

# **The State of Remedy under the OECD Guidelines**

**Understanding NCP cases  
concluded in 2017 through the lens  
of remedy**

## **Introduction**

The OECD Guidelines for Multinational Enterprises (Guidelines) have unique potential to strengthen the global system of corporate governance and provide access to remedy for the victims of corporate misconduct. State-backed, the Guidelines represent a commitment by some of the most powerful governments in the world to advance responsible business conduct. Extraterritorial in application and broad in their coverage of sectors, value chains, and types of human and environmental impacts, the Guidelines also express far-reaching expectations for the responsibility of corporations to account for the negative externalities of their operations.

The Guidelines' most powerful capacity to advance a humane business model lies in the special non-judicial grievance mechanism they create. The National Contact Points (NCPs) have unique ability to facilitate access to remedy for victims of corporate misconduct. By enabling direct dialogue between victims and corporations, NCPs can give voice to the victims of corporate development activities, helping corporations understand first-hand the human toll of their operations, remedy the harms to which they are connected, and collaboratively develop new modes of operation for the future.

NCPs have increasingly been recognized for their potential to become the state-based non-judicial grievance mechanism envisioned by the United Nations Guiding Principles (UNGPs). In 2014, Chair of the OECD Working Party on Responsible Business Conduct, Roel Nieuwenkamp, observed that the NCP mechanism's specific added value in the international corporate accountability arena is "through providing access to remedy."<sup>1</sup> In 2015, G7 leaders committed themselves to "strengthening mechanisms for providing access to remedy,

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<sup>1</sup> Roel Nieuwenkamp, 'OECD's Human Rights Grievance Mechanism as a Competitive Advantage', 4 November 2014, Institute for Business and Human Rights.

including the NCPs.”<sup>2</sup> In 2016, the Council of Europe linked the Guidelines to remedy and urged EU members to further enhance their NCPs for this purpose.<sup>3</sup> And in 2017, the G20 leaders cited the NCPs in relation to remedy,<sup>4</sup> while the European Union Agency for Fundamental Rights issued an opinion that NCPs “[have] the power to offer remedy.”<sup>5</sup> As non-judicial grievance mechanisms, NCPs are not equipped to deal with egregious cases of abuse, which are more effectively handled by judicial mechanisms with real sanctioning power. Yet this does not mean they cannot facilitate access to remedy in a wide array of cases.

What would it mean for NCPs to facilitate meaningful remedy? The UNGPs define “remedy” to include “apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions,” as well as “the prevention of harm through, for example, injunctions or guarantees of non-repetition.”<sup>6</sup> These examples entail actual remediation or prevention of harm to victims. In addition to these types of remedies, OECD Watch also believes that an acknowledgement of wrongdoing in the form of a determination by an NCP can provide a measure of remedy for victims of abuse. Furthermore, related to the notion of guarantee of non-repetition, a company’s commitment to change its policies and act differently in the future as part of an NCP-facilitated agreement can also be considered a part of remedy.

OECD Watch’s 2015 report *Remedy Remains Rare* presented a sobering overview of how few of the NCP cases handled between 2000 and 2015 resulted in meaningful remedy for complainants.<sup>7</sup> The report explored a variety of practices by NCPs that erect barriers to their accessibility to complainants, hinder their ability to act impartially towards parties, impede the transparency and predictability of their operations, and otherwise interfere with their mission to advance corporate compliance with the Guidelines. The report found that the impact of these practices was that, between 2000 and 2015, just 14% of cases filed by non-governmental organizations and communities (as opposed to unions) led to a beneficial result that provided some measure of remedy for the communities filing cases. Only 1% of cases in that period led to directly improved conditions on the ground.

In 2017, NCPs globally concluded 18 OECD Guidelines cases filed by NGOs or communities.<sup>8</sup> This briefing paper identifies and analyses the outcomes of those 18 cases to identify what positive impact the cases may have had and what challenges complainants may have faced in accessing remedy through NCPs. As such, this paper serves as a remedy-focused supplement to the 2017 NCP Annual Report prepared by the OECD secretariat. As this report will describe, **of the 18 NGO/community cases concluded in 2017, only one (5%) - a bright spot in the case of *Former employees v. Heineken* - resulted in a compensatory remedy and a concrete improvement in the situation of the complainants.** In total, **only five (27%) of the 18 cases resulted in some element of remedy for complainants**, such as an acknowledgement of wrongdoing in the form of a determination of a company’s breach of the Guidelines, or an

<sup>2</sup> ‘Think Ahead. Act Together’. Leaders’ Declaration G7 Summit, 7-8 June 2015, Schloss Elmau, Germany.

<sup>3</sup> Council of Europe Recommendation of the Committee of Ministers to Member States on human rights and business, 2 March 2016.

<sup>4</sup> ‘Shaping an interconnected world’, G20 Leaders’ Declaration 7-8 July 2017 Hamburg, Germany.

<sup>5</sup> ‘Improving access to remedy in the area of business and human rights at the EU level’, Opinion of the European Union Agency for Fundamental Rights Vienna, 10 April 2017.

<sup>6</sup> The UNGPs are in line with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly Resolution 60/147, 16 December 2005)

<sup>7</sup> OECD Watch, *Remedy Remains Rare*, 2015.

<sup>8</sup> Out of a total of 34 cases filed by all stakeholder groups in 2017. The 18 NGO/community cases are *Former employees v. Heineken*, *Crude Accountability et al v. KPO Consortium*, *Finance and Trade Watch Austria et al v. Andritz AG*, *Sherpa et al v. Socfin Group/Socapalm*, *WeCAN vs. Arrow International*, *Southeast Alaska Conservation Council v. Seabridge Gold*, *Bruno Manser Fonds v. Sakto Corp.*, *Survival International Italia v. Salini Impregilo*, *Trade unions and NGOs v. Suzuki Motor Corporation*, *ELSAM et al v. Holcim*, *Survival International v. WWF*, *Jamaa Resources Initiative v. Dominion Group*, *Former employees v. Banro Corp.*, and five cases brought by WeCAN against insurance companies.

agreement to improve company policies.<sup>9</sup> This means that **in 73% - nearly three-quarters - of the NGO/community cases concluded in 2017, no remedy-related outcome whatsoever was achieved for the victims of corporate misconduct.**

Analysis of the reasons behind this reveals that many of the same poor practices described in *Remedy Remains Rare* persist at NCPs. These include some NCPs' unwillingness to make determinations where mediation fails or is rejected by a party; most governments' unwillingness to ensure consequences for non-compliance with the Guidelines, non-engagement with the NCP specific instance process, or non-fulfilment of recommendations given by the NCP; some NCPs' imbalanced or unduly restrictive policies on transparency and confidentiality; and many NCPs' lack of accessibility due to frequent premature rejections of complaints at the initial assessment stage. The report concludes with recommendations to governments on how the NCP system can be improved to address these deficiencies and live up to its potential as an effective pathway of remedy for the victims of irresponsible business conduct.

