

# *The effectiveness of the Dutch National Contact Point's specific instance procedure in the context of the OECD Guidelines for Multinational Enterprises*

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*The Dutch National Contact Point (NCP) is currently in the international community referred to as the 'gold standard' of NCPs handling disputes between companies and victims of corporate behaviour, or NGOs or unions representing them. These conflicts are resolved within the framework of the OECD Guidelines for Multinational Enterprises ('OECD Guidelines'). The Dutch NCP is generally acclaimed for its nonpartisan composition comprising only independent members and for an active performance and forward-looking approach in its decision-making in the cases.*

*This article presents an analysis of the effectiveness of the Dutch NCP in the period 2012–2019. The effectiveness is examined by applying the eight criteria established in the Procedural Guidance, which document applies to all specific instances accepted and considered on the basis of the revised 2011 OECD Guidelines. In our study, we also consider an additional key effectiveness criterion, i.e. providing remedies to victims. This criterion has been consistently indicated by OECD Watch over the last years. We embedded this criterion in our research design by considering whether the NCP has succeeded in reaching an agreement between the parties involved in a specific instance (remedies might be a part of the agreement but there are also agreements that do not include the provision of remedies).*

*The study employs multiple methods including desk-research, doctrinal research, the collection of empirical data through interviews with NCP members and specific instance participants and a survey with relevant stakeholders. The findings are put in perspective by examining other high-performing NCPs in Europe, i.e. the UK, German, Danish and Norwegian NCPs.*

*Le point de contact national (PCN) néerlandais est aujourd'hui considéré par la communauté internationale comme le modèle de référence pour les PCNs qui traitent des litiges entre les entreprises et les victimes de leur comportement, ou les ONG ou les syndicats qui les représentent. Ces conflits sont résolus dans le cadre des Principes directeurs pour les entreprises multinationales de l'OCDE ('Principes directeurs de l'OCDE'). Le PCN néerlandais est généralement reconnu pour sa composition non partisane, composée uniquement de membres indépendants, et pour ses performances actives et son approche prospective dans la prise de décision sur les affaires.*

*Cet article présente une analyse de l'efficacité du PCN néerlandais pour la période 2012-2019. L'efficacité est examinée en appliquant les huit critères établis dans les Lignes directrices de procédure, un document qui s'applique à tous les cas spécifiques acceptés et pris en compte sur la base des Principes directeurs révisés de l'OCDE de 2011. Dans notre étude, nous considérons également un critère d'efficacité clé supplémentaire, soit l'offre de recours aux victimes. Ce critère a été constamment indiqué par OECD Watch au cours des dernières années. Nous avons intégré ce critère dans notre conception de recherche en examinant si le PCN a réussi à conclure un accord entre les parties impliquées dans un cas spécifique (les recours peuvent faire partie de l'accord mais il existe également des accords qui ne prévoient pas de recours).*

*L'étude emploie de multiples méthodes, dont la recherche documentaire, la recherche doctrinale, la collecte de données empiriques par le biais d'entretiens avec les membres du PCN et les participants à des instances spécifiques, ainsi qu'une enquête auprès des parties prenantes concernées. Les résultats sont mis en perspective en examinant d'autres PCN très performants en Europe, c'est-à-dire les PCN britannique, allemand, danois et norvégien.*

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*Titre en français : L'efficacité de la procédure d'instance spécifique du point de contact national néerlandais dans le contexte des Principes directeurs de l'OCDE à l'intention des entreprises multinationales*

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## 1. INTRODUCTION

### I. I. INTRODUCTION

Every member state of the Organisation for Economic Cooperation and Development (OECD), as well as every non-member state, that adheres to the OECD Guidelines for Multinational Enterprises (MNE Guidelines), has to set up a National Contact Point (NCP).<sup>1</sup> An NCP serves as a non-judicial conflict resolution mechanism. Complaints concerning alleged non-compliance with the MNE Guidelines by multinational enterprises (MNE) can be submitted by victims of corporate misconduct and other interested parties.<sup>2</sup> These complaints can be submitted to the NCP in the claimant's state or, if more suitable, to the NCP in another state. Issues that arise within the framework of the MNE Guidelines are dealt with by NCPs in what is called the 'specific instance procedure', *i.e.* the grievance mechanism put into place by NCPs.<sup>3</sup>

Unique to the MNE Guidelines and the specific instance procedure is their global scope.<sup>4</sup> The norms stipulated by the MNE Guidelines are not confined to national state boundaries, but extend to global business networks and their international supply chains.<sup>5</sup> MNEs need to assume responsibility when adverse impacts are identified in their supply chains.<sup>6</sup> MNEs are directly linked to those adverse impacts that occur in the context of their operations, products or services or as part of complex and varied business relationships.<sup>7</sup> By complying with the MNE Guidelines within international supply chains, MNEs promote responsible business conduct (RBC), also known as corporate social responsibility (CSR).<sup>8</sup>

<sup>1</sup> See generally "OECD Guidelines for Multinational Enterprises" (2011), online (pdf): *OECD* <[www.oecd.org/daf/inv/mne/48004323.pdf](http://www.oecd.org/daf/inv/mne/48004323.pdf)> [OECD Guidelines].

<sup>2</sup> *Ibid*, immediately above para I.C [for future reference, "immediately above" will be referred to as "Chapeau"].

<sup>3</sup> *Ibid*, para I.C.

<sup>4</sup> See B Bağlayan, 'Searching for Human Rights Norms for Corporate Conduct in Domestic Jurisprudence: A bottom-up Approach to International Law' (2018) 36:4 *Nordic J Hum Rights* at 378 [Bağlayan].

<sup>5</sup> See TE Lambooy, *Corporate Social Responsibility: Legal and Semi-legal Frameworks Supporting CSR* (Kluwer 2010) at 227–276 and 435–484 [Lambooy, 2010]; S van 't Foort, "Due Diligence and Supply Chain Responsibilities in Specific Instances: A Doctrinal Analysis of the Dutch National Contact Point's Decisions in the Light of the Decisions Made by the United Kingdom, German, Danish, and Norwegian National Contact Points and Their Compatibility with the OECD Guidelines for Multinational Enterprises" *Erasmus L Rev* [forthcoming]. For additional literature on the complexities of international supply chains, see TE Lambooy, RA Diepeveen, K Nguyen and S van 't Foort, "The Opacity of a Multinational Company's Organisation, Legal Structure and Power" (2013) 3 *The Dovenschmidt Quarterly* at 121–133.

<sup>6</sup> TE Lambooy, M Varner and A Argyrou, "Oil Companies and Effective Remedies: Can Ruggie's Guiding Principles Help?" in S Deva and D Bilchitz (eds.), *Human Rights Obligations of Business: Beyond Corporate Responsibility to Respect* (Cambridge: Cambridge University Press, 2013).

<sup>7</sup> See OECD Guidelines, *supra* note 1 at para II.12.

<sup>8</sup> R Saner and L Yiu, 'Looking on the Bright Side' [2016] 10:2 *EFMD Global Focus* 54–55; Lambooy, 2010, *supra* note 5 at 36–37; GP Calliess and M Renner, "Between Law and Social Norms: The Evolution of Global Governance" (2008) 22:2 *Ratio Juris* 260–280; P Simons, 'Canada's Enhanced CSR Strategy:

As part of the RBC research, our study focuses on examining the effectiveness of the Dutch NCP in the context of MNE Guidelines and particularly when handling issues raised by parties involved in so-called ‘specific instances’.<sup>9</sup> Specific instances are cases brought before an NCP in a specific instance procedure. These cases are submitted by parties, such as NGOs and trade unions, about an alleged breach of the MNE Guidelines by another party, mostly an MNE.<sup>10</sup> The Dutch NCP is tasked to resolve these issues that arise within the framework of the MNE Guidelines in the most effective way mostly using mediation and conciliation mechanisms.<sup>11</sup> Accordingly, our study aims to assess the effectiveness of the Dutch NCP’s specific instance procedure, while strengthening academic scholarship concerning RBC/CSR and dispute resolution using non-adversarial means such as mediation or conciliation in specific instances, such as mediation or conciliation in specific instances.

#### 1.2. OUR CONCEPTUAL UNDERSTANDING OF EFFECTIVENESS OF THE DUTCH NCP IN THE HANDLING OF SPECIFIC CASES AND THE DEVELOPMENT OF OUR RESEARCH QUESTION

In this article, our study focuses on examining the effectiveness of the Dutch NCP in the context of the MNE Guidelines and particularly when handling specific instances, *i.e.* handling of cases submitted to the Dutch NCP within the framework of the MNE Guidelines.<sup>12</sup> Accordingly, we consider that the OECD Council’s decision on the OECD Guidelines for Multinational Enterprises (MNE Decision) has instructed NCPs to follow four guiding principles in the process of dealing with specific instances. These are: impartiality, predictability, equitability, and compatibility (see Table 1 for an explanation).<sup>13</sup> Four other core criteria are also applied by the OECD Council and are aimed at achieving functional equivalence between the NCPs across the world in dealing with specific instances. These are: visibility, accessibility, transparency, and accountability (see Table 1 for an explanation).<sup>14</sup> Summarising, we assess the Dutch NCP’s effectiveness in its handling of specific instances and apply these eight guiding principles and core criteria, which we use as key effectiveness criteria. Their conceptual definitions can be found in Table 1.

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Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses” (2015) Ottawa Faculty of Law Working Paper No. 2015-21 at 1–39.

<sup>9</sup> See OECD Guidelines, *supra* note 1, s I(1).

<sup>10</sup> See Bağlayan, *supra* note 4 at 381.

<sup>11</sup> See OECD Guidelines, *supra* note 1, s I(C)(2)(d).

<sup>12</sup> In literature, effectiveness of the specific instance procedure has been measured by the scope of application of the MNE Guidelines (*i.e.* the amount of MNEs covered by the MNE Guidelines) and the impact of specific instances (*i.e.* the capability to change corporate behaviour). However, it remains unclear how both can be measured, see *e.g.* A Marx and J Wouters, “Rule Intermediaries in Global Labor Governance” (2017) 670 *The Annals of the American Acad of Pol and Soc Sci* at 189–205.

<sup>13</sup> See OECD Guidelines, *supra* note 1, s I(C).

<sup>14</sup> *Ibid* at “Procedural Guidance” para I Chapeau.

Table 1. Eight effectiveness criteria – conceptual definitions

1. Visibility	NCPs need to make themselves visible and ‘inform the business community, worker organisations and other interested parties, including NGOs, about the availability of facilities associated with NCPs in the implementation of the Guidelines [...] [NCPs] are expected to publish information about their NCPs’. <sup>15</sup>
2. Accessibility	NCPs should facilitate ‘access by business, labour, NGOs, and other members of the public [...] NCPs would respond to all legitimate requests for information, and also undertake to deal with specific issues raised by parties concerned in an efficient and timely manner’. <sup>16</sup>
3. Transparency	NCPs should be transparent but also considering that ‘when the NCP offers its “good offices” in implementing the Guidelines in specific instances, it will be in the interests of their effectiveness to take appropriate steps to establish confidentiality of the proceedings. Outcomes will be transparent unless preserving confidentiality is in the best interests of effective implementation of the Guidelines’. <sup>17</sup>
4. Accountability	NCPs should be accountable. ‘Annual reports and regular meetings of NCPs will provide an opportunity to share experiences and encourage “best practices” with respect to NCPs. The [OECD Investment] Committee will also hold exchanges of views, where experiences would be exchanged and the effectiveness of the activities of NCPs could be assessed’. <sup>18</sup>
5. Impartiality	NCP should decide impartially. ‘NCPs should ensure impartiality in the resolution of specific instances’. <sup>19</sup>
6. Predictability	‘NCPs should ensure predictability by providing clear and publicly available information on their role in the resolution of specific instances, including the provision of good offices, the stages of the specific instance process including indicative time frames, and the potential role they can play in monitoring the implementation of agreements reached between the parties’. <sup>20</sup>
7. Equitability	‘NCPs should ensure that the parties can engage in the process on fair and equitable terms, for example by providing reasonable access to sources of information relevant to the procedure’. <sup>21</sup>
8. Compatibility with the MNE Guidelines	‘NCPs should operate in accordance with the principles and standards contained in the Guidelines’. <sup>22</sup>

<sup>15</sup> *Ibid* at “Procedural Guidance Commentary” at para 9.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid* at para 22.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

In our study, we also consider an additional key effectiveness criterion, *i.e.* providing remedies to victims. This criterion has been consistently indicated by OECD Watch over the last years.<sup>23</sup> We embedded this criterion in our research design by considering whether the NCP has succeeded in reaching an agreement between the parties involved in a specific instance (remedies might be a part of the agreement but there are also agreements that do not include the provision of remedies). Our research question is therefore formulated as follows:

*How is effectiveness achieved in the handling of specific instances undertaken by the Dutch NCP?*

### 1.3. READING GUIDANCE

In the following sections of this article, we describe the background of our research (Section 2), the methodologies which we used for the development of our study (Section 3) and we present (Section 4) and discuss (Section 5) our main findings. Finally, we share our conclusions, state the limitations of the study, and offer recommendations for future research (Section 6).

