

Assessment of NCP Performance in the 2013-2014 Implementation Cycle

OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points

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Executive Summary

OECD Watch's submission to the 2014 Annual Meeting of National Contact Points (NCPs) reports on and analyses the experiences of OECD Watch's 90 member organisations and many other civil society organisations (CSOs) that have engaged with NCPs and used the OECD Guidelines for Multinational Enterprises (hereinafter 'the Guidelines') in an effort to improve corporate practices. This submission identifies trends in NCPs' handling of specific instances based on a comprehensive review of the 34 specific instances that were filed by CSOs between 1 January 2013 and 23 June 2014, plus an additional 33 cases that had major developments or remained pending during the review period. Based on this analysis, the submission concludes with a number of concrete recommendations for improving NCP performance. The submission also includes recommendations for improving the governance of the OECD's "Proactive Agenda" projects, as well as three annexes that provide a detailed analysis of specific cases/NCPs.

Specific instances and NCP functioning

The total number of cases filed in 2013 (32) represented an increase compared to previous years, but 2014 has seen a sharp decrease, with only two cases having been filed midway as of 23 June 2014. Human rights and due diligence-related allegations dominate cases filed since January 2013. This is likely to be in direct response to the strengthened provisions in these areas, but also because systemic adverse impacts by business are very often directly related to these issues, particularly in sectors such as extractives. The cases filed in 2013-4 were unevenly distributed across NCPs. The UK NCP received the most cases (14), and no other NCP came close to that number.

How have NCPs handled these cases? Let's start with the good news: twelve cases had notable case outcomes or processes, including four cases that concluded with the parties issuing a joint statement. Some of the most notable outcomes and processes among these cases include:

- **Stopping irresponsible corporate practices:** The SOCO oil exploration case, filed by WWF and handled by the UK NCP, included a landmark agreement whereby the oil company agreed to halt further activities in the Democratic Republic of the Congo's Virunga National Park and committed never again to jeopardize any other World Heritage Site anywhere in the world. And in the Cameroonian palm oil case against Bolloré et. al. handled by the French NCP, the parties developed and agreed to an action plan to remedy Socapalm's violations to the Guidelines on a range of issues, including community dialogue, reduction of environmental nuisances, public services, local development, workers' rights and conditions of work, transparency, and compensation of local communities for their loss of resources and lands.
- **Confirming the scope of the Guidelines:** The Dutch and Norwegian NCPs issued final statements in the cases against ABP and the Norges Bank Investment Management (NBIM) that confirmed the Guidelines apply to minority shareholders and the commercial activities of central banks and sovereign wealth funds. The Finnish NCP's statement in the Pöyry Group case confirmed they apply to consulting and business service companies.
- **Importance of NCP fact finding:** The ArcelorMittal joint agreement was aided by two fact-finding missions. The Dutch NCP tried to organise a joint NCP mission concerning POSCO's planned activities in India, but there was no cooperation from the South Korean NCP.
- **Professional, fair mediation:** The UK, Luxembourg, and Norwegian NCPs in the SOCO, ArcelorMittal, and Sjøvik cases appointed professional, independent mediators that played a

positive role in facilitating agreement. In the Sjøvik case, the mediator provided extra assistance to the complainant in order to balance out the unequal negotiating power between the parties.

-  **Addressing companies that refuse to engage:** Norway's final statement in the case against NBIM concluded that a company's very refusal to engage in the specific instance process is itself a violation of the Guidelines.

Despite these notable outcomes, it is disconcerting that NCPs continue to **reject an alarming one-third of all cases** filed (as well as individual elements of many more cases). This practice continues to dampen the credibility and legitimacy of the Guidelines' grievance mechanism among civil society. Based on a thorough analysis of rejected (elements of) cases, OECD Watch has identified some of the most problematic elements and trends related to **a grave lack of functional equivalence at the initial assessment phase** that is damaging the effectiveness of the Guidelines and the specific instance grievance mechanism.

-  **Expecting unreasonable burden of proof for substantiation:** The Procedural Guidance instructs NCPs to take into account whether the issues raised in a specific instance are "material and substantiated". In order to satisfy this condition and have the case accepted by an NCP, complainants should be required to provide *prima facie* evidence, enough evidence to raise a rebuttable presumption. However, some NCPs are increasingly expecting complainants to satisfy an unreasonably high burden of proof before even accepting a complaint and seeking to bring the parties together for dialogue. This expectation is simply not feasible for many complainants, significantly reducing the accessibility of the specific instance mechanism. It should not be necessary, at the initial assessment phase, to demonstrate that the preponderance of the evidence supports the allegations. Further, such evidentiary burdens are particularly unnecessary in cases where mediation is sought.
-  **Excluding potential impacts:** Some NCPs are refusing to examine potential impacts if CSOs cannot meet what one complainant coined a "standard of inevitability". This practice is also very much at odds with the new due diligence- and human rights-related provisions added to the Guidelines in 2011, which clearly state that potential impacts and risks be assessed by enterprises. There is no caveat in the Procedural Guidance that states these must be "inevitable" for NCPs to accept them as legitimate topics for mediation/examination in specific instances.
-  **Rejecting cases not amenable to a mediated solution:** Some NCPs are inappropriately using the (un)willingness of parties (both companies and complainants) to engage in mediation as a criterion for accepting or rejecting cases at the initial assessment phase. Note that none of the six criteria the Procedural Guidance instructs NCPs to take into account the parties' willingness to engage in mediation when conducting initial assessments. By conflating the initial assessment phase with the mediation/'good offices' phase, NCPs are acting in contradiction with the Procedural Guidance, damaging the predictability and accessibility of the specific instance mechanism, and unnecessarily limiting the positive contribution NCPs can make to resolving disputes when mediation is not possible. The process of confirming whether both parties are interested in mediation also contributes to inordinate delays during the initial assessment phase, with many cases extending up to a year and beyond before an initial assessment is issued.

- **Applying restrictive definition of 'MNE'**: Some NCPs are applying an unnecessarily restrictive definition of 'multinational enterprise' in order to reject cases, in one case even misrepresenting the text of the Guidelines to do so. The Guidelines state explicitly that no fixed definition of 'multinational enterprise' is required, and only note that MNEs are 'usually' established in multiple countries. Insisting that companies must be physically present in multiple countries in order to fall under the Guidelines is thus erroneous, departs from previous NCP decisions, and contradicts guidance from the Investment Committee on entities such as central banks and sovereign wealth funds. The inconsistent application and interpretation of 'multinational enterprise' is damaging the predictability and accessibility of the specific instance mechanism. In OECD Watch's view, NCPs should be open to accepting cases against all types of commercial entities if there is a possibility that the NCP can contribute to resolving disputes between business and society and/or furthering the effectiveness of the Guidelines.

- **Citing parallel proceedings**: Some NCPs continue to reject cases outright simply because of the existence of parallel (legal) proceedings even though the Guidelines explicitly state that they should not reject cases solely because of parallel proceedings.

Beyond the initial assessment phase, the longstanding trends of perceived **unequal treatment of parties** (often associated with clear conflicts of interest related to **NCPs' housing in a single government ministry/department**) and **inordinate delays in handling cases** (far exceeding the indicative timelines) continued to permeate many complainants' experiences with NCPs. Among the cases reviewed for this submission, there are two examples of NCPs (at the insistence of companies) **pressuring specific complainants and advisors to remove themselves** from the process in order to placate concerns held by the company.

With regard to final statements, the dominant trend continues to be NCPs **refusing to make a clear determination** as to whether companies have breached the Guidelines, even when recommendations in their final statements point to clear lapses in adherence. In addition, there are two case examples where NCPs concluded companies had not violated the Guidelines even though their adherence had not been substantiated. Some NCPs have also **issued final statements that are based on information that was never shared with the complainants** – a practice that was deemed unacceptable by the UK NCP's Steering Board in an earlier case against BP.

The feedback OECD Watch received from users of the specific instance grievance mechanism at 15 different NCPs this implementation cycle reveals that only the Norwegian NCP is receiving the highest marks on all of the core functional equivalence criteria (visibility, accessibility, transparency and accountability).

Proactive agenda

Two years since the launch of Proactive Agenda, one of the key issues to emerge is that the governance of the Proactive Agenda needs strengthening and clarifying. To date the approach has been inconsistent, particularly with regard to appointment and role of Chairs, the development of the terms of reference, and the role of the Advisory Group. This has led some projects to experience significant delays, a lack of transparency, and a failure to have key decisions about content and scope be sufficiently discussed with the Advisory Group. Some projects suffer from a (perceived) conflict of interest related to particular adhering governments with strong views on the subject of the project exerting undue influence on the development of the project.

Recommendations for improving NCP performance

Based on this year's research and analysis, OECD Watch recommends the following in order to improve the performance of NCPs and ensure adherence with the principles of visibility, accessibility, transparency, accountability, impartiality, predictability, and compatibility with the Guidelines:

○ **Recommendations to ensure accessibility**

- NCPs should refrain from expecting complainants to meet an unreasonable burden of proof, particularly at the initial assessment phase.
- NCPs should implement the Guidelines and handle cases within the agreed framework of due diligence—"to identify, prevent and mitigate actual and potential adverse impacts". This means not rejecting cases on the basis that potential impacts have not materialized.
- NCPs should view themselves as problem-solvers and use all of the tools at their disposal to encourage companies' adherence to the Guidelines, rather than rejecting cases if successful mediation is unlikely.
- NCPs should not reject cases simply based on their own assessment that a situation would be resolved better elsewhere, or that the complaint is not in the national interest.

○ **Recommendations to ensure predictability**

- NCPs should set specified time frames for each phase of the handling process and make every effort to adhere to them
- NCPs should ensure that parties are regularly informed about the upcoming steps of the procedure
- Adequate staffing of NCPs in order to be able to settle complaints within the foreseen time frame is crucial
- For cases that have been pending for an unduly period of time, NCPs must either make a concerted effort to bring the parties together or failing that, issue a final statement with recommendations, as appropriate.

○ **Recommendations to ensure impartiality and accountability**

- NCPs should restructure, as necessary, to ensure impartiality and stakeholder involvement or oversight.
- Clearly separate the initial assessment, mediation, and determination phases of the process.
- External mediators should have to be endorsed by both parties. Parties should have the possibility to reject the mediator in justified cases.
- Establishment of terms of reference for the procedures including binding rules how to treat the contentious points and how to follow up and monitor their elimination
- Outline of the agreement solely by the parties - no content-derived statement on the part of the NCP regarding the complaint before or during the mediation
- Mediation proceedings to be held under conditions of 'limited access' with the parties, a mediator and, at the most, a representative of the NCP only

○ **Recommendations to ensure compatibility with the Guidelines**

- NCPs should strive to facilitate an outcome that addresses the harm caused to the complainant, in addition to ensuring that similar harm does not occur in the future.
- Although NCPs appear more willing to monitor the implementation of mediated agreements, monitoring must be accompanied with NCP's willingness to take action if parties do not follow through with their commitments. This could include issuing an addendum to the final statement.

○ **Recommendations to ensure transparency:**

- NCPs should always publish initial assessments and final statements
- NCPs should strive to provide utmost transparency towards the parties concerning information received by each party
- NCPs must not base any part of an initial assessment or final statement on information that was not shared with both parties
- NCPs must not consider regular updates on the process and progress of specific instances a breach of the good faith principle

◉ **Recommendations to the OECD Investment Committee and the Working Party on Responsible Business Conduct**

- The Investment Committee and Secretariat must play an active role to ensure NCPs are functioning in accordance with the Procedural Guidance – including regularly assessing NCPs against the criteria for functional equivalence – and addressing specific instances in a manner that is impartial, predictable, equitable and compatible with the Guidelines.
- The OECD and adhering governments should ensure that sufficient funds are allocated to the secretariat to fulfil this crucial function.