## **2017 remedy-related outcomes in cases filed by NGOs and communities**

In 2017, the NCPs concluded 18 cases filed by NGOs and communities. Of these 18 cases, one resulted in a compensatory remedy and directly improved conditions for the victims of corporate misconduct. One case led to an acknowledgement of wrongdoing (in the form of a determination by an NCP). Four cases - including one of the cases just mentioned as well as three others - led to an improvement in corporate policies.<sup>10</sup>

### **1. Case that resulted in remedy in the form of compensation for harm to victims and directly improved conditions for complainants**

As a bright spot standing out among the rest, the one case closed in 2017 that successfully enabled complainants to access remedy in the form of compensation for past harm was *Former employees v. Heineken*.<sup>11</sup> The complaint alleged that Bralima, a subsidiary of Heineken, caused between 1999 and 2003 a massive, unfair, and unlawful retrenchment of employees in the Democratic Republic of Congo, and miscalculated and failed to pay a final settlement for some of the workers. The complaint asserted that Heineken, which closely cooperated with Bralima at that time, must have known and should have used its influence to prevent further damage to the former employees. The Dutch NCP accepted the case and the parties held mediation meetings in Uganda and Paris that led to an agreement. The NCP issued a final statement which stated that the parties wished to keep their agreement confidential. However, news reports published on the same day confirmed that Heineken had voluntarily paid over €1 million to the former employees. Heineken also agreed to develop a new policy and due diligence protocol for operating in conflict-affected areas. This result is enormously significant because it is one of the only OECD Guidelines cases ever to have achieved compensation for complainants as an outcome. Some of the reasons why that successful outcome was reached are explained in the rest of this paper.

### **2. Case that achieved a determination or other statement of wrongdoing**

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<sup>9</sup> The five cases are Heineken, KPO Consortium, Andritz, Socfin, and Arrow International.

<sup>10</sup> It should be noted that, among the trade union cases that were concluded in 2017, the case of *BWI v. FIFA* resulted in a positive change of policies at FIFA, and the case of *Unite Here v. NATIXIS -NGAM* resulted in an improved condition for the union in terms of the union's formal recognition by the company. For information on cases filed by unions, see case database of The Union Advisory Committee (TUAC) at <http://www.tuacoecdmguidelines.org/Cases.asp>.

<sup>11</sup> See Heineken case description and related materials at [https://www.oecdwatch.org/cases/Case\\_446](https://www.oecdwatch.org/cases/Case_446).

The case of *Crude Accountability et al v. the KPO Consortium*<sup>12</sup> concerned negative environmental and human rights impacts caused by the improper disposal of toxic waste and the pollution of bodies of water near an oil and gas facility in Kazakhstan. The complaint concerned numerous households, but the UK NCP accepted just one of the claims, pertaining to two households located in a particularly risky zone. When mediation between the parties failed, the UK NCP took the positive step of investigating the matter itself. The UK NCP found that KPO had failed to address certain impacts to which it was linked through its business relationship with the Kazakh government, but also that it was not clear if KPO had breached its human rights obligations under the Guidelines. The UK NCP issued recommendations related to community resettlement for the company to undertake by May 2018. Complainants feel that the complaint process has not really addressed the serious concerns that were raised regarding compensation and loss for the families threatened by the facility.

### 3. Cases that achieved an improvement in company policies

As mentioned above, *Former employees v. Heineken* resulted in a commitment by the company to develop a new policy and due diligence protocol for operating in conflict-affected areas.

In *Finance and Trade Watch Austria et al v. Andritz AG*<sup>13</sup>, the complainants alleged that poor design of the Mekong Delta Xayaburi dam in Laos would impede fish migration and sediment flow, causing extinction of species and impoverishment and malnourishment of downstream farm communities dependent upon sediment-enriched soils. The Austrian NCP accepted the case, and three years of mediation ensued. Some of the complainants left the process due to concerns over confidentiality restrictions (addressed below), and others left feeling the process was not achieving a positive outcome. However, two complainants persisted. The parties reached an agreement and issued a joint statement in which Andritz committed to strengthen its internal corporate social responsibility, disclosure, and due diligence policies. Such outcomes do not immediately, and indeed may never, benefit the complainants. Without doubt, alterations to the dam design to mitigate foreseen impacts, or compensation for economic and human rights harms, would have been a stronger outcome. Nevertheless, policy changes do have the potential to help companies avoid repeating mistakes and prevent additional harm in the future.

The case of *Sherpa et al v. Socfin Group/Socapalm*<sup>14</sup> was a case received by the Belgian NCP in 2016 and closed by it in 2017. Our classification of the case focuses on the Belgian NCP's involvement in the case, but we briefly note the case's lengthier history. The case was initially filed in 2010 with three NCPs - the French, Belgian, and Luxembourgian - concerning allegations against the oil company SOCAPALM and four of its holding companies. The complainant Sherpa argued that SOCAPALM had caused negative human rights and environmental impacts by diminishing local communities' access to natural resources and public services, polluting the water and air, and subjecting workers to precarious work and living conditions and physical abuse from security agents. The French NCP accepted the case and took the important step of issuing a determination in 2013 finding that SOCAPALM had indeed breached the Guidelines, and that all four holding companies had too, due to their business relationship with SOCAPALM, in respect of their disclosure policies. After initial foot-dragging, the French holding company Bolloré agreed to mediation and helped develop a remediation action plan that Socapalm and its Belgian parent company Socfin also accepted. However, Socfin blocked implementation of that plan, causing the French NCP to turn to the Belgian and Luxembourgian NCPs, in 2015, for help. The Belgian NCP

<sup>12</sup> See KPO Consortium case description and related materials at [https://www.oecdwatch.org/cases/Case\\_304](https://www.oecdwatch.org/cases/Case_304), [https://www.oecdwatch.org/cases/Case\\_305](https://www.oecdwatch.org/cases/Case_305), and [https://www.oecdwatch.org/cases/Case\\_306](https://www.oecdwatch.org/cases/Case_306).

<sup>13</sup> See Andritz case description and related materials at [https://www.oecdwatch.org/cases/Case\\_326](https://www.oecdwatch.org/cases/Case_326).

<sup>14</sup> See Socapalm case description and related materials at [https://www.oecdwatch.org/cases/Case\\_202](https://www.oecdwatch.org/cases/Case_202).

successfully coaxed Socfin to join several mediations in 2016, but was unable to convince it to implement the action plan. Socfin did publically commit to adopt several notable changes to its responsibility and transparency policies. But in 2017 the Belgian NCP closed the case on grounds that Socfin was unwilling to adhere to the NCP's requests and implement the agreed action plan. Therefore, the attempted agreement on a remediation plan was never ultimately realized for the case.