## 2. BACKGROUND

### 2.1. THE MNE GUIDELINES

The MNE Guidelines set forth by the OECD first saw the light of day in 1976.<sup>24</sup> Formulated as recommendations on RBC towards MNEs from OECD member states and states adhering to the MNE Guidelines, the MNE Guidelines were not adopted as a legal instrument. Nonetheless, they ‘carry the weight of a joint recommendation by OECD [and adhering] governments addressed to all MNEs which represents a firm expectation of MNE behaviour’.<sup>25</sup> Although the recommendations included in the MNE Guidelines are not legally enforceable, they oftentimes cite or reflect international laws and regulations that are enforceable before a court of law.<sup>26</sup> Since the latest revision of the MNE Guidelines in 2011, 11 chapters contain recommendations addressed to MNEs about how they should behave in regard of, amongst others, protecting the environment, maintaining industrial relations, paying taxes, respecting human rights and disclosing information to stakeholders and society at large.<sup>27</sup>

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<sup>23</sup> OECD Watch, “The State of Remedy Under the OECD Guidelines: Understanding NCP Cases Concluded in 2018 Through the Lens of Remedy” (June 2019) at 1–4, online (pdf): *OECD* <[www.oecdwatch.org/wp-content/uploads/sites/8/2019/06/State-of-Remedy-2018-2019-06-08.pdf](http://www.oecdwatch.org/wp-content/uploads/sites/8/2019/06/State-of-Remedy-2018-2019-06-08.pdf)> [OECD Watch “The State of Remedy”]; see also “Remedy Remains Rare: An Analysis of 15 years of NCP Cases and Their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct” (2015) at 17, online (pdf): *OECD Watch* <[www.oecdwatch.org/wp-content/uploads/sites/8/2015/06/Remedy-Remains-Rare.pdf](http://www.oecdwatch.org/wp-content/uploads/sites/8/2015/06/Remedy-Remains-Rare.pdf)> [OECD “Remedy Remains Rare”].

<sup>24</sup> See generally, OECD Guidelines, *supra* note 1.

<sup>25</sup> OECD, *Mid-term Report on the 1976 Declaration and Decisions* (Paris: OECD Publishing, 1982) at 57.

<sup>26</sup> S van ‘t Foort, “The History of National Contact Points and the OECD Guidelines for Multinational Enterprises” (2017) 25 *J of the Max Planck Institute for Europ L Hist* at 195.

<sup>27</sup> See generally, OECD Guidelines, *supra* note 1.

## 2.2. NATIONAL CONTACT POINTS

Whenever the MNE Guidelines allegedly are infringed upon by an MNE, victims and other interested parties, mostly represented by NGOs or trade unions, can issue a notification to an NCP, thereby initiating a specific instance procedure.<sup>28</sup> Since 1984, the MNE Decision stipulates that countries adhering to the MNE Guidelines are legally obliged to set up an NCP in their country.<sup>29</sup> According to the MNE Decision, NCPs are tasked to promote the MNE Guidelines, handle enquiries and resolve issues that arise within the framework of the MNE Guidelines.<sup>30</sup>

An NCP plays a seminal role in monitoring an MNE's activities.<sup>31</sup> It tries to resolve issues that arise between MNEs and interested parties within the framework of the MNE Guidelines in a non-adversarial manner – mostly through mediation or conciliation.<sup>32</sup> As a non-judicial grievance mechanism aimed at a consensual outcome, NCPs do not assume an adjudicative role, such as courts. However, NCPs may issue a 'final statement' if no resolution to the matter is reached.<sup>33</sup> Such a statement may contain a determination whether the MNE has or has not breached the MNE Guidelines.<sup>34</sup> Since 2000, over 425 specific instances have been dealt with by NCPs around the world.<sup>35</sup> In 2018, the OECD reported an unprecedented number of new notifications submitted to NCPs – a record high of 52 notifications (aggregate number worldwide).<sup>36</sup>

Meanwhile, the NCP system has received fierce criticism that is 'largely inaccessible, unpredictable and unable to facilitate effective access to meaningful remedy for victims of irresponsible business conduct'.<sup>37</sup> NCPs have been also accused of handling similar cases in a different manner, due to for instance differences in institutional structures, resources and transparency requirements between NCPs.<sup>38</sup> These gloomy observations are complemented by the OECD's 'less encouraging' statistics, showing that the number of agreements reached in

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<sup>28</sup> See OECD Guidelines, *supra* note 1, s I(C) Chapeau.

<sup>29</sup> See generally, OECD, *Second Revised Decision of the Council on the Guidelines for Multinational Enterprises* (Paris: OECD Publishing, 1984).

<sup>30</sup> See OECD Guidelines, *supra* note 1, s I(1).

<sup>31</sup> JL Černič, "Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises" (2008) 4 *Hanse L Rev* 96.

<sup>32</sup> See OECD Guidelines, *supra* note 1, s I(C)(2)(d).

<sup>33</sup> *Ibid*, s I(C)(3).

<sup>34</sup> OECD, *Guide for National Contact Points on Recommendations and Determinations* (Paris: OECD Publishing, 2019) 6.

<sup>35</sup> OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2018* (Paris: OECD Publishing, 2019) at 9 [OECD Annual Report].

<sup>36</sup> *Ibid* at 30.

<sup>37</sup> The criticism was published by OECD Watch, one of the advisory bodies to the OECD. See OECD Watch "The State of Remedy", *supra* note 23 at 13.

<sup>38</sup> *Ibid* at 21–49; compared to RH Weber, "Development of Coherent Procedural Rules for OECD Guidelines Mediation" in N Bonnuci and C Kessedjian (eds.), *40 Years of the OECD Guidelines for Multinational Enterprises* (Paris: Éditions A. Pedone 2018) at 101–118.

disputes mediated by NCPs ‘substantially decreased’ from 83 per cent in 2017 to 36 per cent in 2018.<sup>39</sup>

NCPs themselves have also reported various issues pertinent to dealing with specific instances. Issues reported are for instance that NCPs are significantly under-resourced, have high staff turnover rates, and NCPs noted that they encounter difficulties with maintaining equitability between parties and in convincing parties to engage in the mediation process.<sup>40</sup> Based on these findings, the 2019 Meeting of the OECD Council at the Ministerial Level recommended the governments adhering to the MNE Guidelines to, *inter alia*, ramp up their efforts in providing financial support and aid in human resources to their NCPs as well as to provide the necessary support and visibility within the governments for NCPs to effectively carry out their function.<sup>41</sup>

### 2.3. THE DUTCH NATIONAL CONTACT POINT

While pressure by parties, such as OECD Watch, on NCPs to perform better is mounting,<sup>42</sup> the Dutch NCP has been praised for its structure and approach. Former UN Secretary-General’s Special Representative for Business and Human Rights, professor John Ruggie, commended the Dutch NCP for its structure being the ‘gold standard’.<sup>43</sup> Together with the NCPs from Norway, Denmark and Lithuania, the Dutch NCP is one of the four among the existing NCPs with an ‘expert-based’ organisational structure, meaning that the decision-making is executed by experts that act independently and externally from the government, but are nonetheless dependent on the government for funding and support.<sup>44</sup>

The Dutch NCP is composed of four ‘independent members’ with various backgrounds (*i.e.* working experience at academic institutions, political parties, business organisations and trade unions).<sup>45</sup> Each independent member is appointed by the Minister of Foreign Trade and Development Cooperation (hereafter: the Minister) for four years with the possibility of re-appointment.<sup>46</sup> Support to these independent members is given by four ‘advisory members’

<sup>39</sup> OECD Annual Report, *supra* note 35 at 8–9, 15–16, 21.

<sup>40</sup> See OECD, *Progress Report on National Contact Points for Responsible Business Conduct: Meeting of the OECD Council at Ministerial Level* (Paris: OECD Publishing, 2019) at para 28.

<sup>41</sup> *Ibid* at para 49.

<sup>42</sup> See SOMO, “Annual Report 2019” (20 May 2020), online: *Centre for Research on Multinational Corporations* <[www.somo.nl/annual-report-2019/](http://www.somo.nl/annual-report-2019/)>. See also SOMO, “Annual Report 2018” (17 May 2020), online: *Centre for Research on Multinational Corporations* <[www.somo.nl/annual-report-2018/](http://www.somo.nl/annual-report-2018/)>.

<sup>43</sup> See Netherlands, House of Representatives, *Letter From the State Secretary for Economic Affairs, Agriculture and Innovation*, 26 485, No 101 (17 January 2011) at 8 [*House of Representatives*]; See also OECD, *Guide for National Contact Points on Structures and Activities*, OECD Guidelines for Multinational Enterprises, (2019) at 30-31 [OECD], in which document the OECD refers to the Dutch set-up of the NCP as a best practice set-up; See also The Consensus Building Institute, “NCP Mediation Manual, Including the Relevant Texts from the OECD Guidelines” (last modified July 2012), online (pdf): <[nettsteder.regjeringen.no/ansvarlignaringsliv2/files/2015/10/NCP\\_mediation\\_manual.pdf](http://nettsteder.regjeringen.no/ansvarlignaringsliv2/files/2015/10/NCP_mediation_manual.pdf)> at 43-45.

<sup>44</sup> See OECD, *supra* note 43 at 29–33.

<sup>45</sup> See Ministry of Foreign Affairs, “NCP Members” (last visited June 2020), online: *OECD Guidelines* <[www.oecdguidelines.nl/ncp/ncp-members](http://www.oecdguidelines.nl/ncp/ncp-members)> [*NCP Members*].

<sup>46</sup> See Ministry of Foreign Affairs, “Order of the Minister for Foreign Trade and Development Cooperation of 1 July 2014 establishing the National Contact Point for the OECD Guidelines” (1 July 2014), art



who are in civil service (*i.e.* employed by the Ministry of Foreign Affairs, the Ministry of Economic Affairs and Climate Policy, the Ministry of Social Affairs and Employment, and the Ministry of Infrastructure and Water Management).<sup>47</sup> The advisory members provide strategic advice. For instance, advice on legislation that may apply in a specific instance. In addition, the advisory members function as liaisons between the NCP and experts who operate within the ministries of the advisory members. The activities of the advisory members are not restricted to specific instances but extend to all tasks of the Dutch NCP.<sup>48</sup>

Two more bodies support the Dutch NCP. General administrative support is provided by the NCP's secretariat consisting of three members and hosted by the Ministry of Foreign Affairs.<sup>49</sup> External stakeholders come together in a body called 'NCP+' to discuss recent developments of the Dutch NCP. This body consists of the NCP members, representatives of the *Sociaal-Economische Raad* (*i.e.* Dutch Social and Economic Council (*SER*)), OECD Watch, the *Verbond van Nederlandse Ondernemingen en Nederlands Christelijk Werkgeversverbond* (*i.e.* the Confederation of Netherlands Industry and Employers (*VNO-NCW*)) and trade unions. The NCP+ convenes four times per year.<sup>50</sup>

Aside from its 'gold standard' structure, the Dutch NCP has been commended for its effective and forward-looking way in which it has been handling specific instances.<sup>51</sup> Among the 12 specific instances concluded in 2018 which were filed by NGOs worldwide, two specific instances<sup>52</sup> resulted in concrete remedies for the complainants. In both cases, the Dutch NCP led the mediation.<sup>53</sup> A year earlier, in a specific instance concluded in 2017, the Dutch NCP also received (inter)national recognition for reaching an agreement that included the provision of remedies by the Dutch beer brewer Heineken to victims of an alleged non-compliance of the MNE Guidelines.<sup>54</sup> By many stakeholders, this case was considered a landmark case and still serves as a textbook example as to how NCPs can contribute to providing redress to victims on the ground as part of an agreement with the parties.<sup>55</sup> On the whole, the handling of specific

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3, online (pdf): *OECD Guidelines* <[www.oecdguidelines.nl/binaries/oecd-guidelines/documents/publication/2016/5/17/ncp-establishment-order-2014/2016-instellingsbesluit-en.pdf](http://www.oecdguidelines.nl/binaries/oecd-guidelines/documents/publication/2016/5/17/ncp-establishment-order-2014/2016-instellingsbesluit-en.pdf)> [*Order of the Minister*].

<sup>47</sup> See *ibid*, art 4; see also *NCP Members*, *supra* note 45.

<sup>48</sup> Based on input received from the NCP's secretariat on 2 April 2019.

<sup>49</sup> "NCP Secretariat", online: *Netherlands Ministry of Foreign Affairs* <[www.oecdguidelines.nl/ncp/ncp-secretariat](http://www.oecdguidelines.nl/ncp/ncp-secretariat)>.

<sup>50</sup> See Netherlands, House of Representatives, *Letter From the Minister for Foreign Trade and Development Cooperation*, 26 485, No 190 (2 July 2014) at 6-7; See also *Order of the Minister*, *supra* note 46 at 4-5.

<sup>51</sup> Based on interviews conducted for this research.

