

A comparative analysis of the Dutch specific instance procedure

Sander van 't Foort BBA LLM (Hons) and Joseph Wilde-Ramsing MA PhD¹

Introduction

In the wake of the Second World War, the Organisation for European Economic Cooperation (OEEC) was established and was specifically assigned to run the US-financed Marshall Plan to build a new Europe based on collaboration instead of conflict. In 1960, the OEEC was superseded by the Organisation for Economic Co-operation and Development (OECD).² As laid down in the convention constituting the OECD, which entered into force in 1961, the OECD is primarily an economic body that aims to promote policies that are ultimately designed to contribute to the development of the world economy.³

It is in this economic context that the OECD Guidelines for Multinational Enterprises (MNE Guidelines) were developed. The MNE Guidelines were adopted in 1976 and have been amended ever since, the last major overhaul taking place in 2011. Disclosure, human rights, employment and industrial relations, environment, bribery, consumer interests, science and technology, competition and taxation, all fall within the ambit of the MNE Guidelines.⁴ The MNE Guidelines are considered the only international corporate responsibility instrument with a built-in grievance mechanism.⁵ This built-in grievance mechanism consists of so-called National Contact Points (NCPs).

NCPs are state-based non-judicial grievance mechanisms and play an indispensable role in providing justice and remedy for those affected by actions of multinational enterprises (MNEs).⁶ Amongst others, NCPs help to resolve issues in a non-adversarial and consensual manner, for instance through mediation or conciliation.⁷ Issues are resolved during 'specific instances', which is OECD lingo for the alternative dispute resolution procedure of NCPs. Since their inception, over 350 specific instances have been recorded. A substantial amount of these specific instances have been dealt with by a relatively small number of NCPs.⁸

NCPs operate within the framework of the MNE Guidelines. Various actors, such as states, multinational enterprises, non-governmental organisations (NGOs) and trade unions can notify an NCP of any alleged non-observance of the MNE Guidelines by for instance an MNE. Although the

¹ Sander van 't Foort is researcher and PhD candidate at Nyenrode Business Universiteit and is a member of the academic network of the OECD Guidelines for Multinational Enterprises. Joseph Wilde-Ramsing is senior researcher at the Centre for Research on Multinational Corporations (SOMO), coordinator of the OECD Watch network, and co-author of OECD Watch's 2015 report 'Remedy Remains Rare' <www.oecdwatch.org/remedy-remains-rare>.

² OECD, History, <www.oecd.org/about/history/> lastly visited: 12 November 2015.

³ Article 1 OECD Convention.

⁴ OECD, OECD Guidelines for Multinational Enterprises, Paris: OECD Publishing 2011, <<http://dx.doi.org/10.1787/9789264115415-en>>.

⁵ OECD, Annual Report on the OECD Guidelines for Multinational Enterprises 2013: Responsible Business Conduct in Action, Paris: OECD Publishing 2012, <<http://dx.doi.org/10.1787/mne-2013-en>>, p.147.

⁶ The Norwegian Ministry of Foreign Affairs, The Oslo Conference on Corporate Social Responsibility, Norway 2012, p.2.

⁷ OECD, OECD Guidelines for Multinational Enterprises. Responsible Business Conduct Matters, Paris: OECD 2014, p.13.

⁸ For instance the Dutch NCP, UK NCP, US NCP and Norwegian NCP. In total there are NCPs in 46 countries (OECD, National Contact Points, <<http://mneguidelines.oecd.org/ncps/>> lastly visited 17 November 2015). Examples of relatively inactive NCPs are the Colombian NCP and Egyptian NCP (The TUAC, Government-backed National Contact Points (NCPs) charged with implementing the Guidelines and resolving cases. Sort by NCP or by number of cases, <www.tuacoecdmneguidelines.org/contact-points.asp> lastly visited 12 November 2015).

