

The State of Remedy under the OECD Guidelines

**Understanding NCP cases concluded in
2018 through the lens of remedy**

Executive summary

The year 2018 was not a good one for remedy under the OECD Guidelines for Multinational Enterprises (Guidelines). According to the OECD's own 2018 Annual Report on the Guidelines, just four (36%) of the cases that went to mediation last year reached some kind of agreement. In the OECD's words, this represented a "substantial decrease from 2017."¹ Only 11 out of the 34 National Contact Point (NCP) cases concluded in 2018 even made it to the stage of mediation in the first place, with the rest being rejected outright by NCPs. This means that just 9% of cases filed actually reached agreement. Nine percent is slim odds to justify the extensive time and energy required to file a complaint.

Among the cases concluded in 2018, 12 were filed by communities or non-governmental organisations (NGOs), with the rest being filed by unions, businesses, or individuals.² Among these 12 NGO/community-led cases, **only two (17%) resulted in some form of remedy** for complainants. Both of these cases were handled by the Dutch NCP. One of the cases resulted in an acknowledgement of wrongdoing in the form of a determination, by the Dutch NCP, of a company's breach of the Guidelines. The other resulted in a commitment by the company to improve their policies moving forward. While these results can be considered to contain an element of remedy, they are far from the fuller forms of remedy that victims of corporate abuse often seek.

The remaining 10 community- or NGO-led cases concluded in 2018 did not achieve any form of remedy at all. Why this low success rate? The reasons for the NCP system's continued low rate of

¹ OECD, Annual Report on the OECD Guidelines 2018, p. 5.

² The 12 NGO/community cases are 1) Hou Friesland Mooi vs. Nuon, 2) Fivas v. Bresser, 3) Bruno Manser Fonds (BMF) v. Saktio Corp, 4) FIDH et al vs. Italtel, 5) Save Teghut Civic Initiative et al vs. EKF, 6) IDI et al vs. ANZ Banking Group, 7) FOCO et al vs. Barrick Gold, 8) Forum Suape et al. vs. Van Oord, 9) ECCHR et al vs. TÜV Rheinland AG, 10) ADIMED vs. Pharmakina SA, 11) ADIMED vs. Groupe Kilu, 12) ADIMED vs. ES-KO International.

success in providing effective access to remedy can often be traced to the case handling procedures of some NCPs, particularly related to:

- Some NCP's unpredictability and lack of regard for the complaint-handling guidance in the OECD Guidelines or their own internal procedures;
- Some NCPs' misinterpretation of elements of the admissibility criteria or over-analysis of facts during the initial assessment stage, which prematurely shuts the door to valuable dialogue between communities and companies;
- Some NCPs' unwarranted and inexcusable delays, too often resulting from ill-managed staff turn-over;
- Some NCPs' unduly restrictive policies on transparency and confidentiality;
- Some NCPs' unwillingness to promise determinations where mediations fail or are rejected by the company; and
- Some governments' unwillingness to ensure consequences for non-participation in the mediation process, non-fulfilment of an NCPs' recommendations, or non-compliance with the Guidelines.

OECD Watch has been calling for reforms to strengthen NCPs for years. To achieve needed procedural reforms, we believe revision is needed to the Procedural Guidance of the Guidelines themselves, which sets out the procedures by which NCPs should implement the Guidelines and handle cases. A revision of the Guidelines could also help address key substantive gaps in the standards themselves. Until a revision occurs, we continue to urge NCPs to address these gaps by implementing the recommendations provided in the conclusion to this paper.

Background

The OECD Guidelines are a set of recommendations from governments to businesses on responsible business conduct. In eleven chapters, the Guidelines set standards for responsible business that cover a wide range of issues and topics, from human rights, labour rights, and environmental protection, to taxation, consumer protection, and supply chain due diligence. In addition to setting standards, the Guidelines require OECD member and adherent states to establish a grievance mechanism – an NCP – to hear complaints from workers, communities, and civil society groups against companies they argue are in breach of the Guidelines. NCPs are supposed to resolve disputes and facilitate effective access to remedy for the victims of corporate abuse.

In theory, the Guidelines have great potential to strengthen the global system of corporate governance. Extra-territorial in application and broad in their coverage of sectors, value chains, and areas of corporate impact, the Guidelines set far-reaching expectations for the responsibility of corporations to account for the negative externalities of their operations. Meanwhile, the government-backed NCPs should have unique ability to draw multinationals to the same table as workers and communities, level the innate power imbalances between them, and help complainants achieve meaningful remedies for the harms the companies' business activities have caused them. But to date, we find that meaningful remedy from the NCP complaint system remains difficult to achieve.

What would remedy look like?