<sup>52</sup> Ministry of Foreign Affairs, 20 August 2018, *FIVAS, the Initiative to Keep Hasankef Alive and Hasankef Matters vs. Bresser*, Dutch National Contact Point (NCP) (Netherlands) [*Bresser*]; Ministry of Foreign Affairs, 19 June 2018, *Hou Friesland Mooi v Nuon Energy N.V.* (Dutch National Contact Point) (Netherlands).

<sup>53</sup> OECD Watch "The State of Remedy", *supra* note 23 at 1-4.

<sup>54</sup> Ministry of Foreign Affairs, 18 August 2017, *Former employees of Bralima vs. Bralima/Heineken*, Dutch National Contract Point (NCP) (Netherlands) [*Heineken*].

<sup>55</sup> S van 't Foort, "De Unieke Schadevergoedingszaak van Heineken" (2017) *Tijdschrift Conflicthantering* 12:6 at 44-47; see also R Nieuwenkamp, "Beer, Conflict and Compensation: Heineken-Congo Agreement" (2017), online (pdf): *OECD Observer* <[www.oecd-ilibrary.org/docserver/6441acd0-en.pdf](http://www.oecd-ilibrary.org/docserver/6441acd0-en.pdf)>.

instances by the Dutch NCP has garnered broad support by its stakeholders due to the marked achievements it has reached so far.<sup>56</sup>

A unique feature has been added to the Dutch NCP's tasks in its revised mandate promulgated by the Dutch government in 2014.<sup>57</sup> Since the revised mandate, the Dutch NCP is allowed to actively adopt a leading role in the interpretation of the MNE Guidelines. For example, the Dutch NCP can assess the conformity with the MNE Guidelines of a Dutch 'industry agreement' or 'sector agreement'<sup>58</sup> concerning the topic of RBC. In addition, the Dutch government can request the Dutch NCP to conduct sector-wide assessments regarding the overall observance of the MNE Guidelines by Dutch business sectors.<sup>59</sup>

#### 2.4. EVALUATIONS OF THE DUTCH NCP

Evaluations of the functioning of the Dutch NCP take place on a regular basis. Every four years, the Dutch Parliament is updated about the functioning of the Dutch NCP by the Dutch government.<sup>60</sup> Such evaluations are performed by the government but are commissioned to expert scientist and scholars for their conduct. Additionally, the activities of the Dutch NCP are also evaluated independently by scholars and members of other NCPs as part of OECD peer reviews.<sup>61</sup> Many of the previous evaluations of the Dutch NCP concern the Dutch NCP's practices that relate to the MNE Guidelines before they were revised in 2011. Consequently, these evaluations do not contain a discussion concerning specific instances referring to the human rights chapter as introduced in 2011. Moreover, several of the previous evaluations are

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xpires=1603208892&id=id&acname=guest&checksum=665509645188A0DFE59EAF87649076C1> [Nieuwenkamp]; see also OECD Watch "The State of Remedy", *supra* note 23 at 2–3, 9–13.

<sup>56</sup> Notable exceptions are the Dutch NCP's handling in the specific instances involving Amnesty International, Friends of the Earth and Shell as well as an instance involving Stroitel, Sakhalin International, Friends of the Earth and Shell, see Amnesty International, "OESO-klachtmechanisme: Beweringen Shell over 'sabotage' in Nigerdelta ongefundeerd" (19 June 2013), online: <[www.iucn.org/nl/content/oeso-klachtmechanisme-beweringen-shell-over-sabotage-nigerdelta-ongefundeerd](http://www.iucn.org/nl/content/oeso-klachtmechanisme-beweringen-shell-over-sabotage-nigerdelta-ongefundeerd)>; see also Accountability Counsel, "A Case Study of the Dutch NCP" (2013) at 1–9, online (pdf): <[www.accountabilitycounsel.org/wp-content/uploads/2017/08/Annex-1\\_AC\\_Case\\_Study\\_Dutch\\_NCP\\_2013.pdf](http://www.accountabilitycounsel.org/wp-content/uploads/2017/08/Annex-1_AC_Case_Study_Dutch_NCP_2013.pdf)> [Accountability Counsel Report].

<sup>57</sup> See *Order of the Minister*, *supra* note 46 at 4–5.

<sup>58</sup> These industry agreements or sector agreements are concluded between businesses, government, unions and NGOs to help promote responsible business conduct. Agreements have been reached in, *inter alia*, banking, insurance and floriculture, see generally "The Social and Economic Council of Netherlands: Home", online: *SER* <[www.imvoconvenanten.nl/en](http://www.imvoconvenanten.nl/en)>.

<sup>59</sup> See *Order of the Minister*, *supra* note 46 at 4. See e.g. S de Bruyn et al, "Compliance of the Dutch Oil and Gas Sector to OECD Guidelines" (June 2018), online: *CE Delft* <[www.ce.nl/en/publications/2300/compliance-of-the-dutch-oil-and-gas-sector-to-oecd-guidelines](http://www.ce.nl/en/publications/2300/compliance-of-the-dutch-oil-and-gas-sector-to-oecd-guidelines)>.

<sup>60</sup> See *Order of the Minister*, *supra* note 46, art 9.

<sup>61</sup> S van 't Foort and H Palm, "The Functioning of the Dutch National Contact Point During the Specific Instance Procedure: An Evaluation of the Functioning of the Dutch NCP Based on Shared Experiences, the OECD Guidelines and the Government Decree" (2015) 2:3 ARACÊ, *Direitos Humanos em Revista*, Special edition with the Business and Human Rights Centre 8; S van 't Foort and J Wilde-Ramsing, "A Comparative Analysis of the Dutch Specific Instance Procedure" (2015) 4 *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement* 16.

not based on a systemic collection of data but have been produced on the basis of incidentally collected data, which were mostly limited to conducting a few interviews.<sup>62</sup>

The latest evaluation report produced by the Dutch government is based on a holistic examination and in-depth assessment of all activities of the Dutch NCP.<sup>63</sup> This holistic evaluation was performed in 2018-2019 by the Dutch university *Nyenrode Business Universiteit* (Nyenrode; the authors of this article were members of the research team) together with the Dutch consultancy firm APE Public Economics (APE).<sup>64</sup> The holistic evaluation was part of a broader evaluation of the Dutch sustainable trade and investment policies by the Policy and Operations Evaluation Department of the Dutch Ministry of Foreign Affairs.

The latest holistic evaluation report conducted by Nyenrode and APE finds itself at the core of this article. However, in this article, we only and specifically focus on the performance by the Dutch NCP of its task of handling specific instances. Hence, we do not discuss the performance of its other tasks (*e.g.* handling enquiries, promotional activities, initiating and/or performing sector studies, and assessing the conformity of 'sector agreements' with the MNE Guidelines). Our analysis comprises the data collected for said evaluation report as well as additional data concerning NCP decisions published in the period January-August 2019 (as the research ended by the end of August 2019).

## 2.5. EVALUATING THE EFFECTIVENESS OF THE DUTCH NCP

As mentioned earlier, MNEs can be held accountable by NCPs in countries from which they operate.<sup>65</sup> In total 49 countries have an NCP or have committed to establish an NCP. In almost each part of the world, NCPs can be found, *e.g.* in Australia, Brazil, Canada, Japan, Mexico and Morocco.<sup>66</sup> Currently, among the 49 existing NCPs, the Dutch NCP is demonstrably one of the leading NCPs in the world.<sup>67</sup> We can bring up two main reasons: (i) compared to other NCPs, it has reached many agreements between the parties to specific instances;<sup>68</sup> and (ii) the Dutch NCP has an independent structure, *i.e.* comprises members which are independent from the government. Such an institutional structure constitutes the ideal institutional arrangement for an NCP, *i.e.* a 'gold standard',<sup>69</sup> because it can increase

<sup>62</sup> See *House of Representatives*, *supra* note 43; *Kamerstukken II*, 2013/14, 26 485, nr.195 (evaluation BSR); *Kamerstukken II*, 2006/07, 30 800 XIII, nr.30; See also *House of Representatives*, *supra* note 43.

<sup>63</sup> Ministry of Foreign Affairs, "IOB Evaluation NCP 2012-2018: Evaluation of the Dutch National Contact Point for the OECD Guidelines" (2019), online (pdf): *Gov't of Netherlands* <[english.iob-evaluatie.nl/binaries/iob-evaluatie-eng/documents/reports/2019/10/01/434-ncp/IOB\\_Evaluation\\_of\\_the\\_Dutch\\_National\\_Contact\\_Point\\_for\\_the\\_OECD\\_Guidelines\\_201909.pdf](http://english.iob-evaluatie.nl/binaries/iob-evaluatie-eng/documents/reports/2019/10/01/434-ncp/IOB_Evaluation_of_the_Dutch_National_Contact_Point_for_the_OECD_Guidelines_201909.pdf)> [IOB Eval, 2012-2018].

<sup>64</sup> Nyenrode Business Universiteit, "Nyenrode Business Universiteit" (last modified June 2020), online: *Nyenrode Business Universiteit* <[www.nyenrode.nl](http://www.nyenrode.nl)>; APE Public Economics, "Significant APE" online: *Significant APE* <[ape.significant-groep.nl](http://ape.significant-groep.nl)>.

<sup>65</sup> See OECD Guidelines, *supra* note 1, s I(1).

<sup>66</sup> OECD, "OECD Guidelines for Multinational Enterprises" online: *OECD Responsible Business Conduct* <[mneguidelines.oecd.org/ncps/](http://mneguidelines.oecd.org/ncps/)>.

<sup>67</sup> See Accountability Counsel Report, *supra* note 56 at 1.

<sup>68</sup> OECD Watch "The State of Remedy", *supra* note 23 at 1-4; see also OECD Watch, "Remedy Remains Rare", *supra* note 23 at 17.

<sup>69</sup> See *House of Representatives*, *supra* note 43 at 8.

the NCP's visibility and impartiality in regard of handling specific instances.<sup>70</sup> Furthermore, representatives of MNEs and non-governmental organisations (NGOs), which have been involved in a specific instance, as well as renowned experts in the field have praised the Dutch NCP for its effective and forward-looking way in which it has been handling specific instances. The professional approach of the Dutch NCP in several 'landmark cases' in which 'historic agreements' have been reached is often acknowledged and commended.<sup>71</sup>

Considering the Dutch NCP's acclaimed structure and performance, in this article, we aim to assess the Dutch NCP's effectiveness in its handling of specific instances. Additional comparative insights are gained by examining the specific instances dealt by four other Northern European NCPs, *i.e.* the UK, German, Danish and Norwegian NCPs. We consider them comparable to the Dutch NCP because of their similar institutional structure and progressive policies on RBC.<sup>72</sup> We used the findings of the examination of the specific instances of these four other NCPs to substantiate the collected evidence in our findings regarding specific instances handled by the Dutch NCP. We believe that our insights are also relevant for non-European NCPs, since other NCPs can learn from best practices which are revealed in this article.

### 3. METHODOLOGY AND KEY TERMS

In this section, we briefly describe which methods we used and how we collected and analysed our data in order to respond to the research question.

In order to answer the research question, we used multiple methods including desk-research, doctrinal research, and qualitative research. The collection of empirical data took place through: (i) collecting all published statements concerning all NCP cases in five selected countries published in the period 2012-August 2019 (doctrinal research); (ii) conducting semi-structured interviews concerning four case studies (qualitative research); (iii) conducting semi-structured interviews with Dutch NCP members and other stakeholders (qualitative research); and (iv) conducting a survey with potential claimants (NGOs and unions; not limited to Dutch stakeholders; exploratory research). In addition to considering how the Dutch NCP has applied the guiding principles and the core criteria in the management of specific instance procedures, we consider as an overall factor of effectiveness whether the Dutch NCP has succeeded in achieving agreements between the parties in the conflicts (this factor was elaborated in Section 1.2).

In order to establish a database with rich information containing a substantial number of specific instances of five comparable NCPs, we systemically collected and analysed publicly available information regarding all specific instances handled by the Dutch NCP and four

<sup>70</sup> See OECD Guidelines, *supra* note 1 at paras 30–31.

<sup>71</sup> See Nieuwenkamp, *supra* note 55. See praise received in the Dutch media: O van Beemen, "Heineken Betaalt Congolezen na Klacht Mensenrechtenschending", *NRC* (18 August 2017); M van Poll, "OESO-Klacht Tegen ING om Financiering Palmolie-industrie", *Financieel Dagblad* (5 July 2019), online: <fd.nl/beurs/1307381/oeso-klacht-tegen-ing-om-financiering-palmolie-industrie>.

