



State of Remedy 2020

Understanding community- and civil society-led complaints concluded in 2020 through the lens of remedy

The year 2020 was a disappointing one for remedy under the OECD Guidelines for Multinational Enterprises (Guidelines). Of the 14 community- or civil society-led complaints concluded that year, only one reached agreement. This factsheet presents key numbers, highlights and lowlights in complaints concluded as well as arguments for how to improve outcomes by revising the Guidelines to close gaps in expectations for National Contact Points (NCPs) and standards for multinational enterprises (MNEs).

Key numbers

- 14 cases filed by civil society and communities were concluded by NCPs in 2020
- Only 1 case reached agreement
- NCPs rejected 5 cases at the initial assessment phase, closing the door to dialogue between communities and companies
- The Slovenian NCP concluded its first complaint in 2020 – by rejecting it
- 7 complaints were accepted, but concluded without resolution
- 1 case was withdrawn by the complainants due to concerns with the NCP's procedures and failures to address security risks for rightsholders
- 8 complaints took two or more years to reach a conclusion – at least double the timeframe prescribed by the Guidelines

Highlights

Benefits of professional mediation

The case *Forum Suape et al. vs. Van Oord* reached an agreement, demonstrating the value of NCPs using trained mediators to help handle disputes. The case concerned human and environmental impacts of dredging operations for a port in Brazil. The final agreement, reached through external impartial mediation, addressed several issues raised in the initial complaint, including critical evaluations of the utility of artificial



reef and public health systems, improved anchoring areas for vessels, and safety equipment for local fishermen. A downside: the complaint took five years to be completed.

NCP determination despite company's refusal to participate in good offices

Although oil company Shell's Nigerian subsidiary refused to participate in mediation in the complaint *Obelle Concern Citizens & FOCONE vs. Shell*, the Dutch NCP proceeded to evaluate as much as it could of Shell's activities regarding an eruption and gas fire in Nigeria. Of note, the NCP issued a determination that Shell's subsidiary had "failed to demonstrate that its grievance mechanism functions in a manner that can be considered to be consistent with the OECD Guidelines and the UNGPs."

In two exciting 2021 litigation proceedings in Dutch courts, the Hague court of appeal ordered Shell to compensate Nigerian farmers for oil spill harm, and the Hague district court ordered Shell to reduce its carbon emissions to comply with the Paris Agreement. In the latter case, the court referred extensively to the UNGPs and OECD Guidelines as providing an "unwritten standard of care" that Shell is expected to follow. This is an exciting example of the Guidelines' soft law standard being turned into hard law by courts.

Lowlights

Company's refusal to sign Terms of Agreement

The case *Ali Enterprises Factory Fire Affectees Association vs. RINA S.p.A* highlighted problems with social auditing in the garment sector – and challenges when MNEs refuse to support agreements reached in complaints. In 2012, a fire at Pakistani Ali Enterprises garment factory killed over 250 workers just three weeks after RINA S.p.A. had certified the factory under the SA8000 standard. The Italian NCP offered good offices and mediation by an external conciliator helped the parties develop a Terms of Settlement. But the company refused to sign it.

Fortunately for the workers, in a parallel negotiation requested by the German government and facilitated by the ILO, German brand KiK agreed to pay an additional US\$5.15 million to fund loss of earnings, medical and allied care, and rehabilitation costs to the injured survivors and dependents of those killed in the disaster.

NCP's poor procedures on confidentiality, security for defenders prompt NGO's withdrawal

The case *Union Hidalgo vs. EDF Group* concerned impacts on the environment and indigenous land rights of a windfarm of French state-owned enterprise EDF. After a year and a half of engagement, the complainants withdrew their complaint over concerns with the French NCP's procedures, including overly extensive confidentiality requirements and failure to address security concerns raised by complainants.

The complainants are now pursuing litigation under the French Duty of Vigilance law to protect the community's right to free, prior, and informed consent. Judges evaluating French companies' vigilance plans are encouraged to consider the OECD Guidelines' due diligence expectations.

