

# Remedy Remains Rare

An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct

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OECD Watch is a global network with more than 100 members in 50 countries. Membership consists of a diverse range of civil society organisations bound together by their commitment to ensuring that victims of corporate misconduct have access to remedy, that business activity contributes to sustainable development and poverty eradication, and that corporations are held accountable for their actions around the globe.

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# Executive Summary

National Contact Points (NCPs) were established to promote adherence to the OECD Guidelines for Multinational Enterprises (the Guidelines). In 2000, these state-based offices began accepting complaints from people harmed by companies' non-compliance with the Guidelines. With this new role, NCPs acquired the potential to serve as a much-needed forum for accessing remedy for corporate abuses.

Now, 15 years on, we look back on NCP performance in handling these complaints. The evidence shows that there are very few examples of complaints leading to beneficial results that provided some measure of remedy, and most of these encompass only forward-looking corporate policy changes. These policy changes – if genuinely implemented – bring with them a potential for prevention of future harms related to a company's activities. However, the overwhelming majority of complaints have failed to bring an end to corporate misconduct or provide remedy for past or on-going abuses, leaving complainants in the same or worse position as they were in before they filed their complaint.

These findings, based on a quantitative and qualitative analysis of 250 complaints filed by communities, individuals and NGOs, have critical implications for the NCP system. Positive outcomes of complaint handling are one of the most salient indicators of an NCP's success in contributing to Guidelines implementation, yet the conclusions of this report indicate that, in most cases, NCPs are not achieving their central objective, which is to “further the effectiveness of the Guidelines.”

OECD Watch's analysis of the first 15 years of NCP performance reveals weaknesses throughout the NCP system. These weaknesses must be addressed before NCPs can be considered an effective network for promoting adherence to the Guidelines or for addressing harm caused by corporate misconduct. Issues NCPs must address include practical and procedural barriers that prevent potential complainants from filing a complaint; a perceived lack of independence and impartiality of some NCPs; policies that prioritise confidentiality over transparency; frequent nonconformity with procedural timelines; and outcomes that are incompatible with the Guidelines. Many of these issues could be addressed systematically through changes to the Procedural Guidance that promote more effective handling of complaints. This report highlights the most critical changes needed to strengthen NCPs and provides concrete recommendations to policymakers at the OECD and in adhering countries.

By any standard, 15 years is enough time to test the effectiveness and impact of the NCP system. The 2011 update to the Guidelines delivered important changes to their scope and content, but did not include changes to ensure the effective functioning of NCPs nor their ability to facilitate access to remedy. NCPs have the potential to serve as a valuable tool in promoting responsible business conduct and ensuring access to remedy, but they are currently not meeting that potential. Adhering governments, together with the OECD and NCPs themselves, must move immediately to improve the NCP system to ensure access to remedy for the victims of corporate misconduct and maintain the relevance of the NCP system in a shifting policy landscape.



# Call to Action!

We call upon NCPs to implement the following recommendations in order to improve their effectiveness in promoting adherence to the Guidelines and in providing access to remedy:

NCPs must ensure that their services are **accessible** to communities and individuals with legitimate claims by:

- Refraining from demanding excessively high standards of proof at the initial assessment stage; the complainant should only have to provide credible, not irrefutable, evidence to support the allegations in the complaint
- Refraining from adding admissibility criteria beyond those stated in the Procedural Guidance
- Accepting allegations related to future harms
- Bearing the costs of necessary translations and travel to attend mediation, or alternatively, holding the mediation in the location where the harm occurred, to ease the burden of bringing a complaint
- Assessing and, to the extent possible, mitigating the risk of reprisals and other security risks for complainants.

NCPs must both operate and be perceived as operating with **impartiality** by:

- Basing initial assessments and final statements only on information that is available to both parties

NCPs must operate **transparently** and **predictably** by:

- Narrowly defining confidentiality requirements in order to promote transparency and information disclosure
- Strictly heeding the indicative timelines provided in the Procedural Guidance

NCPs must deliver meaningful outcomes that are **compatible with the principles and standards expressed in the Guidelines** by:

- Making findings of non-compliance with the Guidelines based on independent investigations if cases are not amenable to mediation or if mediation fails
- Following up on cases after they are concluded, including monitoring whether mediated agreements or the NCP's recommendations have been implemented

**We call upon adhering governments to strengthen their commitment to implementing the Guidelines and to increase access to remedy by ensuring that their NCPs follow the recommendations outlined above. In addition, each adhering government should bolster their NCP's capacity by taking steps to ensure that:**

- The composition of their NCP includes an independent board with decision-making authority or a steering board charged with oversight. The board should be composed of prominent independent individuals and should have equal representation by NGOs and other stakeholder groups
- Their NCP is staffed sufficiently and resourced to fulfil its functions without requiring complainants to pay for services that are a necessary part of the NCP process
- Material consequences are imposed for a company's non-compliance with the Guidelines

**We call upon the OECD Investment Committee and the Working Party on Responsible Business Conduct to facilitate the recommended changes and to ensure genuine, functional equivalence among NCPs by:**

- Institutionalising and managing mandatory peer reviews to assess NCPs' performance and contributions to providing access to remedy. Each NCP's performance should be reviewed at least once every five years, in line with the rate of peer reviews in other OECD committees and directorates.
- Immediately initiating a process to revise the Procedural Guidance to strengthen NCP structure and functioning

To advance these goals, **OECD Watch** commits to better global coordination; to undertaking more rigorous case monitoring and analysis; to mobilizing public concern; to publicizing successes and failures of the OECD Guidelines complaint system; and to providing adhering governments, NCPs, the OECD Secretariat, businesses, trade unions, and other stakeholders with constructive feedback and recommendations for improving the implementation and effectiveness of the Guidelines.





# Introduction

## 1.1 Three tales of wrongs without remedy

In December 2014, the body of an outspoken Ecuadorian indigenous leader was found dead and bound in an unmarked grave. Prior to his death, he had been campaigning against the Mirador open pit copper mine in the Ecuadorian Amazon, and while the circumstances surrounding his death remain a mystery, he was the third vocal critic of the Mirador mine to be killed in recent years.<sup>1</sup> Concerns about the human rights and environmental impacts of the mine were brought to the Canadian NCP in 2013, but the NCP rejected the case a year later, finding the allegations unsubstantiated without ever requesting additional information or clarification from the complainants.<sup>2</sup>

Across the globe in Bangladesh, thousands continue to protest the planned Phulbari open-pit mine that is expected to forcibly displace up to 130,000 people and affect the water resources and ecosystems of thousands more. A case raising these and other concerns made it past the UK NCP's initial assessment phase, but the NCP rejected the main allegations related to the mine's anticipated future impacts, believing at face value the company's claim that it would adequately mitigate the impacts, including the resettlement of tens of thousands of local people.<sup>3</sup>

Meanwhile, communities in the northeastern Indian state of Orissa have been forced off their land to make way for an iron ore mine and steel plant owned by Korean company POSCO. Complaints filed with three different NCPs had mixed results. Though the case established important precedent for the financial industry and principles for NCP case treatment, the tragic irony is that the case did absolutely nothing to remedy harm on the ground or improve the situation of affected Indian communities.<sup>4</sup> They are, if anything, worse off than they were before they filed the NCP case.

These three projects are being developed by different companies in distinct country contexts, but they share a common link: they were each the subject of a complaint through the NCP system, and they were all left unresolved.

The Mirador, Phulbari, and POSCO cases are in many respects emblematic of typical NCP case outcomes over the past 15 years. Especially in cases involving disputes about large-scale infrastructure and extractives projects – cases that often allege very serious environmental, labour and human rights violations affecting many people – the NCP system has historically failed to serve as an effective forum for remedy, or to result in direct change in corporate behaviour.

Simply put, if the NCP process is not resulting in concrete, visible changes on the ground for people harmed by corporate activity, then it is not effective. This report takes a close look at the performance of the NCP system over the past 15 years to analyse trends in NCPs' handling of complaints, highlight areas for improvement, and examine why the NCP system is failing to provide access to remedy for harms from corporate misconduct.

## 1.2 The OECD Guidelines and the role of National Contact Points

The OECD Guidelines for Multinational Enterprises (the Guidelines) are a set of principles and standards for responsible business conduct, developed by the governments adhering to the OECD Declaration on International Investment and Multinational Enterprises (hereinafter “adhering governments”).<sup>5</sup>

Adhering governments are legally bound to implement the Guidelines, though they are not directly binding on companies. Like any standard, promotion and implementation are essential to ensure that the Guidelines meet their objective to prevent harm to people and their environment from the activities of multinational corporations. These responsibilities are entrusted to the NCP system – agencies established by each adhering government to further companies’ implementation of the Guidelines.

NCPs work to promote and implement the Guidelines both by publicising information about the Guidelines and by receiving complaints about company adherence. Although the first version of the Guidelines was agreed in 1976, the NCPs have only been open to complaints about corporate non-compliance with the Guidelines since 2000. The very first case by an NGO was filed in May of 2001 when RAID filed a complaint against Binani alleging corruption and mismanagement at the Ramco Copper mine in Zambia.<sup>6</sup> From that year on, NCPs have handled at least 250 cases submitted by communities, individuals and NGOs.

State governments have flexibility in the way they organise their NCPs and, to some extent, in developing procedures that meet the objectives of their mandate. Although NCPs are supposed to handle cases in a similar manner, a concept in the Guidelines known as “functional equivalence,” in reality broad variations have emerged in NCP structures and practice which, 15 years on, provide insight into what works and what does not.

In 2011, the Guidelines underwent major revisions to update them and bring them in line with current understanding of corporate accountability. These revisions included significant changes to the scope and content of the Guidelines, including the addition of an entire chapter devoted to human rights that reflects the UN Guiding Principles on Business and Human Rights. The Procedural Guidance that directs NCPs’ handling of complaints was also updated, but these changes brought only modest improvements.

The NCP complaint process is meant to help resolve issues related to a company’s adherence to the Guidelines by facilitating a dialogue process and encouraging parties to reach a voluntary agreement. Whether or not an agreement is reached, NCPs are expected to issue a final statement with recommendations for the company to improve its adherence.<sup>7</sup>

As a state-based non-judicial grievance mechanism, NCPs have the potential to serve as an avenue to remedy for harms arising from a company’s misconduct. While the aim of providing remedy is not explicitly included in the Procedural Guidance, remedy is an inherent part of resolving any instance of non-compliance that results in harm. An NCP’s true effectiveness and its ability to ensure implementation of the Guidelines should be measured in terms

of the impact it has in remedying past and on-going harm and prompting concrete changes in a company's future behaviour. Further, governments and the UN Working Group on human rights and transnational corporations have acknowledged that providing remedy is an important function of NCPs.<sup>8</sup>

### 1.3 Aims and approach

The aims of the present research report are fourfold:

- to take stock of the contribution of the OECD Guidelines and NCPs to providing access to remedy for the victims of corporate misconduct;
- to identify and analyse why the outcomes achieved through the NCP process have been so limited (using the OECD Guidelines' own criteria for NCP effectiveness);
- to provide recommendations for improved NCP functioning in order to increase NCP impact, improve OECD Guidelines observance and facilitate access to remedy for those affected by corporate misconduct; and
- to inform the development of National Action Plans (NAPs) on Business and Human Rights in countries adhering to the OECD Guidelines and to strengthen state commitments to improving availability of remedies for victims of corporate abuses.

The present report is based on information gathered through a variety of qualitative and quantitative research methods, including empirical research. Research began with a detailed review of cases filed by communities, individuals and NGOs between May 2001 and May 2015.<sup>9</sup> The scope of the present research is limited to cases filed by communities, individuals and NGOs because OECD Watch is a network of NGOs, and because the other large block of cases – those filed by labour unions – those filed by labour unions – are already being thoroughly analysed through the efforts of the Trade Union Advisory Committee (TUAC).<sup>10</sup> In addition to reviewing information available in the OECD Watch case database, the research also included scans of media coverage of complaint processes and publicly available information from civil society organisations, NCPs and companies. Empirical research was carried out through a small number of in-depth interviews with both companies (4 interviews) and NGOs (12 interviews) directly involved in complaint processes. In addition, a draft of the report was sent to all NCPs and the secretariat of the OECD Working Party on Responsible Business Conduct for comments prior to publication. NCPs' comments have been incorporated into the present version.

