

***Dutch National Contact Point: Aspirations and Expectations Met?***

**Report of the NCP Peer Review Team 2010**

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## **Preface**

The members of the peer review team would like to thank the National Contact Point of the Netherlands for inviting us to participate in this peer review of their NCP.

Conducting a peer review over several months is a challenging project. However, the Dutch NCP and government officials were enthusiastic and helpful, which made the task considerably easier and enjoyable. In this peer review members of the team reviewed voluminous documents on the operations of the Dutch NCP, engaged in several days of meetings with stakeholders, and debated findings and recommendations.

This experience proved to be a valuable learning opportunity for the members of the peer review team, as well as the members of the NCP who were engaged in a thorough self-examination as they answered questions and provided information to the peer review team.

This report attempts to outline the facts relating to the institutional structure of the Dutch NCP, and its record in terms of performing the functions of promoting the OECD Guidelines and dealing with specific instances. We have attempted to identify and discuss issues that stakeholders raised with us, as well as issues that the peer review team considered noteworthy. Finally, we have attempted to make recommendations for improvement. This has been a particular challenge. The Dutch government has devoted significant resources – including highly qualified personnel - to their NCP in order to have an effective institution capable of managing for the best its two functions: promoting the OECD Guidelines and responding to specific instances. The NCP members and secretariat staff take their roles seriously and with a strong commitment. How could one recommend improvement, where the performance is already setting a high standard?

In addition to that, in its current format (since the restructuring in 2007) only three new specific instances have been submitted to the NCP, consequently with such relatively limited experience it has, on occasion, proved difficult to reach firm conclusions.

Bearing all this in mind, we have often chosen to merely flag the issues that were raised, and recommend continued monitoring of performance to determine if any changes may be worthwhile in the future.

The peer review process and developing of this report has proved to be an excellent way to engage in peer learning. While the peer review process is entirely a voluntary one, it is one which we would recommend other NCPs to consider in the future. We also hope that this report will contribute to the discussion that will take place during the planned update of the OECD Guidelines. It is our hope that other NCPs will benefit from this report and that it will contribute to the ongoing evolution and strengthening of NCPs.

We would like to thank the members of the Independent board of the NCP, particularly Mr. Frans Evers and Mr. Herman Mulder with whom the peer review team met on several occasions, as well

as the NCP Secretariat, and the government officials for their cooperation during this review. We would especially like to recognize and thank Mr. Tabe van Hoolwerff of the Secretariat, and Ms. Fieke Krikhaar of DHV Consultancy, for their assistance in every element of the logistics and organisation of the peer review process as well as the drafting of the final report.

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*15 March, 2010*



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*The Hague, 18 September 2009.*

## **Executive Summary**

In June 2007, the Dutch government restructured its National Contact Point for the OECD Guidelines with an independent board, supported by a secretariat and advised by four ministries involved in the subject matter, responsible business conduct. The Dutch ministry of Economic Affairs is responsible for the NCP and hosts its secretariat.

In 2009, a team of five fellow NCPs from Canada, Chile, France, Japan and the United Kingdom was formed for the review of the Dutch NCP. The **goals** of the review were to (1) **evaluate** the structure, practice, and effect and results of the Dutch NCP; (2) to create a **learning process** for all participating NCPs; (3) to assess issues which may serve as useful **input** into any possible future **revision of the OECD Guidelines**; and (4) to provide a review report which may be used as input for the Dutch NCP's preparation of its own **evaluation report for the Dutch Parliament** in June 2010.

The review team makes **28 recommendations** relating to (I) the structure of the NCP; (II) the NCP's promotional activities; and (III) the NCP's dealing with specific instances.<sup>1</sup>

The key recommendations to the Dutch government and its NCP are as follows, with regard to the **structure of the NCP**:

- (1) formalise the appointment process in a transparent manner (§ 2.1.1.1);
- (2) With four members, appoint a new member each year for four years replacing a leaving member, so that institutional memory is preserved (§ 2.1.1.1);
- (3) when appointing new members, appoint qualified mediators to the point that at least half of the total NCP members have adequate mediatory expertise (§ 2.1.1.2);
- (6) consider over time some sort of appeal board or steering board with regard to appeals on procedural grounds, which is now absent (§ 2.1.3).

With regard to the **NCP's promotional activities**, the peer review team recommends the NCP :

- (9) to consult with stakeholders on how to further enhance the relevance of its stakeholders meetings (§ 2.2.2);

- (11) to follow up on the call from the key stakeholders to meet more regularly next to the stakeholders meetings (§ 2.2.3);

- (13) to align its annual communication plan with the schedule of annual reporting to the OECD (§ 2.2.4); and

- (14) to team up with other NCPs and/or the OECD to enjoy the economies of scale in promotional activities, mainly with regard to multilingual access to information (§ 2.2.4).

Concerning the **NCP's handling of specific instances**, the NCP is recommended to:

- (16) more extensively assess the interest of a complainant in the issue(s) raised and his or hers substantiation (§ 2.3.1);

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<sup>1</sup> A selection of key recommendations is made here for the purpose of conciseness.

- (17 and 18) make use of Dutch embassies, also with regard to the relevance of protective measures for the claimants when such is deemed necessary (§ 2.3.1);
- (19) issue a statement on the NCP website about how the NCP deals with parallel procedures (§ 2.3.3);
- (20) keep a clearer distinction between mediatory and adjudicatory stages of the NCP procedures and communicate clearly with parties in this respect (§ 2.3.4);
- (22) avoid situations in which crucial information cannot be shared with all parties involved (§ 2.3.5);
- (24) make clear at the end of an initial assessment the scope of the procedure and to stick to this scope throughout the procedure (§ 2.3.6);
- (25) state a process for obtaining feedback on recommendations in final statements on the correct implementation of the Guidelines and include this in the NCP's online procedural guidance (§ 2.3.7);
- (26) adjust timelines that fit recent practice of procedural steps taken (§ 2.3.8);
- (27) communicate in a transparent manner with parties about time lines, delays and their causes (§ 2.3.8).

Several **lessons learnt** were drawn from the review process, such as the importance of promotional activities in general, and several issues with regard to the NCP specific instance procedure. Amongst these issues are the need for better protection of persons or organisations logging complaints when retaliation over the notification may be feared; the setting of timelines; dealing with parallel procedures; and (local) fact finding. Also the practice of a novel structure has been proven useful to other NCPs that may wish to reconsider their structure.

Finally, although the main goal of a peer review may be to bring about judgments, the main value of this NCP peer review has been the peer learning platform that was created for six months. This was seen as a welcome opportunity next to the annual NCP meetings every June. The review team would like to encourage other NCPs to also initiate knowledge sharing and mutual learning events, possibly through general reviews or more thematic discussions.

The review was conducted in the second half of 2009 through a questionnaire which was sent to a large group of stakeholders, individual interviews and group discussions with multiple stakeholders, additional 'inside' information from the NCP Secretariat, and by attendance of an NCP stakeholders meeting. The final report was drafted in the first quarter of 2010.

## **1. Introduction to the Dutch NCP and the review**

In this chapter a basic picture is drawn of the structure and practice of the Dutch NCP<sup>2</sup> in order to provide common understanding on the subject of this review. This paragraph is followed by a description of the nature, participating NCPs, goals and review methods of the peer review so as to provide insight in why and how the review was conducted.

For the purpose of keeping this report concise and easily accessible, more in-depth information additional to what is described in this chapter can be found in the annexes and on the NCP website, [www.oecdguidelines.nl](http://www.oecdguidelines.nl).

### **1.1 The NCP: structure and practice<sup>3</sup>**

The NCP, which in its current structure has been active since June 2007, is characterised by a three pillar structure, of which the board of independent members is the main, executive pillar. This board consists of four members including a chairman, who are appointed by the Dutch ministry of Economic Affairs. The four members are chosen on the basis of their background in one of the stakeholder groups in the subject area of the NCP, i.e. responsible business conduct.<sup>4</sup> However, the NCP members do not directly represent any of the stakeholder groups. NCP membership is a part-time ancillary position. The members do not officially become government officials; they are paid on an hourly basis.

The second pillar of the NCP structure is made up by four advisory members at management level of ministries involved in the NCP work. Next to the ministry of Economic Affairs, these are the ministries of Foreign Affairs, of Housing, Spatial Planning and Environment, and of Social Affairs and Employment respectively. Advice from these members is mainly gathered when relevant to a specific instance procedure. The minister for Foreign Trade, who holds office in the ministry of Economic Affairs, is responsible for the functioning of the NCP.

The NCP Secretariat embodies the third pillar with two full time equivalent (FTE) officials at the ministry of Economic Affairs, and one special official for the promotional activities. Originally the NCP Secretariat started with two officials fully dedicated to the NCP work, but for greater flexibility the two FTEs were divided over three government officials as of the summer of 2009. The communication official is stationed with the Dutch Government's CSR Knowledge Centre, CSR Netherlands.<sup>5</sup> This membership organisation focuses on promoting CSR with and sharing best practices amongst small and medium sized enterprises (SMEs). SMEs have become increasingly internationally active, but tend to lack the resources to address CSR issues independently in comparison with large (multinational) enterprises.

The three pillar structure is officially laid down in the Government Decree establishing the NCP, which was published in the Dutch Government Gazette on 27 February, 2007.<sup>6</sup>

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<sup>2</sup> From here on the 'Dutch NCP' will be referred to as the 'NCP', whereas other NCPs will be named along with the name of their country.

<sup>3</sup> A more elaborated description of the Dutch NCP is attached in Annex 1.

<sup>4</sup> There are several other terms for responsible business conduct (RBC), whereby corporate social responsibility (CSR) is a much used acronym. Both terms are used here as synonyms.

<sup>5</sup> For more information on CSR Netherlands, please visit <http://www.mvonderland.nl/english/>.

<sup>6</sup> Please find the document attached in Annex 2.



As for the NCP's practice of its promotional task, its first activities focused on the development of a communication strategy, including the website, and a 'stakeholder tour' to introduce the new NCP and to explore the opportunities for cooperation on the outreach of the NCP and the Guidelines. The NCP also works closely with the Dutch Agency for International Business and Cooperation (EVD) and the Chambers of Commerce in the areas of public relations and communications. To enhance its effectiveness, the NCP seeks to organise two stakeholder meetings per year, to be attended by individual companies, business organisations, trade unions, OECD Watch and other NGOs, government agencies and consultants. Next to the regular consultation of the advisory members representing the other involved government departments, these public stakeholder meetings form an important part of the NCP's governance structure. Generally, these meetings consist of an update on the NCP's activities, including the handling of specific, and a thematic discussion on a related topic. Lastly, the NCP members have acted as speakers on various national and international seminars or forums on corporate responsibility and accountability, including meetings of the OECD Investment Committee. The NCP has an advisory seat in the Committee for International CSR of the Dutch Social Economic Council.<sup>7</sup>

Since June 2007, the NCP dealt with five specific instances of which two were inherited from the old NCP.<sup>8</sup> The NCP closed two cases, both without an NCP-led mediatory result; one was mediated by a former Dutch prime minister as the dispute also involved a national government and enterprise from a non-adhering country. The other case was closed after parties involved failed to agree on the issues open to mediation and the notifying party requested the NCP to draft a final statement. Three new cases were brought to the NCP, of which two were primarily dealt with by the NCPs of the host countries. The level of cooperation between the NCP and the NCPs of the host countries differs per case, due to e.g. physical distance and the nature of the complaint. In one of the cases, the Dutch NCP acts jointly with the other NCP by *inter alia* co-signing the letter of admissibility of the specific instance. However, the NCP of the host country remained the leading NCP.

## **1.2 The peer review – participants, goals and methods**

During the 2008 annual NCP meeting in Paris, the chairman of the NCP, Mr. Frans Evers, announced that the Dutch NCP would like to be reviewed by a team of NCPs. Due to the fact that the NCP at that time had only been established for one year, it was decided to postpone the review for one year. During the 2009 annual NCP meeting in Paris, a group of eight NCPs was invited to a side meeting in which the NCP presented its ideas on a voluntary peer review and asked invitees to consider participation. This led to a team consisting of five NCPs from Canada, Chile, France, Japan and United Kingdom respectively. The review team held its first meeting with the NCP and its secretariat in mid September 2009. The Dutch ministry of Economic Affairs, who was the formal

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<sup>7</sup> [http://www.ser.nl/nl/raad/commissies/internationaal%20sociaal-economisch%20beleid/internationaal\\_maatschappelijk\\_verantwoord\\_ondernemen.aspx](http://www.ser.nl/nl/raad/commissies/internationaal%20sociaal-economisch%20beleid/internationaal_maatschappelijk_verantwoord_ondernemen.aspx), only available in Dutch. For general information on the Social Economic Council, please visit <http://www.ser.nl/en/home.aspx>.

<sup>8</sup> For an overview, see Annex 3. At the time the review (September – December 2009) was carried out three cases were still pending.

initiator of the review, hired an external consultant experienced in peer review projects to lead and oversee the process.

In the September meeting of the review team it was determined that the goals of the review would be fourfold;

1. Evaluation of the structure, practice, and effect and results of the Dutch NCP;
2. Learning exercise and inspiration for all participating NCPs;
3. Assessing issues which may serve as useful input into any possible future revision of the OECD Guidelines; and
4. Providing a review report which may be used as input for the NCP's preparation of its own evaluation report for the Dutch Parliament which is required as per section 9 of the Government Decree and will be sent to Parliament by the end of the second quarter of 2010.

The review team has made use of several methods for reviewing the NCP;<sup>9</sup> a questionnaire was sent to a large group of stakeholders, individual interviews and group discussions with multiple stakeholders were organised, and the NCP Secretariat provided additional 'inside' information on the organisation and running of the NCP. Two members of the review team also attended the stakeholders meeting of the NCP on 24 November, 2009. On 10 and 11 December, 2009, a final session was held in The Hague in which the full review team discussed all the obtained information and the recommendations were drafted.

