

Final Statement

Final report of the Netherlands National Contact Point for the OECD Guidelines for Multinational Enterprises on the Specific Instance notified by Amnesty International, Friends of the Earth International and Friends of the Earth Netherlands concerning communications by Royal Dutch Shell about the cause of oil spills in the Niger Delta

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Introduction

Countries adhering to the OECD Guidelines for Multinational Enterprises (the Guidelines) are under the obligation to set up National Contact Points that promote the Guidelines and act as forum for discussion of all matters relating to the Guidelines. The NCP undertakes promotional activities, handles enquiries and contributes to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances.

The specific instance procedure is a forward-looking process. The NCP offers the parties its good offices if certain criteria are met and there is a possibility to improve the implementation of the guidelines. The criteria are described in the procedural guidance of the OECD (2011 revision).

This report describes the process initiated and the good offices offered by the Netherlands National Contact Point for the OECD Guidelines (hereafter: NCP) after receipt of a notification by Amnesty International, Friends of the Earth International and Friends of the Earth Netherlands (hereafter: AI/FoE) on 25 January 2011.

The process was conducted as a dialogue between parties involved, and although helpful discussions took place during the meetings, parties have not reached an agreement on the notification 'Shell in the Niger Delta (1)'. On the 22nd of January 2013 it was decided that the NCP should draft its final statement.

The emphasis in this final statement is on the NCP's views on the course of the procedure, the main issues at stake, including recommendations. It should be noted that the statement is based on the information presented by the parties and the outcome of discussions. The exchange of information in the process is in conformity with the OECD guidelines, confidential.

Notification and parties involved

On January 25, 2011, the Dutch NCP received a notification to the UK and Dutch National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises" submitted by Amnesty International, Friends of the Earth International and Friends of the Earth Netherlands (hereafter: Notifiers). They allege that Shell violated specific provisions of the Guidelines.

Notifiers submitted that Shell has breached the OECD Guidelines in its communication on oil spills in the Niger Delta. In their view, the company provided misleading information and omits mention of relevant facts about causes of oil spills. They claim that Shell based its communications on biased and unverified information, thus failing to provide reliable and relevant information to external stakeholders. Incorrect and conflicting messages about causes of oil spills further contributed to low quality non-financial information.

I. Alleged breaches of the OECD Guidelines (edition 2010):

a. Disclosure (III), specifically points 1, 2 and 4(e)

[...] Enterprises "should ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance," and that "[e]nterprises are also encouraged to apply high quality standards for non-financial information including

environmental and social reporting where they exist. The standards or policies under which both financial and non-financial information are compiled and published should be reported.” [...]

b. Environment (V), specifically points 2 and 3

[...] Enterprises should “take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.”

c. Consumer Interests (VII), specifically point 4

[...] Enterprises should “act in accordance with fair business, marketing and advertising practices.”

II. Recommendations by AI/FoE:

In their notification brought before the NCP, the notifiers recommend Shell to do the following:

- 1) Disclose the source information that it relies on in continuing to make its public allegations relating to sabotage.
- 2) Provide a list of all joint investigations participated in by Shell and the evidence which substantiates the claims relating to sabotage.
- 3) Publish the process by which each decision was made.
- 4) Publicly acknowledge where disagreements have existed between communities in the Niger Delta and Shell.
- 5) End the practice of disseminating unqualified and misleading data and statements on the percentage of oil spills that can be attributed to sabotage, and correct or withdraw existing public materials.

Admissibility of the Notification

The role of National Contact Points (NCP) is to further the effectiveness of the Guidelines. In accordance with the Procedural Guidance for the OECD Guidelines, the NCP made an initial assessment of whether the issues raised merit further examination considering the criteria given in the mentioned procedural guidance.

