

OECD National Contact Points

Better Navigating Conflict to Provide Remedy
to Vulnerable Communities

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About this report series

This report is part of a series produced by the Non-Judicial Human Rights Redress Mechanisms Project, which draws on the findings of five years of research. The findings are based on over 587 interviews, with 1,100 individuals, across the countries and case studies covered by the research. Non-judicial redress mechanisms are mandated to receive complaints and mediate grievances, but are not empowered to produce legally binding adjudications. The focus of the project is on analysing the effectiveness of these mechanisms in responding to alleged human rights violations associated with transnational business activity. The series presents lessons and recommendations regarding ways that:

- non-judicial mechanisms can provide redress and justice to vulnerable communities and workers
- non-government organisations and worker representatives can more effectively utilise the mechanisms to provide support for and represent vulnerable communities and workers
- redress mechanisms can contribute to long-term and sustainable respect and remedy of human rights by businesses throughout their operations, supply chains and other business relationships.

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Acronyms

BHRRC	Business and Human Rights Resource Centre
CAO	Compliance Advisor Ombudsman of the International Finance Corporation
EFIC	Export Finance and Insurance Corporation (Australia's Export Credit Agency)
ETI	Ethical Trading Initiative
MSI	Multi-stakeholder initiative
NAP	National Action Plan, a plan developed by countries in response to the UN Guiding Principles on Business and Human Rights
NCP	National Contact Point
NGO	Non-governmental organization
NHRI	National human rights institution
NJM	Non-judicial mechanism
OECD	Organisation for Economic Cooperation and Development
PPSS	Posco Pratirodh Sangram Samiti
SI	Survival International
UK	United Kingdom
UNGP	United Nations Guiding Principles on Business and Human Rights

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Executive Summary

Each country that is a member of the Organisation for Economic Co-operation and Development 'OECD' is obliged to set up an NCP office, which is responsible for promoting and implementing the Guidelines for Multinational Enterprises ('Guidelines') by disseminating information and hearing complaints regarding alleged breaches by companies.¹ This report adds to the burgeoning literature on the role and effectiveness of NCPs by examining the efforts to gain redress *in practice* rather than only examining the formal characteristics of NCPs.

The analysis presented in this report occurs at three different levels: The first level incorporates a general overview of the performance of NCPs from different countries, drawing on publicly available documentary sources and focussing particularly on best practice. The second level provides a more detailed overview of the Australian and UK NCPs. The third level entails a more intimate examination of claim making in action. To enable us to explore the dynamics of the way that claims are made and NCPs handle grievances in more depth, the report draws on primary empirical research concerning two vulnerable and remote communities that attempted to gain remedy from National Contact Points: the Vedanta and POSCO cases.

NCPs often consider complex and sensitive cases. In both case studies discussed in this report human rights grievances were experienced by vulnerable and remote communities in the state of Odisha in India. Violence was experienced by community members whom the complaints concerned. A number of the community members and their supporters who objected to the business practices in both cases were killed, and many were injured or jailed. Conflict between communities, business and government had been raging for many years before the complaints were lodged with the respective NCPs. Navigating such conflict is extremely challenging. It requires high levels of expertise, thoughtfulness and flexibility in processes.

NCPs differ in utility from country to country in their capacity to navigate such complexity, with some being much more effective avenues of redress than others. NCPs have significant *potential* to provide greater access for victims of human rights abuses to effective remedy when that harm is caused by transnational business. They could be an important mechanism for realising the third pillar of the United Nations' Guiding Principles on Business and Human Rights: the right to remedy.² Our research shows that because these redress mechanisms are part of government and determinations are generally made by panels constituted by respected experts, they have considerable legitimacy, and as such can attract media attention and generate leverage for those seeking redress for breaches of human rights by business. For this potential to be realised, NCPs require strengthening in a number of respects outlined in this report.

When compared with other mechanisms and litigation, NCPs have six major strengths, which are explored in this report. These qualities are stronger in some NCPs than in others. This report describes the NCPs in which these strengths are most prominent and how other countries' NCPs are failing to meet their potential. The six strengths are:

¹ OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011) ('Guidelines').

² Office of the United Nations High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (June 2011).

1. ease of complaint lodgement and broad formal rules of standing;
2. broad interpretation of human rights standards;
3. acknowledgment of business responsibility for supply chains and investments;
4. acknowledgment of positive duties to mitigate harm for businesses in relation to human rights;
5. high degree of legitimacy in findings; and
6. cost-efficient and timely in comparison to litigation.

NCPs require improvement in many respects in order to act as more effective avenues for redress. Some of these areas of improvement would not be costly to implement and are readily achievable by government. In summary, these areas include:

1. independence from government;
2. greater leverage or enforceability;
3. within government coordination;
4. cross-country coordination of NCPs;
5. encouraging long term improvements in human rights practices in businesses;
6. coordination with institutions in the country where the grievance occurred;
7. monitoring of mediated agreements;
8. outreach to increase accessibility for vulnerable communities and workers;
9. transparency; and
10. frequency of NCP peer reviews.

Our research suggests that there are great benefits to NCPs' being housed within, supported by and working closely with government. However, scepticism has been expressed regarding the independence of NCPs and this may undermine their authority.³ Under the Guidelines that govern the constitutions of NCPs across OECD countries, NCPs are required to operate impartially throughout the 'specific instances' process.⁴ However, the structure and location of an NCP can influence how it handles a complaint. Some NCPs, such as Australia's, are housed in and managed by a single government department, with decision-making ultimately sitting within that department, and this can result in conflicts of interest. For example, if a complaint is brought against a company that is a government contractor, or the government is pursuing certain foreign policy aims or industry growth, this could lead to a conflict of interest in the specific instances process.⁵ Steps could be taken in each OECD country to ensure that NCPs operate in a way that reduces these conflicts of interest without losing the benefits of government support and authority.

³ OECD Watch, *NCPs* <<http://oecdwatch.org/oecd-guidelines/ncps>>.

⁴ Department for International Development, 'UK National Contact Point Procedures for Dealing with Complaints brought under the OECD Guidelines for Multinational Enterprises' (Media Release, 28 April 2008) 4 <<http://www.bis.gov.uk/assets/biscore/business-sectors/docs/u/11-1092-uk-ncp-procedures-for-complaints-oecd.pdf>>.

⁵ OECD Watch, 'The OECD Guidelines for MNEs: Are they 'fit for the job'?' (Media Release, June 2009) 7.

NCPs do not have any powers of enforceability and cannot impose penalties on companies or award compensation to victims. Businesses found to be in violation of the Guidelines are not under any obligation to participate in the NCP process or to follow the recommendations of the NCP.⁶ As such, NCPs are seldom useful for stopping a project or other business activity that will infringe upon the human rights of an individual or community. However, our research suggests that NCPs may provide an important opening for negotiation where other requests for negotiation have proved futile and where complainants have raised concerns about ‘how’ a business operates.

NCPs are uniquely situated to deploy forms of leverage to influence business behaviour that are available to them due to their location within government. These types of leverage could include the staying of import or export licenses, the withholding of government subsidies and aid, or disqualification from government procurement. If NCPs were to use such means to penalise offenders and steer business behaviour they would become extremely powerful means of human rights remedy and promotion.

Leverage should be used to encourage long-term behavioural change, not just to address individual grievances. Research reported in other reports in this series shows that many mechanisms and processes for encouraging human rights compliance require enterprises to demonstrate the adoption of corporate accountability practices across the company or broader compliance with human rights standards. These processes can have a much broader positive impact on the human rights performance of enterprises. If NCPs continue only to address single instances, a crucial opportunity will be missed for government to encourage better human rights practices across the whole business in the long term. A further danger is that NCPs will unwittingly entrench harmful human rights practices. In one of the case studies conducted in this report, for example, we find that POSCO developed some voluntary human rights commitments following the NCP complaint against it. However, this did not lead to any tangible changes in its business practices across India, the country where the grievance occurred. Instead, the experience of engaging with the NCP may have equipped POSCO with tools to deflect criticism without making real changes in the way it interacts with communities impacted by its operations.

To achieve this type of long-term change, coordination is not only required across government departments but also with the governments of the countries in which the harm is occurring. This can occur, for example, through information sharing, facilitating fact-finding missions to feed into mediation processes, shared discussion of findings and various other types of meaningful outreach.

One of the strengths of NCPs is the ease of complaint lodgement, including the broad rules of standing. In *formal* terms, NCPs are highly accessible. However, inadequate funding diminishes the capacity of NCPs to provide outreach to the vulnerable communities that most need assistance to access remedies. It also reduces their ability to conduct investigations which might

⁶ Christian Aid, Amnesty International UK & Friends of the Earth, ‘Flagship or failure? The UK’s implementation of the OECD guidelines and approach to corporate accountability’ (Media Release, January 2006) 27 <<http://www.christianaid.org.uk/images/F1167PDF.pdf>>.

overcome barriers for vulnerable communities in presenting evidence. It restricts the capacity of NCPs to conduct follow-up meetings or conduct mediations in the place that the grievance took place. This makes NCPs less accessible *in practice*. The two case studies discussed in this report show that communities that suffer grievances at the hands of transnational business are often in remote locations, and have little chance of knowing that the NCPs might offer an avenue for redress. Unless these communities are provided with assistance to access the mechanisms, including help with constructing the claim, this crucial means for redress is lost to them. Our research suggests that the NCPs that are better funded handle many more disputes than those that receive less funding. This is not because multinational enterprises based in the countries with well-funded NCPs have worse human rights records, but rather because those NCPs are more proactive and accessible. Most NCPs act with no recognition of the disparities in power and resources between claimants and business respondents. The failure to consider such disparities further diminishes the capacity of NCPs to deliver justice to those who most need it.

NCPs could increase their accountability and improve their effectiveness through greater coordination with NCPs in other countries and regular peer reviews. The POSCO case examined in this report, which entailed complaints to three NCPs, demonstrates the problems that arise from failure to coordinate across NCPs when complaints are made about the same grievance. Inconsistent application of the Guidelines diminishes the legitimacy and authority of NCPs. Peer reviews are one way to overcome problems of this type and enhance the sharing of best practice across NCPs.

At its end, this report makes a number of recommendations as to how NCPs can be strengthened to become more effective avenues for redress. It is hoped that these recommendations contribute to future reform processes. Political will plays an important role in the effectiveness of the NCP as an avenue for redress, and accordingly the strengthening of NCPs depends on the genuine concern for human rights in every OECD country. NCPs often offer the only way for aggrieved individuals to seek justice for human rights breaches performed by businesses domiciled in OECD countries. It is critical, therefore, that governments properly resource them so as to realise their potential influence in the field of business and human rights.

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Introduction

Business behaviour can enhance or diminish the lives of the communities and individuals it interacts with. The private sector contributes new livelihoods, ideas, technologies and products to peoples' lives. However, business also causes significant human rights abuses through their practices including through dispossession and forced resettlement, exploitation of workers, environmental damage and harm to peoples' health. When harms of these types occur, it is crucial that people have access to redress and remedy. National Contact Points (NCPs) are mechanisms established under the Economic Co-operation and Development Guidelines for Multinational Enterprises ('Guidelines') to provide such remedy. This report examines how successful existing NCPs are at providing such redress and remedy, and how they might be improved.

This report is part of a series based on the findings of a three-year Australian Research Council Linkage Project analysing the effectiveness of non-judicial redress mechanisms in responding to human rights violations within transnational business supply chains. In examining redress mechanisms, the project considers which factors have contributed to more or less effective outcomes, prioritising the perspectives of the adversely impacted communities seeking redress. These factors include, but are not limited to, degrees of legitimacy, accessibility, certainty, transparency, accordance with substantive human rights, sustained learning and meaningful stakeholder participation. A key objective of the project is to develop recommendations as to how non-judicial forms of redress can better support communities adversely impacted by business operations to access justice and have their human rights respected. These recommendations are primarily aimed at those who participate in these mechanisms, including businesses, affected communities and civil society organizations.

A focus on how people can find redress for business-related human rights abuses has been amplified by the third pillar of the United Nations Guiding Principles on Business and Human Rights. The principles on access to remedy promote the role of a range of mechanisms in ensuring remedy, ranging from company based or operational grievance mechanisms, through to the State responsibility to ensure access to judicial and non-judicial processes. During his mandate as the Special Representative of the Secretary-General to the United Nations on the issue of human rights and transnational corporations and other business enterprises Professor Ruggie developed a framework for remedy. In his 2008 report, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', Professor Ruggie outlined the role that the NCPs could potentially play within the context of his framework. But he noted that 'with a few exceptions, experience suggests that in practice [the NCPs] have too often failed to meet this potential.'⁷

⁷ John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, June 2008; A/ HRC/8/5; paragraph 98: 'The NCPs are potentially an important vehicle for providing remedy. However, with a few exceptions, experience suggests that in practice they have too often failed to meet this potential.'

The women and men whose rights are most frequently injured are often already marginalised, socially, economically or politically. Access to remedy for these abuses is made difficult or almost impossible by failures of domestic legal systems, limited options in terms of redress mechanisms, starting imbalances of power between corporations and local communities, and distance – geographic, cultural, bureaucratic, political and economic – from decision-makers and redress mechanisms that do exist far away from the site of the harm.

NCPs provide one way that those who have suffered harm due to the actions of business can access remedy. NCPs were designed as a relatively cheap way for communities, workers and individuals to access remedy, free from confusing procedural rules and precedent. This report considers whether NCPs are meeting this important aim and contributing to the improvement of business behaviour in the field of human rights.

Relevant Cases From This Research

There are two grievance case studies from the research we conducted that have utilised the NCP mechanism. These cases are discussed in detail below.

1. **Survival International vs Vedanta Resources**
2. **Lok Shakti Abhiyan et al vs POSCO**

Reports on each of these case studies can be found at www.corporateaccountabilityresearch.net.

Methodology

This report is part of a series based on the findings of a five-year Australian Research Council Linkage Project analysing the effectiveness of non-judicial grievance mechanisms in responding to human rights concerns in which transnational business activity is involved. We adopt a broad definition of non-judicial grievance mechanisms, namely, those that are mandated to receive complaints, but are not empowered to produce legally binding adjudications.

Research has sought to shed light on the range of factors that contribute to greater or lesser effectiveness and legitimacy in the functioning of transnational grievance-handling systems. A key objective of the project is to develop recommendations regarding how non-judicial forms of redress can better support communities who are adversely impacted by business operations to access justice and have their human rights respected. These recommendations are primarily aimed at those who participate in these mechanisms, including businesses, affected communities, and civil society organizations, as well as staff and other members or stakeholders of grievance-handling mechanisms themselves.

