NATIONAL CONTACT POINTS FOR RESPONSIBLE BUSINESS CONDUCT

THE ROAD AHEAD FOR ACHIEVING EFFECTIVE REMEDIES

BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT

BUSINESS,
HUMAN RIGHTS AND
THE ENVIRONMENT

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The role of the OECD National Contact Points in providing remedies

Access to effective remedies is one of the three core pillars of the UN Guiding Principles on Business and Human Rights (UNGPs). There are different types of grievance mechanisms, including judicial and non-judicial, state-based and non-state-based, which can contribute to ensuring an effective access to remedies for affected individuals and communities of business-related human rights and environmental harms. As for non-judicial remedies, Commentary to Guiding Principle 27 specifies that "gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new mechanisms".

The UNGPs recommended the use of non-judicial grievance mechanisms as an additional and supportive tool for victims of adverse impacts by businesses. In fact, due to the many challenges encountered with access to judicial remedies for business-related human rights abuses, resorting to non-judicial remedies could have benefits as they could represent a more accessible and affordable mechanism for victims of these violations.

As state-based non-judicial mechanisms, one of the most prominent instruments is represented by the system of National Contact Points (NCPs) under the OECD Guidelines on Multinational Enterprises (The Guidelines). The Guidelines consist of recommendations addressed by adhering governments to multinational enterprises operating in or from their territory, covering labour rights, environmental protection, human rights, consumer protection, information disclosure and the fight against corruption. To date, the Guidelines have been endorsed by 50 states, all 37 OECD Member States and 13 non-OECD members. According to this system, all adhering states are required to establish an NCP domestically. One of the main tasks of the NCPs is to provide mediation in conflicts between the business and communities/individuals affected by business activities and operations.

In this regard, any party can submit a complaint to an NCP regarding the alleged non-observance of the Guidelines under the so-called specific instance procedure. In this procedure, NCPs play a mediating role among multinational enterprises, trade unions, NGOs, individuals or other stakeholders to settle a conflict in accordance with the law. As the last step, the NCP releases a statement including the findings and the outcome of the mediation. This statement could include recommendations in relation to the implementation of the Guidelines, as well as a determination as to whether a breach occurred.

As some of their main features, NCPs are characterised by their consensual and non-adversarial system, their capacity to consider a broad range of business responsibility issues, and their transnational reach. As regards the cases that have been addressed by NCPs, the most dominant themes have been human rights (raised in 51% of cases since 2011), general policies, including due diligence (in 49% of cases), and employment and industrial relations (in 37% of the cases).

The road towards achieving effective remedies

In the 20th anniversary of the NCPs, the OECD Secretariat produced a report highlighting the achievements made during this period, as well as the challenges ahead in terms of both the individual system of NCPs and the NCP network. Based on the feedback provided by users of the mechanism, stakeholders and NCPs, the report made a number of recommendations for improving access to remedies. According to this analysis, the key areas of concern focus on increasing visibility and exposure; ensuring accessibility across the board; respecting indicative timelines where possible; leveraging remedy outcomes more consistently; and guaranteeing equitable and safe proceedings. Moreover, the report explains that difficulties could be caused by both internal and external factors.

In parallel, a recent evaluation carried out by OECD Watch, a global network of civil society organisations, has shown that the NCP system is underperforming on several criteria, especially those that matter most for civil society. In a previous report, OECD Watch warned about the situations of victims of corporate abuse who "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".

More recently, the OECD has been conducting a public consultation process to assess the OECD Guidelines, their implementation and the OECD's work on Responsible Business Conduct. This consultation process focuses on identifying key achievements, challenges and opportunities for Responsible Business Conduct. One of the elements of consultation process also relates to the challenges for NCPs in facilitating access to remediation.

The blog symposium

Against this backdrop, the aim of this blog symposium is to reflect about the state of remedy of the specific instance procedures at the NCPs for Responsible Business Conduct. The idea is to analyse the main challenges of the system in relation to the effectiveness criteria underlined in the UNGPs (UNGP 31). The different blog posts would focus on different thematic challenges, such as accessibility, predictability, etc.; the perspective of specific stakeholders (NGOs, trade unions, etc.); regional perspectives on this issue; and/or the challenges and lessons learned of specific NCPs.

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HOLDING GOVERNMENTS ACCOUNTABLE FOR THEIR DUTY TO PROTECT HUMAN RIGHTS: THE AUSTRALIAN NATIONAL CONTACT POINT AND THE ROAD TO FUNCTIONAL EQUIVALENCE

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'What a difference a day makes', or, in this case, a couple of years and a strategic intervention by civil society. Less than a decade ago, the confidence of civil society organisations ('CSOs') in the Australian National Contact Point ('Australian NCP') was at a "crisis point" following the NCP's abominable handling of several complaints and ongoing concerns about its structure. Today, after a review and significant reforms of the NCP, the situation is much improved.

This blog post focuses on the Australian NCP and reforms made to its 'functional equivalence' under the OECD Guidelines for Multinational Enterprises ('Guidelines'). While governments are afforded flexibility in the way they organise and structure NCPs, the Guidelines set out four 'core criteria', namely visibility, accessibility, transparency and accountability, to promote functional equivalence in their activities. NCPs must at minimum meet these criteria to be effective and appropriate mechanisms in order to facilitate remedy for business-related human rights abuses (UNGPs 27 and 31). Importantly, states must, as part of their duty to protect against human rights abuse, take appropriate steps to ensure that when such abuses occur within their ambit, those affected have access to an effective remedy (UNGP 25). NCPs are a mechanism for states to realise this duty. Accordingly, states should ensure that NCPs comply with the principles and standards for these mechanisms in the UNGPs and Guidelines (e.g. UNGP 31). This is the point of the OECD's principle of 'functional equivalence' among NCPs.