What would it mean for NCPs to facilitate meaningful remedy? The United Nations Guiding Principles on Business and Human Rights (UNGPs) define "remedy" to include "apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions," as well as "the

prevention of harm through, for example, injunctions or guarantees of non-repetition.”³ These examples entail actual remediation or prevention of harm to victims and cover the examples of financial compensation or investment cancellation mentioned earlier. An acknowledgement of wrongdoing in the form of a determination, by an NCP, of a Guidelines, breach can also provide a measure of remedy for victims. A company's commitment to change its policies, act differently moving forward, and not repeat the violation can also be considered to be part of remedy. Yet even with this broad definition of remedy, the majority of NGO/community-led cases filed to NCPs in 2018 did not achieve remedy.

Part of the reason for this is that some NCPs continue to believe that *remedy* is not what they should do. Their approach to dispute resolution is simply to encourage both parties to mediate, but to dismiss the case if a company refuses to participate, and not to investigate or issue themselves a finding on the compliances adherence the Guidelines. While this approach is appropriate for some forms of mediation, we believe it is not appropriate where the mediation is based on a clear standard. The OECD Guidelines set a very real governmental expectations for corporate conduct, so when those expectations are not met, NCPs should not allow negotiation of those expectations. Instead, they should determine plainly whether a breach has occurred and, in the interest of basic justice, urge the breaching company to rectify the harm it has caused.

State of Remedy in 2018

The sections below analyses the cases concluded in 2018 through a lens of remedy, in an attempt to understand what enabled remedy in a couple cases, or contributed to its non-achievement in others.

Cases resulting in some form of a remedy-related outcome

i. Remedy-related result: changed policies moving forward

One case achieved a partial form of remedy through an agreement that involved the company's commitment to improve its policies moving forward.

This case was **Hou Friesland Mooi vs. Nuon**.⁴ In December 2017, the Dutch NGO Hou Friesland Mooi filed a complaint at the Dutch NCP against the energy company Nuon, alleging that Nuon did not engage meaningfully with local Dutch residents before planning development of a wind park. The NGO argued that the wind park would breach the human rights and environment provisions in the OECD Guidelines by not respecting residents' right to a healthy living environment and by disregarding the requirement for an environmental management system for the project.

The Dutch NCP accepted the case and mediation began in June 2018. In August, both parties came to an agreement that problems in communication had indeed occurred, though parties disagreed about whether or not Nuon had properly communicated with local residents. The parties agreed that in future, Nuon should better communicate its specific role in its projects to enable stakeholders to assess its compliance with the OECD Guidelines. The parties agreed to continue their dialogue and follow-up with the NCP regarding these recommendations after one year.

³ The UNGPs are in line with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly Resolution 60/147, 16 December 2005).

⁴ See Hou Friesland Mooi vs. Nuon case description and related materials at https://complaints.oecdwatch.org/cases/Case_497.

ii. Remedy-related result: determination of non-compliance with the Guidelines

The case **Fivas vs. Bresser**⁵ reached no agreement, but the Dutch NCP did issue a determination of the company's non-compliance with the OECD Guidelines. The case was filed to the Dutch NCP in July 2017 by Fivas/Association for International Water Studies, the Initiative to Keep Hasankeyf Alive, and Hasankeyf Matters against a Dutch foundation relocation company called Bresser. Bresser's subsidiary, Bresser Eurasia, had been hired by Turkey's State Hydraulics Works to relocate the Zeynel Bey Tomb in Hasankeyf, Turkey. The complainants alleged that Bresser had failed to undertake meaningful consultation with the local population as part of its due diligence process, and that the relocation and encasement of the tomb violated their cultural rights and degraded the tomb's value as a cultural heritage.

Six months after receiving the complaint, the Dutch NCP issued its initial assessment accepting it. Mediation ensued, but no agreement was reached, and the NCP moved ahead to issue a final statement. The NCP confirmed that even though Bresser is a smaller enterprise, the size of an enterprise does not affect its responsibility to conduct due diligence. The Dutch NCP determined that Bresser had not fully satisfied the due diligence criteria of the OECD Guidelines, and it issued several recommendations for Bresser to be followed-up with a year after conclusion of the case.

Although the determination counts as some form of remedy for complainants, there was no change of circumstances on the ground for the impacted community. The complainants remain frustrated that the Dutch NCP did not encourage Bresser to halt activity in Hasankeyf during the complaint. Nor did the final statement solicit from Bresser an acknowledgement of its responsibility regarding the human right to culture, its commitment to cease operations until it had consent of the local population. The statement did urge Bresser to improve its due diligence procedures and related communications and transparency in a few ways.