<sup>72</sup> For example, some NCPs interpret the MNE Guidelines extensively by including more sectors in their decisions (*e.g.* Dutch NCP and Norwegian NCP), while other NCPs issue determinations (UK NCP), initiate specific instances against their own government (Danish NCP), and accept notifications from Members of Parliament (German NCP) to promote responsible business conduct.

other Northern European NCPs, *i.e.* the UK NCP, the German NCP, the Danish NCP and the Norwegian NCP. We limited our research to specific instances in which a final decision was published in the period from 2012 until August 2019. We thereby cover all the specific instances that are dealt with by these NCPs during this period. The collection of the data concerned 73 specific instances in total. This includes two cases of the Dutch NCP in which a final decision was published before September 2019. Through doctrinal research,<sup>73</sup> we systematically analysed all initial and final statements, which were made publicly available by these five NCPs. We focussed on the types of procedural steps taken by the five NCPs, the timing thereof, the outcomes, and possible follow-up measures. All documents were retrieved by us from the databases of the Trade Union Advisory Committee to the OECD (TUAC), OECD Watch and the OECD.<sup>74</sup>

To gain a deeper insight in the processes of handling specific instances by the Dutch NCP in particular, we also performed four case studies (qualitative research). They concern the following specific instances: *Three individuals v Bralimal/Heineken* (Heineken case);<sup>75</sup> *Both Ends et al. v ABP/APG* (POSCO case);<sup>76</sup> *Amnesty International v Royal Dutch Shell* (Shell II case);<sup>77</sup> and *Both Ends v Atradius Dutch State Business* (Atradius case).<sup>78</sup>

The objective of looking into the case studies was to gather lessons learned and best practices regarding the handling of specific instance procedures. We selected these cases because they provided a variation in the type of party involved. In one case, the claim was asserted against an MNE, while in another case the complaint was brought up against a state-related company (*i.e.* the Dutch state agency Atradius DSB). Additionally, the selection of these cases allowed us to show that cases can end in different ways. In three of the selected cases, the outcome of the case was an agreement with the MNE concerning measures to be implemented by the MNE in order to compensate damages and/or to ensure future compliance with the MNE Guidelines (*i.e.* the Heineken case, the POSCO case and the Atradius case). In the fourth case (*i.e.* the Shell case), no agreement was reached.<sup>79</sup>

For each case study, firstly, all publicly available documents were scrutinised. Secondly, we conducted three to four semi-structured interviews<sup>80</sup> per specific instance with a representative

<sup>73</sup> See T Hutchinson and N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' [2012] 17:1 Deakin L Rev at 83–119.

<sup>74</sup> See TUAC, "Policy Issues", online: *TUAC* <tuac.org/documents/tuac-trade-union-guide-oecd-guidelines-multinational-enterprises/>; OECD Watch, "OECD Watch Case Database", online: *OECD Watch* <www.oecdwatch.org/cases>; OECD, "Database of specific instances", online: *OECD Responsible Business Conduct* <mneguidelines.oecd.org/database/>.

<sup>75</sup> *Heineken*, *supra* note 54.

<sup>76</sup> See Ministry of Foreign Affairs, September 2013, *Both Ends et al. v ABP/APG*, Dutch National Contact Point (NCP) (Netherlands) [*POSCO*].

<sup>77</sup> See Ministry of Foreign Affairs, October 2014, *Amnesty International v Royal Dutch Shell II*, Dutch National Contact Point (NCP) (Netherlands) [*Shell II*].

<sup>78</sup> See Ministry of Foreign Affairs, November 2016, *Both Ends v Atradius Dutch State Business*, Dutch National Contact Point (NCP) (Netherlands) [*Atradius*].

<sup>79</sup> See IOB Eval, 2012-2018, *supra* note 63 at 25.

<sup>80</sup> This research methodology has been deemed appropriate in a number of contexts; for more information, see JW Creswell and CN Poth, *Qualitative Inquiry & Research Design: Choosing Among Five Approaches*

of the defendant(s) (*i.e.* the MNE), a representative of the alleged(s) (*i.e.* individuals, NGOs and/or trade unions), and a Dutch NCP member who had been assigned to the specific instance. The interviews were held by telephone or in person. The interview questions regarded the mediation process and when pertinent, explored how an agreement was (or was not) reached.

The data and analyses conducted through the doctrinal research and the case studies were enriched and supported by empirical information obtained in additional interviews with stakeholders of the Dutch NCP (seven in total) and from a small-scale exploratory telephone survey with international and national NGOs and trade unions (eight respondents in total) concerning the Dutch NCP's specific instances. The goal of pursuing this additional method was to gain opinions from other stakeholders in the field and to assess the results of our analyses and to triangulate the findings.

#### 4. FINDINGS CONCERNING EFFECTIVENESS OF SPECIFIC INSTANCE PROCEDURES

In this section, we present our findings. We start with briefly presenting the various phases of the specific instance procedures dealt with by the Dutch NCP in the examined period (2012-August 2019; Section 4.1) and the possible outcomes per phase, among which reaching an agreement. These results emerged from our doctrinal research. Subsequently, in Section 4.2, we compare the findings presented in Section 4.1 with the findings which emerged from our doctrinal research in regard of the other four examined NCPs. Specifically, we present the number of rejections of notifications and the number of agreements reached by the five examined NCPs. We also demonstrate in which geographical areas the complaints arose. We conclude this section by providing our findings based on an evaluation of the data collected in the four in-depth case studies of Dutch NCP cases, the other stakeholder interviews and the exploratory survey conducted in the qualitative part of the research (Section 4.3). This evaluation takes into account the eight effectiveness criteria and the factor of reaching agreements.

##### 4.1. THE SPECIFIC INSTANCE PROCEDURE: SEVERAL PHASES AND OUTCOMES (DUTCH NCP)

There are several steps that occur in the Dutch NCP's process of handling a specific instance. Upon receiving a notification, *i.e.* the complaint(s) regarding the alleged non-compliance of an MNE with the MNE Guidelines, the Dutch NCP always publishes an initial statement, mostly called 'initial assessment', in which it examines whether the notification merits further consideration. The acceptance of a notification depends on the evaluation of the notification in view of certain criteria *a priori* established by the Dutch NCP.<sup>81</sup> The initial assessment explains whether the notification is taken into consideration in full or in part, or rejected. If the

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(Newbury Park, CA: SAGE Publishing, 2006).

<sup>81</sup> These are included in the Commentaries to the Procedural Guidance of the MNE Decision. They are:

1. Is the Dutch NCP the appropriate entity to assess the alleged violation?
2. What is the identity of the reporting party and its interest in the case?
3. Are the issues raised in the complaint material and substantiated?
4. Is there a link between the activities of the MNE and the issue in the specific instance?
5. What is the relevance of applicable legislation and procedures, including court rulings?
6. How are similar issues (being) resolved in other national or international procedures? and

notification is accepted, the Dutch NCP offers its 'good offices' to facilitate mediation between the parties in dispute. If parties agree to proceed to mediation, an agreed Terms of Reference (ToR) document is drafted. Subsequently, the Dutch NCP may examine the content of the notification through fact-finding missions or other types of research. The specific instance procedure is considered concluded when parties reach an agreement or when a final statement is produced by the Dutch NCP. If parties reach an agreement, the Dutch NCP issues a report in which the agreed terms of the parties are included insofar as parties agree to disclose them. When mediation fails, a final statement is published. It contains the Dutch NCP's recommendations or its determination on whether the MNE Guidelines were violated in the specific instance. Progress made on the agreements concluded or recommendations given is monitored by the Dutch NCP ('follow-up actions') and the findings are mostly published a year after the final statement or agreement has been published.

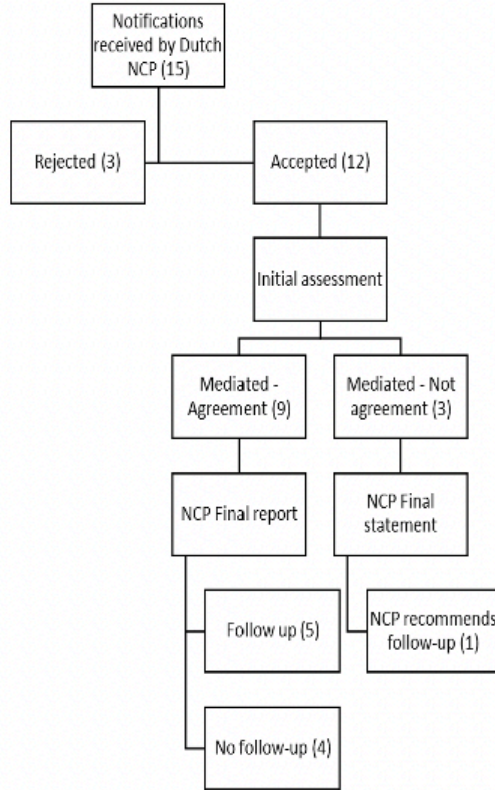
Figure 1 demonstrates the procedural steps implemented by the Dutch NCP in the handling of 15 specific instances. An initial assessment was produced for all accepted and rejected notifications. Of the 12 specific instances in which the notification was accepted, nine resulted in an agreement, whereas three led to no agreement. Of the nine agreements, five were followed-up by the Dutch NCP, whereas four did not lead to any follow-up actions or follow-up was recommended but had at the time the research ended not yet taken place. This is also the case in one of the specific instances<sup>82</sup> that did not lead to an agreement, whereby the NCP recommended a follow-up on its final statement, but follow-up had not yet taken place when the research closed.

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7. Would the consideration of the specific problem contribute to the [MNE] Guidelines' objectives and effectiveness?

<sup>82</sup> Bresser, *supra* note 52.

Figure 1. Procedural steps followed by the Dutch NCP in handling 15 specific instances

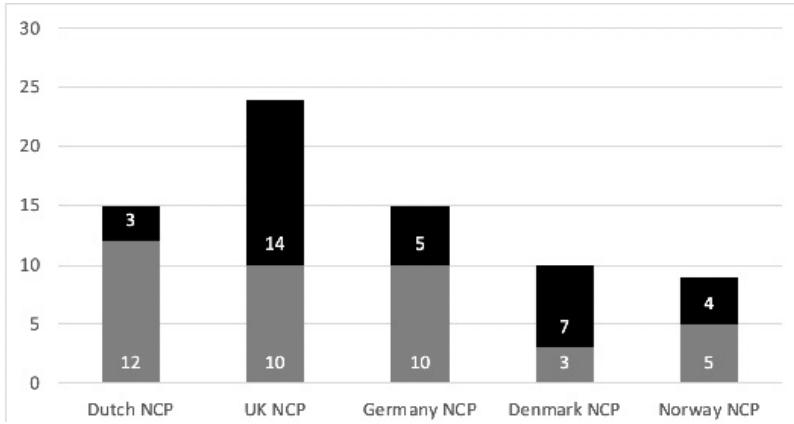


4.2. COMPARATIVE FINDINGS CONCERNING THE FIVE NCPs: ACCEPTANCE RATE, AGREEMENTS REACHED AND GEOGRAPHICAL AREA WHERE THE COMPLAINT AROSE

Figure 2 exhibits the number of notifications which were accepted and rejected by each of the examined NCPs of the Netherlands, the UK, Germany, Denmark, and Norway in the period 2012–August 2019. Comparing these results, we can conclude that the Dutch NCP accepted – relatively and absolutely – the highest number of notifications (12 out of 15), the UK NCP rejected – absolutely – the highest number of notifications (14 out of 24), and the Danish NCP rejected – relatively – the highest number of notifications (7 out of 10).

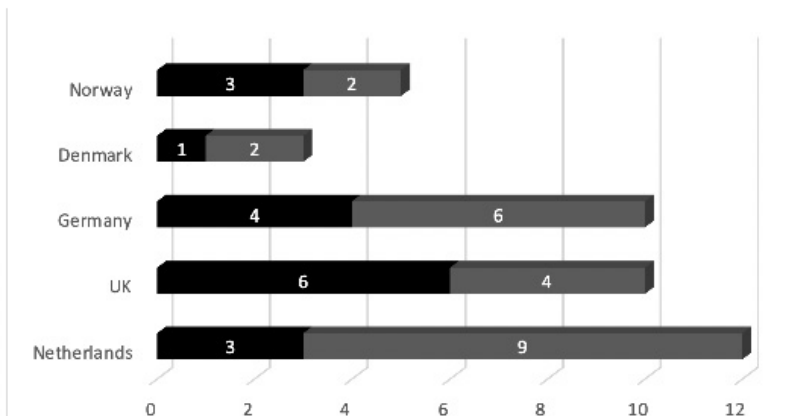


Figure 2. Notifications accepted and rejected per NCP between 2012–August 2019



In regard of agreements reached, Figure 3 shows that the Dutch NCP reached the most mediated agreements (either in full or in part), *i.e.* in nine cases an agreement was mediated out of 12 accepted notifications in total. The NCPs of Denmark and Norway each succeeded in two specific instances to reach an agreement (in full) out of three respectively five accepted notifications. The German NCP reached six agreements out of ten accepted notifications, whereas the UK NCP reached four agreements, also out of ten accepted notifications.

Figure 3. Agreements mediated in accepted specific instances per NCP



In total, 73 notifications were submitted to the five examined NCPs in the defined period containing alleged violations by companies. Figure 4 shows which countries or areas were mentioned in the notifications as the place where the alleged violation took place or arose.<sup>83</sup>

<sup>83</sup> These countries are: Afghanistan, Algeria, Argentina, Armenia, Bahrain, Bangladesh, Brazil, Burma, Cameroon, Canada, Colombia, Cuba, Democratic Republic of the Congo, Denmark, Germany, Hong Kong, India, Indonesia, Iraq, Israel, Ivory Coast, Kazakhstan, Malawi, Malaysian State of Sarawak, Morocco, Mozambique, Netherlands, Nigeria, North Korea, Norway, Pakistan, Palestine, Panama, Portugal, Russia, Saudi Arabia, Somalia, South Africa, Sweden, Switzerland, Turkey, United Arab Emirates, United Kingdom, United States, Uzbekistan, Vietnam, and Yemen.

