

## The State of Remedy under the OECD Guidelines

Understanding NCP cases concluded in 2019 through the lens of remedy

### 1. Report highlights

- In 2019, **28 complaints** filed with National Contact Points (NCP) were concluded, including 14 filed by non-governmental organisations (NGOs) and communities (the other 14 filed by unions and individuals).
- In 2019, victims of corporate abuse continued to see major barriers to accessing remedy through the NCP system, with **inaccessibility, lack of impartiality and lack of equitability** being the most cited obstacles.
- 2019 was the second subsequent year in which the case **rejection rate significantly surpassed the already-high historical averages**. **36%** of NGO/community complaints were rejected outright with no offer of good offices to resolve the dispute.
- Reasons for rejection varied, but included:
  - **Insufficient substantiation** of allegations, often ignoring the OECD Guidelines' standard of "plausibility" for accepting cases.
  - the NCP's **refusal to apply the Guidelines to certain financial services** or see due diligence as something that companies are expected to do both *before and after* harms occur;
  - invoking the existence of **parallel proceedings** without a proper assessment of whether accepting the case would actually negatively prejudice the existing proceedings; and
  - the NCP's **inability or unwillingness to investigate old facts** or matters addressed by domestic law.
- Perceived **conflicts of interest at NCPs** remained a major concern for complaints.

Yet not all of the complaints concluded in 2019 had disappointing outcomes. Six NGO/community complaints resulted in some form of remedy for the complainants, and some of these cases were ground-breaking in their own way, tackling new topics and types of companies in the OECD Guidelines system:

- Two cases confirmed that **the OECD Guidelines do cover the impact of global warming** and the responsibility to companies – including in the financial sector – to work to Paris Agreement targets
- Agreement was reached in a case against a bank involving **respect for indigenous rights, including the right to free prior and informed consent (FPIC)**.
- A **case against a multi-stakeholder initiative**, the Roundtable for Responsible Palm Oil, was accepted and reached agreement.
- The first-ever agreement in a case involving the responsibility of **online platforms and the digital economy**.
- A case involving an oil company in Nigeria led to **remediation of adverse impacts and concrete improvements on the ground**.

## 2. Introduction

The OECD Guidelines for Multinational Enterprises (Guidelines) are a set of recommendations from governments to businesses on responsible business conduct (RBC). In theory, the Guidelines have tremendous potential to strengthen the global system of governance of corporate activity and behaviour. Extra-territorial in coverage and broad in scope across all sectors and value chains, the Guidelines set strong expectations for corporations to prevent, remediate and account for the harmful impacts of their operations. The Guidelines also create a government-backed grievance mechanism, in the form of an NCP at each OECD member and adhering country, to help resolve disputes between companies and the communities and workers negatively impacted by their conduct.

In 2020 as this report is published, the NCPs celebrate their 20<sup>th</sup> anniversary of existence. While NCP functioning has improved significantly in the past two decades, from the perspective of communities and civil society, NCPs are still largely failing in one of their primary objectives: to provide the victims of corporate abuse with an effective way to access remedy for the harm done to them. NCPs are not courts, which should give them unique freedom to be flexible, creative, progressive, and *values-driven* in upholding expectations for *good business*. Too many of them underestimate their own ability.

Each year, in parallel to the OECD's own annual report on the OECD Guidelines, OECD Watch, the formal representative of civil society to the OECD Investment Committee and its Working Party on Responsible Business Conduct, publishes its own assessment of how NCPs performed that year in facilitating access to remedy for victims of corporate harms. The year 2019, despite many continued problems and overall lack of effectiveness, showed several promising and ground-breaking cases as well. In this report, OECD Watch seeks to highlight what worked, and what didn't, to enable remedy or impede it in OECD complaints concluded in 2019. The aim is to encourage and enable governments and NCPs to implement meaningful change to the way NCPs are structured and function, with the expectation that this will lead to improved respect for human rights and responsible business conduct, as well as effective access to remedy for victims.

All of the complainants and NCPs mentioned in this report were provided with a draft and the opportunity to provide comments and corrections to the descriptions and analysis of their case(s). The majority of the complainants and NCPs did indeed provide feedback, which has been incorporated into this version.

## 3. Assessing access to remedy

The UN Guiding Principles on Business and Human Rights (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>1</sup> When assessing how well NCPs performed that year in facilitating access to remedy for victims of corporate harms, OECD Watch takes a very broad approach. In addition to compensation or actual changed circumstance on the ground for victims, we also consider remedy to include an acknowledgement by an NCP of a breach of the Guidelines (i.e. an acknowledgement that a harm has been done), and a company's commitment to change its policies or practices moving forward (as a form of promise of non-repetition).

Despite the broad definition, OECD Watch continues to identify major obstacles to remedy for complainants in NCP cases. We believe this has resulted to a large degree from a reluctance by some NCPs to consider providing access to remedy as a key function of the NCP. Too many NCPs passively facilitate discussion between parties without using all the tools available to them to bring companies to the table, correct power imbalances, call out irresponsible corporate conduct, and encourage creative solutions or seek tangible consequences from their governments for harmful business impacts.

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<sup>1</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).

After years of good faith efforts towards soft-law accountability for corporate harms, stakeholder patience for non-binding measures has worn thin. As a result, national, regional, and global initiatives towards mandatory corporate human rights due diligence have bloomed, and the NCPs – and the Guidelines themselves – are at risk of becoming obsolete. For all our criticism of NCPs, OECD Watch believes NCPs themselves – not only the OECD’s standards and guidance on RBC – still can help promote a new vision for corporate conduct. But they are at a crossroads: can they make themselves, and the Guidelines, relevant in the next decade?

## 4. Summary of complaints handling in 2019

The year 2019 marked both several lows and several highs in the handling of complaints by NCPs. In 2019, 28 complaints were concluded in total, including 14 filed by non-governmental organisations (NGOs) and communities.

As in past years, rejection of cases at the initial assessment stage was a serious barrier to civil society complainants. 2019 was the second subsequent year in which the case rejection rates significantly surpassed the already-high historical averages. Over one-third of NGO-led complaints were rejected pre-mediation. The reasons for rejection varied. Lack of substantiation was referenced in at least four complaints. Other reasons for rejecting cases included:

- the NCP’s refusal to apply the Guidelines to certain financial services or to companies involved in investments either *after* or *before* harms had occurred;
- invoking the existence of parallel proceedings without a proper assessment of whether accepting the case would actually negatively prejudice the existing proceedings; and
- the NCP’s inability or unwillingness to investigate old facts or matters addressed by domestic law.

In two of the cases that were rejected, perceived conflict of interest within the NCP was a serious concern.