MNE Guidelines are considered soft law,⁹ and hence function as a non-legal instrument, non-observance can result in hard consequences.¹⁰ Specific instances may lead to reputational damage and exclusion from grants, trade missions, export credit facilities or investment guarantees.¹¹

The practical relevance of NCPs can best be illustrated by an example. In 2013, the World Wildlife Fund International (WWF) notified the UK NCP about actual and potential impacts of oil exploration activities by international oil and gas exploration and production company, SOCO International Plc (SOCO), in Virunga National Park. Virunga National Park is a World Heritage site of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and is located in the Democratic Republic of the Congo (DRC). WWF noted that SOCO's oil exploration activities were in conflict with international agreements and national laws, and could have adverse impacts on the local communities and environment. After conducting an initial assessment, the UK NCP agreed to take the specific instance into further consideration and to provide mediation and conciliation services. Meanwhile, the Virunga case came under substantial public scrutiny. A documentary on Virunga was produced by Hollywood star Leonardo DiCaprio and was nominated for an Oscar for the best documentary of 2014. During the same year, WWF and SOCO reached an agreement. In a public statement SOCO agreed not to 'undertake or commission any exploratory or other drilling within Virunga National Park [or in any other World Heritage site] unless UNESCO and the DRC government agree that such activities are not incompatible with its World Heritage status'.¹² As a consequence, WWF agreed to 'stop further pursuit of its complaint'.¹³ The WWF-SOCO specific instance shows that specific instances may yield fruitful results, albeit with help of the public, and may be practically relevant for parties that engage in such procedures.

This article focuses on the specific instance procedure of the Dutch NCP¹⁴ and combines insights gained from previous research conducted by the authors.¹⁵ The aim of this article is to share a number of new insights after comparing the Dutch NCP's specific instance procedure with the specific instance procedures of other NCPs. Differences will be analysed by using four guiding principles of the MNE Guidelines specifically designed for specific instances (*i.e.* predictability, equitability, impartiality and compatibility).¹⁶ After briefly outlining the Dutch NCP's specific instance

⁹ T.E. Lambooy, *Corporate Social Responsibility: legal and semi-legal frameworks supporting CSR*, Deventer: Kluwer 2010, p.229.

¹⁰ R. Nieuwenkamp, *The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct Soft Law with Hard Consequences*, *Dovens Schmidt Quarterly*, No.4, 2014, p.174-175.

¹¹ *Kamerstukken II 2010/11*, 26 485, nr. 101, p.9; OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2013: Responsible Business Conduct in Action*, Paris: OECD Publishing 2012. <<http://dx.doi.org/10.1787/mne-2013-en>>, p.78.

¹² WWF International vs SOCO International plc. Public statement is available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/330392/bis-14-967-uk-ncp-final-statement-following-agreement-reached-in-complaint-from-wwf-international-against-soco-international-plc.pdf.

¹³ WWF International vs SOCO International plc.

¹⁴ Belgium also has an NCP. See for more information:

http://economie.fgov.be/nl/ondernemingen/leven_onderneming/Maatschappelijk_verantwoord_ondernemen/OESO-richtlijnen_multinationals/Nationaal_Contactpunt_Belgie/#.VmQ8614vvg8.

¹⁵ S. van 't Foort and H. Palm, *The functioning of the Dutch National Contact Point during the specific instance procedure. An evaluation of the functioning of the Dutch NCP based on shared experiences, the OECD Guidelines and the Government Decree*, ARACÉ, *Direitos Humanos em Revista*, Business and Human Rights Centre special edition, Vol.2, No.3, 2015, p.8-28; S. van 't Foort, *UN Guiding Principle 31 en de specific instance-procedure*, in: N. Teesing (red.), *Duurzame handel in juridisch perspectief*, The Hague: Boom Juridische Uitgevers 2014, p.207-216. Any reference to an interview relates to the research that has been done in the context of the abovementioned article and chapter. OECD Watch, *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: OECD Watch 2015.

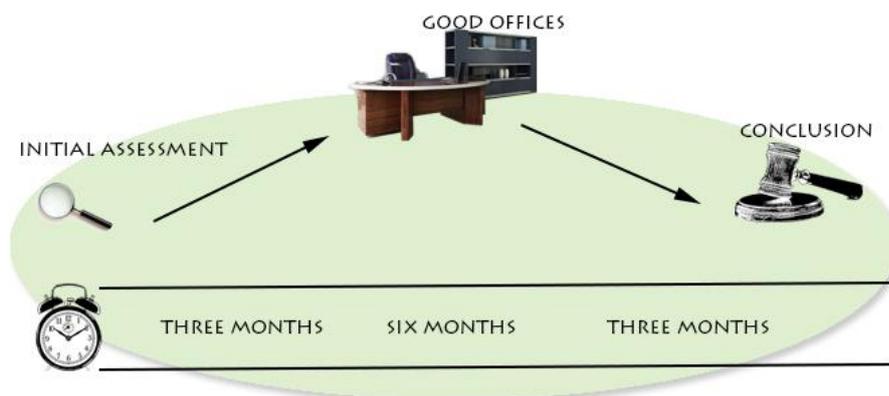
¹⁶ Visibility, accessibility, transparency and accountability are also mentioned as four core criteria for the functioning of NCPs, but have a broader application. NCPs can for instance convene meetings or organise