Two NCP complaints are considered in this contribution. The first, filed in 2014, was rejected by the Australian NCP, prompting the first ever substantiated submission against the NCP, an OECD review of its compliance with the Guidelines and, subsequently, significant reforms to the NCP's structure and procedures. In the second, ongoing complaint, filed in 2020, the Australian NCP has facilitated an agreement between the parties. The stark difference between these two outcomes demonstrates the positive impact of the reforms on the Australian NCP's remedy outcomes.

2014-2015: Australian NCP rejects complaint against G4S

In September 2014, the Human Rights Law Centre (HRLC) and RAID (Rights and Accountability in Development) jointly filed a complaint against G4S Australia Pty Ltd ('G4S') to the Australian NCP. In 2013 and 2014, G4S was contracted by the Australian Government to provide operational and maintenance services at the Manus Island Regional Processing Centre ('Centre'), an 'offshore detention centre' holding asylum seekers in Papua New Guinea ('PNG'). Among other things, the complainants alleged that G4S had breached its obligations under the Guidelines through its complicity in the Government's unlawful detention of asylum seekers (contrary to international law). Nine months after the original filing date, the Australian NCP published its initial assessment rejecting the complaint. The NCP reasoned that certain aspects of the complaint "could be interpreted as commentary on government policy" (namely, the Government's controversial practice of offshore processing of asylum seekers) and that G4S was not accountable for these policies. The complainants appealed the decision, but that appeal was denied in early 2016.

2017-2018: Civil society criticism leads to a review, substantiated submission and subsequent reform of the Australian NCP

In June 2017, the Australian Treasury commissioned an independent review of the Australian NCP. The review was triggered in part by increasingly loud criticism by CSOs of the Australian NCP's monopartite structure which was composed of only officials from the Treasury and its handling of the G4S case. The final report concluded that the Australian NCP was falling short of its commitments in the Guidelines and was ranked among the poorest performing NCPs internationally. Its structure was described as "inherently problematic" and a "serious concern" on a number of levels, including the NCP's policies and procedures and complaint outcomes (or lack thereof). Stakeholder confidence was described as "currently at a crisis point".

In November 2017, OECD Watch submitted the first ever substantiated submission regarding the functional equivalence of the Australian NCP, specifically its handling of the G4S case. OECD Watch claimed that the Australian NCP had not conducted itself in an accessible, equitable and impartial manner and this failure (and similar failures in other complaints) had led to a "loss of confidence" among CSOs and individuals impacted by the activities of Australian companies. OECD Watch described the Australian NCP's conflation of the state duty to protect human rights with the corporate responsibility to respect human rights as "particularly concerning".

The Investment Committee published its response to the substantiated submission one year later. The Committee made several findings and recommendations in line with OECD Watch's submission, including that "In certain respects, the [Australian NCP] did not act transparently or predictably with respect to indicative timelines and in not following its review process procedures" and that certain actions of the NCP had "contributed towards a perception of a lack of impartiality and accessibility." In relation to the conflation of state duties and corporate responsibilities, the Investment Committee emphasised, "The recommendations of the Guidelines, as well as enterprises' responsibility to respect human rights, represent expectations of enterprises which are distinct and separate from government duties."

In response to the independent review report, the Australian Government announced several initiatives aiming to enhance the functional equivalence of its NCP. An independent expert examiner and a new multi-stakeholder governance and advisory board were introduced. The Government published revised procedural guidance and committed to providing

resources, as well as improving outreach and promotion of the Australian NCP. According to Australian CSOs, these reforms led to important improvements in the NCP's functioning. In the Australian Corporate Accountability Network's (ACAN; a network of Australian CSOs, unions and academics working on business and human rights in Australia) submission to the Australian NCP Peer Review 2021, ACAN highlighted four key improvements: increased efficiency of the complaint process; a more professional mediation service; increased transparency and improved oversight; and a more thorough engagement with the issues raised in complaints and consideration of the Guidelines than was previously the case.

2020-2021: Australian NCP accepts complaint against Rio Tinto and facilitates agreement between the parties

In September 2020, the HRLC filed a complaint on behalf of 156 residents of villages near the Panguna mine in Bougainville, PNG, to the Australian NCP. Rio Tinto was the major owner of the mine between 1972 and 1989 and during this period its subsidiary discharged over a billion tonnes of waste into local rivers. Following the forced closure of the mine in 1989 (leading to a decades long civil war claiming 10,000 to 15,000 lives), Rio's subsidiary also failed to clean up massive quantities of waste and pollution, leading to ongoing, devastating health and environmental impacts.

On 21 July 2021, Rio Tinto and the HRLC announced that they had agreed to conduct an independent impact assessment to identify, assess and develop recommendations in relation to the actual and potential environmental and human rights impacts of the Panguna mine. The announcement followed 13 conciliation meetings between the parties facilitated by the Australian NCP.