When countries or areas are portrayed in a darker colour in Figure 4, this indicates that more than one violation was reported in that country or area.<sup>84</sup>

Figure 4. Geographical location of alleged violations reported in the notifications received by the examined NCPs



#### 4.3. APPLYING THE EIGHT OECD EFFECTIVENESS CRITERIA TO THE SPECIFIC INSTANCES HANDLED BY THE DUTCH NCP IN THE PERIOD 2012–AUGUST 2019<sup>85</sup>

In our research, we also analysed the performance of the Dutch NCP in handling specific instances measured against the eight effectiveness criteria as prescribed by the OECD in the context of implementing the MNE Guidelines by NCPs and defined in Table 1. For this analysis, we used the data collected in the four case studies (see the overview of the analysis in Table 2), the interviews with Dutch NCP members, the interviews with parties in the case studies, the interviews with other stakeholders of the Dutch NCP, the survey with potential claimants, and also the data collected in the doctrinal research to the extent that they pertain to the Dutch NCP (15 notifications) and the desk research. The numbers of the sub-sections refer to the key effectiveness criteria as defined in Table 1. In the following sub-sections (4.3.1.–4.3.8), we will analyse more thoroughly whether and in which way each OECD effectiveness criterion is applied by the Dutch NCP in the four case studies.

<sup>84</sup> These countries concern: Algeria, Bahrain, Bangladesh, Canada, Democratic Republic of the Congo, Denmark, Germany, India, Indonesia, Israel, Netherlands, Nigeria, Russia, Turkey, UK, US, and Yemen.

<sup>85</sup> Findings are based on: IOB Eval, 2012-2018, *supra* note 63 at 44–53.

Table 2. Assessing the effectiveness criteria in the four case studies

Name of case	Complaint related to	Outcome procedure	Effectiveness implication <sup>86</sup>
Three individuals v Bralima/ Heineken ( <i>Heineken</i> )	Financial compensation was claimed for allegedly unjustified collective lay-offs in the DRC by Heineken.	Agreement reached, including remuneration of affected parties. Final statement published.	<p><i>Visibility:</i> wide coverage in the media of this case.</p> <p><i>Accessibility:</i> new practices were adopted by the Dutch NCP e.g. covering for travelling expenses of claimants and accepting a notification for alleged violations that took place 18 years ago.</p> <p><i>Predictability:</i> financial compensation was awarded, which is unique. In most cases, claimants expect financial compensation but the final agreement does not provide for that.</p> <p><i>Equitability:</i> the claimants were supported by the Dutch NCP to ensure that parties operated on an equal footing. To that end, a local mediator was added to the mediation team.</p>

<sup>86</sup> The cases mentioned in this table only have substantial effectiveness implications with regard to the core criteria and guiding principles enumerated in the final column. No substantial effectiveness implications were found with regard to core criteria and guiding principles not mentioned in the final column.

<p>Both Ends et al. v ABP/APG (<i>POSCO</i>)</p>	<p>Involvement of several institutional investors in investing in POSCO, which company was held responsible for alleged human rights violations in India.</p>	<p>Agreement was reached after mediation. Final statement published.</p>	<p><i>Visibility:</i> wide media coverage, in part because the case was dealt with by NCPs from three countries.</p> <p><i>Compatibility:</i> procedural innovation applied by introducing the use of a preliminary final statement. Interpretation of the MNE Guidelines - first time that MNE Guidelines were applied to the financial sector (to minority shareholders).</p>
<p>Friends of the Earth/Amnesty International v Royal Dutch Shell (<i>Shell II</i>)</p>		<p>No agreement reached. After a long process, the frustrated claimants withdrew from the mediation. Final statement published by the NCP.</p>	<p><i>Transparency:</i> documents and information available with the MNE representatives were not shared in the mediation process, impairing the transparency of the procedure. Campaigning by the claimants was not allowed during the mediation process.</p> <p><i>Equitability:</i> possible power imbalance between parties, because disparity in information.</p> <p><i>Compatibility:</i> procedural innovation - issuance of a final statement after withdrawal by claimants from the specific instance procedure.</p>

Both Ends v Atradius Dutch State Business ( <i>Atradius</i> )	Displacement of native people in the harbour of Suape, Brazil, where the Dutch company Van Oord was dredging, the activities of which were insured by Atradius.	Agreement was reached on the topics included in the ToR for the mediation. Final statement published.	<i>Compatibility</i> : interpretation of the MNE Guidelines - state-owned enterprises, in particular export credit agencies, fall under the scope of the MNE Guidelines.
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#### 4.3.1. VISIBILITY

The findings of our qualitative research and exploratory survey indicate that the Dutch NCP is sufficiently visible amongst the eight NGOs and trade unions who participated in the interviews and/or in the survey (Dutch and foreign potential claimants)<sup>87</sup> but less visible amongst companies (Dutch).<sup>88</sup> The former revealed that checking corporate compliance with the MNE Guidelines and assisting companies to implement the MNE Guidelines is part of their daily practice, whereas the latter revealed that they are less familiar with the Dutch NCP's existence and do not comprehend the content and added value of the MNE Guidelines' norms well. Table 3 contains some representative quotes that support the latter finding. As regards specific instances, we point out that all NCP statements are publicly available. This also strongly contributes to the visibility of how the Dutch NCP handles specific instances (doctrinal research).

<sup>87</sup> All survey participants indicated that they are familiar with the specific instance procedure of the Dutch NCP. That is due to the fact that NGOs and trade unions as part of their work often check corporate compliance with the MNE Guidelines and assist companies to implement the MNE Guidelines in their daily practices. Hence, knowledge of the specific instance procedures of the MNE Guidelines is inherent to their work. Several survey participants also indicated that they had been directly involved in specific instance procedures. The respondents were less aware of other events or promotional activities. The survey included six NGOs and two trade unions. See IOB Eval, 2012-2018, *supra* note 63.

<sup>88</sup> These findings correspond with the findings presented by the Dutch Association of Investors for Sustainable Development (VBDO) showing that the awareness of the MNE Guidelines amongst 60 Dutch companies listed at the stock exchange is limited. The study shows that 30 per cent of the 60 stock-listed companies publicly committed to the MNE Guidelines and 47 per cent referred to it in publicly available information. In the VBDO study, one of the main reasons that justifies the lack of commitment of companies to the MNE Guidelines is unfamiliarity with the MNE Guidelines as well as uncertainly concerning the added value of committing to the MNE Guidelines. VBDO, "Commitment to OECD Guidelines for Multinational Enterprises by Dutch Stock listed Companies Including their Awareness of the OECD Guidelines for Multinational Enterprises and of the Possibilities and Procedures Provided by the Dutch NCP" (2016) at 8, online (pdf): *VBDO* <[www.vbdo.nl/wp-content/uploads/2018/07/VBDOReportOECDGuidelinesresearch-1.pdf](http://www.vbdo.nl/wp-content/uploads/2018/07/VBDOReportOECDGuidelinesresearch-1.pdf)>.

Table 3. Quotes from interviews with stakeholders and open responses to the survey

<b>Quotes supporting the Dutch NCP's limited visibility amongst companies</b>
‘The OECD Guidelines are complicated – they do ask a lot from companies. Companies don't know when they should apply it and to what extent. There is a need of information on the OECD Guidelines. Thus, first awareness is needed. Then companies realise that this is quite big and important and then they have to develop the idea that this is helpful to work with others to start implementing it’.
‘If it is only general information provided by the NCP, it is really difficult for companies to see why this is a problem for them and why they should engage in awareness raising of the OECD Guidelines. They don't completely understand why they are relevant for them’.
‘I am sure that the people involved in human rights in the company would be aware of that, but apart from that, a lot of people don't know what it is’.
‘The visibility of the guidelines and the NCP could be better. They are not that well known yet amongst businesses’.

Hence, we can conclude in this sub-section that visibility to companies is less established on the side of the Dutch NCP. In the next sub-section, the OECD effectiveness criterion ‘accessibility’ handled by the Dutch NCP will be discussed more thoroughly.

#### 4.3.2. ACCESSIBILITY

The OECD effectiveness criterion discussed in this sub-section is accessibility. According to the findings from the doctrinal research (in Section 4.1), the Dutch NCP accepted more notifications than any other examined NCP in this study. The Dutch NCP even accepted a notification for alleged violations that took place 18 years ago, *i.e.* in the *Heineken* case. Hence, the conclusion could be drawn that the Dutch NCP scores well on accessibility. However, members of the Dutch NCP indicated in interviews (qualitative research) that the Dutch NCP lacks the necessary resources and staff for handling the growing number of accepted specific instances in recent years. This resulted in delays in dealing with new cases and performing less activities to promote the MNE Guidelines (*i.e.* one of the other core tasks of an NCP, besides dispute resolution). When comparing the number of notifications handled by the Dutch NCP in relation to the expenditures and staffing with similar information collected in regard of the Norwegian NCP and Danish NCP, we found that the Dutch NCP handled the highest number of notifications, with the lowest budget. Figure 5 visualises this finding and has been composed by us on the basis of publicly available information collected as part of the doctrinal research. In Figure 5, attention should be drawn to the values pertaining to ‘notifications handled’ and ‘total expenditure’. Hence, we deduce that the Dutch NCP has been very accessible but needs more resources to maintain this level.

Figure 5. Comparison of the Dutch, Norwegian and Danish NCPs' activities and (average) expenditures in the period 2014-2017<sup>89</sup>

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

	Staff	NCP members	Notifications handled	Number of promotional events organised	Number of events in which NCP participated	Salaries and remuneration	Travel budget	Conferences/meetings	Promotion materials/publications	Consultancy	Other	Total expenditure	
Dutch NCP	2014	3 FTE	4	8	4	€ 254,881	€5,651	€9,208	€56,328	€19,596	€2,050	€347,714	
	2015	3 FTE	4		5	9	€308,869	€5,478	€18,500	€6,595	€28,119	€17,972	€385,533
	2016	3 FTE	4		11	11	€310,160	€6,079	€16,846	€7,913	€12,679	€5,331	€359,008
	2017	3 FTE	4		1	10	€290,997	€12,644	€8,195	€2,390	€ -	€266	€314,492
	AV						€291,227	€7,463	€13,187	€18,307	€15,098	€6,405	€351,687
Norwegian NCP	2014	2 FTE	4	4	4	€253,947	€46,053	€16,856	€15,909	€73,206	€ -	€405,971	
	2015	2 FTE	4		3	6	€252,178	€39,218	€28,119	€24,861	€155,349	€526	€500,251
	2016	2 FTE	4		12	15	€254,839	€34,946	€37,634	€10,968	€78,172	€ -	€416,559
	2017	2 FTE	4		8	22	€318,757	€40,514	€33,119	€43,944	€36,013	€ -	€472,347
	AV						€269,930	€40,183	€28,932	€23,920	€85,685	€131	€448,782
Danish NCP	2014	3 FTE	5	6	1	7	€285,302	€10,642	€1,020	€ -	€55,561	€5,203	€367,728
	2015	3 FTE	5		2	8	€284,906	€11,039	€20,831	€6,879	€50,447	€1,502	€385,603
	2016	3 FTE	5		3	7	€295,302	€15,613	€6,195	€10,286	€8,567	€19,190	€355,152
	2017	3 FTE	5		4	9	€295,699	€11,902	€3,834	€4,969	€35,385	€19,944	€371,753
	AV						€295,302	€12,299	€7,970	€5,538	€37,490	€11,459	€370,059

<sup>89</sup> The benchmark was created with the data retrieved from annual reports, NCP reports to the OECD and financial reports published on the NCPs' websites

Another indicator of accessibility is whether potential claimants perceive any barriers. The results stemming from our qualitative research, *i.e.* the interviews with the case studies' stakeholders and other stakeholders as well as the survey with potential claimants, provided information about barriers. Our analysis of the collected information produced the following potential barriers: (i) hesitance of NGOs to file notifications due to uncertainty about possible outcomes; (ii) the process is very formal which is perceived as a burden by smaller NGOs and individuals; (iii) the different languages hamper communication between parties from different countries; (iv) costs to provide assistance in mediation abroad; and (iv) the costs and time involved in conducting research for fact-finding.<sup>90</sup> These barriers are supported by representative quotes identified in our interviews and survey responses (see Table 4).

<sup>89</sup> See IOB Eval, 2012-2018, *supra* note 63 at 42.

<sup>90</sup> The Procedural Guidance does not stipulate who should bear the costs of mediation, conducting research and fact-finding. OECD Watch argues that NCPs should bear these costs in order to improve the accessibility of the specific instance procedure, see OECD Watch, "Our Campaign Demands for Policymakers" (2017) at 2, online (pdf): *OECD Watch* <[www.oecdwatch.org/wp-content/uploads/sites/8/2017/11/OECD-Watch\\_-Campaign\\_demands.pdf](http://www.oecdwatch.org/wp-content/uploads/sites/8/2017/11/OECD-Watch_-Campaign_demands.pdf)>.