Field research for the project as a whole has focused on human rights grievances in the garment and footwear, agribusiness, and extractives sectors, with case studies for each sector drawn from two jurisdictions: India and Indonesia. 10 case study reports examine specific human rights grievances experienced by communities and workers and the strategies employed in their attempts to gain redress in the context of these specific sectors and regulatory environments. Five mechanism reports in this series have been developed to provide a better understanding of

the effectiveness of individual non-judicial human rights mechanisms governing transnational business. In addition to these individual case-study and mechanism reports, the project's overall findings are presented in four cross-cutting reports which provide broader comparative analysis across the various case studies we examined.

The analysis presented in this report occurs at three different levels:

The first level incorporates a general overview of the performance of NCPs from different countries, drawing on publicly available documentary sources and focussing particularly on best practice.

The second level provides a more detailed overview of the Australian and UK NCPs.

The third level entails a more intimate examination of claim making in action. To enable us to explore the dynamics of the way that claims are made and NCPs handle grievances in more depth, primary empirical research has focused on two case studies which are reported in greater depth in other reports in this series. The POSCO case study is reported in *POSCO's Odisha project: OECD National Contact Point complaints and a decade of resistance*. The POSCO report is informed by extensive semi-structured interviews with more than 40 people over three visits to Odisha (in March 2012, December 2012 and December 2013) and Korea (in November 2012). These interviews were with company officials, members of Posco Pratirodh Sangram Samiti (PPSS), civil society organisations in India and beyond, and other relevant experts, such as journalists. The Vedanta report, titled *Case Study of Vedanta Bauxite Mine in Niyamgiri: A model for free, prior and informed consent* is also informed by extensive semi-structured interviews with more than 50 people over two visits to Odisha (in December 2012 and December 2013) and the UK in 2013. Interviews were carried out with company officials, community members, activists, journalists and civil society organisations in Odisha, Delhi and the UK. Additional information for the case studies are drawn from relevant secondary research, including online media articles, civil society organisations and company websites, and judicial documents. Our research on these case studies ended in 2015.

We selected these two case studies for detailed empirical investigation for a number of reasons. Both cases entailed complaints by vulnerable and remote communities in rural settings. The case studies allow us to examine the difficulties and challenges associated with making complaints for aggrieved communities that are far removed from the NJMs. The POSCO case involved complaints to NCPs in three countries. The nature of each complaint differed because each concerned a different aspect of business relations associated with the grievance. The complaint to Korea was with regards to the company at the heart of the grievance – POSCO. The complaints to the Dutch and Norwegian NCPs involved minority investors. The case study presents a unique opportunity to examine the differences in the handling of the cases between NCPs. In comparison, the complaint concerning Vedanta's business activities was only to the UK NCP. Both cases proved to be a complex and protracted cases. They involved significant interactions with national Indian administrative and judicial systems and another grievance handling mechanism that we also analyse as part of this series of reports.

It is important to recognise that these two individual case studies cannot be interpreted as representative of the diverse array of dispute handling processes across all the countries that

house NCPs. Nonetheless, the detailed investigations of these two cases, combined with the broader review of the NCPs' overall functioning, can shed useful light on the processes and mechanisms through which the NCP redress mechanism operates—generating insights and questions of wider significance.

What are National Contact Points?

Each country that is a member of the Organisation for Economic Co-operation and Development 'OECD' is obliged to set up an NCP office, which is responsible for promoting and implementing the Guidelines for Multinational Enterprises ('Guidelines') by disseminating information and hearing complaints regarding alleged breaches by companies.⁸ The NCP mechanism allows complaints to be made through the filing of 'specific instances', and although compliance with the Guidelines is voluntary for companies, the NCP process has shown the potential for preventing companies from violating the human rights of impacted communities. Once complaints are filed with NCPs, they can lead to mediated or conciliated dispute resolution as well as adverse findings ('final statements') against enterprises for violations of the Guidelines. These determinations are usually made public.

46 governments have adopted the Guidelines including all OECD members and also a number of other states which have agreed to adhere to this instrument. NCPs are arranged differently and hosted by varying government departments in each adhering country. The effectiveness of NCPs varies considerably from country to country, and therefore the usefulness of the mechanism for individuals and communities that have suffered human rights grievances due to the activities of transnational business also differs depending on the OECD country in which the company is based. The Dutch, Norwegian and UK NCPs are considered to be reasonably effective, for example, whereas the US, South Korean and Australian NCPs are considered to be relatively weak in the sense that they are under-resourced and their determination processes are less rigorous. Examples from our research to support these views are highlighted below.

Summary of the scope, design and operation of NCPs

This section provides a brief introduction to the way that NCPs work.

Jurisdiction

The Guidelines apply to multinational enterprises operating in an OECD member-country, or which are domiciled in an OECD member-country but operate abroad. If the alleged breach takes place in an OECD member-country, the complaint should be made to that country's NCP in the first instance. If the alleged breach is outside an OECD member-country, but was committed by a company domiciled in an OECD member-country, then the complaint should be made to the home-country NCP.

⁸ OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011) ('Guidelines').

The Guidelines state that ‘any interested party’ can make a complaint. Thus, a complainant does not have to be a resident of the country where the breach allegedly occurred. A non-government organisation (‘NGO’), affected community or person, lawyer or other representative can make a complaint. However, some NCPs require proof that the complainant has a legitimate interest in the issue, for example, in the form of a letter of support from affected people. See ‘representation’ below.

Process

The method by which communities, workers and individuals bring claims to NCPs, and NCPs then proceed differs from country to country.

In all NCPs an initial complaint can be sent by email or post, along with supporting evidence. NCPs vary in terms of expectations in relation to the initial submission. For example, the Norwegian NCP requires complainants to fill out a form answering various questions, whereas a complainant making a case to the UK NCP must provide enough material to substantiate that a possible violation of the Guidelines has occurred (although they do not have to *prove* the violation). NCPs can and often do ask for further information if required.

After the initial assessment, which confirms eligibility, if an NCP decides to pursue the complaint they commence liaising with all parties. This can be through a request for more information and exchange of written positions, or a physical meeting. These early exchanges can result in mediation (face to face, possibly with representatives rather than the affected person or community), investigation (usually desk-based but sometimes in the field), or more meetings with the parties separately or together.

NCPs have the ability to conduct investigations, although few NCPs have funding to conduct extensive investigations, and many are reluctant to investigate outside their own country for fear of encroaching upon another state’s sovereignty. For example, the Dutch NCP can conduct field research and visit the company and complainants if they can acquire consent from the host country. An NCP can carry out any interviews it deems necessary, but cannot command that people participate. Many NCPs call on advice from businesses or NGOs.

The 2011 Guidelines require NCPs to manage complaints in a similar manner. The four criteria of functional equivalence (similarity across all NCPs) are:

- visibility;
- accessibility;
- transparency; and
- accountability.⁹

Although NCPs should in theory have similar processes, in practice NCPs vary greatly in their structures and procedures.

⁹ Guidelines, 79.

Most NCPs do not offer any process to appeal a final statement. However, government authorities, TUAC, OECD Watch and BIAC may request a clarification of the Guidelines' interpretation from the OECD Investment Committee.¹⁰ It is possible that requests of this kind may flesh out the meaning of the four criteria of functional equivalence and set a precedent for required procedures by all NCPs in contexts where complainants feel the NCP has failed to adhere to the principles. According to TUAC's analysis, the UK NCP is unique in offering the right to appeal on the basis of a failure to follow procedure.¹¹ The Australian NCP does not provide parties with a right of appeal.

Box 1: Procedure Case Study – UK National Contact Point

OECD Watch reports that between 2001 and 2015, the UK NCP had received 72 complaints – around 30% of all NCP complaints globally.¹² The NCP accepts complaints so long as a UK business was involved, including through a subsidiary. The UK NCP requires enough material in a complaint to substantiate that a possible violation of the OECD Guidelines has occurred. After assessing eligibility, the NCP can pursue the complaint by liaising with the parties – requesting information, exchange of written positions or a physical meeting. The UK NCP uses mediation between the parties as part of a problem-solving approach. The UK NCP does not use investigatory approaches such as in-host country fact finding, a strategy that other NCPs have used to gain stronger evidence. The NCP can issue a statement (a “Final Statement”) and make recommendations on the implementation of the Guidelines, however these do not have binding legal force. The UK NCP is unique in offering the right to appeal.¹³

Representation

Legal representation is not necessary. Most cases are filed by NGOs or trade unions.

Different NCPs have different approaches to representation. Many are willing to meet with representatives of the affected communities, such as NGOs, particularly in circumstances where travel would be difficult or expensive. For example the Norwegian, Dutch and UK NCPs take this position.

¹⁰ OECD, *The OECD Guidelines for Multinational Enterprises: Frequently Asked Questions* <<http://www.oecd.org/corporate/mne/theoecdguidelinesformultinationalenterprisesfrequentlyaskedquestions.htm>>.

¹¹ Trade Union Cases, *National Contact Point Comparison* <<http://www.tuaoecdmneguidelines.org/NCPcomparisonAll.asp>>.

¹² OECD Watch, *Assessment of NCP Performance in the 2013-2014 Implementation Cycle: OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points*. Amsterdam: OECD Watch, 2014, p. 2.

¹³ Trade Union Cases, *National Contact Point Comparison* <<http://www.tuaoecdmneguidelines.org/NCPcomparisonAll.asp>>.

Most international complainants find it helpful to have an NGO represent them in the country where the complaint is filed so that the NGO can liaise directly with the NCP. In some cases this can be more useful than self-representation, as NGOs often have experience as well as a good understanding of how NCPs operate. In some instances NGOs have a good relationship with the country's NCP, which can help make the process smooth and more productive. An NGO representative can also provide support to the complainant and help maintain an equality of arms. However, NGOs often face their own capacity challenges in gathering information and maintaining communication with complainants.

OECD Watch, a network of NGOs that assist in these ways, has been particularly instrumental in assisting complainants and advancing policy change in NCPs individually and at the OECD level.

Available remedies

The remedies available via a NCP specific instance are determined on a case-by-case basis. They are usually in the form of suggestions to help the company in violation of the Guidelines to become compliant. The NCPs often recommend managerial or procedural improvements, for example the establishment of a reporting process, or the development of new standards or policies.

NCPs have no power to stop a project or other kind of business activity, and are generally more concerned with resolving disputes between companies and affected workers or communities so that business activity can go ahead smoothly, without negative social or environmental impacts.

Anything is possible if all parties agree. NCPs can make recommendations in their determinations; however, compliance with these recommendations by a company in violation of the Guidelines is voluntary.

Monitoring and enforcement

NCP determinations are not binding and there is no enforcement mechanism, although some NCPs do monitor the implementation of their recommendations. For example, the Dutch NCP says that it can follow up on the enactment of their recommendations with the consent of involved parties.

Governance structure

The OECD Committee on Investment and Multilateral Enterprises ('Investment Committee') has responsibility for discussing and reviewing the Guidelines and the work of NCPs. Adhering countries are expected to submit an annual report to this committee. The committee also facilitates a peer review process for NCPs that are willing to participate, whereby NCPs can evaluate each other. These reviews highlight the achievements of individual NCPs as well as areas of improvement and recommendations to ensure the efficient structure and functioning of an NCP.¹⁴

¹⁴ OECD, *OECD Guidelines for Multinational Enterprises* <<http://mneguidelines.oecd.org/ncpeerreviews.htm>>.

Individual NCPs are housed in different departments in different countries and vary in their governance structures. Many are housed in ministries of finance, trade or investment, which reflects the concern of the OECD with economic growth and international trade and investment. The UK NCP is based in the Department for Business, Innovation and Skills (BIS). According to the government's booklet on the complaints procedures, 'BIS Ministers play no part in the NCP's decisions on complaints, and have delegated general oversight of the NCP to its Steering Board which includes external members as well as representatives of Government departments'. But there remains a perception among complainants and NGOs of a pro-business bias that affects the independence of the NCP.¹⁵ The Australian NCP is housed in the Foreign Investment and Trade Policy Division of Treasury. In the Netherlands, the Ministry of Economic Affairs maintains the Dutch NCP, although it operates with a high degree of independence from that Ministry. The Norwegian NCP, alternatively, is housed in the Ministry of Foreign Affairs, which reflects its comparatively greater focus on the transnational aspects of its function.

There is some evidence to suggest that the structure of an NCP influences its capacity to act with independence. For example, OECD Watch has found that 77 per cent of cases that produced some sort of remedy arose in NCPs that had structures more conducive to independence.¹⁶ While the structure of an NCP may be influential, it has not been shown to be determinative of the ability to function independently. OECD Watch recommends that NCPs not be housed in a single government department but that they instead have **an independent location** to avoid conflicts of interest (real or perceived) with the goals of the Guidelines.¹⁷ Evidence from the Vedanta case suggests that divestment in the company after the release of the final statement was related to the UK NCP's status as a government body. This was perceived to have greater authority than the reports of numerous human rights organisations, for example, that had reported on human rights concerns in relation to the company's activities in the Niyamgiri Hills.

Many NCPs have mechanisms through which they consult with other government departments, for example departments of foreign affairs, human rights or labour. These arrangements also have varying degrees of formality. Some NCPs also consult with other stakeholders — civil society, academia, business and trade unions. These arrangements vary in degrees of formality, and it is unclear to what extent such external consultation correlates with the openness or effectiveness of an NCP. For example, the US NCP has both an external Stakeholder Advisory Board, and an internal inter-agency working group, but is nevertheless regarded by civil society as a poorly performing NCP because it is reluctant to accept cases, and has a number of procedural rules that disadvantage complainants.

¹⁵ Amnesty International, *Obstacle course: How the UK's National Contact Point handles human rights complaints under the OECD guidelines for multinational enterprises*, 2016, p. 10.

¹⁶ Caitlin Daniel et al, 'Remedy Remains Rare: An Analysis of 15 Years of NCP Cases and Their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct' (OECD Watch, June 2015) 34–5.

¹⁷ OECD Watch, *NCPs* <<http://oecdwatch.org/oecd-guidelines/ncps>>.

Scope

The number of specific instances handled by NCPs varies significantly from country to country.

Between 2011 and 2015, 80 OECD Guidelines cases (or 48 per cent) were filed by NGOs, and 41 cases (or 25 per cent) were filed by trade unions.¹⁸

As of May 2016, a small handful of NCPs have received 65 per cent of the cases, namely the NCPs of the UK, the US, the Netherlands and Germany.¹⁹

Relevant case studies

There are two grievance case studies from the research we conducted that have utilised the NCP mechanism discussed throughout this report. Brief summaries are provided here.

