**Published by:**

Ministry of Foreign Affairs of the Netherlands  
Policy and Operations Evaluation Department (IOB)  
P.O. Box 20061 | 2500 EB The Hague | The Netherlands

[www.government.nl/foreign-policy-evaluations](http://www.government.nl/foreign-policy-evaluations)  
[www.iob-evaluatie.nl/en](http://www.iob-evaluatie.nl/en)  
[www.twitter.com/IOBevaluatie](https://www.twitter.com/IOBevaluatie)  
[www.oec.org/derec](http://www.oec.org/derec)

Photo front: Shutterstock

Layout: Optima Forma bv commissioned by Xerox/OBT | The Hague  
Print: Xerox/OBT | The Hague  
ISBN: 978-90-5146-060-5

© Ministry of Foreign Affairs of the Netherlands | October 2019

Published by:

Ministry of Foreign Affairs of the Netherlands  
Policy and Operations Evaluation Department (IOB)  
P.O. Box 20061 | 2500 EB The Hague

[english.iob-evaluatie.nl](https://english.iob-evaluatie.nl)

[www.government.nl/foreign-policy-evaluations](https://www.government.nl/foreign-policy-evaluations)

[www.twitter.com/IOBevaluatie](https://www.twitter.com/IOBevaluatie)

[www.oecd.org/derec](https://www.oecd.org/derec)

© Ministry of Foreign Affairs of the Netherlands | October 2019