procedure, each guiding principle will be explained, followed by a comparison between the Dutch NCP's specific instance procedure and the specific instance procedures of other NCPs. The final section will include the main new insights gained.

The Dutch NCP's specific instance procedure

In 2015, the Dutch NCP published an updated version of its specific instance procedure.¹⁷ The Dutch NCP's specific instance procedure follows the three main stages that can be derived from the Procedural Guidance accompanying the MNE Guidelines. The three main stages are: (i) initial assessment; (ii) good offices; and (iii) conclusion (see Figure 1).

Figure 1 Main stages of the Dutch NCP's specific instance procedure



The initial stage of the specific instance procedure starts with a party notifying the NCP of a specific instance of alleged non-observance of the MNE Guidelines by a company (hereafter: reporting party). After receiving the notification, the NCP sends a confirmation of receipt to the reporting party as well as to the party (or parties) that is allegedly not acting in accordance with the MNE Guidelines (hereafter: defendant). The NCP starts its initial assessment from the moment of receiving the notification and will try to conclude the first stage within three months. The central question to be answered in this stage is whether the issue raised merits further examination. The NCP determines whether the issue raised is bona fide as well as relevant to the implementation of the MNE Guidelines. During its assessment the NCP will take the following seven aspects into account: (i) whether the Dutch NCP is the appropriate body;¹⁸ (ii) the identity of the party or parties concerned and its or their interest in the matter; (iii) whether the issue is material and substantiated; (iv) whether there seems to be a link between the MNE's activities and the issue raised; (v) the relevance of applicable laws, procedures and court rulings; (vi) how similar issues have been, or are being, dealt with in other proceedings; and (vii) whether consideration of this specific issue would contribute to the purposes and effectiveness of the MNE Guidelines. Before reaching its conclusion, the NCP may have separate confidential meetings with the reporting party and the defendant. After reaching its

seminars (visibility), develop a website (accessibility), disseminate information on the specific instances that are dealt with (transparency) and publish an annual report (accountability). Visibility, accessibility, transparency and accountability are primarily aimed at furthering uniformity amongst NCPs ('functional equivalence') (OECD, OECD Guidelines for Multinational Enterprises, Paris: OECD Publishing 2011, <<http://dx.doi.org/10.1787/9789264115415-en>>, p.71).

¹⁷ The outline is available at: www.oecdguidelines.nl/notifications/documents/publication/2015/3/5/specific-instance-procedure-ncp-v-15-3.

¹⁸ This aspect is not included in the MNE Guidelines.

conclusion, the NCP notifies the parties involved in writing and publishes its initial assessment on the NCP's website.¹⁹

The second stage of the process takes approximately six months and commences when the NCP has decided that the issue merits further consideration. In this phase, the NCP offers its good offices (*i.e.* it offers to facilitate mediation between the parties) in order to help parties resolve the issue. The NCP assigns two of its members, which, together with the parties involved, help establish terms of reference for further dialogue. During this stage the NCP may seek advice from relevant authorities and experts, consult NCPs in other countries, seek guidance of the Investment Committee,²⁰ facilitate access to consensual and non-adversarial dispute resolution, such as via mediation or conciliation, and may conduct field visits. The second stage of the specific instance procedure will be concluded when parties reach an agreement or when the NCP decides that the issue will not be resolved in due time.²¹