- In one case, the Peruvian NCP’s double role as both the assessor of the complaint and the investment promotion agency linked to supporting the investment project at issue raised serious red flags for the complainants. Whether or not bias was an actual underlying reason for the complaint’s rejection, the perception of bias significantly weakens the confidence civil society has in the NCP.
- In the second, the Belgian NCP’s rejection of a request to ensure recusal from the case review of a business federation involving the bank targeted in the complaint deeply concerned the complainants. The NCP’s response also concerned the UN Independent Expert on human rights and foreign debt, an amicus to the complaint, who issued a blistering press release in 2020 calling for the NCP and OECD generally to ensure such conflicts of interest in complaint handling are better addressed in future.<sup>2</sup>

OECD Watch recognizes complexities in some of these cases and discusses these in the analysis below. Nevertheless, OECD Watch finds it unacceptable that – 20 years into their existence – so many NCPs continue fail to meet the OECD’s core criteria for handling complaints – impartiality, predictability, equitability – and to use unjustifiable grounds to reject and block access to remedy for complainants.

Yet not all of the complaints concluded in 2019 had disappointing outcomes. Among three complaints filed by NGOs that were mediated without reaching agreement, the complainants in two expressed some satisfaction with how the NCP handled their claims. They appreciated, for example, that the NCPs affirmed the application of the Guidelines to the companies at issue and sought apologies from the companies and their participation in a remedy of some kind.

Further, six complaints filed by NGOs went to mediation and ended in agreement. Several of these were ground-breaking in their own way, tackling new questions and challenges in the OECD Guidelines system. The Dutch, Polish, Swiss, and Italian NCPs provided access to some form of remedy in 2109 cases:

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<sup>2</sup> OHCHR, News Release: “Apartheid and bank complicity case: UN expert urges reform of OECD review mechanism to protect human rights,” 27 April 2020, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25831&LangID=E>.

- Through support of the Dutch NCP, a group of Dutch NGOs achieved commitment by ING bank to better report its indirect impacts on climate change and set concrete goals for its own climate targets in line with the Paris Agreement. In a similar case, the Polish NCP helped Polish NGOs encourage improved climate-related non-financial reporting from a Polish state-owned financial institution Group PZU S.A..
- The Swiss NCP helped a Swiss NGO reach agreement with Credit Suisse to respect indigenous rights, including to free prior and informed consent (FPIC), in its project finance operations.
- In another curious case, the Swiss NCP helped advance a complaint handled by *another*, non-NCP grievance mechanism: the Swiss NCP accepted jurisdiction over the Roundtable for Responsible Palm Oil (RPSO) to help Indonesian groups involved in a six-year-and-floundering RSPO case agree on an action plan for the RSPO's next steps.
- Another Polish case addressed the new subject of the due diligence expectations of internet-based companies: the NCP helped a Polish NGO secure agreement with an internet marketplace Grupa OLX sp. z.o.o. to screen out environmentally harmful advertisements from its digital sales platform.
- The Italian NCP facilitated an important agreement and commitment by Italian oil and gas company Eni to address decades of flooding its subsidiary had caused in Nigeria. After the complaint, Eni began remediation preparation before its operations were stalled by the COVID-19 crisis. The case now provides a good opportunity for the Italian NCP to follow-up to ensure the company ultimately makes good on its commitments and nascent good efforts toward the community.

To be sure, success in cases depends to some degree on elements outside an NCP's control, such as the nature of the case and remedy sought and the manner of engagement of the parties. But success also depends in larger part on practices of the NCP: how it encourages parties (especially companies) to come to the mediation table; whether it accepts complaints that state a plausible claim under the Guidelines without delving too deeply (at the initial assessment stage) into facts; how willing it is to actually uphold the Guidelines by calling out breach when it sees it; and how creatively and proactively it seeks to facilitate *meaningful* outcomes for the injured party.

Table 1 below summarizes all 14 of the NGO/community cases concluded in 2019 and highlights the actions of the NCPs OECD Watch considers to have *helped* or *hindered* complainants in accessing remedy. The cases and issues are also discussed in more detail in the section below.

**Table 1: Overview of elements OECD Watch considers helped/hindered access to remedy in 2019 cases**

Case (NCP)	Issues	Outcome	Barriers/Support to successful outcome of NCP complaint	Remedy?
<p>○ <i>Open Secrets &amp; CALS vs. KBL and KBC (Belgium, Luxembourg)</i></p>	<p>Financial sector responsibility Causation/contribution to human rights impacts Violation of arms embargo</p>	<p>Rejection</p>	<p>Perceived conflict of interest at NCP Unwillingness to encourage apology Overly high standard for substantiation at initial assessment phase Difficulty in investigating old facts Time taken to consider initial assessment Insufficient engagement with the evidence presented No requirement that the banks defend the allegations against them – bare denial accepted over evidence presented</p>	<p>No</p>
<p>○ <i>Quechua indigenous group vs. Marriott International (Peru)</i></p>	<p>Respect for indigenous cultural heritage Human rights impacts</p>	<p>Rejection</p>	<p>Alleged conflict of interest at NCP Misuse of parallel proceedings to reject case Overly high standard for substantiation at initial assessment phase Refusal to apply Guidelines to company for impacts prior to its engagement Denial of complainants' right to claim based on cultural heritage</p>	<p>No</p>
<p>○ <i>KTNC Watch et al. vs. KEXIM and Daewoo Engineering and Construction Co., Ltd (Korea)</i></p>	<p>Financial sector / ECA responsibility Breach of due diligence Human rights and environmental impacts</p>	<p>Rejection</p>	<p>Refusal to apply Guidelines to company for impacts prior to its engagement</p>	<p>No</p>
<p>○ <i>Intesa Sanpaolo S.p.A. and Lady Lawyer Foundation (LLF) (Italy)</i></p>	<p>Disclosure and competition breaches</p>	<p>Rejection</p>	<p>Refusal to handle an issue appearing clear under domestic law</p>	<p>No</p>
<p>○ <i>CooperAcción et al. vs. Renco Group and Doe Run Peru S.R.L. (Peru)</i></p>	<p>Human rights and environmental impacts</p>	<p>Concluded without agreement or statement</p>	<p>Alleged conflict of interest at NCP (location in investment promotion agency) Failure to implement specific instance process Failure to follow indicative timelines (process took 8 years to complete)</p>	<p>No</p>
<p>○ <i>Australian Women Without Borders vs. Mercer PR (Australia)</i></p>	<p>Not discussed in this report at the request of the complainant</p>	<p>Concluded with NCP statement</p>	<p>Not discussed in this report at the request of the complainant</p>	<p>Not discussed in this report</p>
<p>○ <i>Alianza por la Solidaridad vs. Cobra (Spain)</i></p>	<p>Violation of FPIC Human rights and environmental impacts</p>	<p>Concluded without agreement but with NCP statement</p>	<p>Refusal to publicize name of company ----- Willingness to confirm Guidelines' applicability to non-implementing company Willingness to encourage apology Willingness to recommend company provide and support remediation including compensation</p>	<p>No (NCP statement positive, but no remedy for complainant)</p>