In the case of *WeCAN v. Arrow International*,<sup>15</sup> complainants argued that a building company had breached the Guidelines and individuals' health and housing rights by failing to re-build housing in a timely and adequate manner following a series of earthquakes in New Zealand in 2010-11. The New Zealand NCP asserted their role was not adjudicative, to determine whether a Guidelines breach had occurred, and therefore they declined to issue an assessment of the substantive claims in the complaint. However, Arrow International agreed to develop an external social responsibility policy noting the human rights-related obligations of the Guidelines and Arrow International's commitment to them, and to undertaking risk-based due diligence. The policy was published on the Arrow International website. Development of an improved policy was a positive step, but it came too late to benefit the complainants who had filed the case and whose core allegations remain unanswered.

#### **4. Cases that achieved no remedy at all for complainants**

Beyond the five cases mentioned above, the other 13 cases that were filed by NGOs and communities and closed in 2017 provided no remedy whatsoever for victims.

*Southeast Alaska Conservation Council v. Seabridge Gold*<sup>16</sup> concerned allegations that Seabridge Gold had violated the OECD Guidelines by failing adequately to consult stakeholders and disclose its plan to avoid, mitigate, or prevent serious environmental, health, and livelihood risks from a proposed metals mine. The complainants requested 15 specific remedies from the company, but none of them were achieved. Instead of making room for potential discussion between the parties, the Canadian NCP pre-emptively dismissed the complaint finding (just from the evidence submitted at the initial assessment phase) that Seabridge Gold had already conducted a sufficiently rigorous environmental assessment and adequately consulted stakeholders. The Canadian NCP did not address whether the 15 remedies actually sought by the complainants had been addressed by the company, nor did the NCP provide an explanation of why it thought its good offices could not help the parties discuss the concerns raised and remedies sought.

In *Bruno Manser Fonds v. Sakto Corp.*,<sup>17</sup> the Canadian NCP again prematurely shut the door to mediation by declaring that its "good offices would not contribute to the purposes and effectiveness of the Guidelines." The complaint alleged that Sakto Corp. had breached the OECD Guidelines' disclosure requirements regarding its financial results, the source of its funding, its beneficial owners, corporate structure intra-group relations, and governance. No opportunity was created to analyse the claims raised. While the Canadian NCP initially proposed in a draft statement to accept the case for mediation, the NCP then reversed course and rejected the case. Canada's first public final statement justified the reversal, in large part, on the complainant's decision to publish the confidential draft initial assessment. That justification is illogical, however, for it was the Canadian NCP's reversed decision to reject the case that prompted the publication of the draft acceptance in the first place. What may alternatively have caused the Canadian NCP to reject the case was the heavy pressure applied by the company on the NCP, which the Canadian NCP itself identified as including "Sakto involving a Member of Parliament during the confidential NCP assessment

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<sup>15</sup> See Johnson & Ross case description and related materials at [https://www.oecdwatch.org/cases/Case\\_328](https://www.oecdwatch.org/cases/Case_328).

<sup>16</sup> See Seabridge Gold case description and related materials at [https://www.oecdwatch.org/cases/Case\\_487](https://www.oecdwatch.org/cases/Case_487).

<sup>17</sup> See Sakto case description and related materials at [https://www.oecdwatch.org/cases/Case\\_471](https://www.oecdwatch.org/cases/Case_471).



process; (...) Sakto's aggressive challenge of the NCP's jurisdiction; (...) Sakto's legal counsel making submissions to the Government of Canada's Deputy Minister of Justice...". The case underscores the need for predictable procedures and a structure conducive to independence and impartiality at all NCPs.

The complainants in *Survival International Italia v. Salini Impregilo*<sup>18</sup> alleged that Salini had failed to conduct adequate independent due diligence assessments and consultations with tribal people in Ethiopia and Kenya so as to effectively prevent or mitigate negative economic and livelihood impacts from the creation of the Omo River Gibe III dam. No remedy was achieved for the complainants and communities. The Italian NCP issued such stringent confidentiality rules in its terms of mediation – preventing the parties from advertising even the existence of the case during mediation – that Survival International (SI) refused the terms. The NCP also said that since the project was already underway, SI's request for completion of a new environmental and social impact assessment could not be taken into account. The NCP also opined that the company could not be expected to obtain (free, prior and informed) consent from populations living in Kenya given that the complaint concerned a contract signed with the Ethiopian government. Such a determination, if made, would erroneously have suggested that a company's due diligence responsibility is bounded by the borders of its contracting partner, not the scope of its actual or potential impacts.

The case *Trade unions and NGOs v. Suzuki Motor Corporation*<sup>19</sup> ended quickly with no remedy for complainants. Complainants alleged that Suzuki Motor (Thailand) Co. Ltd. had violated the right of its workers to freedom of association and collective bargaining at a Suzuki manufacturing facility in Thailand. The Japanese NCP accepted the case, but the Suzuki Motor Corporation refused to mediate, citing the parallel judicial proceedings ongoing in Thai courts. The Japanese NCP then simply closed the case. The Thai Supreme Court subsequently determined the strike was conducted in an unlawful manner.

*ELSAM et al v. Holcim Indonesia*<sup>20</sup> concerned land rights. Complainants alleged that Holcim had breached Guidelines provisions on human rights due diligence and consultation when it gave to the Indonesian Ministry of Forestry, as compensation for forest areas Holcim used for mining and cement factories, other land that had been occupied and cultivated by 826 households (about 3,000 people) for 19 years. The Swiss NCP accepted the case and the parties agreed to join mediation with the Ministry of Forestry. Though the Ministry refused to mediate, the parties did discuss potential remedies for the impacted community. Unfortunately, discussion was followed by no action, and thus no remedy for complainants. The Swiss NCP closed the case on grounds that no substantial progress had been made over the agreed options and that the Swiss NCP was not in a position to contribute further to the resolution of the issues.

In *Survival International v. World Wide Fund for Nature International (WWF)*<sup>21</sup>, the complainants alleged that WWF's support of conservation zones in Cameroon contributed to abuse of the human rights of the Baka indigenous populations living in the vicinity of those zones, including physical harm by security guards and denial of the communities' right to free, prior and informed consent. The parties came to mediation and discussed various options to improve the condition of the Baka people, but no agreement could be reached, and the Swiss NCP closed the case.

<sup>18</sup> See Salini case description and related materials at [https://www.oecdwatch.org/cases/Case\\_459](https://www.oecdwatch.org/cases/Case_459).

<sup>19</sup> See Suzuki case description and related materials at [https://www.oecdwatch.org/cases/Case\\_463](https://www.oecdwatch.org/cases/Case_463).

<sup>20</sup> See Holcim Indonesia case description and related materials at [https://www.oecdwatch.org/cases/Case\\_356](https://www.oecdwatch.org/cases/Case_356).

<sup>21</sup> See WWF case description and related materials at [https://www.oecdwatch.org/cases/Case\\_457](https://www.oecdwatch.org/cases/Case_457).