For the review team, the structure and practice of the NCP and the OECD Guidelines' Implementation Procedures and the Commentaries on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises formed the starting point. The latter state that NCPs have the two tasks of promotion of the Guidelines and of providing for a platform for the informal resolution of conflict concerning the implementation of the Guidelines in a specific instance, i.e. the specific instance procedure. These two main subject areas – promotion and the NCP procedure – can be subdivided in several more specific issues, of which the outcome has led to recommendations on both the structure and the practice of the NCP. The issues and corresponding recommendations are the subject of the next chapter.

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<sup>9</sup> See chapter 4 for more information.

## **2. Recommendations**

The NCP peer review team has formulated recommendations and observations for the Dutch NCP vis-à-vis three subject areas, which are also three recurring elements in the annual reports of NCPs. The recommendations apply to the structure of the NCP (recommendations 1-7), its promotional task and activities (recommendations 8-16), and the implementation in specific instances respectively (recommendations 16-28).

### **2.1. Structure of the Dutch NCP**

The recommendations regarding the structure of the Dutch NCP are divided in five different subthemes; the members of the NCP, the composition and position of the NCP Secretariat, the absence of an appeal mechanism, the stakeholders meetings, and lastly the NCP's resources.

#### **2.1.1. The NCP members**

##### **2.1.1.1. *Appointment of NCP members***

When the ministry of Economic Affairs was in the process of establishing the independent board, key stakeholders were asked to provide the ministry with preferred candidates. However, none of the preferred candidates of any of the stakeholders, i.e. the labour unions, OECD Watch and the business society, were appointed NCP member. The ministry explained that it tried to pick the best candidates taking into account a number of factors, including the need for solid backgrounds in the diverse stakeholder groups while also avoiding perceived conflicts of interest, and ensuring adequate gender representation. The ministry did however not provide the stakeholders with feedback on the proposed candidates, but only mentioned that the opted members were representational for the four key stake holding groups due to their backgrounds. No stakeholder has aired doubts or objection with the appointment of any of the NCP members, but they felt that more information on the process of appointment is desirable.

The NCP members were appointed for three years, parallel to the trial period of three years for the independent structure of the NCP. This means that by June 2010 all their individual appointments will expire, so creating an immediate loss of institutional memory. This could be prevented by prolonging or renewing some appointments while appointing new members on a staggered basis to ensure continuity of the institutional memory of the NCP.

#### **Recommendation 1:**

- The review team therefore would like to recommend the Dutch ministry of Economic Affairs and other involved ministries to make the appointment more transparent and formalise this in the Decree.<sup>10</sup>

#### **Recommendation 2:**

- In the future each year a new member, appointed for four years, could succeed one member, so that institutional memory is preserved. Accordingly, the Government Decree establishing the NCP may need to be altered to achieve this objective.

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<sup>10</sup> The structure is formally established per Government Decree, which is attached under Annex 2.

#### *2.1.1.2. Qualifications of NCP members*

The four NCP members have varied backgrounds and solid credentials to deal with issues of corporate responsibility in a globalising world. One recurrent aspect of great importance in the NCP procedure is the mediation process. Up to this time, the Dutch NCP has not received many cases, and of those that were dealt with only one – the Pandacan case<sup>11</sup> – was characterised by a true mediatory attempt. Apart from the issue of ‘mediation and adjudication’, which is dealt with down below under 2.3.4, mediation, if carried out by the Dutch NCP members themselves, requires specific expertise and qualifications. With due respect for the practical qualities of the NCP members, currently only the chairman appears to be a qualified mediator.

#### **Recommendation 3:**

As long as mediation is kept in-house, the Dutch government, when appointing new members, may want to consider appointing qualified mediators to the point that at least half of the total NCP members have adequate mediatory expertise.

#### *2.1.1.3. Decreased accessibility of NCP members*

Some stakeholders have noted that the government officials who formerly embodied the NCP were in general more easily accessible than the current members. Now the members are generally reached indirectly, as stakeholders send their requests through the NCP Secretariat and then await for the response of the NCP members. Although this may be to a certain extent the price to pay for attracting independent, high level individuals for whom the NCP work is an extracurricular activity, it does not add to the core criterion of accessibility. This is especially relevant during an NCP procedure, easy access to the NCP can be key to gaining and maintaining momentum for the resolution of issues.

#### **Recommendation 4:**

The NCP members could work out a code of conduct or a set of rules of engagement applicable to an NCP procedure, so that parties in a specific instance have more clarity on how to reach the NCP members.

#### 2.1.2. Composition and position of the NCP Secretariat

Originally it was thought by the ministry of Economic Affairs that the NCP members in a specific instance procedure would themselves do most of the drafting of texts and contacting the advisory members, but as a consequence of establishing an NCP board comprising of independent, high level individuals, the NCP Secretariat appears to do more work than initially foreseen. Stakeholders are aware of this and because of that some have aired doubts about the position and, related to that, the uniform composition of the NCP Secretariat; the two ‘full time equivalents’ come from the ministry of Economic Affairs. Some stakeholders expressed the concern that having the secretariat in the ministry of Economic Affairs creates a (perceived) natural bias towards enterprises. Likewise, it has often been said that single department NCPs in other countries – usually the ministry of Economic or Foreign Affairs – can lead to (perceived) bias and the use of selected information only.

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<sup>11</sup> Friends of the Earth and Fenceline Community and Pilipinas Shell Petroleum Corporation, concerning PSPC’s oil terminal in the Pandacan area in Manila, Philippines. PSPC is a subsidiary of Royal Dutch Shell. The specific instance was notified in June 2006, and closed with a final statement in August 2009. See [www.oecdguidelines.org](http://www.oecdguidelines.org) for more information.

Multiple ministry support on the other hand – experimented with in some countries without problems – may create management challenges and risks of disrupting the effectiveness of the secretariat. However, since these concerns were not broadly shared amongst stakeholders the review team does not consider the (com)position of the NCP Secretariat to be problematic at this moment.

#### **Recommendation 5:**

At this time the review team does not believe there is a need to change the current composition of the NCP Secretariat. However, If the issue of perceived bias becomes more widespread, it would recommend reconsideration of this issue.

#### **2.1.3. No appeal mechanism**

The Dutch NCP has no direct mechanism or means for parties to appeal to a final statement, neither for an appeal on procedural grounds nor on the merits of a final statement. The minister of Foreign Trade adds his opinion to a final statement before it is published. When he finds that the NCP has followed a proper procedure he will most likely agree on the findings of the NCP. Parties who do not accept the findings of the NCP, nor agree on the followed procedure, can directly complain with the minister or they could, at least in theory, liaise with members of Parliament who can ask the minister, who is politically responsible for the NCP, for explanations.

Another option, although not a direct appeal mechanism, is that the NCP, possibly at the request of a party, asks the Investment Committee of the OECD for the correct interpretation or application of the Guidelines in case there is uncertainty. However, this is a time consuming and difficult procedure. So far this issue of appeal does not seem to be a major issue, also due to the small amount of cases brought to the NCP the past three years.

#### **Recommendation 6:**

Over time the Dutch government may want to consider some sort of appeal board or steering board with regard to appeals on procedural grounds.

#### **2.1.4. Resources**

The NCP was allocated a budget of around €900.000 for three years, covering remuneration of the NCP members, (inter)national travel expenses, hiring of experts, the communication officer's remuneration, and promotional activities. Only the two full time equivalents working for the NCP Secretariat are not covered by this budget as they are paid directly by the ministry of Economic Affairs. Despite the NCP chairman's observation that there have never been financial constraints to their (envisaged) activities, the NCP, after two and a half years, has only used little over half its budget, mainly due to the absence of new specific instances. The majority of the budget was spent on promotion of the OECD Guidelines. The review team notes that in general it would be difficult to plan a specific budget for any NCP that precisely meets its needs, because it is hard to estimate the costs for dealing with specific instances. The number of notifications may vary greatly, as may also the costs per specific instance.

#### **Recommendation 7:**

The review team recommends the Dutch government to maintain a sufficient budget and amount of human resources for the NCP as it has for the three years trial period of the NCP.

## 2.2. The NCP's promotional activities

The past decade was characterised by the development of a multitude of guidelines, codes of conduct and certification schemes,<sup>12</sup> which has made it increasingly challenging to promote the OECD Guidelines. Although the OECD Guidelines are one of the few government endorsed guidelines, and have been acknowledged as the most comprehensive set of guidelines for responsible corporate conduct by various players,<sup>13</sup> this is not a guarantee for popularity amongst MNEs. Given this situation, the review team was impressed by the way the NCP has taken up its promotional task. The NCP, in this case both the members and the communications official, have promoted the OECD Guidelines and the NCP through frequent guest speakership and training sessions at intermediary organisations. In doing so a great variety of organisations has been reached, such as the aforementioned Agency for International Business and Cooperation (EVD), local Dutch Chambers of Commerce and sector specific business organisations. After this focus on intermediary organisations, the NCP is now planning to focus more on companies, both SMEs and MNEs.<sup>14</sup>

During the past three years the Dutch government developed country specific information dossiers on challenges for responsible business conduct that (potential) entrepreneurs may encounter when trying to implement the OECD Guidelines in activities in the emerging markets. At this moment such dossiers, which are freely available online, were made for doing business in Brazil, China, India, Indonesia, Morocco, Romania, Russia, South Africa, Turkey, Ukraine, and Vietnam.

In 2002, the Dutch government introduced the concept of Corporate Social Responsibility into its financial foreign policy instruments (FFPI) by adopting the so-called 'CSR policy framework'. This framework sets minimum standards for projects in developing countries and emerging markets, which are financed by the Dutch state. In addition to defining a minimum level, the framework aims to stimulate the private sector to think and act socially responsible when doing business abroad. The CSR framework consists of two elements: (1) a signed letter of intent to act in accordance with the OECD Guidelines for Multinational Enterprises and (2) specific CSR requirements in the field of social and environmental standards and good governance. After several years of experience with the CSR policy framework, in July 2007 the Ministry of Economic Affairs commissioned an external research firm to evaluate its effectiveness, efficiency and relevance. It concluded that the objective of the CSR policy framework had been met while also making recommendations for further effectiveness and improvement in e.g. the value chain. Recently, in the requirements for government support for investment projects in emerging and developing markets, special emphasis has been put on banning the use of forced and child labour at the first relevant suppliers.

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<sup>12</sup> Overview of Selected Initiatives and Instruments Relevant to Corporate Social Responsibility, OECD publication, June 2008.

<sup>13</sup> E.g. *OECD MNE Guidelines: A Responsible Business Choice*, Paul Hohnen, in OECD Observer, December 2008. Article is available online on: [http://www.oecdobserver.org/news/fullstory.php/aid/2772/OECD\\_MNE\\_Guidelines.html](http://www.oecdobserver.org/news/fullstory.php/aid/2772/OECD_MNE_Guidelines.html), website visited on 26 January, 2009.

<sup>14</sup> See Annex 4 with the Executive Summary of the NCP Communication plan 2007 – 2010 and the full annual communication plans on the NCP website, [www.oecdguidelines.nl](http://www.oecdguidelines.nl).

### 2.2.1. General comments and recommendation

The Dutch stakeholders of the NCP are generally positive about the NCP's promotional activities. Often the revised website was mentioned as a welcome improvement, but also the aforementioned achievements are experienced as a substantial improvement, although one stakeholder noted that the information on cases could be better kept up to date. Another stakeholder noted that promotion should also focus on local people that encounter corporate misconduct whereby the NCP could form a platform for resolution. In addressing this stakeholder group, embassies have an important role to play. In general, the Dutch embassies seem to focus mainly on Dutch (potential) entrepreneurs who are active or consider being active abroad. Given that main focus, it may sometimes be difficult to explain to these entrepreneurs that the embassy is also promoting, next to the Guidelines themselves, a complaint mechanism that entrepreneurs may find compromising. This seemingly conflictual situation could find a solution through clear communication and collective steps taken by embassies whose countries adhere to the Guidelines.

#### **Recommendation 8:**

Remain active with diverse promotional activities, particularly by making use of Dutch embassies in the emerging economies. Continue the activities carried out through CSR Netherlands.

### 2.2.2. The NCP Stakeholders meetings

The NCP's semi-annual meetings with (national) stakeholders are an innovative means and good opportunity for dialogue between all interested groups and the NCP in its entirety. During these meetings the promotional activities and the specific instances procedures are discussed, the latter in as far as appropriate in relation to individual Specific Instances. The stakeholders meetings contribute to the NCP's meeting of the four core criteria for NCP functioning, visibility, accessibility, accountability, and transparency. In some meetings a specific CSR related topic is put on the agenda for broad discussion.

Two members of the review team attended the 4<sup>th</sup> stakeholders meeting which took place on 24 November 2009. Participants in these meetings are not only government officials of involved ministries and the three key stakeholders – OECD Watch, labour unions and the business society – but also directors of the works councils of major Dutch companies, consultants, and the consumers' organisation. Some stakeholders noted that, partially due to the diversity of participants, it is unclear what the exact purpose is, other than the stakeholders acting as a sounding board.

#### **Recommendation 9:**

- The review team would like to suggest to the NCP that it consults with stakeholders on how to further enhance the relevance of the meetings.

#### **Recommendation 10:**

- Furthermore, the secretariat should provide feedback on specific ideas and suggestions put forward at stakeholders meetings and whether these have been adopted or merited follow-up.

### 2.2.3. Role of key stakeholders

During the interviews one of the key stakeholders noted that on the one hand they are happy with the NCP being able to reach a greater amount of stakeholders, mainly through the stakeholders meetings. On the other hand however, it has not given much consistency to the role of the

representatives of the three key stakeholder groups, i.e. business society, labour unions and the NGOs united in OECD Watch. It was suggested that the NCP should intensify its contact with this group in a more formal way, aside from the semi-annual NCP stakeholder meetings. They noted that this kind of key stakeholder dialogue used to be part of the ministry's preparations for meetings of the OECD Investment Committee. One stakeholder also suggested that the NCP could work with 'CSR champions' within specific organisations or enterprises who will promote the OECD Guidelines within their own organisation.