The third and final stage consists of drafting and issuing a public statement on the results of the specific instance procedure. Whenever parties reach an agreement, the NCP will publish a report. In case parties fail to reach an agreement, the NCP will publish a final statement in which it qualifies the proceedings and recommends the parties on the implementation of the MNE Guidelines. After sending the statement to the Minister of Foreign Trade and Development Cooperation and after providing the different parties with the opportunity to react on the statement, the final version of the public statement will be published on the Dutch NCP's website.²² Subsequently, the NCP will request the parties to report on future progress made. One year later, the NCP will publish a brief evaluation of the implementation of the agreements made or recommendations given on its website.²³

Predictability

According to the MNE Guidelines NCPs should ensure predictability by 'providing clear and publicly available information on their role in the resolution of specific instances, including the provision of good offices, the stages of the specific instance process including indicative timeframes, and the potential role they can play in monitoring the implementation of agreements reached between parties'.²⁴ On paper, the Dutch NCP is successfully following through on these provisions of the MNE Guidelines with regard to predictability: the NCP provides clear and publicly available information on its website about its role and about each stage of the specific instance procedure. In practice, there is still some room for improvement.

In a specific instance concerning a large Dutch/UK multinational vis-à-vis a number of non-governmental organisations (NGOs), mediation failed and the NCP drafted and issued a final statement. One of the parties involved expressed his discontent with the procedure and stated that 'there is a potential deception involved in the way the NCPs operate, leading people to think that

¹⁹ Dutch NCP, Specific Instance Procedure - Dutch National Contact Point OECD Guidelines for Multinational Enterprises, The Hague: Ministry of Foreign Affairs 2015, p.2-3. OECD, OECD Guidelines for Multinational Enterprises, Paris: OECD Publishing 2011, <<http://dx.doi.org/10.1787/9789264115415-en>>, p.72, 82-83.

²⁰ Within the framework of the MNE Guidelines it is the Investment Committee's responsibility to oversee the functioning of the MNE Guidelines and to clarify their meaning (OECD, OECD Guidelines for Multinational Enterprises, Paris: OECD Publishing 2011, <<http://dx.doi.org/10.1787/9789264115415-en>>, p.77).

²¹ Dutch NCP, Specific Instance Procedure - Dutch National Contact Point OECD Guidelines for Multinational Enterprises, The Hague: Ministry of Foreign Affairs 2015, p.3. OECD, OECD Guidelines for Multinational Enterprises, Paris: OECD Publishing 2011, <<http://dx.doi.org/10.1787/9789264115415-en>>, p.72-73, 83-84.

²² Article 7 Government decree establishing the Dutch National Contact Point for the OECD Guidelines for multinational enterprises (amended) (*Stcrt.* 2014, nr. 36720).

²³ Dutch NCP, Specific Instance Procedure - Dutch National Contact Point OECD Guidelines for Multinational Enterprises, The Hague: Ministry of Foreign Affairs 2015, p.3. OECD, OECD Guidelines for Multinational Enterprises, Paris: OECD Publishing 2011, <<http://dx.doi.org/10.1787/9789264115415-en>>, p.73-74, 84-85.

²⁴ OECD, OECD Guidelines for Multinational Enterprises, Paris: OECD Publishing 2011, <<http://dx.doi.org/10.1787/9789264115415-en>>, p.82.

they can achieve something that they cannot achieve'.²⁵ Later on, he specifies his discontent by arguing that a final statement 'needs to compel and without that power it is questionable as to whether there is any value in the NCP'.²⁶ What is striking is that the party involved presupposes that the NCP's decisions have compelling power. As mentioned earlier, the NCP is a non-judicial grievance mechanism, without any legal powers. Hence, NCPs cannot enforce their decisions. Irrespective whether enforceability is preferable or not, it becomes clear from this example that managing expectations is crucial and that in this case one of the parties entertained incorrect expectations.

The specific instance before the Japanese NCP against Toyota Motor Philippines Corporation concerning alleged labour rights infringements in the Philippines provides an extreme illustration of managing expectations. It took the Japanese NCP six years to decide on the admissibility of the notification and eleven years after the notification the issue still remains unresolved and pending before the Japanese NCP.²⁷ In the Netherlands exceedance of timeframes is less extreme, but timeliness still seems to be an issue.²⁸ Even though an NCP can strategically choose to prolong the procedure in order to bring parties closer to each other, it may increase the predictability of the specific instance procedure when in complex cases the NCP immediately communicates with the parties involved that the specific instance procedure will exceed the indicative timeframes. In this way expectations can be better managed.