On February 24, 2011 the NCP decided that the notification deserved further examination under the specific instance procedure of the OECD Guidelines for Multinational Enterprises and formally informed parties of this decision. The decision is published on the NCP website. As the notification had been submitted to the UK NCP as well, the Netherlands and the UK NCP jointly decided that the Netherlands NCP would take overall lead on the notification, with support and assistance from the UK NCP as required.

Response by RDS

In its response to the Complaint d.d. June 15, 2011 (which was reiterated by letter of January 16, 2012), RDS argues the Complaint to be unfounded and unsubstantiated. RDS addresses its organisational structure, the features of the Niger Delta, the details of the Complaint and the related Chapters of the Guidelines.

With regard to its organizational structure, RDS in its letter clarifies that it does not have any operations [i.e. extracting, processing or distributing activities] of its own and that information on Shell’s operations in Nigeria has been furnished to Shell by its relevant affiliates, e.g. Shell Petroleum Development Company of Nigeria Limited (SPDC) and Shell Nigeria Exploration and Production Company (SNEPCo), operating in Nigeria. SPDC is the ‘operator’ of an unincorporated joint venture with the Nigerian State Oil Company (NNPC) and others, with an undivided participating interest in the joint venture of 30%.

Furthermore, RDS points out that the Royal Dutch Shell Sustainability Report, that is the main source of information on the social and environmental performance of Shell’s operational subsidiaries, is

drawn up in accordance with the Global Reporting Initiative (GRI A+ standard), as referred to in the OECD Guidelines. To the best of the knowledge of RDS, the data in that report are correct and meet the OECD Guidelines requirements. With regard to the interpretation of the data on spill reports, RDS indicates that the complainants fail to recognize the basic distinction made in spill reporting between numbers of spills and volumes spilled. Also RDS points out that SPDC's practice with regard to the (determination of the) oil spills by Joint Investigation Team (JIT), comprising of representatives of SPDC, affected communities and relevant government agencies, follow the applicable Nigerian laws.

In order to enhance further transparency, since January 2011, JIT reports are published on SPDC's public website. By doing so, RDS believes to have substantively addressed four (1-4) of the recommendations of the Complaint.

For above reasons, and since Friends of the Earth Netherlands has initiated court cases in the Netherlands that touch upon the issues covered in the Complaint, RDS – in first instance - saw neither basis nor scope for mediation. RDS was at that moment not prepared to engage in a dialogue with parties who had commenced legal proceedings.

The fact that Milieudefensie was withdrawn from the procedure and thus creating clarity on the distinction between the court case between RDS and Milieudefensie on the one hand and the NCP procedure on the other hand, made it possible for RDS to engage in a dialogue with AI/FoE.

NCP's view on alleged breaches of the OECD Guidelines

The NCP has not undertaken a mission to verify the information that has been provided for by both notifiers and RDS. However by examining the documentation in NCP's view the main fact remained that information on spills and spill cause determination procedures apparently allow for different interpretation. Exactly this fact should be the main reason for both parties to engage in a forward looking dialogue, to share views on the facts and fact finding in order to address the discrepancies in the provided data and suspicion on the procedures that are used to determine spill causes.

The NCP raised the question to what extent RDS gives account to the fact that it reports data on operational errors of its Nigerian subsidiary, that are generated in a process that heavily relies on the expertise of that subsidiary, e.g. SPDC, or as stated in UNEP's Environmental Assessment of Ogoniland, 2011, p.140, "government agencies are at the mercy of the oil companies when it comes to conducting site inspection."

The NCP understands that the decentralized commercial and legal responsibility of local subsidiaries is a crucial element of Shell's business philosophy. Local management should feel responsible for solving local problems, without the comfort of a parent company that will intervene when things seriously go wrong. According to the NCP there is a role to play for the parent company when international governance standards require more than just compliance to local law. In this specific instance under the OECD Guidelines RDS cannot ignore its own ultimate responsibility and accountability concerning local operations of SPDC.