**Recommendation 11:**

- The review team recommends the NCP to follow up on the call from the key stakeholders to meet more regularly next to the stakeholders meetings, whilst ensuring that other stakeholders do not consider themselves to be marginalised with their views not carrying any weight and stakeholders meetings becoming a mere formality. These separate meetings could be used for the purpose of setting the agenda for the general stakeholders meetings.

**Recommendation 12:**

- The NCP promotional activities could be aimed at 'CSR champions' within (umbrella) organisations for spreading awareness of the OECD Guidelines.

**2.2.4. Communication plan cycle and joint efforts in promotion**

Currently, the NCP prepares its annual communication plan for a whole calendar year, whereas the NCPs report annually in June on their activities of the past year. It seems more logic to harmonize the communication plan cycle with the annual reporting cycle. In this way new initiatives or ideas that may have sprung from the Annual NCP Meeting may be more easily followed upon.

The Dutch government is also preparing instructions to its embassies to guide them in a more engaged promotion of the Guidelines and the DNCP. Some members of the review team, whilst congratulating the government for this initiative, noticed that it is not always easy for an embassy to promote at the same time their national companies in the country, and the OECD Guidelines, the second seen as encouraging possible claims against the behaviour of those companies.

Besides the Annual NCP Meeting, NCPs could team up with each other to enjoy the economies of scale of combined efforts of promoting the Guidelines. Despite the varying circumstances per adhering country, there will also be many similarities when it comes to effective ways of promoting the Guidelines. Also the OECD itself could play a more central role in communicating information about the Guidelines and sharing best practices. Consolidation of efforts will be likely to lead to a more coherent message from the adhering countries and will contribute to more functional equivalence as far as promotion of the Guidelines is concerned.

**Recommendation 13:**

- Align communication plan with the schedule of annual reporting to the OECD and formalise this.

**Recommendation 14:**

- The NCP could team up with other NCPs and/or the OECD to share experiences with promotion and to enhance (multilingual) access to information on the Guidelines and their implementation through best practices.



#### **Recommendation 15:**

- The NCP could share with the OECD its experiences with promoting the OECD Guidelines and best practices, whereby the OECD could have a role in advising NCPs on promotional activities and also keep a library of such activities which NCPs could draw up on.

### **2.3. The NCP's handling of specific instances**

In the introductory chapter of this report it was already noted that the NCP has not received many new specific instances since the establishment of its revised structure in July, 2007. One specific instance procedure, concerning a subsidiary of Royal Dutch Shell in the Philippines, brought up the majority of issues that were considered worth discussing in this peer review. Many of these issues were mentioned in the NCP's annual report of 2009. In this chapter the issues and corresponding recommendations are dealt with in the chronologic order as they may occur during a specific instance procedure.

#### **2.3.1. Initial assessment**

The Commentary on the Implementation Procedures of the OECD Guidelines sets out in basic terms the different stages of the NCP specific instance procedure – i.e. initial assessment, resolution of issues raised, and possibly a final statement – and their requirements and characteristics. On the basis of this commentary, the Dutch NCP developed an elaborated procedural guidance, which is published on its website to inform stakeholders about the way the NCP deals with notifications. When having received a notification of an alleged violation of the Guidelines, the NCP Secretariat conducts an initial (desk) assessment of the received materials and advises the NCP members who decide whether a case merits further consideration. The Secretariat seems to be consistent in making use of the basic determinants for further consideration of the issue raised as mentioned in paragraph 14 of the Commentary on the Implementation Procedures of the Guidelines, which come down to two basic questions; does the complaint fall within the Guidelines, and are the issues raised material and substantiated?

However, it is not clear currently how the Secretariat or the NCP members carry out the initial assessment and who are consulted in doing this. Embassies in the country where the specific instance took place can play a useful role in this regard, as they may be very well aware of the company in question, its operations in the country and the history of the dispute. They may provide some useful background information that would be of assistance in performing the initial assessment, whereas later on in the procedure they may monitor the media, meet with the complaining parties, raise facts that the complaining parties (or possibly the company) may have omitted to mention, and reflect on the role of local laws, customs and possible parallel procedures.

After the NCP decides that an issue raised merits further consideration, a broader assessment may prove useful. When only the notifying party and the enterprise are consulted the NCP risks having too limited an understanding of the issue as third party information is not taken into account. It is praiseworthy that in the specific instance concerning Shell in the Philippines, independent local counsel was hired to provide the NCP with local understanding and context.

Lastly, one stakeholder raised the issue of retaliation against filers of complaints and the corresponding fear of retaliation as being a major obstacle to the filing of more cases. Although this type of situation appears to arise in the context of an employee or their representative filing a complaint relating to the behaviour or actions of an employer, it can also occur with complaints from other bodies (e.g. complaints: from indigenous people about development on their land; or on environmental issues). Without adequate protection, their jobs may be at risk once the employer becomes aware of the filing of a complaint and traces it back to a source. It was suggested that the number of filings would remain low and would be unlikely to increase until a degree of protection could be provided to affected individual in such situations.

At this moment it is unclear what protective measures the Dutch NCP would or could take to address this fear of retaliation. It was suggested that the Embassy could be asked to make its own assessment of the risk and propose certain measures. However, the members of the peer review team are aware that this is a sensitive and complicated area which needs to be treated with flexibility on a case by case basis so as not to inadvertently exacerbate what may already be a tense situation. The recommendations that follow may not be possible or advisable in all cases.

**Recommendation 16:**

- Conduct an assessment of the complainant to verify whether it is an 'interested' party or is acting on behalf of identified other parties, and whether it is in a position to provide detailed information about the complaint.

**Recommendation 17:**

- Where appropriate make more use of the services of Dutch embassies.

**Recommendation 18:**

- On a case by case basis, Dutch embassies should evaluate the relevance of protective measures for the claimants as soon as they are informed by the secretariat of the initial presentation of a specific instance, and, if necessary and appropriate, later, ask from the local government or from international systems specific protection measures. This includes the possibility to use the range of collective initiatives included in the EU Guidelines for the protection of Human Rights defenders, and call for help from the UN High Commissioner for Human Rights and from the ILO. The question of the potential use of the mentioned EU Guidelines in such circumstances should be clarified and made public on the request of the Dutch government to the concerned EU bodies.

### 2.3.2. Investment nexus

The Dutch NCP, even before being set up as an independent board, showed willingness to interpret the investment nexus in a broad way. In the specific instance procedure concerning Dutch apparel brand G-Star the former NCP in December 2006 put this broad interpretation in practice. It has led to a process of weighing multiple parameters depending on the specific situation. This interpretation was further formalised in the Government Decree establishing the independent NCP.

**Observation:**

The review team regards the NCP's clarity on its interpretation of the investment nexus a positive thing as it shows flexibility to look at notifications on a case-by-case basis.

### 2.3.3. Parallel procedures

The NCP has taken the position that when the enterprise claims to be unable to cooperate in the NCP procedure because of potential negative impact on its position in a parallel (legal) procedure, the NCP has a duty to investigate in how far this is true, given the contents and involved parties of both procedures. Where procedures do not overlap, the NCP will propose to continue the procedure. After refusal by one of the parties, the NCP will close the procedure.

During an expert meeting in Boston,<sup>15</sup> which was attended by one of the members of the review team, the interesting notion was suggested that “the existence of parallel procedures justifies, even fortifies, mediation by the NCP, as mediation tends to lead to better deals for all parties involved.”<sup>16</sup> Such may not yet be the experience with NCP procedures, but it is a noteworthy thought that might apply to NCP procedures in the future.

#### **Recommendation 19:**

Issue a statement on the NCP website about how the NCP deals with parallel procedures.

### 2.3.4. Mediation and adjudication

Some stakeholders who have been involved in an NCP procedure noted that it has not always been clear in which stage of the procedure they found themselves; future oriented mediation, or the stage in which the NCP collects information for the purpose of writing a final statement?

The NCP stated in its own procedural guidance that it may consider doing local fact-finding. The question that was posed by some stakeholders in this respect was which of the two stages local fact-finding then serves.

Regarding the final statement it was noted that when a mediatory attempt fails, two situations appear: either the company has already acted or persists to act in violation with mandatory aspects of the Guidelines, i.e. regarding fundamental and universally recognised rights, or it does not merely accept to implement voluntary recommendations imbedded in the Guidelines. In the first case, a final statement endorsed by the government can never be avoided.

#### **Recommendation 20:**

Keep a clearer distinction between mediatory and adjudicatory stages of the NCP procedures and communicate clearly with parties in this respect.

### 2.3.5. Confidentiality

The NCP has taken the position that information about the merits of a case is confidential, whereas information on the procedure – i.e. the stage of the procedure – is not. In practice this means that the NCP is quite open about its cases e.g. during its stakeholders meetings. This has not led to any protests from any party to either of the procedures at hand. With regard to confidentiality between the NCP and involved parties within the procedure however, the review team noted serious criticism from some stakeholders. This was based on the procedure on Shell’s Philippine subsidiary,

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<sup>15</sup> See Annex 7

<sup>16</sup> Quote of professor Lawrence Susskind, founder of the Consensus Building Institute and professor at the Massachusetts Institute of Technology.

in which the NCP signed an agreement on confidentiality with the enterprise with regard to the outcome of an on-site environmental assessment, which was carried out by an independent environmental research agency.<sup>17</sup> Only the general conclusions could be shared after declassification by Shell. In this way, the NCP and the notifying parties were unable to verify any of the information that the NCP used in its final statement. The review team understood that this was the only way to be able to conduct the research in this case, which may have been better than no research at all. The notifying party as well as other stakeholders involved in the review process have expressed their concerns about this practice as it may set an unfavourable precedent for future fact finding in NCP procedures. The Shell Philippines case should be regarded as the exception in this respect.

Another aspect with the issue of confidentiality that was touched upon by some stakeholders was the need for anonymity of representatives of local parties to an NCP procedure. In some cases serious consequences are feared when local employees bring a case to an NCP or another grievance body. Currently, this discourages people from filing a complaint, according to a number of stakeholders.

**Recommendation 21:**

- The review team is in favour of the NCP's balance between transparency and confidentiality, meaning that procedural information on cases is shared, whereas information on the content of cases is kept confidential (between the parties).

**Recommendation 22:**

- The NCP should avoid situations in which crucial information cannot be shared with all parties involved. This leads to unwanted uneven handedness of the parties. The NCP should stick to the principle that information that cannot be verified by the other party cannot be used in a final statement.

**Recommendation 23:**

- The NCP should strike a right balance between transparency and protection of names and image of the (representatives of) the parties concerned, regardless of what is already published online. It would be wise to issue a statement on this matter on the NCP website, so as to inform, and so reassure, (potential) parties to a procedure. This would enhance the accessibility and predictability of the procedure.

#### 2.3.6. Scope of specific instance procedure

When an NCP decides that a notification merits further consideration, the scope of the procedure has to be determined so as to provide the parties with clarity on which issues will be open for discussion in light of the (implementation of the) OECD Guidelines and where different interpretations of these issues exist. This scope serves as the terms of reference for the procedure, including the issues to be dealt with in a final statement in case the parties fail to find a solution.

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<sup>17</sup> The research in Manila, Philippines, was carried out by the Rotterdam based DCMR Environmental Protection Agency, which is the regional environmental agency of the local and regional authorities operating in the Port of Rotterdam area in the Netherlands, where also oil refineries and depots of Shell and other companies are located (information provided by the NCP Secretariat. For more information on DCMR, please visit <http://www.dcmr.nl/en/index.html>).

In the final statement concerning Shell Philippines, the NCP brought up an issue that had not been raised by the notifying party, nor had it been dealt with during the procedure. The problem here is that parties did not have the opportunity anymore to address the issue, due to the fact that a final statement closes the procedure.

**Recommendation 24:**

The NCP should make clear at the end of its initial assessment the scope of the procedure and should stick to this scope along the procedure. New issues that arise during the procedure should first be discussed with both parties before they become part of the scope the procedure and, if applicable, before they can be dealt with in the final statement.

**2.3.7. Follow-up of final statements**

Because of the small amount of specific instances that have been dealt with by the NCP, it does not seem to have developed a common approach in its final statements with regard to monitoring the recommendations made. Moreover, those that were published do not contain any such provision. Several stakeholders thought this should be improved, as it enhances the credibility of the OECD Guidelines and its grievance mechanism as an effective means to address issues concerning corporate conduct. On the other hand, extensive monitoring provisions could be a potential drain on resources, and may thus impair the NCP's ability to deal with new cases. In principle, an NCP procedure should lead to a viable dialogue between the enterprise and the notifying party which does not require a long term role for the NCP.

**Recommendation 25:**

The NCP in their handling of specific instances should state a process for obtaining feedback on whether recommendations (if any) contained in the Final Statement have been implemented. This process should be included in the NCP's written procedures on its website.

**2.3.8. Timelines of procedural steps**

In its own procedural guidance the NCP has set timelines for notably the first procedural steps of the NCP procedure, but also for the procedure as a whole. However, in practice it appears to be difficult to stick to these timelines due to a variety of factors generally beyond the influence of the NCP itself. Especially when more research is needed on e.g. the position of other stakeholders<sup>18</sup> six weeks for determining the admissibility of a notification may prove to be too tight.

**Recommendation 26:**

- Adjust timelines that fit recent practice of procedural steps taken.

**Recommendation 27:**

- Communicate in a transparent manner with parties about timelines, delays and their causes.

**2.3.9. Cooperation with other NCPs**

The NCP has received some notifications over the years that involve multiple NCPs. The level of cooperation differs per case, but the NCP has shown its willingness to cooperate actively with other

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<sup>18</sup> Vide paragraph 2.3.1

(host country or joint home) NCPs. In a notification in which the activities of the enterprise, which was a subsidiary of a Dutch multinational, took place in Ireland, the Dutch NCP dealt with the case jointly with the Irish NCP, which acted as the leading NCP. In this procedure, meetings took place in Dublin between the parties involved and the two NCPs. In accordance to the OECD Guidelines and its procedural guidance for NCPs, the Irish and Dutch NCP have always been clear on the fact that the Irish NCP was the leading NCP.