1. *Survival International vs Vedanta Resources*

Facts: This case involved a UK listed resources company operating in India. Vedanta Aluminium Complex project was proposed and partially initiated by subsidiaries of Vedanta Resources Ltd, a UK-listed company. The complex involved a proposal to establish a Bauxite mine at the top of Niyamgiri Hills in Kalahandi and Rayagada districts, an alumina refinery in Lanjigarh at the bottom of the Niyamgiri Hills and by one of Odisha's most important rivers, and a smelter in Northern Odisha. The Niyamgiri Hills constitute the only traditional home to the Dongria Kondh and the Kutia Kondh.

On 19 December 2008, Survival International ('SI') filed a complaint with the UK NCP against Vedanta Resources ('Vedanta') claiming that the company's aluminium refinery and proposal for a bauxite mine on Niyam Dongar Mountain in Odisha, India, would breach provisions of the Guidelines and violate the rights of the Dongria Kondh tribe as the mountain is sacred and inextricably linked to the tribe. SI wanted Vedanta to engage with the communities most directly affected by its proposal. However, Vedanta refused to accept that any impacts on the tribe existed. At the same time as an international campaign and complaint to the UK-based business and human rights redress mechanism (OECD National Contact Point) was occurring, a complex train of administrative reviews and court cases were being lodged and heard in India, backed by an incredibly committed network of local supporters.

Development and outcome: The UK NCP sought to engage SI and Vedanta in mediation; however, Vedanta rejected the UK NCP's offer for mediation. In September 2009, the UK NCP published a final statement upholding SI's allegations that Vedanta acted in violation of the OECD Guidelines. The NCP made recommendations to Vedanta to bring its business practices in line with the OECD Guidelines. In its three-month follow-up report, Vedanta reiterated that the mine was in compliance with Indian law, was already in line with the UK NCP's recommendations, and that there would be no displacement or intrusion by the proposed

¹⁸ Organisation for Economic Co-operation and Development, 'Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015' (2016) 2.

¹⁹ These statistics have been calculated using data available from OECD Watch, *Case Database* <<http://www.oecdwatch.org/cases>>.



Anti-Vedanta protest, London.

Source: Survival International.

mining project for the Dongria Kondh tribe. SI stated that Vedanta had declined to alter its conduct in any way following the recommendations of the UK NCP in the final statement.

In March 2010, the UK NCP issued a follow-up statement urging Vedanta to seek the views of the Dongria Kondh people in order to explore alternatives to resettlement of the affected families. The NCP also recommended the company include a human rights impact assessment in its project management process and take concrete action to implement any self-regulatory practices it might adopt.

Ultimately, the UK NCP could not compel Vedanta to comply or cooperate with the procedures and recommendations.²⁰

The determination against Vedanta by the UK National Contact Point led to the disinvestment of a number of shareholders and reputational damage for Vedanta on the international stage. At home, the pursuit of legal means of redress resulted in a process of self-determination for tribal people which is underwritten by constitutional law, rather than soft international norms. There is little evidence that the NCP determination influenced administrative and judicial decisions in India, although interviews indicate that the Environment Minister was aware of the determination and that it may have bolstered his resolve to block the mine. Ultimately the mine was stopped by a Supreme Court of India judgment to send the decision about the mine back to the lowest level of government in India - the Gram Sabha. This process can act as an international model for a democratic means of free and prior informed consent.

²⁰ OECD Watch, *Survival International vs Vedanta Resources plc* <http://oecdwatch.org/cases/Case_165>.



Anti-Posco protest, Odisha.

Source: ibtimes.com

2. Lok Shakti Abhiyan et al vs POSCO

Facts: The POSCO project is an industrial development entailing an iron ore mine and steel plant in Odisha, India. It has an estimated value of US\$12 billion, the biggest foreign direct investment ever in India. Until recently, it had strong support from all arms of Indian and Korean governments, with particularly strong support at the Odisha state government level. The dispute between POSCO and local communities relates to land acquisition and environmental damage at the site of the proposed steel plant. In formal terms, it revolves around flawed environmental impact assessments and other administrative details, but in more informal terms it is a dispute over different notions of development, and competing aspirations for the land at the project site. Opposition to the project has been spearheaded by the PPSS, a movement based in the villages that will be displaced for the steel plant. Since an MOU was signed between POSCO and the Odisha government in 2005, PPSS has held the company at bay through grassroots protests against land acquisition, combined with state and national level administrative and judicial appeals, and more recently, translational civil society support. These tactics stalled the case. Changes in regulation around minerals will make the project more expensive for POSCO. At the time this report was written, the project had not been categorically cancelled, but seems highly unlikely to proceed for a combination of these reasons.

This case involves a three-pronged NCP complaint to the Korean, Dutch and Norwegian National Contact Points. On 10 October 2012, Lok Shakti Abhiyan, an alliance of progressive people's organisations and movements, filed a complaint with supporting collations simultaneously to the NCPs of South Korea, the Netherlands, and Norway. The complaint concerned the failure of POSCO to seek to prevent human rights abuses, and to carry out comprehensive human rights and environmental studies for its proposed iron mine, steel plant and associated infrastructure in the State of Odisha, India. The complaint alleged that POSCO's efforts to construct a 12-million-ton per annum integrated steel plant and other related infrastructure

would lead to the physical and economic displacement of more than 20,000 people. The complaint maintained that POSCO had not engaged in meaningful stakeholder consultation with all affected companies to identify the scope and severity of human rights, social and environmental impacts. The complaint also argues that minority shareholders, the Dutch Pension Fund *Algemeen Burgerlijk Pensioenfonds/Algemene Pensioen Groep* (ABP/APG) and the Norwegian Pension Fund *Norges Bank Investment Management* (NBIM), should exercise leverage over POSCO to address these human rights concerns, and consider divestment if that fails.²¹

Development and outcome: The Dutch NCP dealing with the case against ABP/APG accepted the complaint. In relation to the minority shareholder, the Dutch NCP found that ABP/APG was compliant with the Guidelines because of its willingness to exercise leverage over POSCO, though ABP/APG did not divest because it considered pressure to be a more promising path. In addition to this finding, the Dutch NCP facilitated discussion between ABP/APG, and the complainants' representatives which resulted in an agreement to undertake a fact-finding mission. Shortly after this agreement, POSCO indicated its desire to be involved with the Dutch NCP's process and the Review Assessment Panel. However, POSCO attached a series of conditions which would preclude the fact finding process from generating new and impartial information. These conditions included the company's right to review and reassess the findings, the exclusion of 'issues related to the Indian authorities', and confidentiality provisions. The NCP accepted this proposition as a legitimate starting point for dialogue. However, the complainants were not willing to engage in a dialogue without the possibility of a more independent fact-finding mission, and discussions stalled at this point. The fact finding mission did not go ahead.

The only unequivocal success of the NCP process, from the complainants' perspective, was the confirmation that minority shareholders have obligations regarding human rights due diligence and the exercise of leverage to prevent or mitigate adverse human rights impacts. This sets an important precedent for future cases against financial institutions.

The Norwegian NCP accepted the case and tried to facilitate mediation. However, NBIM refused to engage with the NCP. On 27 May 2013, the Norwegian NCP published its Final Statement, finding NBIM to be in violation of the Guidelines both for refusing participation, and for not demonstrating adequate due diligence. This statement also reaffirmed the Dutch NCP's assertion that the Guidelines apply to minority shareholders.

The Korean NCP declined to pursue the complaint on the grounds that the human rights issues were a matter of Indian law and the issues raised in the complaint were not directly related to the business activities of POSCO, but rather to the administrative activities of the government of Odisha.

The NCP case also demonstrated that there is a lack of functional equivalence between NCPs, as all three generated different outcomes. OECD Watch argues that there is an ongoing and urgent need for all NCPs to be functionally equivalent at the most robust levels of complaint handling.

²¹ OECD Watch, *Lok Shakti Abhiyan et al. vs POSCO* <http://oecdwatch.org/cases/Case_260>.

Furthermore, the failure to launch a fact-finding mission represents a missed opportunity to make a positive impact on human rights fulfilment in Odisha. In a context where most of the information about the project is controlled by POSCO and the largely pro-POSCO government, and there is very little publicly available information about human rights impacts, it is unreasonable for the NCP to expect communities to engage in dialogue based on such information. This pressure demonstrates a failure to appreciate the importance of the political and economic context for the possibilities regarding the resolution of a dispute.

In relation to the OECD NCP process, our research found that despite some reasonable efforts from the Dutch and Norwegian NCPs, the NCP process made no identifiable positive contributions to protecting, respecting or remedying the human rights concerns directly raised in the complaint.

How effective are these mechanisms?

The previous section of this report discussed the general features of NCPs qua non-judicial mechanisms. These features were described in general terms in relation to the Guidelines. This section of the report assesses the effectiveness of NCPs against a range of criteria, discussing the case studies where a further contextualisation of the assessment is of assistance. Of particular focus are questions of the independence of NCPs, the quality and resourcing of staff, and their scope to consider a range of cases. The section also considers the varied effectiveness of the regulatory style of NCPs. NCPs are purportedly ‘problem solving’ bodies and non-adversarial. In practice, however, the ways that NCPs operate tends to be influenced the dominant regulatory style of the judicial system, with countries with more inquisitorial legal systems having NCPs that are more willing to conduct their own fact finding. Accessibility is a further criteria for assessment of the effectiveness of NCPs. Here, this section notes wide variance between NCPs. Effectiveness is also impacted by the types of remedies and leverage that NCPs deploy. Here, again, we find vast disparities between NCPs with regards to their willingness to make determinations concerning breaches of the Guidelines or to wield other sources of influence over the behaviour of business.

Independence

General scepticism has been expressed regarding the independence of NCPs. NCPs are required to operate impartially throughout the specific instances process.²² However, the structure and location of an NCP can influence how it handles a complaint. Some NCPs are housed in a single government department and managed by that department. Where decision-making ultimately sits within that department, this can result in conflicts of interest.²³ Only 13 per cent of NCPs have taken steps to structure themselves so as to promote impartiality, including the UK and French NCPs.²⁴ Professor John Ruggie, the UN Special Representative on Business and Human

²² Department for International Development, ‘UK National Contact Point Procedures for Dealing with Complaints brought under the OECD Guidelines for Multinational Enterprises’ (Media Release, 28 April 2008) 4, <<http://www.bis.gov.uk/assets/biscore/business-sectors/docs/u/11-1092-uk-ncp-procedures-for-complaints-oecd.pdf>>.

²³ Caitlin Daniel et al, ‘Remedy Remains Rare: An Analysis of 15 Years of NCP Cases and Their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct’ (OECD Watch, June 2015) 33.

²⁴ Caitlin Daniel et al, ‘Remedy Remains Rare: An Analysis of 15 Years of NCP Cases and Their Contribution to Improve

Box 2: Independence case study – the Australian NCP

The Australian NCP is “monopartite”, meaning that it is comprised of representatives of a single ministry. The Australian NCP is represented by one person: a senior executive within the Australian Treasury’s Foreign Investment and Trade Policy Division. The staff member is not employed to manage the Australian NCP full time: it is only part of his role. In 2012, an “Oversight Committee” was established, with the individual who constitutes the Australian NCP as the chair, joined by representatives from the Department of Foreign Affairs and Trade, the Department of Industry, the Export Finance and Insurance Corporation (Efic), the Department of Employment, and the Australian Trade Commission. The function of this oversight committee is to assist the Australian NCP when complaints are made and there are contentious issues to be considered. The Oversight Committee was expected to meet biannually, however there is only a record of an initial meeting in November 2012.³⁰

The OECD review of NCPs classified Australia as being “mono-agency ‘plus’” due to the involvement of other Ministries or stakeholders being involved in the work of the NCP on an advisory basis.³¹ The OECD has also classified the Australian “Oversight Committee” as an advisory body rather than an oversight bodies. Oversight bodies used in other countries’ NCPs have more authority to review the policies and practices of the relevant NCP.

Rights, has stated that ‘[t]he housing of some NCPs primarily or wholly within government departments tasked with promoting business, trade and investment raises questions about conflicts of interest.’²⁵ Earth Rights International has criticised the structure of NCPs, stating that the location of NCPs within government agencies responsible for promoting trade and investment imbues NCPs with ‘pro-corporate bias.’²⁶ For example, if a complaint is brought against a company that is a government contractor, or the government is pursuing certain foreign policy aims or industry growth, this could lead to a conflict of interest in the specific instances process.²⁷

Although institutional independence may be a concern due to the housing of NPCs within government departments, there are also advantages to being linked to government which could be explored more thoroughly by NCPs so as to increase their leverage. The issue of leverage is explored further below. Moreover, the location of NCPs within government tends to increase their perceived legitimacy.

Access to Remedy for Victims of Corporate Misconduct’ (OECD Watch, June 2015) 35.

²⁵ John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc A/HRC/8/5 (7 April 2008) para 98.

²⁶ EarthRights International, ‘OECD Guidelines Update: Substantive Improvements, Procedural Disappointments’ (Press Release, 25 May 2011) <<http://www.earthrights.org/campaigns/oecd-guidelines-update-substantive-improvements-procedural-disappointments>>.

²⁷ OECD Watch, ‘The OECD Guidelines for MNEs: Are they ‘fit for the job?’ (Media Release, June 2009) 7.

Independence and legitimacy could also be enhanced by oversight mechanisms, such as multi-stakeholder boards or inter-departmental steering boards. Only seven NCPs (or 15 per cent) have created a multi-stakeholder board, including France and Belgium.²⁸ With its own unique structure, the UK NCP has an external steering board the role of which is ‘to oversee and monitor the effectiveness of the operation of the NCP, ensuring correct and fair procedures are followed in line with the established and published NCP procedures for dealing with complaints.’²⁹

Location

Box 3: Location and structure case study – UK NCP

The UK National Contact Point is the most significant state-based non-judicial mechanism available to people harmed by UK companies operating overseas. In the UK, the NCP is hosted within the Business, Innovation and Skills (BIS), consisting of two staff with the occasional support of an additional staff member, and partly funded by the Department for International Development.

The UK NCP has a Steering Board consisting of 5 representatives of government departments, 1 trade union representative, 1 business representative, 1 non-governmental organization representative and 1 independent representative. The Steering Board’s role is ‘to oversee and monitor the effectiveness of the operation of the NCP, ensuring correct and fair procedures are followed in line with the established and published NCP procedures for dealing with complaints.’³³ A recent review of 25 cases in the UK NCP found “evidence of the UK NCP’s failure to implement some of the recommendations of the Steering Board, and of the Steering Board’s failure to direct the NCP to correct deficiencies in its procedures, including misinterpretations of the Guidelines”³⁴

Within home government

NCPs are housed within home-country governments. Some NCPs have Steering Committees or Reference Groups with civil society and private representation. Although being located within government has given rise to concerns regarding independence, it could be a significant plus for NCPs if utilised effectively. NCPs could use their location within government to increase

²⁸ Caitlin Daniel et al, ‘Remedy Remains Rare: An Analysis of 15 Years of NCP Cases and Their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct’ (OECD Watch, June 2015) 33. Caitlin Daniel et al, ‘Remedy Remains Rare: An Analysis of 15 Years of NCP Cases and Their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct’ (OECD Watch, June 2015) 34.