1 Friends of the Earth International, "Justice at last – Dutch court orders Shell to compensate Nigeria farmers for oil spill harm," 5 February 2021, available at: <https://www.foei.org/news/justice-shell-compensate-nigerian-farmers-oil-spill>.

2 Sarah McFarlane, Wall Street Journal, "Shell ordered by Dutch court to cut carbon emissions," 26 May 2021, available at: <https://www.wsj.com/articles/shell-ordered-by-dutch-court-to-cut-carbon-emissions-11622038961>.

NCP rejects complaint against its export credit agency

The UK NCP rejected the complaint *Global Witness vs. UK Export Finance*, arguing that the export credit agency (ECA) is not a multinational covered by the OECD Guidelines. The NCP thereby endorsed a gap in enforcement – and a double standard – on sustainability expectations for ECAs, which play a critical role in facilitating commercial investment in high-risk areas.

In addition to the UK NCP, the Korean NCP has also recently rejected complaints against its ECA, KEXIM. Another complaint concluded in 2020, *South Korean Civil Society Task Force vs. SK E&C*, underscores the gap this allows: when SK E&C refused to participate in good offices, the Korean NCP simply closed the complaint; meanwhile, the NCP had already rejected the same complaint against KEXIM. Victims now lack any recourse to remedy. In contrast, the Dutch NCP already accepted a complaint against Atradius, the Dutch ECA, over the same Brazilian port issue cited in the first complaint above. Although no agreement was reached, the NCP found the Guidelines applicable to the ECA and called for Atradius to use its leverage over investor Van Oord to ensure fulfilment of stakeholder dialogue. That finding, and Atradius' leverage, likely helped bring about the agreement reached above.

Conclusion & Recommendations

OECD Watch continues to believe that gaps in the standards for MNEs and expectations for NCPs generate poor outcomes in NCP complaints. The complaints concluded in 2020 help demonstrate many of the gaps that governments must close to ensure the Guidelines remain fit for purpose. Meanwhile, several court proceedings mentioned above underscore a key reason why the Guidelines should be revised: because they are being used to underpin hard law on corporate accountability.

Recommendations

- The Procedural Guidance should be strengthened to ensure NCPs:
 - Proceed with investigations and findings even when companies refuse to join in good offices.
 - Issue determinations when companies breach the Guidelines.
 - Seek to promote, rather than limit, the Guidelines' applicability to all MNEs, including by
 - Accepting all complaints that state a plausible claim against a company under the Guidelines, and
 - Applying the Guidelines to states acting as economic actors such as ECAs (the definition of MNEs in Chapter I should also be clarified in this respect).
 - Engage professional mediators or internal mediation training as one of several steps to promoting impartiality in complaint handling.
 - Develop procedural rules that prioritize transparency over confidentiality.
 - Adopt policies and procedures to address security risk to human rights defenders.
- The standards for MNEs should be strengthened to ensure MNEs:
 - Understand their responsibility to respect land rights of Indigenous peoples and other marginalised groups even where states fail their own duty.
 - Don't rely on auditors to replace their own labour rights due diligence responsibilities.
 - Address their carbon impacts by setting and achieving targets in line with the Paris Agreement.
 - Undertake thorough, responsive, and continuous due diligence – including participating in stakeholder engagement and providing remedy – that is tailored to meet the needs of marginalised and disadvantaged groups.

OECD governments have a duty to ensure accountability for adverse business impacts and remedy for victims, including via non-judicial mechanisms such as the NCPs. Revising the Guidelines to close these and other gaps and make them fit for purpose is a key step in fulfilling that duty.