Fulfilling the state's duty to protect human rights, including to ensure access to effective remedy

In the case of the Australian NCP, the road to functional equivalence has been long and is not at an end. CSOs criticised the Australian NCP's structure and its negative effect on the NCP's processes for many years. The NCP's rejection of the G4S case seems to have been the straw that broke the camel's back. OECD Watch's subsequent substantiated submission and the Investment Committee's critical report increased pressure on the Australian Government to implement significant reforms. Stakeholder confidence in the Australian NCP has risen significantly since the reforms. This is evident from the growing number of complaints filed to the Australian NCP and is bolstered by the substantive remedy outcomes that the NCP has facilitated. A recent report by the Australian Human Rights Institute and the Australian Human Rights Commission described these remedy outcomes as "promising signs regarding its potential usefulness as an avenue to remedy."

While the 2017-2018 reforms undeniably led to important improvements, Australian CSOs continue to advocate for further reform to the Australian NCP. In ACAN's submission for the Australian NCP Peer Review 2021, among other things, ACAN called for the NCP's visibility and accessibility to be increased, for more resources to support the NCP to carry out investigations, for the NCP to make determinations of (non)compliance with the Guidelines and its recommendations in final statements, and for the Government to clarify that adverse (and unremediated) findings by the Australian NCP impact a company's eligibility for procurement and trade support. The Australian NCP has travelled far down the road towards functional equivalence, but in order to reach its destination the Australian Government must do more to fulfill its duty to protect human rights.

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THE OECD NATIONAL CONTACT POINTS: A PROMISING EXTERNAL REGULATOR FOR VOLUNTARY SUSTAINABILITY STANDARDS?

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'It is fairly well-recognized that the scope of potential remedies for transnational business-related violations of human rights realistically achievable through the OECD National Contact Points for Responsible Business Conduct (NCPs) is limited. This is largely due to the voluntary nature of the OECD Guidelines for Multinational Enterprises (the Guidelines) and, relatedly, the limitations of 'naming and shaming' as the NCPs' enforcement mechanism. In fact, a recent report by the OECD emphasizes that managing the expectations of claimants is a challenge for the NCPs, since the NCPs are unable to provide access to many types of remedy that are often sought by alleged victims of violations of the Guidelines, such as compensation for damages.

This is even more so the case for NCPs whose mandates are strictly limited to facilitating mediation because, as I argue elsewhere, they are equally unable to provide other forms of remedy such as verification of the facts and public disclosure of the truth or an official declaration restoring the dignity, reputation and rights of the victim(s). Companies often have little incentive to engage in the process and – especially at NCPs without a mandate to make a determination when mediation cannot proceed – face few repercussions if they do not. Indeed, the reputational damage potentially resulting from not engaging in the specific instance process has not been a strong enough motivating factor for the many companies who have declined to participate after being named in a complaint.

That said, a recent specific instance demonstrates the NCPs' potential for providing a new avenue for remedy by providing an oversight function for multistakeholder initiatives or private standard-setting bodies that aim to address various global problems through setting and enforcing standards that specify sustainability requirements – widely referred to as voluntary sustainability standards (VSS). Because VSS work by providing public acknowledgement of a firm's compliance with certain standards, the VSS' own reputation and legitimacy are crucial. Many VSS even offer their own grievance mechanisms, the success of which also relies on a certain degree of legitimacy and reliability. Though at first glance, the inclusion of these non-governmental, often not-for-profit, VSS under the umbrella of "multinational enterprises" may seem odd, they may well be the perfect candidates for NCP-led mediation because they are unlikely to be willing to risk the reputational damage of non-participation. Moreover, stronger oversight of these mechanisms is needed: VSS are known to vary considerably in terms of effectiveness and credibility and yet VSS remain largely unregulated. Applying the Guidelines to VSS may provide a useful bridge over this regulatory gap.

The first specific instance brought against a VSS for a violation of the Guidelines was submitted by Transformation for Justice Indonesia (TuK Indonesia) against Roundtable on Sustainable Palm Oil (RSPO) in 2018 at the Swiss NCP. The complaint alleged that RSPO was acting in breach of the human rights chapter of the Guidelines (chapter IV) by continuing

to certify one of its members, Malaysian palm oil giant Sime Darby Berhad, despite an unresolved complaint alleging its non-compliance with RSPO's certification criteria that had been opened in RSPO's internal grievance mechanism five years earlier. The executive director of TuK Indonesia **(1)** explained that the decision to turn to the OECD NCP system was partly motivated by the fact that RSPO had meanwhile continued to certify Sime Darby as compliant and had continued to receive membership revenue from the company while it seemed to be stalling on processing the complaint. In its submission, TuK requested that the NCP assist the RSPO conflict resolution proceedings that were already underway by facilitating mediation to formulate an action plan with strict deadlines to be followed by both parties.

The Swiss NCP determined the submission merited further consideration and accepted the case in May 2018. It is worth noting that the flexibility of the Guidelines and its broad definition of "multinational enterprises" gave the Swiss NCP the room to determine both that the Guidelines were applicable to RSPO and that the Swiss NCP was an appropriate forum to handle the specific instance. Though RSPO is an NGO and therefore not a traditional multinational enterprise, the Swiss NCP determined that its activities were multinational since it operated in multiple countries and that its international operations could be considered commercial despite its non-profit status since a majority of its income ultimately came from the trade of sustainable palm oil and because its ecolabel helped to promote trade of sustainable palm oil. Additionally, though none of the parties were headquartered or operational in Switzerland, the Swiss NCP agreed to take the case because RSPO had registered there and because neither Indonesia, where the alleged breach occurred, nor Malaysia, where RSPO is headquartered, are adherents to the Guidelines.