²⁹ Department for Business Innovations & Skills & Department for International Development, ‘Terms of Reference and Explanation of the Role of the NCP Steering Board’ (Media Release, November 2010) 2 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31819/10-1329-terms-of-reference-ncp-steering-group.pdf>.

³⁰ See: Australian National Contact Point, *AusNCP—Publications* (7 October 2016) <<http://www.ausncp.gov.au/content/Content.aspx?doc=publications.htm>>.

³¹ OECD, *Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points*

their leverage by embedding the NCPs more thoroughly in the institutions of trade, human rights and corporate accountability in that country. For instance, a negative finding for a business at the NCP could result consequences in relation to trade, subsidies and other types of assistance. The only instance of such negative consequences to date is the recent case of *Canada Tibet Committee vs China Gold International Resources* (2013). In this case the Canadian NCP imposed sanctions on the breaching company, withdrawing its Trade Commissioner Services and other overseas Canadian advocacy support.³²

As a beginning point, there needs to be stronger cooperation with aid/development agencies of national governments in developing programs on human rights risk management, support for access to justice, support for capacity building and outreach for communities. In the UK, DFID has a presence on the oversight board of the NCP. However, it does not appear to be playing an active role in promoting the mechanism in the countries in which it provides aid and runs programs. If DFID were to play such a role, this would the UK NCP far more accessible to potential complainants.

Other government initiatives could offer enterprises assistance in becoming more accountable. In the UK, for instance, a negative finding might result in a requirement to become a member of the Ethical Trading Initiative. Unfortunately, NCPs are not taking advantage of most of the possible benefits, such as across-government coordination.

Box 4: Governance case study – Australian NCP

The Australian NCP Oversight Committee comprises only representatives from other government departments,³⁵ with no external to government members. This limits the utility of the Oversight Committee to provide independent oversight to the Australian NCP. When created, the intention was that the Oversight Committee would meet biannually or as required, but it appears they have only met once, in 2012.³⁶

Within the home country

NCPs are located within the home country, that is, the country where enterprises are domiciled. This location is both a strength and a weakness of the mechanism. On the one hand, it is

³² Canada National Contact Point, (2015), Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region, accessed at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng>, May 12 2015.

³³ Department for Business Innovations & Skills & Department for International Development, 'Terms of Reference and Explanation of the Role of the NCP Steering Board' (Media Release, November 2010) 2 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31819/10-1329-terms-of-reference-ncp-steering-group.pdf>.

³⁴ Amnesty International, Obstacle course: How the UK's National Contact Point handles human rights complaints under the OECD guidelines for multinational enterprises, 2016, 6-7.

laudable that home countries are attempting to hold transnational businesses from that country accountable for their actions overseas in accordance with norms that have been agreed upon across industrialised countries. On the other hand, the lack of interaction with host-country institutions and the distance from the location of most human rights breaches reduces access for affected communities and diminishes the impact of decisions for affected communities.

In our interviews regarding the *Vedanta* case with people who were actively involved in the campaign in support of the Niyamgiri people in India, we found that many people had not heard of the NCP complaint. We also found little evidence that would support the proposition that the UK NCP decision with regards to Vedanta had an impact on policy or judicial decision-making in India, although some interviewees thought that the determination influenced Indian decision-makers. Some NCPs will not accept cases that are being heard by another body. This means that there is an informal interaction between NCPs and domestic legal institutions (ie the courts), as some NCPs will seek to enquire into whether a judicial body is adjudicating upon the lodged complaint already. This limits interaction. While some NCPs exclude complaints on the basis of parallel proceedings, it is important to note that the OECD's formal guidance does not mandate such exclusion.

Distance from the place where the human rights grievance occurred could be overcome in a number of ways, such as:

- by requesting evidence from interested parties in the host country;
- by conducting investigations in the host country;
- by coordinating with relevant government and non-government agencies in the host country;
- by communicating determinations to stakeholders in the complaint beyond just those named in the complaint.

This shows that currently not nearly as much is being done by most NCPs with respect to gathering verified factual background to complaints. Only seven NCPs conduct fact-finding within the host country, or are willing to do so where necessary.³⁵ The Dutch NCP is one of these NCPs. The refusal of the Dutch NCP to take up the complainants' offer to visit India after they refused to enter into dialogue with POSCO demonstrates the contingency of the fact finding function of even the most active NCPs.

Quality of staff

The sufficiency and quality of staffing varies from NCP to NCP and is often low. The Australian NCP, for example, only funds its staff member for two days a week. After the Steering Board was put in place in the UK NCP, the Foreign & Commonwealth Office withdrew its representative, stating that it could not afford for 20 per cent of one staff member's time to be dedicated to the mechanism.³⁶ NCP staff members also vary in their expertise in the area of human rights,

³⁵ These are the NCPs of Canada, Denmark, Germany, the Netherlands, Norway, Sweden and Switzerland. Trade Union Cases, *National Contact Point Comparison* <<http://www.tuacoecdmneguidelines.org/NCPcomparisonAll.asp>>.

³⁶ RAID, CORE & TUC, 'Fit for Purpose? A Review of the UK National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises 2008' (Media Release, November 2008) 9 <<http://oecdwatch.org/files/raid-fit-for-purpose-report>>.

environmental sustainability and corporate social responsibility, many instead having expertise in the financial side of business.

Scope

The NCPs enjoy a broad scope. They can make determinations about a wide range of decisions in relation to human rights, and ‘any interested party’ may make a complaint to an NCP regarding an alleged violation of the Guidelines by a multinational enterprise.

Broad interpretation of human rights standards: The 2011 review of the Guidelines broadened the scope of the Guidelines, focussing on human rights, the environment and climate change, supply chains, and the functionality of NCPs. For example, the reviewed Guidelines introduced section IV which focuses on human rights and directs enterprises to respect human rights and avoid causing or contributing to adverse human rights impacts.³⁷

Complaints can only be brought where there has been a breach of the OECD Guidelines, rather than a breach of any international human rights instrument. This restriction will have minimal effects in practice, however, since the Guidelines were amended in 2011 to include a chapter that is consistent with the UNGP, which covers a broader range of human rights.³⁸ In addition, the human rights that the Guidelines explicitly protect overlap with human rights standards in the *International Covenant on Civil and Political Rights*, *International Covenant on Economic, Social and Cultural Rights* and the Core Labour Standards (including the right to life, the right to housing, and the elimination of all forms of forced or compulsory labour).³⁹

Acknowledgment of business responsibility for supply chains and investments: The Guidelines recognise the work of John Ruggie in emphasising the need for due diligence in supply chains. The Guidelines have adopted the UNGP, in which Ruggie recommended that the Guidelines require more specific guidance on enterprises’ responsibility for managing human rights challenges posed by their upstream suppliers.⁴⁰ The Guidelines also allow for complaints to be made regarding investment in, and financing of, companies that are in breach of the guidelines, as well as allowing complaints regarding bribery. Almost half of all NCPs (21, or 46 per cent) now accept cases involving suppliers or other business partners (not just their subsidiaries).⁴¹ Both Australia and the UK accept cases of this nature. The POSCO case provided useful clarification of the scope of the responsibility of investors. Drawing on the UN Guiding Principles, the Dutch NCP stated that, “the size of a share that an investor holds in a company does not determine whether there is a business relationship for the purpose of the Guidelines. It rather is a factor to determine whether

³⁷ OECD, ‘2011 Update of the OECD Guidelines for Multinational Enterprises: Comparative table of changes made to the 2000 text’ (Media Release, 2012) 33 <<http://www.oecd.org/investment/mne/49744860.pdf>>.

³⁸ Guidelines, 3.

³⁹ Amnesty International UK, ‘Briefing for UK National Contact Point on Human Rights Implementation of OECD Guidelines for Multinational Enterprises’ (Press Release, February, 2013) 4–5 <http://oecdwatch.org/publications-en/Publication_3966>.

⁴⁰ John Ruggie, ‘10th OECD Roundtable on Corporate Responsibility: Updating the Guidelines for Multinational Enterprises Discussion Paper’ (Discussion Paper, 30 June 2010) 4 <<http://www.oecd.org/daf/inv/mne/45545887.pdf>>.

⁴¹ Trade Union Cases, *National Contact Point Comparison* <<http://www.tuaoecdmneguidelines.org/NCPcomparisonAll.asp>>.

or not the investor in question disposes of sufficient leverage to effectuate change in the wrongful practices of the entity that causes the harm”⁴².

Acknowledgment of positive duties for businesses in relation to human rights: The Guidelines adopt the notion that companies should not only avoid causing harm, but should also engage meaningfully with stakeholders in order to assist with not causing harm. This suggests that multinational enterprises in OECD member-countries have a positive duty in this regard. Many NCPs have failed to properly adopt the principle of a positive duty in relation to human rights. For example, the Korean NCP in the POSCO case focussed on the specific problems of violence, land acquisition and government approvals of environmental impact assessments rather than POSCO’s duty to mitigate and prevent adverse human rights impacts. The former are exclusively subject to local laws, while the latter are matters of the Guidelines to which the NCP should have responded.

Limits to scope

Some countries have a rule that where the issue is being considered by another body (eg courts, UN, etc), the NCP will **not instigate parallel proceedings**. Only 20 NCPs (or 43 per cent) accept cases involving parallel proceedings where there is no risk of prejudice to the parties to those proceedings.⁴³ Jessica Champagne of Service Employees International Union (SEIU) has argued that some NCPs around the world seem determined to draw their mandate as narrowly as possible and refuse to engage in specific cases if there are any other legal or quasi-legal proceedings anywhere in the world, which unnecessarily precludes many workers and communities from benefitting from the NCP process.⁴⁴ Our study finds highly inconsistent application of the parallel proceedings rule in the countries we studied.

In the UK, where an NCP process overlaps with other proceedings, this has had the effect of halting investigations. For example, in the Democratic Republic of Congo mining cases regarding allegations of bribery by Defence Company, the UK NCP halted the complaint process due to ‘parallel proceedings’, as it was concerned with being perceived as infringing ‘the sovereignty of host governments.’⁴⁵ In the *Vedanta* case studied by our project, Vedanta attempted to use this rule to stop proceedings. The UK NCP will only proceed with cases if there is some ‘added value’ to its intervention. However, RAID argues that this current practice has allowed some companies to exploit this loophole to rule out or suspend complaints.⁴⁶

The Korean NCP has likewise employed what is arguably a flawed interpretation of the Guidelines to reject the POSCO case. In that case, the Korean NCP declined to pursue the

⁴² Dutch NCP (2013) Final Statement ABP/APG - Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance, Forum for Environment and Development. Ministry of Foreign Affairs, Amsterdam, p. 5.

⁴³ Trade Union Cases, *National Contact Point Comparison* <<http://www.tuaoecdmneguidelines.org/NCPcomparisonAll.asp>>.

⁴⁴ Submission (2010) US State Department Meeting on the National Contact Point, Public Meeting November 2 2010, <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=DOS-2010-0401>

⁴⁵ RAID, CORE & TUC, ‘Fit for Purpose? A Review of the UK National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises 2008’ (Media Release, November 2008) 11 <<http://oecdwatch.org/files/raid-fit-for-purpose-report>>.

⁴⁶ RAID, CORE & TUC, ‘Fit for Purpose? A Review of the UK National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises 2008’ (Media Release, November 2008) 11 <<http://oecdwatch.org/files/raid-fit-for-purpose-report>>.

Box 5: Admissibility case study – Australian NCP

The Australian NCP has issued five statements rejecting, or rejecting in part, complaints following initial assessment. None of those statements include any discussion as to whether or not the complaint meets the threshold for admissibility, namely that the complaint raises issues that merit further consideration under the Guidelines. Instead, the Australian NCP's stated reasons for rejecting the complaints were that:

- Consideration of the complaint may require a comment on government policy: *Australian Human Rights Centre and RAID vs G4S; GSL*.
- A party was unwilling to negotiate: *Amadiba Crisis Committee vs MRC Ltd; CMFEU v Xstrata*.
- There were parallel legal proceedings: *Australian Human Rights Centre and RAID vs G4S; Amadiba Crisis Committee vs MRC Ltd; CMFEU v Xstrata*.
- The Australian NCP was unable to verify claims or resolve competing accounts: *ACF v ANZ; Amadiba Crisis Committee vs MRC Ltd*.

Regulatory style

Regulatory style differs between NCPs and is influenced by the legal style of the nation in which the mechanism is located. The best NCPs, such as the Norwegian one, have the capacity to conduct their own investigations. Most are adversarial in nature, however, with the parties presenting their positions and evidence, and the NCP making determinations based on the available evidence. The only exception to this adversarial style when NCPs facilitate mediation and dialogue. This can create more of a problem solving regulatory style.

Mediation

Following the 2011 update of the Guidelines increasing emphasis has been placed on mediation and the preferred outcome of any complaint from the UK NCP's and the OECD's perspective is an agreement between the parties: 'The benchmark of success is the ability of NCPs to facilitate mediation and dialogue and stakeholders are beginning to appreciate this non-judicial grievance mechanism.'⁵¹ NCPs are encouraged to consider themselves as 'informal problem solvers in corporate responsibility disputes.'⁵² Improving mediation skills is a high priority for NCPs.⁵³

⁵¹ OECD Annual Report on the OECD Guidelines for Multinational Enterprises 2014, p. 41. http://www.keepeek.com/Digital-Asset-Management/oeed/governance/annual-report-on-the-oeed-guidelinesfor-multinational-enterprises-2014_mne-2014-en#page46.

⁵² OECD (2012) Annual Report on the OECD Guidelines for Multinational Enterprises 2012: Mediation and Consensus Building OECD Publishing, p 42.

⁵³ OECD Annual Report on the OECD Guidelines for Multinational Enterprises 2012: Mediation and Consensus Building OECD Publishing, available at: <http://www.oecd.org/corporate/mne/2012annualreportontheguidelines-formnes.htm> p. 43.