Table 4. Interview quotes and open responses to survey

<b>Quotes supporting barriers in accessing the processes of the Dutch NCP</b>
'If we don't have confidence, we don't recommend using the process for the sake of just using the process. People got expectations. If we don't have confidence on the NCP, we will not recommend people to embark on approaching that'.
'Language was a bit of issue, but also communication technology like phones'.
'What made it more complicated was the distance and bad phone connections half in French half in English and we couldn't do Skype'.
'I cannot yet say if we would start a procedure with the NCP again, that depends on the outcome. I cannot see every NGO doing it either. It is a very formal process, which might make the NCP less accessible. It takes a long time and it is all very official'.
'The Dutch NCP was equally accessible to the company, in any case of questions they were very reachable, very accessible by email, during calls. I would definitely say that the Dutch NCP is accessible'.
'It is also a matter of having enough staff to prepare and handle the cases [...] and also the financial opportunities to do the work properly. The Dutch NCP is the only one that once paid for the travel cost of the complainants. This was in the case of Heineken'.

Hence, we can conclude that the processes described in this sub-section establish accessibility on the side of the Dutch NCP, but more resources are needed to maintain accessibility while facilitating the Dutch NCP in overcoming existing barriers. In the next sub-section, the OECD effectiveness criterion 'transparency' handled by the Dutch NCP will be discussed more thoroughly.

#### 4.3.3. *TRANSPARENCY*

The OECD effectiveness criterion discussed in this sub-section is transparency. The analysis of the information collected in the doctrinal research divulges that the Dutch NCP conducts its activities in a transparent way: all initial assessments and final statements are published. Our qualitative research revealed that this was considered as a good practice by stakeholders, especially in comparison with other NCPs' practices. It was noted by stakeholders that there is always a fine balance between creating transparency about specific instance processes and safeguarding an adequate level of confidentiality concerning the information shared by stakeholders in such mediation processes. Representative quotes taken from the interviews with stakeholders and the open answers to the survey with potential claimants are displayed in Table 5. Overall, in this sub-section, we conclude that the Dutch NCP was found to have developed a good balance between transparency and confidentiality.



Table 5. Interview quotes and open responses to survey.

<b>Quotes supporting the Dutch NCP's balance between transparency and confidentiality</b>
'I think the Dutch NCP will not necessarily receive a low score on this topic [ <i>i.e.</i> transparency] [...] What I do appreciate, is [...] that an evaluation took place disclosing what has happened with the recommendations [of the NCP] a year after the final statement'.
'I heard it from complainants, they have confidence in the Dutch NCP. One that is extremely important is that they publish their initial assessment report. It is a very important point that they should do that'.
'We know that the Dutch NCP is very open and accessible'.
'I think that the NCP respects confidentiality and it is transparent. When it comes to the process and outcomes, the NCP communicates upfront that there is a timeline for publishing the final assessment, they reach out asking for input comments, then they share the draft with the parties and ask for comments, all in a very open and transparent way'.
'The NCP has a good balance between transparency and confidentiality: they have not disclosed specific information before talking to the party in question'.

In the next sub-section, the OECD effectiveness criterion 'accountability' handled by the Dutch NCP will be discussed more thoroughly

#### 4.3.4. ACCOUNTABILITY

The OECD effectiveness criterion discussed in this sub-section is accountability. The results from the interviews held with NCP members and other stakeholders bring to light that the Dutch NCP reports annually to the OECD in which way it has handled the specific instances submitted to it. Moreover, desk research confirmed that the same information is published on the Dutch NCP's website.<sup>91</sup> As indicated in regard to the criterion 'transparency', the Dutch NCP also publishes its initial assessments and final statements on its website, hence enabling its stakeholders to examine the content of the complaints and how they were dealt with. Additionally, our desk research divulged that information about the progress made by the Dutch NCP and its functioning is reported to the Parliament by the Minister to ensure accountability towards the Parliament.<sup>92</sup> These findings were confirmed by the interviewees in the qualitative research and respondents to the survey with potential claimants. Representative quotes are included in Table 6. We can conclude that the processes described in this sub-section establish accountability on the side of the Dutch NCP towards the OECD, the Dutch government, its stakeholders, and the public.

<sup>91</sup> See Ministerie van Buitenlandse Zaken, "Jaarverslagen en werkprogramma's", online: *Ministerie van Buitenlandse Zaken* <[www.oesorichtlijnen.nl/ncp/jaarverslagen](http://www.oesorichtlijnen.nl/ncp/jaarverslagen)>.

<sup>92</sup> *Kamerstukken II*, 2006/07, 30 800 XIII, nr.30; See *House of Representatives*, *supra* note 43; see also IOB Eval, 2012-2018, *supra* note 63.

Table 6. Interview quotes and open responses to survey

<b>Quotes supporting the Dutch NCP's accountability</b>
‘The NCP does not actively share [initial assessments and final statements] with Parliament. We make all statements publicly available via our website’.
‘The Minister reports [about the NCP] to Parliament every four years’.

In the next sub-section, the OECD effectiveness criterion ‘impartiality’ handled by the Dutch NCP will be discussed more thoroughly.

#### 4.3.5. IMPARTIALITY

The OECD effectiveness criterion discussed in this sub-section is impartiality. All interviewees in the case studies and stakeholder interviews as well as the survey respondents consider the Dutch NCP as impartial in its processes and in its structure. In Table 7, some representative quotes illustrate this finding. Furthermore, our desk research concerning the institutional set-up of the Dutch NCP corroborates these findings: the Dutch NCP is structured as an independent expert body (see Section 2.3) and the independent members are persons of stature. Its institutional structure instils confidence in the participants of the Dutch NCP's specific instances, and hence increases the Dutch NCP's (perceived) impartiality. In addition, interviewees explained that the Dutch NCP has developed internal mechanisms, checks and balances, to safeguard and maintain impartiality. For instance, when handling the specific instances, the Dutch NCP has developed a system in which two out of four members are assigned and work on the substance of the specific instance, whereas the other two members maintain an objective observing role. Hence, in this sub-section, we conclude that the Dutch NCP is impartial in its processes and in its structure.

Table 7. Interview quotes and open responses to survey

<b>Quotes supporting the Dutch NCP's impartial structure and processes</b>
‘There are problems with the perceptions of partiality: some of the NCPs have strong perceptions. They are partial towards the company, or partial against trade unions, or partial against NGOs. We don't have that with the Dutch NCP’.
‘Their procedure is impartial, which gives all parties the opportunity to express themselves’.
‘The structure of the NCP at the moment is good’.
‘I haven't done a review of their procedure to check if the Dutch NCP members are impartial but the perception is that they are impartial and you can have trust and confidence in the process’.
‘The general sense is that the [NCP] members are impartial. They have a check and balance system that two of them work on the case and then there are some checks in the procedures. They discuss all four amongst themselves every case in order to try and balance as much as possible. They do look beforehand who is going to take a case and consider whether there any reason to assume that there is a problem with impartiality’.

In the next sub-section, the OECD effectiveness criterion ‘equitability’ handled by the Dutch NCP will be discussed more thoroughly.

#### 4.3.6. *EQUITABILITY*

The OECD effectiveness criterion discussed in this sub-section is equitability. The findings from the interviews with stakeholders and NCP members and the results from the survey with potential claimants show that the overarching objective of the Dutch NCP is to make all parties feel at ease and comfortable in ‘that they are listened to on an equal footing’ and treated equally during the processes. Table 8 contains some illustrative quotes indicating that interviewees and survey respondents view the Dutch NCP and its specific instance procedure as equitable. Hence, we conclude that all processes described in this sub-section establish equitability on the side of the Dutch NCP.

Table 8. Interview quotes and open responses to survey

<b>Quotes supporting the Dutch NCP's procedural equitability</b>
'If you want to really be equitable, it means that the claimant should not be disadvantaged in a way that it cannot obtain certain information as a result of confidentiality'.
'The assistant mediator [of the Dutch NCP] had to be accepted by both parties. Part of a mediation process is to ease the parties to the situation and to make them feel comfortable, that is that they are listened to on an equal footing as the other party'.
'Even before the procedure commences, parties do not operate on an equal footing. Complete equality will never be reached. However, the Dutch NCP is one of the best NCPs when it comes to creating equitability'.

In the next sub-section, the OECD effectiveness criterion 'predictability' handled by the Dutch NCP will be discussed more thoroughly.

#### 4.3.7. PREDICTABILITY

The OECD effectiveness criterion discussed in this sub-section is predictability. The findings from the qualitative research employed in our study through case studies interviews, stakeholders' interviews and survey with potential claimants distinguish between procedural predictability and predictability in terms of outcome of the procedure. Procedural predictability comprises the provision of clear information on the role of the Dutch NCP and of the parties in the different stages of each specific instance, including an indication of the expected time frames. Stakeholders indicated that the Dutch NCP's steps in the specific instances were often but not always procedurally predictable. Some examples of quotes concerning this topic, extracted from interviews with parties in the case studies and with other stakeholders, are included in Table 9. Sometimes, the Dutch NCP could not meet the parties' expectations, *i.e.* the process took more time and effort than they had expected. This was confirmed by NCP members: they explained that due to their workload and the complexity of some cases, they could not always deliver quick results.

When it comes to the predictability of the outcome of the procedure, parties often have conflicting expectations of the outcome of the specific instance procedure. For instance, sometimes the claimant asks for a final statement that acknowledges the alleged violation and requires additional remedy, whereas the defendant pushes for a final statement that does not discuss the alleged violation but only describes possible actions aimed at avoiding future violations.

We conclude that all processes described in this sub-section establish predictability on the side of the Dutch NCP although considerations were raised by several stakeholders who indicated the contrary. With regard to the predictability of the outcome of the procedure conflicting expectations of the outcome of the specific instance exist, which makes it difficult to create outcome predictability.

Table 9. Interview quotes and open responses to survey

<b>Quotes supporting the Dutch NCP's predictability</b>
'The procedure is fair and predictable, because, if they [the Dutch NCP] receive a complaint, they first make a preliminary evaluation, say whether or not they find the complaint substantiated, give their motives. It is therefore possible to see in advance how a dossier will develop'.
'It is hard to be predictable on the outcome of the process because it is part of the mediation. You know that there will be a final statement, that's clear from the beginning [...] [It] is clear what the process is about, what the steps are, and what the timelines are – that kind of predictability they offer'.
'A good step is to make the procedures [...] more predictable. The NCP secretariat already does a good job in keeping timelines and everyone on track'.
'I find the procedure predictable: proactive communication, timelines indicated. What I don't find predictable is what are the criteria to take the case. I know that there are criteria but they are vague'.
'The NCP was clear that it wanted to facilitate the mediation, but the claimants insisted on demanding compensation'.

In the next sub-section, the OECD effectiveness criterion 'compatibility with MNE Guidelines' handled by the Dutch NCP will be discussed more thoroughly.

#### 4.3.8. COMPATIBILITY WITH MNE GUIDELINES

The final OECD effectiveness criterion discussed in this sub-section is compatibility with MNE Guidelines. We make a distinction between procedural compatibility and compatibility with the content of the MNE Guidelines. The findings from the doctrinal research indicate that the Dutch NCP was found to act in a procedurally compatible way: (i) in most<sup>93</sup> of the initial assessments published by the Dutch NCP regarding the specific instances, the NCP systematically addresses the question of whether the issue raised by the complainant(s) is material and substantiated by the claimant(s); (ii) the Dutch NCP follows the indicative time frames set by the OECD for specific instance procedures; and (iii) the Dutch NCP publishes its initial assessments and final statements in conformity with the Procedural Guidance.

Remarkable findings from the qualitative research were that the Dutch NCP explained in interviews that it had introduced 'new' procedural steps, *i.e.* which are not stated in the MNE Decision or its Procedural Guidance. The Dutch NCP argues that it does so for the benefit of the implementation of the MNE Guidelines. An example of a procedural innovation is the issuance of a preliminary final statement in cases in which multiple NCPs are involved (*POSCO* case). The goal thereof is to increase functional equivalence because it provides the other NCPs with time and information on the basis of which they can adjust their decisions

<sup>93</sup> This was not the case in: *Amnesty International v Royal Dutch Shell I*, [2013] Dutch NCP; *Shell II*, [2013] Dutch NCP *supra* note 77; and *Oxfam Novib et al. v Nidera*, [2012] Dutch NCP.

to those of the other involved NCPs, thereby creating uniformity. Another example is the issuance of a final statement in a specific instance procedure in which the claimant withdrew from the specific instance procedure after a long mediation process (*Shell II* case).

Table 10 contains some quotes from interviews with NCP members on this topic and on the topic of compatibility with the content of the MNE Guidelines. Regarding the second topic, for example, in the *Mylan* case, the Dutch NCP decided that the MNE Guidelines apply to the pharmaceutical sector and in the *POSCO* case, it was decided that they also apply to minority shareholders. In both cases, the Dutch NCP made a clear decision about the applicability of the norms of the MNE Guidelines.