Equitability

The MNE Guidelines stipulate that NCPs should ensure that the participants in a specific instance can engage on fair and equitable terms.²⁹ An illustrative example in this context is the specific instance before the Finnish NCP regarding the consulting firm the Pöyry Group. The Pöyry Group advised the government of Laos about the Xayaburi hydroelectric dam. The reporting party in this specific instance alleged that the Pöyry Group's advice contravened the MNE Guidelines because it endangered community land and incomes as well as food security. The Finnish NCP consulted the Pöyry Group and at their request decided not to share confidential information provided by the Pöyry Group with the reporting party. When making its decision, the Finnish NCP used this confidential information of the Pöyry Group whilst the reporting party did not have any knowledge of its content. For this reason, OECD Watch, an OECD advisory body, argued that the Finnish NCP's handling of this specific instance procedure was not fully equitable.³⁰

Another example elucidates the difficulties and complex situations that NCPs could be confronted with when not all information is equally available. In 2013, multiple NGOs notified the German NCP with regard to monitoring equipment provided to security agencies in Bahrain. Trovicor, a German manufacturer and maintenance provider of monitoring equipment, allegedly maintained monitoring equipment for Bahraini security agencies, which was used for the monitoring, arrest, and torture of Bahraini opposition activists. Trovicor refused to provide any information on its business relations, claiming they were commercial secrets. The NGOs believed that they had nevertheless provided sufficient evidence for a credible assumption that a business relationship existed, but the NCP insisted that the NGOs had not 'proven' that a relationship existed and thereby indicated that

²⁵ The name of the respondent is kept confidential, since the interviewee asked to remain anonymous.

²⁶ The name of the respondent is kept confidential, since the interviewee asked to remain anonymous.

²⁷ OECD Watch, *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: OECD Watch 2015, p.40.

²⁸ S. van 't Foort and H. Palm, *The functioning of the Dutch National Contact Point during the specific instance procedure. An evaluation of the functioning of the Dutch NCP based on shared experiences, the OECD Guidelines and the Government Decree*, ARACÉ, *Direitos Humanos em Revista, Business and Human Rights Centre special edition*, Vol.2, No.3, 2015, p.19-22.

²⁹ OECD, *OECD Guidelines for Multinational Enterprises*, Paris: OECD Publishing 2011, <<http://dx.doi.org/10.1787/9789264115415-en>>, p.82.

³⁰ OECD Watch, *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: OECD Watch 2015, p.36.

the mediation it was offering would not address the core of the NGOs' concerns. As a consequence, the NGOs decided not to engage in the mediation.³¹

The two aforementioned examples re-emphasise that the Dutch NCP must always ensure that both parties receive an equal amount of information and that it is important to stimulate information sharing between parties – even when companies are reluctant to share confidential information. Although the Dutch NCP seems to have a good track record in this field, it may still learn from specific instances dealt with by other NCPs in order to further enhance the equitability of its own specific instance procedure.

Impartiality

According to the MNE Guidelines NCPs should ensure impartiality when resolving issues during a specific instance procedure.³² The institutional structure of an NCP is an important factor to take into consideration, since it may affect the perceived impartiality of (the members of) an NCP.³³

NCPs can take on different institutional shapes and sizes, ranging from 'single department structures' or 'monopartite structures'³⁴ (one ministry involved), 'multi-department structures' or 'interagencies' (multiple ministries involved) and 'bipartite structures' (one or more ministries, including the business community or trade unions) to 'tripartite structures' (several ministries, including the business community and trade unions), 'quadripartite structures'³⁵ (several ministries, including the business community, trade unions and NGOs) and 'mixed structures'.³⁶ The Dutch NCP is an example of a 'mixed structure' and is deemed as one of the most striking and innovative NCP structures.³⁷ It is composed of four independent members and four government representatives from different ministries functioning as advisory members. Support is given by a secretariat from the Ministry of Foreign Affairs.³⁸ In contrast to the traditional NCP structures, the independent members act independently from the government.³⁹

The impartiality of the Dutch NCP may be improved by making a clearer demarcation between the mediation or conciliation procedure and the drafting procedure of a final statement or

³¹ See for a summary: OECD, Annual Report on the OECD Guidelines for Multinational Enterprises 2014: Responsible Business Conduct by Sector, Paris: OECD Publishing 2014 <<http://dx.doi.org/10.1787/mne-2014-en>>, p.98.