Box 6: Mediation case study – Dutch NCP handling of the POSCO case

The Dutch NCP dealing with the case against ABP/APG accepted the complaint. In relation to the minority shareholder, the Dutch NCP found that ABP/APG was compliant with the Guidelines because of its willingness to exercise leverage over POSCO, though ABP/APG did not divest because it considered pressure to be a more promising path. In addition to this finding, the Dutch NCP facilitated discussion between ABP/APG, and the complainants' representatives which resulted in an agreement to undertake a fact-finding mission. Shortly after this agreement, before decisions were made about its implementation, POSCO initiated a discussion with the Dutch NCP, indicating the company's desire to be involved with the Dutch NCP's process and the Review Assessment Panel. Given the failure of the Korean NCP to bring POSCO into a problem solving process, and in-keeping with the NCPs' mandate to facilitate non-adversarial resolutions to problems, the NCP welcomed POSCO's entrance to the dialogue without question. However, POSCO attached a series of conditions which would preclude the fact finding process from generating new and impartial information. These conditions included the company's right to review and reassess the findings, the exclusion of 'issues related to the Indian authorities', and confidentiality provisions. The NCP accepted this proposition as a legitimate starting point for dialogue. However, the complainants were not willing to engage in a dialogue without the possibility of a more independent fact-finding mission, and discussions stalled at this point.

The Dutch NCP invited POSCO, ABP/APG and Fair Green Global Alliance to informal meetings and strongly encouraged ongoing dialogue. However, the complainants were unwilling to engage in dialogue in the absence of a fact-finding report. For them, any such dialogue would amount to no more than a continuation of the existing terms of conflict, which, as ABP/APG and the complainants had agreed, were problematic. Given the polarisation between the parties before, but especially after POSCO's suggested conditions, the complainants invited the Dutch NCP and ABP/APG to India to see conditions firsthand and convince the NCP of the futility of dialogue in such extreme conditions of inequality of information. The Dutch NCP declined on the grounds that any further efforts to engage the case that wouldn't lead to dialogue would bear no worthwhile fruit.

Most NCPs conduct mediation themselves. The preferred practice is to appoint external, professional mediators to facilitate dialogue. This has been the practice of the UK NCP to since 2008.

In the *Vedanta* case the company did not engage in mediation process with Survival International and the costs and length of the dispute would have been reduced had the NCP had proceeded directly to conducting investigations and releasing a final statement.

Mediation is sometimes fraught with complexity. In the POSCO case, for example, the Dutch NCP pursued dialogue between the complainants and the investors and POSCO. While the complainants wanted to pursue dialogue with the investors, they were deeply concerned about entering into dialogue following POSCO's impositions of conditions on the scope of investigations in return for its willingness to come to the table. The Dutch NCP's emphasis on the importance of dialogue eventually led to the demise of the specific instance. The case suggests that clearer policies are required in relation to the extent that mediation and dialogue should be privileged over other processes.

A focus on 'problem-solving' may sometimes lead to the rejection of politically sensitive cases or to failing to examine critical or complex aspects of complaints that are not amenable to amicable settlement.⁵⁴ Amnesty International, for example, reports that in the *WWF International vs SOCO International plc* case considered by the UK NCP there were widespread reports of human rights violations allegedly connected to SOCO's activities. Despite this, the UK NCP, by narrowing the scope of mediation and rejecting information from anonymised sources (a precaution which is recognised under the procedures as being at times a necessity), ignored the company's past failure to conduct due diligence or engage with the communities living inside the Virunga National Park.⁵⁵ The process of mediation was unable to remedy human rights breaches, and thus was an appropriate process for addressing for all the grievances of the complainants.

Accessibility

Easy access to NCPs is a crucial component of providing redress. Although in formal terms NCPs are highly accessible, in practice they remain very difficult to access. Vulnerable and remote communities have particular difficulty accessing the mechanism when they experience a breach of human rights at the hands of transnational business.

Our research suggests that the fact that concerned organisations, such as NGOs, are permitted to make complaints on behalf of aggrieved parties is extremely beneficial. The *Vedanta* case is an instance where a remote tribal community was represented before the NCP mechanism. SI is a human rights organisation that campaigns for the rights of indigenous tribal peoples. SI brought a complaint on behalf of the impacted community, the Dongria Kondh tribe. The Dongria Kondh are largely illiterate, upholding oral traditions. They speak their own language, although they may also speak the official state language, Oriya. All these factors are major barriers to lodging a complaint directly. It is unlikely that such a complaint could have been made without assistance, given that, even following the handing-down of the determination, the level of awareness of the mechanism remains low.

⁵⁴ Amnesty International, *Obstacle course: How the UK's National Contact Point handles human rights complaints under the OECD guidelines for multinational enterprises*, 2016, 48.

⁵⁵ Amnesty International, *Obstacle course: How the UK's National Contact Point handles human rights complaints under the OECD guidelines for multinational enterprises*, 2016, p. 48.

complaint on the grounds that the human rights issues were a matter of Indian law. In an ‘initial assessment’⁴⁷, the South Korean NCP stated that:

“The complaint is not directly related to business activities of Posco India. Instead, it is related to the administrative activities of the provincial and the central governments of India and the rulings of the Indian court, whose legality and legitimacy are not to be determined by the Korean NCP. [...] On the basis of the due diligence provisions and other procedural or practical issues stated in the Guidelines, the Korean NCP cannot find any problems in the court rulings and other relevant procedures of the Posco case. Therefore, the Korean NCP has decided that there will be no additional proceedings.”(Korean NCP, 2013)

This imperfect application of the Guidelines enabled the Korean NCP to avoid its responsibility to address the grievance while the Dutch and Norwegian NCPs distinguished the legal proceeding in India concerning the matter and pursued the complaint.

The Australian NCP has published a paper to provide guidance on how it intends to handle the issue of parallel legal proceedings within the OECD Guidelines complaint process.⁴⁸ According to that guidance, the Australian NCP adopts the following approach where there are legal proceedings underway regarding issues the subject of a complaint submitted to the Australian NCP:

The fact that parallel proceedings exist will not of itself cause a suspension of its process and/or its determination of any dispute; [and]

The ANCP will suspend a complaint only where it is satisfied that it is necessary in order to avoid *serious prejudice* to a party to parallel proceedings and is appropriate in all the circumstances.⁴⁹

However, when this guidance was relevant to a complaint considered by the Australian NCP, it does not appear to have been followed. In the Specific Instance of *Australian Human Rights Law Centre and RAID vs G4S*, there were parallel legal proceedings and parliamentary inquiries into the conduct the subject of the complaint submitted, namely an incident in which an asylum seeker was killed and many others injured while detained at a detention centre operated by G4S. In its reasons for rejecting the complaint, the Australian NCP noted the parallel proceedings, and stated only that, “*it is clearly not appropriate for the ANCP to intervene in any way in due legal processes, either domestic or international*”.⁵⁰ The Australian NCP did not consider whether considering the matter would cause *serious prejudice* to a party.

⁴⁷ An ‘initial statement’ is typically used to make public a judgment on whether or not a NCP has decided to offer ‘good offices’ to complainants to resolve a complaint, and ‘final statements’ are issued upon conclusion of a case that was engaged by the NCP.

⁴⁸ Australian National Contact Point, Approach of the Australian National Contact Point to Specific Instances in which there are parallel proceedings (2011) <<http://www.ausncp.gov.au/content/Content.aspx?doc=anncp/parallel.htm>>.

⁴⁹ Australian National Contact Point, Approach of the Australian National Contact Point to Specific Instances in which there are parallel proceedings (2011) [3.1] – [3.2] (emphasis added) <<http://www.ausncp.gov.au/content/Content.aspx?doc=anncp/parallel.htm>>.

⁵⁰ Australian National Contact Point (2015) Statement by the Australian National Contact Point Specific Instance – G4S Australia Pty Ltd, page 4, http://www.ausncp.gov.au/content/Content.aspx?doc=publications/reports/general/G4S_Aus.htm

Barriers to accessibility

One of the barriers to accessibility of NCPs is the *level of evidence* that is required to proceed with a complaint. Each country demands a different level of evidence, but in general there are two requirements that must be met in order to make a specific instances complaint and have access to the dispute resolution mechanism. First, the complainant must have a ‘valid’ complaint. Secondly, the complainant must provide enough information regarding a possible breach for the NCP to determine whether there is enough evidence to investigate. If there is insufficient evidence to substantiate the complaint, or it is deemed outside the scope of the NCP, then the NCP may reject the complaint upon its initial assessment. For example, in the case *FoE US & RAID vs Trinitech*, the US NCP rejected the complaint on the ground that the allegations had ‘not been adequately substantiated.’⁵⁶ The UK NCP has also taken a particularly tough line on adequacy of sources and sufficiency of evidence in those cases involving telecommunications companies, which relied on sources that had either been leaked or destroyed, or which were available to the general public. In the *Reprieve v BT complaint*, the NCP took the view that Reprieve’s failure to uncover new evidence that was not already in the public domain undermined its interest in the case.⁵⁷

Complainants often lack the resources to put together an adequate standard of evidence for a complaint to be accepted by an NCP. It is widely agreed that the success of Survival International’s case against Vedanta can be attributed to the thorough research undertaken to obtain sufficient evidence to support their claim. The UK NCP commented on how ‘well put together’ the complaint was. Dr Jo Woodman, who was a key player in Survival International’s complaint to the UK NCP against Vedanta, estimated that the case took around a year and a half of her time. In an interview, she spoke of the challenges faced in collecting evidence during the NCP process: ‘It did take an enormous amount of our time ... It was terribly difficult to get because ... no one had any of this information; nobody knew where any of the relevant documents were.’⁵⁸ Few vulnerable communities or NGOs have the resources to spend 18 months collecting and presenting evidence to the standard undertaken by Survival International. If the presentation of novel evidence or a high standard is a requirement, this acts as a barrier to accessibility.

One way around this problem is to request that the NCP facilitate a **fact-finding mission or investigation**. Only six NCPs conduct in-host country fact-finding, or are willing to do so where necessary, including the German, Dutch, Canadian and Norwegian NCPs.⁵⁹ In the absence of a fact-finding mission, an NCP does not develop a nuanced and contextualised understanding of the case’s dynamics; nor does the NCP hear from a range of community voices. This, in turn, limits the extent to which the NCP panel can bring its expertise to bear on the case.

In the POSCO case, a lack of impartial information about the projects’ social and environmental impacts was one of the grievances raised by complainants. The Dutch NCP sought to establish a fact-finding mission to address this, with the agreement of the Dutch pension fund investor

⁵⁶ OECD Watch, *FoE US & Raid vs. Trinitech* <http://oecdwatch.org/cases/Case_46>.

⁵⁷ Amnesty International, *Obstacle course: How the UK’s National Contact Point handles human rights complaints under the OECD guidelines for multinational enterprises*, 2016, p. 7.

⁵⁸ Interview with Dr Jo Woodman (Skype Interview, 14 June 2012) check before quoting.

⁵⁹ Trade Union Cases, *National Contact Point Comparison* <<http://www.tuacoecdmguidelines.org/NCPcomparisonAll.asp>>.

Box 7: Fact finding case study – Dutch NCP handling of POSCO case

The POSCO case provides a particularly important case study concerning evidential barriers. There is a lack of reliable information regarding the social or human rights impact – present or anticipated – of the POSCO project. The only available sources of information on human rights impacts of the project have come from civil society organisations, or from occasional investigations by government commissions, such as the NHRC. In light of this significant challenge to accountability in the POSCO case, the complainants and ABP/APG agreed that a fact-finding mission would be a valuable contribution towards addressing human rights concerns in this case.⁶²

As such, the Dutch NCP-facilitated dialogue between ABP/APG and Fair Green and Global Alliance (representing Lok Shakti Abhiyan) resulted in a ‘draft Terms of Reference for a Review & Assessment Mission’ agreed between these two parties. The terms included:

- “a mission of independent, authoritative members to prepare a high level assessment of the social, environmental and human rights aspects of all proposed POSCO investments in Odisha;
- to assess how meaningful ongoing stakeholder engagement can be set up, in which the right to free, prior and informed consent is assured, including compliance with rights of indigenous people and forest dwellers, as defined by the UN Declaration on the Rights of Indigenous Peoples (DRIP);
- the Mission to be acting under the authority of the NCPs of the Netherlands, Norway, South Korea; at least one member must be from India or of Indian origin with a sound understanding of the local situation and context;
- the findings of the Mission will be made public” (Dutch NCP, 2013: 8)

In an interview with one of our researchers, Samantha Balaton-Chrimes, the Dutch NCP explained that it understood the composition and process of this mission as an important safeguard for communities to engage in dialogue. Specifically, the mission would be composed of three members, one from South Korea, one from India, and one independent chairperson; funding would be provided by the NCP, rather than any of the parties; and anonymity would be guaranteed for anyone who spoke with the committee.

⁶² A further problem for the complainants is that they are confident there are direct connections between POSCO and the ‘goons’ that commit acts of violence and intimidation against anti-POSCO villagers, but have been unable to prove the connection. They argue that another possible outcome of a fact-finding mission is the proof of such a connection.

Box 8 - Accessibility case study - Australian National Contact Point

It is unclear from the Australian NCP Procedure or website how complaints are to be lodged. This requires clarification.

The Australian NCP has high evidential standards, requiring “detailed information” about the complaint. Linked to this, it specifies that complainants should have a “close interest in the case” and “be in a position to supply information about it” as well as having a “clear view of the outcome they wish to achieve”. This potentially reduces the range of parties that can represent aggrieved communities, workers and individuals.

The Australian NCP requires evidence to be submitted in English making the presentation of evidence difficult for non-English speaking complainants.

There is no provision in the Australian NCP Procedure for conducting field visits.⁶⁴

and the complainants, but when POSCO intervened and imposed unfair conditions on the mission, it was abandoned and the opportunity lost. Had the fact finding mission gone ahead, it might have provided a good example of the composition of fact finding missions, particularly where multiple NCPs are involved.

Time limitations on complaints are another barrier to accessibility. The UK NCP has said that it does not consider complaints once a ‘substantial’ amount of time has elapsed since the alleged breach, if that particular operation has ceased.⁶⁰ For example, when RAID filed their complaint against Anglo-American in 2001, by the time the UK NCP’s investigation had been concluded in 2008, the NCP decided to take no action because the breach had occurred between 1995–2000 by a company that Anglo-American had bought and sold on in the meantime.⁶¹ Likewise, the Dutch NCP has decided not to further investigate cases where parts of a company or subsidiaries have gone bankrupt. This policy makes it difficult for aggrieved people to enter proceedings with that company.⁶²

The geographic locations of NCPs present a major problem for accessibility. NCPs are often located far from the setting of the grievance and the aggrieved communities. Dr Jo Woodman was concerned that the NCP process is ‘extremely inaccessible to the communities that we work with.’⁶³ She explained:

So I don’t think the process is open and accessible to the right people. It’s fine if you’ve got an organisation like Survival that is able and willing to put that kind of time in and do all of that work.