We conclude that by handling in line with the Procedural Guidance, as described in this sub-section, the Dutch NCP acted procedurally compatible with MNE Guidelines. With regard to the compatibility with the contents of the MNE Guidelines, the Dutch NCP adheres to the MNE Guidelines in its decisions and applies a broad interpretation.

Table 10. Interview quotes

<b>Quotes supporting the Dutch NCP's procedural and outcome compatibility</b>
'This [the preliminary final statement] was an innovation [...] We didn't want to confront the other NCPs. Our statement is finished, but it is preliminary. Parties agreed with each other, but we are not finalising our statement until our statement is also supported by the other parties [involved in a similar case at another NCP]'.
'Consequently, the claimants withdrew. They said: 'we are withdrawing our notification'. That's not possible. Just look at it, the Guidelines do not offer the possibility to withdraw a notification'.
'You will notice our broad interpretation when we consider supply chains or complete value chains, when we accepted the <i>Mylan</i> case, where we speak of the application [of the MNE Guidelines] to the financial sector, and look at our approach of the claims in the <i>POSCO</i> case [...] We are very progressive, and yes also about assessing the role of the government in view of the MNE Guidelines. Hence, we also took on the <i>ADSB</i> case [concerning Dutch State's export credit insurance activities]'.

In the next sub-section, a discussion is developed with respect to the effectiveness of the Dutch NCP based on our conclusions and observations from the theoretical and empirical examination of the OECD effectiveness criteria.

## 5. DISCUSSION

In this section, we discuss how effectiveness is achieved in the handling of specific instances undertaken by the Dutch NCP by following the same structure as in Section 4. For the development of the discussion we build on literature and on the findings presented in Section 4, and we address several points of discussion in response to our research question. Each point of discussion covers one of the eight criteria which we considered as constitutive elements of effectiveness (as defined in Table 1; Section 1.2). We also included in this discussion section the criterion of reaching agreements between the parties and, especially, whether the agreement included the provision of remedies. In Section 1.2, we have provided the motivation for selecting these criteria.

### 5.1. VISIBILITY IN NON-ADHERING COUNTRIES

The scope of the visibility of an NCP, especially in non-adhering countries is of great relevance to our discussion. As shown in Figure 4, the most alleged violations amongst the cases investigated took place in non-adhering countries (*e.g.* Russia, Yemen and India). In Section 4.3.1, it was stated that the Dutch NCP is relatively well-known amongst Dutch NGOs and trade unions, and, to a lesser extent, amongst MNEs. While the Dutch NCP may be relatively well-known amongst Dutch NGOs and trade unions in the Netherlands, the question arises whether the Dutch NCP should also be visible in non-adhering countries. The MNE Guidelines do not provide an answer to this question, since the boundaries of the visibility of an NCP are not clearly demarcated. Arguably, an NCP should focus on its visibility in its home country first, since an NCP is primarily responsible for dealing with issues which arise in its own country.<sup>94</sup> However, as stated earlier, amongst the five NCPs investigated in our research, most of the alleged violations of the MNE Guidelines submitted to them in specific instances, occur in non-adhering countries, such as Russia and Yemen (see Figure 4). Despite the importance of the role of NCPs in resolving conflicts between OECD-based companies and victims in non-adhering countries, or their representatives, it may be practically impossible for an individual NCP to increase its visibility in the countries where many of the complaints are rooted, due to budgetary constraints. A possibility is to promote an NCP's mediation facilities through international NGOs, such as SOMO and Oxfam, which also operate in non-adhering countries. OECD Watch, TUAC, and the Business and Industry Advisory Committee to the OECD<sup>95</sup> also can play a role in promoting NCPs among their constituents in non-adhering countries. Accordingly, it is concluded that there is ample space for improving NCPs' visibility so that it can be utilised by affected parties in non-adhering countries.

### 5.2. ACCESSIBILITY AND CAPACITY

The increase of the Dutch NCP's capacity to accept notifications is also relevant to our discussion. When compared to other examined NCPs, such as the UK NCP, the Dutch NCP has developed a low threshold for accepting notifications (see Figure 2). As part of its

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<sup>94</sup> See OECD Guidelines, *supra* note 1 at "Commentaries" s 23.

<sup>95</sup> At the OECD, OECD Watch represents NGOs, the TUAC represents trade unions, and the Business and Industry Advisory Committee to the OECD represents the business community. Each of these parties is allowed, amongst others, to express their views on matters covered by the MNE Guidelines. See OECD Guidelines, *supra* note 1, s II(2).

forward-looking approach, the Dutch NCP aims to improve future policies, procedures and relationships between companies, parties allegedly affected by them, and other stakeholders such as NGOs and trade unions. Notifications that addressed issues that predate the 2011 MNE Guidelines, notifications that were aimed at remedy, and notifications about issues not explicitly mentioned in the MNE Guidelines, such as the right to culture, have therefore not been excluded from further examination (Section 4.3.8).<sup>96</sup> Although this forward-looking approach has the benefit of achieving a higher acceptance rate of notifications, the continuation of this practice is in danger if no expansion of the human and financial resources would be realised (Section 4.3.2). The increasing number of accepted notifications received by it puts a strain on the Dutch NCP's human and financial resources in recent years and may affect its accessibility. As international trade continuously grows and international supply chains comprise more and more chains, we can expect an increase of NCP cases in general. Anticipating such an increase would be prudent.

### 5.3. TRANSPARENCY AND CAMPAIGNING

Maintaining a balance between transparency and confidentiality is crucial for the Dutch NCP in specific instances (see Section 4.3.3). However, the tension that exists between NGOs and trade unions on the one hand and MNEs on the other hand during a specific instance procedure in regard of the level of confidentiality of the information disclosed may disrupt the balance. For instance, in the *Shell II* case, the MNE, insisted in the mediation negotiations that the NGO involved in this specific instance would not use any information gained through this specific instance in campaigns. Since campaigning is at the heart of this NGO's activities, the NGO would not be able to deliver on such promises and therefore declined the condition. Eventually, the situation came to a deadlock and the Dutch NCP decided to issue a final statement.<sup>97</sup> Recently, the OECD developed a guide on the matter of campaigning and confidentiality in relation to the specific instance procedure.<sup>98</sup> In the guide, the OECD concludes that NCP policies should be 'predictable, equitable, clear, flexible, and promote transparency to the greatest extent possible' in order to strike a balance between campaigning and transparency.<sup>99</sup> It remains to be seen whether these new guidelines will remove the tension existing between campaigning and transparency.

### 5.4. ACCOUNTABILITY TOWARDS THE MINISTER

As shown in Section 4.3.4, the Dutch NCP establishes accountability towards the OECD, the Dutch government, its stakeholders, and the public. A point of discussion concerns the role of the Minister in improving the accountability of the Dutch NCP. Before December 2014, the Minister used to add his/her findings to the draft statement of the Dutch NCP before any decision was published.<sup>100</sup> This was changed after the Decree establishing the Dutch NCP was amended in December 2014. Thenceforth, the NCP only has to send its draft statement to

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<sup>96</sup> *Bresser, supra* note 52; *Heineken, supra* note 54.

<sup>97</sup> *Shell II, supra* note 77 at 6. Interview with NCP representative.

<sup>98</sup> See OECD, OECD Guidelines for Multinational Enterprise, *Guide for National Contact Points on Confidentiality and Campaigning When Handling Specific Instances*, (Paris: OECD Publishing, 2019).

<sup>99</sup> *Ibid* at 26.

<sup>100</sup> See *Order of the Minister, supra* note 46, art 7.



the Minister as well as to the parties involved in a specific instance, but the Minister does not have to share or publish his/her findings anymore.<sup>101</sup> It has been argued by one interviewee in our research that adding the Minister's findings to the draft statement could contribute to the accountability of the Dutch NCP towards the government, because it could help the NCP to reflect on its own performance. Also, it was stated that an opinion of the Minister annexed to a decision of the NCP might contribute to the exposure, and consequently visibility, of the NCP as well as add weight to the decision due to the backing of a Minister. However, an investigation of specific instances showed that annexing the Minister's findings to a statement elongated the procedure, because it takes extra time to draft the findings.<sup>102</sup> We argue that the former situation also contained the risk that NCP's statements were influenced by the Minister's findings and that stakeholders regard the NCP as less independent.

#### 5.5. IMPARTIAL INSTITUTIONAL STRUCTURES

An NCP's institutional structure may affect its (perceived) impartiality. Our findings show that the stakeholders' confidence in the Dutch NCP flows from the NCP's institutional structure which is an expert-based structure with independent members (Section 4.3.5). These findings correspond with findings from literature, in which the Dutch NCP's structure is referred to as the 'gold standard', which may enhance impartiality (Section 2.3).<sup>103</sup> Despite its 'gold standard' structure, the Dutch NCP's stakeholders, *i.e.* NGOs, trade unions, the Dutch government, and the business community, do not have any decision-making powers. Involving stakeholders in decision-making procedures may increase an NCP's impartiality according to the OECD.<sup>104</sup> For instance, the UK NCP instituted a Steering Board that is composed of representatives from the business community, trade unions, and NGOs. The Steering Board may review procedural errors of the UK NCP, which may lead to the revision of the final statement by the UK NCP.<sup>105</sup> The Dutch NCP can take note of institutional structures at other NCPs and consider whether changes may empower or weaken its stakeholders.

#### 5.6. PROCEDURAL AND OUTCOME PREDICTABILITY

Discussion about the predictability of specific instances pertains to the procedure itself as well as the outcome of specific instances (Section 4.3.6). An example is the discourse about mediation versus adjudication. While the MNE Guidelines do not contain any obligations for NCPs to make determinations and stress that NCPs can offer mediation services, stakeholders sometimes expect a more adjudicative role of an NCP, *i.e.* that the NCP makes a determination on whether the MNE Guidelines were breached or not.<sup>106</sup> Another much debated topic is that

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<sup>101</sup> See Order of the Minister for Foreign Trade and Development Cooperation, *supra* note 46, art 7.

<sup>102</sup> Van 't Foort and Palm, *supra* note 61 at 25.

<sup>103</sup> See OECD, *supra* note 43 at 30-31; See also *House of Representatives*, *supra* note 43 at 8.

<sup>104</sup> See OECD, *supra* note 43 at 36.

<sup>105</sup> See GOV.UK, "UK National Contact Point (UK NCP) steering board: terms of reference and role", (13 September 2018), online: GOV.UK <[www.gov.uk/government/publications/uk-national-contact-point-steering-board-terms-of-reference-and-role/uk-national-contact-point-uk-ncp-steering-board-terms-of-reference-and-role](http://www.gov.uk/government/publications/uk-national-contact-point-steering-board-terms-of-reference-and-role/uk-national-contact-point-uk-ncp-steering-board-terms-of-reference-and-role)>.

<sup>106</sup> See OECD Watch "The State of Remedy", *supra* note 23 at 3.

of remedy.<sup>107</sup> On the one hand, some stakeholders follow a more adjudicative line of thought and expect that NCPs offer remedy to the victims of alleged corporate misconduct.<sup>108</sup> On the other hand, the MNE Guidelines do not dictate that NCPs must offer remedy, since NCPs are expected to resolve disputes in a non-adversarial manner. Our research shows that if the Dutch NCP assumes a more adjudicative role, it may increase the participation of NGOs and trade unions, while MNEs may become more reluctant to participate in a specific instance if the outcomes may lead to providing (financial) remedies. In keeping all parties engaged and satisfied, an NCP must be clear on what role it takes on, *i.e.* whether it takes on an adjudicative role or not, or whether it strives for resolutions that include remedies, in order to ensure a specific instance's procedural as well as outcome predictability. An innovative result was developed by the Dutch NCP and the parties in the *Heineken* case. In the mediation process, the parties reached an agreement that provided for financial remedies for groups of claimants.

### 5.7. MAINTAINING EQUITABILITY

In general, NCPs consider maintaining equitability a major challenge (see Section 2.2). Power imbalances between MNEs and NGOs or trade unions, especially if an MNE has more resources, may jeopardise the equitability of the specific instance procedure. The Dutch NCP tries to overcome these imbalances in various ways. For instance, by covering for travel and lodging expenses of parties with limited resources (*Heineken* case). As a government-backed institution, the Dutch NCP *ipso facto* carries governmental weight, which may also restore possible power imbalances as NCP participation strengthens the position of NGOs and trade unions vis-à-vis MNEs, and contributes to the legitimacy of their notifications. Sharing information about the Dutch NCP's practices can also support other NCPs, as our findings indicate that there are no equitability issues at the Dutch NCP (see Section 4.3.7).