Introduction

OECD Watch welcomes the opportunity to provide a submission to the 15th Annual Meeting of National Contact Points (NCPs). This year's submission entailed a comprehensive review of the 34 specific instances that were filed by CSOs between 1 January 2013 and 23 June 2014, plus the 33 cases that had major developments or were still pending during the review period. In addition, it describes some of the experiences of OECD Watch's 90 member organisations and many other CSOs that have engaged with NCPs and filed cases. This submission also includes OECD Watch's assessment of the Investment Committee's Proactive Agenda. Our aim has been to highlight the issues and trends that are contributing to or hindering the effective implementation of Guidelines as a tool to help affected communities and to improve corporate practices globally.

- **Part 1** describes developments at 15 NCPs during the last implementation cycle, including how these NCPs' are perceived to be adhering to the functional equivalence criteria. Part 1 also reports on notable outcomes on cases and the negative trends that we have observed in NCPs' handling of cases.
- **Part 2** reflects on experiences with and governance of the "Proactive Agenda" projects being carried out under the Investment Committee's Working Party on Responsible Business Conduct.
- **Part 3** provides concrete recommendations for improving implementation of the Guidelines based on the feedback we have received from CSOs as well as our in-depth interviews with complainants and analysis.

In addition, this submission highlights analysis of NCP performance conducted by individual OECD Watch members and allied organisations. The following annexes to the present submission can be downloaded on the [OECD Watch website](#) or by clicking on the following hyperlinks:

- Annex 1: ECCHR's analysis of the Trovicor GmbH case
- Annex 2: ECCHR's update on the Uzbek cotton trader cases
- Annex 3: Assessment of the Australian NCP by Monash University, the University of Melbourne and Deakin University: The Non Judicial Human Rights Mechanisms Research Project

This year's assessment of NCP performance represents a joint OECD Watch submission authored by the OECD Watch secretariat with significant input from the following individuals representing OECD Watch members and other NGOs (in alphabetical order by organisation): Sarah Singh (Accountability Counsel), Michel Egger (Alliance Sud), Sandra Cossart (Association Sherpa), Tim Lyons (Australian Council of Trade Unions), Ahmed Ali (Bahrain Watch), Wiert Wiertsema (Both ENDS), Carole Samdup (Canada Tibet Committee), Daniel Taillant (Centre for Human Rights and Environment), Molly Thomas-Jenson (Change to Win), Cesar Augusto Guimarães Pereira (Coletivo Alternativa Verde), Kate Watters (Crude Accountability), Jonathan Kaufman (EarthRights International), Juan Carlos Cárdenas (ECOCEANOS), Orlando Olivera (Escapes Santander), Yvonne Veith (European Center for Constitutional and Human Rights), Jorge Carpio (Foro Ciudadano de Participación por la Justicia y los Derechos Humanos), Gunhild Ørstavik and Siri Luthen, (Forum for Environment and Development) Cornelia Heydenreich (Germanwatch), Alfred Brownell and Francis Colee (Green Advocates, Liberia) Jolovan Wham (Humanitarian Organisation for Migration Economics), Kate Hoshour (International Accountability Project), John Dorman (Ireland Palestine Solidarity Campaign), Mikyun Choe (Korean House of International Solidarity), Denis Tougas (L'entraide Missionnaire), Paul de Clerck (Friends of the Earth Europe), Jen Moore (MiningWatch Canada), Shelley Marshall, Kate Macdonald and Sam

Balaton-Chrimes (The Non Judicial Human Rights Mechanisms Research Project - Monash University, the University of Melbourne and Deakin University), Erik Hagen (Norwegian Support Committee for Western Sahara), Serena Lillywhite (Oxfam Australia), Alinda Vermeer (Privacy International), Matt McEvoy (Proyecto de Derechos Económicos, Sociales y Culturales), Kevin Lo (Reprive), Tricia Feeney (Rights and Accountability in Development), Liisa Uimonen (Siemenpuu Mekong Group), Théo Jaekel (Swedwatch), Shirley van Buiren (Transparency International – Germany), Anett Sasvari (Uppsala University, PhD candidate), Owen Espley (War on Want) Steve Patterson (Wider Earthquake Community Action Network), Zach Abraham (WWF International).

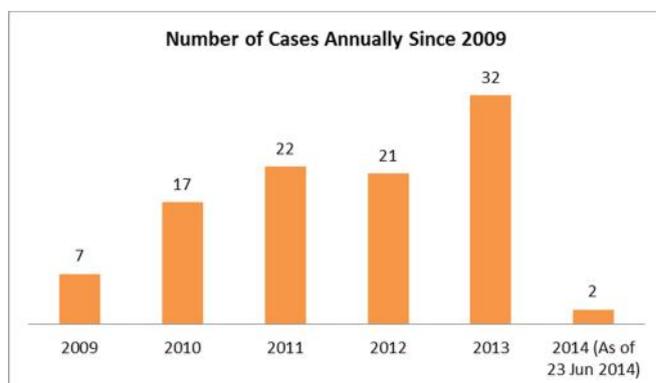
PART 1 – NCP functioning and specific instances

1. Analysis of statistics from the OECD Watch case database

Since the specific instance mechanism was established in 2000, OECD Watch has documented and tracked cases filed by CSOs and affected communities at NCPs around the world in its online case database. It serves as a rich source of information for a statistical analysis that provides greater insight into how the specific instance procedure has worked in practice.

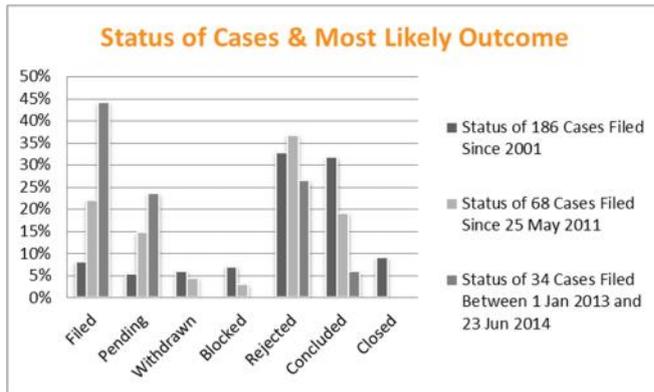
1.1. The average annual number of complaints has increased under the updated Guidelines

The years 2011-2013 saw an increase in the annual number of cases being submitted by CSOs and affected communities from 22 to 32. This increase is likely a reflection of the renewed hope among CSOs and affected communities that the update of the Guidelines would improve their usefulness for improving irresponsible corporate behaviour. However, the fact that only two cases have been filed in 2014 may be an early warning that CSOs may already be losing faith in the effectiveness of the specific instance procedure.



1.2. Most common outcome in cases filed since 2001

Since the first case was filed in 2001, 183 cases have been submitted by CSOs and affected communities. The most common outcome of these cases has been rejection. In total, NCPs rejected 61 (33%), concluded 59 (32%), closed 17 (9%) and blocked 13 (7%) of the 186 cases documented in OECD Watch's case database. Complainants withdrew 11 cases (6%). It is important to note that while 32% of cases have been concluded since 2001, the number of cases that were rejected, blocked, closed and withdrawn combined is 102 cases or 55%. Since the updated Guidelines were adopted on 25 May 2011, 68 specific instances have been filed. Again, the most likely outcome has been rejection. And of the 34 cases filed between 1 January 2013 and 23 June 2014, once again the most likely outcome is rejection.

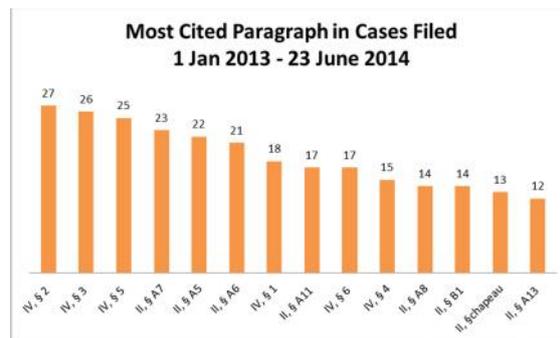
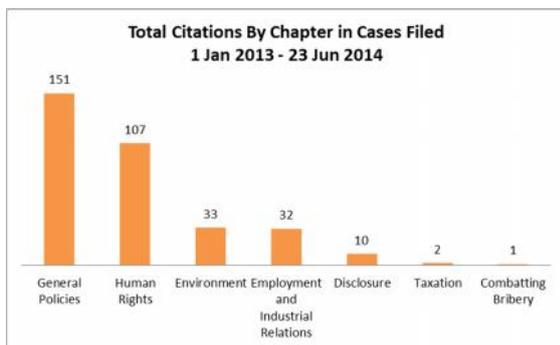


Filed means a case has been submitted, but the NCP has not published an initial assessment determining whether the case is admissible. *Pending* means the NCP has issued an initial assessment and determined that the case merits further examination. *Rejected* means an NCP has determined the issues do not merit further examination. *Blocked* means the NCP either 45provides no response to the complainants at all or it allows the case to proceed endlessly without finalising it. *Concluded* means the case was resolved with a joint agreement by the parties or the case was not resolved and the NCP issued a final statement. *Closed* means the NCP has accepted the case, attempted to handle it, but then stops handling it (usually because the company

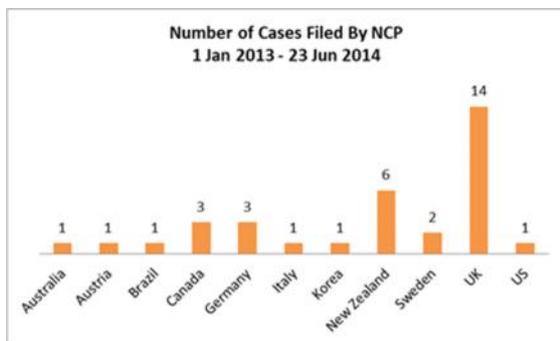
refuses to cooperate) without issuing a final statement. *Withdrawn* means the complainant withdrew their case, usually because the NCP has mishandled the process.

1.3. Human rights and due diligence-related allegations dominated

With regard to the type of violations being alleged by complainants, the Guidelines' General Policies and the Human Rights chapters dominated with allegations concerning companies' human rights and due diligence-related breaches and obligations. This is likely to be in direct response to the strengthened provisions in these areas, but also because systemic adverse business impacts are very often directly related to these issues, particularly in sectors such as extractives.



1.4. Uneven distribution of cases among NCPs continues

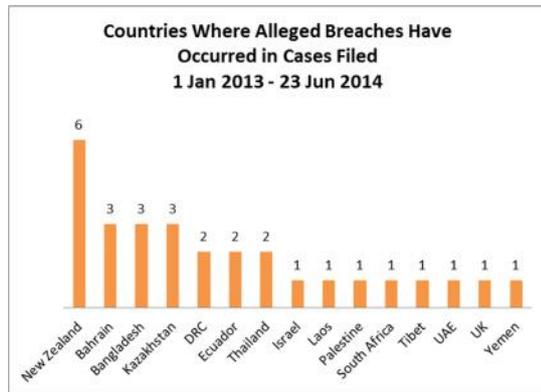


The UK NCP received the most cases (14) from January 2013 to June 2014, and no other NCP came close to that number. With the exception of the German NCP who forwarded one case to Brazil, no NCPs from adhering countries received new specific instances directly from CSOs this cycle.