Case (NCP)	Issues	Outcome	Barriers/Support to successful outcome of NCP complaint	Remedy?
<p>○ <i>Dutch NGOs vs. ING Bank</i> (Netherlands)</p>	<p>Financial sector responsibility Non-financial disclosures Climate change</p>	<p>Agreement</p>	<p>Willingness to find application of Guidelines to climate change responsibilities Willingness to explore application of Guidelines to financial institutions Willingness to confirm Guidelines' applicability to non-implementing company Commitment to follow-up on agreement and recommendations</p>	<p>Yes: commitment by company to change policy and practice in future</p>
<p>○ <i>Development YES – Open-Pit Mines NO vs. Group PZU S.A.</i> (Poland)</p>	<p>Financial sector responsibility State-owned enterprise responsibility Non-financial disclosures Climate change</p>	<p>Agreement</p>	<p>Willingness to find application of Guidelines to climate change responsibilities Willingness to explore application of Guidelines to financial institutions Willingness to confirm Guidelines' applicability to state-owned institutions Willingness to confirm Guidelines' applicability to non-implementing company</p>	<p>Yes: commitment by company to change policy and practice in future</p>
<p>○ <i>Society for Threatened Peoples vs. Credit Suisse</i> (Switzerland)</p>	<p>Financial sector responsibility Breach of due diligence Violation of FPIC</p>	<p>Agreement</p>	<p>Willingness to use external mediator Willingness to address one out of several issues at headquarters' level of company Willingness to find application of Guidelines to FPIC responsibilities Willingness to explore application of Guidelines to financial institutions Willingness to confirm Guidelines' applicability to non-implementing company</p>	<p>Yes: commitment by company to change policy and practice in future</p>
<p>○ <i>Frank Bold vs. Grupa OLX sp. z.o.o.</i> (Poland)</p>	<p>Internet intermediary responsibility Breach of due diligence Environmental impacts</p>	<p>Agreement</p>	<p>Willingness to enable mediation without NCP participation Willingness to explore application of Guidelines to internet intermediaries Willingness to confirm Guidelines' applicability to non-implementing company</p>	<p>Yes: commitment by company to change policy and practice in future</p>
<p>○ <i>TUK Indonesia vs. the Roundtable for Sustainable Palm Oil (RSPO)</i> (Switzerland)</p>	<p>Failure of parallel non-judicial grievance mechanism Human rights and environmental impacts Violation of FPIC</p>	<p>Agreement</p>	<p>Willingness to accept complaint based on limited headquarters-level link, in part to ensure complainants a hearing <i>somewhere</i> Willingness to apply Guidelines to a multi-stakeholder initiative Willingness to support resolution of a parallel proceeding</p>	<p>Yes: commitment by grievance mechanism to implement action steps to resolve complaint</p>
<p>○ <i>Egbema Voice of Freedom et al. vs. Eni</i> (Italy)</p>	<p>Human rights and environmental impacts</p>	<p>Agreement</p>	<p>Willingness to use external mediator</p>	<p>Yes: commitment by company to prevent future impacts</p>

## 5. State of Remedy in 2019

The sections below analyse the cases concluded in 2019 through a lens of remedy, in an attempt to understand what enabled remedy in a couple cases, or contributed to its non-achievement in others.

### 5.1. Cases in which no element of remedy was achieved

#### 5.1.1. Cases rejected at the initial assessment stage

Five cases were rejected before proceeding to mediation, and these resulted in no remedy for the complainants.

##### 🕒 **Open Secrets & CALS vs. KBC**

A chief concern of the South African complainants in the case *Open Secrets & CALS vs. KBC*<sup>3</sup> was conflict of interest perceived at the Belgian NCP. The complaint was filed in April 2018 along with a linked complaint *Open Secrets & CALS vs., KBL*<sup>4</sup>, handled by the Luxembourg NCP. The complaint alleged that in the 1970s and 1980s, the banks facilitated clandestine financial transactions to sell arms to Armscor, the state-owned arms procurement and production company of the then-apartheid government of South Africa, in violation of the UN Security Council arms embargo. The complainants assert the banks provided many numbered bank accounts to Armscor and shell companies in foreign jurisdictions to facilitate weapons deals with global arms companies in contravention of the UN arms embargo. In May 2018, Mr. Juan Pablo Bohoslavsky, UN Independent Expert on Foreign Debt and Human Rights, submitted an amicus brief to the Belgian and Luxembourgian NCPs in support of the complaint.

The Belgian and Luxembourg NCPs divided the complaints such that the Belgian handled the claims against KBC and the Luxembourgian handled the claims against KBL. In June 2018, Open Secrets and CALS alerted the Belgian and Luxembourg NCPs to a perceived conflict of interest within the National Contact Point in Belgium: several senior KBC executives hold influential positions within the Federation of Belgian Enterprises, one of the 15 members of the Belgian NCP. Open Secrets and CALS requested a recusal of those conflicted parties, concerned their involvement could derail the legitimacy of the process. They wrote the OECD Secretary-General about their concerns, who requested a letter be returned from the Directorate for Financial and Enterprise Affairs. The letter observed that the tripartite structure of the NCP is designed to ensure a balanced approach, but also suggested additional steps to address the complainants' concerns, including "having the NCP members representing the employers' federations and the company in question issue statements in which they commit not to communicate directly with each other regarding this specific instance." In September 2018, the Belgian NCP members reconsidered the conflict of interest question, but unanimously rejected the recusal request.

In June 2019, having taken a year rather than three months to process the initial assessment, both NCPs rejected the complaints. The Belgian NCP rejected the complainants' request to secure a public apology to the South African people by KBC. It also explained that its capabilities extended to mediation, but that it could not apply punitive sanctions against KBC as a court of law. OECD Watch considers that apologies can be an important element of remedy and that NCPs *may* seek apologies from a party (including, as in this case, towards an entire injured population rather than merely complainants). NCPs can also ask other ministries to apply consequences to companies found to have violated the Guidelines or acted in poor faith toward the specific instance process. The Belgian NCP declined to consider whether KBC had breached the OECD Guidelines. Of note, the three trade union representatives who sit in the Belgian NCP expressed deep disappointment over this last decision. The Belgian NCP has a tripartite structure that does not involve NGOs in the handling of complaints.

The Luxembourg NCP found the complaint not material and substantiated, and observed that investigation of the complicated facts from 30 or 40 years ago would be extremely difficult if not impossible. In addition to

<sup>3</sup> Open Secrets & CALS vs. KBC, available at: [https://complaints.oecdwatch.org/cases/Case\\_519](https://complaints.oecdwatch.org/cases/Case_519)

<sup>4</sup> Open Secrets & CALS vs. KBL, available at: [https://complaints.oecdwatch.org/cases/Case\\_516](https://complaints.oecdwatch.org/cases/Case_516)



these criteria, it also rejected the complaint under the catch-all admissibility criteria, asserting that consideration of the specific issue would not contribute to the purposes and effectiveness of the Guidelines.