The Swiss NCP also took steps to ensure both parties could access the mediation on equal footing. Because neither party was located in Switzerland, the NCP determined "classical mediation" to be unfeasible and arranged teleconferences with the parties. Despite some difficulties with regard to unmet deadlines (according to the Swiss NCP), as well as language barriers and difficulties in understanding procedures (according to Sutrisno), the Swiss NCP noted that the procedure contributed to improve mutual trust and was concluded in 12 months. Both parties agreed to a 'Confidential Joint Outcome of the Dialogue' that stipulated an action plan as well as an agreement as to the financing and selection of an independent legal reviewer. Both parties also agreed to follow-up by the Swiss NCP after six months. The final statement closing the specific instance in June 2019 contains a partly redacted overview of the Joint Outcome.

Because the RSPO Complaints System provides public updates on each case under review, it is possible to assess the implementation of the action plan. In the Joint Outcome, the parties agreed to select a reviewer by 31st March 2019 and have the legal review completed by 31stMay 2019. Though the RSPO Complaint System does not indicate the exact date of the agreement on the reviewer, the reviewer was engaged by 24 April 2019, indicating the parties managed to stick reasonably close to the deadline. Though the legal review was not finalized until 26 February 2020, nearly nine months behind schedule, it appears that RSPO made a genuine attempt to stick to the deadlines. In most cases the delay seems to have been the result of a lack of response from Sime Darby, at one point prompting RSPO to issue a show cause letter to the firm stating that the RSPO Secretariat had written "numerous times"requesting the company to furnish a particular document needed for the legal review.

Overall, it appears that the specific instance procedure at the Swiss NCP contributed to the final conclusion of the RSPO complaint procedure, leading to the desired form of remedy for the claimants. According to Sutrisno, the claimants found significant value in the process and credited the NCP process with changing RSPO's behaviour and prompting RSPO to

monitor the effectiveness of its own grievance mechanism. Additionally, Sutrisno noted that the bilateral dialogue between TuK and RSPO facilitated by an external party helped the parties to reach an agreement that RSPO would "comply with their own rules" **(2)**.

The positive outcome for the claimants in this specific instance was likely influenced by several factors, including the Swiss NCP's efforts to facilitate access to the mechanism and the fact that claimants' expectations were modest – simply to formulate an action plan for the conclusion of the open complaint in RSPO's existing grievance system. Additionally, and importantly I believe, RSPO showed a high level of willingness to participate in the procedure in good faith, to publicly share the results of the agreement forged in the context of the mediation, and to attempt to stick to the deadlines stipulated in the action plan.

RSPO's willingness to engage in the voluntary procedure was likely strongly influenced by its interest in preserving its credibility and a broader trust in its standard, which, as noted above, is an interest the organization likely shares with most other VSS. As several VSS have come under scrutiny in recent years, this specific instance demonstrates the potential for the NCP system to serve as an external oversight body for VSS, which are thus far largely unregulated. Indeed, it seems to have inspired a similar case that was accepted by the NCP of the United Kingdom in 2019 against another VSS (see Inclusive Development International v. Bonsucro). It may be that the NCP system, though perhaps not particularly well-suited (in its current form) for ensuring effective remedy for many of the serious human rights violations committed by multinational enterprises, may nevertheless be uniquely well situated for ensuring the effective functioning of multistakeholder initiatives and VSS.

Footnotes:

1. Edi Sutrisno, Executive Director, TuK Indonesia, in personal correspondence with the blog author, 28 May 2020.
2. Edi Sutrisno, Executive Director, TuK Indonesia, in personal correspondence with the blog author, 28 May 2020.

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LEADING RBC ON THE GROUND: NATIONAL CONTACT POINTS FOR RESPONSIBLE BUSINESS CONDUCT, LOOKING BACK TO PREPARE FOR THE FUTURE

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'Two decades ago, governments created the National Contact Points for Responsible Business Conduct (NCPs) as the first, and still only, State-based non-judicial grievance mechanism built into a leading responsible business conduct (RBC) standard: the OECD Guidelines for Multinational Enterprises (the Guidelines). The dual mandate of NCPs, covering both promotion and remedy, allows them to foster the effectiveness of the Guidelines both proactively through promotion, and retroactively as non-judicial grievance mechanisms. NCPs also contribute to shaping government policies and promoting stronger policy coherence for RBC.

To date, 50 NCPs form part of the network, one for each adhering Government. Since receiving their mandate as a grievance mechanism in 2000, NCPs have collectively handled close to 600 cases. With their ability to review issues involving companies operating 'in or from' their territory, they have addressed issues in over 100 countries and territories. Considering that adherents to the Guidelines represent over 50% of the world's GDP and over 70% of FDI stocks, NCPs cover a large share of the world's economic activity.

The year 2020 marked 20 years of the mandate of these unique bodies' to act as grievance mechanisms under the Guidelines. **(1)** This anniversary, coupled with the global challenges brought by the COVID-19 pandemic, invited us to pause and reflect on how NCPs are contributing to the promotion of RBC and access to remedy. By looking back, we can prepare for the NCPs we want for the future to help respond to the needs of tomorrow's world.

A year in numbers: a focus on the strengths and challenges of the NCP system in 2020 (2)

To fulfil their remedy mandate, NCPs boast measures such as affordability (e.g. filing a case is free-of-charge and does not

require legal help) and availability (e.g. anyone with a legitimate interest can submit a case; parties do not have to be direct victims). NCPs are also flexible: they regularly leverage creative and innovative tools to facilitate remedy for those affected by corporate impacts across a range of issues. Let's take a closer look at how NCPs demonstrated these characteristics in 2020.