There are 18 NCPs that have still never received cases from CSOs: Czech Republic, Egypt, Estonia, Greece, Hungary, Iceland, Israel, Latvia, Lithuania,

Morocco, Peru, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, and Turkey.

1.5. Countries where alleged breaches have occurred



Note: Excludes Privacy International's six cases against BT Group, Interoute, Level 3, Verizon Enterprises, Viatel, and Vodafone Cable, which are not geographically specific.

1.6. Sectors or industries where alleged breaches have occurred



2. **Developments and functional equivalence at NCPs**

As in past years, OECD Watch members were asked to provide feedback about the NCPs they have engaged with in the last implementation cycle, including 1) if the NCP had changed its structure or procedures; 2) how they assess NCP's general functioning; 3) how they assess the NCP's handling of their case, if one was filed; and 4) how they assess the NCP's information and promotion activities.

This year OECD Watch members and other CSOs involved in specific instances were also asked to rate their NCP's performance in meeting the functional equivalence criteria of visibility, accessibility, transparency and accountability. Detailed below is the feedback that OECD Watch received on 15 NCPs. Please note that the following table is not a comparative overview of NCP performance. It reflects how the respondents rated each NCP on their own merits.

NCP	Visibility	Accessibility	Transparency	Accountability
Argentina	Very poor	Good	Poor	Very poor
Australia	Very poor	Good	Fair	Very poor
Brazil	Very poor	Very poor	Poor	Very poor
Chile	Good	Good	Fair	Good
Canada	Fair	Fair	Poor	Very poor
France	Fair	Good	Poor	Poor
Germany	Fair	Fair	Poor	Poor to very poor
Korea	Very poor	Very poor	Very poor	Very poor
Mexico	Very poor	Very poor	Very poor	Very poor
Netherlands	Good	Good	Excellent	Excellent
New Zealand	Fair to good	Excellent	Poor	Poor
Norway	Excellent	Excellent	Excellent	Excellent
Switzerland	Fair	Fair	Poor	Fair
United States	Poor	Fair	Poor	Fair
United Kingdom	Excellent	Excellent	Fair	Fair

- Argentina.** In the 2012-2013 Implementation Cycle, the Argentine NCP informally announced that it has adopted a tripartite format. However, two CSOs report that there has been no sign of change at the NCP, and that it continues to be a weak, bureaucratic entity in the Ministry of Foreign Affairs. CSOs said that while the NCP is responsive to inquiries, it does not communicate information about cases it is handling and does not engage with civil society. They also do not think the NCP is accountable to any authority and doubt that parliament is even aware of its existence. One organisation speculated that a specific instance would need to be filed at several NCPs, or at least an MNE's country of origin, to have any chance at being handled by the Argentine NCP.
- Australia.** In the 2012-2013 Implementation Cycle, the Australian NCP made some structural improvements that included the creation of an oversight committee; however, researchers have reason to believe the committee has not been active. One CSO, one trade union and several university researchers report that while the NCP's website has been improved over the last year, its promotion efforts and consultations with stakeholders have been virtually non-existent. The Australian NCP used to hold three multi-stakeholder consultations a year in Sydney, Melbourne and Canberra. The respondents report that they have not been invited to any consultations regarding the Guidelines or the work of the NCP despite on-going suggestions for further and more meaningful consultation and reform. One CSO also mentioned the fact that the NCP did not participate in the inaugural Global Forum on Responsible Business Conduct in 2013, and that it is not involved in the Proactive Agenda on Meaningful Stakeholder Engagement and Due Diligence in the Extractives Sector, despite Australia being one of the world's largest mining countries.
- Brazil.** One CSO said the Brazilian NCP's visibility, accessibility, and accountability is very poor. Its transparency was rated slightly higher because the NCP does publish final statements. However, the respondent said the NCP does not engage with civil society at all, and there is no process or oversight body to ensure accountability. In addition, the deep roots between the government and Brazilian MNEs were noted as one reason why the specific instance process does not work in Brazil. According to OECD Watch's database, no CSOs have filed a complaint directly with the Brazilian NCP since 2006.

- **Chile.** In April 2014, the Chilean NCP created an advisory committee, which includes representatives from CSOs, trade unions, business associations, and experts in sustainability and CSR. Led by the NCP, the committee will advise on different substantive and procedural issues of the Guidelines, carry out promotion, help define the NCP's strategic direction, assist with preparing the NCP's annual activity report, and provide counsel on specific instances.
- **Canada.** The Canadian NCP's visibility and accessibility are viewed as fair, but its transparency is considered poor according to one CSO, which noted its reliance on OECD Watch to know what cases have been filed and to track their progress. The CSO said that the NCP has not published a French version of the Guidelines on its website and it does the strict minimum in terms of transparency compared to Office of the Extractive Sector Corporate Social Responsibility. While the NCP participates in mining association meetings regularly and has an annual, one half-day meeting with civil society, there are no known efforts to keep parliament informed.
- **France.** In March 2014, the French Minister of Commerce and Finance announced a reform of the NCP, stating that an 'advisory board' would be created in order to include CSOs, as labour, business and government representatives are already officially part of the NCP. The NCP will be led by an independent, non-executive president and will be re-named to "Mediator of Sustainable Trade", though it will remain a tripartite body and still be housed in the Ministry of Commerce and Finance. According to one CSO, the NCP's accessibility and visibility is fair following updates to the website in 2012. However, its transparency is poor because the NCP does not post information about cases in a consistent manner and the Procedural Guidance is sometimes ignored.
- **Germany.** The German NCP has not undertaken any restructuring since the Guidelines were updated in May 2011. Irrespective of recently announced minor organizational changes intended to enhance visibility and some increased staffing capacity, in the view of three CSOs, the NCP lacks independence due to its being housed in and under the authority of the Department of Foreign Investment in the Ministry for Economics and Energy. The CSOs noted there have been significant improvements to the NCP's website and the information provided on cases, and the NCP staff are considered to be conscientious and approachable. However, the 2010 "leitfaden" or "guidance" document that contains the formerly very contested and now no longer applicable "investment nexus" provision is still online despite the NCP's assurances that a new version was being produced.

Other than improved website, active promotion is lacking. The NCP occasionally accepts invitations to informational or promotional activities of other organizations, but it does not initiate noteworthy campaigns of its own to support awareness of and knowledge on Guidelines, much less actively promote compliance with them. The German NCP's accountability was rated as poor to very poor because of limited transparency, no oversight arrangements, overall lack of promotion, and merely responding to queries in a bureaucratic, perfunctory manner. In addition, there is no parliamentary reporting and CSOs are not party to the inter-ministerial information exchange and coordination meetings. The NCP meets with CSOs and other stakeholders only once a year, though it did announce recently that it intends to do so twice a year in the future.

- **South Korea.** One CSO reported that the Korean NCP is still performing very poorly, even after updating its procedures and structure in September 2013. They said it is very difficult to find information about the NCP and its promotion activities. While there is some information

about the Guidelines on the Ministry of Trade, Industry and Energy's website, there are no case archives or relevant resources except one announcement of a complaint received. In addition, the NCP lacks independence and impartiality because its committee is unilaterally appointed by the government without any CSO and trade union input. The Korean NCP does not have any process or mechanism to regularly engage with stakeholders, and it does not have an advisory board. The CSO also noted that the National Human Rights Commission of Korea recommended that the NCP revise its procedures/structure in order to collaborate with labour, civil society organizations, international organizations and the business sector, but the re-organized NCP has disregarded these recommendations.

- **Mexico.** The Mexican NCP is performing very poorly in all aspects per the feedback received from one CSO. The NCP's website only has a vague pamphlet with no procedural guidance, and it does not have a Spanish version of the Guidelines posted online. The NCP does not post information about past or current cases nor its annual report to the OECD. In addition, it has no dealings with civil society and there is no oversight body or reporting to parliament.
- **Netherlands.** The Dutch NCP did not receive any new specific instances from CSOs this implementation cycle, but there is an interesting procedural update on which to report. As initially indicated in the Netherlands' National Action Plan for the UN Guiding Principles, the Dutch NCP is likely to be given a mandate to conduct – at the request of the Minister of Foreign Trade and Development, or even potentially on its own initiative – investigations into a particular issue or problem related to the Guidelines (not into a specific company). This change is part of a renewed institutional mandate that is expected to be approved by the Government this summer.
- **New Zealand.** Complainants who have been engaging with the New Zealand NCP report that the NCP has no dedicated staff and no oversight committee. The NCP's advisory board is principally government civil servants and there is no civil society representation. The complainant also notes that questions about the NCP's internal process and expertise for handling cases that raise international human rights law issues have not been answered by the NCP. In terms of visibility, the NCP's website and communication of procedures are good, but the NCP could do more to proactively communicate with the business community about the Guidelines. Initial assessments are not published. The NCP indicated in its 2013 annual report to the OECD that it is not interested in peer evaluation.
- **Norway.** Norway's NCP is the only one that received the highest ratings for all functional equivalence criteria. One CSO said the NCP has excellent information on its website, it quickly responds by e-mail and phone, and is transparent and friendly. Norway's NCP always publishes initial assessments as well as final statements. It also publishes annual reports about its work, sends newsletters by e-mail and publishes minutes from all their meetings, and since 2013, minutes from annual meetings on administrative issues with the Ministry of Foreign Affairs. If information is held back at any stage, it is agreed by the parties to the complaint and explained on the website. In March 2014, a [peer review](#) of the Norwegian NCP found it to be "highly effective at fulfilling its mandate" in the two and half years since the NCP was restructured into an independent body of experts. Norway's NCP is the second to undertake a voluntary peer review since the Guidelines were updated in May 2011.
- **Switzerland.** The Swiss NCP's advisory board has now met three times to discuss revising the NCP's specific instance procedures. According to one OECD Watch member, the Swiss NCP's advisory board has now met three times to discuss revising the NCP's specific instance

procedures. NGO and trade union representatives on the advisory board have proposed that the NCP should publish initial assessments, cover costs for complainants' travel to Switzerland and translation of documents into local languages, relax the restrictive policy concerning complainants' public communications about cases, provide clear and authoritative recommendations in final statements, and follow-up on cases after they have concluded, including asking the parties to evaluate the NCP's performance (a practice employed by Norway's NCP). The Swiss NCP is currently working on these recommendations in order to propose a new draft of the specific instance procedures, which should be finalised in the next meeting of the advisory board. However, it is already clear that, despite the insistence of NGO and trade union representatives on the advisory board, the NCP will not make determinations on whether companies have observed the Guidelines or an assessment of the facts or circumstances in final statements. The NCP's accessibility, visibility and accountability is viewed as fair; however, its transparency was deemed poor since it currently does not publish initial assessments. As noted in OECD Watch's 2012-2013 submission, the Swiss NCP's advisory board does not have a supervisory or oversight role.