³² OECD, OECD Guidelines for Multinational Enterprises, Paris: OECD Publishing 2011, <<http://dx.doi.org/10.1787/9789264115415-en>>, p.82.

³³ OECD Watch, 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: OECD Watch 2015, p.33-35.

³⁴ Monopartite and interagency structures have been added to the OECD vocabulary since 2012 (OECD, Annual Report on the OECD Guidelines for Multinational Enterprises 2012: Mediation and Consensus Building, Paris: OECD Publishing 2012, <<http://dx.doi.org/10.1787/mne-2012-en>>, p.16).

³⁵ Before the mixed structure and bipartite structure existed, the TUAC concluded that in general the NCPs with a tripartite or quadripartite structure operate better than NCPs with another structure (The TUAC, TUAC Submission to the Annual Meeting of National Contact Points. TUAC Internal Analysis of Treatment of Cases Raised with National Contact Points February 2001 – June 2007, Paris: The TUAC 2007, p.7).

³⁶ OECD, Annual Report on the OECD Guidelines for Multinational Enterprises 2014: Responsible Business Conduct by Sector, Paris: OECD Publishing 2014 <<http://dx.doi.org/10.1787/mne-2014-en>>, p.19-20.

³⁷ *Kamerstukken II* 2010/11, 26 485, nr. 101, p.8.

³⁸ Articles 3-5 Government decree establishing the Dutch National Contact Point for the OECD Guidelines for multinational enterprises (*Stcrt.* 2014, nr. 19014). See also: Dutch NCP, NCP Members, <www.oecdguidelines.nl/ncp/contents/ncp-members> lastly visited: 17 November 2014.

³⁹ Investment Division, Directorate for Financial and Enterprise Affairs, Review of NCP Performance, OECD 2008, p.4; OECD, Annual Report on the OECD Guidelines for Multinational Enterprises 2008, Paris: OECD Publishing 2009, p.12. The best performing NCPs have a mixed structure with independent experts and an external steering board, according to OECD Watch (OECD Watch, The OECD Guidelines for Multinational Enterprises. A tool for responsible business conduct, Amsterdam: OECD Watch 2012, p.5).

report.⁴⁰ The Consensus Building Institute argues that impartiality can be secured by appointing external mediators or by installing independent NCP members, the former being the case in the UK, the latter in the Netherlands.⁴¹ The Norwegian NCP however brings together the best of both worlds, consisting of independent NCP members and also engaging neutral third parties when necessary. The Norwegian NCP has been lauded for using neutral third parties to support and strengthen the specific instance procedure, including, but not limited to, the mediation or facilitation of dialogues, which has served to preserve the NCP's neutrality.⁴² Therefore, it may be useful for the Dutch NCP to clearly demarcate between the mediation or conciliation procedure and the drafting procedure of a final statement or report by appointing a professional third party that can assist with the conciliation or mediation (after consulting the involved parties).

Compatibility with the MNE Guidelines

The MNE Guidelines prescribe that NCPs should operate in accordance with the principles and standards of the MNE Guidelines.⁴³ An interesting discussion in this context revolves around the need for making so-called determinations, which means that NCPs must determine whether a party acted in accordance with the MNE Guidelines or not. Not all NCPs currently make determinations, but doing so is permitted under the Procedural Guidance. OECD Watch found that 77 per cent of the specific instances that resulted in a positive remedy-related outcome were made by NCPs that have either a stated policy or track record of making determinations when mediation is impossible or fails.⁴⁴ The necessity of making determinations may be of particular relevance taking into account that one of the fundamental roles of NCPs is to further the effectiveness of the MNE Guidelines.⁴⁵

The UK NCP is one of the best examples of an NCP that frequently makes a determination.⁴⁶ In its final statements, the UK NCP explicitly states whether or not the defendant has acted in compliance with the MNE Guidelines.⁴⁷ On the contrary, the US NCP's stated policy is that it does not make any determination – even when requested. In the past, the Dutch NCP has declined to make a determination,⁴⁸ but in recent years it has tended to do so, even if its determination is sometimes implicit and must be read between the lines of its final recommendations to the company.⁴⁹ Although it is not mandatory for the Dutch NCP to make a determination according to the MNE Guidelines, using its leverage via the specific instance procedure through making a determination may be an interesting avenue to explore in order to further the effectiveness of the MNE Guidelines.