For the people, by the people: access by different groups is expanding, but showing signs of fatigue amongst traditional users

With 54 cases received, 2020 registered as the record year concerning cases received. The most prevalent sectors referenced in these cases included mining and extractives (13 submissions), energy (8 submissions), and financial and nsurance activities (7 submissions). These cases addressed a number of different issues: for example, the Brazilian NCP is currently examining three cases concerning human rights and environmental issues following the collapse of a tailings dam from mining operations in Brazil. **(3)**

Moreover, 2020 also saw more individuals accessing the mechanism, making up 48% of new submissions. Historically, individuals have only filed around 22% of the cases, leading to concerns about their barriers to access without support from a trade union or NGO. Such numbers hint towards a positive step in easing these barriers. However, this increase in individual submissions also corresponds to a decrease in submissions by traditional users of the mechanism, like NGOs and trade unions. This decrease may speak to some fatigue in the mechanism by these groups.

Remedy for all and all for remedy?

NCPs are not courts and therefore rely on dialogue and mediation to seek agreement between the parties and/or make recommendations on solutions to the issues. By doing so, NCPs regularly facilitate remedies for the persons affected, including through financial or in-kind compensation or by fostering changes in companies' policies and operations, thereby aspiring to contribute to the prevention of future harms.

Yet the mechanism also faces challenges facilitating outcomes and impact. For example, less than a third of cases for which NCPs provided mediation in 2020 resulted in agreements. This is a low figure compared to previous years, but at the same time, NCPs have been making more systematic use of other tools to facilitate remedy, such as addressing public recommendations to companies involved in cases on how they could improve their practices to align with the Guidelines. Likewise, more and more NCPs systematically follow-up on agreements and recommendations to verify whether and how they are being implemented.

The numbers also suggest that more efforts across the network may be needed to improve visibility and access throughout the entire NCP network: in 2020, 20 NCPs received at least one submission, representing only 40% of all NCPs. Furthermore, almost half of the cases were received by just four NCPs, and no NCP received its first case in 2020. Historically, 13 NCPs out of 50 are yet to receive a case.

2021 and beyond: where do we go from here?

The world in which NCPs first emerged has changed, and with that, greater complexities have come, both within the cases

that NCPs handle and in the way NCPs interact. By delivering on their dual mandates, NCPs have proven that they can facilitate concrete remedy outcomes for individuals and contribute to advancing RBC around the world. Yet despite these remarkable achievements, a number of challenges limit the mechanism's potential.

By looking back on the last 20 years, we see that these struggles reflect weaknesses that affect not only the operations of individual NCPs, but also, to some extent, their design as a grievance mechanism. To keep pace with tomorrow's challenges, it is critical that governments act decisively now to address the challenges NCPs face related to resources and structure. Governments can take action to help their NCPs increase their visibility and exposure, ensure accessibility across the board, and leverage remedy outcomes more consistently. With this, NCPs will be able to more consistently leverage their strengths to provide access to remedy and ultimately realise RBC on the ground.

Footnotes:

1. To mark the 20th anniversary of NCPs, the OECD Secretariat published the report Providing access to remedy – 20 years and the road ahead, which takes stock of NCP's contribution to access to remedy for RBC impacts over that period.
2. This analysis draws from OECD (2021), Annual Report on the OECD Guidelines for Multinational Enterprises 2020: Update on National Contact Point Activity.
3. See for example Vale and BHP Biliton and SITICOP, CNQ-CUT, BWI, and IndustriALL, Vale S.A., and Mr. Carlos Cleber Guimarães Júnior and Ms. Carla de Laci França Guimarães and Vale S.A. and Multiple Individuals.

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CAN NATIONAL CONTACT POINTS ADEQUATELY REMEDY HUMAN RIGHTS IMPACTS OR DO THEIRROOTS AS A CSR INITIATIVE TRANSFORM REMEDY AND HUMAN RIGHTS INTO CORPORATE PROCESSES?

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The OECD Guidelines for Multinational Enterprises apply to corporations in all sectors in all adhering countries. They provide a standard for responsible business conduct that has responded and evolved with changing environments, ever more complex supply chains and shifting in social expectations. Most recently, they were revised in 2011 to promote corporate attention to and respect for Human Rights, thus paralleling the UN Guiding Principles on Business and Human Rights (UNGPs). Even though the Guidelines themselves are voluntary and non-binding, there is a legal obligation on national governments to establish a National Contact Point (NCP) for "promotional activities, handling inquiries for discussions within the parties concerned on all matters covered by the Guidelines so that they can contribute to the solution of problems which may arise in this connection" (pg. 68). The NCPs arguably took on the de facto status of a non-judicial grievance forum for human rights when their remits were expanded to encompass the Guiding Principles in 2011. NCPs as such provide what we term 'accountability forums' (Bovens, 1998) where relationships between corporations, victims and representative NGOs can be negotiated. NCPs are an example of the tensions inherent in current approaches to Business and Human Rights, namely their being defined by a quasi-judicial process that can only maintain engagement by prioritising mediation and negotiation and that cannot resort to a more adversarial presence by their design. This institutional aversion to confrontation risks an impression that NCPs seek a middle ground between wrongdoers and their victims and, by association, over remedy for victims.