Cases achieving no remedy for complainants

The remaining cases led by NGOs and communities and concluded in 2018 did not achieve remedy. The procedures of NCPs cited above contributed to this outcome.

The case **Bruno Manser Fonds (BMF) vs. Sakto Corp**⁶ has the distinction of being the only case that falls under two annual state of remedy reports, since the Canadian NCP rejected it twice, replacing its initial final statement in 2017 with a new one in 2018. The NCP's proceedings in the case flouted the rules for NCPs regarding complaint-handling.

BMF first filed its complaint against Sakto in January 2016, alleging the real estate and investment holding company had breached the OECD Guidelines' disclosure standards by failing to disclose its financial results and the sources of its funding. The complaint sought disclosure to rule out suspicions the company might be involved in laundering the proceeds of corruption from Malaysia. In October 2016, the NCP issued a draft 11-page acceptance of the complaint, finding the claims sufficiently material and substantiated to warrant further consideration. Then five months later, the NCP did an unexplained about-face and offered complainants a one-page draft final statement rejecting the complaint. In an effort to blow the whistle on this unexplained change of stance, the complainant BMF released both draft statements.

⁵ See Fivas vs. Bresser case description and related materials at https://complaints.oecdwatch.org/cases/Case_485.

⁶ See BMF vs. Sakto Corp case description and related materials at https://complaints.oecdwatch.org/cases/Case_471.

In July 2017, the NCP then issued a public final statement rejecting the complaint, this time revealing pressure it had faced from Sakto during the specific instance process, including: “Sakto involving a Member of Parliament during the confidential NCP assessment process; (...) Sakto’s aggressive challenge of the NCP’s jurisdiction; (...) Sakto’s legal counsel making submissions to the Government of Canada’s Deputy Minister of Justice....”. The NCP also accused BMF of “inappropriately sharing confidential information with Canadian and foreign NGOs about the ongoing NCP process” and of going to the media with the organization’s concerns regarding the NCP’s process.⁷

The case appeared concluded in July 2017, and it was included in OECD Watch’s 2017 State of Remedy briefing paper. But without warning in May 2018 the Canadian NCP again changed course and contradicted itself, retracting its detailed eight-page final statement of July 2017 and replacing it with another new one-page final statement that does not explain why the July 2017 final statement was being replaced. This dramatically shortened new final statement appears biased because it removes all mention of concerns about Sakto’s conduct (as detailed in the July 2017 final statement), but still accuses BMF (alone) of breaching confidentiality. Shortly thereafter, BMF, MiningWatch Canada, and OECD Watch received letters from the Canadian Department of Justice, on behalf of the NCP, asking the organizations to remove copies of the NCP’s October 2016 draft initial assessment proposing to accept the case.

The Canadian NCP’s actions in this case mark a particular low in the history of dispute resolution by NCPs. The Canadian NCP failed to act in a manner that was transparent and accountability, and failed to handle the complaint in a manner that was impartial, predictable, equitable, or compatible with the Guidelines.

A couple cases were unduly rejected at the initial assessment stage.

The case **FIDH et al vs. Italtel**⁸ was rejected at the initial assessment stage by the Italian NCP. In a September 2017 complaint, the International Federation for Human Rights (FIDH), Justice for Iran (JFI), and Redress argued that the Italian telecommunications company Italtel was breaching the OECD Guidelines in relation to its business activities in Iran including by forming a memorandum of understanding (MOU) with the Telecommunications Company of Iran (TCI) to provide advanced technologies and services that could be used by the Iranian government and Islamic Revolutionary Guard Corp (IRGC) for Internet censorship and suppression of a wide range of human rights and crushing of political dissent in Iran. The complainants sought an immediate moratorium of business negotiations between Italtel and TCI until actual and potential breaches of the Guidelines were addressed.

The Italian NCP rejected the complaint on 21 May 2018 (eight months after the complaint was filed) on grounds that information submitted by Italtel showed the project was of a narrower scope than that initially announced; that Italtel had taken adequate steps to disable interception of the telecommunication data; and that the MoU was yet to be finalized as a contract, suggesting “that the current business relationship cannot be assessed as an actual or potential breach of the guidelines.” The NCP thus determined that the issue at hand was not material or sufficiently substantiated to warrant further consideration.

⁷ BMF only publicized its concerns after the NCP issued its draft final statement rejecting the case in March 2017. The NCP cannot, and does not, accuse BMF of sharing confidential information with NGOs, or going to the media, in the period between BMF’s filing of the complaint in January 2016 and its receipt of the draft final statement in March 2017, with its curt and unexplained reversal of the NCP’s earlier draft initial assessment. This means the NCP had decided to reject the case before BMF shared any information with other NGOs or the media, and that the NCP did not decide to reject the case as a result of confidentiality concerns related to BMF. In our opinion, at the time BMF went public on the case, which the NCP’s draft final statement said it considered to be closed, BMF did so not as a “notifier,” but as a “whistleblower” on a flawed and harmful process undertaken by an office of the Government of Canada.