- **United Kingdom.** Multiple CSOs have been critical of the frequency with which the UK NCP has been rejecting cases or significantly narrowing the scope of complaints that it accepts—at times excluding issues that are central to the complaint—without adequate justification. One CSO noted that while the NCP attempts to be fair, the way issues are prematurely dismissed and the fact that it has become impossible to provide further information to substantiate aspects of the claim as the case unfolds has tended to make the process unduly rigid and formalistic. In addition, the NCP is viewed as operating in manner that make it more difficult for an affected community to engage in the process without legal or CSO assistance. For example, one CSO reported that the NCP does not appear to have a mechanism for including foreign CSOs or communities in mediations if they do not speak English and/or have the means to be in the UK with any regularity. Several CSOs have also expressed concern about the length of time it has taken the NCP to conduct initial assessments and bring the parties together for mediation, though a number of them recognise that many cases have been filed in the UK and that the NCP does a good job keeping the parties informed about any delays.
- **United States.** The US NCP's visibility remains poor because most US CSOs still do not know about its existence and its visibility within the government is lacking. Two CSOs report that the NCP has improved its accessibility and responsiveness, though it has not published procedures for handling cases from non-English speaking complainants or from complainants unable to travel to the US for mediation. The NCP's overly restrictive approach to confidentiality continues to be very problematic. It has very restrictive rules on the publication of information about complaints and complaints cannot be published when they are filed. In addition, the NCP does not publish initial assessments or updates, only final statements. CSOs report that the NCP's accountability could be improved. It does not report to Congress and the NCP's Stakeholder Advisory Board (SAB) does not have the power to review specific instances. In addition, the NCP is not obliged to adopt the SAB's recommendations and there is no formal process for improving its performance. In February 2014, the SAB issued its first report.¹ CSOs also noted that the number of staff at the US NCP has gone from two full-time people to just one, and that individual is responsible for other CSR-related work, which could pose a conflict of interest.

¹ <http://www.state.gov/e/eb/adcom/aciep/rls/225959.htm>.

3. Notable outcomes and processes

In the review period of January 2013 to March 2014, 12 cases had notable outcomes, including four cases that concluded with the parties issuing a joint statement. Overall, these cases show a greater appetite for fact-finding missions and NCPs having a monitoring role. They also confirmed that Guidelines' apply to the financial sector, including minority shareholders, as well as to consulting and business service companies.

- [SOCO International plc](#). On 11 June 2014, in a stunning and landmark agreement, UK oil company SOCO agreed “not to undertake or commission any exploratory or other drilling within Virunga National Park unless UNESCO and the DRC government agree that such activities are not incompatible with its World Heritage status”. SOCO has agreed to cease its operations in approximately 30 days once its current programme of work is completed. SOCO also committed that it would never again jeopardize any other World Heritage site anywhere in the world. It also committed to undertaking environmental impact assessments and human rights due diligence that complies with “international norms and standards and industry best practice, including appropriate levels of community consultation and engagement on the basis of publicly available document”.² The SOCO case is the first time a company has agreed to halt its operations during NCP-facilitated mediation.
- [ArcelorMittal](#). This case is notable for three reasons: First, it is the only case in which an NCP fact-finding mission has taken place since the Guidelines were revised in 2011. Second, it is a good example of effective NCP collaboration. While the complaint was forwarded by the Netherlands NCP to the Luxembourg NCP, the former played a prominent role in the negotiated resolution. Third, after two fact-finding missions and several meetings, the parties submitted a proposal to the Liberian government to reform the County Social Development Fund, which funds socio-economic development projects with monies provided by ArcelorMittal.
- [ABP](#). Of the three complaints relating to POSCO's proposed mega steel plant and related infrastructure in India, only the ABP case resulted in a mediated outcome by the parties. The Netherlands NCP's final statement included several notable elements. First, it reconfirmed that the Guidelines do apply to minority shareholders, though ABP never questioned their applicability to its activities. Rather, it wanted further clarification on how they apply to the day-to-day business of financial institutions. Second, it called on the three NCPs (Korea, Netherlands and Norway) to undertake a joint “International Review & Assessment Mission”. Third, the parties agreed to a draft terms of reference for the NCPs' mission that would, among other things, “assess how meaningful on-going stakeholder engagement can be set up, in which the right to free, prior and informed consent is assured, including compliance with rights of indigenous people and forest dwellers, as defined by the UN Declaration on the Rights of Indigenous Peoples”. Despite the Netherlands NCP's strong final statement, the overall impact of the three complaints was disappointing. There still have been no improvements for the affected communities, and POSCO has not undertaken the

² “Joint Statement by SOCO International PLC and WWF”, 11 June 2014, http://awsassets.panda.org/downloads/soco_wwf_statement_11_june_2014.pdf.

comprehensive human rights and environmental studies or meaningful stakeholder consultation that the Guidelines' prescribe.

- [Norges Bank Investment Management \(NBIM\)](#). NBIM would not cooperate in the specific instance process, refused to answer the NCP's questions and denied that the Guidelines' apply to investors that have a minority share in a company. In a ground-breaking finding, the NCP said NBIM's very refusal to engage in the specific instance process was itself a violation of the Guidelines. Like the Netherlands NCP in the related APB/POSCO complaint, the Norwegian NCP also reaffirmed the Guidelines apply to minority shareholders and also the commercial activities of central banks and sovereign wealth funds.³ The NCP also concluded that NBIM did not have an available strategy for identifying and handling possible violations of human rights in the companies they invest. According to the NCP's press release, "By not answering the NCP's questions and by not making more information available on how human rights risks are identified and assessed, NBIM renders itself vulnerable to criticism that it does not have a credible system for identifying and assessing the broader range of human rights that its portfolio companies might impact".⁴
- [Sjøvik AS](#). Mediation in the Sjøvik case was led by an independent mediator and supported by an external consultant, who provided guidance to the NCP and extra assistance to the complainant in order to balance out the inequality of negotiating power between the parties. Despite the differences between the parties, they agreed upon a recommendation to the Norwegian government and that Sjøvik would carry out risk and environmental and social impact assessments for its operations overall. This due diligence would also take into account the status and vulnerability of Western Sahara. Sjøvik also agreed to establish and maintain a company-level grievance mechanism to "receive notifications from anyone affected by the company's activities", both internally and externally, by the end of 2013.⁵ The NCP invited both parties to a follow-up meeting in May 2014 and to submit a follow-up report in advance of the meeting on the implementation of the joint statement. However, NSCWS reports that while the meeting took place, the company has refused to disclose its due diligence analysis, stating it has no obligation to do so. OECD Watch is concerned that NSCWS now has no way to know whether the agreement they signed has been honoured.
- [Bolloré S.A.](#), [Financière du champ de Mars S.A.](#), [Intercultures](#), and [SOCFINAL](#). While it took the French NCP almost two years to start work on these cases and the complainants faced procedural difficulties in the process, the NCP's final statement was quite strong, concluding that Cameroonian palm oil producer Socapalm had breached certain Guidelines relating to general policies, employment and industrial relations, and the environment and the holding

³ Norway NCP, "Final Statement: Complaint from Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum for Environment and Development, vs. POSCO (South Korea), ABP/APG (Netherlands) and NBIM (Norway)", 27 May 2013, http://www.responsiblebusiness.no/files/2013/12/nbim_final.pdf.

⁴ Norway NCP, "Norwegian Bank Investment Management violates OECD Guidelines", *news release*, 27 May 2013, <http://www.responsiblebusiness.no/en/2013/05/27/norwegian-bank-investment-management-violates-oecd-guidelines/>.

⁵ Norway NCP, "Final Statement of the Norwegian OECD National Contact Point (NCP): Mediated Outcome between the Norwegian Support Committee for Western Sahara and Sjøvik AS", 3 July 2013, http://www.responsiblebusiness.no/files/2013/12/vest_sahara_final.pdf.

companies were not respecting certain recommendations on disclosure of information.⁶ The NCP recommended that the companies find a remedy to the violations and that they rely on the action plan the parties prepared during mediation. That action plan covers a range of issues, including community dialogue, reduction of environmental nuisances, public services, local development, workers' rights and conditions of work, transparency, and compensation of local communities for their loss of resources and lands. In March 2014, the French NCP issued a follow-up statement announcing that an independent body had been selected by Bolloré and Sherpa to monitor implementation of the action plan and that it will receive annual progress reports.

- [American Sugar Refining Inc.](#) Though the case was closed when American Sugar refused to engage in mediation after a civil claim was filed by the Cambodian communities in the UK High Court against its subsidiary, Tate & Lyle, the US NCP issued for the first time ever a final statement that included recommendations. The statement recommended that American Sugar “conduct a corporate human rights policy review process, consistent with the recommendations of the Guidelines and the UN Guiding Principles [that] could include consultations with external stakeholders”.
- [Pöyry Group](#). The Finnish NCP's handling of Pöyry Group case was largely problematic. However, it is notable that the NCP's final statement confirmed that consulting and business service companies are covered by the Guidelines.⁷ In addition, the NCP began the process of developing better and clearer procedures for handling specific instances after this case.

4. Trends related to the initial assessment phase

Getting a case through the initial assessment phase has never been simple for complainants. During the 2011 update of the Guidelines—that included the creation of clearer guidance on how NCPs should handle cases—some of the longstanding obstacles in getting cases accepted were finally addressed. For example, the Guidelines now apply to companies' supply chains, and NCPs should not use the existence of parallel proceedings as reason for rejecting a case. Following the update, the expectation among OECD Watch members was the specific instance procedure would become more accessible, predictable, and transparent but also easier and more user-friendly. However, in the 2013-2014 Implementation Cycle, OECD Watch has observed far too many obstacles to having a case accepted in the initial assessment phase. In fact, it appears that getting a case through this phase has been, at best, as challenging as it was before the 2011 update and at worst, has become even more challenging for complainants.

4.1. Ignoring the Procedural Guidance and mishandling cases

There are still instances of NCPs ignoring the Procedural Guidance and mishandling cases in multiple and egregious ways despite the enhanced information in the revised Guidelines describing NCPs' tasks.

⁶ France NCP, “Report from the French National Contact Point for the OECD Guidelines for Multinational Enterprises”, *nonofficial translation*, accessible at http://oecdwatch.org/cases/Case_203.

⁷ See OECD Watch database for an unofficial English translation of the NCP's final statement: http://oecdwatch.org/cases/Case_259.

- [CRH plc](#). The complainant has been waiting three years for the Irish NCP to issue an initial assessment.
- [Panasonic Corporation](#) and [Panasonic Asia Pacific Pte. Ltd.](#) The Japanese NCP rejected these cases without issuing an initial assessment.
- [Michelin](#). The complainants withdrew the case after the NCP's flagrant mishandling of the process, but the NCP still issued a final statement anyway stating the company did not violate the Guidelines.
- [George Forrest International](#). The Belgian NCP rejected the case, but then tried to facilitate mediation on 'goodwill gestures' the company was willing to make on matters that did not address the key issues raised in the case.
- [Il-Kyoung Co. Ltd.](#) The Korean NCP allowed this case to languish for seven years because of parallel legal proceedings and then closed it without publishing a final statement or even officially informing the complainants.

4.2. Expecting unreasonable burden of proof for substantiation

One of the most troubling trends that we have observed in the 2012-2013 Implementation Cycle is NCPs' increasingly expecting complainants to satisfy an unreasonably high burden of proof before even accepting a complaint and seeking to bring the parties together for dialogue. This expectation is simply not feasible for many complainants, significantly reducing the accessibility of the specific instance mechanism. It should not be necessary, at the initial assessment phase, to demonstrate that the preponderance of the evidence supports the allegations. Rather, the complainant should only be required to provide *prima facie* evidence, enough evidence to raise a rebuttable presumption. Further, such evidentiary burdens are particularly unnecessary in cases where mediation is sought. It has been OECD Watch's experience that a great deal of consideration, analysis, and investigation goes into describing the facts and circumstances of alleged breaches. Rather than rejecting allegations, NCPs ought to be satisfied with evidence that raises a credible doubt that the Guidelines have been implemented adequately and bring parties together to explore how the problems might be resolved.