In *Jamaa Resources Initiative v. Dominion Group*<sup>22</sup>, the complainants alleged that Dominion Group's subsidiary, Dominion Farms Ltd in Kenya, caused loss of livelihood for local farmers and severe environmental and health impacts when it used an economically sensitive wetland for rice cultivation, an irrigation and hydropower project, a tilapia fish aquaculture farm, and other projects. The U.S. NCP accepted the case for mediation, but Dominion Group refused to participate citing ongoing legal proceedings, and the U.S. NCP closed the case. As a result, no remedy was achieved for complainants.

The case of *Former employees v. Banro Corp.*<sup>23</sup> was filed with the Canadian NCP by five former employees of a mining company in the Democratic Republic of Congo (DRC). The DRC company was majority-owned by Banro, a Canadian mining company, at the time the Congolese company's shareholders decided to liquidate it. The former employees alleged that the necessary severances were never paid after the liquidation and that Banro was responsible to settle accounts and had violated provisions of the Guidelines by failing to ensure the payout occurred. The Canadian NCP accepted the case, but determined on its own that without other lead actors in the liquidation, including the DRC government, the complainants would not be able to get resolution of the claim. The Canadian NCP thus determined that no benefit – compensatory or otherwise – could be reached through a facilitated mediation, and closed the case. The NCP did also, however, issue recommendations to Banro to engage in good faith to seek resolution of the severance payment delay, and provide updates to the NCP on steps taken and outcomes achieved. Complainants reported to OECD Watch in June 2018 that Banro has yet to take any action to implement the Canadian NCP's recommendations.

Finally, five of the cases closed in 2017 were filed by WeCAN against insurance companies (*WeCAN v. Insurance Companies*<sup>24</sup>) responsible for resolving insurance claims of households harmed by the 2010-11 New Zealand earthquakes. The New Zealand NCP rejected these five complaints on grounds that they were not material and substantiated, did not sufficiently draw a link between the enterprise's activities and the harms alleged, or that the enterprise did not fall under the scope of the Guidelines. Civil society stakeholders assert that the NCP is setting an unduly high burden of proof for claims at the initial assessment phase, and that it is this excessive burden, together with a refusal to adjudicate, that prevented access to remedy for these complainants.

## 5. A bright spot related to NCPs following up on concluded cases

A bright spot was the commitment by many NCPs to undertake follow-up after completion of their cases. The Procedural Guidance allows NCPs to follow up on the implementation of mediated agreements and the recommendations made in final statements. Such monitoring activities are critical to ensuring that the NCP process has a long-term impact and that recommendations and remedies, where achieved, endure. NCPs conducting follow-up monitoring include the Austrian, Belgian, French, Norwegian, Swiss, and UK, to name a few. Among cases closed in 2017, *Finance and Trade Watch Austria et al v. Andritz AG, Sherpa et al v. Socfin Group/Socapalm, ELSAM et al v. Holcim, Former employees v. Banro Corp.*, and *Crude Accountability et al v. the KPO Consortium* all involved commitments by NCPs to conduct follow-up to verify companies' compliance with agreements or recommendations

## Four reasons why NCPs did not provide effective access to remedy in 2017

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<sup>22</sup> See Dominion Group case description and related materials at [https://www.oecdwatch.org/cases/Case\\_466](https://www.oecdwatch.org/cases/Case_466).

<sup>23</sup> See Banro case description and related materials at [https://www.oecdwatch.org/cases/Case\\_469](https://www.oecdwatch.org/cases/Case_469).

<sup>24</sup> See New Zealand NCP responses to the 2017 NCP reporting questionnaire.

The results described above leave much to be desired. Out of the 18 cases filed by NGOs and communities that were completed in 2017, just five generated some kind of positive outcome. In four of those five cases, the positive outcome was a determination or policy change - a positive step, but one that does not signify a tangible change of circumstances for the complainants. This means that just one case resulted in a shift on the ground for the people experiencing harm. Why did such minimal outcomes occur?

OECD Watch acknowledges that **the low achievement of meaningful remedy in specific instances is not necessarily a reflection of low effort invested by NCPs into each case.** To the contrary, we know that some NCPs put significant effort into handling specific instances, and share stakeholders' desire for harms to communities and workers to be addressed swiftly and thoroughly. **Instead, the poor outcomes result largely from structures and procedures at NCPs that work against the NCPs' effectiveness.** The purpose of this and other of OECD Watch's publications is to highlight these deficiencies and propose reforms to NCP structures or procedures that will help ensure victims of corporate abuse have effective access to remedy.

Below, we highlight four primary reasons why the large majority of the cases discussed here did not achieve remedy for complainants:

- Some NCPs' **unwillingness to make determinations** where mediation fails or is rejected by a party;
- Most governments' **unwillingness to ensure consequences** for non-participation in the mediation process, non-fulfilment of an NCP's recommendations, or non-compliance with the Guidelines;
- Some NCPs' **imbalanced or unduly restrictive policies on transparency and confidentiality**; and
- **A lack of accessibility due to frequent premature rejections** of complaints at the initial assessment stage.

### 1. Unwillingness to make determinations of non-compliance with the Guidelines

The topic of determinations lately has attracted significant attention among NCPs. In response to NCPs' interest in determinations and recommendations, the OECD secretariat this month published a draft scoping paper on the topic.<sup>25</sup> **That paper finds that 17 NCPs (36% of the 47 NCPs total) currently engage in determinations according to their rules of procedure or practices.**

**The 2017 Annual Report on the OECD Guidelines acknowledges that “determinations can help companies better understand the Guidelines and what steps they can take to fully observe them.”**<sup>26</sup> OECD Watch has also observed positive benefits from the issuance of determinations.<sup>27</sup> One NCP peer review found that determinations provided leverage to encourage parties to engage in dialogue.<sup>28</sup> Businesses have also indicated that the prospect of a determination makes them more inclined to resolve disputes through mediation.<sup>29</sup> For companies, awareness that an NCP will, of its own accord, issue a compliance determination adds pressure for them to mediate in good faith, proactively discovering their own missteps and identifying meaningful corrective actions. In contrast, the lack of a threat of determinations by the NCP may encourage companies to drag the mediation process out without reaching a conclusion.

<sup>25</sup> OECD, Draft Scoping paper: Recommendations and Determinations in Specific Instances, DAF/INV/NCP(2018)46, 4 June 2018.

<sup>26</sup> OECD, Draft Annual Report on the OECD Guidelines for Multinational Enterprises 2017, DAF/INV(2018)19, 22 March 2018, paragraph 34.

<sup>27</sup> *Remedy Remains Rare*, supra note 7 at 41-44.

<sup>28</sup> Norwegian Peer Review Final Report, 2012, p. 26.

<sup>29</sup> *Remedy Remains Rare*, supra note 7, pg. 44.