Key elements in community- and civil society-led complaints concluded in 2020

Case & Lead NCP	Issue	Status	Sector(s)	Keywords	Victim group(s)	Duration	Analysis of complaint handling, outcome
<u>Forum Suape et al. vs. Van Oord</u> ; NCP Brazil	Dredging impacts in Brazil	Agreement	Infrastructure	Environment, Human rights, Land rights	Communities	2015-2020	Agreement reached through external mediation process.
<u>Obelle Concern Citizens & FOCCONE vs. Shell</u> ; NCP Netherlands	Gas fire eruption in Nigeria	No Resolution	Oil & Gas	Disclosure, Environment, Human Rights	Communities, Indigenous	2018-2020	Company rejected good offices, NCP proceeded to issue a determination.
<u>Ali Enterprises Factory Fire Affectedes Assoc. vs. RINA S.p.A</u> ; NCP Italy	Wrongful certification by audit company of garment factory	No Resolution	Garment & Textile; Other	Health, Labour rights, Supply Chain	Children, Workers	2018-2020	Company entered good offices but refused to sign Terms of Settlement.
<u>South Korean Civil Society Task Force vs. SK E&C</u> ; NCP Korea	Dam collapse in Laos	No Resolution	Infrastructure	Disclosure, Environment, Human rights, Land rights	Communities	2019-2020	Company rejected good offices, so NCP closed complaint.
<u>Southeast Alaskan Conservation Council vs. Imperial Metals</u> ; NCP Canada	Mining due diligence gaps in Canada	No Resolution	Mining	Disclosure, Environment, Human rights	Communities	2016-2020	Mediation did not result in agreement.
<u>UK Lawyers for Israel vs. PwC</u> ; NCP UK	Allegation of inadequate audit of Palestinian Authority	No Resolution	Other	Disclosure, Human rights	Communities, Public	2016-2020	NCP assessed that the company did not breach the Guidelines.
<u>Several individuals vs. Nokia</u> ; NCP Finland	Violation of tax and labour agreements in Argentina	No Resolution	Manufacturing, Technology & Telecoms	Disclosure, Labour rights, Taxation	Workers	2019-2020	NCP assessed that the company did not breach the Guidelines.
<u>CCC et al. vs. Adidas</u> ; NCP Germany	Labour rights violations at Indonesian supplier	No Resolution	Garment & Textile	Human rights, Labour rights, Supply chain	Workers	2018-2020	NCP refused to handle core claims.
<u>Global Witness vs. UK Export Finance</u> ; NCP UK	Failure of climate commitments	Rejected	Financial	Climate change, Disclosure, Environment	Public	2020-2020	NCP rejected complaint, claiming the company not an MNE covered by the Guidelines.
<u>Focus vs. Ascent Resources plc</u> ; NCP Slovenia	Fracking impacts anticipated in Slovenia	Rejected	Oil & Gas	Environment, Health	Communities	2019-2020	NCP assessed that the company did not breach the Guidelines
<u>ClientEarth vs. BP</u> ; NCP UK	Misleading fossil fuel advertising	Rejected	Oil & Gas	Climate Change	Public	2019-2020	Company adapted its policy, so mediation was deemed unnecessary.
<u>Conectas Human Rights & ADERE MG vs. Illy</u> ; NCP Brazil	Labour rights violations on coffee farms in Brazil	Rejected	Agriculture & Food	Human rights, Labour rights, Supply chain	Workers	2018-2020	NCP stated that evidence was admitted too late by complainants.
<u>Conectas Human Rights & ADERE MG v. Starbucks</u> ; NCP Brazil	Labour rights violations on coffee farms in Brazil	Rejected	Agriculture & Food	Human rights, Labour rights, Supply chain	Workers	2018-2020	NCP stated that evidence was admitted too late by complainants.
<u>Union Hidalgo vs. EDF Group</u> ; NCP France	Violation of FPIC, environmental harms at wind energy park in Mexico	Withdrawn	Energy	Environment, Human rights, Land rights	Indigenous	2018-2020	Complaint withdrawn due to concerns over NCP procedures, lack of transparency, security risks.

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