The National Contact Point

The National Contact Point is a unique implementation mechanism which provides a platform for resolving issues via mediation. Procedural guidance influences the effectiveness of the guidelines and the functions of the role, specifically through core functional equivalence criteria. These criteria are visibility, accessibility, transparency, and accountability. Despite their existence (which are in place to ensure conformity and consistency) there exists a marked disparity in the quality of NCPs. For example, in the past our research has considered the Irish NCP, historically comparatively inactive, although it is interesting to see a number of cases being brought forward in recent months including two lodged by Glan involved the Cerrejon mine in Colombia (one vs Coal Marketing Company and the other vs Electricity Supply Board). More recently, however, our research has turned to the UK NCP, heralded as it is for being an NCP to which others might aspire. Whereas the functions of the NCPs are highlighted in the procedural guidelines as (1) Institutional Arrangements, (2) Information and Promotion, (3) Implementation in Specific Instances and (4) Reporting - our research in the UK NCP focuses

on the third function, the specific instance procedure.

The Specific Instance Procedure

The specific instance procedure itself has four stages: (1) initial assessment, (2) offer of good offices, (3) conclusion and (4) (optional) follow up. At the initial assessment stage, the NCP reviews the information provided and decides whether to proceed with the complaint, or to reject at this stage. Whatever the outcome it will be published through an 'initial statement'. Interestingly, even in those cases where a complaint is rejected, fruitful information on interpreting the OECD guidelines can be found, such as in the case of ADHRB vs FIFA (2016) which considered how organisations might be categorised as falling within or outside of the OECD Guidelines (i.e. focussing on the commercial nature of the organisation's activities in the particular context rather than the classification of the organisation itself). If the NCP decides to proceed with the complaint, they make an offer of 'good offices,' meaning an offer to act as a mediator between corporation and complainant, as outlined in the OECD Guidelines. When the investigation is concluded, the NCP produces a 'final statement'. Usually this emerges from a written agreement between parties, but, even where this has not been achieved, the NCP will still publish a statement that emphasises its views. The fourth stage is optional – providing a follow up evaluation of any agreement and its subsequent implementation. This occurs one year after the publication of the final statement.

The UK NCP: What hope for victims

With the inclusion of the human rights chapter in the 2011 update, the language and ethos of the UNGPs were embedded into the language and practice of the OECD Guidelines, and by extension, the NCP structure. Central to the UNGPs is the importance of access to an effective remedy for those victims impacted by business activities. Indeed, Principle 31 of the UNGPs sets out the role of state-based non judicial grievance mechanisms, outlining an effectiveness criteria that closely mirrors the functional equivalence of the OECD Guidelines.

But the NCPs are limited in the remedy that they can provide. They are not judicial bodies. As such, they do not provide compensation to victims. Further, they do not sanction corporations nor are they able to declare violations. They are, after all, the product of a CSR mechanism and their value as a vehicle for remedy needs to be understood within this context. They do have potential as political accountability mechanisms, with their public forum structure being a way to name, shame and transform future corporate behaviour.

In this sense then, they are not necessarily of value to the current victim, but they have a role to play in limiting the number of potential future victims of corporate human rights impacts. This does have value but our concern, and the one that underpins our research is that it draws human rights within a CSR framework – emphasising future good will to the detriment of today's victim. Intentionally or not, the gravitational pull of CSR practices means that the corporate responsibility to respect human rights is brought within the remit of a pragmatic proceduralism. The obligation towards remedy in the UNGPs is read in this context as a procedural subject of negotiation rather than something accessible to victims by right.

To test this, we continue to look at all complaints filed with the UK NCP since 2001 (84 and counting). We categorise these by complainant, the types of failings alleged, and the outcomes sought. Finally, we look at the outcomes recommended by the UK NCP. Sitting alongside this quantitative data, we returned to the language of the complaints and the reports emerging.

CAN NATIONAL CONTACT POINTS ADEQUATELY REMEDY HUMAN RIGHTS IMPACTS OR DO THEIR ROOTS AS A CSR INITIATIVE TRANSFORM REMEDY AND HUMAN RIGHTS INTO CORPORATE PROCESSES?

We are finding that despite being heralded as a "good" NCP, the UK NCP has contributed to the process of transforming remedy for human rights impact away from reactionary restitution towards a process of improving future respects and future duties to mitigate future harms. Whereas this has a role to play in improving the business and human rights corporate landscape, this can only ever be secondary to remedying the rights of current victims in a manner that resolves (or alleviates) their issues. For it to be otherwise would mean prioritising corporate interests over victims' right to remedy. This is the antithesis of the business and human rights movement and should be avoided at all costs.

[To view this research in more detail, please visit http://ssrn.com/abstract=3959057 to read our paper on 'Transforming human rights in the search of a remedy: an investigation into the UK NCP']

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THE OECD NCPS: 'UNFIT FOR PURPOSE'

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One thing that the concluded Glasgow COP26 has taught us is that there will be greater need than ever for the rule of law, access to justice, transparency, and accountability for communities impacted or likely to be impacted by the climate emergency. Lawyers will need to protect these concepts and ensure they are actively applied for universal benefit, not bought off for private ends or window dressing exercises. The Glasgow Climate Pact agrees many pledges: on unabated coal power phaseout, methane, deforestation, climate adaptation and mitigation finance and finance for local communities and indigenous peoples. The UK government pledges to 'rewire the entire global financial system for Net Zero' through several new initiatives such as the Glasgow Financial Alliance for Net Zero (GFANZ). All these ambitions must be made accountable to people as it is people and often those residing in developing countries, that will suffer human rights violations and unimaginable loss and damage should those pledges fail to deliver.