The NCP agrees with the Special Representative of the Secretary-General of the United Nations on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, who stated that "leadership from the top is essential", which means, according to the NCP, that the parent company of a multinational, e.g. RDS, has to actively stimulate pro-active observance of its subsidiaries to the OECD guidelines for multinational enterprises.

Dialogue 'Shell in the Niger Delta

RDS accepted NCP's 'good offices' to facilitate a dialogue. The NCP held several separate meetings aimed at further consideration of the notification and to create positive conditions for an open dialogue.

Both parties involved expressed their willingness to engage in a dialogue to solve the issues at stake. The NCP helped setting the agenda and terms of reference for the dialogue, including a timeframe, and facilitated the meetings that took place in the framework of the dialogue.

During the summer of 2012 parties agreed to jointly set the agenda and terms of reference with a view to the first meeting of the Dialogue that was foreseen for early September. Base for the dialogue was a) the present communication by Shell on complicated matters, like the proportion of oil spills that has to be attributed to a certain spill cause, and b) the spill cause determination procedure and Joint Investigation Teams (JIT) in Nigeria, where alleged inequality of access to relevant information, divergent interests and disparity of powers of the parties involved, could impede a fair determination of spill causes. Improvements of the procedures were to be discussed. The NCP believed that both issues could be dealt with in a constructive, forward-looking NCP procedure. Both parties being able to gain from an exchange of views on the disputed data, with an aim to improve the oil spill determination and related communication on the JIT-procedures.

In two joint sessions and several bilateral sessions, the NCP facilitated both AI/FoE and RDS to find common ground for a solution regarding the issues as put forward in the notification. The NCP suggested focusing on trying to find a creative solution that recognizes the concerns of both sides.

The issue of confidentiality has been thoroughly discussed, specifically related to the JIT-cases from before 2011 that were to be examined. RDS would need a guarantee from AI/FoE that these cases would not be part of a campaign or appear in the public domain. Although AI/FoE had not foreseen any campaigning related to the specific cases, it could in general sense not guarantee such thing, since campaigning is at the heart of the organisation and used to accomplish their goals. According to AI some information on the specific cases had already been recorded in AI's public reports and would also be recorded in the future, albeit no information that was shared within the confidentiality of the NCP procedure.

In general, the NCP expressed that it would not expect AI/FoE to turn their back to the communities nor stop taking care of the communities involved and that, on the other hand, it would not expect RDS to want to be the cause of initiating or confirming a public interest in the cases that were to be discussed.

The NCP is of the opinion that RDS on the basis of its interpretation of the course of events in the recent past can have the wish to find a certain level of comfort in an exchange of information during a dialogue with AI/FoE. But the NCP also accepts that discussing JIT documents in the confidentiality of the NCP process, for AI/FoE cannot mean that they will give up mentioning that case in their campaigning or reports in the future. The NCP regrets that no solution for this dilemma could be found within the agreed time frame.

The NCP is of the opinion that given the many years of discussion about the causes of oil spills in Nigeria, RDS management should have had a more cautious attitude about the percentage of oil spills caused by sabotage, after all JIT data are not absolute.

On the other hand SPDC has per January 2011 introduced a more transparent attitude towards the content of JITs by making them publicly available on the company's website. RDS has stated that any

new evidence on spill causes and quantities immediately will be used to rectify existing reports.