In April 2020, the UN Independent Expert Bohoslavsky issued a news release about the cases, expressing shock that some of the Belgian NCP's private sector participants involved KBC group and stating that "Being judge and judged at the same time is against basic legal principles." The Belgian NCP notes that KBC does not itself participate in the NCP's meetings. The UN Expert urged that "OECD member states should consider establishing a mechanism to prevent conflict of interest of their NCP's corporate review process to strengthen the procedure and its credibility." He said he "agreed with [the] OECD that States should ensure National Contact Points operate impartially and without any risk of real or perceived conflict of interest."<sup>5</sup>

OECD Watch appreciates the complexity of the case, including of establishing facts from so long ago, but shares concern over the risk of perceived or actual conflict of interest in the complaint's handling. OECD Watch also considers that the NCPs could have accepted the complaints to, at a minimum, open dialogue about due diligence in apartheid-like situations and evaluate what policies and procedures the bank has in place to prevent such harms from happening. It would not be necessary to do factual research on the past events in order to have that kind of discussion.

The complainants were deeply frustrated with the process, feeling the NCPs did not ensure an equitable, accountable, and transparent process. Involvement in the complaint led the complainants to question the power and legitimacy of the NCP grievance mechanism itself.

### 🕒 **Quechua indigenous group vs. Marriott International**

There was also a perceived conflict of interest in the first-ever Quechua language complaint **Quechua indigenous group vs. Marriott International**<sup>6</sup> filed in December 2018 to the Peruvian NCP. Another leading concern was the NCP's insistence that the complainants (an indigenous community) did not represent an indigenous group (which is not actually a requirement by the OECD Guidelines). Complainants alleged that Marriott International Inc. and its wholly owned subsidiary Starwood Hotels & Resorts Worldwide LLC had destroyed an ancient Inca temple, exhumed human remains from an attached cemetery, and conducted unauthorized excavations in an archaeological site in order to build a hotel of the Marriott family of hotels. The complainants requested that Marriott withdraw from the hotel project and return all Incan artefacts removed during the construction. The complainants further asked for the reconstruction and restoration of the Inca site where the hotel is being built.

In 2016 before the complaint was filed, the Ministry of Culture had already issued a stop order against the project, stating that after inspecting the site multiple times, it determined that the execution of civil works was causing serious harm to the archaeological site, which was registered as part of the Cultural Heritage of the Nation and Humanity.<sup>7</sup>

According to the complainants, the Peruvian NCP refused to allow the U.S. union Unite Here to join the case as a co-complainant.<sup>8</sup> Then ten months after receipt of the complaint, the Peruvian NCP rejected the case based on three grounds: a lack of substantiation (demanding a burden of proof far higher than the OECD Guidelines' standard of "plausibility"), existence of parallel proceedings (without providing a proper analysis of why accepting the case would negatively prejudice existing proceedings), and failure to establish a link between the company and the impacts because Marriott had not started operations at the site (effectively ignoring Marriott's due diligence requirements, which exist before during and after the start of operations). The NCP also deeply offended complainants by insisting they do not represent the interests of the Quechua people, a diverse ethnic group encompassing several million people. The complainants feel strongly that Quechua culture and religion are collective rights, and that in their position as Quechua individuals and communities, they have a clear interest in the matter and the right to complain

<sup>5</sup> OHCHR, News Release: "Apartheid and bank complicity case: UN expert urges reform of OECD review mechanism to protect human rights," 27 April 2020, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25831&LangID=E>.

<sup>6</sup> Quechua Indigenous group vs. Marriott International, available at: [https://complaints.oecdwatch.org/cases/Case\\_529](https://complaints.oecdwatch.org/cases/Case_529)

<sup>7</sup> Quechua Indigenous group vs. Marriott International, Stop Order of Ministry of Culture, available at: [https://complaints.oecdwatch.org/cases/Case\\_529](https://complaints.oecdwatch.org/cases/Case_529)

<sup>8</sup> UNITE HERE sent an email in Spanish and English to the Peruvian NCP on 14 May 2019 with a "request to participate" in the specific instance, but the Peruvian NCP maintains that UNITE HERE never requested participation.



against a harm done to their ancestral cultural heritage. They could not achieve and should not need power of attorney to represent eight million people who form the Quechua people of Peru in order to seek remedy for a violation of Quechua culture and history.

The complainants perceive a conflict of interest at Proinversión (“Pro-investment”, the investment promotion agency that fulfils Peru’s NCP functions) to be an underlying cause for rejection of the complaint. The complainants assert that hotel exploration began under an investment promotion agreement signed between Proinversión and the developer (Inmobiliaria R&G) in 2014. In addition, the NCP official handling the case is a former employee of the bank that financed the project (Banco de Credito del Peru).<sup>9</sup> Moreover, the father of that same NCP official is a real estate consultant that at the time of the proceedings spoke to the press in favour of this hotel.<sup>10</sup> The complainants and OECD Watch believe it is inappropriate for the Peruvian NCP or any NCP to be based in an investment promotion agency where staff (part-time, in the case of the Peruvian NCP) simultaneously handle NCP functions and other tasks in investment promotion. The complainants also believe that Proinversión lacks the confidence of stakeholders given its role in infrastructure projects linked to serious political corruption in Latin America.

### ○ **KTNC Watch et al. vs. KEXIM and Daewoo Engineering and Construction**

The case *KTNC Watch et al. vs. KEXIM*<sup>11</sup> and *Daewoo Engineering and Construction Co., Ltd*<sup>12</sup> highlighted shortcomings in the Korean NCP’s analysis of the due diligence responsibilities of export import banks and companies joining a project after harms have been caused by businesses partners. This case concerned phase two financing of the Jalaur Multipurpose Dam Project in the Philippines. The complainants asserted that in implementing the project beginning in 1976, the Philippine government violated the rights of indigenous people to their cultural heritage and FPIC over the alienation of their land. The government implemented an involuntary resettlement plan and provided inadequate compensation for farmland and cemeteries of impacted people. Further, the Philippine government did not adequately mitigate risks of a potential earthquake resulting from the dam. In 2012, KEXIM decided to provide a tied loan of 2.1 billion from its Economic Development and Cooperation Fund. In 2018, Daewoo joined as a contractor and executor of the Jalaur Multipurpose Project Phase Two. The complainants argued KEXIM and Daewoo should not have supported the project knowing the human rights abuses had not been addressed. The companies failed to meet their responsibility through their business relationship with the Philippine government to address its shortcomings by themselves pursuing consultations or communications with affected people, including to ensure FPIC for impacted indigenous groups.

The Korean NCP rejected the claims against both companies. It argued the Guidelines do not apply to KEXIM when it provides official development assistance loans at non-commercial concessional rates to a public and non-financially viable project. OECD Watch is concerned the NCPs’ analysis was applied too broadly, inappropriately excluding a valid specific instance about a multinational’s engagement in overseas investment activities. Furthermore, even non-commercial activity of state financial institutions must in fact comply with the *higher* ‘state duty to protect human rights’ found under international law. At a minimum, the NCP should have underscored KEXIM’s higher state duties and urged it to set a better public example.