So, accessible, and effective judicial and non-judicial mechanisms through which people can hold to account the science-based commitments on climate and environmental degradation, and advocate for the fulfillment of those commitments through a human rights or a people-centered approach, should be non-negotiable. The implementation mechanism underpinning the OECD Guidelines, the grievance mechanisms of the National Contact Points (NCPs) for responsible business conduct, is one such mechanism. Up until now, most complaints to NCPs have either been on the domains of human rights or employment and industrial relations. We predict that NCPs will become more utilised especially for complex issues linking state and private commitments on GHG emissions and finance with environmental degradation, human rights harms and loss and damage dialogue.

The OECD recently published its own 'stocktake' of the Guidelines and invited the public to submit comments. We took the opportunity to provide input to the public consultation using it to focus on the implementation mechanism underpinning the Guidelines: the grievance mechanisms of the NCPs for responsible business conduct. We focused on NCPs as we believe that the fitness for purpose of the Guidelines is only as strong as the accessibility and responsiveness of the mechanism through which individuals and communities can resolve the inevitable issues that arise in relation to the implementation of the Guidelines. Our submission to the stocktake was grounded in our peer reviewed research on the ability of NCPs to offer effective remedy. While the OECD may take the technical view that NCPs are not designed to offer formal remedy but rather a mediation platform for dialogue and solutions, it would be short sighted of the OECD not to recognise that NCPs frequently operate within complicated political and legal ecosystems in which people cannot access a functioning rule of

law. Since 2001, NCPs have handled over 500 complaints (called 'specific instances' in OECD jargon). Looking at the increasingly complex vulnerability on people and institutions posed by climate change, we envisage that this trend of inability to access formal courts will continue. People will turn to whatever means available to access remedy and for many, the NCPs will be the only way to hold MNEs accountable for irresponsible business conduct. For the OECD to deny that, is, at best putting form over substance or at worst, denying reality.

Our research into the ability of NCPs to offer effective remedy demonstrates that effectiveness of NCPs is highly dependent on the general context of a case and a fortunate conjunction of external factors e.g. an NCP's own networks, funding and priorities and who is at the mediation table. Thus, the effective use of the NCP good offices to bring about resolution or remedy becomes more about luck and circumstance. This requires urgent attention to ensure a level playing field, equal access for harmed individuals/communities but also to strengthen the legitimacy and relevance of the Guidelines. Adhering states have the flexibility to organise their NCPs as they see fit and, in this context, we recommend the following improvements:

- Increasing resource allocation to NCPs is important for ensuring that NCPs can deliver on their problem-solving mandate. We suggest that each NCP set up an independently administered trust to provide communities, particularly those abroad, with funds for facilitating a mediation. An International Fund for Victims like the one envisaged in the proposed draft legally binding instrument on business and human rights is an option.
- NCPs require an independent oversight mechanism staffed with independent experts to render proceedings and decisions more legitimate, accountable and consequently, more responsive to individuals/communities. The possibility for establishing multi-stakeholder oversight bodies is contained in the procedural guidelines and requires implementation at pace.
- Sanctioning mechanism: Standard operating procedures applicable across all NCPs should compel respondent companies to engage with the claimants in good faith. Lack of a sanctioning mechanism raises questions around the legitimacy of the entire scheme. Business enterprises that do not experience negative effects, such as reputational costs flowing from specific instances, might simply refuse to participate.
- We recommend the introduction of compulsory follow-up to concluded instances as a tool for fostering long-term fitness for purpose. Monitoring of mediated outcomes should be automatic and in robust forms such as publicly available periodic update reports. This should be implemented across all NCPs, adhering states with findings feeding into and strengthening the peer-review process.
- Finally, dialogue and coordination between NCPs in different countries is required to incentivize the harmonisation of NCP practices across home states.

The Guidelines for MNEs were last updated in 2011. Since then, a huge amount of research has been conducted on the question of efficacy and overall, the conclusion is not positive. Transformational change is needed within the structures of the NCPs to make them fit to cope with the significantly evolving environmental agenda and the readiness of citizens and lawyers to use all available legal mechanisms to promote and uphold an environmental agenda that is varied in legal claims and grounded in a people-orientated approach. Scanning the horizon, we predict an increasing number of specific instances being brought before NCPs, notably in the context of environmental degradation and the climate emergency. Specifically, with regards to the EU Green Deal and Fit for 55 Package, we anticipate that European NCPs will be increasingly confronted with complex demands against MNEs and financial institutions around climate change and the environment which will require a more harmonised and transparent approach. Onboarding these recommendations is critical for the future orientation and fitness of NCPs and the increasing pressures that NCPs will face as they encounter more David and Goliath situations supported by an increasingly mature, strategic and demanding public interest driven civil society.

Failing which, it would not be unimaginable to see a creative legal case brought against the OECD's member states themselves holding them to account for the lack of fitness for purpose of their own NCP mechanisms.

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THE GERMAN NATIONAL CONTACT POINT AND ITS WEAKNESSES FOR ACHIEVING EFFECTIVE REMEDIES

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'The German National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (OECD Guidelines) constitutes an important element of the previsions regarding effective remedies in the terms of the UN Guiding Principles on Business and Human Rights (UNGPs). In 2016, the German government published the National Action Plan (NAP) for the implementation of the UNGPs. According to the German NAP, the NCP is an extrajudicial grievance mechanism and part of the guarantee of access to remedy and redress of the UNGPs. The criteria to evaluate the effectiveness of non-judicial grievance mechanisms, like the NCP, are stated in UNGP 31. In order to be effective, NCPs need to be legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning. This blog post examines how these effectiveness criteria apply to the German NCP and whether we can consider this mechanism as an effective tool in addressing business-related human rights abuses.