⁸ See FIDH et al vs. Italtel case description and related materials at https://complaints.oecdwatch.org/cases/Case_496.

In joint submissions to the Italian NCP, the complainants communicated their deep disagreements with the NCP on several grounds, and they urge correction of these issues in future complaints:

- The complainants feel the NCP mis-interpreted the requirement that complaints be material and substantiation. Complainants feel the issue is undoubtedly material to the Guidelines because it concerns due diligence and (potential) human rights impacts covered by the Guidelines. The charges were also substantiated since the complainants sufficiently demonstrated a plausible link between the prospective project and potential human rights violations, through a detailed analysis of the current Iranian context of repression of freedom of expression and of the explicit links between the TCI and the IRGC. The complainants note that the company itself admitted in its supplementary reply to the complainants that “it is not in a position to state definitively whether the communications put in place through its system will not be intercepted.” The complainants believe the Italian NCP made the admissibility criteria into an unreasonable threshold for the complainants, when the criteria should instead simply ensure the case is bona fide and plausible to discourage the filing of frivolous complaints;
- They complainants also believe the NCP misinterpreted “business relationship” as conceived under the Guidelines, for it is not necessary that Italtel enter into a binding contract or operational phase for a business relationship to exist and for the NCP to accept the case;

The complainants stress that Italtel activities have actual and potential adverse impact on human rights in Iran, but that the Italian NCP ignored or justified these *ex post facto*, selectively using only some elements of the OECD Due Diligence Guidance to reject the case. The complainants deeply regret the NCP’s decision not to proceed with a thorough, fair, and impartial mediation, where the complainants and company would have benefited from space for direct dialogue.

The case **Save Teghut Civic Initiative et al vs. EKF**⁹ was also rejected at the initial assessment stage, and so resulted in no remedies at all for the impacted communities. The complaint was filed in September 2017 by Save Teghut Civic Initiative (an alliance of NGOs and individuals) and Armenian Environmental Front Civic Initiative. The complaint centred on the Danish Export Credit Agency EKF’s 2013 backing of a loan to a high-risk mining project in Armenia, and whether EKF had conducted adequate due diligence.

The Teghut copper-molybdenum open-pit mining project involved serious and known risks from the start: according to complainants, the mining was to take place in the last 10% of forested space in Armenia, in an active seismic territory, and using a tailing dam design the World Bank determined is not recommended and that risked leaking pollutants into the water basin. Further, there was evidence that participation by local communities in decision-making was falsified, and that land would be expropriated without compensation.

The Danish NCP concluded from its Initial Assessment – delving much too far into facts at this stage without benefit of mediation to better understand the core concerns of the complainants – that EKF had carried out effective due diligence over the investment using processes the NCP assessed to be in accordance with the OECD Guidelines. The Danish NCP reached this conclusion because EKF set contractual environmental and health requirements on the client (a subsidiary of Vallex), and then monitored the client during the investment, met with stakeholders and local communities, (unsuccessfully) attempted to use leverage to secure better conduct, and finally withdrew from the investment after two years of mine operation.

⁹ See Save Teghut Civic Initiative et al vs. EKF case description and related materials at https://complaints.oecdwatch.org/cases/Case_541.

But as the complainants see it, the Danish NCP's analysis missed the key point: that EKF's due diligence *prior* to the investment was inadequate, because the risks were so well-known and so unavoidable that effective due diligence should have prevented EKF's investment in the first place. The mine projected depended on Danish financing and equipment to take place. Hoping to prevent the project, civil society met with EKF in 2012 and told them of the legal, environmental, and human rights risks inherent in the project. Then in October 2013 just a few months after the official investment statement was made, civil society sent EKF an urgent appeal to divest, detailing the project's non-compliance with the OECD Guidelines and national and international law. But EKF proceeded. EKF chose to overcome the non-compliance of the project by mandating the company to commit to environmental and social management plans, but without assessing the company's actual capacity and good faith to meet such commitments.

The Danish NCP refused the complainants request to critique the "gap analysis" EKF had received from an independent consultant about the project's risks. The complainants felt that had the NCP critiqued the analysis, the NCP would have realized that EKF was aware of such level of risk that it should have declined to invest. When the complainants tried to raise concerns about wrong-doing of other entities and persons directly-linked to the case, the Danish NCP insisted these should be filed as separate complaints, a significant and seemingly bureaucratic burden for the complainants.