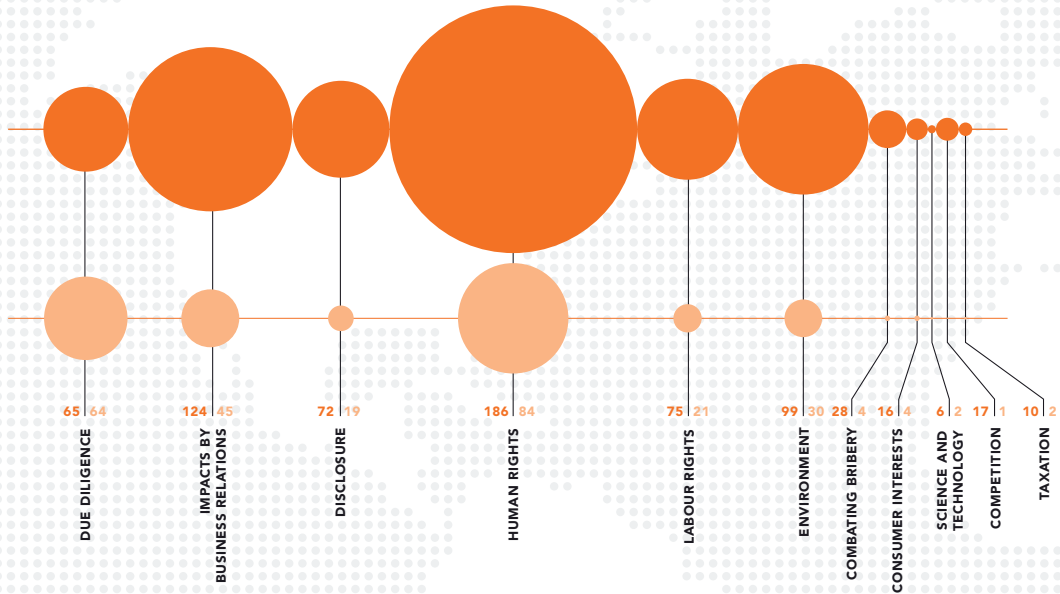
All statistical figures are based on information gathered through the above research. Because the agreements and recommendations produced in many of the concluded cases have not been followed-up upon by the NCPs nor the parties to the case, some of the information provided in the present report may be incomplete. Information on all of the cases referenced in the report can be found in OECD Watch's case database, available at [www.oecdwatch.org/cases](http://www.oecdwatch.org/cases).



## The facts: taking stock of trends across 15 years of NCP complaints

### ISSUES RAISED IN COMPLAINTS

COMPLAINTS FILED 2001 - 2015 | COMPLAINTS FILED 2012 - 2015



### COMPLAINTS PER SECTOR

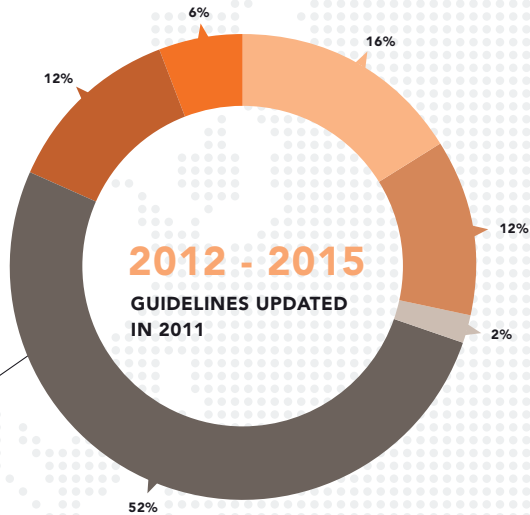
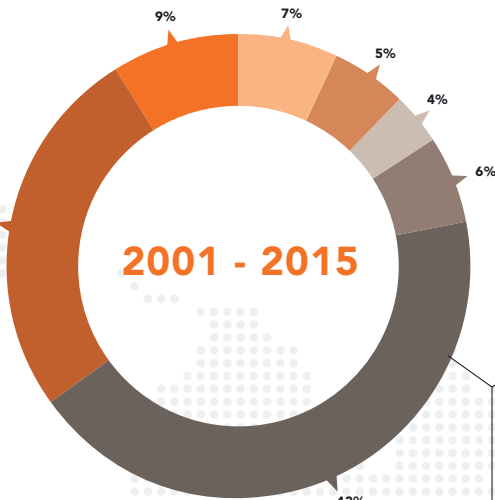
COMPLAINTS FILED 2001 - 2015