Recommendations for the further implementation of the OECD Guidelines

- The NCP calls on RDS, as the parent company, to exert its influence to stimulate pro-active observance and implementation of its subsidiary SPDC in Nigeria of the OECD guidelines for multinational enterprises.
- The NCP urges both parties to continue the discussion on the best way to communicate about oil spills. Parties should take a positive, constructive and solution-focused approach in a non-judicial forward-looking problem solving process and by doing so create trust in the dialogue about the steps that have to be taken to solve the Nigeria oil pollution problem.
- The NCP in the above context calls on RDS to share information on relevant spill causes and spill cause determination procedures, also dated before January 2011. The importance of accurate facts and figures for both RDS and the communities involved, should lead to RDS' willingness to take account of evidence that may dispute earlier published data and related communications.
- The NCP calls on AI/FoE to provide input for the further improvement of the JITs that are dated from 2011 and further. To the NCP this is of specific importance, since the improvements that have been made by SPDC with regard to those JIT-procedures seem not to be contradicted.
- The NCP recommends RDS to be prudent with regard to general communication to stakeholders of very detailed figures on oil spills, when discrepancies exist with regard to the causes or amounts of those oil spills.
- The NCP in each specific instance calls on notifiers to be prudent with regard to publications or campaigning on matters at stake in a NCP-procedure, also when it refers to information that may already be in the public domain. This without prejudging the fact that the heart of the notifying organization lies in the defense of human rights by public campaigning and litigation.

Annex 1

Overview of the NCP procedure

On **24 January 2011** the Netherlands NCP (NCP) received per email the notification concerning Royal Dutch Shell (RDS) in the Niger Delta submitted to the UK and Dutch National Contact Points, dated January 25, 2011, under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises by Amnesty International, Friends of the Earth International (AI/FoE) and Friends of the Earth Netherlands. By letter on **24 February 2011**, the Netherlands NCP confirmed the receipt of the notification and informed both parties of its decision on the admissibility of the notification.

A first meeting of the NCP with the notifiers took place on **March 22** in order to exchange views on the scope and possible outcomes of the mediation process. By the end of March, RDS confirmed in email correspondence that it would respond to the notification not earlier than by the end of May due to the lengthy complaints and the overlapping pending procedures initiated by Milieudefensie (Friends of the Earth Netherlands) before a Dutch court of law.

Based on the initial meeting and written correspondence the NCP submitted a proposal for further steps on **16 May 2011**. The NCP proposed to carry out preliminary meetings in order to determine whether mediation would be appropriate. The NCP invited parties to discuss the conditions for a full assessment and mediation that would detail the scope of the issues to be raised, the parties involved, the limits of confidentiality, expected outcomes of the mediation process and a tentative timetable, taking due account of the pending court case. An example of a Terms of Reference for Mediations services was included. Notifiers welcomed the proposals by email on **June 14**, including some suggestions for the Terms of Reference. On **June 15**, RDS responded to both the Complaint and the letter including the proposal to discuss a Terms of Reference, stating it was not prepared to engage in mediation. On **August 8**, this response was forwarded to notifiers with the consent of RDS.

On **11 July 2011**, the NCP discussed with RDS and notifiers separately its position on the possible benefits of the NCP procedure in this specific instance. The minutes of these meetings were sent to both parties by email and by formal letter to RDS on **August 12**¹. In this letter to RDS, the NCP seriously suggested RDS to reconsider the decision not to accept NCP's offer of its good offices aimed at conciliation or mediation. It summarized the allegations expressed by notifiers, confident that these issues can be dealt with in a constructive, forward looking NCP procedure, where both parties can gain. The NCP concluded that neither Shell nor AI/FoE would benefit from a so-called final statement in this specific instance.

Notifiers responded to RDS' letter of June 15 on **28 September 2011**, repeating that the figures used by Shell cannot be considered reliable and that RDS fails to acknowledge the much-contested nature of the data used in their reporting. This response was forwarded to RDS on **October 14**.

30 September 2011, the NCP met with notifiers on the issue how to proceed. Notifiers confirmed their willingness to cooperate in mediation, provided the end result is clear and RDS is committed to mediation. The NCP indicated that if mediation is unsuccessful, or if either one or two parties do(es) not want mediation, the NCP will reflect on the reasons why the NCP process did not result in a mediated solution in its final statement. On request of the NCP, notifiers provided additional information on 17 October 2011, regarding the relevance for the case at hand of the findings of UNEP in its recent report on the environmental situation in Ogoniland.