Regarding Daewoo, the Korean NCP asserted that Daewoo E&C was not in a position to affect the problems that occurred before the conclusion of the construction contract and thus there was no link between the company and issues raised. OECD Watch and the complainants believe strongly that the Korean NCP’s analysis is wrong. Under the OECD Guidelines, Daewoo has a clear responsibility to conduct due diligence to assess and mitigate adverse impacts directly linked to it through a business partner, even if they did not contribute to those impacts. Daewoo could have, and did not, take any steps to mitigate harms caused by its business partner the Philippine government.

<sup>9</sup> Quechua Indigenous group vs. Marriott International, Mortgage, available at: [https://complaints.oecdwatch.org/cases/Case\\_529](https://complaints.oecdwatch.org/cases/Case_529).

<sup>10</sup> Andina, “Peru: 22 hotel projects to be completed by 2021” (7 July 2019), available at <https://andina.pe/ingles/noticia-peru-22-hotel-projects-to-be-completed-by-2021-758255.aspx>; see also El Capital, “Peru tendra 22 nuevos hoteles al 2021 con inversion de US\$ 789 millones” (11 July 2019), available at: <http://elcapital.pe/elcapital/peru-tendra-22-nuevos-hoteles-al-2021-con-inversionde-us-789-millones/>. Note that the Peruvian NCP denies that there is any conflict of interest as a result of these facts and personal relationships.

<sup>11</sup> *KTNC Watch vs. KEXIM*, available at: [https://complaints.oecdwatch.org/cases/Case\\_547](https://complaints.oecdwatch.org/cases/Case_547).

<sup>12</sup> *KTNC Watch vs. Daewoo*, available at: [https://complaints.oecdwatch.org/cases/Case\\_553](https://complaints.oecdwatch.org/cases/Case_553).

### ○ Lady Lawyer Foundation vs. Intesa Sanpaolo

In July 2019, the Lady Lawyer Foundation (LLF), an Italian human rights NGO, filed the specific instance *Lady Lawyer Foundation vs. Intesa Sanpaolo S.p.A* to the Italian NCP alleging that an Italian banking group breached the OECD Guidelines and acted out of alignment with the OECD financial sector due diligence guidance and its own guidelines for socially-responsible investment regarding the office property rented by LLF. As a result of a property dispute between the property owner and the bank, the bank began seeking a new buyer for the property. LLF asserts it offered to purchase the property and sought negotiation with the bank to agree to a purchase that would comply with Intesa Sanpaolo' Guidelines for Socially Responsible Investments and 2018-2021 Plan of Action for the market price according to the expertise of the court expert witness. LLF felt a negotiation was appropriate in light of applicable law and also LLF's non-governmental status and activities.

In its December 2019 initial assessment, the NCP declined to accept the case and support such negotiation. The NCP noted the bank asserted it received no written proposal for purchase. The NCP asserted the actions taken by the bank fell within the normal course provided for by the Italian legal system, and that any complaints related to this type of procedure should be brought to a judge with jurisdiction over the matter.

The complainant LLF is disappointed the NCP did not communicate with it following its comments to the draft final statement, and that the NCP did not share with the complainant the documents produced by Intesa Sanpaolo, upon which the complainant feels the NCP's statement is wholly based. For its part, again OECD Watch would encourage the NCP not to constrain itself to assessing the matter like a court, and rather to consider how dispute resolution might reach a favorable outcome under the OECD Guidelines.

## 5.1.2 Cases mediated but concluded with no agreement

Several cases went to mediation without reaching any remedy. While one left the complainants disappointed, the complainants felt positively about how at least two of these cases were handled.<sup>33</sup>

### ○ CooperAcción et al. vs. Renco Group and Doe Run Perú

One complaint that ended with no agreement took eight years before finally being concluded and did not, unsurprisingly, win any appreciation from the complainants. In February 2011, CooperAcción, Oxfam in Perú, Oxfam America, and other NGOs filed the complaint *CooperAcción et al. vs. Renco Group*<sup>34</sup> and *Doe Run Perú S.R.L.*<sup>35</sup> to the Peruvian and US NCPs. The complaint alleged that Doe Run Perú (DRP) and its parent company, the Renco Group, failed to meet environmental and human health standards set by Peruvian law and the OECD Guidelines at the La Oroya metallurgical complex, one of the world's largest polymetallic processing facilities. When Renco/DRP acquired the company, it committed to significantly reduce the environmental impact, but it failed to meet these commitments. Complainants alleged that the operation was discharging into the local environment high concentrations of lead, cadmium and sulphur dioxide far exceeding WHO standards. The complainants noted several studies showing the negative health effects on the inhabitants of the area La Oroya, who lack access to adequate health care or treatment for pollution-related diseases. The complainants allege the company failed to adequately disclose the consequences of the contamination to the La Oroya citizens and have continuously failed to abide by its obligatory Environmental Management and Mitigation Plan (PAMA). The complainants asked the NCPs to engage with the companies to make them comply with all the provisions in the PAMA.

According to its own final statement,<sup>36</sup> in June 2011, the Peruvian and US NCPs discussed the case and decided the Peruvian NCP should take the lead. The Peruvian NCP met with the complainants, but it didn't notify the companies of the complaint until July 2011, five months after its submission. That September 2011, the NCP also met with the respondent companies. The NCP then reports no further action on the case; it notes only

<sup>33</sup> One of the civil society complaints concluded in 2019 was *Australian Women Without Borders vs. Mercer PR*, handled by the Australian NCP. The matter is still under legal consideration and the complainant has requested that discussion of the specific instance be excluded from this report until the matter is concluded. Complaint details are available at [https://complaints.oecdwatch.org/cases/Case\\_545](https://complaints.oecdwatch.org/cases/Case_545).

<sup>34</sup> *CooperAcción et al. vs. Renco Group*, available at: [https://complaints.oecdwatch.org/cases/Case\\_299](https://complaints.oecdwatch.org/cases/Case_299).

<sup>35</sup> *CooperAcción et al. vs. Doe Run Peru S.R.L.*, available at: [https://complaints.oecdwatch.org/cases/Case\\_297](https://complaints.oecdwatch.org/cases/Case_297).

<sup>36</sup> Peruvian NCP final statement in *CooperAcción et al. vs. Renco Group and Doe Run Peru S.R.L.*, available at: [https://www.investinperu.pe/RepositorioAPS/1/o/JER/PERU\\_OECD/2019/Final%20Assessment%20-%20Doe%20Run%20Peru%20and%20the%20Renco%20Group.pdf](https://www.investinperu.pe/RepositorioAPS/1/o/JER/PERU_OECD/2019/Final%20Assessment%20-%20Doe%20Run%20Peru%20and%20the%20Renco%20Group.pdf).



that after it held the meetings, in which it offered its good offices, the case was paralyzed because none of the parties came forward again. This was apparently due to the fact that Renco had gone bankrupt, and Doe Run Perú had started a process of liquidation, including its assets in the La Oroya metallurgical complex. Nevertheless, the Peruvian NCP clearly failed to follow normal complaint processing procedures and indicative timelines. After holding meetings, the responsibility was on the NCP formally to issue an initial assessment accepting the complaint and proposing a plan for discussion. Instead, the NCP passively waited, and eventually closed the complaint eight years later in September 2019.