**There is strong empirical evidence suggesting that determinations help lead to agreements in NCP cases.** An analysis of all the cases filed by NGOs and communities since 2000 reveals that out of the 31 cases that resulted in an agreement between parties, 22, or a full 71%, were facilitated by NCPs that make determinations.<sup>30</sup> The numbers suggest a correlation between achieving agreements and the practice of issuing determinations.

One positive example of issuance of determinations from 2017 was the case of *Crude Accountability et al v. the KPO Consortium*, in which the UK NCP found that the KPO Consortium had breached the OECD Guidelines in respect of its duties resulting from its business relationship with the Kazakh government. The determination in this case was more limited than that which complainants sought, in part because the UK NCP dismissed the more significant of the claims filed by complainants. But the determination did help lead to a recommendation by the NCP for the company to ameliorate the conditions of some of the residents near the oil and gas facility, which was also a small but positive step forward.

We also note that, outside the time-frame of this 2017 analysis, but relevant to one of the 2017 cases, the French NCP did issue a determination in *Sherpa et al v. Socfin Group/Socapalm* that all four of SOCAPALM's holding companies had violated the OECD Guidelines through their relationship with SOCAPALM. This was also very positive step in seeking accountability and acknowledgment for the complainants.

Unfortunately, some NCPs may issue determinations inequitably, only when they find a company *has* complied with the Guidelines. The peer review of the German NCP, conducted in 2017, suggested the German NCP engaged in such one-sided determining.<sup>31</sup>

Moreover, a number of cases closed in 2017 might have benefited from use of determinations.

- The case of *Finance and Trade Watch Austria et al v. Andritz AG* did result in some positive outcomes as cited above. But if the Austrian NCP had committed at the outset to issuing a determination on Andritz' compliance with the Guidelines, even stronger outcomes with more tangible benefits for complainants might have been reached, where Andritz assumed responsibility of its own role in the adverse impacts and committed to concrete actions aimed at true amelioration of the circumstances experienced by the complainants.
- In *ELSAM et al v. Holcim*, the Swiss NCP's good offices initially helped parties discuss several potential options to strengthen access to land by the impacted communities. Unfortunately, after continuing for a couple of years, the conversations floundered. The NCP closed the case on grounds that no substantial progress had been made over the agreed options, and that the Swiss NCP was not in a position to contribute further to the resolution of the issues. From the complainants' point of view, if at the outset the Swiss NCP had committed to issuing a determination should mediation fail, that could have encouraged Holcim to make some of those options a reality.

<sup>30</sup> According to OECD, Scoping paper: Recommendations and Determinations in Specific Instances, DAF/INV/NCP(2018)46, 4 June 2018, the following NCPs make determinations, either in policy or in practice: Australia, Canada, Chile, Colombia, Czech Republic, Denmark, Finland, France, Italy, Korea, Lithuania, Luxembourg, Morocco, Netherlands, Norway, Peru, Poland, Sweden, and UK.

<sup>31</sup> Draft Peer Review of the OECD National Contact Point of Germany, DAF/INV/RBC(2018)1/REV1, 23 February 2018. In paragraph 92, Germany asserts that it does not issue determinations of compliance. That stance is reflected in the OECD's recent Scoping paper on Determinations practice (supra note 25), where Germany is not counted among countries that do undertake determinations. However, this position is contradicted by paragraph 94 of the peer review, where peer reviewers show that Germany has rejected complaints on grounds that a company *has* complied with the Guidelines. It thus remains unclear to OECD Watch whether Germany issues determinations in an impartial manner, both in cases of compliance and non-compliance, or only in cases of a company's compliance, in order to reject complaints.

- In *Trade unions and NGOs v. Suzuki Motor Corporation*, Suzuki Motor Corporation refused to engage in the NCP process on grounds that it would instead participate in ongoing court proceedings. The Japanese NCP then dismissed the case. The Japanese NCP should, rather, have encouraged Suzuki to join mediation for any issues extending beyond those specifically covered in the parallel proceedings. If Suzuki had still refused, the Japanese NCP could have helped advance the matter by investigating on its own any allegations of non-compliance with the OECD Guidelines (which are different from the national law addressed in the parallel proceedings), and issuing a determination on whether Suzuki had complied with the OECD Guidelines in respect of those claims.
- Similarly, in *Jamaa Resources Initiative v. Dominion Group*, the US NCP closed the case following the Dominion Group's refusal to engage in mediation because of parallel judicial proceedings. The US NCP did remind the company in its final statement that a broader process of mediation could lead to resolution of issues not before the courts and advance implementation of the Guidelines. The US NCP should have taken this a step further and investigated and issued a determination, on its own, about those allegations falling outside the scope of the judicial proceedings.
- The Canadian NCP concluded the case *Former employees v. Banro Corp.* without issuing a determination on whether Banro had complied with the Guidelines in its conduct in respect of the closure of the DRC mining company and payment of severance. The complexity of the political situation at the time of the liquidation should only have increased the reason for the Canadian NCP to have taken the opportunity to identify the responsibilities of the company operating in a tumultuous context. The prospect of a determination might have prompted Banro to engage more meaningfully in the specific instance proceedings.

The case *Former employees v. Heineken* shares notable similarities with *Former employees v. Banro Corp.*; both were brought by former employees alleging harms from a massive termination of employment occurring in the DRC in the late 1990s. In *Former employees v. Heineken*, the Dutch NCP's policy on determinations made clear at the outset of the case that if mediation failed, the NCP would conduct its own investigation and issue a determination. When discussing the case at the UN Forum on Business and Human Rights in November 2017, a representative of Heineken stated that the prospect of a determination provided an impetus for Heineken to engage in good faith in the mediation.<sup>32</sup>

## 2. Governments' unwillingness to ensure consequences for non-compliance with the Guidelines

The Annual Report on the OECD Guidelines 2017 observed in a section on economic diplomacy that tools such as export credit, investment guarantees, direct lending, participation in trade missions, capacity building activities, and access to information and networks through embassies "are not only instrumental to promote foreign trade and investment, but they can also be powerful levers for governments to guide corporate behaviour and support best practice on RBC."<sup>33</sup> When a company refuses to engage fully in the NCP process or fails to implement the NCP's recommendations, or when an NCP finds that a company has not complied with the Guidelines, material consequences should result. Attaching material consequences would not change the legal nature of the Guidelines – it is a question of policy coherence. Applying consequences for disregard for the Guidelines will

<sup>32</sup> OECD Watch, *Six secrets to success: Analysis of key success factors for remedy in the case of DRC workers vs. Heineken at the Dutch NCP*, 3 December 2017.

<sup>33</sup> 2017 Annual Report on the OECD Guidelines, *supra* note 26 at paragraph 144.

create a level playing field for business, and help ensure that companies failing to respect the Guidelines do not gain a competitive advantage over those upholding the standards. At present only a few governments attach real consequences to companies that refuse to participate in NCP-facilitated mediation. The Canadian, Dutch, and German governments have all committed to apply consequences in respect of NCP cases.<sup>34</sup>

In *Sherpa et al v. Socfin Group/Socapalm*, the Belgian NCP took the positive step of sharing the final statement with the Belgian export credit agency, encouraging it to take extra care in its own screening evaluation of Socfin and to seek input from the NCP if needed.<sup>35</sup>

Other cases in 2017 would have benefited from such application of material consequences.