- [Alliance Boots](#). The UK NCP ignored the complainants' detailed, evidence-based response to the draft initial assessment when it rejected the complaint, arguing the allegations were unsubstantiated. Among its reasons, the NCP relied upon the fact that UK tax authorities had not acted to conclude that the company was in compliance with its tax obligations. However, lack of state enforcement does not mean that a company is, in fact, in compliance with the Guidelines.
- [British Gas](#), [Chevron](#) and [ENI](#). The UK NCP rejected the complainants' request to examine relocating Berezovka village because the consortium's legal obligation to do so had not been substantiated.
- [BT Group plc](#). The UK NCP argued that the complainant's evidence did not show a specific link between the communications services provided by BT and the impact of US drone operations in Yemen when it rejected this case.
- [Eurasian Natural Resources Corporation](#). The UK refused to examine resettling Kisankala village and environmental and social monitoring in Lenge village, claiming "insufficient evidence. The UK narrowed the scope of the case and seemed to rule out actual factual matters (i.e., compliance with domestic legal requirements) at an early stage and before, as the NCP admits, it has undertaken a full background study.
- [Trovicor GmbH](#) and [Gamma International](#). The German NCP would only allow mediation about Trovicor's management system and rejected the principal allegation by claiming it was not substantiated. The UK NCP (in a departure in its practice of expecting an unreasonable burden of proof for substantiation) accepted the Gamma case even though it found that direct

evidence about Gamma's supply of surveillance technology and training to the Bahraini government had not been provided by the complainants.

- ◉ [Minera Escondida](#). Even though the company refused to engage in mediation due to parallel legal proceedings, the Chilean NCP still produced a final statement that said Minera Escondida/BHP Billiton had not violated the Guidelines, arguing that the company's actions affected only the interest of the complainant and not the public interest.
- ◉ [POSCO](#). The Korean NCP said that the issues should be resolved by the India courts and that it did not believe accepting the complaint would contribute to furthering the effectiveness of the Guidelines. The NCP's reasoning blatantly ignores the well-established fact that the Guidelines' go beyond merely adhering to domestic legal requirements, particularly when it comes to the new due diligence, human rights and stakeholder consultations provisions in the revised Guidelines that were all applicable to this case. In addition, the NCP's arguments have no basis in the Guidelines, as the Procedural Guidance does not suggest in any way that NCPs take a position on where issues should be heard/addressed.
- ◉ [SOCO International plc](#). The UK NCP rejected the allegation that SOCO had failed to meaningfully engage with communities, arguing confidential testimonies did not substantiate the claims. The NCP also concluded that the company provided adequate information about its current activities to the affected communities even though a key social and environmental assessment was never publicly disclosed. In addition, the NCP accepted SOCO's claim that it did not intend for the "full freezing" stabilisation clause in its production sharing contract to be applicable to anything beyond the "fiscal regime", thereby ignoring analysis by a preeminent legal expert that advised Professor John Ruggie that the clause grants SOCO a legal exemption from any new human rights, environmental and other laws.
- ◉ [Shell and Shell Sakhalin Holdings B.V.](#) The Netherlands NCP's final statement rejecting the case seem to suggest that allegations relating to resettlement and compensation must first be litigated in domestic or international court before being raised with NCPs. The NCP's reasoning prejudged the scope of a possible mediation in this case. In general, a mediation can occur on any issue, including compensation, that is agreed by the parties.

4.3. Excluding potential impacts

In two cases, the UK NCP has also refused to examine potential impacts by reasoning that the impacts had not been shown to be inevitable. In other words, the complainants had not proven the impacts would actually occur. In the [GCM Resources](#) case, the NCP argued allegations the company had failed to disclose information about risks and failed to prevent or mitigate human rights impacts were "not substantiated" because the complainants had not shown that the impacts had occurred yet. Instead, the NCP accepted GCM Resources' claim that it will avoid and mitigate the impacts of relocating an estimated 54,000 people should its project proceed.

In the [SOCO International plc](#) case, the NCP narrowed the scope of mediation to only focus on the specific risks of the military presence in Virunga National Park instead of discussing SOCO's failure to conduct human rights due diligence. Though the UK NCP acknowledged in its initial assessment that the UN Guiding Principles on Business and Human Rights advise that due diligence should occur at an early stage and be on-going, it is OECD Watch's view that the NCP did not to apply this standard when it declined to consider the potential human rights risks of SOCO's current oil exploration activities.

4.4. Rejecting cases not amenable to mediation

In OECD Watch's submission last year, we noted that NCPs seemed to be rejecting cases when successful mediation is unlikely and only accepting relatively "easy" cases that can be solved through

mediation and dialogue. For example, after conducting an initial assessment, the Australian NCP rejected [MRC Ltd](#) case because the complainants expressed unwillingness to enter into mediation with the company and because the mineral exploration rights are currently being considered by the relevant local authorities. In rejecting the [Shell and Shell Sakhalin Holdings B.V.](#) case, Netherlands NCP argued that the allegations had not been substantiated and that a mediated solution would not be possible. The NCP said it did “not see how within its own procedures a mediation could successfully bring the company in its present role as shareholder to reconsider decisions of the company that have been taken such a long time ago”.⁸

We must reiterate our position that if companies or complainants are not willing to mediate or if mediation is likely to be hard/unsuccessful, a case should not be rejected at the initial assessment phase. If mediation fails, then the reasons for that failure can be dealt with in a final statement, which can call out the parties for being unwilling to negotiate. If the complainant refuses to engage in mediation and even in cases when this is stated at the outset, NCPs must be sympathetic to the circumstances that have led to the level of distrust that makes successful mediation unlikely or impossible. When a company refuses to engage, NCPs continue to be unwilling to employ the tools at their disposal to encourage their participation. Equally important, NCPs seem to be avoiding the platform they have in the final statement to highlight the Guidelines’ expectations of companies. A robust NCP statement with reasoned recommendations may still have positive effects for the affected communities or workers.

4.5. Applying a restrictive definition of MNE

Some NCPs are applying an unnecessarily restrictive definition of ‘multinational enterprise’ in order to reject cases, in one case even misrepresenting the text of the Guidelines to do so. For example, in the [Dae Kwang Chemical Corporation](#) case, the Korean NCP argued in its rejection that the Guidelines “require” companies to “exist in more than one country. In the [Earthquake Commission](#) and [Southern Response Earthquake Services Ltd.](#) cases, the New Zealand NCP rejected the former case on the grounds that it is not an MNE or for profit entity and the latter because it “does not complete in the insurance market, has a purely domestic focus, and does not have a commercial or transnational focus”.⁹

The Guidelines state explicitly that no fixed definition of ‘multinational enterprise’ is required and only note that MNEs are ‘usually’ established in multiple countries. Insisting that companies must be physically present in multiple countries in order to fall under the Guidelines is thus erroneous, departs from previous NCP decisions, and contradicts guidance from the Investment Committee on entities such as central banks and sovereign wealth funds. The inconsistent application and interpretation of ‘multinational enterprise’ is damaging the predictability and accessibility of the specific instance

⁸ Netherlands NCP, Initial Assessment: Notification and request for mediation to the Dutch and UK National Contact points for the OECD Guidelines for Multinational Enterprises, 20 March 2013, http://www.oesorichtlijnen.nl/sites/www.oesorichtlijnen.nl/files/nl_ncp_initial_assessment_stroitel_sakhalinenvronmentwatch_shell_200313.pdf.

⁹ Michael Hobby, Ministry of Business, Innovation and Employment, letter to Steve Patterson, WeCAN, 4 February 2014. “Southern Response is a Crown-owned company. Until 5 April 2012, it traded as AMI Insurance Limited. It was formed after the Crown purchased AMI’s Canterbury earthquake liability. Southern Response is responsible for settling claims by AMI policyholders for Canterbury earthquake damage which occurred before 5 April 2012 (the purchase date). It does not complete in the insurance market, has a purely domestic focus, and does not have a commercial or transnational focus”.

mechanism. In OECD Watch's view, NCPs should be open to accepting cases against all types of commercial entities if there is a possibility that the NCP can contribute to resolving disputes between business and society and/or furthering the effectiveness of the Guidelines. OECD Watch must also highlight the contrast between the above case decisions with that of the Norway's decision on the [NBIM](#) case, which noted that governments that have adopted the Guidelines have an obligation to adhere to them as well.

4.6. Citing parallel proceedings to reject or to take no action on complaints

The Procedural Guidance is very clear that NCP's should not use the existence of parallel proceedings to reject, but that is exactly what the Swedish and Australian NCPs did in the [Electrolux/Mölnlycke](#) and [MRC Ltd.](#) cases. As noted previously, the Korean NCP let the [Il-Kyoung Co. Ltd.](#) case languish for seven years because of parallel legal proceedings and then closed it without publishing a final statement or even officially informing the complainants.

4.7. Failing to treat complainants equally

A long occurring trend that persists is NCPs failing to treat complainants equally primarily through their unwillingness to give complainants access to documents that inform their decisions on their cases. Unequal treatment has also occurred in cases when the company has not been cooperative or fully engaged in the process.

- [Corriente Resources](#) and [CRCC-Tongguan Investment \(Canada\) Co., Ltd.](#) The Canadian NCP has refused to translate its documents into Spanish yet it has required the complainants to translate theirs into English or French, thus placing an onerous burden on the complainants.
- [Pöyry Group](#). The Finnish NCP gave in to Pöyry's demands for an excessive degree of confidentiality and the complainants were not allowed to see or rebut to the company's responses, making the process very laborious for them because they had to correct distortions of their complaint multiple times.
- [American Sugar Refining Inc.](#) The company would not allow the US NCP to share documents with them and the NCP complied with their demands. In addition, the complainants had to wait until the the company was willing to allow the NCP to speak with them about issues they were supposedly negotiating
- [Michelin](#). The French NCP refused to share a key report that it had requested from the French economic mission to India about the case.
- [Shell and Shell Sakhalin Holdings B.V.](#) The Netherlands NCP appears to have not shared information with the complainants that they believe informed its decision to reject the case.

4.8. Taking too long to publish initial assessments

In OECD Watch's opinion, NCPs are still taking too long to decide admissibility and in some instances, the amount of time is quite excessive. Among the cases reviewed for this submission, the following are awaiting initial assessments.

Case	Date Filed	NCP	Duration since filed (as of 23 June 2014)
CRH plc	03-May-11	Ireland	3 Years, 1 Months, 22 Days
C&A	13-May-13	Brazil	1 Years, 1 Months, 11 Days
Corriente Resources and CRCC-Tongguan Investment (Canada) Co., Ltd.	25-Jul-13	Canada	11 Months, 3 Days

BT , Interoute , Level 3 , Verizon Enterprise , Viatel , and Vodafone Cable	05-Nov-13	UK	7 Months, 20 Days
AIG New Zealand Ltd. , Tower Insurance Ltd. , Vero Insurance New Zealand Ltd. , and Fletcher Construction Company Ltd.	11-Nov-13	New Zealand	7 Months, 16 Days
China Gold Int'l Resources Corp. Ltd.	29-Jan-14	Canada	4 Months, 25 Days
Andritz AG	09-Apr-14	Austria	2 Months, 15 Days

5. Trends related to the mediation phase

5.1. Inordinate delays in the mediation phase

For those complainants who have been able to get their cases past the initial assessment phase to the mediation phase, it is very likely they will encounter excessively long delays. While the reasons for these delays can be quite varied and may not always be directly attributable to the NCPs, the below table illustrates that most cases that make it to mediation will be pending for at least one to two years. Among the cases reviewed in this submission, the Shell Capsa case has now been pending an astonishing six years.