The complainants were left deeply dissatisfied with the complaint's processing and the lack of results for communities. The mining company has gone bankrupt, and meanwhile the dam is in a critical state and cannot be further operated as its walls may collapse, there are signs of a strong acid drainage into nearby rivers, soils that have been irrigated with polluted water are now themselves polluted, and local communities are left in poverty with neither land nor mining jobs. Nobody has taken responsibility for the situation, but Danish entities have benefited royally, receiving their investment back through liquidation of company equipment and also saving themselves the reputation of being involved in a failed project. The complainants' frustration over the process with the Danish NCP was so great that it caused them to lose faith in the whole NCP system, discouraging them from filing a similar complaint to the Swedish NCP on mining investments in Armenia.

A couple cases went into mediation stage, but were beset by serious delays.

In the case **EC and IDI vs. ANZ Banking Group**¹⁰, two NGOs – Inclusive Development International and Equitable Cambodia – filed a joint complaint at the Australian NCP against ANZ Bank for impacts from ANZ's investments in Phnom Penh Sugar Co. Ltd. (PPS) for a sugar plantation and refinery operation. The complainants alleged that PPS had forcibly displaced 681 Cambodian families through military-backed land seizures and destruction of crops and property, engaged in the arbitrary arrest and intimidation of villagers, and in the widespread use of child labour and dangerous working conditions that led to the death of several workers. As the complaint pointed out, the situation had been reported extensively through public media and NGO campaigning even before ANZ issued a loan to PPS. The complainants argued that ANZ's due diligence should therefore have made it refuse to offer PPS the loan, and because ANZ did proceed with the loan, ANZ was thus contributing to the adverse impacts caused by PPS.

Extensive delays occurred in this case too: The Australian NCP commenced its Initial Assessment proceedings in November 2014, but took more than a year to progress to mediation. When the parties did not reach agreement after four months of mediation in 2015, the NCP then took a full two and a half years to issue its final statement.

¹⁰ See EC and IDI vs. ANZ Banking Group case description and related materials at https://complaints.oecdwatch.org/cases/Case_343.

Although delays occurred in the processing of the complaint, the complainants noted a few positive outcomes. The complainants felt the Australian NCP's handling of the case improved markedly once the new NCP was appointed in the context of the review underway at the NCP and OECD Watch's substantiated submission about the NCP. The new NCP started the examination afresh and did a much better job. The NCP admitted that shortcomings in its practices had caused the delays. The NCP agreed with the complainants that ANZ should have known about the risks associated with PPS and thus recommended that the bank strengthen and improve compliance with its due diligence standards. The NCP also recommended that ANZ establish a grievance mechanism for complainants.

Nevertheless, the complainants felt the Australian NCP was too weak in declining to draw any conclusions on the responsibility of ANZ and the need for remediation. The Australian NCP did not call upon ANZ to provide redress for the victims in this case, saying such a declaration by it would fall outside its role as a non-judicial mechanism. The NCP also did not make a finding on whether or not ANZ had contributed to the harms identified. The Cambodian families, meanwhile, are still seeking remedy for the numerous harms they have experienced.

Following conclusion of the case, in October 2018, ANZ's CEO told an Australian parliamentary committee that ANZ may consider providing some compensation to the Cambodian families. At ANZ's AGM in December 2018, the CEO affirmed that ANZ would consider compensation pending the outcome of a government process.

The case **FOCO et al vs. Barrick Gold**¹¹ was also plagued by so many bureaucratic delays that after *eight* years of struggle, the complainants withdrew the case before it reached a natural conclusion. Filed in 2011 to the Argentinian NCP, the case alleged that Barrick Exploraciones Argentinas S.A. and Exploraciones Mineras S.A, subsidiaries of the Canadian mining company Barrick Gold Corporation, had breached numerous Guidelines provisions on disclosure, environment, and general policies at the Veladero and Pascua Lama gold mines in the Argentine San Juan province. The complainants argued the mines had caused numerous harms, including systematic pollution of the area generating serious environmental and health impacts; severe disruption of regional livelihoods, economy, and land access; violent repression of local activists; and improper involvement by the company in local political decision-making.

Delays began immediately after filing. In the first two years of the case handling, the NCP experienced staff turnover and also sought additional documentation from FOCO. Two years after the filing, in 2013 the Argentinian NCP finally accepted the case – but then again activity floundered on the case. It wasn't until 2015 that Barrick agreed to join mediation. More staff-turnover caused delays until the second half of 2016. Email exchanges continued through 2017, but by April 2018, the complaints withdrew, feeling the NCP was stalling the case on purpose, failing to manage the case in a timely and effective manner to support meaningful in-person mediation between the parties.