⁴⁰ This was suggested by one of the respondents in our research. The name of the respondent is kept confidential, since the interviewee asked to remain anonymous.

⁴¹ The Consensus Building Institute, NCP Mediation Manual, including the relevant texts from the OECD Guidelines as of February 2012, p.43-45.

⁴² F. Nofle et al., Norway National Contact Point peer review process. Final Report of the Peer Review Delegation, 2012, p.25-27; OECD, Annual Report on the OECD Guidelines for Multinational Enterprises 2014: Responsible Business Conduct by Sector, Paris: OECD Publishing 2014 <<http://dx.doi.org/10.1787/mne-2014-en>>, p.54.

⁴³ OECD, OECD Guidelines for Multinational Enterprises, Paris: OECD Publishing 2011, <<http://dx.doi.org/10.1787/9789264115415-en>>, p.82.

⁴⁴ OECD Watch, 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: OECD Watch 2015, p.44.

⁴⁵ OECD, OECD Guidelines for Multinational Enterprises, Paris: OECD Publishing 2011, <<http://dx.doi.org/10.1787/9789264115415-en>>, p.71.

⁴⁶ See for exceptions RAID vs Oryx; UNI vs G4S; IUF vs Unilever plc.

⁴⁷ See for example Survival International vs Vedanta Resources plc.

⁴⁸ See for example ICN vs Kubbinga.

⁴⁹ See for one of the most outspoken final statements of the Dutch NCP: Friends of the Earth vs Shell (Philippines).

Conclusion

Even though the Dutch NCP has received some unfavourable criticism,⁵⁰ the Dutch NCP can generally be considered as one of the best performing NCPs in the world. For example, Accountability Counsel, a US-based NGO that was involved in a specific instance before the Dutch NCP, criticised the Dutch NCP for stymying 'the full and effective implementation of the OECD Guidelines' through its reasoning and interpretation, but at the same time acknowledged that the Dutch NCP can still be regarded as 'a leader amongst NCPs'.⁵¹ The Dutch NCP has also been hailed by the Dutch Minister of Foreign Trade and Development Cooperation as 'an international best practice'⁵² and the former Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises of the United Nations, labelled the Dutch NCP's institutional structure as the 'golden standard'.⁵³ To maintain its top position however, the Dutch NCP must seek new avenues to improve its functioning, as pressure from civil society and the OECD secretariat pushes other NCPs to improve their performance.

This article gained four insights after comparing the Dutch NCP's specific instance procedure with the specific instance procedures of other NCPs, which may aid the Dutch NCP in improving its functioning. The Dutch NCP is recommended to take the following four insights into account: (i) the specific instance procedure's predictability may be improved in complex cases when the NCP immediately communicates with the parties that the procedure will exceed the indicative timeframes; (ii) in order to safeguard the equitability of the specific instance procedure, the NCP should ensure that both parties receive an equal amount of information and that information is being shared between parties, even when companies are reluctant to share confidential information (iii) establishing a clear demarcation between the mediation or conciliation procedure and the drafting procedure of a statement or report may improve the impartiality of the Dutch NCP during the specific instance procedure; and (iv) the Dutch NCP can increase the compatibility of the specific instance procedure with the MNE Guidelines by using its leverage via the specific instance procedure through making clear determinations of non-observance with the MNE Guidelines in cases where mediation is not possible or fails.

⁵⁰ See for instance: Amnesty International, 'OESO-klachtmechanisme: Beweringen Shell over 'sabotage' in Nigerdelta ongefundeerd', <www.amnesty.nl/nieuwsporaal/pers/oeso-klachtmechanisme-beweringen-shell-over-sabotage-in-nigerdelta-ongefundeerd> lastly visited: 14 November 2015.

⁵¹ Accountability Counsel, A Case Study of the Dutch NCP, 2013, p.1 and 9.

⁵² *Kamerstukken II 2013/14*, 26 485, nr. 190, p.3.

⁵³ *Kamerstukken II 2010/11*, 26 485, nr. 101, p.8.