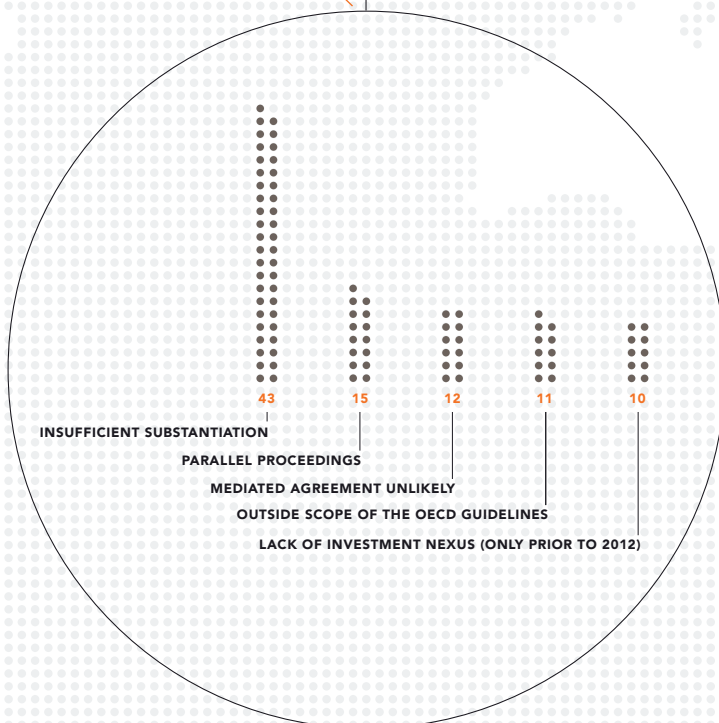


COMPLAINTS BY STATUS AS OF MAY 2015

COMPLAINTS FILED 2001 - 2015 | COMPLAINTS FILED 2012 - 2015



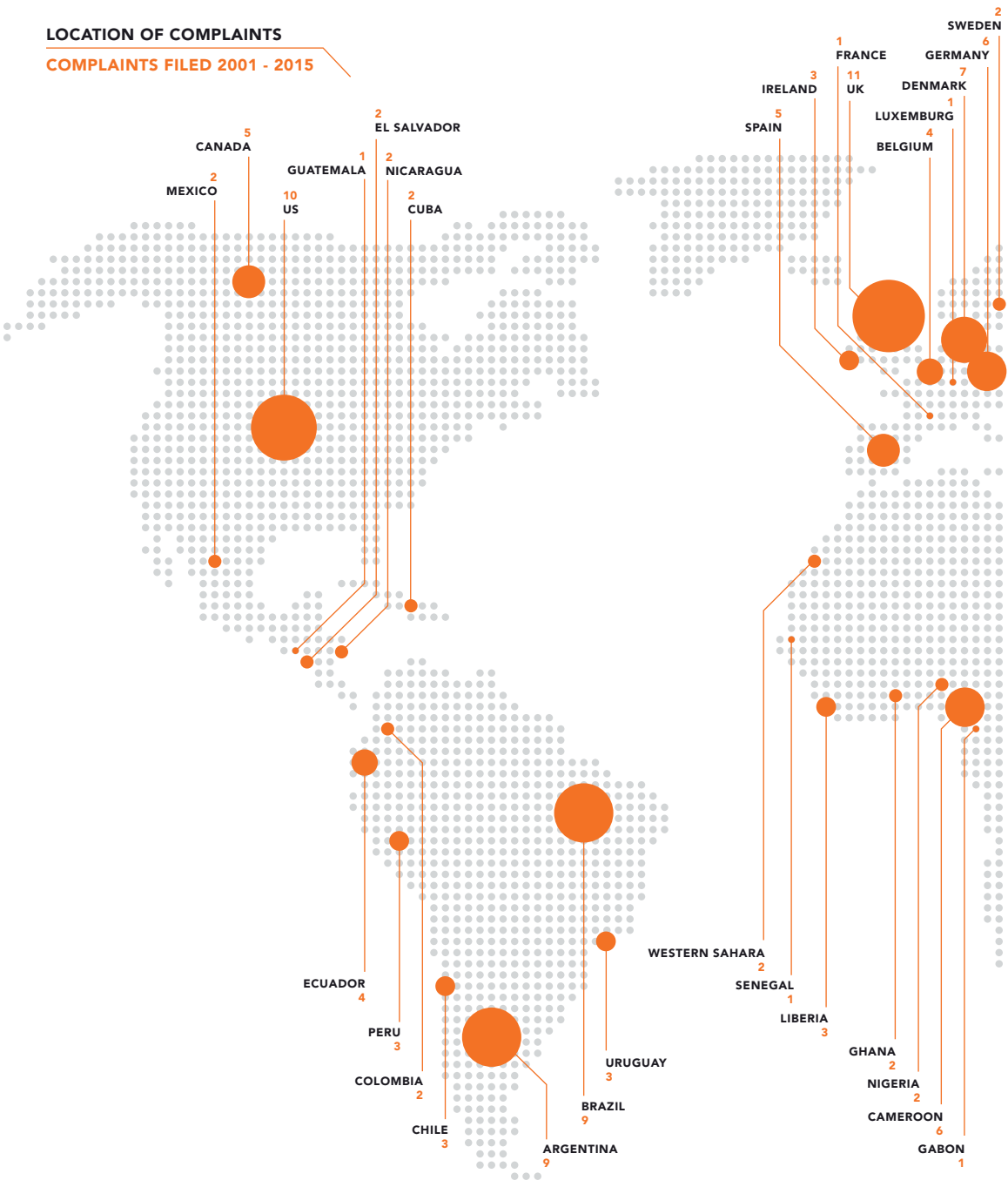
MOST COMMON GROUNDS FOR REJECTION





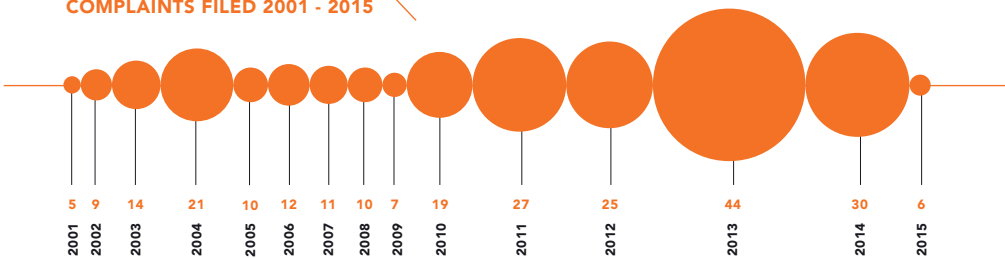
# LOCATION OF COMPLAINTS

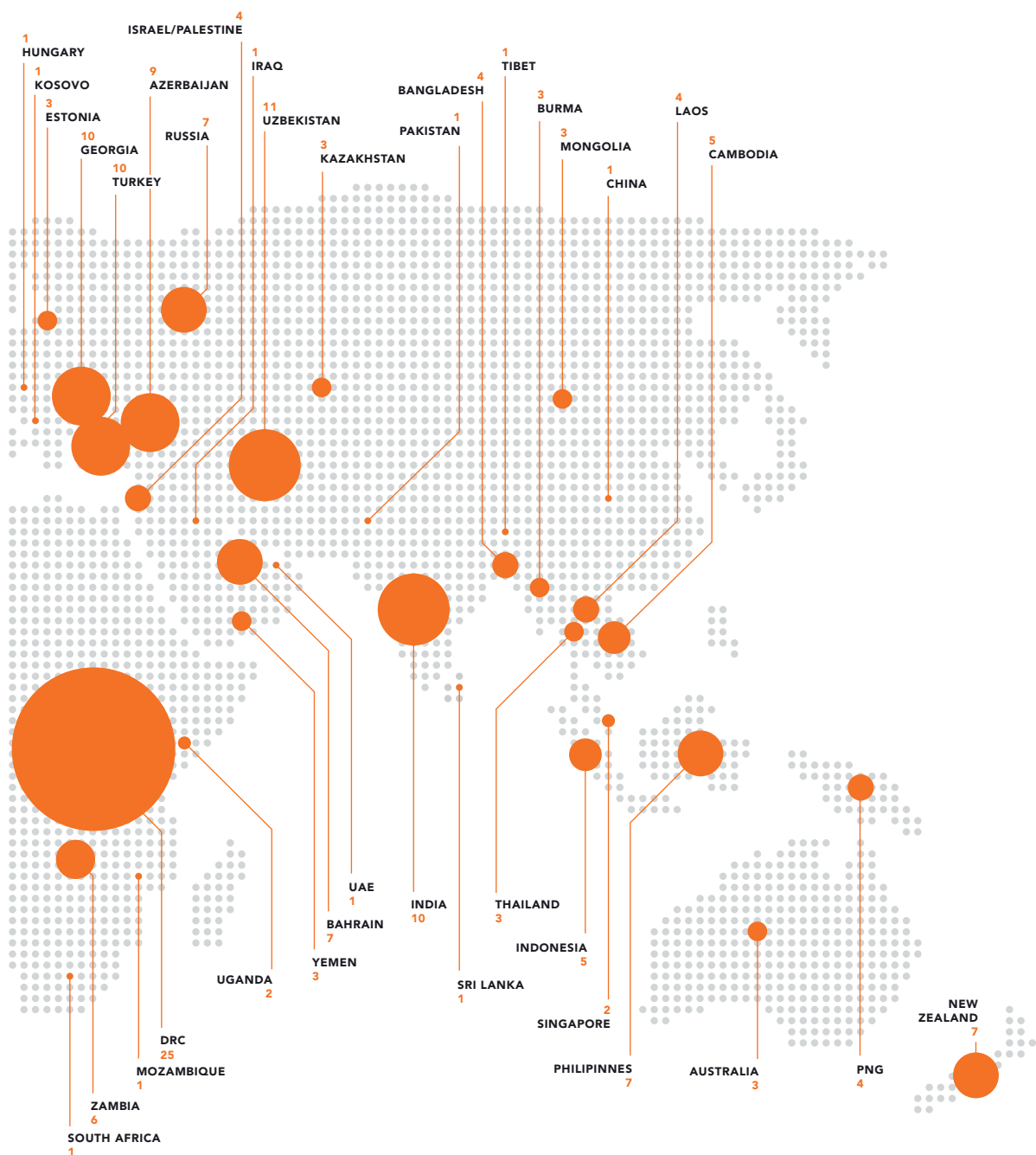
COMPLAINTS FILED 2001 - 2015



# COMPLAINTS PER YEAR

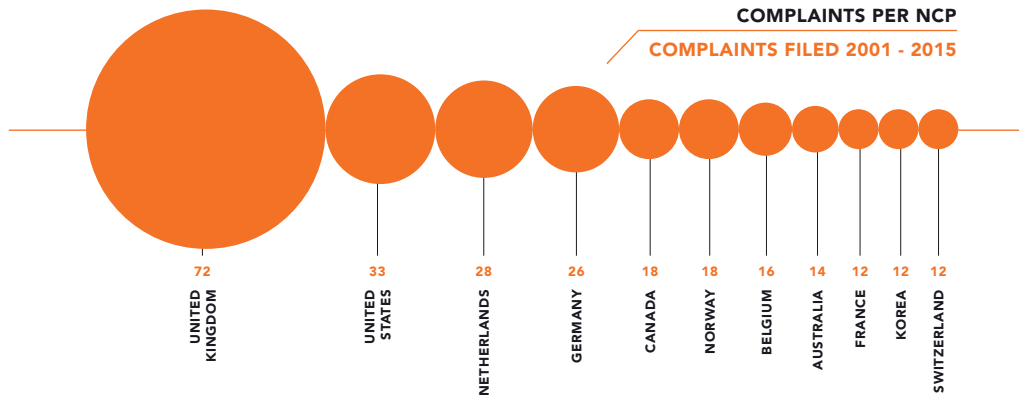
COMPLAINTS FILED 2001 - 2015





## COMPLAINTS PER NCP

### COMPLAINTS FILED 2001 - 2015







## What is remedy and what outcomes can NCPs deliver?

After 15 years of experience with the NCPs, a key question is: what remedies and outcomes are possible through the NCP system? Can this system lead to measurable results and provide remedy for the human rights, labour and environmental abuses that are often the subject of complaints?

In some respects, at least, there is increasing evidence that NCP cases can indeed lead to positive outcomes. Companies in a number of recent cases have reached mediated agreements that include commitments to develop and improve human rights due diligence policies. In a 2014 case alleging human rights violations in connection with Formula One's Grand Prix races in Bahrain, the mediated agreement facilitated by the UK NCP included the first public commitment by Formula One to respect human rights in all operations and develop a human rights due diligence policy.<sup>11</sup> In a case against global dairy producer Arla Foods at the Danish NCP, the company promised to implement new due diligence in its global practice and to update its human rights policy.<sup>12</sup>

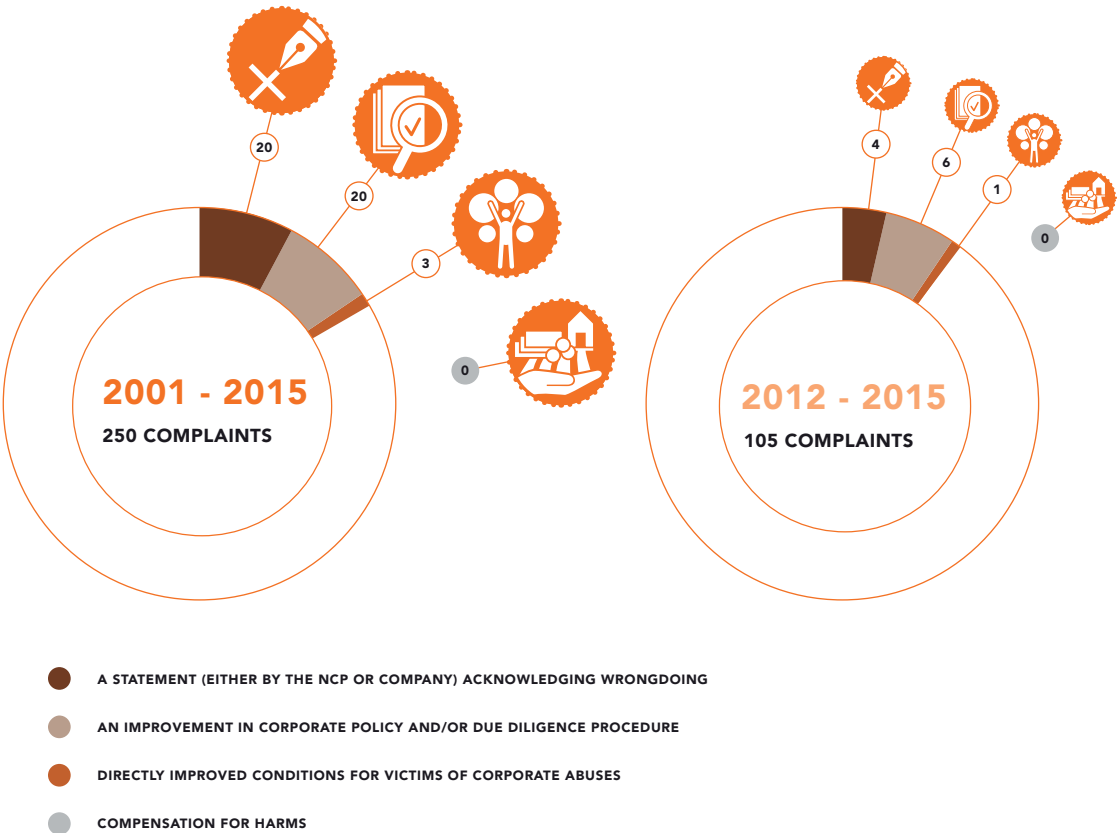
These forward-looking agreements bring with them a promise of improved corporate responsibility and attention to the human rights impacts of companies' operations. If well implemented, they may have a positive impact on Guidelines adherence and help to prevent future harms related to a company's business activities.

However, in cases that allege serious human rights, labour and environmental violations that have caused past or on-going harm, forward-looking agreements are necessary but not sufficient. In those cases, the company must discontinue the harmful activity and repair any damage that has already occurred. These three components—cessation of the violation, reparation of harm that has occurred, and adoption of measures to prevent future violations—must be present in order to be considered full remedy.

The NCP system has on occasion produced outcomes that provided some measure of remedy for the complainants. A 2012 case alleging labour rights abuses in the corn-seed operations of Dutch agricultural company Nidera led to concrete improvements to working conditions in the company's operations in Argentina.<sup>13</sup> In a case raising concerns about SOCO's oil exploration activities inside Virunga National Park, a UNESCO World Heritage Site, the company committed not to undertake any further oil exploration within the park unless UNESCO and the DRC government agree that such activities are not incompatible with its World Heritage status.<sup>14</sup> These two cases may be as close as the NCP system has come to facilitating remedy for on-going harms, but these results are few and far between and may be inadequate where reparations are needed for harms that have already accrued. This report takes a close look at NCPs' handling of complaints to discover why remedy remains so rare.

**BENEFICIAL OUTCOMES**

**COMPLAINTS FILED 2001 - 2015 | COMPLAINTS FILED 2012 - 2015**



The results required to facilitate remedy may vary in each case, based on the nature of a company's non-compliance and the harm that has been caused. Cases that fall short of full remedy may still provide some beneficial results. OECD Watch has identified four categories of beneficial results that could be considered to provide some measure of remedy, as shown in the graph above. Although on its own a statement of wrongdoing could not be considered remedy – and indeed, in 11 of the 20 cases where there was a statement of wrongdoing, there was no other result – it can contribute to a fuller understanding of the facts and a validation of the complainants' concerns. Improvement of corporate policies and due diligence procedures are results that are purely forward-looking, changes that will hopefully prevent future impacts but that do not address the harm raised in the current complaint. Results that directly benefit the complainant and lead to on-the-ground changes fall into the "improved conditions" category. However, even if the violation ceases and conditions improve, complainants may also be entitled to

compensation for harms that have already occurred. In addition to economic benefits, compensation could also include, *inter alia*, restoration of lands or resources that had been inappropriately taken from the complainant. NCPs are not expected to provide compensation themselves, but they can facilitate a process that leads to compensation being paid.

Of the 250 cases filed by communities, individuals and NGOs that are documented in OECD Watch's case database, only 35<sup>15</sup> (14%) have had some beneficial results that may have provided some measure of remedy (some cases fall into more than one category):

- A statement (either by the NCP or company) acknowledging wrongdoing: 20 cases<sup>16</sup> (8%)
- An improvement in corporate policy and/or due diligence procedure: 20 cases<sup>17</sup> (8%)
- Directly improved conditions for victims of corporate abuses: 3 cases<sup>18</sup> (1%)
- Compensation for harms: 0 cases (0%)

It is worth restating that over the past 15 years, **only one per cent of the 250 NCP complaints** filed by communities, individuals and NGOs **have resulted in an outcome that directly improved conditions for the victims of corporate misconduct**. It is also interesting to note that while the overall rate of cases being filed by communities, individuals and NGOs has increased since the 2011 update (with 103 cases filed between January 2012 and May 2015), the number of cases resulting in some measure of remedy has *not* increased. In fact, the rate of rejection of cases has actually increased since the update in 2012, with NCPs rejecting an astounding 52% of all cases filed since January 2012, compared to a 43% rejection rate over the full 15-year period (see graph page 13). The rate of remedy-related outcomes has also noticeably *decreased* since the update. Of the 103 cases filed by communities, individuals and NGOs since January 2012, only 10 (10%) have resulted in some sort of remedy-related outcome, as compared to almost 17% of the cases filed prior to 2012.

The 2012-2015 cases had the following beneficial results (some cases fall into more than one category):

- A statement (either by the NCP or company) acknowledging wrongdoing: 4 cases (4%)
- An improvement in corporate policy and/or due diligence procedure: 6 cases (6%)
- Directly improved conditions for victims of corporate abuses: 1 case (<1%)
- Compensation for harms: 0 cases (0%)





## Why the NCP system is failing to provide access to remedy & recommendations for improvement

National Contact Points were established to “further the effectiveness” of the OECD Guidelines and are expected to uphold the core criteria of visibility, accessibility, transparency and accountability as they carry out this mandate. The Guidelines’ Procedural Guidance also calls on NCPs to address complaints impartially, predictably, equitably, and in a manner that is compatible with the principles and standards of the Guidelines.<sup>19</sup>

OECD Watch’s analysis of the past 15 years of NCP performance indicates that poor performance on five of these eight effectiveness criteria has led to a failure to increase access to remedy for victims of corporate abuses. Of the four core criteria, **accessibility** is overwhelmingly the most problematic. There remain far too many barriers to accessing the Guidelines’ complaint mechanism, and there is an urgent need to focus on improving NCPs’ accessibility to potential complainants. Complainants also continue to experience many NCPs as lacking **impartiality**, either in their structure or their handling of complaints, and as favouring overly broad confidentiality requirements that interfere with the need for **transparency** in NCP processes. In addition, many NCPs do not follow the indicative timelines provided in the Procedural Guidance, detracting from the **predictability** of the complaint process. Finally, cases regularly lead to outcomes that are not **compatible with the Guidelines**.

In many areas, NCPs are handling similar scenarios in wildly different ways. While this lack of consistency and predictability is not positive for complainants, it has led to valuable insights into what strategies work well and should be adopted more broadly, and which practices hinder an NCP’s effectiveness in remedying corporate misconduct. As best practice emerges, these different practices must be reconciled to ensure that all NCPs are equally effective in resolving disputes between corporations and those adversely impacted by their activities. The Investment Committee’s role of issuing clarifications on the Guidelines is invaluable to achieve greater functional equivalence, and this section provides recommendations to hasten this process.

### 4.1 Accessibility

The principle of accessibility refers to the need for all members of the public to be able to easily access the NCP’s services. Along these lines, NCPs are expected to respond to all legitimate requests for information and to deal with complaints in an efficient and timely manner. Although accessibility is one of the core guiding criteria for NCPs, it is one of the areas in which NCPs have shown the most need for improvement. The OECD Guidelines complaint mechanism should be as accessible as possible, yet there are many serious hurdles that



complainants must overcome in order to file a complaint to an NCP. These obstacles range from developing technical knowledge and understanding of the OECD Guidelines to obtaining the considerable resources necessary to meet the high burden of proof demanded by some NCPs to document abuses and participate in the complaint process. In addition, some complainants even face reprisal from companies and local governments if they do file a complaint.

In many cases, NCPs are not helping to ease the burden of filing a complaint. Many NCPs require complainants to pay for the translation of key documents and/or the cost of traveling to mediation meetings at the NCP office or in another location. Moreover, NCPs too often add to the complainants' burden by creating additional barriers. In an alarming number of cases, NCPs apply unduly burdensome standards of proof or reject complaints for reasons not contemplated in the Procedural Guidance.

Taken as a whole, these patterns suggest that some NCPs are approaching the initial assessment phase by seeking out reasons to reject cases, rather than seeking to offer their good offices wherever there is a dispute between parties and legitimate allegations. NCPs have great potential to further the implementation of the Guidelines and promote corporate responsibility, but this potential is thwarted if NCPs do not offer their good offices to complainants with legitimate concerns.