Case	Date Filed	NCP	Duration since filed (as of 23 June 2014)
Shell Capsa	01-Jun-08	Argentina, Netherlands	6 Years, 23 Days
GlencoreXstrata	01-Jun-11	Argentina, Australia	3 Years, 23 Days
Barrick Exploraciones Argentinas S.A. and Exploraciones Mineras S.A.	09-Jun-11	Argentina	3 Years, 15 Days
Statkraft	29-Oct-12	Norway, Sweden	1 Years, 7 Months, 27 Days
GCM Resources plc	19-Dec-12	UK	1 Years, 6 Months, 6 Days
Gamma International	01-Feb-13	UK	1 Years, 4 Months, 22 Days
Eurasion Natural Resources Corporation	13-May-13	UK	1 Years, 1 Months, 11 Days
Karl Rieker and KiK	13-May-13	Germany	1 Years, 1 Months, 11 Days
British Gas , Chevron , and ENI	06-Jun-13	UK	1 Years, 17 Days
G4S plc	27-Nov-13	UK	6 Months, 28 Days

One case that encouragingly bucked this trend was the [SOCO International plc](#) case, in which successful mediation was completed within a matter of days, and the total case time was approximately seven months.

5.2. Allowing companies to pressure complainants and advisors to remove themselves from the process as a condition of their participation

As noted in OECD Watch's 2012-2013 submission, in two cases companies forced community representatives and advisors to remove themselves from the process. In the [Shell \(Nigeria\)](#) case (concluded June 2013), the company would not discuss the substance of the complaint with Milieudefensie at the table, so the Dutch CSO agreed to step back to facilitate the process. In the [Barrick Gold Corporation \(Papua New Guinea\)](#) case (concluded January 2014), the company insisted that Rights and Accountability in Development and EarthRights International be removed from the process.

5.3. Failing to collaborate with other NCPs

OECD Watch is aware of one case in which an NCP refused to cooperate with other NCPs since the 2011 update, continuing a long-standing practice among some NCPs. In the [POSCO](#) case, the Korean NCP made little bona fide effort to collaborate on the case with Dutch and Norwegian NCPs and it never entertained a fact-finding mission with them.

6. Final statement phase

This review period saw two cases in which NCPs determined the companies have violated the Guidelines in their final statements.

- ◉ [NBIM](#). The Norwegian NCP concluded that NBIM violated the Guidelines for refusing to engage in the process and also because it lacked a strategy for identifying and handling possible violations of human rights in the companies they invest.
- ◉ [Bolloré S.A.](#), [Financière du champ de Mars S.A.](#), [Intercultures](#), and [SOCFINAL](#). The French NCP concluded the holding companies were not respecting the Guidelines' disclosure recommendations and Socapalm had breached several guidelines relating to general policies, employment and industrial relations, and the environment.

One of the more positive outcomes of the 2011 update was the inclusion of a very clear expectation that NCPs should publish final statements when cases are concluded unless the parties agree otherwise. Yet there are still instances of NCPs not adhering to the Procedural Guidance in this regard.

- ◉ [Il-Kyoung Co. Ltd.](#) The Korea NCP did not produce a statement on the case when it closed it after seven years of letting it languish due to parallel legal proceedings.
- ◉ [Panasonic Corporation](#) and [Panasonic Asia Pacific Pte. Ltd.](#) The Japanese NCP also did not produce a final statement when it rejected the cases against without any explanation.

OECD Watch has long been critical of the fact that NCPs are willing to state when a company has not violated the Guidelines but not when they have—even when their final statements point to clear lapses in adherence—and this trend continues.

- ◉ [Pöyry Group](#). Despite being critical of Pöyry, the Finnish NCP only made a general recommendation about conducting more thorough assessments and stakeholders' views being taken more into account in the future.
- ◉ [Shell \(Nigeria\)](#). Even though the Dutch NCP concluded that Shell's statements on the oil spills were based on flawed investigations/disputed evidence and that its general communication with stakeholders about the percentage of oil spills caused by sabotage was flawed, it did not determine the company breached the Guidelines.
- ◉ [American Sugar Refining](#). The US NCP issued a statement with recommendations that the company "conduct a corporate human rights policy review process, consistent with the recommendations of the Guidelines and the UN Guiding Principles [that] could include consultations with external stakeholders" without making any determination of American Sugar's adherence to the Guidelines.
- ◉ [Trovicor GmbH](#). After the complainants refused mediation on the company's management systems (their principal allegation was rejected), the German NCP did not include any recommendations on this issue in its final statement.

One NCP, and possibly two, issued final statements that are based on information that was not been shared with the complainants—a practice that was deemed unacceptable by the UK NCP’s Steering Board in an earlier case against BP.

- ◉ [Pöyry Group](#). The Finnish NCP did not share a confidential response with the complainants that it informed its final statement. In addition, when the draft final statement was received, it contained new information provided by the company, which they should have been able to respond to during the process.
- ◉ [Shell and Shell Sakhalin Holdings B.V.](#) The complainants suspect that the Netherlands NCP’s decision to reject their case is based on information that was not shared with them.

In addition, there are two case examples where NCPs concluded companies had not violated the Guidelines even though their adherence had not been substantiated.

- ◉ [Minera Escondida](#). Even though the company refused to engage in mediation due to parallel legal proceedings, the Chilean NCP still produced a final statement that said it had not violated the Guidelines.
- ◉ [Michelin](#). Even though the complainants withdrew their case, the French NCP published a final statement that concluded the company had not violated the Guidelines while also recommending that the company improve its behaviour on most of the issues.

PART 2 – Governance in Proactive Agenda projects

The Proactive Agenda was conceived during the 2010-2011 update of the OECD Guidelines as a multi-stakeholder forum for developing additional guidance and clarification on certain elements of the Guidelines that were too complex and/or contentious to deal with in depth during the update process itself. Issues such as the application of the OECD Guidelines to the financial sector and the ‘meaning’ of ‘meaningful’ in the Guidelines’ provision on meaningful stakeholder engagement were ‘parked’ during the update process until broad agreement could be reached and the Proactive Agenda could take them on. Since 2011, the Proactive Agenda has consumed significant time and resources of not just the Investment Committee and Secretariat, but also adhering governments and key stakeholders including OECD Watch, TUAC, BIAC and others. It is thus of critical importance that the projects be governed and managed effectively, efficiently, transparently, and impartially.

Two years since the launch of Proactive Agenda, one of the key issues to emerge is that the governance of the Proactive Agenda needs strengthening and clarifying. To date the approach has been inconsistent, particularly with regard to appointment and role of Chairs, the development of the terms of reference, and the role of the Advisory Group. This has led some projects to experience significant delays, a lack of transparency, and a failure to have key decisions about content and scope be sufficiently discussed with the Advisory Group. Some projects suffer from a (perceived) conflict of interest related to particular adhering governments with strong views on the subject of the project exerting undue influence on the development of the project.

One key OECD Watch recommendation related to the governance of future Proactive Agenda projects is that chairmanship of the project should not be held by the governments that have provided financial support for the project or that have any other clear vested interest. This creates an unnecessary potential for a (perceived) conflict of interest and is not conducive to an effective and impartial process. Ideally, chairs should be appointed from impartial member countries or organisations or the OECD secretariat.

PART 3 – OECD Watch’s recommendations for the 2014-2015 Implementation Cycle

The aim of this submission has been to highlight the issues and trends that are contributing to or hindering the effective implementation of OECD Guidelines, so that they genuinely and substantially reduce company-community conflicts and contribute to improve corporate behaviour worldwide. This year’s review thoroughly analysed a wide swath of specific instances filed in 2013 and 2014, and focussed particularly on the initial assessment phase of specific instances. Based on our research and analysis, OECD Watch strongly recommends the following in order to improve the performance of NCPs and ensure adherence with the principles of visibility, accessibility, transparency, accountability, impartiality, predictability, and compatibility with the OECD Guidelines:

● Recommendations to ensure accessibility

- NCPs should refrain from expecting complainants to meet an unreasonable burden of proof, particularly at the initial assessment phase.
- NCPs should implement the Guidelines and handle cases within the agreed framework of due diligence—“to identify, prevent and mitigate actual and potential adverse impacts”. This means not rejecting cases on the basis that potential impacts have not materialized.
- NCPs should view themselves as problem-solvers and use all of the tools at their disposal to encourage companies’ adherence to the Guidelines, rather than rejecting cases if successful mediation is unlikely.
- NCPs should not reject cases simply based on their own assessment that a situation would be resolved better elsewhere, or that the complaint is not in the national interest.

● Recommendations to ensure predictability

- NCPs should set specified time frames for each phase of the handling process and make every effort to adhere to them
- NCPs should ensure that parties are regularly informed about the upcoming steps of the procedure
- Adequate staffing of NCPs in order to be able to settle complaints within the foreseen time frame is crucial
- For cases that have been pending for an unduly period of time, NCPs must either make a concerted effort to bring the parties together or failing that, issue a final statement with recommendations, as appropriate.

● Recommendations to ensure impartiality and accountability

- NCPs should restructure, as necessary, to ensure impartiality and stakeholder involvement or oversight.
- Clearly separate the initial assessment, mediation, and determination phases of the process.
- External mediators should have to be endorsed by both parties. Parties should have the possibility to reject the mediator in justified cases.
- Establishment of terms of reference for the procedures including binding rules how to treat the contentious points and how to follow up and monitor their elimination
- Outline of the agreement solely by the parties - no content-derived statement on the part of the NCP regarding the complaint before or during the mediation
- Mediation proceedings to be held under conditions of ‘limited access’ with the parties, a mediator and, at the most, a representative of the NCP only

● Recommendations to ensure compatibility with the Guidelines

- NCPs should strive to facilitate an outcome that addresses the harm caused to the complainant, in addition to ensuring that similar harm does not occur in the future.
- Although NCPs appear more willing to monitor the implementation of mediated agreements, monitoring must be accompanied with NCP's willingness to take action if parties do not follow through with their commitments. This could include issuing an addendum to the final statement.

○ **Recommendations to ensure transparency:**

- NCPs should always publish initial assessments and final statements
- NCPs should strive to provide utmost transparency towards the parties concerning information received by each party
- NCPs must not base any part of an initial assessment or final statement on information that was not shared with both parties
- NCPs must not consider regular updates on the process and progress of specific instances a breach of the good faith principle

○ **Recommendations to the OECD Investment Committee and the Working Party on Responsible Business Conduct**

- The Investment Committee and Secretariat must play an active role to ensure NCPs are functioning in accordance with the Procedural Guidance – including regularly assessing NCPs against the criteria for functional equivalence – and addressing specific instances in a manner that is impartial, predictable, equitable and compatible with the Guidelines.
- The OECD and adhering governments should ensure that sufficient funds are allocated to the secretariat to fulfil this crucial function.

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Annex 1: ECCHR's update on the Uzbek cotton trader cases

ECCHR Analysis & Update Best Practices in OECD Complaints Procedures The OECD procedures against cotton traders regarding forced child labor Berlin, June 2014

Introduction

In 2011, ECCHR had filed seven OECD complaints in Germany, Switzerland, France and UK. The complaints were addressed against trade houses which sourced cotton from Uzbekistan, which had been harvested through state organized forced labor of children and adults. The parallel submission of mostly congruent complaints in four European countries has enabled ECCHR to compare the functioning of the respective NCPs. In November 2011, after the procedures were terminated, ECCHR has published the lessons learnt from this comparison in a report ("A Comparison of National Contact Points - Best Practices in OECD Complaints Procedures").