Frustrated by the Argentinian NCP's refusal to properly follow the Procedural Guidance set out by the OECD, the complainants felt that the entire process was a waste of time, energy, and resources. That April, the complainants, joined by a network of other organisations, sent a letter to the Argentine Ministry of Foreign Affairs explaining their deep frustration with the case and demanding serious reforms at the Argentina NCP. The letter received no response, and this led the complainants to finally withdraw from the case.

¹¹ See FOCO et al vs. Barrick Gold case description and related materials at https://complaints.oecdwatch.org/cases/Case_221.

On 17 September 2018, the NCP issued its final statement, showing no interest to discuss the claim itself, but only the processing by the NCP. To date, the mines are still in operation and the complainants have not received any positive change, neither from the NCP nor any other mechanism. After more than eight years, the situation is as it was at the beginning.

Another case surpassed the willingness and capacity of the NCP to engage, prompting the parties eventually to seek help elsewhere.

The case of **Forum Suape et al. vs. Van Oord**¹² likely should not be included among the OECD's count of cases concluded in 2018, as according to our contact with both the complainants and NCP, the case is still under mediation. Forum Suape et al. vs. Van Oord concerned impacts of two dredging projects at a port in Brazil. In June 2015, two Brazilian NGOs, a Brazilian union of fishermen and shellfish collectors, and a Dutch NGO filed a complaint at the Brazilian and Dutch NCPs against Van Oord (a Dutch dredging company), Atradius Dutch State Business (ADSB, the Dutch export credit agency), and the Suape Industrial Port Authority. Complainants argued that Van Oord's dredging operations at the Port of Suape had caused numerous adverse human rights and environmental impacts, including increased flooding and loss of homes and livelihoods, coral reefs, mangrove forests, and local fish populations. Complainants alleged that Van Oord, ADSB, and the Suape Port Authority had failed to conduct appropriate human rights due diligence, including meaningfully engaging local stakeholders and providing them timely information about the project's adverse impacts. The complainants asked the Dutch and Brazilian NCPs to work together to urge the companies to rehabilitate damaged area and take effective measures to protect the livelihoods of fishermen and other local communities endangered by the dredging operations.

The NCPs decided that the Brazilian NCP would take the lead in the case against Van Oord, while the Dutch NCP would take the lead in the case against ADSB.¹³ In August 2015, the Brazilian NCP accepted the complaint against Van Oord, but rejected the complaint against the Suape Port Authority, concluding incorrectly that the OECD Guidelines do not apply to the Port Authority because it is a public company. The Brazilian NCP hosted two mediation meetings between Van Oord and the complainants in the third quarter of 2015, but was not prepared to mediate sessions with the affected communities in and around the Suape port area – thereby refusing to fulfil one of its most basic functions as an NCP. Despite the NCP's refusal to offer its good offices to facilitate dialogue, the complainants and Van Oord sought their own recourse beyond the NCP. They jointly engaged a professional mediator to organise meetings without the involvement of the Brazilian NCP. Pending eventual results of this mediations process, the Brazilian NCP suspended its handling of this case. The parallel mediations have not yet reached an outcome, and the Brazilian NCP will not issue a final statement until the mediations conclude.

The next case was one in which extensive limitation of transparency—rather than commitment to determinations and consequences—were attempted unsuccessfully as a means to encourage a company to mediate.

¹² See Forum Suape et al. vs. Van Oord case description and related materials at https://complaints.oecdwatch.org/cases/Case_367

¹³ In handling the complaint against ADSB, the Dutch NCP translated the complaint from Portuguese into English, and facilitated a dialogue between the complainants and ADSB and the Dutch Ministry of Finance, which is responsible for the policies of ADSB. In November 2016, the NCP published a final statement concluding that ADSB qualifies as a multinational under the Guidelines and should have done a better job in ensuring that Van Oord and its client, the Suape port authority, made every effort to prevent and alleviate the negative effects of the projects. This was the first NCP case declared in favour of a complaint against a government-supported Export Credit Agency. In May 2018 the Dutch NCP evaluated the recommendations it had made in its final statement.

In the case **ECCHR et al vs. TÜV Rheinland AG¹⁴**, restrictions on transparency and campaigning were a serious challenge for the complainants. The complaint was filed in May 2016 to the German NCP by the European Center for Constitutional and Human Rights (ECCHR), together with FEMNET, Medico International, the Garment Workers Unity Forum, the Comrade Rubel Memorial Center, and survivors of the Rana Plaza Factory collapse. The complainants argued that TÜV Rheinland AG and its subsidiary TÜV Rheinland India Pvt. Ltd. had carried out an inadequate social audit of Phantom Apparel, an apparel factory in the Rana Plaza building, less than a year before the building's collapse. The audit failed to accurately report serious labor rights violations at Phantom including child labour, sex discrimination, and forced overtime, and it declared the building's construction quality as good.