Mediation is by its nature consensual, providing an opportunity for, but not requiring, parties to engage in a facilitated dialogue to resolve a dispute. While not all disputes are amenable to mediation, the parties themselves have the power to decide whether participating in a dialogue process will be useful. Where a dialogue will not be worthwhile, the mandate of NCPs to promote the implementation of the Guidelines requires them to undertake an analysis of whether the company met the Guidelines in that specific case. However, too often, NCPs miss this opportunity to further the Guidelines, and instead reject cases that they determine would not be amenable to mediation.

The remainder of this section highlights the key barriers that are unnecessarily but significantly reducing access to the NCP system. Each barrier is analysed, and a concrete recommendation for removing or diminishing the barrier is provided.

#### **4.1.1 NCP complaints are prohibitively expensive and sometimes dangerous for affected communities**

Although many communities and individuals harmed by corporate misconduct and the grassroots organisations supporting them have very limited financial means, NCPs frequently require them to pay for services that are a necessary part of the complaint process and should be provided by the mechanism itself, such as the translation of key documents. Some NCPs have also imposed strict requirements that all complainants travel to the NCP's home country, or another location, and pay for their own travel costs in order to participate in a mediation process. These hidden fees not only make the process more

burdensome for complainants, they may prevent those with limited resources from moving forward with their case.

For example, in a case brought by Thai and Filipino factory labour unions and NGOs against Swiss clothing company Triumph International, the Swiss NCP refused to hold meetings in Thailand or the Philippines and was also not willing to provide support to bring the victims to meetings in Switzerland or for translation of key documents. The NCP's final statement, which reflects the current practice of most NCPs, stated only that "the NCP is not in the position to provide any funds to the parties" and that "[a]ccording to its established practice, the NCP is holding its meetings in Switzerland."<sup>20</sup> By placing the burden of simple things like translations on victims of corporate abuses who have limited resources, NCPs discourage potential complainants from filing valid complaints and benefitting from the NCP's good offices.

On the other hand, some NCPs have done what is required to enable engagement by the parties and promote a successful mediation. In a case about Sjøvik's fish processing plant operations in the Western Sahara, the Norwegian NCP hired a consultant, at no expense to the parties, to provide guidance during the mediation process and address the imbalance of power between the parties.<sup>21</sup> Although the Norwegian NCP's process was less burdensome, it did not lead to effective results, as Sjøvik appears not to have implemented the agreement fully. The Dutch NCP was similarly willing to ease the complainants' burden in a case brought by a local community organisation in the Philippines against Shell. In that case, the Dutch NCP offered to host a mediation meeting between the parties in Manila, where the project was located. In the end, Shell Philippines obstructed the process and the mediation ultimately did not take place.<sup>22</sup>



### **G-STAR: THE DANGER OF REPRISALS** <sup>23</sup>

In a case alleging labour violations by an Indian supplier of G-Star clothing company, the Indian supplier responded to the NCP complaint by filing a criminal defamation lawsuit against Dutch NGOs supporting the case. Even before the NCP complaint was filed, local organisations working to document labour abuses reported being subject to harassment and attempted bribery, and the Indian supplier also sued them for defamation. In this particular case, the reprisal lawsuits appeared to have the unexpected effect of raising the profile of the case internationally – a former Dutch prime minister soon became involved to serve as a mediator, and through that process, the parties agreed to establish an ombudsman to resolve labour complaints. For complainants with fewer resources, however, lawsuits and other retaliatory actions may deal a crippling blow to their efforts to seek remedy, threaten their safety, and serve as a practical barrier to accessing the NCP.<sup>24</sup>

NCPs typically impose costs on complainants because they are themselves severely resource constrained. This is a problem that adhering governments must address, especially where resource constraints are so severe that they

prevent an NCP from effectively carrying out its duties. An NCP that does not have sufficient resources to genuinely provide its good offices to complainants in other countries may be doing more harm than good by merely creating the illusion of accountability.

However, even for NCPs with limited budgets, there may be creative solutions to address translation and mediation costs that will not unduly burden either the complainant or the NCP. For instance, NCPs may suggest bringing parties to the mediation table via videoconferencing in order to save on travel costs. While this solution will not be appropriate to every scenario, it may in some cases allow a mediation to proceed where it otherwise would have been infeasible.

## RECOMMENDATION

NCPs should lower the costs of accessing the mechanism wherever possible. They should cover the costs of necessary translation and hold mediation meetings in the location where the harm occurred, or find alternative ways to ease the burden of bringing a complaint. Adhering governments should ensure their NCPs are sufficiently staffed and resourced to allow them to cover these costs. Upon receiving a complaint, NCPs should discuss with complainants any potential security risks related to the complaint and what steps can be taken to mitigate those risks. NCPs should also communicate those risks to embassy and other relevant government authorities and solicit their assistance in protecting the security of complainants.

### 4.1.2 NCPs are insisting on excessively high standards of proof in order to accept a complaint

One of the most common frustrations that complainants face when bringing NCP cases is the application of an unreasonably high burden of proof at the initial assessment phase. NCPs have rejected 43 of the 250 (17%) cases filed by communities, individuals and NGOs because the NCP did not consider that the complainants had provided sufficient evidence of a breach of the Guidelines. The Procedural Guidance directs NCPs to determine whether a complaint raises a *bona fide* issue and to consider whether the issue is “material and substantiated.”<sup>25</sup> The Procedural Guidance does not define “substantiated,” which has led to widely varying interpretations by different NCPs. While many NCPs apply an interpretation that leads them to accept complaints that raise credible claims, others have used this language to require a level of certainty that is inappropriate and often impossible for complainants to meet.

In a case against Shell regarding its investment in the Sakhalin II integrated oil and gas complex, the Dutch NCP applied a heightened interpretation of the substantiation standard that implies that complainants must obtain a positive court ruling before the NCP will offer its good offices for complaints raising violations of domestic or international law. The NCP ultimately rejected the case, reasoning in part that the complainants failed to provide any court decisions to “substantiate” their claims under Russian and international law.<sup>26</sup>

This interpretation of substantiation creates such a high standard of proof that it in effect amounts to an exhaustion requirement – something that the Procedural Guidance never intended.

The NCP system can serve as a valuable alternative to litigation, but only if complainants are able to access the process without first obtaining a positive court ruling. Indeed, for some parties – including companies – the main value of the NCP system is its potential to resolve disputes without a lengthy and expensive court proceeding.



### EXCELLON RESOURCES: A STANDARD THAT LEAVES LITTLE ROOM FOR PRODUCTIVE MEDIATION <sup>27</sup>

In May 2012, a group of communal landowners in Mexico submitted a complaint to the Mexican NCP alleging human rights, environmental and labour violations related to Excellon Resources' La Platosa poly-metallic mine in Durango, Mexico. The Mexican NCP conducted an initial assessment and rejected every allegation based on an analysis that is out of line with the Procedural Guidance: instead of analysing whether the claims raised were substantiated, the NCP's decision turned on whether the facts that motivated the complaint had been "proven."<sup>28</sup>



In many places, the NCP's analysis relied on whether or not there was a formal decision by a government agency confirming the veracity of the facts asserted by the complainants. On the issue of water pollution caused by the mine, complainants had provided the results of independent tests from 2010 and 2011 conducted by the Universidad Autónoma Agraria and Agropecuario Regional, which showed that the mine's

wastewater had five times more arsenic than it should for human consumption and high levels of salt, making it dangerous even for agricultural purposes.<sup>29</sup> The NCP found the tests insufficient to prove the allegations, noting that they were "not conclusive or updated, and are not official."<sup>30</sup>

The Mexican NCP's conclusion that none of the concerns merited further consideration applied a standard of proof that is far above that which is required by the Guidelines. It is also a higher standard than that applied by other similar non-judicial grievance mechanisms, such as the Canadian Office of the Extractive Sector Corporate Social Responsibility Counsellor, which received a complaint on the same project but decided that the concerns were *bona fide* and substantiated.<sup>31</sup>

Even where the standard of proof does not amount to an exhaustion requirement, there are many other examples of evidentiary requirements that are too high to serve the needs of the NCP system. In the case against Excellon Resources (see case study page 25), the Mexican NCP rejected all of the allegations raised based on a “material and proven” standard that is notably higher than the Procedural Guidance’s substantiation standard. Moreover, in a number of cases, NCPs failed to ask the complainants for additional information or evidence in support of the allegations prior to rejecting cases for lack of substantiation.

On the other hand, the case against Gamma International (see case study opposite) shows how an NCP can use the tools and services at its disposal to encourage the resolution of disputes through a voluntary mediation or similar process. Rather than preventing the process from moving forward because the complainants were not able to present direct evidence of the company’s supply of surveillance technologies, the UK NCP nonetheless accepted the case and offered its good offices, encouraging the parties to meet to resolve the issue. Although the mediation ultimately failed, this case is still an example of an NCP serving a positive role to promote the Guidelines and encourage corporate responsibility.

The substantiation standard in the Procedural Guidance is intended to establish whether a complaint is *bona fide*, and should only require that the factual allegations be plausible. Dr. Roel Nieuwenkamp, Chair of the OECD Working Party for Responsible Business Conduct, has stated that the “material and substantiated” standard was intended to prevent frivolous complaints without setting an unreasonable threshold for offering good offices.<sup>32</sup> An inappropriately high standard of proof, especially if placed solely on the complainants, leaves little room for NCPs to fulfil their mission or to have any influence on corporate responsibility. If NCPs only accept allegations that have already been found true by a government authority or have similarly conclusive official documentation, the utility of the complaint process will be greatly reduced. Where complainants are able to obtain a positive court ruling, the ruling would often negate the need to resolve an issue through voluntary mediation.

## RECOMMENDATION

NCPs should maintain a reasonable standard of substantiation at the initial assessment phase, aimed at preventing fabricated or frivolous claims, while promoting the use of the NCP’s voluntary good offices wherever possible to resolve *bona fide* claims. The OECD Investment Committee and Working Party on Responsible Business Conduct should revise the Procedural Guidance to include a definition of “substantiated” that clarifies that this standard is meant to assess whether the factual allegations are plausible and that legalistic proof of the claims raised is not necessary.

## **GAMMA & TROVICOR: TWO NCPs, TWO STANDARDS FOR SUBSTANTIATION<sup>33</sup>**



In February 2013, Bahraini and international organisations filed simultaneous complaints to the UK and German NCPs alleging that the government of Bahrain used surveillance equipment provided by Gamma International UK Ltd and Trovicor GmbH to target pro-democracy activists. The complaint against Gamma showed that malware sent to Bahraini activists had features similar to those Gamma advertised and linked to trade names and sites registered to Gamma. The complaint against Trovicor cited statements from the company's predecessor and from Trovicor employees indicating its involvement in Bahrain. Both complaints claimed that the companies did not have an adequate human rights policy in place and that they should have known that their products were likely to be used in human rights violations by the government of Bahrain.

Both Gamma and Trovicor refused to confirm whether their products were being used in Bahrain and the complainants were not able to present direct evidence that the surveillance equipment was purchased from those companies. The UK NCP nonetheless accepted the complaint against Gamma, finding that "the evidence provided suggests that the company's product may have been used against Bahraini activists" and that there "may be a relationship" between Gamma and the impacts in Bahrain.<sup>34</sup> The company agreed to engage in mediation, but the parties did not reach an agreement. In its final statement, the UK NCP addressed the uncertainty surrounding the claims, yet it still found that Gamma violated the Guidelines by failing to take steps to identify, prevent and mitigate potential human rights violations from its products.

The Trovicor case proceeded in a vastly different manner. In contrast to the UK NCP, the German NCP rejected the allegations regarding the company's role in human rights abuses in Bahrain, accepting only those related to Trovicor's human rights policy. It argued that the company's role in the abuses was not substantiated and that it was "impossible to determine" whether the company was doing business with Bahrain because it had refused to provide any information about its business relations.<sup>35</sup>

### **4.1.3 NCPs are employing additional criteria for the initial assessment**

Under the Procedural Guidance, the purpose of the initial assessment phase is to determine whether a complaint merits further examination and whether it raises a bona fide issue that is relevant to the implementation of the Guidelines. The Commentary to the Procedural Guidance lists six specific criteria that NCPs should take into account in the initial assessment.<sup>36</sup> Despite these clear instructions, there are numerous examples in which initial assessments consider additional factors that are unrelated to the criteria listed in the Procedural Guidance. In addition to undermining accessibility, this trend can also damage the predictability and transparency of the process and make it more difficult for complainants to determine in advance whether they have a viable case.<sup>37</sup>

In one common example, a number of NCPs have rejected cases based on the refusal of one of the parties to participate in mediation. In a case brought by the Lead Education and Abatement Design (LEAD) Group against Innospec, the US NCP determined that the issues raised merited further consideration and stated that it would have been prepared to offer its good offices, but ultimately decided to reject the complaint because Innospec had refused to engage in mediation.<sup>38</sup>

In other cases, although NCPs explain that their decision to reject a complaint is based on a variety of considerations, they note the company's refusal to participate in mediation as a determining factor. In the complaint communal landowners filed against Excellon Resources (see case study page 25), the Mexican NCP cited Excellon's unwillingness to participate in any possible NCP-facilitated mediation as a reason for rejecting the case, in addition to its finding that the issues raised were not substantiated.

NO  
REMEDY

### **POSCO: WHEN THE GUIDELINES REPRESENT A HIGHER STANDARD THAN DOMESTIC LAW** <sup>39</sup>

In October 2012, the Korean NCP received a complaint about a proposed iron mine and steel plant that South Korean steel company POSCO plans to develop in Orissa, India. The complaint claimed that the plant and related infrastructure will displace an estimated 20,000 people, but that POSCO had not conducted meaningful consultations with all affected communities and had not conducted adequate due diligence to assess the project's human rights and environmental impacts.