But the work with the cotton traders continued: in six cases, we reached agreements with traders that they pursue with concrete measures to influence the Uzbek government to end forced and child labor. We have closely monitored the implementation of these measures over a period of about one and a half years. We have found that the traders were not willing to take truly effective means and that they did not fully meet the obligations they had committed to.

Now, after this implementation phase, there are additional lessons learnt from the OECD procedure that we would like to share. In particular, we want to address the question of how to ensure that the agreements reached in mediation are implemented sustainably and over the long-term. These considerations apply to agreements made during mediation, but equally to the recommendations made by the NCPs in case mediation has failed.

In this paper, we outline how the respective issues are regulated through the OECD Guidelines as well as through the procedural rules that are formulated by every single NCP for the handling of complaints in their country. In a second step, we confront these provisions with the implementation in practice.

Summary of the 2011 findings

The comparison of the four NCPs had indicated that all NCPs involved had attributed a high degree of importance to the complaints. In addition, all four NCPs had consulted each other during the procedure. The UK's NCP could be highlighted as a good example for others, as it relied on a very transparent communication with the relevant parties, engaged an external mediator, and publicized all relevant decisions. By engaging with an external mediator for the first time, the Swiss NCP had strengthened the mediation process. Nevertheless, the procedure lacked transparency in some points. While the proceedings before the German NCP could be improved in several areas, it should be stressed that the NCP handled the procedure from the beginning with great interest and sought a goal-oriented procedure.

The good functioning of the British NCP can be attributed to its structure. Like the other three NCPs, the British NCP is based in one single ministry, the Department for Business, Innovation and Skills (BIS). However, since 2007 it is monitored by a steering committee which consists of representatives of five ministries, as well as four external members who represent companies, trade unions and NGOs. In addition, the new structure provides a review process for procedural issues.

For this reason it is appropriate that recommendations addressing the NCPs should not only cover the individual measures listed below, but also ensure that they take structural measures to generate the implementation of procedural principles in the long run.

New findings: Implementation of the agreements and the recommendations

After completion of the implementation phase of the OECD proceedings against the cotton traders, it has become apparent that the initial goal to induce companies to take responsibility and stop violations of the OECD Guidelines could not be reached. In all six cases, ECCHR was unhappy with the implementation of the Joint Statements. After the traders had at first shown themselves engaged on the issue, cooperation deteriorated quickly after the conclusion of the procedures. ECCHR tried hard to arrange evaluation meetings with the traders in order to discuss the measures undertaken so far, but (most of) the traders rejected any sort of evaluation meeting. The NCPs did not support ECCHR in this matter.

The NCP's procedural rules do not foresee any tools to influence the company in cases where they do not adhere to their commitments or the recommendations in the Final Statement (see below). Complainants who wanted to take action against non-compliance could only file a new OECD complaint. For this, it would not be sufficient to only address and substantiate the non-compliance with the Final Agreement/Final Statement; complainants would also have to submit new evidence for the persistence of violations of the OECD Guidelines. This would be time-consuming and expensive.

Regulation of Follow-up Procedures in the OECD Guidelines and in the NCP Procedural Guidance

Paragraph 34 of the Commentary of the OECD Guidelines on the Procedural Guidance for NCPs provides that the parties may agree to seek the assistance of the NCP in following-up on the implementation agreement, and that the NCP may do so on terms agreed between the parties and the NCP.

The UK NCP has responded to this regulation in its 2013 revised procedural rules and makes follow-up statements with respect to compliance with recommendations. For the question of the observance of agreements made in a joint agreement, the NCP advises parties to agree to have a follow-up statement at a set date. However, this provision is not binding.¹⁰

The German NCP governs this point only very vaguely: in appropriate cases, the NCP will monitor the implementation of agreed steps or the implementation of its recommendations and can ask parties to report. The NCP can then inform about the progress made on its website.¹¹

The Swiss NCP does not foresee any provisions relating to a follow-up in its procedural guidance.¹²

In practice: Follow-up procedures with the NCPs of UK, Germany and Switzerland

¹⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270577/bis-14-518-procedural-guidance.pdf, p. 19.

¹¹ <http://www.bmwi.de/BMWi/Redaktion/PDF/M-O/oecd-leitfaden-zum-beschwerdeverfahren.property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>, p. 4.

¹² <http://www.seco.admin.ch/themen/00513/00527/02584/index.html?lang=en>
0,d.Yms.

In the two procedures with the UK NCP, it was agreed in the Joint Agreement to have an evaluation meeting facilitated by the NCP.¹³ One of the companies refused to meet and the NCP did not insist that the meetings were held. The NCP however acknowledged that in the future it would ensure that follow-up arrangements agreed by parties will be clear, and that parties and the NCP will share an understanding about what is required to deliver. The NCP also stated that their procedural guidelines shall encourage parties in the future to publish their agreed follow-up arrangements in the NCP's Final Statement.

The Final Statement in the case with the German NCP does not foresee a follow-up meeting or statement. Even though representatives of the NCP had announced that there would be some sort of evaluation meeting after one year's time, this meeting never was realized.

Although follow-up meetings were foreseen in individual Joint Agreements in Switzerland, these were rejected by the respective companies.

Conclusions

Under the current regulation, the only incentives for a company to make commitments within the mediation are media pressure and the influence of the NCP during the procedure. Once these factors subside, whether and how the negotiated measures are implemented depends merely on the goodwill of the company.

The main reason for the subsiding engagement of the traders was the lack of bindingness of the procedure. Next to sanctions, which are not part of the OECD complaint procedure for the time being, a binding evaluation process including a follow-up statement which is publicized could contribute to more accountability in the proceedings.

This paper shows that as long as follow-up procedures and statements are voluntary for NCPs to undertake, they cannot be enforced through complainants. However, a mandatory evaluation process and a follow-up statement to be published by the NCP on the course of the implementation phase would ensure an objective assessment of the measures undertaken so far and through this contribute to bind companies to their commitments made in the Final Agreements and to provide an incentive for them to maintain this engagement.

Recommendations to ensure the implementation of Final Statements and Final Agreements

- ⊙ Foresee monitoring overseen through the NCP
- ⊙ Introduce a mandatory evaluation process
- ⊙ Put the burden of proof to show compliance with the agreement on the party that made the commitments
- ⊙ Foresee a mandatory evaluation statement published by the NCP

¹³ <http://webarchive.nationalarchives.gov.uk/20121205150610/http://www.bis.gov.uk/policies/business-sectors/green-economy/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/cases/final-statements>

Annex 2: ECCHR's analysis of the Trovicor GmbH case

ECCHR Analysis & Update
Best Practices in OECD Complaints Procedures
The The OECD procedures regarding surveillance technology against Trovicor
Berlin, June 2014

Introduction

Following the ECCHR position paper “A Comparison of National Contact Points - Best Practices in OECD Complaints Procedures” of November 2011, in which we evaluated the OECD procedures on forced child labor in Uzbekistan against European cotton traders, in this paper we evaluate the procedure against the company Trovicor (Germany) regarding their trade in surveillance technique. The main criteria for the evaluation shall be - as in the paper of 2011 - the principles of transparency, impartiality and predictability.

In this paper, we outline how the respective issues are regulated through the OECD Guidelines as well as through the procedural rules that are formulated by the German NCP for the handling of complaints. In a second step, we confront these provisions with the implementation in practice.

Delivery/Maintenance of surveillance technology/Bahrain

Munich based firm Trovicor produce surveillance software that can be used by authoritarian states to commit human rights violations. During the Arab Spring, the use of systematic telecommunications surveillance as a tool to repress peaceful protest movements has become a common problem. Since the start of the mass protests in February 2011, the Arab Gulf State of Bahrain has used information obtained through intercepted telephone and internet connections to secure arrests of, and extract confessions from dissidents. Such actions are facilitated by high-performance technologies, the use of which could only be justified if strictly bound by the highest rule of law standards. Due to international coverage of the opposition protests in Bahrain, as well as of the violent suppression of the movement and the use of surveillance technologies as a tool of repression, representatives at Trovicor must have had knowledge of the human rights violations being committed in the country by summer 2011 at the very latest. Yet, available information suggests that these companies have maintained their business activities in the state.

Together with Reporters Without Borders, the Bahrain Center for Human Rights (BCHR) and Bahrain Watch (BW), ECCHR has lodged an OECD complaint against the company. The German National Contact Point has rejected the complaint regarding Trovicor's responsibility in Bahrain and has only accepted the portions of the complaint relating to the company's risk management procedures.

Evaluation

1. Predictability

The NCP is required to comply with the OECD Procedural Guidance and to inform about upcoming procedural steps. According to the “Procedural Notes for Specific Instances (“Complaints”) of the German National Contact Point for the OECD Guidelines for Multinational Enterprises” (in the following: NCP procedural guidelines), the given timeframe of three months for the Initial Assessment can be exceeded if, for example, comprehensive fact-finding is required or if an external expert advice

needs to be sought.¹⁴ In the Trovicor case, the German NCP has exceeded the foreseen time frame by six months. In spite of the significant delay, the NCP did not inform the complainants about a revised timeframe and explained the delay only on specific request and very vaguely with the complexity of the matter. Thus, the NCP has left the complainants in the dark about the prospects of success of the complaint, which is unacceptable in particular for the affected persons within the Bahraini organizations, for whom the procedure can have serious practical impact. If the three-month period cannot be met on reasonable grounds, NCPs should present a concrete and realistic alternative schedule to ensure planning security for complainants.

2. Transparency

The NCP is required to ensure a transparent procedure toward the parties as well as toward the public.

a. Transparent management of the procedure toward the parties

The German NCP's procedural guidelines stipulate that the NCP stay in contact with the parties for the duration of the procedure and discuss the state of the process and possible future steps with them. The NCP has not met these requirements in several respects. In particular, it

- did not inform the complainants about the timeframe and content of the communication with the company.
- informed the complainants only three months after the filing of the complaint and after specific request that the company replied to the accusations in the complaint.
- only shared the company response with the complainants late and after several requests. It agreed however to handle this issue in a transparent way in the future.

b. Transparency toward the public

In addition, the NCP is required to inform the public about the basic features of the process. Transparency toward the public is considered as a crucial principle by the Guidelines themselves.¹⁵ The Guidelines provide that the NCP publish the following procedures:¹⁶

- a statement when the NCP decides that the issues raised do not merit further consideration. The statement should at a minimum describe the issues raised and the reasons for the NCP's decision;
- a report when the parties have reached agreement on the issues raised.
- a statement when no agreement is reached or when a party is unwilling to participate in the procedures. This statement should at a minimum describe the issues raised, the reasons why the NCP decided that the issues raised merit further examination and the procedures the NCP initiated in assisting the parties. The NCP will make recommendations on the implementation of the Guidelines as appropriate, which should be included in the statement. Where appropriate, the statement could also include the reasons that agreement could not be reached.

Especially the publishing of the recommendations is an essential factor that can contribute significantly to the effectiveness of the procedure.

¹⁴ <http://www.bmw.de/English/Redaktion/Pdf/oecd-procedural-notes,property=pdf,bereich=bmw2012,sprache=en,rwb=true.pdf>, S. 7.

¹⁵ OECD Guidelines for Multinational Enterprises, p. 78.

¹⁶ OECD Guidelines for Multinational Enterprises, p.73.