The German NCP accepted the case in July 2016. Because the German procedural guidelines unduly and unnecessarily restrict parties from campaigning, the complainants were prevented from speaking publicly about the case throughout the time of the mediation. Further, TÜV agreed to mediate only if complainants signed an additional confidentiality agreement. The affected Bangladeshi complainants were not willing to sign this additional agreement as they perceived the extra limitation on their right of free speech to be both offensive and damaging to their negotiating position with the company.

As a consequence, they were excluded from the meetings with TÜV. The NCP did not publish the initial assessment in an attempt to maintain a "positive" atmosphere for mediation, although the complainants felt it would have been beneficial to inform the larger public about the case.

In the initial assessment, the NCP rejected the aspects of the complaint regarding the building structure and the Rana Plaza collapse. Because the question in the complaint was narrowed to the future improvement of the auditing system overall, TÜV successfully avoided discussion of its own failures of compliance with the Guidelines. Mediation ensued for two years, but then TÜV Rheinland abruptly broke off the conversation, saying the draft agreement text – which already focused only on broader social audit policies, and did so more weakly than the complainants sought – was not sufficiently balanced towards their views. The mediation thus reached no agreement and achieved no remedy for the victims.

The German NCP did issue a unilateral final statement in July 2018, which overall the complainants welcomed: The complainants appreciated the NCP's acknowledgement of the need for reform of social audits in the textile industry and the NCP's recommendation for a multi-stakeholder dialogue to address key challenges with social audits, including problematic issues such as conflict of interest generated by factories paying auditors and the need for transparency of audit reports.

But the NCP did not issue a determination on whether TÜV Rheinland had breached the Guidelines, and the case resulted in no compensation or improved circumstances for the complainants, and no strengthened policies by the company moving forward. Although TÜV Rheinland and the head of the German NCP together wrote a personal message to the Bangladeshi complainants "conveying their heart-felt sympathies for the suffering endured," the message did not admit or apologize for wrongdoing by the company.

At the end, the complainants felt their sacrifices on several points were not worth the outcome achieved. While the complainants appreciate improvements in the German NCPs complaint-handling procedures since 2010, they seek a changed approach in a few key areas

- The extreme confidentiality measures taken in the case did not help achieve an agreement; they merely enabled the company to pretend to engage, stall the process while preventing

¹⁴ See ECCHR et al vs. TÜV Rheinland AG case description and related materials at https://complaints.oecdwatch.org/cases/Case_509.

NGO campaigning, then out with no consequences. The German NCP should reject such unfair and unhelpful restraints on transparency. The German NCP must enable public campaigning in Germany, for if the public is not given the opportunity to know of and support business reforms, then companies will not react in specific instances;

- The complainants agreed to TÜV Rheinland's demand to shift the complaint's intended focus away from TÜV's own actions and responsibility. But when the agreement fell through, the complainants gained nothing from TÜV – neither admissions on its own poor conduct nor its commitment to broader audit reform. To prevent such gaming of the dispute system, the German NCP should allow an alteration of the complaint scope only if the German NCP commits to issue a determination on companies' compliance if agreement fails. This would provide meaningful incentive for companies to proceed;
- Finally, from the start TÜV Rheinland appeared in the mediation with legal assistance from a law firm, whose lawyers' training and goal was to avert damage to TÜV Rheinland rather than seek a mediated solution between the parties. The complainants urge the NCP and all NCPs to prevent or set parameters for parties hiring external legal counsel during the mediation process, as they deepen the already stark power imbalance between big company and NGOs

Finally, a few other cases filed by an association called ADIMED (Action for Development and Medical Innovation) were rejected at the initial assessment stage on territorial jurisdictional grounds.

In **ADIMED vs. Pharmakina SA**¹⁵, filed in May 2018, ADIMED argued that Pharmakina SA, a manufacturer of quinine in the DRC, had breached the OECD Guidelines by cooperating with rebel forces during the civil war in the DRC between 1996-1999 and violating human rights and labor law when laying off 139 workers during that time. The German NCP traced the ownership of the company, finding that it had not been owned by a German company, but is rather a DRC-headquartered company of which 99.99% of its shares have been, since 1999, held by a Luxembourg public limited company. The German NCP found that although a German company may have been a shareholder until 1997, that company ceased to exist at that time and could not form a basis for territorial jurisdiction. The German NCP declined to transfer the complaint to the Luxembourg NCP or any other NCP, saying this would have required an in-depth assessment of the material aspects of the case. In OECD Watch's opinion, rather than rejecting the case outright, the German NCP should have transferred the case to the Luxembourg NCP and allowed that NCP to do its own initial assessment.