**Recommendation to the OECD:**

The OECD should be invited to play a greater role in encouraging cooperation between NCPs where such is not yet the case.

**2.3.10 Level of requirement for MNEs as regards their subsidiaries**

During the proceedings in the specific instance concerning Shell Philippines, the issue of stakeholder consultation or engagement on health and safety aspects came up. In the view of the NCP, it appeared that companies may take different standards of communicating about health and environmental risks in different countries. The NCP noted here that it is in the spirit of the OECD Guidelines for companies to strive for applying the highest level of transparency towards local stakeholders that they apply at one specific location – i.e. usually the home country – to local stakeholders in any country. More generally, the standards to which companies refer should not differ when implemented by mother companies and subsidiaries, particularly when fundamental rights are at stake. In this way the OECD Guidelines and their implementation in practice will lead to better business practice in home and host countries. The review team agrees with this interpretation.

**Recommendation 28:**

Maintain the current interpretation, not only with regard to communication of a company's impact on (local) society in general, but also with regard to environmental issues and other fundamental rights.

### **3. Lessons learnt**

The second chapter of this report seeks to fulfil the first and the last goal of the review, i.e. the evaluation of the structure, practice and effects and results of the Dutch NCP, and to provide for input for the Dutch NCP's preparation of its own evaluation report for the Dutch Parliament.

However, the review process has also provided for other valuable outcomes and insights which might be useful for the improvement of other NCPs and for the updating of the OECD Guidelines. These are the subject of this third chapter.

#### **3.1 Importance of promotional activities**

The combined promotional activities of the NCP, which employs one full time communication officer, and the CSR Centre, the Agency for International Business and Cooperation (EVD), the Dutch Chambers of Commerce as well as sector specific business organisations appear as an exemplary and inspiring role model for other NCPs. An effective promotion is a condition for the acceptance of the NCP as a mediator by business and other stakeholders.

The peer review also pointed out the advantages that might result from common promotional campaigns amongst NCPs – sharing in particular documents translated in diverse languages – which would involve their embassies in non OECD countries (See recommendations 8, 13-16). Another key element for the success of the promotion of the Guidelines is the inclusion of all stakeholders. The NCP structure, in which business organisations, trade unions, academics and NGOs are represented through two bodies, appears innovative and effective with regards to the complexity of ensuring a fair and level playing field: (1) an implicit representation of the four categories in the NCP as such; (2) an explicit participation in a Stakeholder forum convened twice a year. NCPs which face problems of credibility might draw lessons from this organisation, as well as from those experienced by other NCPs having chosen a multi-Department/Ministry structure.

#### **3.2 Better protection of persons and organisations who lodge complaints**

The lack of protection of the complainants in countries where their jobs, their security and sometimes their lives are at stake, may be one reason why so many NCPs have received so few specific instances. In that respect, common local protection measures undertaken by embassies might be useful, but it is likely that these will need to be considered on a case by case basis and may depend on the level of governance in the host country. But it appears also necessary to raise the question before the different international bodies in charge of ensuring the respect of the right to a fair trial and the right to participate in collective bargaining. A careful use of transparency procedures must also be organised, the high level of transparency of the NCP being a key element of its credibility. To this extent, the rules of procedure adopted by the NCP, including an Initial Assessment statement as soon as the specific instance has been accepted, appear worthy of emulation (see recommendations 21-23).

#### **3.3 The NCP's approach on aspects of the NCP procedure**

The different measures of the NCP as laid down in its own procedural rules appear interesting and seem worth further exploring. The measures taken provide for a mediatory process which is quickly launched and concluded; set objectives regarding the timelines – even if optimistic; a pragmatic

approach regarding the parallel procedures; and fact-finding research including visits to the countries. Its practice of cooperation with other NCPs goes in the same direction (see § 2.3.9).

### **3.4 Interpretation of the OECD Guidelines**

Confronted, as are other NCPs, with the question of the interpretation of certain provisions of the Guidelines, the NCP has set up a kind of jurisprudence which might be helpful for others and for the Guidelines updating process: consideration of the trade and supply linkage, as well as immaterial investment in the “investment nexus”; equal behaviour requested from parent companies and their subsidiaries; differentiation between mediation and adjudicatory roles on the basis of the core obligations imbedded in the Guidelines.

### **3.5 Independence / Relations with the government**

The intention of the Dutch government and of some stakeholders to have an independent NCP had nevertheless to incorporate the provision of the Guidelines for a final statement “on behalf of the State making publicly available the result of the procedure”, since the State is the signatory of the Guidelines. A compromise is still worked out currently based on: (1) logistics which provide for the equivalent of 2 full time government-mandated staff in the Secretariat, participation of several ministries in NCP meetings in an advisory capacity and an, enviable budget; (2) the possibility given to the Minister of Foreign Trade to make a public comment on the NCP final statement before its publication; and (3) a legal recognition of the independence of the body and its members. The solution has not appeared totally satisfactory to the review team, who consider that further experience of this is required before deciding if any changes should be considered (see recommendations 5 and 6). It may provide nevertheless a rich potential of lessons for other NCPs to draw on in search of a more comprehensive organisation for stakeholders, likely to provide them with increased credibility.

### **3.6 Peer reviewing as a means of peer learning**

Finally, an important procedural lesson has been the value of the peer review mechanism as a means of potentially enhancing the performance of participating NCPs in general, and of one NCP in particular. In its call for ‘functional equivalence’ of NCPs in its Model-NCP report, OECD Watch recommends the OECD Investment Committee to institute an effective peer review mechanism to improve NCP performance.<sup>19</sup> As the previous remarks demonstrate however, the greatest value of this exercise has been the peer learning process, that sprung from the frequent meetings, in person and online, of the peer review team members. Reviews as a consequence bring about judgments, but judgments do not necessarily best serve the aim of peer learning. Currently, NCPs only meet annually at the OECD meeting in June each year. For the improvement of overall NCP performance, the review team considers that improved networking between NCPs through bilateral or regional meetings, possibly OECD led, would be beneficial, keeping in mind that constraints on budgets and other resources might be an issue. The use of teleconferencing instruments could be

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<sup>19</sup> Model National Contact Point, report by OECD Watch, September 2007, p25



helpful in this respect.

The European Parliament on 13 March 2007 unanimously adopted a resolution with regard to 24 of the 27 EU countries, in which the Commission and the Member States are called upon "to contribute to supporting and strengthening the OECD Guidelines for Multinational Enterprises, in particular by conducting a review of the functionality of European NCPs and their role in effectively mediating between stakeholders to resolve conflicts; [the European Parliament] calls for the development of a model for European NCPs including best practices on their institutional set-up, visibility, accessibility for all stakeholders, and handling of complaints; [and] calls for a broad interpretation of the definition of investment in the application of the OECD Guidelines to ensure supply-chain issues are covered under implementation procedures".<sup>20</sup> The European Parliament may be pleased by the steps taken by Dutch government that fit within this call.

A peer review is a proven review mechanism inside and outside the OECD, but thus far had not been used to examine the functioning of a National Contact Point. For this reason, the peer review of the Dutch NCP has been an endeavouring exercise as no blue print was available that would explain exactly how the review ought to be conducted. Some aspects worked out perfectly as planned, such as the timeline; other aspects went differently as planned, such as the assumed interest in the review with stakeholders.

Despite the fact that the review has been finished within its envisaged schedule of six months, one of the difficulties of the review was the planning of all the meetings with international visitors on relatively short notice and the distance some members of the review team would be travelling to reach The Hague. The last quarter of the year is traditionally busy with two meetings of the Investment Committee and several seminars and conferences on national, regional and global scale.

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<sup>20</sup> European Parliament resolution of 13 March 2007 on corporate social responsibility: a new partnership (2006/2133(INI)).

#### **4. Information on how the review was conducted**

In the introductory chapter brief reference was made to how the review was conducted. This chapter provides for more in-depth information, consisting of an overview of meetings of the review team, the review methods that were used, and, lastly, the stakeholders that were involved in the review process.

##### **4.1 Meetings of review team, timeline**

The NCP and the ministry of Economic Affairs, the latter acting as the formal initiator of the review given its responsibility for the functioning of the NCP, aimed at delivering a review report to the OECD Investment Committee meeting of March 2010. The ministry contracted an external consultant who was experienced in peer review processes for the purpose of supervising and guiding the process. The review team was furthermore supported by one of the members of the NCP Secretariat.

On 17 and 18 September, 2009, the review team had its first meeting at the Dutch ministry of Economic Affairs in The Hague with the NCP and its Secretariat. The overall purpose of this meeting was to determine the scope of the review with regard to content and procedure, and to set a timeline for the whole process. During this meeting the then minister of Foreign Trade, Mr. Heemskerk, met with the review team and stressed the importance of the process, as the OECD Guidelines, including the NCP, form the basis of Dutch CSR policy. The review team had only six months to start and complete the review. It was agreed that the NCP Secretariat would first collect and produce information on the working of the NCP, both theory and practice. For proper dissemination of all information an online database was created on the NCP website.

In November, several review team members came to the Netherlands to conduct interviews with stakeholders. Lastly, the review team met again in The Hague on 10 and 11 December, adjacent to the OECD Investment Committee meeting, in order to discuss all the information received and to draw its final conclusions. January and February 2010 were used for drawing up this report.

##### **4.2 Review methods used**

The recommendations reveal that a broad scope was set for the review of the NCP. Aspects to be dealt with by the review team varied with regard to the number of stakeholders directly concerned and so they varied in which review method was most appropriate. For example, questions on the NCP's communication efforts can be asked to a broad group of stakeholders, whereas questions on how the NCP dealt with specific instances only (directly) concerns a small group of stakeholders, namely those who were involved in a specific instance procedure. In the following paragraphs the applied methods are touched upon, including for which topics they were used and how this worked in practice.

#### 4.2.1 Descriptions and analyses by NCP Secretariat

In the first two months the NCP Secretariat worked on providing the review team with much background information and analyses on how the NCP functions and what it has achieved. The issues covered here concerned the structure of the NCP,<sup>21</sup> the relationship with stakeholders, the promotional activities that were carried out, and how the NCP dealt with aspects of the specific instance procedure,<sup>22</sup> such as *inter alia* the investment nexus, parallel procedures, confidentiality, third party involvement, and the good offices of the NCP (adjudication v. mediation). This information served as a knowledge basis for the review team that was to be held against the opinions of the stakeholders.

#### 4.2.2 Questionnaire

With the aim of efficiently consulting a large group of stakeholders a questionnaire<sup>23</sup> was developed and sent to over 70 stakeholders, consisting of labour unions, general and sector specific business associations, enterprises and NGOs. The questionnaire consisted of general questions and more specific questions dealing with structure, promotion and the resolution of complaints by the NCP, against the background of the four core criteria for NCPs, visibility, accessibility, transparency and accountability.

Unfortunately, only seven questionnaires were returned, whereas five organisations replied by stating they could not return the questionnaire, because they did not consider themselves to be a stakeholder to the NCP or for other reasons. One stakeholder chose not to fill out the questionnaire, but did share his views through an individual interview. The questionnaires that were returned did not come from one specific group of stakeholders. Having received so few responses from stakeholders, the return rate was somewhat disappointing. Given the degree of previous criticism and expressed dissatisfaction with the functioning of NCPs, this consultation exercise provided a good opportunity for all stakeholders to be heard and influence the conduct and outcome of the peer review. The low response rate to the questionnaire from stakeholders was a disappointment. A better response by stakeholders to the questionnaire may have assisted the review team.

#### 4.2.3 Individual interviews

In November, the review team conducted individual interviews with NCP members, key stakeholders, a representative of Royal Dutch Shell, and with officials from government departments and agencies who use or promote the OECD Guidelines in their activities. Each of the interviews were conducted in the Netherlands by two varying members of the review team. The NCP Secretariat took notes which were made available to the whole review team. All of the interviewees were involved in the work of the NCP in both its current structure and in its former, government staffed structure.

The interviews were technically based on the questionnaire, which served as a starting point, but went more in-depth into the NCP mechanism in practice, both in the Netherlands and in general.

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<sup>21</sup> *Ib idem* note 10.

<sup>22</sup> Also see the 2009 Annual Report of the NCP, where of the issues are mentioned.

<sup>23</sup> Questionnaire is attached in the Annexes.

#### **4.2.4 Group discussions**

On 10 December 2009, two group discussions were organised, which were attended by various stakeholders. One discussion was held on the promotional task and structure of the NCP, the other discussion concerned the NCP's handling of specific instances. The main result of these discussions was the interaction between stakeholders sharing their views, so that the review team could derive the stakeholders' overall appreciation of the NCP.

Late November, an expert meeting was held in Boston with scholars from Harvard Law and Business School, Kennedy School of Government, Massachusetts Institute of Technology, and Fletcher School of Law and Diplomacy at Tufts University. In this meeting, which was attended by the Canadian NCP, the OECD Guidelines, the NCP mediation model, and the Dutch NCP structure were discussed.

#### **4.3 Stakeholders involved**

The peer review involved a variety of stakeholders, although the total number of organisations who participated was not as large as initially anticipated. From within the government, the ministries of Economic Affairs, of Foreign Affairs and Development Cooperation, of Housing, Spatial Planning and Environment, and of Social Affairs and Employment participated, as well as two external government agencies, the International Business Promotion Agency and CSR Netherlands.

Outside the government, participants comprised of the Netherlands' largest labour union, employer organisations, OECD Watch as well as individual NGOs, one multi-stakeholder CSR initiative, and Royal Dutch Shell, being involved in the majority of specific instance procedures over the last three years. A more detailed list of people involved during the review is attached in the last Annex.

#### **4.4 Additional background information**

Much background information on the Dutch NCP with regards to structure, communication activities and budget, as well as additional information on the review can be found under the Annexes.

However, this is not all the information that was used by the review team. For the purpose of keeping this report concise and easily accessible, some additional texts, reports and overviews have been left out. These documents are only available online at the (English) website of the Dutch NCP, [www.oecdguidelines.nl](http://www.oecdguidelines.nl). The Secretariat of the Dutch NCP can be contacted for questions relating to this report and the peer review in general.