⁶⁰ United Kingdom National Contact Point, ‘Statement by the United Kingdom National Contact Point for OECD Guidelines for Multinational Enterprises (NCP): Anglo American’ (Press Release, 4 May 2008) <<http://mneguidelines.oecd.org/database/ncp/43750200.pdf>>.

⁶¹ OECD Watch, *RAID vs. Anglo American* <http://oecdwatch.org/cases/Case_22>.

⁶² Australian National Contact Point, *Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises (2011)* <<http://www.ausncp.gov.au/content/Content.aspx?doc=anpc/complaints.htm>>, [47] – [52].

⁶³ Interview with Dr Jo Woodman (Skype Interview, 14 June 2012).

This distance increases the dependence of aggrieved communities and individuals on NGOs and other representatives and means that much hangs on the community's garnering of powerful and active international support. The *POSCO* claim, for example, relied on the assistance of SOMO, a Dutch NGO that specialises in complaints of this type. If supportive NGOs do not have adequate resources to conduct investigations, then complainants will not be able to present all the relevant evidence to an NCP, which may affect whether their complaint is accepted by the mechanism. Our research across 11 case studies of aggrieved communities shows that whether communities and individuals accessed redressed mechanisms was very much based on chance encounters and alliances with NGOs that had knowledge of redress mechanisms, experience putting together complaints, and resources to see the complaint through. Most remote and vulnerable communities do not have such luck, and this means that they are effectively barred from accessing these crucial forms of redress.

What measures offered by NPCs increase accessibility?

Broad rules of standing and the low formal burden of proof improve accessibility. According to the Guidelines, NCPs do not require a complainant to prove that the breach has been committed by a multinational enterprise; rather, there must be evidence that the enterprise may potentially breach the Guidelines by acting in a certain manner. The lower burden of proof increases accessibility, as complainants can seek a remedy from an NCP to prevent a breach before it actually occurs. This also has the advantage of preventing the potential violation of the human rights of individuals or communities.

NCPs have various means at their disposal to collect evidence concerning a potential breach. The NCP will first ask for submissions from the company in question and will continue to meet with the complainant and the company to gather more evidence. The NCP can also make field visits and conduct interviews with other parties to try to establish whether a breach has occurred. NCPs can also call on the advice of businesses or NGOs. For example, in the *Vedanta* case, the UK NCP called on advice from Indian environmental NGOs. This increases accessibility, as often complainants will lack the capacity to gather such evidence themselves. However, it is contingent upon the NCPs willingness to take these steps, and the *POSCO* case suggests that even among the strongest NCPs, this willingness is inconsistent.

Assistance and information for communities?

Under the Guidelines, NCPs have a duty to provide assistance to communities by undertaking promotional activities.⁶⁴ NCPs also have a duty to promote the Guidelines to companies that operate in the OECD member-country or abroad. NCPs perform extremely badly in this regard. In 2015 20 NCPs organised events to promote the Guidelines in their home country, and only seven NCPs organised events to promote the Guidelines abroad (those being the Australian, Canadian, Dutch, German, Italian, Polish and Swiss NCPs).⁶⁵ Certain NCPs are

⁶⁴ OECD, 'OECD Guidelines for Multinational Enterprises' (Media Release, 2011) 68 <<http://www.oecd.org/daf/inv/mne/48004323.pdf>>.

⁶⁵ Trade Union Cases, *National Contact Point Comparison* <<http://www.tuaoecdmguidelines.org/NCPcomparisonAll.asp>>.

recognised as being ‘best practice’ mechanisms, while others lag in this regard. The Dutch NCP is part of a body called CSR Netherlands which engages with businesses, employers unions, sector associations, financial associations, media, NGOs and OECD Watch to promote the Guidelines. This involves holding workshops and presentations at conferences and other meetings. The NCP makes a strategy each year for communication and promotion. The website also has toolkits for companies to assess whether their behaviour is in line with the Guidelines.⁶⁶ The Norwegian NCP’s role is focussed within Norway and does not take a role in educating communities where Norwegian businesses might operate. It does, however, actively engage with NGOs in Norway through stakeholder meetings, such as KOMpakt, and through the government’s consultative forum on CSR. The NCP’s website is in multiple languages. The website also has tools for companies to assess their behaviour in reference to the Guidelines, and to ascertain whether they are operating in conflict zones. The Norwegian NCP also gives presentations at business conferences and schools.⁶⁷

In its early years the UK NCP conducted some promotional activities, but in 2010 the UK Government froze all spending on communications and advertising. Since then, the UK NCP has improved its outreach activities and is in line with other NCPs in this regard. All embassy staff members receive training on the Guidelines and the NCP relies on other government departments to raise its profile in their spheres.

Leverage over parties

Leverage is the means by which a mechanism exerts forms of authority or influence over relevant targets. NCPs have high levels of legitimacy due to their location within governments. This legitimacy enhances their leverage over parties, bolstering the NCPs’ attempts to have parties engage in the process and adhere to determinations. However, NCPs do not deploy the range of leverage potentially available to them. Currently, only the Canadian government applies consequences when companies refuse to participate in the NCP process.⁶⁸

Available remedies

In formal terms, NCPs can issue statements and make recommendations on the implementation of the Guidelines, as appropriate. Recommendations can urge contending parties to resolve their dispute, even without binding legal force.

⁶⁶ Ministry of Foreign Affairs, *National Contact point OECD Guidelines* <<http://www.oesorichtlijnen.nl/en>>.

⁶⁷ Norwegian Ministry of Foreign Affairs, ‘Corporate social responsibility in a global economy’ (Media Release, June 2011), 3 <http://www.regjeringen.no/pages/2203320/PDFS/STM200820090010000EN_PDFS.pdf>.

⁶⁸ Trade Union Cases, *National Contact Point Comparison* <<http://www.tuacoecdmneguidelines.org/NCPcomparisonAll.asp>>.

Box 9: Recommended remedies

OECD Watch identifies four results of complaint procedures which could contribute to positive changes that may amount to an effective remedy:

- A statement (either by the NCP or company) acknowledging wrongdoing;
- An improvement in corporate policy and/or due diligence procedure;
- Directly improved conditions for victims of corporate abuses;
- Compensation for harms.⁷²

The UN Guiding Principles on Business and Human Rights and the UN Working Group on Human Rights and Transnational Corporations make it clear that a non-judicial grievance mechanism 'should be able to "counteract or make good" any human rights harms that have occurred'.⁷³

The remedies that NCPs recommend are determined on a case-by-case basis. Such remedies are usually suggestions to help a company that is in violation of the Guidelines to become compliant. This can include recommending that a company halt certain operations or establish a consultation and reporting process. Remedies suggested by NCPs range from immediate actions to more long-term and indirect measures. An example of immediate recommended action is the *Vedanta* case, in which the UK NCP recommended that Vedanta enter into a dialogue with the Dongria Kondh tribe in India to explore alternatives.⁶⁹ Measures that are more long-term or indirect include recommendations that companies formulate policies on employee relations or environmental sustainability. For example, the Norwegian NCP suggested to Intex mining company that it should improve its due diligence tests in the future by assessing potential impacts on communities, as well as improving tests for the current actual impacts on indigenous communities in the Philippines through environmental remediation.⁷²

A significant benefit of engaging in NCP processes is the flexibility of recommendations. Recommendations can be designed creatively to suit the particular circumstances, and are free from the influence of financial motivations. The Guidelines do not place any limits on the remedies that an NCP can provide as redress to victims. The appropriate remedy in each case differs depending on the identity of the complainant (eg an individual, a community, etc), the factual matrix of the case, the provisions of the Guidelines that have been breached, and the most effective action available to the company to bring itself into compliance.

⁶⁹ United Kingdom National Contact Point, 'Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Survival International against Vedanta Resources plc' (Press Release, 25 September 2009) <<http://www.oecd.org/investment/mne/43884129.pdf>>.

⁷⁰ OECD WATCH, 2015, *Remedy Remains Rare*, p.10- 11-18.

⁷¹ UN General Assembly, A/HRC/26/25, 2014 Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, para.23, p.9.

⁷² Norwegian National Contact Point 'Final Statement: Complaint from the Future in Our Hands (FIOH) against Intex Resources ASA and the Mindoro Nickel Project' (Press Release, 2011) 47-52 <http://www.menschenrechte.uzh.ch/entscheide/intex_final.pdf>.

Recommendations made by NCPs are unique to each specific case. Jonathan Kaufman, from Earthrights International, has commented on the beneficial nature of remedies that NCPs can recommend as a non-judicial mechanism. He noted that recommendations can be used to 'prevent harms before they happen' and once the violations start occurring, an NCP 'provides a forum for discussion'. A further positive aspect identified by Kaufman is the fact that 'mediation is a lot more flexible than court process', as one has the 'potential to develop creative solutions that are not just about money'.⁷³

Box 10: Determination of breaches of the guidelines case study – Australian NCP

When mediation is refused or fails, the Australian NCP's policy is to proceed to examine the complaint and make a determination on whether the multi-national enterprise has breached the OECD Guidelines.⁷⁴ Australia is one of six NCPs that has a policy of making compliance determinations if no mediated agreement is reached (the others are UK, Dutch, Norwegian, French and Danish NCPs).⁷⁵ In practice, no determinations concerning breaches of the Guidelines have been made, however. This is a particular weakness of the Australian NCP.

No powers of enforcement

Importantly, however, the benefit of remedies is limited by the willingness of a violating company to comply voluntarily with the recommendations. This means that a business can walk away from the process if it does not agree with it. This is exactly what Vedanta did in *Vedanta vs Survival International*. Vedanta failed either to participate in the process, or to respond to the final statement in any meaningful way. Amnesty International has expressed its disappointment at the lack of consequences for companies that fail to comply with the Guidelines or refuse to engage in mediation.⁷⁶

Dr Woodman, who put together Survival International's successful claim against Vedanta, raised concerns that organisations representing aggrieved communities are deterred from investing time and energy into collecting evidence and submitting a claim because of perceptions that the remedies are weak:

⁷³ Interview with Jonathan Kaufman (Washington DC, 21st June 2012) check before quoting.

⁷⁴ Australian National Contact Point, *Procedures for Dealing with Complaints Brought under the OECD Guidelines for Multinational Enterprises* [52] <<http://www.ausncp.gov.au/content/Content.aspx?doc=anpc/complaints.htm>>.

⁷⁵ OECD Watch, *Remedy Remains Rare*, 55.

⁷⁶ Amnesty International, 'The 2010-11 Update of the OECD Guidelines for Multinational Enterprises has come to an end: the OECD must now turn into effective implementation' (Press Release, 23 May 2011) 2 <<http://www.amnesty.org/en/library/asset/IOR30/001/2011/en/601f0e2c--a8a3--4fbc--b090--c0abb3c51ab2/ior300012011en.pdf>>.

Obviously it's not that appealing to do if you don't think there's a much point because nothing is really going to come out of it. So I think it's a system that is in absolutely desperate need of very radical reform.⁷⁷

Follow-up

Thirteen NCPs across all OECD countries provide follow-up, such as monitoring the implementation of agreements or recommendations. This is an area for improvement amongst NCPs. The Dutch NCP states that 'the extent of the NCP's involvement in supervising compliance with the agreements can also be part of the overall agreement between parties.' This is voluntary, however. In the case of *Vedanta*, the UK NCP's follow-up to the final statement was merely a summary of the case and of the responses of Survival International and Vedanta. The follow-up made no comment whatsoever on Vedanta's refutation of the final statement and refusal to adhere to the recommendations.⁷⁸

Though the Australian NCP has formal procedures for following up with companies,⁷⁹ in practice, the Australian NCP seems averse to being conducting any follow-up action. In its Final Statement in BHP Billiton/Cerrejon Coal that, "the ANCP fulfilled its primary function in providing a forum for discussion and assisting the parties reach agreement on the issues. The Australian NCP does not anticipate having an ongoing role".⁸⁰

Reputational damage can be the most powerful tool

The lack of enforcement is not seen as a problem for all people interviewed for this research. Dr Woodman of Survival International, noted that the moral weight of a decision in Survival's favour was the most important consequence. Moreover, Dr Woodman noted that Vedanta's unwillingness to engage in the process was perceived by many to be a direct indictment on the company's moral standing. Although various reports damning Vedanta's actions in the Niyamgiri hills had been released, the NPs report was seen to be more powerful.⁸¹

I think having government saying — Survival is quite right, this really is not acceptable and there is a need for behavioural change from this company — it makes a very different impact.

Peter Frankental, Economic Relations Programme Director at Amnesty International, agreed that the NCP verdict was effective in casting suspicion over Vedanta. He stated:

When you've got the UK government saying the company is in breach of international standards, investors do care. The combination of the NCP verdict and investor ac-

⁷⁷ Interview with Dr Jo Woodman (Skype Interview, 14 June 2012).

⁷⁸ United Kingdom National Contact Point, 'Follow up to the Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Survival International against Vedanta Resources plc' (Press Release, 12 March 2010) <<http://www.oecd.org/daf/inv/mne/46085980.pdf>>.

⁷⁹ Australian National Contact Point, Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises (2011) <<http://www.ausncp.gov.au/content/Content.aspx?doc=anncp/complaints.htm>> [56] – [57].

⁸⁰ Australian National Contact Point, Final Statement by the Australian National Contact Point: BHP – Cerrejon Coal Specific Instance (12 June 2009) [29], [34] <http://www.ausncp.gov.au/content/publications/reports/general/Final_Statement_BHP_Billiton_Cerrejon_Coal.pdf>.

⁸¹ Interview with Dr Jo Woodman (Skype Interview, 14 June 2012).

tion helped to create a climate of opinion against Vedanta which made it easier for the Environment Minister of India at the time, Jairam Ramnesh, to decline the licenses. So I think this was an important contribution, but it has to be seen within the wider dynamics of factors and power relationships that influence decisions.⁸²

In contrast, Sandeep Pattnaik from the National Centre for Advocacy Studies in Odisha, India, who was involved in the POSCO claim, did not know if the NCP process was ‘worth the investment of time’. He stated that an NCP’s decision ‘has no teeth; it is not binding’.⁸³

Box 11 : Remedy case study – UK NCP

Potential remedies from the UK NCP rely on the willingness of a company who is in violation of the Guidelines to voluntarily engage in good faith mediation or comply with recommendations in a Final Statement. In reality, a business can walk away from the process if they do not agree with it. Amnesty International has expressed its disappointment at the lack of consequences for companies who fail to comply with the Guidelines or refuse to engage in mediation.⁸⁷

The effects of the Final Statement in the Vedanta complaint were reputational and material, contributing to divestment in Vedanta. The determination by a state-based body that Vedanta’s actions were not acceptable was seen as having significant moral weight, including with investors. The mine was stopped through national political and legal processes in India. Although our research in India suggested that there was no direct effect from the NCP determination, we did find evidence that the Environment Minister, Jairam Ramnesh, did know about it and that it did potentially bolster his resolve to block the mine.