The Korean NCP conducted an initial assessment and decided to reject the case. While the NCP claimed that the decision turned on a finding that there was no link to the company's activities, the explanation did not support that finding, but instead argued that the issues raised relate to actions by the provincial government.<sup>40</sup> The NCP is presumably referring to the fact that the provincial government had approved POSCO's environmental and socio-economic

assessments. The implication of the NCP's statement is that because the assessments met the local government's standards, they were in compliance with the Guidelines.

The Procedural Guidance did not intend for NCPs to exclude cases simply because a company's actions have been found to comply with domestic laws. The Guidelines clearly state that they apply to corporate conduct even when a company is operating in a country whose laws provide a lower standard of conduct. In language that the Korean NCP's decision actually quotes, the Guidelines state that where there is a conflict between a state's law and the Guidelines, enterprises should find ways to honour

the principles of the Guidelines “to the fullest extent which does not place them in violation of domestic law.”<sup>41</sup> In the context of this case, POSCO therefore has a duty under the Guidelines to prevent and reduce negative impacts from its operations, even if this means acting beyond the minimum requirements of Indian law.

Perhaps worse than considering the company’s refusal to mediate as a basis for deciding whether to offer their good offices, in some instances NCPs have rejected cases based on reasoning that conflicts with the purpose of the Guidelines. In the case brought against Excellon Resources (see case study page 25), the Mexican NCP noted that allegations regarding the company’s environmental protection and due diligence efforts “are not susceptible to dialogue between the parties,” indicating that these matters should instead be left to local authorities and “could hardly be resolved in a body such as an NCP.”<sup>42</sup>

This reasoning appears to misconstrue and unnecessarily limit the purpose of the NCP system. The NCP process is intended as a forum to resolve any issue related to the implementation of the Guidelines, and NCPs should therefore be empowered to facilitate mediations about all issues that are covered under the Guidelines. Further, the parties to a specific case, rather than the NCP, should have the power to determine whether issues raised are susceptible to mediation. Facilitated mediation is flexible enough to be capable of addressing many different types of issues and can produce any solution that the parties agree on. By rejecting certain allegations based on conclusory statements that those matters were not susceptible to dialogue, the Mexican NCP unnecessarily limited its own functionality and blocked the complainants from accessing the complaint process.

Another important purpose of the NCP system is to provide an opportunity for companies and affected parties to come together to address issues that the complainants feel are not being adequately resolved by domestic law. The additional criteria that the Korean NCP applied to its initial assessment in the POSCO case (see case study opposite) not only misconstrued a central principle of the applicability of the Guidelines, but also removed the NCP’s ability to provide such a forum. Similarly, the Mexican NCP in the Excellon Resources case (see case study page 25) imposed limitations on its own functionality by blocking issues from the complaint process for reasons that have no basis in the Guidelines.

## RECOMMENDATION

The Procedural Guidance should be amended to clarify that NCPs should not add additional criteria when making initial assessments. The initial assessment should focus on the criteria presented in the Procedural Guidance, or similar criteria that meet the same purpose and set a similar standard, in line with the goal of functional equivalence.



#### 4.1.4 NCPs are rejecting allegations related to future harms

When the OECD Guidelines were updated in 2011, a key outcome was the consensus between adhering governments that one important strength of the NCP approach is that it can prevent conflicts from escalating by bringing parties together in mediations or conciliation processes. New due diligence and human rights-related provisions were also added to the Guidelines to encourage enterprises to assess the potential impacts and risks associated with projects.<sup>43</sup> Despite this explicit reference to potential harms, OECD Watch has repeatedly witnessed NCPs refusing to accept allegations related to the potential impacts of a company's planned actions.

In a case against GCM Resources regarding the planned Phulbari coal mine (see case study below), the UK NCP set a high bar for determining that issues raised in the complaint merited further consideration. Although it admitted that there were potential adverse impacts from the mine, it took the company's claim that it would avoid or mitigate those harms at face value and rejected all allegations related to future harms. The UK NCP applied a stringent "inevitability" standard and seemed to ignore evidence challenging the company's promises of mitigation, while also refusing to conduct an independent investigation on the adequacy of the company's due diligence. At the very least, the NCP should not have rejected the allegations outright at the initial assessment phase, but given the parties a chance to negotiate on the issues and saved its judgement for the final statement.



#### GCM RESOURCES: REFUSING TO CONSIDER FUTURE HARMS<sup>44</sup>

In December 2012, directly affected communities and NGOs filed a complaint to the UK NCP regarding GCM Resources' proposed Phulbari coal mine in Bangladesh. The planned open-pit mine and related infrastructure were expected to acquire 14,660 acres of fertile agricultural land, directly displacing an estimated 40,000 to 130,000 people.<sup>45</sup> The complaint alleged inadequate due diligence and consultation, as well as claims related to involuntary resettlement and impacts to local water sources, ecosystems, housing, food and livelihoods that the mine would cause. An official statement from seven UN experts bolstered these allegations, requesting that the government of Bangladesh halt the development of the mine "because of the massive disruptions it is expected to cause" and the threat it poses to the fundamental human rights to food and water, and indigenous rights.<sup>46</sup>



The NCP found that the evidence established potential adverse impacts but rejected consideration of all allegations related to these impacts, claiming that an assessment of the mine's potential impacts was outside of its remit. The NCP assessed only whether the company appeared to have properly conducted its own impact assessment and

explicitly refused to consider evidence of the mine's impacts from independent experts or any other source.<sup>47</sup>

Complainants had argued that the company's mitigation measures would not adequately address potential impacts and some would do more harm than good, such as the plan to divert two rivers to counteract the depletion of the local water table. The NCP's assessment does not analyse these points. Both parties had also requested that the NCP conduct an independent assessment of the mine and its impacts, but the NCP refused, finding this to be "outside the remit and expertise of the NCP."<sup>48</sup>

The NCP had, however, accepted allegations related to human rights due diligence and ultimately recommended that the company carry out a new human rights impact assessment. GCM is expected to submit a follow up report on its progress towards this recommendation in mid-2015.

In contrast, in a 2008 case against Vedanta (see case study below), the UK NCP accepted claims related to anticipated harms from a mine project without raising any concerns. The difference between these two cases may be the degree to which the company assessed and planned to mitigate the potential impacts, as well as its level of engagement in the process more generally. In Vedanta, the UK NCP seemed to seriously fault the company for its failure to show that it had assessed and planned to mitigate future impacts. However, even where the company has some plan to mitigate potential harms, such as in GMC Resources, NCPs should consider evidence presented by complainants to determine whether the mitigation measures are likely to fully address the impacts. Evidence of gross inadequacies in a mitigation plan can be the basis of a finding that the company did not, in fact, meet the Guidelines' due diligence requirements.

#### **VEDANTA: NON-COMPLIANCE FINDING LEADS TO POSITIVE RESULTS<sup>49</sup>**

In 2008, Survival International filed a complaint against Vedanta Resources regarding impacts from its open pit bauxite mine that endangered a mountain held sacred by local communities in Orissa, India. The complaint was filed to the UK NCP and alleged that Vedanta failed to consult with local indigenous people and otherwise violated their rights. The NCP accepted all allegations, finding that a clear difference in understanding existed between the parties that would potentially benefit from the NCP's independent platform for dialogue.<sup>50</sup> The company submitted a statement denying all of the claims against it and refused to participate in a mediation process.

In its final statement, the UK NCP found that Vedanta had not engaged in adequate consultations with local indigenous people and, because Vedanta did not present any evidence that it had assessed the mine's impacts on local people, that the company



had not taken adequate steps to respect the rights and freedoms of those affected by its activities. The NCP was therefore able to conclude that the company breached the Guidelines provisions regarding the rights of the local indigenous communities without needing to assess the future impacts of the project.

The company ignored the NCP's recommendations to change its practices and rejected the findings at the outset. However, the NCP's compliance determinations did play a role in convincing some shareholders to divest from the company,<sup>51</sup> as well as eventually encouraging internal policy changes within Vedanta. The dispute

was ultimately resolved through a 2013 court decision that gave local communities the power to decide whether the mining project could proceed.<sup>52</sup>

NCPs and adhering governments often emphasise the “forward looking” nature of the OECD Guidelines, and in many respects the whole process of due diligence is aimed at identifying potential impacts and avoiding them before they occur. It is then highly counterintuitive for an NCP to disallow consideration of potential impacts and mitigation measures in a complaint process.

There are also strong practical arguments in favour of allowing consideration of potential impacts. Complaints filed before the likely or inevitable impacts of a project have begun have the greatest potential to avoid harm and bring a company's actions in line with the Guidelines. By raising grievances before a planned project has been implemented, complainants have a better chance of resolving problems before they become more serious and intractable issues. This is in part because companies may find it easier and more cost-effective to adjust project plans before they have begun implementing them. These factors can enable NCPs to assist complainants and companies more effectively to find mutually beneficial solutions.

## RECOMMENDATION

The Procedural Guidance should include a clear statement that NCPs should accept allegations of future harms that are plausible if the company proceeds with its planned course of action. NCPs should consider credible evidence from all parties when determining whether this standard is met.

## 4.2 Impartiality

NCPs are expected to act impartially in the resolution of each complaint,<sup>53</sup> meaning that they should not show bias towards either party to a case, and should be capable of acting and making decisions independently from any outside influence. The perception of impartiality can be just as critical to an NCP's success as actual impartiality, and can impact an NCP's credibility, the level of trust that stakeholders have in the system, and the likelihood that potential complainants will use the system.

### 4.2.1 Some NCP structures contribute to a (perceived) lack of independence

The Procedural Guidance permits governments to organise and locate their NCPs in a number of different ways, including by involving representatives from one or more ministries or using an interagency group structure, with or without formal participation by business, labour and other stakeholder groups. Experience with different organisational structures has proven that all options are not equal. Certain structures can play an important role in discouraging actual or perceived bias and promoting meaningful case outcomes.

The majority of NCPs are strictly monopartite, meaning they are composed of representatives of a single ministry. This structure may result in simpler decision-making processes, since only the interests of one ministry are represented. However, for this same reason, this structure is most vulnerable to problems with lack of independence and perceptions of bias. Bias concerns arise particularly when the ministry in which the NCP is housed is responsible for promoting business interests. Examples of monopartite NCPs are: Argentina, Australia, Austria, Chile, Colombia, Egypt, Estonia, Greece, Hungary, Iceland, Israel, Italy, Jordan, Mexico, New Zealand, Peru, Poland, Slovak Republic, Spain, Turkey and the US.<sup>54</sup>

Interagency NCPs are composed of representatives from more than one government ministry, meaning that more viewpoints are theoretically represented in the NCP's decision-making. However, interagency NCPs may still be single-partite, meaning that while they include different representatives from within the government, external stakeholder groups are not represented within the NCP. Examples of interagency NCPs include: Brazil, Canada, Germany, Japan, Morocco, Portugal, Slovenia, and Switzerland.<sup>55</sup>

Multipartite NCPs are composed of representatives from one or more government ministries as well as representatives from business associations, trade unions and/or NGOs. In theory, multipartite NCPs should be less prone to bias because they involve input from multiple stakeholder groups with different interests, and are therefore less likely to be influenced by any one party. The French NCP, for example, has successfully adopted this model, with four government ministries, six labour groups and one business group represented in its membership.<sup>56</sup> However, where multipartite NCPs have disproportionate representation by government ministries while other stakeholder groups represent only a small minority of the NCP's staff, then

the influence of external stakeholders may not be enough to counteract any perceived bias or capture by particular government interests.

Examples of tripartite NCPs (involving representatives of business and trade unions) are Belgium, Latvia, Sweden and Tunisia, in addition to France, mentioned above. The only quadripartite NCPs (involving NGO representatives as well) are the Finnish and Czech NCPs.<sup>57</sup>

Independent expert bodies are NCPs that include independent experts as members of the NCP. These structures can be effective, so long as the experts are selected through an open, transparent and impartial process. Norway, the Netherlands and Denmark are all structured in this way. After undergoing a restructuring in 2014, the Korean NCP now also appoints experts to participate in the NCP as members, although the selection process has been criticised for not allowing sufficient involvement by civil society and trade unions. The chosen individuals have close ties to the government, which has led to questions regarding their impartiality.<sup>58</sup>

The UK has a structure that is unique among its peers and which has helped to create a degree of independence. The NCP is based in the Department of Business but it has an inter-departmental steering board with four external members. The steering board is mandated to provide advice, oversee the effectiveness of the NCP and review decisions taken by the UK NCP to ensure that the procedures are followed.<sup>59</sup>

Oversight bodies such as the UK's steering board can be a useful way to insert additional accountability into the NCP's decision-making process, but boards are only a positive element when they are selected through an open, transparent process. Further, steering boards should have the authority to review NCP decisions in order to have a real impact on the NCP's accountability and performance.

As a supplement to their official structure, many NCPs have stakeholder advisory boards. Stakeholder advisory boards are also a way to promote an NCP's consideration of diverse viewpoints, but these typically do not have the authority to take part in decisions regarding cases. Because advisory boards cannot influence the NCP's handling of complaints, they often do not have a noticeable impact on the NCP's performance and independence. Advisory boards should be used to enhance NCP functioning, but should not be considered a replacement for independent, multi-stakeholder governance structures.