Introductory document on the  
**Dutch National Contact Point**  
for the OECD Guidelines  
for Multinational Enterprises

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## **1. Background of the NCP Peer Review**

At the annual NCP meeting at the OECD in Paris in 2008 the Dutch NCP indicated, on the repeated suggestions of OECD Watch, that it would be willing to subject itself to a peer review. The peer review system is widely used at the OECD, but to date it had never been used to evaluate the performance of a specific NCP. The outcomes of this peer review process will be used for the evaluation report for the Dutch Parliament.

The peer review also fits in well with the increasing demand – at both the national and international level – for effective NCPs. An example of this demand can be found in the reports dated April 2008 and April 2009 by UN Special Representative for Business and Human Rights, Prof. John Ruggie, in which he writes that NCPs are potentially an interesting vehicle for complaints.<sup>24</sup> Given that there has also been a great deal of criticism of how NCPs operate, this review fits in well with the discussion in the OECD Investment Committee about how to improve the operation and effectiveness of NCPs.

## **2. The Dutch NCP until July 2007**

In the year 2000, the Dutch NCP was established in the Trade Policy Department at the Ministry of Economic Affairs. This department also provides the Dutch input to the OECD Investment Committee. Given the broad scope of the Guidelines, other ministries were also involved, more specifically of Foreign Affairs, of Housing, Spatial Planning and the Environment, and of Social Affairs and Employment. These other ministries were involved on an ad-hoc basis in the handling of specific instances, depending on the content of the issue. The NCP focussed mainly on handling issues and less on promoting the Guidelines.

### *Increasing dissatisfaction*

After the first five years, during which the NCP was involved in 14 issues (see Annex 1) either as the primary handler or in an assisting role for other NCPs, the NCP increasingly received some criticism from civil-society organisations and trade unions in particular, who complained that the NCP was ineffective and slow and that its procedures were insufficiently transparent. These complaints alleged bias on the part of the government in favour of the business community, a lack of investigative and supervisory possibilities and insufficient general resources for handling issues. It was also felt that the information and the explanations given about the NCP and the OECD Guidelines were not up-to-date and were not clear or powerful enough.

In 2003, the Ministry of Economic Affairs deemed the structure of the NCP to be constitutionally debatable because of the tension between, on the one hand, the administrative hierarchy with a politically accountable member of the government at the top, and, on the other hand, the task of the acting official who has to issue independent advice after the closure of an specific instance procedure. For these reasons, the Ministry launched an internal review in June 2005 into how the

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<sup>24</sup> Ruggie report, April 2008, paragraph 98.

NCP was operating, the aim being to draw up recommendations for revising the organisation of the NCP. This process would also boost awareness of the OECD Guidelines in the business community.

#### *Internal review*

The review of five years of the National Contact Point of the Netherlands included the following review questions:

Regarding the *role and operation* of the NCP:

1. **Role of the NCP:** What is the opinion of stakeholders regarding the original function for which the NCP was established – namely a future-oriented conciliation platform focussed on solutions that brings together parties with opposing interests – compared, for example, to a different, more administrative role?
2. **Effectiveness:** What is the opinion of stakeholders regarding the effect of raising a specific instance with the NCP compared to other, more publicity-oriented channels such as the media or politicians, for example?
3. **Scope:** What is the opinion of stakeholders regarding the clarity of the criteria for determining the admissibility of issues, the investment nexus and the fact that the OECD position – for the time being – is that questions about a purely trade relationship will not be taken in consideration?
4. **Efficiency:** What is the opinion of stakeholders about the speed and transparency of the NCP procedures, from the intake through to any subsequent statement?

Regarding the *structure of the NCP*:

5. To what extent is the current structure constitutionally desirable, given that there is a relationship of dependence between the member of the government and an NCP composed of government officials?
6. How do other OECD countries tackle this point? What is the most common composition of the NCP?
7. What might a reformed NCP be like? Would it be desirable to put more distance between the NCP and politicians by e.g. appointing an independent, external chairman?

The review was carried out based on desk research, analysis of the files on a number of issues, interviews with several other NCPs, open interviews with the various stakeholders and a roundtable meeting. The review showed that the various stakeholders had wide-ranging opinions regarding the role and operation of the NCP. NGOs wanted NCPs to tackle issues in a more proactive manner, whereas employers' organisations were more focussed on promoting the Guidelines and would only handle issues on a reactive basis. As regards the effectiveness of the NCP, the respondents differentiated between the promotional task and the mediation task. It was found that the NCP was not adequately performing its promotional task because of insufficient visibility (the website was not up to date, for example). The Ministry itself indicated on this point that promotion of the Guidelines was one of the first areas to be cut back if the overall workload of its officials was high. As regards the handling of specific instances, some stakeholders felt that the government was too much on the side of the business community, that it had no review capacity of its own, that the

government had too few personnel to handle the number of issues raised appropriately, and that the government was not able to monitor compliance with agreements. The trade unions and NGOs in particular felt that the confidentiality of the specific instance procedure reduced the effectiveness of the procedure.

#### *Recommendations for a new NCP*

The above observations resulted in a number of recommendations, first of all as regards the tasks of the NCP:

- *Promoting the Guidelines:*
  - Draw up a communication plan (including updating and improving the website, promotional activities by all stakeholders, etc.);
  - show political support by focussing on embedding them in political and trade missions and instruments;
  - implement targeted preventive awareness-raising campaigns, including about risks in the corporate supply chain.
- *Handling of specific instances:*
  - Clarification of procedures, including working methods, the setting of deadlines and the criteria for determining the investment nexus;
  - the possibility of preliminary advice for parties who may consider raising a specific instance;
  - implementation in practice of the confidentiality provisions;
  - possibility of and budget for local fact finding;
  - drawing up a final statement, including an assessment of the alleged breaches and agreements regarding supervision and evaluation.
- *Networking with other NCPs:*
  - Establish contacts with other NCPs and compare working methods; based on similarities in working methods and/or intentions;
  - present action plans to the OECD IC secretariat.
- *Consultations:*
  - Organise separate meetings with NCP stakeholders, 1x in the run-up to the annual NCP meeting, 1-2x at other times;
  - organise consultations prior to IC meetings for interested stakeholders.
- *Structure of the NCP:*
  - A more independently positioned NCP, with independent members who must be recognisable for each of the various stakeholder groups;
  - the official decree establishing the NCP must include a clear description of tasks and the *possibility* for the NCP to consult with the government – i.e. the ministries concerned – regarding the official interpretation of the Guidelines when handling an issue that has been raised;
  - the authority to issue statements independently.

The Commentaries in the Guidelines set four core criteria for the functional equivalence of all NCPs: visibility, accessibility, transparency and accountability. The efficient and timely handling and



settlement of issues is considered part of accessibility. The criteria apply to the two main tasks of an NCP, namely providing information about/promoting the OECD Guidelines and handling the issues that are raised.

#### *OECD Watch's Model NCP*

These recommendations were broadly in line with the Model NCP document that was published later by OECD Watch in September 2007 (see Annex 3).

The Model NCP document includes the following proposals:

- An NCP should be independent, well informed and authoritative, possibly based on an interdepartmental, a tripartite or an independent model, for example.
- All parties should have confidence in the NCP and the NCP should have sufficient financial resources and training to carry out its tasks properly.
- The Model NCP should be involved in a range of promotional activities and training, supplemented by other government initiatives such as: publishing a booklet on the Guidelines and the NCP procedure; maintaining an informative website; drawing up and implementing a communication strategy; training people inside and outside the government regarding the content and meaning of the Guidelines; organising stakeholder meetings, certainly in the run-up to the annual NCP meeting in Paris; and promotion of the Guidelines by embassies and during trade missions; the Model NCP should take on a more proactive role in checking compliance with the OECD Guidelines by companies that receive government subsidies for their activities. The process of handling issues, such as the statement of admissibility, the local investigation of the facts and the mediation phase should be completed within 12 months.
- The investment nexus should be interpreted broadly.
- The content of the specific instance procedure can be considered confidential information, but the bare procedural steps cannot.

In short, OECD Watch recommends that the Model NCP should consistently work through the procedure if an issue is raised, should treat and inform the parties equally and should deliver a substantiated final statement at the end of the procedure.

### **3. The new Dutch NCP after July 2007**

#### *The decree establishing the NCP*

On 16 February 2007, the then Minister for Foreign Trade signed the decree establishing the updated NCP for a three-year term ending on 1 April 2010. The decree confirmed once again the two tasks of the NCP, specified how they should be implemented and named the people and departments that would be involved in implementing the NCP's tasks and at what times. The decree also stated that the NCP would establish its own, more detailed procedural guidance and would send an evaluation report to the Minister at the end of the aforementioned three-year period. See Annex 4 for the full text of the decree.

### *Composition of the new NCP*

The decree establishing the NCP states that the NCP must be organised as a committee of four independent members, one of whom is the chairman. The members are appointed based on their knowledge and capacities acquired in one of the groups that have an interest in the work of the NCP. However, the NCP members do not represent these interest groups in their capacity as NCP members.

The current members are the chairman, Mr Frans Evers, who was a high ranking civil servant in environmental protection and real estate management and a CEO of a large environmental NGO, and three members, namely Professor Joske Bunders, who specialises in sustainability and innovation, Mr Herman Mulder, former head of group risk management of ABN AMRO bank and internationally known expert in CSR, and finally Mr Lodewijk de Waal, former chairman of FNV, the Netherlands' largest trade union.<sup>25</sup>

NCP membership is a part-time ancillary position. The members do not officially become government employees; they are paid on an hourly basis.

The independent members are supported by four advisory members who are officials from the director level of the Ministry of Economic affairs, the Ministry of Foreign Affairs, the Ministry of Housing, Spatial Planning and the Environment and the Ministry of Social Affairs and Employment. The independent NCP members can call on the specific knowledge of these officials in their status as members, especially when handling issues that have been raised. If a specific instance concerns an alleged breach of employment rights, for example, the Ministry of Social Affairs and Employment will be more closely involved in the handling of the issue and the formation of a judgment.

The four independent NCP members have a secretariat consisting of three people at their disposal. The secretariat's main office is at the Ministry of Economic Affairs, which provides the NCP with two full-time-equivalent policy officers. Economic Affairs has also appointed a senior communications officer to work at the Dutch knowledge centre for corporate social responsibility, which is known as CSR Netherlands. As an independent, government-financed organisation, CSR Netherlands focuses on the implementation of CSR in practice by spreading best practices and organising sector-specific information campaigns.

On 4 July 2007, the Minister for Foreign Trade published the names of the people appointed as members of the NCP in the Government Gazette.<sup>26</sup> On 24 July of that year, the NCP held its first meeting with its new, independent members, chaired by Mr Evers.

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<sup>25</sup> The NCP members' CVs can be found on the NCP website. Annex 5 provides for the weblink.

<sup>26</sup> Government Gazette, 11 July 2007, no. 131, p.10.

	<a href="#">F.W.R. Evers</a> (Chairman)
	<a href="#">H. Mulder</a>
Independent members	<a href="#">L.J. de Waal</a>
	<a href="#">Prof. J.F.G. Bunders</a>
	R.E. van Hell (Economic Affairs)
Officials who are NCP members (advice)	H. von Mijenfeldt (Housing, Spatial Planning and the Environment)
	W.H. Bel (Social Affairs)
	R.J. Scheer (Foreign Affairs)
	J. van Wijngaarden
Secretariat & communications	T.D. van Hoolwerff
	M. van Yperen (CSR Netherlands)
Box: Composition of the Dutch NCP since 2007	

### *The Dutch NCP in practice*

Since 2000, the Dutch NCP has handled a total of nine specific instances itself and has been an assistant NCP on 14 other cases (see the overview in Annex X). The largest number of these complaints (19) alleged non-compliance with Chapter 4 Employment and Industrial Relations, which was followed by alleged breaches of Chapter 2 General Policies (5 cases). A small number of issues concerned breaches of the chapters on Environment (Chapter V), Disclosure (Chapter III) and Combating Bribery (Chapter VI); this information is included in the overview and the numbers are also in line with the numbers previously stated at the beginning of this document.

Out of the nine issues that the NCP itself has handled or is currently handling – at the time of writing there are two cases pending – a total of three have been settled with a joint agreement and a final statement; in three other cases the complaints were withdrawn following an agreement that was reached without the NCP being involved. The required investment nexus was lacking in a number of cases and the NCP was therefore unable to handle the cases concerned. Sometimes the NCP issued a number of recommendations to the company or sector in question, such as in the case of the issue concerning Chemie Pharmacie Holland BV and the issue raised against the tourism industry regarding travel to Burma.

The extent of cooperation with other NCPs differed from case to case as regards issues that were to be handled jointly. The decisive factors in such cases include the relationship between the (sometimes Dutch) parent company and the local company, the physical distance between the Netherlands and the country where the circumstances underlying the issue occur, and the need for assistance experienced by the primary NCP handling the issue. The Dutch NCP does not deviate in this regard from the provisions of the OECD Guidelines in respect of the primary authority of the local NCP to handle an issue, but it does actively seek involvement therein, especially vis-à-vis the involved parent company.

The NCP has made every effort to be more transparent in its activities since it started work in its current form. The website has been entirely updated, for example, and a working method has been published on the website for handling specific instances that are raised (see Annex 6 for details of

the working method). In house, a more extensive working method has been established to determine who has what task and responsibility at what time. The aim of this working method is to be able to offer a homogeneous complaints procedure and to have a clear distribution of tasks in house at all times.

#### *Communication and stakeholder dialogue*

Specifically for the NCP's promotional task, a communication advisor has been appointed at the national CSR knowledge centre "MVO Nederland" (CSR Netherlands).

First activities focused on the development of a communication strategy, including the website, and a 'stakeholder tour' to introduce the new NCP and to explore cooperation on the outreach of the NCP and the Guidelines. In total 75 stakeholders were visited.

The NCP also works closely with the [Agency for International Business and Cooperation](#) (EVD) and the [Chambers of Commerce](#) in the areas of public relations and communications.