The Vedanta case highlights some of the challenges in the UK NCP being an effective avenue for redress. Firstly, the NCP has established a relatively high barrier to accessibility in the requirement to substantiate that a violation may have taken place. The success of the Survival International case against Vedanta was based on eighteen months of evidence collection – a significant investment of resources that is not always available to a community. This high bar for evidence from complainants is not matched by high standards for information required of companies: “in contrast to the high level of specificity required from complainants, it appears that the expectations of the NCP towards companies to provide evidence of responsible business practice are not as stringent”.⁸⁸ This may occur largely through claims of confidentiality by companies that the NCP does not investigate or contest.

⁸² Interview with Peter Frankental, (Skype Interview, 2012).

⁸³ Interview with Sandeep Pattnaik, (India, 1 December 2012).

⁸⁴ Amnesty International, Obstacle course: How the UK’s National Contact Point handles human rights complaints under the OECD guidelines for multinational enterprises, 2016.

⁸⁵ Amnesty International, Obstacle course: How the UK’s National Contact Point handles human rights complaints under the OECD guidelines for multinational enterprises, 2016, 7.

This case also reinforces the scope of remedy possible through an NCP case. Direct remedy relies on good faith engagement that was completely lacking in the Vedanta case, as the company walked away. The remaining effects of the NCP Final Statement were reputational and material, through an indirect effect on investors. While this is useful in an ongoing campaign, it cannot be considered a “remedy”.

Utilising market forms of leverage

The two case studies examined in this report confirm the importance for NCPs of utilising market based forms of leverage to extend the impact of specific instances. NCPs can urge minority shareholders, parent companies, financiers and powerful companies within supply chains to use their market power to bring about changes in behaviour by those businesses on the ground whose actions are directly impacting the human rights of communities and workers.

This was an important theme of the POSCO case. For example, the Dutch NCP praised APG for using its influence on POSCO:

“The NCP is especially pleased with the fact that APG is committed to continue to use its influence bringing POSCO’s business practices in line with the Guidelines and other international principles and standards, under the expectation that POSCO publicly agrees to adopt these standards for all its operations including those in India and publicly reports on their implementation.”⁸⁶

The affirmation from the Dutch and Norwegian NCP’s in the POSCO case that minority shareholders have obligations in relation to human rights impact in companies in which they are invested raises practical questions regarding how a minority shareholder might go about exercising leverage of this type. The Norwegian NCP’s final statement, in its criticism of NBIM for its *failure* to exercise leverage, makes concrete suggestions regarding how minority shareholders might exercise leverage. The Norwegian NCP states that “The appropriate action for an enterprise to take depends on factors including its leverage over the other entity, how crucial the relationship is to the enterprise, and whether terminating the relationship would have adverse human rights impacts.”⁸⁷ It acknowledges that minority shareholders do not have the same tools available to them as majority ones, but suggests a range of pre-investment (imposing conditions) and post-investment (shareholder proposals, shareholder voting, engagement with management, and the threat of divestment) tools that may be effective.⁸⁸ In relation to the provision of remedy, though

⁸⁶ Dutch NCP, Final Statement ABP/APG - Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance, Forum for Environment and Development. Ministry of Foreign Affairs, Amsterdam, 2013.

⁸⁷ Norwegian NCP, Final Statement: Complaint from Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum for Environment and Development vs POSCO (South Korea), ABP/APG (Netherlands) and NBIM (Norway). Oslo: Norwegian NCP, Available from: http://oecdwatch.org/cases/Case_262 (accessed 11 February 2015), 34.

⁸⁸ Norwegian NCP, Final Statement: Complaint from Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum for Environment and Development vs POSCO (South Korea), ABP/APG (Netherlands) and NBIM (Norway). Oslo: Norwegian NCP, Available from: http://oecdwatch.org/cases/Case_262 (accessed 11 February 2015), 34-35.

investors cannot be expected to *provide* the remedy, they should provide *access* to it, for example by requiring the company to establish an operational-level (internal) grievance mechanism.⁸⁹

Coordination and overlap between NCPs

Though there may be benefits to NCPs in different countries developing unique and varying strengths, NCPs collective authority and legitimacy is undermined when NCPs differ greatly in their procedures, structure and effectiveness. The OECD has sought to overcome this problem by fostering “functional equivalence” or sufficient similarity across NCPs.

The 2011 OECD Guidelines contain four principles of functional equivalence for NCPs: visibility, accessibility, transparency and accountability.⁹⁰ In relation to specific instances, NCPs must be impartial, equitable, predictable, and operate in a way that is compatible with the Guidelines. NCPs are required to conduct an initial assessment within three months to ascertain whether or not the complaint merits further attention. If it is decided that it does, the NCP is to offer its good offices to the parties. In doing so, the NCP may seek advice from relevant external parties, other NCPs involved in the case, or the OECD Investment Committee if clarification of the Guidelines is required. If a dialogue between parties is agreed, it must be voluntary, consensual, and non-adversarial. Upon conclusion of procedures, the NCP is expected to make the outcome public, with due respect for sensitive business or stakeholder information. Within the bounds of these principles, governments are able to constitute their NCPs in any institutional arrangement.

OECD Watch and the Trade Union Advisory Committee (TUAC) of the OECD have long been concerned that functional equivalence is not a reality for NCPs.⁹¹ The POSCO case demonstrates several problems in this regard. In response to a complaint about similar factual circumstances (though different parties) three NCPs arrived at three different conclusions: one declared the case did not merit further assessment, one was unable to engage the relevant company (the Norwegian pension fund), while one took proactive measures to facilitate a dialogue, and offered financial support for a fact finding mission (though for other reasons it did not materialise).

The POSCO case also exemplifies failures of coordination among NCPs. Though the Dutch NCP took a number of formal and informal steps to facilitate coordination between NCPs, including regular communication, invitations to formal meetings, the publication of a provisional final statement to make time for agreement among NCPs, and an invitation to the other NCPs to co-sponsor the fact finding mission, coordination was not achieved. Though the Norwegian NCP had agreed to coordinate, for reasons that are unclear, coordination did not eventuate. Despite

⁸⁹ Norwegian NCP, Final Statement: Complaint from Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum for Environment and Development vs POSCO (South Korea), ABP/APG (Netherlands) and NBIM (Norway). Oslo: Norwegian NCP, Available from: http://oecdwatch.org/cases/Case_262 (accessed 11 February 2015), 34.

⁹⁰ See the Guidelines: Procedural Guidance.

⁹¹ OECD Watch, Assessment of NCP Performance in the 2013-2014 Implementation Cycle: OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points. Amsterdam: OECD Watch, 2014, p. 10; TUAC, TUAC Submission to the Working Party on Responsible Business Conduct. Paris: TUAC, 2014, 2.

stating its commitment to coordinating responses to shared complaints with other NCPs,⁹² the Korean NCP was not willing to work with the two other NCPs considering the same matter.⁹³ The three only met to discuss the case at the annual NCP meeting in Paris, after the Norwegian and Korean NCPs had finalized the cases. The Dutch NCP commented, in its final statement, that “although each NCP has its own responsibility to deal with its part of a multiple case, early exchanges of views and possible coordination are essential in order to meet the OECD Guidelines requirements of coherence between the NCPs’ approaches (principle of functional equivalence)”⁹⁴

The POSCO case did trigger discussions about functional equivalence and coordination at the June 2013 OECD NCP annual meeting in Paris, and it featured again at the 2014 meeting. There is now informal agreement among NCPs, arising from that meeting, to take up the Dutch NCPs suggestions. The Dutch NCP confirms that the OECD Working Group on Responsible Business Conduct now shares the view that the NCP closest to the impact has the responsibility to coordinate, while not mitigating the responsibilities of other NCPs who have received related complaints about corporations that are not contributing, but are directly linked to the impact (e.g. investors).⁹⁵ At this stage, it is too soon to determine the impact of this agreement in practice. One potential problem of the search for functional equivalence is the risk of ‘ratcheting down’ rather than up, though it is clear that those advocating for functional equivalence have in mind equivalence with the most, rather than the least robust NCP processes. For those in the POSCO case, a lack of functional equivalence contributed to the lack of meaningful outcome for complainants.

Box 12: Summary of three NCP responses to POSCO case

The POSCO case demonstrates the lack of functional equivalence as the three NCPs that received the complaint responded differently:

Dutch NCP – some progress

The Dutch NCP accepted the complaint in December 2012 and used its good offices to facilitate a dialogue between ABP/APG and Fair Green Global Alliance (representing Lok Shakti Abhiyan). On 6 March 2013 the NCP issued a provisional final statement stating that:

⁹² Korean NCP Initial Assessment of Complaint on Violation of OECD Guidelines for Multinational Enterprises. Copy on file with authors, 2013.

⁹³ Dutch NCP (2013) Final Statement ABP/APG - Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance, Forum for Environment and Development. Ministry of Foreign Affairs, Amsterdam, 2013, 2.

⁹⁴ Dutch NCP (2013) Final Statement ABP/APG - Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance, Forum for Environment and Development. Ministry of Foreign Affairs, Amsterdam, 2013, 3.

⁹⁵ Private communication, Herman Mulder, Dutch NCP, June 2015.

- ABP/APG has and will continue to exercise its leverage over POSCO in the form of phone calls, correspondence and face-to-face meetings with the company, and is therefore compliant with the OECD Guidelines.⁹⁹
- There is concern about forcible land acquisition and violence in the area, and gaps between the issues raised in the complaint, and the response from POSCO, and “there is a need from the beginning of the project development for the establishment of a constructive and meaningful stakeholder consultation process between POSCO India the local communities and NGOs to identify, prevent and mitigate any negative impact related to the project”.¹⁰⁰
- Parties agreed upon a draft Terms of Reference for an independent review and assessment of contentious issues in Odisha that could contribute to meaningful stakeholder dialogue.¹⁰¹ However, as described elsewhere in this report this fact finding mission did not take place.

This statement was provisional in the hope that the Norwegian and Korean NCPs might coordinate activities to facilitate the outcomes agreed in the Netherlands. However, by the end of May the other two NCPs issued their own final statements. Though the Korean NCP did not pursue the case, POSCO did write to the Dutch NCP indicating willingness to engage in dialogue with the complainants and ABP/APG, and to explore possibilities for an independent review assessment panel¹⁰². The Dutch NCP finalised its final statement in September 2013, when it became clear that the parties could not agree on terms for a panel, but continued informal dialogue with all parties.

Korean NCP – rejected the complaint

On 11 May 2013, more than six months after the complaint was submitted (the OECD Guidelines suggest initial assessments should be made within three months), after some written submissions from POSCO and the complainants providing clarification on the various aspects of the allegations in the complaint, the Korean NCP declined to pursue the complaint any further on the grounds that the impact assessments and violent encounters are the responsibility of the Indian government, rather than POSCO. In an ‘initial assessment’¹⁰³, the South Korean NCP stated that:

“The complaint is not directly related to business activities of Posco India. Instead, it is related to the administrative activities of the provincial and the central governments of India and the rulings of the Indian court, whose legality and legitimacy are not to be determined by the Korean NCP. [...] On the basis of the due diligence provisions and other procedural or practical issues stated in the Guidelines, the Korean NCP cannot find any problems in the court rulings and other relevant procedures of the Posco case. Therefore, the Korean NCP has decided that there will be no additional proceedings.”¹⁰⁴

Norwegian NCP – pension fund refused cooperation but strong final statement

The Norwegian NCP was willing to offer its good offices to engage the case, but NBIM refused. In a final statement issued on 27 May 2013 (after the Korean NCP), the Norwegian NCP concludes that,

“NBIM violates the OECD Guidelines chiefly on two accounts. First; by refusing to cooperate with the OECD NCP NBIM violates the OECD Guidelines Procedural Guidance. Second; by not having any strategy on how to react if it becomes aware of human rights risks related to companies in which NBIM is invested, apart from child labour violations.”¹⁰⁵

OECD Watch argues that one of the most effective ways of ensuring functional equivalence is through a peer review mechanism.¹⁰⁶ In 2009, the Dutch NCP submitted itself to a voluntary peer review by five other NCPs who provided recommendations to the Dutch NCP regarding structure, promotional activities and the handling of specific instances.¹⁰⁷

Improving the National Contact Points: recommendations for change

What reforms might improve the performance of the NCPs? The following recommendations are aimed at the OECD, NCPs and the organisations that support communities and individuals to make complaints. In most cases, these recommendations do not require any changes in the Guidelines. They simply require stricter adherence to the Guidelines and greater funding to allow NCPs to contribute to learning in the human rights practices of businesses and enhanced access to redress for communities and workers.

⁹⁹ Dutch NCP (2013) Final Statement ABP/APG - Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance, Forum for Environment and Development. Ministry of Foreign Affairs, Amsterdam, 2013, 8.

¹⁰¹ Dutch NCP, Final Statement ABP/APG - Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance, Forum for Environment and Development. Ministry of Foreign Affairs, Amsterdam, 2013, 6.

¹⁰² Dutch NCP, Final Statement ABP/APG - Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance, Forum for Environment and Development. Ministry of Foreign Affairs, Amsterdam, 2013, 3.

¹⁰³ Dutch NCP, Final Statement ABP/APG - Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance, Forum for Environment and Development. Ministry of Foreign Affairs, Amsterdam, 2013, 7.

¹⁰⁴ An ‘initial statement’ is typically used to make public a judgment on whether or not a NCP has decided to offer ‘good offices’ to complainants to resolve a complaint, and ‘final statements’ are issued upon conclusion of a case that was engaged by the NCP.

¹⁰⁵ Korean NCP (2013) Initial Assessment of Complaint on Violation of OECD Guidelines for Multinational Enterprises. Copy on file with authors.

¹⁰⁶ Norwegian NCP, Final Statement: Complaint from Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum for Environment and Development vs POSCO (South Korea), ABP/APG (Netherlands) and NBIM (Norway). Oslo: Norwegian NCP, Available from: http://oecdwatch.org/cases/Case_262 (accessed 11 February 2015), 7.

¹⁰⁷ Caitlin Daniel et al, ‘Remedy Remains Rare: An Analysis of 15 Years of NCP Cases and Their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct’ (OECD Watch, June 2015) 51, 40-1. <http://www.oecdwatch.org/publications-en/Publication_4201>.

¹⁰⁸ NCP Peer Review Team 2010, ‘Dutch National Contact Point: Aspirations and Expectations Met?’ (24 March 2010) <<http://www.oecdguidelines.nl/ncp/contents/peer-review>>.