- In *Bruno Manser Fonds v. Sakto Corp.*, the Canadian NCP made an attempt to recommend consequences for Sakto for its uncooperative approach towards the NCP mediation process. The Canadian NCP's first public final statement recommended that, "[s]hould Sakto approach the Government of Canada Trade Commissioner Service (TCS) in future to access trade advocacy support, the NCP recommends that the company's actions during this NCP review process be taken into account by the TCS." Unfortunately, in a highly-irregular move, the Canadian NCP inexplicably replaced this statement almost a year later with another that makes no reference to Sakto's missteps, and no longer recommends that Sakto face trade support consequences as a result of its conduct during the specific instance process.<sup>36</sup> The new final statement mentions only the complainant's decision to publish the draft initial assessment – again, a decision that was taken *after* the Canadian government had already reversed its stance and proposed, without explanation, to reject the case.
- As described above, the parties in *ELSAM et al v. Holcim* developed and discussed several options for remediation for the impacted land users. Implementation of some of these was stymied by the Indonesian government itself, but even others that could have been implemented by the company alone floundered. Though discussed, these options were not pursued to any meaningful degree. The Swiss NCP closed the case asserting that it was not in a position to contribute further to the resolution of the issues. Once again, that last conclusion of the Swiss NCP may have been premature. The Swiss NCP was in a very good position to issue consequences to Holcim for failing to take action on the options discussed in mediation. If Holcim had known it would face trade-related consequences for failure to make good in ensuring a better outcome for the impacted communities, then it would have had greater incentive to make some of those options a reality.
- In *Trade unions and NGOs v. Suzuki Motor Corporation*, as described, the Japanese NCP dismissed the case when Suzuki Motor Corporation refused to engage. If the NCP had warned the company that trade support-related consequences would result for the company's refusal to engage in mediation of any issues falling outside of the

<sup>34</sup> Germany, National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights, pg. 25, available at [https://www.business-humanrights.org/sites/default/files/documents/NAP%20Business%20Human%20Rights\\_English%281%29.pdf](https://www.business-humanrights.org/sites/default/files/documents/NAP%20Business%20Human%20Rights_English%281%29.pdf); Canada's National Contact Point for the Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises, Engagement in good faith in the NCP process and possible consequences, available at [http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu\\_id=1&menu=R](http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu_id=1&menu=R).

<sup>35</sup> Final statement of Belgian NCP, available at [https://www.oecdwatch.org/cases/Case\\_202](https://www.oecdwatch.org/cases/Case_202); Correspondence with Belgian NCP regarding this paper, 14 June 2018.

<sup>36</sup> Second final statement of Canadian NCP, available at [https://www.oecdwatch.org/cases/Case\\_471](https://www.oecdwatch.org/cases/Case_471).

bounds of the parallel proceedings, that would have provided encouragement for a resolution to be achieved.

- Similarly, in *Jamaa Resources Initiative v. Dominion Group*, the US NCP closed the case following the Dominion Group's refusal to engage in mediation because of parallel judicial proceedings. The US NCP was cognizant that a broader process of mediation could lead to resolution of issues not before the courts and advance implementation of the Guidelines. The US NCP could have strengthened its encouragement of the company by recommending consequences to it for refusing to mediate regarding allegations falling outside the scope of the judicial proceedings.
- Another case that was closed in 2016, but which deserves mentioning in the year 2017 in respect of consequences, is the case of *Rights and Accountability in Development (RAID) v. ERG (then ENRC)*.<sup>37</sup> In 2016, the U.K. NCP issued a final statement finding that Kazakh mining giant ERG had failed to meet its obligations under the OECD Guidelines with regard to respecting the rights of thousands of residents living on its mining concession in the DRC. In a follow-up statement published by the U.K. NCP in April 2017, the U.K. NCP found that ERG had not fulfilled any of the recommendations given by the NCP.<sup>38</sup> The case demonstrates the need for governments to apply material consequences to companies that fail to comply with the Guidelines, or at a minimum, fail to follow the recommendations they receive in a specific instance proceeding. Without consequences, companies can ignore the OECD Guidelines and NCP statements with impunity.

Once again in contrast to the above cases, in *Former employees v. Heineken*, the Dutch government's promise to attach consequences to the company's refusal to engage in the process potentially had a role in bringing about remedy for the complainants.

### 3. Imbalanced or unduly restrictive policies on transparency and confidentiality

A third reason why so many of the 2017 cases resulted in no effective remedy for victims were NCP policies on transparency and confidentiality that, in various ways, made it impossible or difficult for NGOs to participate in the case on fair and impartial terms.

Ensuring an effective and reasonable balance between transparency and confidentiality in NCP cases is important. **Transparency is prioritized under the Guidelines as one of the four core criteria of the Procedural Guidance.** Without any public scrutiny into a case, companies have little incentive to engage, and media attention can generate the pressure necessary to balance the scales and nudge the company towards the mediation table.<sup>39</sup> Transparency enables the public to know which companies may be implicated in human, labour, or environmental impacts. Media can also alert responsible investors of the matters at hand. For example, campaigning by WWF in the case of *WWF v. SOCO* led investors to exert pressure on the company, which had a positive effect on the company's willingness to engage meaningfully in the process.<sup>40</sup> Media can also draw public attention to the government's and the company's own good efforts to promote responsible business conduct. Ground rules on what information may be included in campaigning can establish appropriate protections without stemming public awareness of the complaint and proceedings altogether. Further, ground rules can ensure that companies are not prematurely depicted as having breached

<sup>37</sup> See ERG case description and related materials at [https://www.oecdwatch.org/cases/Case\\_295](https://www.oecdwatch.org/cases/Case_295).

<sup>38</sup> UK NCP follow up to final statement: RAID against ENRC, 23 April 2018, available at <https://www.gov.uk/government/publications/uk-ncp-follow-up-to-a-final-statement-rights-and-accountability-in-development-raid-complaint-against-the-eurasian-natural-resources-corporation-e>.

<sup>39</sup> *Remedy Remains Rare*, supra note 7 at 37-39.

<sup>40</sup> See *WWF v. SOCO* case description and related materials at [https://www.oecdwatch.org/cases/Case\\_307](https://www.oecdwatch.org/cases/Case_307).

the OECD Guidelines if they may not have, but simply identify them as subject to an NCP mediation.