The communication strategy is based on the following concepts and principles:

- The OECD guidelines as CSR starting point for international enterprise and as basic expectation of the Dutch government towards corporate conduct in international business
- Emphasis both on small and medium-sized enterprises (SMEs) and large companies
- Communication via intermediary organizations for SMEs (sectors, Chambers of Commerce, EVD, financiers, embassies)
- Simultaneous raising of public awareness and explaining of practical application
- Inspiration, innovation and integration: concrete tools, practical examples and best practices
- Generic approach and sector-specific approach (e.g. textile industry, metal, chemical, ICT, flowers, agro-food, tourism);
- Development of website, flyers, factsheets, presentations, stakeholder meetings;
- Media approach focused on sector magazines and business magazines;
- Integration of the OECD guidelines in strategic policies such as:
  - The declaration on International CSR of the Dutch Social Economic Council (SER);
  - The export credit insurance policy of the Dutch government;
  - Trade missions;
  - The mission statement and practice of the [Agency for International Business and Cooperation](#) (EVD);
  - Dutch Sustainable Trade Initiative (IDH);
  - The [Chambers of Commerce](#); and
  - The Dutch cabinet vision on CSR (2007-2011).

Enterprises, sector associations, employer organisations, public information services, trade unions, civil society organisations and degree programmes can call on the NCP members or the communications manager to act as speaker or process consultant for training, workshops, forums, seminars, conferences, guest lectures and other meetings.

For the emerging markets: Brazil, China, India, Indonesia, Russia, South Africa, Ukraine, Morocco, Vietnam, Turkey and Romania, the NCP provided (potential) entrepreneurs with country specific information on the OECD Guidelines and the CSR challenges that may occur when trying to implement the Guidelines in these countries.

#### *Regular stakeholder meetings*

To enhance its effectiveness, the NCP seeks to organise two stakeholder meetings per year, to be attended by individual companies, business organisations, trade unions, OECD Watch and other NGOs, government agencies and consultants. Next to the regular consultation of the advisory members representing the other involved government departments, these public stakeholder meetings form an important part of the NCP's governance structure. Generally, these meetings consist of an update on the NCP's activities, including the handling of specific instances<sup>27</sup>, and a thematic discussion, such as on the variety and coherence between international CSR codes. Through these meetings the NCP tries to create a common basis for its fulfilment of its promotional and mediatory tasks, or more broadly, to create a multi stakeholder dialogue on corporate social responsibility. The stimulation of such dialogue is an important policy goal of the Dutch government.

For more information please see the NCP procedural guidance, the 2009 annual report and the website of the NCP, in Dutch ([www.oesorichtlijnen.nl](http://www.oesorichtlijnen.nl)) and in English ([www.oecdguidelines.nl](http://www.oecdguidelines.nl)).

#### **Annexes:**

1. Overview of NL NCP cases until 2007\*
2. Overview of NL NCP cases post-2007\*
3. OECD Watch Model NCP (available at [http://oecdwatch.org/publications-en/Publication\\_2223](http://oecdwatch.org/publications-en/Publication_2223))
4. 2007 Decree Establishing the NCP (available at the <http://www.oecdguidelines.nl/ncp/organisation/>)
5. CVs of the NCP members (please click on the names at the <http://www.oecdguidelines.nl/ncp/organisation/>)
6. NCP procedural guidance (available at the <http://www.oecdguidelines.nl/ncp/filing-complaints/>)
7. Annual Report 2009 (available at the <http://www.oecdguidelines.nl/nieuws/annual-report-2009/>)

\*These annexes can be found on the digital working space of the NCP-website.

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<sup>27</sup> Updates on specific instances only comprise of the procedural steps that have been taken and do not disclose the merits of a procedure.

## **Annex 2**

*From: Government Gazette, 27 February 2007, no. 41 / page 12*

### **Decree establishing the Dutch National Contact Point (NCP) for the OECD Guidelines for multinational enterprises No. WJZ 7020203**

The Minister for Foreign Trade, acting in agreement with the Minister of Foreign Affairs, the Minister of Social Affairs and Employment and the Minister of Housing, Spatial Planning and the Environment;

hereby decrees:

#### *Section 1*

In this Decree, the following terms shall be understood to mean:

- a. the Minister: the Minister of Economic Affairs;
- b. the NCP: the National Contact Point for the OECD Guidelines for multinational enterprises.

#### *Section 2*

1. There shall be a National Contact Point for the OECD Guidelines for multinational enterprises.
2. The duties of the NCP shall be:
  - a. to propagate the OECD Guidelines for multinational enterprises, and
  - b. to consider reported specific instances of alleged violations of the Guidelines or elements thereof.

#### *Section 3*

1. Unless the effective application of the Guidelines is best served by confidentiality, the NCP, having considered a specific instance, shall prepare a statement on the subject and submit it to the Minister.
2. Within one month of receiving this statement, the Minister, after consulting the Minister or Ministers concerned, shall add his or her findings to the statement.
3. The NCP shall submit the statement, together with the Minister's findings, to the parties involved in the specific instance and publish this information on the NCP website.

#### *Section 4*

1. The NCP shall consist of a chairman, who is also a member, and up to four members.
2. The members shall be appointed by the Minister and may be suspended and dismissed by the Minister after the latter has consulted the Minister of Foreign Affairs, the Minister of Social Affairs and Employment and the Minister of Housing, Spatial Planning and the Environment.
3. The members shall contribute their knowledge and expertise in a personal capacity and shall not act as representatives of a specific interest group.

#### *Section 5*

1. Furthermore, the NCP shall comprise up to four advisory members.
2. The advisory members shall represent the Minister of Economic Affairs, the Minister of Foreign Affairs, the Minister of Social Affairs and Employment and the Minister of Housing, Spatial Planning and the Environment. The latter three advisory members shall be appointed by the Minister on the recommendation of the Minister of Foreign Affairs, the Minister of Social Affairs and Employment and the Minister of Housing, Spatial Planning and the Environment, respectively.

#### *Section 6*

The Minister shall provide for the NCP secretariat.

#### *Section 7*

1. The NCP shall determine its own working procedure.
2. The documents concerning the NCP's activities shall be administered in accordance with the procedures applicable at the Ministry of Economic Affairs. Upon termination of the NCP's activities, the documents shall be kept in the archives of that Ministry.

#### *Section 8*

1. Before 1 June of each year, the NCP shall draw up a report of its activities, findings and results

and submit this annual report to the Minister. The Minister shall send the annual reports to the OECD.

2. At the Minister's request, the chairman shall provide an interim verbal report of the NCP's activities.

#### *Section 9*

The NCP shall draft an evaluation report addressing the effectiveness of its performance. The NCP shall submit this report to the Minister before 1 January 2010.

#### *Section 10*

1. This Decree shall enter into force on the second day after the publication date of the Government Gazette.

2. This Decree shall remain valid until 1 April 2010.

#### *Section 11*

This Decree shall be cited as: Decree establishing the NCP [*Instellingsbesluit NCP*].

This Decree and the explanatory notes shall be published in the Government Gazette and copies shall be sent to the parties involved.

*The Hague, 16 February 2007*

*Minister for Foreign Trade,  
C.E.G. van Gennip*

### **Explanatory notes**

#### *General*

The OECD Guidelines for multinational enterprises establish how the authorities of the OECD member states expect multinational enterprises to conduct themselves. They contain a number of voluntary principles and standards for corporate social responsibility and cover such issues as information provision, labour, the environment, fighting corruption, consumer interests, knowledge transfer, competition and taxation. The voluntary nature does not alter the fact that enterprises may be 'held to account' for not complying with the OECD Guidelines. This may take the form of proceedings before the National Contact Point for the OECD Guidelines for multinational enterprises (NCP).

#### *Task of the NCP*

The NCP has the following two tasks: to propagate the Guidelines, which includes raising awareness of the NCP's purpose and working method among enterprises and other stakeholders, and to consider specific instances submitted to the NCP of alleged violations of the Guidelines or elements thereof.

Studies have shown that SMEs in particular are not or hardly aware of the Guidelines or the NCP. An increasing number of SMEs are entering markets that may entail a risk in terms of socially responsible business practices.

This is why the launch of the revised NCP is accompanied by a release of funds for additional information provision, especially via the knowledge centre for corporate social responsibility: CSR Netherlands. The NCP has to carry out its duties in compliance with the text of the Guidelines established in 2000 and with the additions (e.g. agreements on interpretations) or amendments to this text that have been or will be adopted by the OECD Investment Committee. In preparing such additions or amendments, the representative of the Netherlands on the Investment Committee will consult the NCP. An NCP representative will be part of the Dutch delegation to the Annual Meeting of NCPs.

#### *Proceedings*

The NCP must assess the admissibility of a specific instance on the basis of the Guidelines themselves and the 'Procedural Guidance' provided by the OECD as part of the Guidelines. The role of an NCP as outlined in the Procedural Guidance is primarily that of a mediator, without any legal connotations.

Account must also be taken of the Investment Nexus accepted by the OECD in 2003. This concept was addressed earlier in the letter to the Lower House of Dutch Parliament of 16 February 2005 (Parliamentary Papers II 2004/05, 29 439, no. 5). In assessing the admissibility of a specific instance, the NCP must broadly interpret this Investment Nexus. Rather than focusing on the ownership structure, consideration must be given to aspects such as the extent of influence the

Dutch enterprise can exert over the foreign enterprise involved in the specific instance, the extent to which the foreign enterprise depends on the Dutch enterprise in terms of sales, the extent to which the products are marketed in the Netherlands as the own products of the Dutch enterprise, the sustainability of the cooperation between the two enterprises, etc.

A statement from the NCP must be drawn up as soon as possible after the consideration of a specific instance declared admissible has been completed. Even if its mediation is unsuccessful, the NCP will have the authority to draw up a statement in which it expresses an opinion on the alleged violations.

#### *Composition of NCP*

The OECD Guidelines for multinational enterprises were revised in 2000. Every country which endorses these revised Guidelines undertakes to set up an NCP. The Dutch NCP consisted of officials from the Ministry of Economic Affairs (primarily responsible), the Ministry of Foreign Affairs,

the Ministry of Social Affairs and Employment, and the Ministry of Housing, Spatial Planning and the Environment. Based on a study completed in 2006 into five years of NCP, it was decided to set up a more independent NCP with a non-official chairman and up to four non-official members. In addition, the NCP has advisory members who are officials of the aforesaid Ministries. The latter members advise the non-official members on matters such as the interpretation of the Guidelines. All decisions (e.g. admissibility, proceedings, statement, etc.) are made by the non-official members.

#### *Working method*

The same study revealed criticism of the drawn-out handling of specific instances and the insufficient level of transparency in respect of procedures and criteria. The analysis of specific instances considered shows that the lengthy processes were often attributable to a lack of manpower at the NCP secretariat. The introduction of the new NCP means that the Ministry of Economic Affairs will structurally provide for an adequate secretariat.

The new NCP will be instructed to give priority to clarifying and publishing the successive steps in the specific instance consideration process, including indications of processing times.

#### *Evaluation report*

Based in part on the evaluation report to be drafted in 2009, a decision will be taken on whether to extend the operating period of the NCP in its current form.

*Minister for Foreign Trade, C.E.G. van Gennip*



### Annex 3

#### Specific Instances Considered by the Dutch National Contact Point to Date

NCP concerned	Issue dealt with	Date of Notification	Host Country	Guidelines Chapter	Status	Final Statement	Comments
Netherlands	Adidas' outsourcing of footballs in India	July 2001	India	II. General Policies IV. Employment and Industrial Relations	Concluded	Yes, December 2002	A resolution was negotiated and a joint statement was issued by the NCP, Adidas and the India Committee of the Netherlands on 12 December 2002 <a href="http://www.oecd.org/dataoecd/33/43/2489243.pdf">www.oecd.org/dataoecd/33/43/2489243.pdf</a>
Netherlands	Dutch trading company selling footballs from India	July 2001	India	II. General Policies IV. Employment and Industrial Relations	Concluded	No investment nexus	After the explanation of the CIME on investment nexus it was decided that the issue did not merit further examination under the NCP.
Netherlands	IHC Caland's (now: SBM Offshore) activities in Myanmar to contribute to abolition of forced labour and address human rights issues	July 2001	Myanmar	IV. Employment and Industrial Relations	Concluded	Yes	After several tripartite meetings parties could agree on common activities and a joint statement. Parties visited the ambassador of Myanmar in London. Statement can be found on <a href="http://www.oesorichtlijnen.nl">www.oesorichtlijnen.nl</a> (English version)
Netherlands	Closure of an affiliate of a Finnish company in the Netherlands	December 2001	Netherlands	IV. Employment and Industrial Relations	Concluded	No	Labour unions withdraw their instance after successful negotiations of a social plan.
Netherlands	Labour unions requested the attention of the NCP due to a link of government aid to Dutch labour unions to help labour unions in Guatemala	March 2002	Guatemala/ Korea	IV. Employment and Industrial Relations	Concluded	Not by Dutch NCP	The specific instance was about a Korean company, the Korean NCP was already dealing with the instance. The Dutch NCP concluded by deciding that it did not merit further examination under the Dutch NCP.
Netherlands	Labour unions requested the attention of the NCP on a closure of a French affiliate in the U.S.A.	July 2002	United States	IV. Employment and Industrial Relations	Concluded	Not by Dutch NCP	The link that the labour unions made was the fact that another affiliate of this French company in the Netherlands could use the supply chain paragraph to address labour issues. The Dutch NCP concluded by deciding that the specific instance was not of

							concern of the Dutch NCP and did not merit further examination.
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<b>NCP concerned</b>	<b>Issue dealt with</b>	<b>Date of Notification</b>	<b>Host Country</b>	<b>Guidelines Chapter</b>	<b>Status</b>	<b>Final Statement</b>	<b>Comments</b>
Netherlands	Treatment of employees of an affiliate of an American company in the process of the financial closure of a company	August 2002	Netherlands	IV. Employment and Industrial Relations	Concluded	Yes	As the Dutch affiliate went bankrupt and the management went elsewhere, neither a tripartite meeting nor a joint statement could be realised. The NCP decided to draw a conclusion, based on the information gathered from bilateral consultations and courts' rulings.
Netherlands (consulting with Chile)	On the effects of fish farming	August 2002	Chile	V. Environment	Concluded	Not by Dutch NCP	The specific instance was dealt with by the Chilean NCP. The Dutch NCP acted merely as a mediator between the Dutch NGO and the Chilean NCP.
Netherlands	Chemie Pharmacie Holland BV and its activities in the DRC.	July 2003	Democratic Republic of Congo	II.10. Supply chain IV. Employment and Industrial Relations	Concluded	Yes, May 2004	Despite the lack of an investment nexus, the NCP decided to publicise a statement on lessons learned.
Netherlands	Closure of an affiliate of an American company in the Netherlands	September 2003	Netherlands	IV. Employment and Industrial Relations	Concluded	No	Labour unions withdraw their instance after successful negotiations of a social plan.
Netherlands	Travel agencies organising tours to Myanmar.	2003-2004	Netherlands	IV. Employment and Industrial Relations	Concluded	Yes, April 2004	Despite lacking investment nexus, NCP decided to make statement about discouraging policy on travel to Myanmar.
Netherlands	Through supply chain provision address an employment issue between an American company and its trade union	August 2004 - April 2005	United States	IV. Employment and Industrial Relations	Concluded	Not by Dutch NCP	The link that the labour unions made was that a Dutch company, though its American affiliate, could use the supply chain recommendation to address labour issues. The Dutch NCP discussed the matter with the Dutch company involved. Shortly thereafter the underlying issue between the American company and its trade union was solved.