It is important to note that while the structure of an NCP can influence an NCP's ability to function independently and free from bias, structure is by no means determinative of an NCP's success. NCPs with strong organisational structures may nonetheless have difficulty acting impartially for a variety of other reasons, while even NCPs with relatively weak structures may have varying degrees of success based on factors specific to individual country contexts. Nonetheless, statistical trends do indicate that structure plays an important role in the success of an NCP: 27 of

the 35 (77%) cases OECD Watch considers to have some element of remedy-related outcome were produced by NCPs that are comprised of independent expert bodies, have a balanced tripartite structure, or have a multi-stakeholder oversight body as part of their governance structure (UK 11 cases, France 6, Netherlands 4, Norway 4, Belgium 1, Denmark 1). These findings suggest that it is worthwhile to promote more independent and impartial structures among all NCPs.

## RECOMMENDATION

NCPs should be structured to promote impartiality. The Procedural Guidance should explicitly state a preference for an independent expert body and a steering board charged with oversight. Experts should be selected through an open, transparent and impartial process. The board should be composed of prominent independent individuals and have equal representation by government, NGOs, labour and business groups.

### 4.2.2 NCPs are basing decisions on information that has not been shared with both parties

Even NCPs that are structured to ensure accountability to multiple parties with diverse interests can fall prey to bias during their handling of complaints. Bias can be difficult to confirm in single cases, but more obvious when observing patterns of an NCP's treatment of complaints. However, even in single cases, there are some instances of apparent bias too obvious to ignore. In a case concerning the Shwe natural gas project in Burma, the Korean NCP summarily dismissed the complaint in an initial assessment that adopted nearly word-for-word every opinion expressed in the company's response.<sup>60</sup> Such a wholesale adoption of the company's position, without equal treatment of the claims raised in the complaint, constituted a failure of impartiality that completely discredits the NCP as a functioning grievance mechanism.

In a case concerning the highly controversial Xayaburi hydroelectric dam on the Mekong River (see case study page 36), the Finnish NCP based its final statement in large part on the company's confidential response to the complaint, which was withheld from the complainants. The NCP's inequitable procedure in this case produced unfair results, as the complainants had no opportunity to rebut the company's claims or even have clarity on what arguments the company was making in response to the complaint. The decision generated broad criticism and has damaged the NCP's credibility.

Contrast this inequitable handling of information in the Xayaburi case with best practice that came out of the UK NCP Steering Board's review of the 2003 British Petroleum (BP) Baku-Tbilisi-Ceyhan (BTC) oil pipeline case. After several years of failed mediation attempts, the UK NCP closed the case with an August 2007 final statement that heavily relied on information from BP, which was not shared with the complainants. The complainants asked the UK

NCP's Steering Board to review the fairness of this decision, and the NCP was subsequently forced to acknowledge that it had acted unfairly and retract its final statement. The Steering Board's review confirmed the NCP's procedural failures and urged the NCP to issue a new final statement based only on information available to both parties. Following the Steering Board's review, BP agreed to share its previously undisclosed response with the complainants, and in March 2011, the UK NCP issued a revised final statement on the case, determining that BP had breached the Guidelines by failing to properly consult impacted communities along the pipeline route. The Steering Board's decision supported the practice of sharing any statement from one party with the other party, and found that where a document or statement from one party cannot be shared with both parties, the NCP may need to set aside that information to ensure fairness.<sup>61</sup>

## **PÖYRY GROUP: DECISIONS BASED IN SECRECY** <sup>62</sup>



In a case against Finnish consulting firm Pöyry Group, complainants alleged that the firm's advice to the Government of Laos regarding the planned Xayaburi hydroelectric dam was in breach of the Guidelines. The complaint raised concerns that the proposed dam would have serious impacts along the Mekong River, flooding community land and endangering their incomes and food security. It alleged that Pöyry did not conduct adequate due diligence and that its services to Laos undermined established cooperative regional processes on the use of Mekong River water resources.<sup>63</sup>

Scientists, experts, NGOs and neighbouring countries that will be affected by the dam's downstream impacts have all called for suspension of the project pending further research. Nonetheless, the Government of Laos decided to proceed with construction of the project, relying on the advice of Pöyry to justify its decision.

During the NCP process, Pöyry demanded that its entire response to the complaint be treated as confidential and withheld from complainants. The NCP acquiesced to this demand and did not share the response with complainants nor give them an opportunity to respond to its claims, yet it based its final statement in large part on the contents of Pöyry's response.

The project is now more than 40% complete despite on-going lack of agreement by regional decision-makers and representatives of neighbouring affected countries. The final project design still has not been made public.<sup>64</sup>

## **RECOMMENDATION**

NCPs should adhere to the requirement of impartiality by providing unbiased services and equal treatment to all parties. To this end, any information NCPs rely on to formulate initial assessments and final statements should be available to both parties.

### 4.3 Transparency and Predictability

The Procedural Guidance incorporates the principle of transparency as one of the core criteria that guide NCP functioning. It provides that the activities of NCPs should be transparent, yet directs NCPs to strike a balance between the importance of transparency and the need for confidentiality.<sup>65</sup> The ideal balance between these two competing principles has been the subject of vigorous debate. Transparency is critical to the credibility of the system, but confidentiality may be an important factor to enable open communication during mediation proceedings. In addition, the need to guard the identity of certain individuals and protect sensitive business information may outweigh the general interest in transparency in specific circumstances.

NCPs are further instructed to ensure predictability by providing clear information to the public on their role in resolving complaints, including information on the stages of the complaint process and the timeframes that apply to each stage. A predictable complaint process can benefit all parties, allowing them to decide whether to participate in mediation with full information on what is involved. A time-bound mediation stage can increase the effectiveness of the dialogue.

#### 4.3.1 NCPs are applying overly broad confidentiality requirements

The principles of confidentiality and transparency need not be incompatible, as long as the rules and exceptions remain clearly defined. However, it is important to ensure that confidentiality requirements do not become so broad that they destroy any commitment to transparency. Some NCPs impose such strict confidentiality requirements that they seem to do just that.

The US NCP, for example, requires complete confidentiality regarding all communications with the NCP and between the parties, requiring complainants to keep secret even the contents of their own complaint.<sup>66</sup> Some NCPs, including the US, do not publish any information about cases that have been filed or their status while the complaint process is ongoing. In other instances, final statements are not even sent to complainants, let alone made publicly available.<sup>67</sup> These policies of secrecy greatly hinder the transparency of the system as a whole and may damage an NCP's credibility and discourage potential complainants from using the complaint process.

Further, the 2011 update to the Guidelines also added language encouraging "good faith" behaviour by the parties by, among other things, "maintaining confidentiality where appropriate."<sup>68</sup> This language, together with the unclear balance between the need for transparency and confidentiality, have been used to discourage parties from making any reference to the NCP process in media statements, regardless of whether those statements reveal confidential information. In past cases, NCPs have accepted companies' unreasonable confidentiality requirements and have threatened to dismiss complaints if complainants make any public statements about the case.



Although the substance of a mediation process must remain confidential in order to promote openness between the parties, experience has shown that outside media work can be an important way to bring parties to the mediation table, thereby actually helping NCPs to do their job successfully. Public exposure can level the playing field between the parties and raise the stakes in a case, thereby providing parties with an additional incentive to engage in the process and work constructively toward swift resolution. In a case brought by WWF against SOCO (see case study below), WWF has maintained that the company's decision to participate in mediation and move quickly toward a positive outcome was in part due to the public pressure that WWF was able to exert on the company during the complaint process.<sup>69</sup>

In cases like the one against SOCO, disclosing the filing of the complaint, its allegations, and its acceptance by the NCP do not breach the Guidelines' confidentiality requirements and can have a positive impact on the case's swift resolution. Where these strategies do not interfere with the need to protect sensitive information and keep information exchanged during mediation proceedings private, NCPs should accept them as a way to raise awareness, overcome power imbalances, and increase pressure on the company to resolve problems. Further, transparency on objective, procedural elements of a case, such as the filing of complaints and their status, is crucial to maintain the legitimacy and effectiveness of NCPs.

### **SOCO: A MEDIATED OUTCOME AS PART OF A WIDE CAMPAIGN<sup>70</sup>**



In October 2013, WWF filed a complaint to the UK NCP with the main aim to stop SOCO's oil exploration activities in Virunga National Park, a World Heritage Site in the Democratic Republic of Congo. The decision to file a complaint to the NCP was part of a larger campaign that included direct engagement with the company and governments and raising the public profile of the case through media outreach.



The mediation facilitated by the UK NCP resulted in an agreement and joint statement by the parties. SOCO agreed to cease its operations and not to undertake 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. It also committed not to conduct any operations in any other World Heritage site.<sup>71</sup>

The WWF-SOCO agreement represents the first time a company has agreed to halt operations during NCP-facilitated mediation. Despite the agreement, however, SOCO has yet to relinquish its operating permits.



## RECOMMENDATION

NCPs should narrowly define and interpret the "good faith" requirement to preclude only the disclosure of strictly confidential business information and not public disclosure of the existence, nature, and status of the complaint, as long as those disclosures are not materially false or misleading. The Procedural Guidance should also direct NCPs to keep a case registry and publish documents such as initial assessments, final statements and follow up reports for all cases.

### 4.3.2 NCPs are flaunting the indicative timelines provided in the Procedural Guidance

The Procedural Guidance provides NCPs with indicative timeframes to handle complaints. As a general principle, NCPs should strive to conclude cases within twelve months after the receipt of a complaint. Although the particular circumstances of a case may require more time, in many cases NCPs' handling of complaints far exceeds a reasonable timeframe and no justification is given for the delay, thereby severely impeding the predictability of the complaint process.

The Procedural Guidance suggests that NCPs should seek to conclude the initial assessment stage within three months.<sup>72</sup> This suggested timeframe is rarely met, and in some instances the amount of time NCPs take to decide on admissibility has approached the absurd. In a case about construction materials supplied to build the Occupied Palestine Territories Separation Wall (see case study opposite), the Ireland-Palestine Solidarity Campaign has been awaiting an initial assessment by the Irish NCP for more than four years. The Brazilian and Australian NCPs have also imposed excessively long delays at the initial assessment stage in cases filed against garment retailer C&A (two years)<sup>73</sup> and security contractor G4S (eight months).<sup>74</sup>

No specific timeframe is offered for the provision of an NCP's good offices after it has accepted the complaint, but the Procedural Guidance suggests that NCPs facilitate the resolution of the issues raised in the complaint in a timely manner and establish reasonable timeframes to come to a resolution.<sup>75</sup> Of the 90 cases filed by individuals, communities and NGOs that have been accepted for further consideration by NCPs, only one-third were concluded within one year. In some extreme cases, NCPs have taken many years to conclude a complaint. Most distressing is the case against Toyota Motor Philippines Corporation for labour rights violations in the Philippines, in which the Japanese NCP took six years to decide on admissibility of the complaint. Now, eleven years after the complaint has been filed, the NCP has still not moved the case forward. OECD Watch considers this case and at least eleven other complaints as being 'blocked' by NCPs because of the unreasonable delays in the complaint process, despite complainants' repeated requests to move the cases forward.

The Procedural Guidance's timeframe of three months for issuing final statements<sup>76</sup> has likewise not been followed. For example, an indigenous reindeer-herding collective in Sweden who raised concerns about impacts on their traditional livelihoods has currently been awaiting the Norwegian NCP's final statement on their case for more than six months.

As confirmed by both complainant and company representatives that have engaged in the complaint process, more predictability regarding the complaint process would be beneficial.<sup>77</sup> A clear and agreed timeframe would enable the parties to effectively prepare for each meeting, ensure that the dialogue remains effective, and lessen the possibility that the process may be unduly influenced by outside factors or by pressure from either of the parties.

## CRH: DELAYS SO EXTREME THEY BLOCK THE COMPLAINT<sup>78</sup>



In its complaint filed with the Irish NCP in May 2011, the Ireland-Palestine Solidarity Campaign (IPSC) alleges that CRH, through its jointly owned subsidiary Nesher Cement Enterprises, has breached the Guidelines by supplying cement for the construction of the much criticised Separation Wall in the Occupied Palestinian Territories. Four years later, in June 2015, the Irish NCP has failed to even issue an initial assessment.

According to IPSC's account, in the four years that it has been waiting for the outcome of the initial assessment, it has repeatedly requested the NCP and the Irish government to move the case forward. The NCP has promised to issue an initial assessment on multiple occasions, but has consistently failed to do so. CRH has challenged the NCP's authority to handle the case but has not provided a substantive response to the complaint. In the spring of 2014, in response to concerns raised by CRH, the Irish Attorney General was tasked with assessing whether the NCP would be the appropriate institution to investigate the complaint. No progress has been made on the case since.

## RECOMMENDATION

NCPs must heed the indicative timelines in the Procedural Guidance. Where NCPs cannot meet the indicative timelines, the Procedural Guidance should require them to communicate this clearly to all parties and provide an explanation of why the timeline cannot be met and a new proposed timeline.

### 4.4 Compatibility with the Guidelines

The Procedural Guidance instructs NCPs to resolve cases "in a manner that is compatible with the principles and standards of the Guidelines."<sup>79</sup> This phrase must be read in the context of the purpose of NCPs: to further the effectiveness of the Guidelines<sup>80</sup> by helping to resolve disputes arising from corporate non-compliance with the Guidelines. When cases regularly fail to achieve outcomes that affect a change in corporate behaviour or create a situation in which the OECD Guidelines are upheld, NCPs do not meet this stated aim.

