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# National Contact Points in OECD Countries Promote Business & Human Rights in the Extractives Sector

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For over 20 years, a little-known dispute resolution mechanism has facilitated conciliatory ends to numerous human rights and environmental grievances levied against multinational corporations. The OECD's National Contact Point ("NCP") program empowers countries that adhere to the OECD's Guidelines for Multinational Enterprises (the "OECD Guidelines") to develop mechanisms to resolve complaints that a company's conduct violates the OECD Guidelines. The NCP program celebrated its 20-year anniversary in 2020. During its first two decades, 49 countries have established NCPs and those NCPs have handled over 500 cases involving alleged misconduct that took place in over 100 countries. Complainants, companies, and countries are increasingly paying more attention to the NCP program. Here is what multinational companies need to know about the NCP program as it enters its third decade.

## What are NCPs?

In 2000, the OECD updated its Guidelines for Multinational Enterprises—a set of non-binding standards of "responsible business conduct" for transnational corporations first issued in 1976—to include a mandate for member countries that adhere to the Guidelines to establish National Contact Points for Responsible Business Conduct. The term "responsible business conduct" encompasses a range of activities related to business, including employment and industrial relations, environment, anti-corruption, competition, and taxation. In 2011, the OECD again updated its Guidelines for Multinational Enterprises, this time adding a chapter on human rights, consistent with the United Nations Guiding Principles for Business and Human Rights (UNGPs).

NCPs are implemented and run by their respective governments. The US NCP, for example, is housed in the Bureau of Economic and Business Affairs within the State Department.

Governments are afforded significant flexibility in how to operate their respective NCPs, guided only by the core criteria of visibility, accessibility, transparency and accountability, and the requirement to handle specific cases impartially, predictably, and equitably.

In UN-speak, NCPs are mandated to provide "good offices" on issues related to the implementation of the Guidelines in "specific instances." In practice, this means that NCPs

provide a non-judicial forum for dispute resolution between corporations and people who allege corporate conduct that violates the Guidelines.

### **How do NCPs operate?**

Three procedural steps follow the receipt by an NCP of a complaint: initial assessment, good offices, and conclusion. If the NCP determines after the initial assessment that the complaint merits further examination, it will facilitate a dialogue between the complainant and the corporation (“good offices”). During the good offices phase, the NCP endeavors through conciliation or mediation to help the parties resolve the issue, which can involve updates to the company’s corporate policies—often focusing specifically on drafting or updating their business and human rights policies—and sometimes monetary compensation. Between 30 to 40 percent of the cases where the NCP provides good offices lead to some type of agreement between the parties. Even when there is no agreement, the NCP often still issues public recommendations for the company to implement (even though the company is not legally required to do so).

The NCPs that have received the most specific instances are the United Kingdom (56), United States (48), and the Netherlands (39), while Germany, France, and Brazil have handled 32 cases each. The majority of cases since 2011 have dealt with human rights, general policies, which include standards and expectations regarding the level and scope of due diligence done by companies into human rights issues, employment and worker issues, and the environment.

### **Why do complainants file complaints with NCPs?**

A complainant can be any individual, organization, or community with an interest in the matter. The majority of complaints are submitted by NGOs or trade unions, often on behalf of aggrieved individuals or communities. The complainant need not have been a direct victim of the alleged misconduct.

There are many reasons why complainants might avail themselves of the NCP process rather than resort to domestic courts. First, costs are zero to minimal. It costs nothing to file a complaint, and the complainant need not be represented by legal counsel, either when filing the complaint or subsequently when the process is underway. Additionally, the NCP will typically cover the costs of an independent mediator during the good offices stage.

Second, the barriers to file are minimal. The complainant need not satisfy jurisdictional requirements that would arise in court (such as proving personal jurisdiction over a defendant). Complainants can initiate claims with the NCP of the country where the alleged misconduct took place (including domestically) or with the NCP of the country where the corporation is headquartered. There is generally no statute of limitations for complaints.

## Why do corporations usually participate in the NCP proceedings?

An NCP cannot compel a company to participate in the NCP proceeding. Yet OECD statistics indicate that nearly three-quarters of corporate respondents participated voluntarily in the proceedings. There are several reasons why.

First, in the past few decades, corporations have found themselves subject to an increasing number of non-binding (or “soft law”) international instruments. In addition to the OECD Guidelines, there have been the International Labor Organization’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1978), the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003), and, perhaps most importantly, the United Nations Guiding Principles on Business and Human Rights (2011). While companies are not legally required to participate in NCP proceedings, their shareholders, directors, and employees simply might expect them to do so, either to refute unsubstantiated allegations or to address legitimate issues identified in the complaint.

Second, although NCP proceedings are generally confidential, there is still a public component. The NCP can publish the allegations and may investigate the complaint even if the company does not participate in the NCP proceeding. Additionally, if the NCP finds merit in the allegations, it often makes its recommendations to the company public—again, even if the company does not participate. Negative press makes for bad business. And the non-participating company will then need to justify to its shareholders, directors, and employees why it chose not to tell its side of the story to the NCP.