NCP concerned	Issue dealt with	Date of Notification	Host Country	Guidelines Chapter	Status	Final Statement	Comments
Netherlands	Treatment of the employees of an Irish company in the Netherlands	October 2004	Netherlands	IV. Employment and Industrial Relations	Concluded	No	The NCP decided that the specific instance, raised by a Dutch labour union, did not merit further examination, because of the absence of a subsidiary of a multinational company from another OECD country in the Netherlands.
Netherlands	Introduction of a 40 hrs working week in an affiliate in the Netherlands of an American company	October 2004	Netherlands	IV. Employment and Industrial Relations	Concluded	No	Legal proceedings took care of labour union's concerns.
Netherlands	Treatment of employees and trade unions in a subsidiary of a Dutch company in Chile	July 2005	Chile	IV. Employment and Industrial Relations	Concluded	Not by Dutch NCP	Labour Union requested the Dutch NCP to inquire after the follow up of a Interim report of the ILO Committee on Freedom of Association on the complaint against the Government of Chile.
Netherlands	Storage facilities in the Philippines of Royal Dutch Shell: alleged improper influencing of local decision making processes and of violating environmental and safety regulations.	May 2006	Philippines	II. General Policies III. Disclosure V. Employment and industrial Relations VI. Combating Bribery	Closed	Yes, on 31 August 2009	The procedure had been halted for 1,5 years due to legal procedures in host country. NCP went on a fact finding mission in November 2008 but was not able to mediate successfully in 2009. Final statement published on 31 August, 2009.
Netherlands	Request by NCP of the USA to contact Dutch Gamma Holding, re an instance concerning trade union rights at an USA-based subsidiary.	July 2006	USA	IV. Employment and Industrial Relations	Closed	N.A.	Report of the meeting between Dutch NCP and the Dutch company was sent to the NCP of the USA. In April 2007 an agreement was reached between the parties.
Netherlands	Maltreatment of employees and de facto denial of union rights at a main garment supplier in India of Dutch denim manufacturer G-Star.	October 2006	India	II. General Policies IV. Employment and Industrial Relations	Withdrawn	Yes, only procedural on 15 April 2008	After a successful mediatory attempt beyond NCP-level between complainants and the Indian company directly, the specific instance was withdrawn on February 5, 2008.
Netherlands and United Kingdom	Abuse of local corporate law by a subsidiary of a Dutch/British Unilever, in order to dismiss employees without compensation.	October 2006	Pakistan	IV. Employment and Industrial Relations	Concluded	Yes	Case was brought to both the Dutch and UK NCP. The instance was decided admissible by the UK NCP in December 2008. Facilitating role by the DNCP.

<b>NCP concerned</b>	<b>Issue dealt with</b>	<b>Date of Notification</b>	<b>Host Country</b>	<b>Guidelines Chapter</b>	<b>Status</b>	<b>Final Statement</b>	<b>Comments</b>
Netherlands	Alleged violation of local land property law and environmental pollution (air, noise) by a Pakistani Joint Venture of Dutch SHV Holding NV at a newly build store in Karachi.	October 2008	Pakistan	II. General Policies V. Environment	Concluded	Yes	After admissibility the NCP met with the MNE, which turns out to have sold its share in the JV. No longer an investment nexus.
Netherlands, Ireland (lead), Norway, USA	Pipeline laying project of Shell Ireland E&P, Statoil and Marathon allegedly violating human rights and environmental standards	August 2008	Ireland	II. General Policies V. Environment	Pending	No	The SI was brought to both the Irish and the Dutch NCP, which accepted the SI jointly. All parties involved were heard in late April 09, new steps are under consideration.
Netherlands, Argentina (lead)	Alleged violation of environmental standards and ineffective local stakeholder involvement by subsidiary of Shell, Shell CAPSA.	June 2008	Argentina	II. General Policies V. Environment	Pending	No	The SI was merited further consideration in September 2008. Arg. NCP has spoken with both parties and has visited the site. Shell objects further proceedings due to parallel legal procedures.

## Executive summary of the NCP Communication plan 2007 – 2010

In 2007-2008, National Contact Point (NCP) communication focused primarily on:

- *Developing* tangible resources (website, texts, presentations, factsheets, practical examples, etc.);
- *Informing and engaging brokerage firms* that target the business community.

The results of these activities include:

- A website that attracts a lot of hits (250 unique visitors/week on average);
- Practical tools to implement the guidelines in company operations;
- Trained management consultants at the Agency for International Business and Cooperation (EVD) and the Chambers of Commerce;
- OECD guidelines as a normative framework in the policy of the Ministry of Economic Affairs, the International Corporate Social Responsibility (IMVO) Committee of the Social and Economic Council of the Netherlands (SER), the corporate social responsibility (CSR) policy of the EVD, the Chambers of Commerce CSR dossier, the Dutch Sustainable Trade Initiative (IDH), a range of foreign tools and several trade organisations.

During the 2009-2010 period, the results cited above will be maintained (low effort) and there will primarily be a shift in focus (high effort) to a:

- More *direct approach towards businesses* (SMEs and multinationals) involving, for instance, direct mailing and business-oriented media;
- Higher *media profile for the NCP*, particularly with respect to the reporting facility;
- *Informed NGO sector in southern countries* with respect to the reporting facility;
- *Learning strategy* based on NCP cases.

The strategy:

- The OECD guidelines are *positioned* as the normative government framework that must be applied to enhance the economic legal order.
- Compared to other CSR initiatives, the guidelines help to navigate the sea of codes and serve as the starting point for international corporate social responsibility ('the trunk of the decision tree').
- The NCP reporting facility will be presented as an opportunity for companies, trade organisations and civil-society organisations to learn to be more effective. The associated core messages are: report at an early stage, better to prevent than to respond, the NCP as a secure (learning) environment, the potential appeal of the NCP for other CSR initiatives (e.g. SER, Ruggie, Global Compact (GC), sustainable procurement).
- The *dilemmas and problem areas* will be presented in addition to the *added value* of the NCP and the reporting facility as a learning environment. This increases credibility (potential for self-reflection),

demonstrating that this is a learning process for everyone involved (the road to the ideal NCP model is long) and adjusting the expectations of stakeholders (more goodwill, less vulnerability).

Expected results:

- Direct mailing to the CEO/Central Works Council of multinationals regarding the added value of the NCP/guidelines;
- Focus on the guidelines and the NCP in general and trade-specific media;
- Presentation of the opinion-forming contributions of NCP members in both general and business-oriented media;
- Opening up NCP cases and distilling learning experiences;
- Strategic collaboration and clearinghouse between GC, International Organisation for Standardisation (ISO), Global Reporting Initiative (GRI), International Labour Organisation (ILO), etc.;
- Decision tree/step-by-step plan for companies to develop CSR policy;
- Start of a well-functioning and low-threshold NCP model (e.g. peer review).

## Annex 5

### Global overview of budget and costs of the Dutch NCP till date

2007	Budget	Costs
Remuneration & NCP members	€ 42.724,50	€ 9.051,56
Communication officer	€ 36.458,00	€ 36.458,00
Travel expenses – local <sup>28</sup>	€ 5.152,00	€ 216,90
Travel expenses – abroad	€ 10.000,00	€ 0
External expertise	€ 10.000,00	€ 0
Promotional activities	€ 30.000,00	€ 0
Contingency	€ 5.735,62	€ 2.092,00
<b>Total</b>	<b>€ 140.070,12</b>	<b>€ 47.818,46</b>

2008	Budget	Costs
Remuneration & NCP members	€ 51.645,00	€ 14.008,49
Communication officer	€ 87.500,00	€ 56.875,00
Travel expenses – local	€ 8.832,00	€ 745,50
Travel expenses – abroad	€ 40.000,00	€ 18.851,98
External expertise	€ 20.000,00	€ 7.119,07
Promotional activities	€ 40.000,00	€ 11.652,48
Contingency	€ 9.832,50	€ 4.216,44
<b>Total</b>	<b>€ 257.809,50</b>	<b>€ 113.468,96</b>

2009	Budget	Costs
Remuneration & NCP members	€ 51.645,00	€ 11.894,00
Communication officer	€ 87.500,00	€ 87.500,00

<sup>28</sup> Travel expenses made in the Netherlands.

Travel expenses – local	€ 8.832,00	€ 1294,55
Travel expenses – abroad	€ 40.000,00	€ 208,95
External expertise	€ 20.000,00	€ 16.148,16
Promotional activities	€ 37.500,00	€ 15.499,55
Contingency	€ 4.096,88	€ 2.852,35
<b>Total</b>	<b>€ 249.573,88</b>	<b>€ 135.397,56</b>



October 23, 2009.

**Questionnaire for Stakeholders in Peer Review of Dutch NCP  
(only send by email)**

This questionnaire is send to a large group of external stakeholders. The purpose of this questionnaire is to obtain information that will help us get insight in the views and experiences of the stakeholders with respect to the strengths and weaknesses of the Dutch NCP, and how its performance may be improved.

This questionnaire is one of the instruments we will use in reviewing the Dutch NCP, next to multiple reports, interviews and group discussions. The responses should help us with the drafting of our final report, and with the formulation of recommendations.

The information you could provide us with will neither be used for any other purposes than the review, nor will they be published and / or distributed outside the review team and its assistants. Where the information provided is used in the Peer Review team's final report, it will be made anonymous so that it cannot be attributed to an individual person or organisation

Please answer the questions from your personal position within you organisation (a few companies / organisations have more than one participant). Please be concise in your answers and feel free to ignore questions about issues you have no experience with. The 'boxes' after every question will stretch to fit you answer.

**Please send this questionnaire back to Tabe van Hoolwerff  
([t.d.vanhoolwerff@minez.nl](mailto:t.d.vanhoolwerff@minez.nl)) on 6 November at the latest.**

Thank you very much for your cooperation,

On behalf of the peer review committee,

Andrew Kavchak,  
Chair of the peer review team of the Dutch NCP

### A. General questions

1. What is your name and position in your organisation
2. When did your organisation engage with the NCP? (time/occasion)
3. How does engagement with the NCP fit in the goals of your organisation?
4. Please describe the importance of NCP activities for your organisation (on short and longer term basis)
5. Do you attend the semi-annual stakeholders meetings?  
If 'no', please proceed with question 7.
  - What is your opinion about them?
  - Do you have any suggestions regarding these stakeholder meetings?
6. Can you give an example of where the Dutch NCP has acted on or rejected comments/recommendations that have been made by you?

### B. Your impressions and experiences with the Dutch NCP

#### **Promotional task:**

7. What is your impression of the performance of the Dutch NCP in terms of raising awareness of and promoting the Guidelines? Is it effective? What are their strengths and weaknesses? What could they do better? Is the Dutch NCP sufficiently accessible in your view?

#### **The structure of the Dutch NCP**

In 2007 the Dutch NCP was restructured, the following questions relate to changes in its structure and performance since that date.

8. What is your opinion of the actual structure of the Dutch NCP. What is good and where do you see or experience difficulties?

9. The Dutch NCP is in its activities independent from the government and other organisations. What is your appreciation of this feature of the Dutch NCP in practice?

10. With respect to the four core criteria of the OECD guidelines – visibility, accessibility, transparency and accountability – do you experience a difference between the performance of the NCP before 2007 and after? In what way?

### **Specific Instance Procedure**

11. Dealing with specific instances: Is your organisation (or has it been) involved in one or more so called Specific Instances (SI) with the Dutch NCP? If so, which SI and what was your role?

12. Were you aware of the OECD Guidelines or the Dutch NCP before you became involved in a Specific Instance?

13. What is your appreciation of the following issues:

- the procedure of the Dutch NCP as published on the website? Is it helpful? Is it missing something?
- the stated timelines?
- screening of cases / initial assessment of cases?
- fact-finding?
- communication with you during the process of an SI?
- cooperation with you during the process of an SI?
- mediation/conciliation?
- confidentiality issues during the process?
- the final statements?

14. Did you experience difficulties with the interpretation of the OECD guidelines, and if so, can you be specific?

Do you have any further comments?

## **Annex 7**

### **Institutionalizing Mediation in the OECD Guidelines: A one-time Consultation among CSR/Mediation Experts and National Contact Points (NCPs) in Cambridge, Massachusetts**

*Harvard Law School – 30 November 2009*

#### **Meeting Summary**

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### **1. Overview**

In 2010, global stakeholders will be updating the OECD Guidelines for Multinational Enterprises and seeking opportunities to strengthen the role that the guidelines can play in promoting responsible corporate conduct abroad. Important among these will be exploring opportunities to institutionalize the emerging role of mediation in the work of National Contact Points (NCPs), as a way of helping to resolve disputes arising under the guidelines.