### 5.8. COMPATIBILITY INNOVATIONS

An NCP's actions must be compatible with the MNE Guidelines. The Dutch NCP has shown that it meets this criterion by interpreting the MNE Guidelines in line with its provisions and by following the Procedural Guidance in specific instance procedures. Difficulties arise when the MNE Guidelines do not provide a clear-cut answer as to how an NCP must interpret the MNE Guidelines or apply the Procedural Guidance. As discussed

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<sup>107</sup> See M van Huistee and J Wilde-Ramsing, "Remedy is The Reason: Non-Judicial Grievance Mechanisms and Access to Remedy" in S Deva and D Birchall, eds, *Research Handbook on Human Rights and Business* (Cheltenham, UK: Edward Elgar Publishing Limited, 2020) 471; K Buhmann, "National Contact Points under OECD's Guidelines for Multinational Enterprises: Institutional Diversity Affecting Assessments of the Delivery of Access to Remedy", in L Enneking et al, eds, *Accountability, International Business Operations, and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains*, 5<sup>th</sup> ed (London: Routledge, 2019) 38; K Buhmann, "Analysing OECD National Contact Point Statements for Guidance on Human Rights Due Diligence: Method, Findings and Outlook" (2018) 36:4 *Nordic Journal of Human Rights* 390; B Maheandiran, "Calling for Clarity: How Uncertainty Undermines the Legitimacy of the Dispute Resolution System Under the OECD Guidelines for Multinational Enterprises" (2015) 20 *Harv Negot L Rev* 205. See for a recent case in this context, whereby a commercial bank provided financial compensation to victims that were displaced by a sugar company to which the bank loaned money: Australian NCP, *Equitable Cambodia and Inclusive Development International v ANZ Bank* [2020].

<sup>108</sup> See generally, OECD Watch "The State of Remedy", *supra* note 23.

in Section 4.3.8, in several specific instances,<sup>109</sup> the Dutch NCP applied various procedural innovations and content interpretations. In those cases, guidance by the MNE Guidelines or the Procedural Guidance fell short. It would contribute to the functional equivalence if the OECD, through the Investment Committee and its advisory bodies, confirmed or commented on such interpretations.

## 6. CONCLUSIONS, LIMITATIONS OF THE STUDY, AND IDENTIFICATION OF FURTHER RESEARCH OPPORTUNITIES

By applying multiple methods (Section 3), we arrive at our conclusions concerning the main research question. We conclude that Dutch NCP effectively handled the specific instances submitted to it during the examined period (2012–August 2019). The Dutch NCP accepted the highest number of notifications and reached most agreements when compared to the UK NCP, the German NCP, the Danish NCP and the Norwegian NCP. However, it remains uncertain whether the Dutch NCP can maintain its effectiveness in handling specific instances due to limited human and financial resources.

Our conclusions are further elaborated in Section 6.1. We also discuss the limitations of our study and offer some avenues for future research in Section 6.2.

### 6.1. CONCLUSIONS

In this article, we evaluated the effectiveness of the way in which the Dutch NCP deals with specific instances. The concept of effectiveness was deconstructed into four guiding principles (*i.e.* impartiality, predictability, equitability and compatibility) and four core criteria (*i.e.* visibility, accessibility, transparency and accountability) (Section 1.2). Additionally, we assessed to what extent the Dutch NCP reached agreements between the parties to specific instances, as this factor was considered particularly important by one of the main key stakeholders, *i.e.* OECD Watch. The Dutch NCP's practices on this point were put in perspective by comparing them with the practices of four other North-European NCPs, *i.e.* the UK NCP, the German NCP, the Danish NCP and the Norwegian NCP.

Section 4 comprised the findings of our assessment and in Section 5, we discussed topical issues which emerged from the findings. We found that the Dutch NCP is visible amongst NGOs and trade unions and to a lesser extent amongst companies (Section 4.3.1). Since many breaches of the MNE Guidelines take place in non-adhering countries, we discussed whether an NCP's visibility should extend to these countries (Section 5.1). With regard to the accessibility of the Dutch NCP, we concluded that Dutch NCP has been very accessible, but may become less accessible due to limited human and financial resources (Section 4.3.2 and Section 5.2). Furthermore, we discussed the need to strike a balance between transparency and campaigning and concluded that the Dutch NCP was found to have developed a good balance between transparency and confidentiality and therefore meets the core criterion of transparency (Section 4.3.3 and Section 5.3). In Section 4.3.4, we concluded that the Dutch NCP strengthens its accountability by publishing its decisions on its website, writing annual reports for the OECD and by sharing information about its progress with the Dutch parliament. While discussing the Dutch NCP's accountability, we highlighted the advantages and disadvantages of a system

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<sup>109</sup> Comment: For reference, please see *Mylan* case and *POSCO* case.

whereby the Minister adds his/her findings to the draft decision of an NCP before it is published (Section 5.4). When it comes to the guiding principle impartiality, we concluded that the Dutch NCP is impartial in its procedures and structure (*i.e.* expert-based structure with independent members) (Section 4.3.5) and discussed how the Dutch NCP may empower its stakeholders by learning from other NCPs (*e.g.* the UK NCP's steering board structure) (Section 5.5). With regard to the guiding principle predictability, we concluded that the Dutch NCP does not meet the sub-criterion procedural predictability according to all stakeholders (Section 4.3.6) and discussed the diverging views on procedural predictability (*e.g.* mediation versus adjudication) and outcome predictability (*e.g.* the role of remedy) (Section 5.6). In Section 4.3.7, we concluded that the Dutch NCP meets the guiding principle equitability by ensuring that parties engage in the specific instance on an equal footing. In Section 5.7, we discussed how the Dutch NCP ensures equitability by addressing power imbalances, for instance by covering lodging expenses for the claimants. In the final section, Section 4.3.8, we concluded that by handling in line with the Procedural Guidance the Dutch NCP acted procedurally compatible with MNE Guidelines. With regard to the compatibility with the contents of the MNE Guidelines, we concluded that the Dutch NCP adheres to the MNE Guidelines in its decisions and applies a broad interpretation. We discussed the implications of the Dutch NCP's innovative interpretations (*e.g.* application of the MNE Guidelines to minority shareholders) and procedural innovations (*e.g.* preliminary statements) on functional equivalence in Section 5.8.

The findings regarding all eight criteria (Section 4.3) and the assessment of the capability of the Dutch NCP to reach agreements (Sections 4.1) warrant the conclusion that the Dutch NCP effectively handled the specific instances submitted to it during the examined period (2012–August 2019). This conclusion is furthermore supported by the findings that the Dutch NCP applied procedural and content-wise innovations, *i.e.* 'new' procedural steps which are not stated in the MNE Decision or its Procedural Guidance and accepted more notifications and reached more agreements than the other four North-European NCPs (Section 4.2). The Dutch NCP accepted – relatively and absolutely – the highest number of notifications submitted to it (12 out of 15) compared with the other four NCPs (Figure 2). Secondly, the Dutch NCP achieved – relatively and absolutely – the highest number of mediated agreements (nine out of 12) compared with the other four NCPs (Figure 3). In these nine cases, the parties agreed with each other about the way forward, and sometimes even about how to redress damages.

Only in regard of the criterion predictability, some reservations apply. The Dutch NCP was not always found to be consistent with procedural predictability (sub-criterion) due to the increasing number of notifications received by the Dutch NCP in recent years. Apparently, the Dutch NCP sometimes could not always meet the parties' expectations of shorter time frames for the specific instance. Secondly, concerning the sub-criterion of predictability of the outcome of the procedure, it was noted that parties to specific instance procedures often have conflicting expectations, which makes it difficult to create outcome predictability.

A final conclusion concerns the ability of the Dutch NCP to maintain its effectiveness in handling specific instances. Section 5.2 revealed that due to the Dutch NCP's forward-looking approach, the number of notifications filed with it increased enormously in recent years. This trend puts a strain on the Dutch NCP's human and financial resources and capacity to handle notifications (Sections 4.3.2 and 5.2). We conclude that if the resources would not be

expanded accordingly by the Dutch government, the additional burden on the Dutch NCP's resources will potentially affect its accessibility, because it will have to reject more notifications as it may not be adequately equipped to deal with those. Ultimately, over-burdening the Dutch NCP may obstruct effectiveness in adequately dealing with all forthcoming submissions of notifications for specific instances.

## 6.2. LIMITATIONS OF THE STUDY AND IDENTIFICATION OF FURTHER RESEARCH OPPORTUNITIES

In this section, we present several limitations of our study. We argue that by disclosing these limitations our study is not devalued, but strengthened since it shows that our research is clearly demarcated and offers opportunities for future research.

The eight effectiveness criteria are based on instructions by the OECD to NCPs and constitute a limitation of the study, because only the criteria accessibility, predictability, equitability, and transparency are based on a substantial amount of research and public consultations.<sup>110</sup> Even so, the eight criteria which we employed in our analysis are very commonly regarded as suitable and relevant criteria to evaluate effectiveness of mediation procedures and relevant for solving conflicts relating to responsible business conduct.<sup>111</sup> As a specific instance procedure is referred to as a non-judicial grievance mechanism in the 'Protect, Respect and Remedy' framework for business and human rights, and the United Nation's Guiding Principles formulate similar effectiveness criteria as the OECD,<sup>112</sup> we decided to use

<sup>110</sup> See Mossavar-Rahmani Center for Business and Government, "Corporations and Human Rights: Accountability Mechanisms for Resolving Complaints and Disputes – Report of Multi-Stakeholder Workshop" (April 2007), online (pdf): *Business & Human Rights Resource Centre* <media.business-humanrights.org/media/documents/ac5022c5589e8e35ed135f517e4f276ae77b2775.pdf>; Mossavar-Rahmani Center for Business and Government, "Corporations and Human Rights: Accountability Mechanisms for Resolving Complaints and Disputes – Report of 2<sup>nd</sup> Multi-Stakeholder Workshop" (November 2007), online (pdf): *Business & Human Rights Resource Centre* <media.business-humanrights.org/media/documents/files/reports-and-materials/Accountability-mechanisms-workshop-report-Nov-2007.pdf />; see also JF Kennedy School of Government, "Rights-Compatible Grievance Mechanisms" (January 2008), online (pdf): *Business & Human Rights Resource Centre* <media.business-humanrights.org/media/documents/files/reports-and-materials/Grievance-mechanisms-principles-Jan-2008.pdf>; C Rees, "Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned" (23 May 2011), online (pdf): *Harvard Kennedy School* <media.business-humanrights.org/media/documents/files/media/documents/ruggie/grievance-mechanism-pilots-report-harvard-csri-jun-2011.pdf>.

<sup>111</sup> Taken into account that in more than a dozen of peer reviews conducted amongst NCPs, these effectiveness criteria have been used by the assessing NCPs to assess their peers. See OECD, National Contact Points peer reviews <mneguidelines.oecd.org/ncppeerreviews.htm>.

<sup>112</sup> See JG Ruggie, "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework" (9 April 2009) at 26, online (pdf): *United Nations Digital Library* <digitallibrary.un.org/record/682467?ln=en>; see also JG Ruggie, "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework" (21 March 2011), online (pdf): *United Nations Digital Library* <digitallibrary.un.org/record/705860?ln=en#record-files-collapse-header>. See also TE. Lambooy,

the eight criteria provided by the OECD in the context of enhancing effectiveness. Additionally, we also assessed the Dutch NCP's ability to reach agreements as NCP stakeholders find that aspect very important.

The doctrinal research conducted in this study is based upon assessing and systematically examining 73 specific instances handled by five selected NCPs, all based in Northern Europe. Five is a small number of NCPs in view of the 49 NCPs that exist around the world. That is a limitation of the study. However, these five NCPs operate in the same part of the world and act in a comparable way when dealing with specific instances. Hence, they seemed suitable to us for the purpose of comparing the Dutch NCP's policies and activities with. We also argue that the total number of 73 specific instances examined is representative, since worldwide 425 specific instances were filed between the period 2000-2018.<sup>113</sup> Hence, 73 represents an adequate proportion thereof.

*Further research opportunities* lie in expanding the database of 73 specific instances and analysing them by applying the eight effectiveness criteria and the factor of reaching agreements, and exploring whether differences in effectiveness can be established between NCPs in other regions of the world and the selected five Northern European ones.

Another limitation relates to the number of interviewees. Including more interviewees in our research could have broaden our findings. However, what we learned from our interviewees reached a certain level of saturation, meaning that we would not gain much new insights by enlarging the group of interviewees. Nonetheless, interviewing more foreign victims of alleged non-compliance of MNEs based in the Netherlands could have enlarged our insights, in particular victims in non-adhering countries.

We limited our research to four case studies. Conducting more case studies could have produced more information concerning the effectiveness of the Dutch NCP in handling specific instances. Despite this being a limitation of our research, our triangulation of the data confirmed our findings and conclusions based thereon.

*Further research opportunities* entail selecting a larger number of cases, including cases from other NCPs. Investigating other NCPs may be worth-while to see whether differences occur between NCPs' handling of cases due to differences in for instance institutional structures and legal and political contexts. Also, researchers could work with a larger population of interviewees.

Future research could also entail conducting case studies to answer other research questions, such as whether remedies should be considered part of the NCP's tasks in the handling of specific instances. Currently, diverging perspectives exist in respect of this topic.

In a similar vein, the issue of visibility of Western-based NCPs in developing countries, in particular in least-developed countries and areas, also merits further research.

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"Corporate Due Diligence as a Tool to Respect Human Rights" (2010) 3 Netherlands Quarterly of Human Rights at 404.

<sup>113</sup> See OECD Annual Report, *supra* note 35 at 19.