¹ It is not clear whether this letter has reached RDS. A copy of the letter has been sent to RDS by email on October 11.

The NCP called upon RDS by letter dated **4 November 2011** to discuss the outstanding issues face to face, rather than to continue a written exchange with the NCP, reiterating the confidentiality that is essential with regard to the court cases. This letter also includes further questions from the NCP regarding the RDS/SPDC procedures on verification, stakeholder participation and some specific spill cases. RDS indicated in response that it could not react on AI/FoE's letter before December 14, 2012, being the date for submission of additional documents in the pending Dutch court case.

AI/FoE submitted an addendum to their letter d.d. 28 September on **December 1, 2011**, in further response to certain statements made in Shell's letter of June 15.

Shell submitted its response by **January 16, 2012**, firmly reinstating its belief that the complaint is unsubstantiated and the NCP procedure being used as a public relations campaigning tool, but remaining prepared to meet with the NCP to discuss any remaining questions. An appendix was added with replies on further questions by the NCP as of 4 November 2011.

On **March 5, 2012**, the NCP identified some of the concerns that could hamper the engagement in a forward looking and solution-focused dialogue. It drafted a preliminary final statement to further the NCP-process and discussed this with RDS on **March 7 and April 11** and with AI/FoE on **May 25**. These meetings resulted in a more favorable attitude from RDS to engage in a dialogue. On RDS' request FoE/AI was willing to withdraw Friends of the Earth Netherlands (Milieudefensie) from the NCP procedure, thus creating clarity about the distinction between the Dutch court case between Milieudefensie and Shell on the one hand and the NCP's dialogue on the other. On the basis of the separate meetings and safeguards that were deemed necessary by the parties involved, the NCP drafted an outline for further steps in June 2012.

RDS and FoE/AI both agreed to engage in a dialogue. It was decided to hold a joint agenda meeting on **July 16, 2012**, to set the agenda and the terms of reference for the foreseen dialogue. No substantive discussions took place during this session. Based on a NCP's proposal, parties reached agreement on subjects to be discussed or bracketed for the time being, the mandate, the timeframe (January 2013 at the latest), the stakeholders, the confidentiality and facilitation by the NCP.

The first session of the dialogue took place on **September 28, 2012**. Although progress was made and both parties reiterated their willingness to progress, the NCP noted with concern that both parties retained their positions in either insisting to look forward or, opposite, to look back. It was agreed that the NCP would seek information and discuss how to solve the existing stalemate individually with AI/FoE and RDS. This would allow the NCP to provide possible ways forward. The NCP bilaterally discussed the issues with RDS at RDS' headquarter in The Hague on **October 10** and with AI/FoE in Brussels on **November 21, 2012**.

On the basis of the bilateral meetings the NCP drafted a memo with a view to a second joint meeting of the Dialogue that was scheduled for **December 10, 2012**. The NCP suggested focusing on trying to find creative solutions for a joint findings process, elements for the NCP's final statement and agree on the communication regarding the joint finding process and improvements of the JITs. Although AI/FoE cancelled the meeting in last instance, the NCP took the opportunity to bilaterally discuss the issues with RDS. On **December 13** a telephone conference took place with the NCP and AI/FoE. An extended memo with suggested ways forward followed these two meetings.

Both meetings with RDS and FoE/AI convinced the NCP to schedule a meeting on **January 22, 2013**, that served as the last meeting, as indicated by the parties in their Terms of Reference for the Dialogue, also with a view a second notification regarding Shell in the Niger Delta that has been put on hold during this NCP-procedure.

Although helpful discussions took place during this last meeting, parties have not reached an agreement on the notification 'Shell in the Niger Delta (1)'. Following the fact that no common conclusion could be drawn, the NCP has drafted its final statement to finalize the procedure. The statement has been written in a way that it would not damage future relations between AI/FoE and RDS.