The effectiveness criteria applied to the German NCP

The first element in assessing the effectiveness of non-judicial grievance mechanisms is the legitimacy. To be legitimate means "enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes" (UNGP 31 (a)). Institutional independence is ideally to enable trust in a space free of possible political influence (e.g., OECD Watch 2019, p. 4 f.; ECCHR 2013, p. 7). The German NCP is based at the Federal Ministry for Economic Affairs – like most NCPs, but unlike e.g., the Netherlands' NCP which is an independent organisation. In this regard, an independent German NCP would serve to strengthen its legitimacy.

Secondly, accessibility requires the NCP to be "known to all stakeholder groups for whose use they are intended", and to provide "adequate assistance for those who may face particular barriers to access" (UNGP 31 (b)). The accessibility is a challenge for all NCPs. One of the findings (2.2) of the Peer Review of the German NCP in 2017 was that the awareness of the NCP is generally low in countries where German companies operate. In general, the complainants are NGOs domiciled in Germany or Europe that advocate for or with their partners in the global South. Without a partnership with German NGOs, a complaint is challenging. The promotion of the NCP is key to improving its accessibility. One of the measures (2.2) that was taken after the Peer Review was the intensification and institutionalization of promotion with embassy staff. Even better would be the promotion facilitated by and in cooperation with labour unions, NGOs, and business associations in countries where German companies operate.

As for the predictability of the NCP, this would depend on "a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation" (UNGP 31

(c)). There is a known updated procedure for the German NCP, but it has been sometimes ignored in the past. For example, it was exceeding the procedural deadlines for six months without a known reason (ECCHR 2015, p. 9 f.). Even though the unpredictability remains an exception, it contributes to hinder the trust from stakeholders in the NCP, if measured against the requirements established in UNGP 31 (a).

According to the UNGP 31 (d), the NCP should be equitable, which means "seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms". The German NCP seems to offer the conditions to be equitable in the terms of the UNGP, or at least there are no published complaints on this criterion. That is not the case with the next effectiveness criterion, namely the transparency.

A NCP is transparent if it manages "keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake" (UNGP 31 (e)). The German NCP reports annually on its activities to the German Parliament. The reports contain neither information that can be verified by the stakeholders involved in the process, nor information on how the decisions about complaints have been made, for example how the OECD Guidelines have been applied (DIMR 2019, p. 120). The Peer Review found a misbalanced relation between transparency and confidentiality. The new proceeding terms(2019) after the Peer Review and the last report (2021) of the NCP to the Parliament do not represent a considerable improvement in transparency. Nevertheless, as a positive development, the NCP has improved its website, allowing the public to access information about the decisions on the admissibility or motivated inadmissibility of complaints.

Additionally, the NCP should be rights-compatible by "ensuring that outcomes and remedies accord with internationally recognized human rights" (UNGP 31 (f)). Agreements and recommendations that take place at the NCP should be in line with internationally recognized human rights. However, the grievance mechanism at NCPs rarely results in any form of remedy (OECD Watch 2019, p. 1) - see e.g., the Annual Report on the OECD Guidelines for Multinational Enterprises 2020. If there is an outcome it may be a recommendation for the company or in a better case an acknowledgment of wrongdoing. At the German NCP, the situation is not different than on average.

In virtue of the UNGPs, the last effectiveness criterion for the NCP as a grievance mechanism is to be a source of continuous learning by "drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms" (UNGP 31 (g)). The German NCP has improved on this point. Instead of just closing the case with a declaration about an agreement or non-agreement, the German NCP publishes now follow-up statements about the implementation of its recommendations in particular cases. An example of this practice is the case of TÜV Rheinland, whose Indian subsidiary audited the production facility Rana Plaza months before its collapse - which killed more than 1,130 people and left more than 2,500 injured. In this case, which ended in non-agreement, the NCP argued in its recommendations that the parties should discuss deeply how to enhance social auditing. A year and a half later, the NCP published the follow-up statement regarding compliance with recommendations. This measure can serve the NCP to become an enriching source of continuous learning.

With the above mentioned weaknesses of the German NCP to be considered a truly effective non-judicial grievance mechanism according to the criteria of the UNGP 31, it would not be reasonable to expect it to provide an effective remedy

(to victims of business-related human rights abuses, especially when the NCP sees itself exclusively as a mediator. From the NGOs perspective, which are frequently acting as complainants in these processes, the NCP should be the guardian of the OECD Guidelines. This means that the NCP should make its own assessments with regard to the compliance of multinational enterprises with due diligence requirements by virtue of the OECD Guidelines. Therefore, recommendations based on this kind of assessments could represent an effective remedy.

Finally, it is important to highlight that German enterprises will be certainly interested in complying with their due diligence obligations from 2023 when the Act on Corporate Due Diligence in Supply Chains comes into force. In this upcoming scenario, enterprises may face administrative sanctions if they fail to comply with their due diligence obligations according to this Act. This regulation does incentive enterprises to comply with the recommendations of the NCP, including recommendations on effective remedies, and to participate constructively in the NCP proceedings to avoid unsatisfied complainants at the NCP which could initiate administrative processes - that could consequently lead to a fine. European and global regulations of due diligence would also strengthen the incentive.

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