On 30 November 2009, a group of experts and practitioners from the fields of mediation, corporate accountability, and corporate social responsibility met with representatives from the Dutch and Canadian NCPs visiting at the Program on Negotiation at Harvard Law School (See attached list of attendees). The purpose of the consultation was to explore how best to encourage and strengthen the use of mediation by NCPs pursuant to the OECD guidelines.

### **2. The OECD Guidelines, NCPs, and Mediation**

The OECD Guidelines for Multinational Enterprises are an important component of the international accountability architecture for the conduct of multinational enterprises (MNEs) operating abroad. National Contact Points (NCPs), established in each OECD signatory country to promote implementation of the guidelines, provide an entry point for concerned stakeholders in host countries to hold MNEs accountable in their home countries for their conduct abroad. Concerned stakeholders can file 'notifications' with NCPs of alleged breaches of conduct by MNEs, which must then be addressed through the NCP structure. Across the approximately 40 different NCPs, experience in receiving and handling notifications varies widely. For the majority, relatively few notifications have been received. For the most part, NCP structures have not been very active. Where notifications have been received, NCPs must decide whether and how to investigate complaints and provide a public statement of their findings.

In a few countries, NCPs have begun to play a direct role in helping to resolve some of the disputes about which they have been notified – by hiring professional mediators or by mediating themselves. Where they have used mediation effectively, they have helped to build confidence across stakeholder categories in the OECD framework – in a timely, less costly, and more inclusive way than would otherwise have been the case. However, institutionalizing mediation within the NCP process raises a number of challenges that ought to be addressed as the OECD guidelines are reviewed during the coming months.

### 3. Mediation by NCPs: Key Questions

Based on their experience mediating disputes about which they have been notified, NCP representatives shared some of the questions they have been asked. These tend to fall under four broad headings.

#### ***a. The Roles, Obligations and Position of the NCP:***

- NCPs have interpreted their roles differently, especially regarding the extent to which it is their responsibility to help reconcile the parties to the conflicts that have been brought to their attention. According to the Guidelines, the primary function of an NCP is to implement the OECD guidelines, among them fulfilling their obligation to issue written findings in specific instances. NCP notification procedures were established in service of that mandate. Nevertheless, some NCPs have taken a more active approach in resolving disputes, while others have not.
- Similarly, NCPs are structured in different ways. The vast majority of NCPs are government entities. This can affect both the credibility and the perceived neutrality of the NCP among the relevant stakeholders. It may also have implications for the ability of an NCP itself to play a mediating role on its own, as opposed to a convening role that might involve the use of professional neutrals or mediators. The UK NCP is a multistakeholder independent organization, while the Dutch NCP is an independent entity consisting of independent experts, which may place them in a better position to intervene directly as a mediator. One question we discussed on 30 November 2009 was what are the factors that determine the NCPs credibility as a mediator.
- NCPs play a dual role in responding to notifications by concerned stakeholders: a fact-finding role in which they, after a mediation attempt are expected to release a public statement of findings, indicating whether or not a company is in break of the Guidelines; and, if parties agree, a mediating role, in which they seek to facilitate resolution of whatever charges have been brought. Some of the 30 November 2009 consultation raised some worries that the first, more traditional role of an NCP might give it access to information that would make it impossible to function as a mediator, which requires the trust and concurrence of the parties. If the parties know that information shared during a mediation session could be used against them in a statement of findings, they might be unwilling to accept the NCP as a neutral mediator. Several participants at the consultation felt these two roles might need to be separated, or at least balanced in a credible way (through a meaningful separation of fact-finding and mediation functions, and by using external professional mediators rather than expecting the NCP to mediate on its own).
- Once a notification is received, NCPs face a threshold question of how much due diligence they must invest in initially investigating each complaint before even determining whether mediation or some other process might be most effective. This includes initial research into the facts, initial conversations with relevant stakeholders to determine the facts, and other background inquiries to identify all the relevant stakeholders, given that an official notifier may not be representative of all the interests involved.

### ***b. The Rights and Participation of Parties***

- In many instances, one concerned stakeholder may file a notification with an NCP, but other stakeholders may be directly (or more directly) affected by alleged corporate misconduct. How should NCPs determine whether a notifier is appropriately representative of the various stakeholders that might be affected, and has the legitimacy to negotiate in a mediated forum on behalf of the others?
- One of the potential benefits of mediation is that it usually yields a more inclusive resolution of a dispute that takes better account of all stakeholder interests. Should a notification, therefore, require or encourage an NCP to trigger a broader inquiry and/or invite a broader, more inclusive set of stakeholders to a mediation process?
- In many instances, corporate operations abroad are conducted by subsidiaries and/or contractors. International standards for defining the responsibility of parent companies for the actions of subsidiaries and contractors are evolving among stakeholders in various international forums. What standard should NCPs apply in addressing such situations?
- Mediation is a voluntary process, requiring the parties to give their consent to participate and to live by potential agreements. Participants in the consultation raised questions about the incentives of different parties to participate in NCP-run processes. After all, the total number of notifications filed over the past decade is relatively low. While a more inclusive forum with greater promises of confidentiality might be attractive to some MNEs, it might make it be attractive to other notifiers. Effective mediation may be limited to those cases in which the priority of the parties to find an effective and inclusive resolution of their differences, as opposed to seeking an opportunity for a public finding of fault.

### ***c. Roles for Neutral Parties in NCP Processes***

- There are several different NCP models within the OECD. The UK NCP hires professional neutrals once a notification has been initiated. The Dutch NCP, by nature of its formal independence from government and its multi-stakeholder composition, has been able to play a direct mediating role on its own, gaining credibility among the stakeholders. Other NCPs may face difficulty gaining credibility in the eyes of certain stakeholders, especially if the NCPs are government officials seeking to designate themselves as neutrals. Regardless of the institutional design, for mediation to be effective, the process and those playing a direct role in addressing a dispute must be perceived as credible and neutral by the parties involved.

#### **d. Institutional Arrangements**

- NCPs have different interpretations of the section of the guidelines dealing with ‘parallel procedures’. Some have interpreted it to mean that NCP efforts should be halted if the subject matter of a notification is also pending before a court of law. Others believe that the NCP process should only be halted if an MNE can make clear that the NCP procedure could harm its standing before the court. With greater accumulated experience across NCPs, it may be appropriate and helpful for NCPs to develop a clearer understanding of the parallel procedures provision and how best to handle it.
- With different structures, practices and processes across NCPs, what institutional arrangements can be established to ensure peer learning among NCPs, including the identification of best practices? The participants in the consultation felt strongly that NCPs should request close and careful review of their operations by peer NCP participants.
- Although experience varies across countries, most NCPs have minimal resources at their disposal. If NCPs are to play an active role – in both achieving the broad mandate of promoting the OECD guidelines and a potentially expanded role in resolving the disputes that come before them – they will require a greater investment of resources in NCP operations. What opportunities exist for increased national, international and/or private sector funding to enable NCPs to play any of these roles more effectively? During the consultation meeting, one idea discussed was the possibility of charging “investigation or filing fees” to help defer NCP expenses. NCPs might also seek to build mediation “endowments” with one-time funding from philanthropic sources.

#### **4. Opportunities to Strengthen NCP Mediation Capacity**

Participants in the consultation recognized the potential of NCPs to play an important role in strengthening implementation of the OECD guidelines. NCPs are uniquely positioned to offer a strong, legitimate convening power that few other international entities hold, with credibility to bring together MNEs and stakeholders when notifications are filed. That convening power arises from the OECD guidelines, the authority to issue public statements of findings, and the official connection to home-country government structures.

At the same time, some of these same factors may pose challenges to the credibility of NCPs who wish to play a direct mediating role themselves: the dual responsibility of mediation and adjudication; the fact that in most cases NCPs are represented by government officials; and limits on mediation capabilities and resources. Participants offered the following initial recommendations to address these challenges:

##### **a. Use more professional neutrals to enhance credibility and capacity**

With the exception of the independent models, the structure of NCPs in most countries is not conducive to building effective neutral mediating capacity. As government officials, NCPs may not be able to establish credibility as neutral parties among all affected stakeholders. In addition, they may not have the professional mediation skills required. The UK model of hiring certified, professional mediators offers an

attractive alternative, whereby the NCP uses its convening power to bring stakeholders together, and then draws on a member of a pre-listed panel of professional mediators for help. Even in the Dutch model, it may be effective to use external professionals -- either as an alternative or as part of the mediation team - both to enhance the capacity of a relatively small NCP staff and to enhance credibility if stakeholders object to the shared nationality of the NCP and the relevant MNE. The use of external neutrals can also build confidence in mediation by creating "an internal wall" between the mediation and adjudication functions of the NCP. External neutrals could play a variety of roles at different stages, from early assessment of conflicts, to process design, to joint fact finding by stakeholders, to the management of agreement-seeking processes.

#### **b. More robust stakeholder assessment and process design**

One important potential role for external professional neutrals would be to conduct more meaningful stakeholder assessment after a notification has been received. Stakeholder assessment consists of confidential interviews with relevant stakeholders to better understand their perceptions of the issues at hand. Assessment teams often produce a report to be shared with all stakeholders that presents the issues as seen by the stakeholders (while protecting confidential information) and proposes recommendation regarding the best way of moving forward with a mediation process.

This type of assessment could help to address several of the challenges raised above:

- the extent to which notifiers are representative of affected stakeholders,
- whether additional parties need to be involved in a potential mediation,
- whether the necessary parties are willing to participate in a mediation process and educate themselves about the potential benefits, and
- how best to take parallel processes into consideration.

Based on this type of assessment, mediations can be designed which: (1) ensure effective representation of various stakeholder interests; (2) provide for a more inclusive approach which can lead to more satisfactory outcomes; and (3) complement rather than conflict with parallel processes.

#### **c. Separate the functions of mediation and fact-finder**

The participants in the workshop were concerned about combining the dual functions of mediation and fact-finder. Although there are some examples of mechanisms whether this dual function had been managed simultaneously, more of than not, trying to do the two things together raises significant challenges that can undermine the effectiveness of mediation. This could be addressed though any number of mechanisms, including a meaningful internal separation within the NCP of these two functions, and/or using external professionals to complete an independent assessment and then deciding whether the NCP was in a good position to mediate

Each of these initial recommendations will require further exploration and discussion among NCPs and OECD stakeholders. They are offered as topics to consider as the OECD guidelines come under review in 2010, in the spirit of strengthening the role that NCPs play in promoting and implementing the OECD guidelines.



## **Institutionalizing Mediation in OECD Guidelines:**

### **Consultation among CSR / Mediation Experts And National Contact Points (NCPs)**

#### *List of participants*

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#### **National Contact Point (NCP) Representatives**

Frans Evers National Contact Point, Netherlands	Herman Mulder National Contact Point, Netherlands
Andrew Kavchak National Contact Point, Canada	Tabe van Hoolwerff National Contact Point, Netherlands

#### **Mediation, Corporate Accountability, and Corporate Social Responsibility Experts**

Convener: Professor Lawrence Susskind  
MIT – Harvard Public Disputes Program at Harvard Law School

Professor Robert Bordonne Harvard Law School (Dispute Systems Design)	Professor David Matz University of Massachusetts – Boston (Conflict Resolution Program)
Professor Rohit Deshpande Harvard Business School (Corporate Codes of Conduct)	Professor William Moomaw Fletcher School of Diplomacy (International Public Negotiation)
Professor Brian Ganson Fletcher School of Diplomacy (Corporate Accountability and Risk Management)	Professor Lynn Paine Harvard Business School (Corporate Codes of Conduct)
David Kovick Consensus Building Institute (Harvard Corporate Social Responsibility Initiative)	David Plumb Consensus Building Institute (Corporate Stakeholder Dispute Resolution)
	Arnold Zack (Professional Mediator)

## **Annex 8**

### **Overview of people involved in the peer review**

Peer review team members:

- Canada: Mr. Andrew Kavchak
- Chile: Mr. Marcelo Garcia-Silva
- France: Mr. Michel Doucin, and Mr. Andre von Walter  
supported by Mr. Fabrice Wenger and Mr. Julien Cleach
- Japan: Mr. Kenko Sone, supported by Mr. Tasuku Fajita
- United Kingdom: Mr. Rowland Bass

The peer review team was supported from the Dutch NCP by:

- Ms. Fieke Krikhaar – DHV Consultants
- Mr. Tabe van Hoolwerff – Dutch NCP Secretary
- Mr. Michiel van Yperen – Communication Official Dutch NCP

The members of the Dutch NCP:

- Mr. Frans Evers, chairman
- Ms. Joske Bunders
- Mr. Herman Mulder
- Mr. Lodewijk de Waal

### **Interviewees and participants in discussions with the peer review team**

Representatives of Dutch government departments and agencies involved in the NCP work:

- *Ministry of Economic Affairs:*  
Mr. Roel Nieuwenkamp, Mr. René van Hell, Mr. Jan van Wijngaarden, and  
Mr. Willem van der Leeuw
- *Ministry of Foreign Affairs and Development Cooperation:*  
Mr. Robert-Jan Scheer and Mr. Lex van der Burg
- *Ministry of Housing, Spatial Planning and the Environment:*  
Mr. Hugo von Meijenfeldt
- *Ministry of Social Affairs and Employment:*  
Mr. Wim Bel and Ms. Jos Huber
- *CSR Netherlands and International Business Promotion Agency (EVD):*  
Ms. Bernedine Bos and Ms. Esther Wielzen

External stakeholders who participated:

- *FNV Labour union:* Ms. Lucia van Westerlaak and Ms. Annie van Wezel
- *VNO NCW Business organisation:* Mr. Winand Quaedvlieg and Mr. David Vermijs
- *OECD Watch:* Mr. Joris Oldenziel
- *Royal Dutch Shell:* Mr. Bert Fokkema