On the other hand, confidentiality is also important to complainants as well as business – to protect trade secrets, individuals' personally-identifying details, and the communications made during mediation. These **legitimate bases for confidentiality should be respected as narrow exceptions to the presumption favouring transparency**. It is *not* legitimate for a company to be allowed to keep a complaint confidential because it wishes to avoid any media attention at all to the case. Nor may a company mask its overall desire for secrecy with an unjustified claim that any and all information it shares is tied to a trade secret. NCPs should scrutinize such arguments and respond to them in reasonable fashion. And while the contents of mediation should be kept private, the overall stages of proceedings of a case, including that a case exist, that a complaint is drafted, that a specific instance is accepted for mediation, that mediation is being entered into, should all be part of the public domain.

Challenges arise for many complainants when NCPs require – or concede to company demands to instate – a policy setting confidentiality as the norm rather than the exception in a case. NGOs often file an NCP case as part of a larger campaign to raise awareness on an issue. Prohibiting campaigning would thus constitute an unfeasible proscription of an NGOs core activity of awareness-raising. NGOs must report their outputs, including campaigning publications, to donors in order to do the work that all agree is valuable for them to do. NCPs should understand these realities for NGOs and enable reasonable guidelines around publicity. Some NCPs restrict campaigning on grounds that it evidences bad faith on the part of the complainant. Yet if a company is not required to halt its own core business on a project site during an NCP case, neither should an NGO be kept from its core work of raising awareness of potential harms. Both parties may do their work and still intend in good faith to reach a resolution that provides remedy for impacted people and strengthens adherence to the Guidelines.

Another challenge that NGOs often face when filing specific instances, which is related to confidentiality and transparency, is NCPs' use in their final decisions of information that is shared only between the company and NCP, and not with the complainants. It is patently unfair to decide a case based on information that one party has had no opportunity to see and counter through arguments or contrasting evidence.

Unfortunately, many NCPs continue to apply transparency and confidentiality policies that cause these very problems for complainants.

- In **Finance and Trade Watch Austria et al v. Andritz AG**, the Austrian NCP accepted the case, but applied transparency and campaigning restrictions considered by one complainant as an attempt to silence complainants. A more balanced policy on campaigning might have enabled that party to participate.
- The Italian NCP in **Survival International Italia v. Salini Impregilo** also set restraints on campaigning – for example, preventing the parties from advertising even the existence of the case during mediation – that caused the complainant to drop out of the case.
- Another case that was not closed in 2017, but which deserves attention here, is the case of **HRLC & RAID v. G4S Australia Pty Ltd**.<sup>41</sup> In that case, the Australian NCP rejected the complaint at the initial assessment stage on several questionable grounds. Of note here, the Australian NCP refused to share any of its correspondence

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<sup>41</sup> See G4S case description and related materials at [https://www.oecdwatch.org/cases/Case\\_342](https://www.oecdwatch.org/cases/Case_342).



from G4S with the complainants, despite this correspondence being material to the ANCP's decision to reject the complaint. Such conduct raised serious concerns about the NCP's impartial treatment of parties. Such concerns were exacerbated when, in response to the complainants' request for review, the ANCP issued an appeal statement in 2016 (published and amended on 27 October 2017), which purported to exonerate G4S in relation to every allegation despite the NCP's rejection of the specific instance. This case is relevant to discussion of 2017 cases, as this case served as the basis for the first substantiated submission, filed by OECD Watch that year.

In contrast to the above cases, a more balanced policy on transparency and confidentiality in [Former employees v. Heineken](#) helped encourage a meaningful negotiation and Heineken's voluntary payment of compensation to complainants. During the case, several newspaper articles were published about the matter, drawing public attention to the discussions. At the 2017 UN Forum panel evaluating the case, the Heineken representative stated that media and public attention around the case helped convince management to engage constructively in the NCP process and incentivized the company to genuinely seek to resolve the case through the NCP system.<sup>42</sup>

#### 4. A lack of accessibility due to premature rejections

Unreasonably high burdens of proof at the initial assessment phase are a common frustration facing users of many NCPs. 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." Dr. Roel Nieuwenkamp has explained that the substantiation standard is intended simply to discourage frivolous claims and not to bar claims presenting allegations of fact that are credible or plausible.<sup>43</sup> Excessive standards greatly reduce accessibility and utility of the complaint process, and may reveal a legalistic tendency by an NCP towards eliminating complaints on procedural grounds, rather than helping facilitate dispute resolution of legitimate underlying concerns.

NCPs also take varying approaches to determining whether certain enterprises are covered by the Guidelines. The Guidelines state explicitly that no fixed definition of 'multinational enterprise' is required and only note that MNEs are 'usually' established in multiple countries.<sup>44</sup> The fact that a company operates within one country should not necessarily exclude it from consideration. Further, some NCPs have rejected complaints because the company in questions was "just implementing government policies". However, the Guidelines are clear that a company that is implementing government projects is not excluded from the Guidelines on that ground; businesses have a responsibility to respect the rights of communities and workers that is parallel to the government's own duty to protect rights.

Other NCPs reject complaints by deciding without explanation that their own good offices would not contribute to the purposes and effectiveness of the Guidelines. In such cases, an NCP often disregards the specific remedies sought by the complainant and instead decides, on the basis of less evidence at the initial assessment phase, that the company has met a more generic duty. To better facilitate remedy for complainants, NCPs should respond to the actual requests of the complainants in considering whether the company could have acted more responsibly under the Guidelines to avoid harms. Provided the issue is material and substantiated, NCPs should not stand in the way of their own good offices when complainants clearly believe the NCP can help and contribute to the purposes of the Guidelines.

Several cases were prematurely dismissed by the New Zealand and Canadian NCP in 2017.

<sup>42</sup> Six secrets, *supra* note 32.

<sup>43</sup> OECD, Draft summary record of the joint meeting of the WPRBC and NCPs held on 4 December 2014.

<sup>44</sup> OECD Guidelines, Chapter I, paragraph 4.

- The New Zealand NCP rejected five *WeCAN vs. Insurance Companies* cases on grounds that they had not sufficiently substantiated their claims. Stakeholders assert that the New Zealand NCP sets an impossibly high standard of proof that is effectively at the level of “beyond a reasonable doubt” – the same standard used in many court criminal proceedings. Such a standard would be inappropriate at the initial assessment phase, creating a burden complainants often cannot meet.
- In *Southeast Alaska Conservation Council v. Seabridge Gold*, the Canadian NCP rejected the complaint on grounds that Seabridge Gold had already conducted a sufficiently rigorous environmental assessment and adequately consulted stakeholders. The Canadian NCP did not discuss whether the 15 remedies actually sought by the complainants had been addressed by the company, nor explain why its good offices could not help the parties discuss remedy for the harms that are, despite any actions of the company, or even later phases, still impacting the community.
- In *Bruno Manser Fonds v. Sakto Corp.*, the Canadian NCP again unilaterally dismissed the case asserting that the NCP’s mediation services would not contribute to the purpose and effectiveness of the Guidelines. The Canadian NCP stated in its first final statement that the parties lacked the good faith to mediate together.<sup>45</sup> A more effective approach might have been to facilitate a mediation in which to allow the parties themselves to determine whether they could reach a mediated solution.
- In *Former employees v. Banro Corp.*, the Canadian NCP accepted that the case was material and substantiated, but determined on its own that without other key voices at the table, the mediation could not be successful. As emphasized above, NCPs should not unilaterally determine that a mediation cannot be successful. The process of mediation can draw out unexpected solutions, and it is unnecessary for an NCP to prejudge the potential outcomes. Relatedly, remedy may mean various things to complainants, and alternative remedies, such as recognition and apology, may have been achieved through mediation.