Third, apart from reputational effects, companies may find that the NCP process offers significant strategic advantages over traditional judicial mechanisms:

- *Non-binding*: The NCP process is not binding on the corporation and relies on a non-adversarial process (mediation or conciliation) to reach a resolution. The company can therefore help shape the resolution by participating in the NCP proceeding, and, ultimately, the company need not comply with any resolutions with which it disagrees. Any resolution that the corporation agrees to will not have a precedent-setting effect, and may actually aid the corporation in preventing or defending future related litigation.
- *Efficiency*: The NCP process may be more efficient from the perspective of time and costs. The company can resolve longstanding disputes while avoiding the expensive and time-consuming litigation, including onerous discovery obligations and potentially years of appeals.

- *Confidentiality*: As discussed above, NCP proceedings generally involve strict confidentiality, with only minimal details about the alleged conduct included in the NCP's public statements. Litigation, on the other hand, is often entirely public, with court documents made accessible to the public.
- *Flexibility*: The NCP proceeding may allow a resolution that is more creative and flexible than the relief a court may order. The process may focus not just on remedying the past alleged misconduct, but also help the company function better in the future in terms of better-developed due diligence and compliance programs.

The energy sector has responded positively to resolving disputes through NCP proceedings. Here are some examples.

- *ClientEarth–BP*. In June 2020, the UK NCP released an initial assessment regarding a complaint filed by the British NGO ClientEarth against BP for its 2019 advertising campaign that allegedly misled consumers about the scale of BP's low-carbon energy activities relative to its fossil fuel business. The NCP decided not to accept the complaint on the grounds that it would not contribute to the purposes or effectiveness of the OECD Guidelines. Specifically, ClientEarth had requested that BP withdraw the campaign and make public commitments regarding future advertising. BP accepted the invitation from the UK NCP to respond, but before it issued its response, BP ended the advertising campaign and issued a statement that it would “stop corporate reputation advertising campaigns and re-direct resources to promote well-designed climate policies.” Because the NGO's requests were largely satisfied, the UK NCP did not proceed to the good offices phase.<sup>[1]</sup>
- *Egbema Voice of Freedom–Energy Company*. In December 2017, the Nigerian NGO Egbema Voice of Freedom submitted a complaint to the Italian NCP alleging that an energy company and its Nigerian affiliate had not observed the OECD Guidelines' chapters on General Policies, Human Rights and Environment. The NGO filed the complaint on behalf of villagers near Mgbede, Nigeria, who had regularly experienced violent floods since 1971 allegedly linked to oil drilling. The NCP facilitated mediation which led to a signed mutual agreement whereby ENI committed to building and maintaining a drainage system to end flooding caused by its operations.<sup>[2]</sup>
- *Society for Threatened Peoples–Credit Suisse*. In April 2017, the Society for Threatened Peoples submitted a specific instance to the Swiss NCP regarding Credit Suisse's business relationship with companies involved in the construction of the Dakota Access Pipeline in the US. The Pipeline was a source of protests for allegedly

threatening the local indigenous communities' supply of drinking water and some important cultural sites, and the complainants alleged that Credit Suisse failed to conduct adequate due diligence and encourage its business partners to prevent or mitigate adverse human rights and environmental impacts. Credit Suisse agreed to participate in mediation with the complainant, and, after five sessions, the parties reached an agreement in which Credit Suisse committed to include the concept of Free, Prior, and Informed Consent of indigenous peoples in its internal sector-specific energy policies.<sup>[3]</sup>

- World Wildlife Fund–SOCO. In October 2013, the NGO World Wildlife Fund submitted a specific-instance complaint to the UK NCP alleging that energy company SOCO International had violated the OECD Guidelines by conducting oil exploration activities in a Congolese national park that allegedly posed risks to the local communities and environment, without having conducted appropriate due diligence and local outreach. The parties agreed to participate in mediation appointed by the UK NCP and eventually reached an agreement whereby SOCO agreed to cease and refrain from any exploratory or other drilling within the park for as long as UNESCO and the Congolese government viewed such activities as incompatible with the park's World Heritage Status.<sup>[4]</sup>
- Ongoing Cases. Other specific instances involving global energy companies are currently in various stages of the NCP process in Australia, Brazil, Ireland, Switzerland, and the UK.

## Conclusion

The OECD's National Contact Point program begins its third decade in 2021 with ever-increasing popularity. Corporations headquartered or operating in any of the 49 countries that observe the OECD Guidelines should familiarize themselves with the relevant NCP procedures in those countries. While not mandatory for the corporation, participating in NCP proceedings can offer considerable advantages over traditional litigation, and not participating may have serious consequences.

[1] Final Statement of UK NCP, June 16, 2020, available at <http://mneguidelines.oecd.org/database/instances/uk0054.htm>.

[2] Final Statement of Italian NCP, July 8, 2019, available at <http://mneguidelines.oecd.org/database/instances/it0013.htm>.

[3] Final Statement of Swiss NCP, October 16, 2019, available at <http://mneguidelines.oecd.org/database/instances/ch0016.htm>.

[4] Final Statement of UK NCP, July 15, 2014, available at <http://mneguidelines.oecd.org/database/instances/uk0038.htm>.

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