#### 4.4.1 An insufficient number of NCPs are committed to making determinations of non-compliance with the Guidelines when mediation fails

In cases where the parties do not agree to participate in mediation, or where a mediated agreement is not reached, the most effective NCPs issue determinations of non-compliance with the Guidelines as part of their final statements. However, many NCPs refuse to make such determinations. While in some cases a determination may not be possible because of insufficient

evidence, many complaint processes end without a final determination even where the available evidence would have supported one. In many instances, NCPs avoid any analysis of the merits of a case whatsoever in their final statements. Moreover, some NCPs seem to have a general practice of not making such determinations, regardless of the strength of the allegations against the company and the evidence presented.

By carrying out a full analysis of the issues underlying a dispute and making a final determination on a company's compliance with the Guidelines, an NCP can assist with broader efforts the parties may undertake to resolve the matter. In a case regarding Shell's Pandacan oil depot (see case study opposite), the Dutch NCP's attempts to get the parties together for mediation failed when the company refused to discuss the primary issue raised in the complaint. Nonetheless, the NCP proceeded with a field visit to the project site and published a final statement with a thorough analysis of the company's Guidelines compliance. While this public statement of the company's compliance with the Guidelines did not have an immediate or direct effect on the resolution of the dispute, it did play a supportive role in helping the parties to reach an ultimate solution through other strategies pursued in parallel to the NCP complaint process.

In a case regarding Vedanta Resources' planned open pit bauxite mine (see case study page 31), the UK NCP issued a decision with strong findings of non-compliance. Although the decision did not directly lead to any change in the company's behaviour on the ground, it played a role in convincing several shareholders to put pressure on the company to improve its human rights policy, which it ultimately did.<sup>81</sup>

In order to make meaningful findings of a company's compliance or non-compliance with the Guidelines, an NCP should undertake an investigation into the allegations presented in the complaint. This investigation can be carried out in different ways depending on the needs of the case, but a site visit to the location where the project is being carried out and where the alleged harm occurred is often the best, and sometimes the only, way to gain a full understanding of the case. As one company representative indicated, part of the value that an NCP can bring to a case is to investigate the facts to actively try to identify areas where agreement between the parties might be possible, especially when the parties themselves may be unable or unwilling to see that potential.<sup>82</sup>

## SHELL PANDACAN: INVESTIGATING AND NAMING COMPLIANCE VIOLATIONS<sup>83</sup>



In 2006, a local community organisation brought a case to the Dutch NCP alleging that Shell withheld information from local communities regarding the environmental, health and safety impacts of its Pandacan oil depot in Manila, Philippines. The NCP attempted to bring the parties together for mediation, but was forced to close the case when the parties could not agree on the terms and scope of the process. The company refused to discuss the option of relocating its oil depot, which was the core issue in the complaint, and complainants did not wish to proceed with a discussion that did not include that matter.

However, the Dutch NCP did not end its efforts there. Instead, it undertook a field visit to the project site to gather information about the underlying facts, using the information to produce a final statement that included a thorough analysis of



each allegation raised in the complaint and corresponding determinations, as well as a set of recommendations to improve the company's adherence to the Guidelines. The NCP found, among other things, that Shell had violated Guidelines provisions related to disclosure of information and consultation with affected stakeholders and recommended that Shell would need to clarify and reiterate its plan to relocate its oil depot in order to resolve the dispute.

Nearly nine years after the complaint was filed with the NCP, complainants have now obtained a court decision, confirming that Shell must relocate its oil depot by January 2016. Complainants have stated that the NCP process helped to shape the court case that ultimately resolved the issue.<sup>84</sup> Although a mediated resolution through the NCP process may have been less antagonistic and saved both parties time and resources, it is striking that the NCP did ultimately contribute to resolving the dispute.

A general policy of making compliance determinations in final statements wherever relevant can also create leverage to persuade companies to resolve an issue through a mediated dialogue. The NCP-facilitated dialogue process has some notable benefits, including the possibility of resolving disputes faster and with fewer resources than a traditional court case would require, yet the voluntary nature of the dialogue process means that an NCP has more options to resolve a dispute when the parties agree to participate in mediation. To maximise effectiveness, NCPs should take advantage of every opportunity to encourage parties to engage.

Evidence from a variety of sources demonstrates the value of compliance determinations. In the 2014 Peer Review of the Norwegian NCP, several stakeholders noted that the NCP's practice of issuing compliance determinations provides it with leverage to encourage parties to engage in the NCP-facilitated dialogue process.<sup>85</sup> Corporations that were party to NCP complaints have also indicated that they decided to participate in the mediation process in part to avoid a compliance determination.<sup>86</sup> Further, 27 of the 35 cases (77%) that OECD Watch identified as having resulted in a remedy-related outcome were produced by NCPs that have demonstrated that they will make determinations of non-compliance with the Guidelines if mediation fails.<sup>87</sup>

## RECOMMENDATION

In situations where no agreement is reached through mediation, NCPs should make a determination on whether the company in question has complied with the Guidelines. The Procedural Guidance should require NCPs to make compliance determinations in the final statements of cases in which mediation is unsuccessful.

### 4.4.2 NCPs are unwilling or reluctant to employ all tools at their disposal to produce successful outcomes

As discussed above, one of the most persistent challenges NCPs face is the limitation posed by companies who choose not to participate in a dialogue process. There are many examples of this problem from throughout the past 15 years, but one striking instance arose only recently. In a case filed against Norges Bank Investment Management (NBIM) related to its investment in POSCO, a South Korean steel company, the Norwegian NCP was unable to convince a pension fund owned by its own government to cooperate in mediation. The NCP found NBIM's complete lack of cooperation to constitute a breach of the Guidelines.

In the case about Shell's Pandacan oil depot (see case study page 43), Shell refused to participate in a dialogue. The dispute in that case was resolved years later in a way that corresponded with the NCP's final recommendations, but a resolution might have been achieved in far less time and with fewer resources had the NCP been able to persuade the parties to engage in a dialogue process.

A similar problem arose in a case that alleged negative impacts from SOCAPALM's palm oil plantation in Cameroon. In that case, the parties went through a mediation process and agreed to an action plan, but one of the companies involved has refused to move forward with implementing the action plan, and the French and Belgian NCPs have not managed to influence the company's decision. Without cooperation from a crucial player, a dispute resolution that seemed poised to generate successful outcomes has been put on hold indefinitely.



## SOCAPALM: CORPORATE NON-COOPERATION PREVENTS PROMISED REMEDY<sup>88</sup>



In 2010, French, German and Cameroonian NGOs filed a complaint to the French, Belgian and Luxemburg NCPs, alleging adverse impacts caused by Société Camerounaise de Palmeraies (SOCAPALM), a Cameroonian producer of palm oil, on plantation workers and the traditional livelihoods of local communities. The complaint was filed against four holding companies that exert joint control over SOCAPALM's operations in Cameroon through complex financial investments.



After refusing to cooperate for almost two years, one of the companies, Bolloré, indicated a willingness to solve the issues raised in the complaint and accepted the French NCP's offer of good offices to resume dialogue with the complainants. The parties entered into mediation, and as a result, agreed on an action plan with concrete steps for SOCAPALM to resolve community concerns. The action plan included steps to address the project's environmental impacts, workers' rights and working conditions, local development, community dialogue and compensation to local communities for their loss of resources and land access.

In June 2013, the French NCP issued a final statement at the request of the parties, while the mediation was still underway. It concluded that through their business relations with SOCAPALM, all four holding companies had failed to comply with the OECD Guidelines. The action plan was published in a follow up communiqué in March 2014. The NCP issued a second follow-up communiqué in March 2015 to ask all parties to take responsibility for concrete implementation of the action plan.

Even after the NCP's findings of non-compliance and additional statements, the action plan is not being carried out as planned. The Luxemburg-based holding company, SOCFIN, has refused to implement it, and neither the Luxemburg, the French, nor the Belgian NCP has managed to convince the company to honour the agreement. Bolloré has made improvements to its community engagement policy as a result of the case, but the communities have otherwise been left without any form of remedy to date.<sup>89</sup>

There is no single answer to the challenge of how NCPs can increase their ability to persuade companies to engage in the process, but it is clear that in some cases NCPs are not approaching complaints from a viewpoint of trying to do everything within their power to resolve a dispute or further the

implementation of the Guidelines. One possible solution, as discussed in the previous section, is for more NCPs to adopt a general policy of making findings of compliance with the Guidelines when companies refuse to engage in the process. NCPs are also beginning to pioneer other creative approaches to increase their power to persuade companies to engage.

In the case against China Gold (see case study below), the Canadian NCP for the first time imposed sanctions on a company for its lack of participation in the complaint process. Sanctions may be a way to promote participation by companies and ultimately produce more impactful outcomes, although tying the sanctions to a company's compliance with the Guidelines (rather than its willingness to engage in mediation) may be a better policy to achieve these aims while ensuring respect for the ultimately voluntary nature of the Guidelines.

However, it remains to be seen whether any type of corporate sanction imposed by NCPs will have an effect in practice. In the case of China Gold, the Canada Tibet Committee has argued that the sanctions imposed did not go far enough. As it is such a recent case, it is still unclear whether and with how much force the sanctions will be implemented and, even if they are strictly enforced, whether this new policy of imposing sanctions will have a noticeable impact on the willingness of companies to engage in the NCP process. Nonetheless, the practice of imposing sanctions provides some hope of increasing the impact of NCPs by encouraging more companies to enter into a dialogue process. China Gold may mark the beginning of a trend that is well worth watching.



### **CHINA GOLD: IMPOSING SANCTIONS FOR NON-PARTICIPATION**<sup>90</sup>

On March 29, 2013, Chinese state media reported that 83 miners were buried in a landslide at the Gyama Copper Polymetallic Mine in Central Tibet. The owner of the mine, a subsidiary of China Gold International Resources, called the landslide a natural disaster.

In January 2014, the Canada Tibet Committee filed a complaint to the Canadian NCP raising environmental, human rights and employment concerns related to the mine and arguing that the landslide was in fact manmade and that the company had ignored previous warnings.<sup>91</sup> The Canadian NCP accepted the complaint and offered its good offices, but China Gold never responded to the offer or to the NCP's follow-up correspondence and outreach.

In its final statement, the NCP took the unprecedented step of imposing sanctions on the company for failing to engage in the complaint process, including withdrawing Trade Commissioner Services and other Canadian advocacy support abroad.<sup>92</sup> However, complainants have noted that the company will still have protections under Canada's bilateral investment treaties, and it may still access trade services offered by provincial governments and support from Export Development Canada.<sup>93</sup>

## RECOMMENDATION

The Procedural Guidance should direct adhering governments to ensure that concrete consequences follow from a company's non-compliance with the Guidelines.

### 4.4.3 NCPs are not adequately following up on the outcomes of final statements and agreements

Although the Procedural Guidance permits NCPs to follow up on the implementation of mediated agreements, with the consent of the parties, and on recommendations made in final statements,<sup>94</sup> NCPs rarely do so. Both where parties reached a mediated agreement and where the NCP simply made recommendations to improve the company's implementation of the Guidelines, monitoring activities are critical to ensuring that the NCP process has a long-term impact and that remedies, where achieved, endure.

Too often, parties reach an agreement through hard-fought negotiations in the complaint process, yet one or both of the parties do not honour the agreed terms, and the dispute ultimately remains unresolved. In some instances, the simple process of following up on a closed case after a specified period of time can provide the accountability needed to ensure implementation. Even relatively minimal follow up procedures and the issuance of a follow-up monitoring report can provide leverage, encouraging companies to implement an NCP's final recommendations.

Follow-up activities need not be costly or burdensome for NCPs. For example, in a case regarding Vedanta's planned bauxite mine in India (see case study page 31), the NCP asked both parties to send written reports on the implementation of the NCP's recommendations after three months. Likewise, in the case regarding the Phulbari coal mine (see case study page 30), GMC and the complainants were each instructed to provide written reports describing the company's progress in carrying out a recommended human rights assessment.<sup>95</sup>

In other cases, a more in-depth monitoring plan may be necessary to reveal the true outcomes of an NCP case. In the case against Cermaq (see case study 48), the Norwegian NCP hosted a meeting with the parties a year after the agreement was signed, but that meeting alone was not enough to uncover the true outcomes of the NCP process for directly affected communities and employees. Only when complainants undertook their own site visit to the company's plants in Chile did they find that there had been little or no change in circumstance for local people.<sup>96</sup>

## CERMAQ: POSITIVE POLICY OUTCOME BUT FOLLOW UP REVEALS NO CHANGE ON THE GROUND<sup>97</sup>



In 2009, ForUM and Friends of the Earth Norway filed a complaint against global fish farming and feed company Cermaq, in which the Norwegian government was a majority shareholder. The complaint raised allegations related to environmental, indigenous and labour rights from Cermaq's salmon breeding activities in Canada and Chile.