In the *Former employees v. Heineken*, the Dutch NCP accepted the case even focused, as it was, on financial compensation. Some NCPs would have rejected this request, erroneously asserting that NCPs can only handle forward-looking requests and not remedy for past harms. This ignores the fact that most users of the NCP grievance system are primarily seeking remedy for past harms, as well as being interested in forward-looking improvements. The Dutch NCP recognized that remedy, which can take many forms, is the reason for the NCP system and demonstrated that both restorative and forward-looking remedy are possible through the NCP system if NCPs recognize that this is their purpose. The mediation facilitated by the Dutch NCP led to the company voluntarily deciding to pay the former employees for their harms.

## **Conclusion and Recommendations**

As emphasized at the outset of this report, the OECD Guidelines for Multinational Enterprises (Guidelines) have unique potential to strengthen the global system of corporate governance and provide access to remedy for the victims of corporate misconduct. State-backed, extraterritorial in their application, broad in their coverage of sectors, value chains, and types of human and environmental impacts, and equipped with non-judicial grievance

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<sup>45</sup> First final statement of Canadian NCP, supra note 34.

mechanisms supported by some of the world's leading governments, the Guidelines could have far-reaching impact in encouraging a global shift in the norms of responsible business conduct.

The NCPs themselves have a unique role to play in advancing a humane business model, and the potential to become the state-based non-judicial grievance mechanism envisioned by the UNGPs. However, the outcomes of cases completed in 2017 leave much to be sought. The lack of remedy for complainants lies not so much in insufficient effort by NCPs to handle specific instances carefully and thoroughly, but rather in the existence, or lack, of practices that hinder NCPs from meeting the core criteria set for all NCPs – visibility, accessibility, transparency and accountability – and the principles that NCPs are supposed to follow in handling complaints – impartiality, predictability, equitability and compatibility with the Guidelines.

Determinations, consequences, balanced policies on transparency and confidentiality, and appropriate standards for accepting and rejecting cases, are all critically needed to enable complaints to be heard, encourage companies to mediate in good faith, and strengthen NCPs' own hands in ensuring companies actually follow-through with the agreements they form and the recommendations NCPs give them.

That list of four reasons is not exhaustive, however. OECD Watch's Campaign Demands<sup>46</sup>, our 2015 report *Remedy Remains Rare*<sup>47</sup>, and our 4 x10 Plan for why and how to unlock the potential of the OECD Guidelines<sup>48</sup>, all outline many other common NCP organizational structures and practices that limit access to remedy.

### Recommendations for governments

OECD Watch's research from this and past years leads us to urge OECD adherent governments to make the following reforms at their NCPs:

- Governments must explicitly recognize that the primary reason for the NCPs is to **ensure access to remedy for victims**.
- Governments should require NCPs to **issue determinations** of non-compliance or compliance with the Guidelines, as a measure to encourage companies to implement the Guidelines' recommendations and participate meaningfully in the specific instance process.
- Governments should **assign consequences** for companies' refusal to mediate or implement the NCP's recommendations, or for companies' failure to comply with the Guidelines. Consequences can include exclusion from trade promotion privileges, public procurement contracts, export credit guarantees, and investment missions.
- Governments should ensure their NCPs strike a **meaningful balance between transparency and confidentiality** that permits reasonable campaigning activities.
- Governments should **ensure their NCPs are accessible** to potential complainants, by engaging in broad-based promotional activities with stakeholders, providing information on the specific instance process on their websites, and accepting cases

<sup>46</sup> OECD Watch, Our campaign demands for policymakers, November 2017, available at [https://www.somo.nl/wp-content/uploads/2018/04/OECD-Watch\\_-Campaign\\_demands.pdf](https://www.somo.nl/wp-content/uploads/2018/04/OECD-Watch_-Campaign_demands.pdf).

<sup>47</sup> *Remedy Remains Rare*, supra note 26.

<sup>48</sup> OECD Watch, A "4x10" plan for why and how to unlock the potential of the OECD Guidelines through effective National Contact Points, November 2017, available at <https://www.somo.nl/wp-content/uploads/2018/04/4x10-plan-for-why-and-how-to-unlock-the-potential-of-the-OECD-Guidelines-update.pdf>.

that present a plausible claim and meet the admissibility criteria proposed in the Procedural Guidance.

- Governments should ensure that NCPs have an **organizational structure conducive to impartial decision-making**, such as a multi-partite structure involving various government agencies, a structure involving international experts and stakeholders, or a structure involving an oversight steering board.
- Governments must provide **NCPs sufficient resources** to accomplish their mandate, including to support indigent complainants in utilizing the complaint and mediation services.
- Governments should **enhance the predictability of their NCPs** by ensuring NCPs set and follow reasonable timelines for case processing, communicate regularly with both parties regarding the complaint status, and base their final statements only on material available to both parties.
- Governments should help NCPs to **support the safety of activists using the mechanism**, who increasingly face threats for their engagement in claims on corporate misconduct.
- Governments must **require NCPs to follow-up on case outcomes**, to encourage compliance with their recommendations and with the Guidelines.

The NCP system is currently an unpredictable patchwork of methods and structures – some successful, many not – to implement and ensure compliance with the principles of the OECD Guidelines. Taking these steps will help governments promote adherence to the Guidelines, strengthen the functional equivalence among NCPs, and increase accessibility of remedy for the victims of corporate misconduct. At the same time, governments must recognize that non-judicial grievance mechanisms such as NCPs are only part of the remedy system, and that improvement to NCPs should go hand in hand with strengthening national level options for judicial remedy (such as creating avenues for remedy through mandatory due diligence laws) and engaging in good faith negotiations on a UN treaty on business and human rights. We have previously described judicial mechanisms as the backbone of the remedy system, with NCPs and other non-judicial mechanisms the fingertips.<sup>49</sup> Ensuring that both are functioning effectively will allow NCPs to deliver better results in their role, while the most egregious cases of abuse are dealt with effectively by judicial mechanisms with real sanctioning power.

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<sup>49</sup> OECD Watch, Judicial mechanisms are the backbone of the remedy system, non-judicial the fingertips, 4 December 2017, available at <https://www.oecdwatch.org/news-en/2017-judicial-mechanisms-are-the-backbone-of-the-remedy-system-non-judicial-the-fingertips2017>.