### ○ **Alianza por la Solidaridad vs. Anonymous Spanish Contractor**

In November 2017, Alianza for Solidarity (AxS) submitted the complaint *Alianza por la Solidaridad vs. Anonymous Spanish Contractor*<sup>17</sup> to the Spanish NCP alleging that a hydroelectric complex RENACE in Alta Verapaz, Guatemala, supported in part by a Spanish contractor had caused negative environmental and human rights impacts affecting the Q'eqchi indigenous people. The project on the Cahabón river is the largest hydroelectric complex in Central America, expected to produce 306 mega watts of power and contribute approximately 15% of the energy consumed in Guatemala. First, AxS argued that although an environmental impact study was carried out in each phase of the project, no comprehensive study was done to understand the project's cumulative impact. Second, AxS alleges the company did not consult the local community during the implementation of the project, violating its right to free, prior, and informed consent. For its part, the company claimed that the RENACE project fulfilled the requirements established by the Government of Guatemala and the company had implemented a wide program of engagement with the local communities and social development. Besides, it felt its role as a contractor – and not the adjudicating company or implementing agency – limited their ability to carry out due diligence obligations consultations for free, prior and informed consent with the communities.

In April 2017, the Spanish NCP accepted the complaint and proceeded to meetings with the parties. In late 2019 it concluded the case in a manner that the complainants appreciated. The NCP's final statement noted that the Spanish company, in its role of contractor, was not exempt from carrying out the OECD Guidelines requirements, but indeed had a responsibility to require its local partner also to comply with them. The NCP recommended the company apologize to the community for any damage its failure to conduct adequate due diligence may have caused to the communities and convey its willingness to collaborate with the Guatemalan judicial authorities for mitigation and remediation of those damages.

The complainants appreciate the NCP's resistance to pressure by submitting a final report clearly affirming the complainants' claims against the company, but are disappointed the NCP's Rules of Procedure allowed it not to release the name of the company, upon the company's request.<sup>18</sup> OECD Watch discourages NCPs like the Spanish NCP from allowing companies to remain anonymous during, and especially following conclusion of, NCP complaints simply to protect their reputational interests. The Guidelines set a core criterion of transparency for NCPs. Meeting the expectation of transparency and maintaining legitimacy of the system are more important than protecting the reputation of companies against which complaints are filed. To encourage companies to engage in mediation, we urge NCPs not to allow companies anonymity over their links to harmful impacts, but instead to follow an approach several NCPs take, namely to apply consequences (e.g. exclusion from trade benefits such as participation in overseas mission trips or access to certain export support services) for refusal to engage in good faith in the NCP complaint process.

## 5.2 Cases achieving remedy for complainants

Finally, six cases concluded in 2019 reached agreement. Among those six, five represent landmark cases addressing a novel situation or emerging challenges in the field of business and human rights, including responsibilities of financial institutions for addressing climate change and assuring the protection of indigenous rights, the potential for NCPs to help advance parallel disputes, and the due diligence responsibility of internet intermediaries over the impacts of products shared on their platforms.

<sup>17</sup> *Alianza por la Solidaridad vs. Grupo COBRA*, available at: [https://complaints.oecdwatch.org/cases/Case\\_508](https://complaints.oecdwatch.org/cases/Case_508).

<sup>18</sup> Note that Grupo Cobra itself identifies its involvement in the RENACE hydroelectric project on its own website. See <https://www.grupocobra.com/en/proyecto/renace-ii-hydroelectric-plant/>.



## 5.2.1 Remedy in the form of changed company policies and/or practice

### 🕒 Dutch NGOs vs. ING Bank

The complaint *Dutch NGOs vs. ING Bank*<sup>19</sup> was filed in May 2017 to the Netherlands NCP. Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands alleged that ING failed to report on its indirect greenhouse gas emissions via global companies and projects it finances, and to set targets to reduce the emission of greenhouse gases resulting from its financial products. As a result of these failures, the complainants alleged ING breached the disclosure, environment, and consumer protection provisions of the OECD Guidelines, and did not adequately contribute to the 2015 Paris climate agreement targets.

The NCP published its initial assessment accepting the complaint in November 2017. While ING had objected to acceptance of the complaint, the NCP noted that ING itself “indicates that climate change is an immense challenge for the world and one in which banks also have a role to play,” and therefore that dialogue over the complaint could help “clarify issues relating to climate change in the financial sector in respect of due diligence.”<sup>20</sup>

Dialogue did prove useful: the NCP’s final statement issued in April 2019 made clear that the OECD Guidelines expect banks to set concrete climate goals for their financial services in line with the Paris Climate Agreement. Dialogue also helped the parties reach agreement on several points: ING’s adoption of particular approaches and methodologies to measure, set targets, and steer the bank’s climate impact; ING’s commitment to reduce its thermal coal exposure to close to zero by 2025 and refrain from financing new coal-fired power plants; and a joint call from ING and the NGOs to the Dutch Government to request the International Energy Agency to develop two models limiting global warming below 1.5 degrees.

The complainants and OECD Watch were pleased to see the first NCP take a clear and affirmative position on the OECD Guidelines’ expectations for businesses around climate change, and satisfied at its conclusion that under the Guidelines, banks must establish concrete climate goals for their financial services aligned with the Paris Climate Agreement.

### 🕒 Development YES – Open-Pit Mines NO vs. Group PZU

Another case filed to the Polish NCP also addressed the climate and other environmental impacts and reporting requirements of a financial institution – in this case a state-owned financial institution. In *Development YES – Open-Pit Mines NO vs. Group PZU S.A.*<sup>21</sup>, filed in August 2018 by the foundation Development YES - Open-Pit Mines NO (RT-ON) against Polish insurance and banking company Group PZU S.A. (PZU), the complainants alleged that PZU did not submit complete non-financial reporting on the environmental impacts of its activities and services. The complainants sought an agreement to improve PZU’s non-financial reporting in coming years.

The Polish NCP accepted the complaint in November 2018. The assessment was classified. OECD Watch appreciates that in this case the complainants and company felt classification was helpful for the duration of proceedings. However, OECD Watch urges that for transparency’s sake such practice does not become a rule and is used only in exceptional cases, on a temporary basis, and by agreement of both parties. OECD Watch also appreciated that the NCP published on its website that a case was currently proceeding that would remain confidential until the final assessment – and that the full case was made public at the final statement stage.

After several months of dialogue supported by the NCP, the parties reached agreement in April 2019 for PZU to include in its non-financial reporting moving forward the majority of the climate and environment impact elements that RT-ON had sought. PZU also agreed to implement policies on respecting human rights and the environment. The Polish NCP’s final statement urged PZU to fulfill the commitments it had made, and committed to follow-up 12 months’ time to assess PZU’s progress.