The Norwegian NCP accepted the case and facilitated a mediation process between the parties. In July 2011, they reached an agreement that included commitments by Cermaq to a set of principles regarding responsible aquaculture, indigenous peoples rights, human rights, workers' rights and sustainability reporting. In its final statement, the NCP invited the parties to a meeting one year later to provide an update on the implementation of the agreement. The Norwegian NCP did not plan or conduct any follow-up site visit.<sup>98</sup>



At the follow-up meeting, the Norwegian NGOs, Cermaq and the NCP all agreed that the case had been a success and the company was adhering to the agreement. Six months later, however, the complainants undertook a follow-up visit to Chile and hired two independent consultants to examine to what extent the agreement had led to a

change of conditions on the ground. They found that for plant workers and indigenous peoples living near the company's fish farming activities, little has changed as a result of the mediated agreement.<sup>99</sup> Cermaq has disputed these findings and continues to maintain that the labour conditions and environmental impacts of its operations have improved since the NCP complaint was filed.<sup>100</sup>

Site visits can be an important way for NCPs to gain a full understanding of a case, yet they require significant resources. One option to lessen the expense of follow-up site visits is to hire an independent consultant to carry out the investigation on the ground and report back to the NCP. If NCPs do choose to rely on third parties to carry out monitoring activities, the third party should be selected with the consent of all parties to the case and should be adequately vetted to ensure there is no conflict of interest.

## NIDERA: A RARE CASE OF SUCCESSFUL OUTCOME, PROPER FOLLOW UP, AND REAL CHANGE ON THE GROUND<sup>101</sup>



In 2011, Argentine and Dutch NGOs filed a complaint against Nidera for abusing the rights of temporary workers at its corn seed processing operations in Argentina. After a series of meetings initially facilitated by the Dutch NCP, the parties reached an agreement. As part of the agreement, Nidera strengthened its human rights policy,

formalised a human rights due diligence procedure for temporary rural workers, and allowed the NGOs to monitor its Argentine corn seed operations through field visits.



The complainants monitored the implementation of the agreement during the 2011-2012 summer corn detasseling season. A fact-finding visit and worker interviews confirmed that Nidera had complied with the conditions of the agreement. Workers' health and safety conditions were satisfactory, and workers themselves reported their contentment with the improved conditions.

Additionally, Nidera complied with its commitment to implement a company-wide grievance mechanism and produced its first public corporate responsibility report.

### RECOMMENDATION

The Procedural Guidance should direct NCPs to conduct follow up activities regarding agreements reached through mediation and recommendations made by NCPs in all instances where follow-up would be relevant. Monitoring of a mediated agreement should be automatic and not left to the request of the parties. Follow-up activities should include, at minimum, a request that the parties submit periodic reports to update the NCP on their progress and corresponding publicly available monitoring reports by the NCP.



## Conclusion

If you were an indigenous or community leader defending the rights of your community in the face of a large-scale extractives project and seeking to stop the violation and obtain reparation for the damage that has already occurred, where would you turn? Would you go to an NCP seeking that outcome? The conclusions of this report would counsel against it. Although the last 15 years have shown incremental progress in the performance of some NCPs and best practices have slowly begun to emerge, NCPs are overwhelmingly failing to produce measurable outcomes through the complaint process. Cases resulting in remedy for past or on-going harms are even rarer. Without generating positive outcomes that address past corporate misconduct and change corporate behaviour, NCPs cannot succeed in their mission to promote corporate adherence to the Guidelines.

Yet, as the only grievance mechanism for an international, government-endorsed standard for responsible business conduct, the NCP system has the potential to be a powerful tool to affect real change in corporate behaviour and provide remedy for those who are harmed by corporate misconduct. To realize their full potential, the Procedural Guidance that directs the policies and operations of NCPs must be revised. The field of corporate accountability has come a long way since 2000, when NCPs first began serving as a grievance mechanism for people affected by corporate misconduct, but the Procedural Guidance has hardly changed. A revision to the directives that guide NCPs is necessary to distil the practices and policies that have proven most successful, spark significant change across NCP offices, and create a long sought-after level playing field across all adhering countries.

The findings and recommendations contained in the present report highlight the changes to the Procedural Guidance that will make the most significant contribution to improving access to remedy for corporate

misconduct. NCPs must alter their approach to initial assessments to ensure that potential complainants can access the complaint process as a forum to address legitimate concerns and obtain remedy. They must act with impartiality at all times and avoid actions that create an impression of bias when handling complaints. The need for transparency must be paramount, with confidentiality provisions limited to those with a specific rationale. NCPs must strive to handle complaints in a timely manner, adhering to set timelines to ensure predictability. Finally, NCPs must use all tools available to them to increase their effectiveness and produce outcomes that are compatible with the Guidelines and ultimately serve to remedy harms from corporate misconduct.

While a Procedural Guidance review is necessary to set the standard for handling complaints, more can and should be done to ensure NCPs are effectively implementing the current standard. The recent practice of conducting peer reviews can serve an important role in promoting excellence and equivalent case treatment among NCPs on an on-going basis. However, to have any noticeable impact on the behaviour of NCPs, peer reviews must be developed into a consistent, mandatory requirement for all NCPs. Each NCP should undergo a peer review every 5 years as is the practice in other OECD departments such as the Development Assistance Committee (DAC)<sup>102</sup> and the Anti-Corruption Division.<sup>103</sup>

The widespread support for a binding treaty on business and human rights is evidence that the current system is not working. Those harmed by corporate misconduct cannot rely on the Guidelines and the NCP system for remedy. If the NCP system is to remain relevant in the shifting landscape of corporate accountability, a system-wide change is needed to achieve a more standardised and effective treatment of complaints, with an ultimate focus on providing a forum for remedy for corporate misconduct.





## Endnotes

- 1 *Ecuador Indigenous Leader Found Dead Days Before Planned Lima Protest*, The Guardian (6 Dec. 2014), available at <http://www.theguardian.com/world/2014/dec/06/ecuador-indigenous-leader-found-dead-lima-climate-talks>.
- 2 *FIDH et al vs. Corriente Resources Inc*, OECD Watch Case Database, available at [http://oecdwatch.org/cases/Case\\_300](http://oecdwatch.org/cases/Case_300).
- 3 *IAC & WDM vs. GCM Resources plc*, OECD Watch Case Database, available at [http://oecdwatch.org/cases/Case\\_285](http://oecdwatch.org/cases/Case_285).
- 4 *Lok Shakti Abhiyan et al. vs. POSCO*, OECD Watch Case Database, available at [http://oecdwatch.org/cases/Case\\_260](http://oecdwatch.org/cases/Case_260).
- 5 *OECD Guidelines for Multinational Enterprises*, 3, OECD (2011), available at <http://www.oecd.org/daf/inv/mne/48004323.pdf> [hereinafter OECD Guidelines].
- 6 *RAID vs. Binani*, OECD Watch Case Database, available at [http://oecdwatch.org/cases/Case\\_18](http://oecdwatch.org/cases/Case_18).
- 7 OECD Guidelines, *supra* note 5, at 72.
- 8 See National Action Plan on Business and Human Rights, 34, Dutch Ministry of Foreign Affairs (1 Dec. 2013) (noting the important role that non-judicial mechanisms, including NCPs, play in providing direct remedy for victims); Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 9, UN Human Rights Council (5 May 2014) (discussing NCPs as a source of remedy for grievances related to business conduct).
- 9 The total of 250 cases filed by communities, individuals and NGOs is based on the total number of cases OECD Watch has documented in its case database ([www.oecdwatch.org/cases](http://www.oecdwatch.org/cases)) as of June 2015. OECD Watch estimates that there are additional cases that are not included in the database due to poor reporting by NCPs, especially in the early 2000s.
- 10 TUAC's database of union cases can be found at <http://www.tuaoecdmneguidelines.org/cases.asp>
- 11 *ADHRB vs. Formula One Management Ltd.*, OECD Watch Case Database, available at [http://oecdwatch.org/cases/Case\\_334](http://oecdwatch.org/cases/Case_334).
- 12 *MS & Arla – Case Study on OECD Guidelines Agreement*, 3, ActionAid Denmark (2015).
- 13 *CEDHA et al. vs. Nidera*, OECD Watch Case Database, available at [http://oecdwatch.org/cases/Case\\_220](http://oecdwatch.org/cases/Case_220).
- 14 *WWF vs. SOCO*, OECD Watch case database, available at [http://oecdwatch.org/cases/Case\\_307](http://oecdwatch.org/cases/Case_307).
- 15 The 35 cases (and year in which they were filed) are: Arla (2014), F1 Management (2014), F1 World Championship (2014), China Gold (2014), UPM (2014), SOCO (2013), Karl Rieker (2013), Gamma (2013), NBIM (2013), ABP/APG (2013), Xstrata (2011), Nidera (2011), ICT Cotton (2010), Cargil (2010), Bolloré (2010), Financière du champ de Mars (2010), SOCFIN (2010), Intercultures (2010), , Devcot (2010), Otto Stadlander (2010), ECOM (2010), Paul Reinhart (2010), BRINKS (2010), Cermaq (2009), Intex (2009), Vedanta (2008), Accor (2007), Afrimex (2007), Shell Philippines (2006), Aker Kværner (2005), GSL (2005), Bayer (2004), Das Air (2004), , BP (2003), and Adidas (2001).
- 16 The 20 cases are: China Gold (2014), UPM (2014), Gamma (2013), NBIM (2013), Nidera (2011), Bolloré (2010), Financière du champ de Mars (2010), SOCFIN (2010), Intercultures (2010), BRINKS (2010), Cermaq (2009), Intex (2009), Vedanta (2008), Accor (2007), Afrimex (2007), Shell Philippines (2006), Aker Kværner (2005), GSL (2005), Das Air (2004), and BP (2003).
- 17 The 20 cases are: Arla (2014), F1 Management (2014), F1 World Championship (2014), SOCO (2013), Karl Rieker (2013), ABP/APG (2013), Xstrata (2011), Nidera (2011), ICT Cotton (2010), Cargil (2010), Bolloré (2010), Devcot (2010), Otto Stadlander (2010), ECOM (2010), Paul Reinhart (2010), Cermaq (2009), Vedanta (2008), GSL (2005), Bayer (2004), Adidas (2001).
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- 26 Initial Assessment: Notification and request for mediation to the Dutch and UK National Contact points for the OECD Guidelines for Multinational Enterprises, 4, Netherlands NCP (Mar. 20, 2013), available at: <http://www.oecdguidelines.nl/notifications/documents/publication/2015/1/6/ncp-initial-assessment-shell--stroitel-sew>.

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- 31 Closing Report Executive Summary: Request for Review file #2011-01-MEX, Office of the Extractive Sector Corporate Social Responsibility Counsellor, Government of Canada (Oct. 2011), available at [http://www.international.gc.ca/csr\\_counsellor-conseiller\\_rse/publications/2011-01-MEX\\_closing\\_rep-rap\\_final.aspx?lang=eng](http://www.international.gc.ca/csr_counsellor-conseiller_rse/publications/2011-01-MEX_closing_rep-rap_final.aspx?lang=eng); TUAC Concerns Regarding Mexican NCP Procedure, Conflicts with the Grievance Mechanism of the Home Country (9 Jan. 2013).
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- 87 Based on empirical observation of past practice, this analysis considers that the UK (11 cases with some form of remedy-related outcome), Dutch (4 cases), Norwegian (4 cases), French (3 cases), Australian (2 cases) and Danish (1 case) NCPs follow a practice of making compliance determinations if no mediated agreement is reached.
- 88 Information on this case can be found in the OECD Watch Case Database at [http://oecdwatch.org/cases/Case\\_200](http://oecdwatch.org/cases/Case_200).
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- 90 Information on this case can be found in the OECD Watch Case Database at [http://oecdwatch.org/cases/Case\\_324](http://oecdwatch.org/cases/Case_324).
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- 94 Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, §34-36, OECD (2011).
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- 96 Site visits can be an important way for NCPs to gain a full understanding of a case, yet they require significant resources. One option to lessen the expense of follow-up site visits is to hire an independent contractor to carry out the investigation on the ground and report back to the NCP. If NCPs do choose to rely on third parties to carry out monitoring activities, the third party should be selected with the consent of all parties to the case and should be adequately vetted to ensure there is no conflict of interest.
- 97 Information on this case can be found in the OECD Watch Case Database, available at [http://oecdwatch.org/cases/Case\\_166](http://oecdwatch.org/cases/Case_166).
- 98 Final Statement by the Norwegian NCP: Friends of the Earth Norway and Forum for Environment and Development vs. Cermaq ASA, 1, The Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises (10 Aug. 2011).
- 99 Workers note that the unimproved conditions are likely due to the authoritarian management culture, little dialogue between management and workers, and a lack of real interest in improving occupational health and safety conditions. See Mainstream / Cermaq's Progress in Contributing to Sustainable Salmon Aquaculture in Chile, Executive Summary, Maria Veronica Bastias and Tor Opsvik (11 Nov. 2012), available at <http://www.forumfor.no/assets/docs/Cermag-study.pdf>.
- 100 Statement by Lise Bergan, Cermaq (21 May 2015); Cermaq's comments to report on Mainstream Chile operations (May 2013).
- 101 Information on this case can be found in the OECD Watch Case Database, available at [http://oecdwatch.org/cases/Case\\_220](http://oecdwatch.org/cases/Case_220).
- 102 DAC adhering countries are peer reviewed once every five years, meaning that the DAC does at least 5 peer reviews per year. Personal communication with C. Verger, Senior Policy Analyst, Development Cooperation Directorate, OECD, 26 May 2015
- 103 The Anti-Corruption Division of the OECD's Directorate for Finance and Enterprise Affairs, the very same Directorate which is responsible for the OECD Guidelines for MNEs, organises 10 peer reviews annually to continuously improve compliance with the OECD's Anti-Bribery Convention. Personal communication with P. Moulette, Head of Anti-Corruption Division, Directorate of Finance and Enterprise Affairs, OECD, 29 May 2015