Location

- Although all NCPs are expected to be impartial and functionally equivalent, the structure and location of an NCP can influence independence. The location of the NCP should enhance its independence on the one hand, but not compromise the benefits of the NCP's authority as a part of government.

Jurisdiction and scope

- **Scope for parallel proceedings:** NCPs' policies on parallel proceedings should be reviewed to ensure that cases are not unnecessarily excluded. There are circumstances in which the Guidelines should give precedence to other criminal and civil proceedings. However, this should only be where there is a real likelihood that the OECD process could result in significant prejudice to the other proceeding. There should be no automatic assumption that other proceedings should take precedence. Where an NCP rules that a proceeding should take precedence, it should provide justification for that decision.

Procedures

- **Case management:** There should be early case management meetings held between an NCP and all the parties involved in a specific complaint, including other NCPs. The purpose of such meetings would be: i) to timetable the case, ii) to narrow the issues in the complaint, and iii) to identify any additional evidence that is required. This will ensure that cases continue to progress and do not drift for months without apparent reason. It would also save significant time and expense if the issues were narrowed down from the outset. Such an approach should also take account of the need to monitor implementation of agreements or other outcomes.
- **Mediation:** Attempts to mediate may be inappropriate when dealing with companies that are not seriously engaging in the process, or in cases involving issues that are not suitable for mediation, such as alleged complicity in human rights abuses where complainants are fearful of engaging with the company directly due to fear of reprisal. NCPs should **desist from pressuring for dialogue in the absence of safety safeguards and processes to ensuring that vulnerable complainants are not disadvantaged**. One possible way to begin to generate such safeguards is by exploring other options for provision of assistance. This may require, for example, a willingness to engage with complainants 'on their territory', in places and modes that are more comfortable for them, and in which their freedom to speak is not unduly constrained by the presence of company or government actors. Unlike multinational businesses, communities often do not feel 'at home' in the professional milieu in which NCPs operate. Reaching out to complainants in this way may generate alternative ideas and suggestions for addressing human rights complaints that are more sensitive to local context.
- Where safeguards of this type cannot be provided, the NCP should move directly to the investigation and determination phase (although it should be noted that while all NCPs are required to issue final statements, some have abrogated that duty). The immediate progression to investigation and determination would save time and costs in the specific instances process.

Process

- Each NCP should **follow the same process for resolving a complaint**. Eighteen NCPs (or 39 per cent) have developed procedures for submitting specific instances. These include the NCPs of the UK, the US, Norway, the Netherlands, and Australia.⁹⁶ These developed procedures differ between each NCP. This means that over half of all NCPs are not adhering to the guidelines in this respect. There should be four stages to the specific instances process which are uniform across all NCPs, as described below.
 1. When a complaint is lodged with a NCP, the NCP should make investigations into the complaint, including asking for a response to the complaint from the company allegedly in violation of the Guidelines. After investigation, if there is a proper basis for the complaint, it should be accepted and the NCP should publish an 'Initial Assessment', which provides details of the complaint to the public. If a complaint is rejected, NCPs should provide reasons to the complainant on why it was rejected.
 2. The NCP should then determine what process to initiate. Such processes might include fact-finding, dialogue, mediation and shuttle diplomacy. The process pursued should be agreed with the parties. If a party chooses not to engage in the mediation, dialogue or shuttle diplomacy processes, the NCP should conduct further investigations into the complaint and review the evidence to determine whether the Guidelines have been breached. If parties refuse to engage in mediation, an NCP should make an assessment of whether the company has breached the Guidelines. Currently only 16 (35 per cent) of NCPs do so. The remaining 65 per cent close such cases.⁹⁷
 3. The NCP should then draft and publish a final statement which summarises the process (if one takes place) and its outcome, or states whether the concerned company has breached the Guidelines and recommendations for the company on how to bring its business practices into compliance with the Guidelines.
 4. Three months after the final statement is released, the NCP should perform a follow-up with the breaching company. This follow-up would investigate what actions have been taken by the company to follow the NCP's recommendations and to avoid breaching the Guidelines. If no action has been taken, NCPs should refer the case to other government departments which have leverage over the business.

⁹⁶ Trade Union Cases, *National Contact Point Comparison* <<http://www.tuacoecdmneguidelines.org/NCPcomparisonAll.asp>>.

⁹⁷ Trade Union Cases, *National Contact Point Comparison* <<http://www.tuacoecdmneguidelines.org/NCPcomparisonAll.asp>>.

- **Time frames:** A clear timeframe for reaching a final conclusion on complaints should be agreed upon for all NCPs with an overall timeframe of not more than 12 months, subject to extension only upon the agreement of all parties, and only if extension would demonstrably lead to a better outcome. This will ensure predictability and consistency both within an NCP and between NCPs in different OECD countries in line with the Procedural Guidance.
- NCPs should establish an **appeals mechanism** which is removed from the influence of the NCP such as an independent steering board, a parliamentary committee or ombudsman, so that complainants can request a review of specific decisions. Grounds for review should encompass substantive errors in the application of the Guidelines to the case in question as well as procedural errors.

Access and standing requirements

The following changes should be made to enhance the accessibility of the NCPs.

- The specific instance process needs to be more **transparent**, and information on the process should be published. These goals could be benchmarked against the most effective NCPs (eg those of Norway and the Netherlands). The changes should include requirements that OECD governments provide adequate funding for NCPs to work meaningfully with complainants. For example, funding should be provided for **translation services and outreach**.
- It should be possible to make a complaint in **multiple languages**. Failing this, targeted assistance should be available to help parties overcome language barriers.
- Governments should require that businesses in receipt of government support, such as export finance, **inform communities that they may engage with the NCP as a means of redress** in the event of a grievance.
- There is potential value for NCPs to develop provide assistance of various types to complainants. Such assistance will ensure that NCPs can assess the merits of a complaint using all relevant evidence available, instead of only that evidence which complainants had the resources to obtain. This assistance might be provided by a Public Advocate or **Outreach** entity.
 - Such an Outreach entity could act as a central contact point to provide advice to people on the scope and operation of the NCP's complaint system, as well as alternative or complementary avenues available to individuals or communities seeking resolution of their problems. Those planning to bring a complaint through the NCP could apply for active accompaniment or technical advice and support, as required on a case by case basis. Provision of advice and accompaniment on a kind of legal aid model may be the primary function in some cases, though a facilitation role to support internal community organising and decision making may also be required for more complex cases.

- Such an entity would need to operate at arms-length from other parts of the NCP to ensure its independence. For example, as a minimum, it could have a separate budget and staff, with separate reporting lines directly to the oversight or governance board, thus creating some independence from other elements of the complaint handling system. Evidential requirements and investigative powers
- The **evidential requirements should be lowered**, since complainants often lack the resources to accumulate evidence sufficient for the NCP to accept the complaint.
- In highly politicized conflicts, it can be very difficult to establish a single source or form of evidence that all parties will recognize as independent and credible. There may be value in searching for more **creative methods of contested and triangulated evidence building**, taking account of the disparities between the capacities of different parties to collect evidence of different kinds.
- In place of the higher evidential requirements, the **investigative powers** the NCP should be increased so that it can assist complainants in gathering evidence. Such capacities are important in part because evidence underpinning disputes is itself often vigorously contested. Moreover, there are often significant disparities between the capacities of conflicting parties to generate evidence of kinds that are suitable for use within formalised complaints systems.
 - **Investigations may be conducted by the staff of the NCP.** Resourcing is crucial here. NCPs should be given adequate funding and resources to undertake thorough investigations into a complaint. NCP staff should be provided with training to ensure that they have adequate expertise and experience to undertake thorough investigations.
 - Alternatively, independent inquiries and fact finding activities might be conducted by **externally commissioned experts**. If this model is to achieve the objective of generating ‘facts’ that have a good chance of being accepted by all parties as credible, then the perceived independence and credibility of these experts will be crucial. In securing broad-based recognition of the authority of independent experts, we suggest that transparency in the selection processes for relevant experts may play a useful role. Additional protections could be provided by giving disputing parties the opportunity to veto nominated experts prior to an investigation occurring, to make it harder for evidence generated through this process to subsequently be questioned on the basis of conflict of interest or inadequate technical, cultural or other contextual knowledge.
- We suggest that there may also be value in providing **support for communities (as appropriate on a case by case basis) to produce their own evidence**. This may be a role for the **Outreach entity**. This could then provide an additional input into deliberations, alongside findings of external experts. No matter how ‘independent’ an investigator is, in some complex cases evidence will continue to be contested, and to this extent it is still important to make some contribution towards balancing power disparities between parties in their capacity to bring their own versions of the facts to the negotiating table.

Community or worker capacity enhancement

- NCPs should conduct **awareness building and training around accessing NCPs** for NGOs and worker representatives in countries where grievances occur.
- **Creative and informed approaches to partnership** between complainants and NGOs must be part of the complaint process. In order for NGOs and the complainants they represent to work through issues of mismatched interests, NCPs need to allow sufficient time and be flexible in their approach to representation. In cases where urgent action is required, NCPs should issue preliminary statements encouraging moratoriums on business activities until issues of representation are resolved. (See the IFC CAO report in this series at www.corporateaccountabilityresearch.net which elaborates on the CAO's approach in this respect.)
- **Clear guidelines are required to govern any proposed instance of representation**, to ensure workers and communities are properly represented and empowered within the process. Clarity would be required on the roles that are and are not appropriate for intermediaries to play in 'representing' the interests of directly affected workers and communities in any given context.

Substantive

- Where there is evidence of a company that is the subject of a complaint having '**caused or contributed**' to **human rights abuses**, with regard to how such terms are defined in human rights norms or by expert opinion, the NCP should make a determination of a breach of the relevant provision of the Guidelines.
- Where the alleged conduct of a company is likely to have **future harmful impacts** on affected communities, these impacts should be considered as part of the process of determining whether there has been a breach, in light of the preventive aspects of the Guidelines.

Enhancing leverage — remedies, enforceability and systemic change

- NCPs should identify and take advantage of opportunities to make an impact on a business' global operations. NCPs should **not limit their recommendations to the rectification of breaches of the Guidelines** but also make recommendations as to changes in business practices more broadly or the adoption of policies and procedures across the business to as to **prevent future breaches of human rights**.
- NCPs have limited formal powers of enforcement. The impact of NCPs on wider change is drawn primarily from '**soft power**' or **moral authority**. A determination of breaches of human rights by an NCP can be used to lobby private financiers and investors to act on final statements, as occurred with disinvestments from Vedanta. In order to maximise soft power, a **final statement should be released in all accepted instances**, and should include a review of the evidence and a determination of compliance with the Guidelines.

- The impact of final statements that are in favour of the complainants could be enhanced by greater communication, and possibly coordination, with relevant host-country government agencies. While tensions around sovereignty place significant limits on this kind of coordination, it would enhance the NCP's utility if they were to search for opportunities to make **diplomatic approaches to host government officials** wherever possible.
- NCPs could facilitate the **creation of deeds or legally binding agreements between parties** to a complaint. This could be the **outcome of mediation**. Contractual agreements could nominate an arbitration body for alleged breaches and specify appropriate remedies for breaches, including financial penalties.
- NCPs should also ensure that **use is made of the market leverage that minority shareholders, financiers and powerful parties in supply chains have over businesses** that are directly harming the human rights of communities and workers. This might include placing conditions on investment, requiring due diligence, conducting independent inquiries into the human rights practices of the investee or supplier, and so on. This is a significant area of learning for NCPs.
- Most critically, there are significant opportunities for NCPs to exert greater leverage by **preventing or enabling access to government support** – for example, import or export licenses, government subsidies, qualification for government procurement, and export credit and trade financing support. This could be extended to provide consequences for negative determinations and/or failure to follow up.
- NCP determinations should be linked to **government procurement**. Businesses should be barred from government contracts until they have adopted the recommendations within a determination.

Monitoring and follow-up

- After an NCP issues a final statement, it should perform a **periodic review to see what progress has been made by the multinational enterprise in integrating NCP recommendations into business practices**. Such follow up could be conducted by a multi-stakeholder panel based on the IFC CAO's model (see the report on the IFC CAO in this report series at www.corporateaccountabilityresearch.net).
- If the follow-up identifies continued non-compliance with the Guidelines and no effort on the part of the company to implement the recommendations, the NCP should have the power to **refer the violation to a relevant government agency which has enforcement power**. Such agencies include export financing agencies and aid departments that fund business activities. Government support should be conditional on compliance with the Guidelines.

Governance structure

- An **oversight mechanism** for each NCP is desirable. The purpose of oversight is to ensure the independence and accountability of an NCP, to ensure compliance with procedural rules and to enhance learning and coordination across government concerning business and human rights.

Links to and interactions with host -country governments

- NCPs based in home-countries need to **coordinate far more with host-country institutions**. It is not enough for NCPs simply to discern whether parallel proceedings are occurring in the host country, and there is concern that parallel proceedings are being used as a way for companies to avoid responsibilities in the home country. It would be preferable for coordination to occur between the NCP and the relevant host-country institutions that may have an interest or a current proceeding on the matter.
 - This suggests that **ad hoc arrangements** may be necessary, to coordinate **with an institution (court or administrative body) in the host-country that has a proceeding before it** concerning the same matter, as well as more on-going arrangements.
 - **Longer-term relationships could be established between NCPs and relevant institutions in host-countries**. Memorandums of understanding or some other formalised institutional arrangements could be formed with government bodies, such as Human Rights Commissions, which would allow for the development of on-going outreach and publicity concerning the role of NCPs.

Links to and interactions within the home-country

- Because NCPs are based within government, they offer a unique opportunity for **coordination between government departments** within the home country. As well as increasing the leverage of the mechanisms, such coordination could allow for greater learning across government in relation to business and human rights, and also allow for broader engagement with business and community.
- As a beginning point, there needs to be **stronger cooperation with aid/development agencies** of national governments in developing programs on human rights risk management, support for access to justice, support for capacity building and outreach for communities.
- Greater **interaction needs to occur with business and civil society organisations**, also. The Dutch NCP is a model here, with its CSR Netherlands engaging business, employers, unions, sector associations, financial associations, media, NGOs and OECD Watch to promote the Guidelines.

Functional equivalence and Coordination across NCPs

- **Functional equivalence** between the institutional arrangements of different NCPs is paramount. Peer review allows not only the NCP under review to learn from the recommendations made, but also the NCPs that are conducting the review to see how they can improve their NCP functionality.
- In the next review of the OECD Guidelines, the OECD should articulate in more detail how it expects NCPs to put the four criteria of functional equivalency into operation.
- The OECD Secretariat should enhance its capacity to share lessons so as to enhance NCP performance and encourage functional equivalence.

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