The German NCP's procedural guidelines stipulate that the NCP publish on its website information about the rejection of the complaint and a summary of significant reasons.

For the event of an agreement, the results of the procedure should be made publically available, unless it is in the best interest of effective implementation of the Guidelines, to maintain confidentiality.

In the case that mediation has failed, the NCP is required to publish a Final Statement, which may include recommendations to comply with the Guidelines. The NCP will formulate such recommendations, when they notice a violation of the Guidelines that the company in question does not recognize and respect to which the company has not announced a change in behavior.¹⁷

Also with these requirements, the NCP largely failed to comply. The NCP has not published its decision on the acceptance / rejection of the complaint, although this would have been possible without a violation of the principle of confidentiality.

In addition, the NCP has failed to express recommendations to the company regarding the part of the complaint that it had accepted. The NCP argued that the procedure is of voluntary nature that aims solely at mediation. As shown above, however, a recommendation should be made if the NCP notices a violation of the Guidelines that the company in question does not recognize and respect to which the company has not announced a change in behavior. The NCP however, was not ready to take this issue into account.

3. Impartiality, especially regarding the interpretation of the OECD Guidelines - The decision on the acceptance/rejection of the complaint

The German NCP has rejected the (major) part of the complaint regarding the responsibility of the company for the human rights abuses in Bahrain on the grounds that the complaint did not provide sufficient evidence for the company's contribution to the abuses. The complainants' accusation however was sufficiently substantiated.

Involvement in Bahrain was admitted by a spokesman for Trovicor's predecessor Nokia Siemens Networks in 2009, has been confirmed by employees in 2011, and has never been denied by Trovicor. With this decision, the NCP follows a clear trend: According to the findings of the organization OECD Watch, more and more NCPs seem to reject complaints on the grounds of lacking evidence. In many cases however, this is in contradiction to the purpose of the OECD Guidelines as well as to the NCP's procedural guidance in the specific countries.

The OECD Guidelines themselves require solely that the NCP will take into account (...) whether the issue is material and substantiated".¹⁸

In the German NCP's procedural guidance for instance, it is stated that "for a condemnation to be issued, it is sufficient for the accusations to be credible. Unlike in a court, there is no requirement for strict evidence."¹⁹

¹⁷ Procedural Notes for Specific Instances ("Complaints") of the German National Contact Point for the OECD Guidelines for Multinational Enterprises, p.4.

¹⁸ OECD Guidelines for Multinational Enterprises, S. 83.

¹⁹ Procedural Notes for Specific Instances ("Complaints") of the German National Contact Point for the OECD Guidelines for Multinational Enterprises, p.3.

It is appropriate to request more flexible standards on the burden of proof than in court procedures. First, the OECD process is a soft law mechanism with voluntary participation and without sanctions; its main aim is mediation. Secondly, for many cases of human rights violations by companies, hard evidence is often very difficult to obtain. This is especially the case in a field such as surveillance technology, where the countries and companies involved apply the highest levels of confidentiality and secrecy to their work. In this situation, those affected by serious human rights violations cannot be denied access to the complaint mechanism on the grounds that they could not deliver the full chain of evidence. Again, this is reflected in the OECD complaints procedure with its less stringent requirements.

Conclusions and recommendations

The German NCP has seriously damaged its credibility and reliability through the opaque handling of the complaint procedures. Credibility and reliability are both essential to ensure that stakeholders, as well as companies, develop confidence in dealing with OECD complaints and regard the OECD complaint procedure as an effective means to remedy their problems. The lack of respect for the OECD complaint procedure in Germany is also reflected in the low number of complaints that have been filed in recent years.²⁰

As in the procedures conducted with the German NCP in 2011, the NCP interpreted the OECD Guidelines in a very restrictive way.

The poor procedural guidance by the NCP obviously results from the structural integration of the NCP in the Federal Ministry of Economics and Technology, specifically in the department of foreign trade. The aim of this department is the development and securing foreign markets. Thus, it can hardly be expected for this department to make decisions that may cause the loss of certain already-developed markets.

In addition, the German NCP's effectiveness is weakened by its failure to involve civil society organizations in the decision process and to include their perspective of the case. Although an NCP/NGO working group exists and since recently meets twice a year, instead of only once a year, NGOs are not asked for their opinion on cases; instead, they are only informed about concluded cases.

Another structural problem with the German NCP are human resources. Both persons involved in the NCP work are responsible for many other issues within the division. It is obvious that a timely handling of complaints is not possible due to lack of capacities.

Recommendations to the German NCP:

The German NCP should:

- Introduce an independent structure of the NCP; alternatively, install an oversight body to ensure participation of civil society
- Handle complaints timely and punctually

²⁰ <http://www.bmwi.de/DE/Themen/Aussenwirtschaft/Internationale-Gremien/oeed-leitsaetze,did=429912.html>

- ◉ Inform parties about the state of the procedure regularly
- ◉ Ensure more transparency, in particular by providing the statements of the company to the complainants
- ◉ Adjust the requested standards of proof in light of the purpose of a voluntary mediation procedure
- ◉ Publish recommendations to the company if no agreement was reached but violations of the Guidelines were found
- ◉ Ensure sufficient staffing capacity

Annex 3: Assessment of the Australian NCP by Monash University, the University of Melbourne and Deakin University's Non-Judicial Human Rights Mechanisms Research Project

April 21st, 2014

Has the NCP changed its structure or procedures in the present implementation cycle?

Although the Australian National Contact Point (ANCP) has not changed its structure or procedures in the past period, the establishment of the oversight committee in 2012 as a direct response to the 2011 review of the Guidelines is important to note. The prime duty of the committee is to assist the ANCP when complaints are made and there are contentious issues to be considered. Although it was introduced as part of the structure of the ANCP and members are expected to meet biannually, the ANCP website only has records of the minutes from its First Meeting in November 2012 suggesting that it has not been active. We encourage the ANCP to ensure an active role for the oversight committee.

How do you assess the general functioning and structure of the NCP in your country / you have been in contact with?

The ANCP is considered to be relatively weak, even after the oversight body was established. The ANCP is under-resourced and its determination processes are less rigorous than 'best practice' NCPs. The ANCP receives significantly less funding than the model NCPs (UK, Dutch, Norway). It does not have a dedicated budget or any designated staff, and instead is supported by staff of the Foreign Investment and Trade Policy Division of the Commonwealth Treasury.²¹ As a result of its lack of funding, its ability to investigate specific instance complaints, conduct consultations within Australia, participate at OECD meetings, and promote the OECD Guidelines is detrimentally affected. Whilst the ANCP is one of the 15 (33%) NCPs that have created a multi-stakeholder board²² the continuing functionality of this board is in question (as discussed above).

The ANCP is not very active when compared with other NCPs, and there is no reason to believe that Australian companies have better human rights records than companies based elsewhere in the OECD. It has only received 12 cases, of which 5 have been concluded, 5 rejected, 1 withdrawn and 1 still pending.²³

If the ANCP chooses to refuse mediation or mediation fails, it does not continue to investigate the complaint and it does not make an assessment of whether a company has breached the Guidelines. This is an area where Australia is failing to uphold the Guidelines. Furthermore, where mediation is successful and the NCP releases a final statement, it does not have a follow up process to monitor a company's compliance with its recommendations.²⁴ This allows multinational enterprises that are in

²¹ Trade Union Cases, *National Contact Point Comparison* <<http://www.tuacoecdmneguidelines.org/NCPcomparisonAll.asp>>.

²² Trade Union Cases, *National Contact Point Comparison* <<http://www.tuacoecdmneguidelines.org/NCPcomparisonAll.asp>>.

²³ OECD Watch, *NCP: National Contact Point Australia* <<http://oecdwatch.org/cases/advanced-search/hcps/casesearchview?type=NCP&search=National%20Contact%20Point%20Australia>>.

²⁴ Trade Union Cases, *Australia NCP* <<http://www.tuacoecdmneguidelines.org/companydetails3.asp?organisationID=22733>>.

violation of the Guidelines to avoid implementing the recommendations of the NCP to bring themselves in line with the Guidelines.

The ANCP performs well by having a dedicated website with adequate web pages explaining its function and role. Key OECD materials on the Guidelines are accessible on the website in English. Far more can be done to improve accessibility, however, such as more thorough outreach activities and the publication of materials in different languages.

The ANCP offers reasonable levels of transparency by publishing its initial statement in the complaint process and provides mediation to parties for the purpose of resolving disputes. The NCP uses independent mediators in this process, and upon the conclusion of the mediation process it publishes a final statement to the public which includes recommendations to the company on future implementation of the Guidelines. Despite this, there is much room for improvement within the ANCP.²⁵

How do you assess the performance of information and promotion function of the NCP in your country?

The ANCP complaint process is well publicised on their website. The website details information on the stages involved in handling complaints, the review procedure for complaints, and provides time limits for each stage. However, in Australia, the NCP is not a widely known mechanism and the NCP itself does little promotional work.

The ANCP website states that their role includes the promotion of the Guidelines and that they do this by undertaking activities such as conducting seminars and consultation session on the Guidelines with businesses, NGOs, government departments and agencies, and the interested public; and publicising a Service Charter on the role of the ANCP to multinational enterprises and more broadly.²⁶ However, in practice, there is no evidence of these outreach activities being conducted in any substantive form. As a result, concerns have been raised about the lack of accessibility to the ANCP due to the lack of promotional activities undertaken.

Furthermore, the NCP website states “Consultations are held at least once a year to complement the schedule of meetings of the OECD Committee on Investment. These sessions aim to provide a forum for stakeholders to address issues under the Guidelines with the ANCP and to promote the Guidelines as a useful framework for business.”²⁷ However, members of OECD Watch complain that although there used to be 3 meetings a year in Sydney, Melbourne and Canberra, which operate as multi-stakeholder consultations, these no longer occur. According to the Trade Union Cases (TUAC), the ANCP does not hold regular consultations in cooperation with external stakeholders, including trade unions, and it does not organise events to promote the Guidelines either in Australia or abroad.²⁸

²⁵ Trade Union Cases, *Australia NCP*

<<http://www.tuacoecdmneguidelines.org/companydetails3.asp?organisationID=22733>>.

²⁶ Australian Government, *Implementation and Promotion*

<<http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/implementation.htm>>.

²⁷ Australian Government, *The Australian National Contact Point*

<<http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/contactpoint.htm>>.

²⁸ Trade Union Cases, *Australia NCP*

<<http://www.tuacoecdmneguidelines.org/companydetails3.asp?organisationID=22733>>.

Whilst the ANCP does have publications and key materials on the OECD Guidelines and reports from the Annual Meeting of NCPs, it has not been updated since 2012, which further limits its information and promotion function.

Other comments

With respect to the structure of the ANCP, it is housed in a single government department, the Foreign Investment and Trade Policy Division at the Commonwealth Treasury. In general, scepticism has been expressed regarding the independence of the ANCP (from ACTU and Oxfam Australia) and its ability to operate impartially throughout the complaints process as the structure can influence how the NCP handles complaints. For example, decision-making by the ANCP ultimately sits within this government department which can result in conflicts of interest. Thus, the ANCP should consider having an independent location to avoid conflicts of interest with the goals of the Guidelines.

In short, the Australian NCP is falling short of achieving the four core criteria of functional equivalence of NCPs recommended in the 2011 Guidelines. Though it is formally visible, accessible, transparent and accountable, in practice it takes a very minimalist approach to meeting these criteria and that has impacted adversely on its usefulness as a grievance mechanism and promoter of human rights in the Australian business community.