<sup>19</sup> *Dutch NGOs vs. ING Bank*, available at: [https://complaints.oecdwatch.org/cases/Case\\_476](https://complaints.oecdwatch.org/cases/Case_476).

<sup>20</sup> Initial Assessment in *Dutch NGOs vs. ING Bank*, p. 5, available at: [file:///Users/marianingrams/Downloads/171114-1A-ING-ENG\\_WEB.pdf](file:///Users/marianingrams/Downloads/171114-1A-ING-ENG_WEB.pdf).

<sup>21</sup> *Development YES – Open-Pit Mines NO vs. Group PZU S.A.*, available at: [https://complaints.oecdwatch.org/cases/Case\\_546](https://complaints.oecdwatch.org/cases/Case_546).



Given the above two positive precedents regarding the OECD Guidelines' expectations for climate-related reporting and targeting of financial institutions, OECD Watch has high expectations for the outcomes of other pending climate-related specific instances against **ANZ Bank**<sup>22</sup> and **BP plc**<sup>23</sup>.

#### ○ **Society for Threatened Peoples vs. Credit Suisse**

The complaint **Society for Threatened Peoples vs. Credit Suisse**<sup>24</sup> also concerned responsibilities of a financial institution. Filed in April 2017, the complaint alleged that by remaining engaged with clients involved in the controversial North Dakota Access Pipeline (DAPL), despite being informed of adverse human rights impacts caused and risked by the project, Credit Suisse breached its own internal policies and the OECD Guidelines. The complaint alleged Credit Suisse failed both to carry out due diligence and encourage its investees to prevent or mitigate adverse impacts. The DAPL project in the USA has generated massive protest because it threatens the main source of drinking water for local indigenous people and could lead to dangerous leaks.

The Swiss NCP accepted the complaint in October 2017, finding it had jurisdiction over the matter because the main part of the complaint concerned company policies at the headquarters level of the bank. The Swiss NCP appointed a professional external mediator who held five mediation sessions focusing in particular on how Credit Suisse could operationalise its commitment to ensure FPIC of indigenous people.

Two years later in October 2019, the Swiss NCP issued a final statement outlining an agreement reached by the parties to address one of several issues raised by the complainants. Under the agreement, Credit Suisse promised to require its project financing clients in the oil & gas, mining, and forestry & agribusiness sectors to follow the International Finance Corporation's Performance Standard 7 on Indigenous Peoples, which incorporates the principle of FPIC. The Society for Threatened Peoples welcomed this improvement by Credit Suisse, but expressed disappointment that the bank limited its compliance with FPIC to project financing. The NGO (and NCP) committed to follow-up on the implementation of the agreed outcome. The Society for Threatened Peoples urged Credit Suisse to expand the requirement soon to other business segments and take clear action when clients fail to ensure FPIC in project financing projects.

#### ○ **Frank Bold Foundation vs. Grupa OLX**

The case **Frank Bold Foundation vs. Grupa OLX sp. z.o.o.**<sup>25</sup> was one of the first to address the responsibility of an online marketplace company for due diligence over goods sold through its platform. In April 2018, Frank Bold Foundation (FBF) alleged that Polish multinational Grupa OLX's digital sales platform allows third parties to buy and sell furnaces that may be used to illegally burn processed oil and discarded wooden railway clippers. Both processed oil and wooden railway clippers constitute hazardous waste whose burning is prohibited in Poland due to its serious environmental harm. The complaint alleged that while Grupa OLX does not cause the environmental harm, it is directly linked to it through its business relationship with the portal's users that sell or buy the furnaces. FBF alleged that Grupa OLX failed to conduct due diligence to identify and seek to prevent this potential impact.

The Polish NCP accepted the complaint with an initial assessment in June 2018 and offered the parties its good offices. At the meeting organized in September 2018, in the presence of the NCP the parties expressed their commitment and openness to engage in dialogue. The parties also agreed to continue negotiations without participation of NCP, while keeping the NCP informed. Following separate negotiations, the parties reached an agreement outlined in the Polish NCP's May 2018 final statement. The Polish NCP notes in its final assessment that the parties jointly emphasized the significance of air pollution in Poland and the importance of promoting public awareness on environmental protection. OLX agreed to accept FBF's help to improve its environmental policies, improve screening of environmentally harmful advertisements (for example, to minimize coal-linked sales), and prioritise addressing illegal advertisements alerted to them by FBF. FBF now helps monitor the OLX portal for adverts breaching the conditions set in the agreement and notifies OLX of any passing through the platform's revised screening conditions. The NCP recommended the parties continue following the concluded agreement and asserted it would follow-up in April 2020 to ask the parties to submit information on the cooperation and keep respecting the provisions of the agreement.

<sup>22</sup> *Australian bush fire victims and FoE Australia vs. ANZ Bank*, available at: [https://complaints.oecdwatch.org/cases/Case\\_564](https://complaints.oecdwatch.org/cases/Case_564).

<sup>23</sup> *ClientEarth vs. BP*, available at: [https://complaints.oecdwatch.org/cases/Case\\_556](https://complaints.oecdwatch.org/cases/Case_556).

<sup>24</sup> *Society for Threatened Peoples vs. Credit Suisse*, available at [https://complaints.oecdwatch.org/cases/Case\\_475?searchterm=credit+suisse](https://complaints.oecdwatch.org/cases/Case_475?searchterm=credit+suisse).

<sup>25</sup> *Frank Bold vs. Grupa OLX sp. z.o.o.*, available at: [https://complaints.oecdwatch.org/cases/Case\\_523](https://complaints.oecdwatch.org/cases/Case_523).





OECD Watch and the complainant are pleased to see advancement made by the Polish NCP on deepening awareness of the due diligence responsibilities of digital companies such as online marketplaces.

## 5.2.2 Remedy in the form of assistance to a parallel proceeding

### ○ **TUK Indonesia vs. the Roundtable for Sustainable Palm Oil**

The case *TUK Indonesia vs. the Roundtable for Sustainable Palm Oil (RSPO)*<sup>26</sup> also ended with an agreement. In January 2018, Transformation for Justice (TUK Indonesia), an Indonesian community rights group, filed a complaint against the Roundtable on Sustainable Palm Oil (RSPO) alleging the RSPO has failed to address complaints by villagers in West Kalimantan, Indonesia, over a land dispute with palm oil giant Sime Darby.

According to the complaints, in 1995, a palm company Mitra Austral Sejahtera (MAS) approached the Dayak indigenous villages promising electricity, housing, hospitals, schools and employment in exchange for leasing their land until 2022. Reportedly no contract was ever signed, the communities were not informed of the project, yet MAS obtained cultivation permits and a land-use contract valid until 2030. The complainants assert that Sime Darby acquired MAS in 2007 after the villagers had been demanding that MAS allow them the right to cultivate the land. The community says it met with Sime Darby management over 25 times, but that the company stated it cannot concede to the community's demands as that would require it to breach its concession agreement with the Indonesian government.

In 2012 Tuk Indonesia filed a complaint with the RSPO, but no progress was made in the following six years. TUK therefore complained to the Swiss NCP in 2018 asking it to help TUK and the RSPO elaborate an action plan to resolve the six-year RSPO complaint. In May 2018, the Swiss NCP accepted the complaint. It found that the RSPO, though not a traditional multinational enterprise, is nevertheless covered by the OECD Guidelines because it has commercial activities. Further, while the NCP noted that the RSPO has only legal headquarters and not operational control in Switzerland, because no other NCP would be competent to handle the specific instance, the Swiss NCP would help where it could.

During the good offices period, discussions over teleconference and email centred on clarifying the process for a legal review of the pending issues as part of the RSPO complaint. Through the NCP's mediation, the parties agreed to several steps and procedures regarding payment for the legal review, selection of the reviewer, standards and timeline for the review, and opportunities for TUK and Sime Darby to give input. The agreed action plan for the legal review was written up in the Swiss NCP's final statement in June 2019. The parties also agreed to send an update to the NCP within six months, at which time the NCP would organize a telephone conference and consider whether further mediation is needed.

## 5.2.3 Remedy in the form of company commitment to prevent future impacts

### ○ **Egbema Voice of Freedom et al. vs. Eni**

Finally, the case *Egbema Voice of Freedom et al. vs. Eni*<sup>27</sup>, filed in December 2017 to the Italian and Dutch NCPs, addressed impacts of Italian oil & gas company Eni in Nigeria. Complainant Egbema Voice of Freedom (EVF), an association of residents of Aggah Community in Rivers State, Nigeria, filed the complaint to the Italian and Dutch NCPs together with public interest law firm Chima Williams & Associates (CWA) and a Ghanaian NGO Advocates for Community Alternatives (ACA), with support of the International Federation for Human Rights (FIDH). The complaint alleged that for over four decades, Eni had caused annual flooding in the Aggah village by elevating roadways and embankments to facilitate oil drilling in the adjacent Mgbede oil field, thereby blocking the natural flow of streams through residential and farm areas. The complaint asserted that Eni's conduct violated the Guidelines and devastated people's health, property and livelihoods.

<sup>26</sup> *TUK Indonesia vs. the Roundtable for Sustainable Palm Oil (RSPO)*, available at: [https://complaints.oecdwatch.org/cases/Case\\_491](https://complaints.oecdwatch.org/cases/Case_491).

<sup>27</sup> *Egbema Voice of Freedom et al. vs. Eni*, available at: [https://complaints.oecdwatch.org/cases/Case\\_489](https://complaints.oecdwatch.org/cases/Case_489).



The Italian NCP accepted the complaint in July 2018 and opened mediation through a third-party conciliator. The parties reached agreement in July 2019, publicized in October 2019. Under the agreement, Eni agreed to urgently construct new culverts and drainage channels and maintain and manage existing channels to avoid flooding. Eni also agreed that its measures would be verified by a technical expert to determine whether further action should be taken.

Since the announcement of the agreement, Eni has conducted engineering surveys to design a new drainage system through Aggah, but work is suspended due to the COVID-19 crisis. Representatives of the complainants continue to monitor the implementation of the agreement and insist on a transparent and inclusive process to ensure that a sustainable solution to the flooding is found.

## 6. Conclusion and Recommendations

As emphasized at the outset of this paper, the NCPs of the OECD Guidelines stand at a crossroads at the start of the 2020s. For decades, NCPs have largely failed to provide effective access to remedy for complainants, and the lack of alternative for victims is contributing to the increasing momentum for binding regulation of corporate conduct and genuinely effective access to remedy through courts. Yet the Guidelines still have value in setting standards – particularly if they can be updated to reflect ongoing and emerging challenges such as gender inequality, climate change, harms to human rights defenders and animal rights, and the due diligence responsibilities of technology companies. Similarly, the NCPs themselves could be a powerful voice in describing a more humane business model and in facilitating remedy for the individuals who, we all agree, bear undue fall-out from irresponsible corporate conduct.

NCPs' handling of cases concluded in 2019 both supported and hindered access to remedy for complainants. How will they act, moving forward, to strengthen their structures and rules to facilitate better outcomes for communities? Table 1 above outlines several hinder factors, including:

- Perceived conflicts of interest within NCPs;
- Incorrect refusal to apply the Guidelines to companies investing either before or after harms occurred; and
- Improper approach to substantiation of claims at the initial assessment phase, such as by expecting too high a level of proof, refusing to proceed with a case involving old and complicated facts, or refusing to proceed with a case not meeting legal requirements.

The table also identifies many practices of NCPs that helped support agreement and remedy, including:

- Willingness to encourage apologies by companies;
- Willingness to recommend participation in remediation;
- Willingness to tackle new issues not clearly covered in the Guidelines like climate change and the responsibility of digital platforms for the impacts of companies using them; and
- Willingness to support resolution of, not shy away from, a parallel proceeding.

If the Guidelines and the NCP system are to meet their potential in ensuring responsible business conduct around the world, reforms are needed to strengthen NCPs.

### Recommendations for governments

OECD Watch's research from this and past years finds several structural barriers to NCPs' effectiveness in promoting the OECD Guidelines and providing access to remedy. These include a lack of resources for NCPs – many NCPs are under-resourced and understaffed, with NCP officials having to split their time between their NCP role and other duties, limiting their ability to pay due attention to NCP matters and contributing to perceived conflicts of interest. Another structural barrier for NCPs is the more general lack of political support from governments for the work of the NCP. Policy incoherence between the NCP and other government departments is widespread, evidenced by the fact that in most countries a company that refuses to engage with the NCP or blatantly violates the OECD Guidelines is still able to receive export credit insurance, go on trade missions and other trade promotion activities, and be eligible for public procurement contracts by other



government departments. This lack of political support from governments is also evidenced by the fact that many NCPs have still not undergone a peer review.

In addition to addressing these structural barriers related to lack of government support and policy incoherence, OECD Watch urges OECD adherent governments to make the following reforms at their NCPs:

- Governments must explicitly recognize that NCPs should aim to **provide effective access to remedy** for victims of corporate misconduct.
- 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 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 **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 that present a plausible claim, meeting the admissibility criteria proposed in the Procedural Guidance.
- 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 complaint status, and base their final statements only on material available to both parties.
- Governments should ensure their NCPs strike a **meaningful balance between transparency and confidentiality** that permits reasonable campaigning activities.
- Governments should help NCPs to **support the safety of activists using the mechanism**, who increasingly face threats for their engagement in claims on corporate conduct.
- 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 NCPs 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 must **require NCPs to follow-up on case outcomes**, to encourage compliance with their recommendations and with the Guidelines.

OECD Watch recognizes that many NCPs already meet these recommendations, and that many are taking active steps to do so. Meeting these recommendations will ensure that NCPs meet the core criteria established in the Guidelines for all NCPs – visibility, accessibility, transparency and accountability – and the principles of impartiality, predictability, equitability and compatibility with the Guidelines for handling complaints.

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