In **ADIMED vs. Groupe Kilu and ES-KO International**¹⁶, filed in March 2018, concerned nine workers and dated from 2000 to 2008. The complaint argued that Kilu Group, a food storage company in the DRC, and ES-KO International Int'l, a Monaco consultant subcontracting with KILU Group, had breached employment provisions of the OECD Guidelines by violating several contract, firing, and compensation requirements towards its workers. The NCPs reported strong reluctance by the companies to engage in the case. The Belgian and French NCPs both rejected the case on grounds they lacked territorial jurisdiction over ES-KO in Monaco and Kilu group in the DRC. Although a branch of Kilu Group was located in Belgium, the Belgian NCP considered that the branch lacked independent legal personality from its parent in the DRC and could not be considered to establish Belgian jurisdiction over the company. The Belgian NCP encouraged the complainant to pursue the complaint under Congolese law, and also urged the OECD to explore ways to encourage the European microstates of Andorra, Lichtenstein, San Marino, the Vatican, Monaco, and Malta to promote the OECD Guidelines to their multinationals. ADIMED asked the Belgian and French NCPs

¹⁵ See ADIMED vs. Pharmakina SA case description and related materials at https://complaints.oecdwatch.org/cases/Case_538.

¹⁶ See ADIMED vs. Groupe Kilu and ES-KO International case description and related materials at https://complaints.oecdwatch.org/cases/Case_539 and https://complaints.oecdwatch.org/cases/Case_540.

to share the complaint with their consulates in Monaco. ADIMED believed that the French NCP did not follow through on this request, but the French NCP asserted it did.

A few highlights

Beyond the specific issue of remedy, a few positives are worth highlighting from the cases concluded in 2018.

- The case **Fivas et al. vs. Bresser** was the first to address the right to culture and cultural heritage. In that case, the Dutch NCP concluded that the right to culture and/or the right to cultural heritage and its conservation should be considered a human right under the OECD Guidelines.
- In the case **IDI et al. vs. ANZ Bank**, the Australian NCP recommended that ANZ Bank establish a grievance mechanism for complainants. OECD Watch strongly supports calls for financial institutions to take responsibility for their own linkage and contribution to human rights harms, including through establishing their own effective complaint mechanisms that can be directly access by complainants.
- The complainants in the case **ECCHR et al. vs. TÜV Rheinland** appreciated the effort the German NCP took to organize a video conference for the Bangladeshi complainants, attempting to make it easier for them to engage in the mediation process. OECD Watch calls on other NCPs to take such effort to promote the accessibility of the complaint procedure.
- We are pleased to read in the OECD's annual report that NCPs are increasingly making determinations in their final statements: "[O]ver half (56%) included determinations on whether the enterprises in question observed the recommendations of the Guidelines." There is strong empirical evidence suggesting that determinations help lead to agreements in NCP cases. OECD Watch's analysis of all the cases filed by NGOs and communities since from 2000 to 2017 reveals that out of the 31 cases that resulted in an agreement between parties, 22, or a full 71%, were facilitated by NCPs that make determinations.¹⁷ The numbers suggest a correlation between achieving agreements and the practice of issuing determinations.
- We are glad to read in the OECD's annual report that "77% of final statements included provision for monitoring and follow up, doubling the rate reported in 2017." It is essential that NCPs follow-up on complaints a year or so after their conclusion, not only to assess if companies are respecting and implementing the recommendations, but also to see if complainants are benefiting as intended from the dispute resolution, if men and women are benefiting equally, and if complainants are facing any reprisals for having raised the complaint in the first place.

Conclusion and Recommendations

As emphasized at the outset of this paper, the OECD Guidelines have unique potential to strengthen the global system of corporate governance and provide access to remedy for the victims of corporate misconduct. Moreover, the NCPs themselves have a unique role to play in advancing a humane

¹⁷ According to OECD, Scoping paper: Recommendations and Determinations in Specific Instances, DAF/INV/NCP(2018)46, 4 June 2018, the following NCPs make determinations, either in policy or in practice: Australia, Canada, Chile, Colombia, Czech Republic, Denmark, Finland, France, Italy, Korea, Lithuania, Luxembourg, Morocco, Netherlands, Norway, Peru, Poland, Sweden, and UK.

business model, and in giving voice to the victims of corporate development activities to demand that companies remedy the harms they have caused.

Unfortunately, in practice, neither the Guidelines nor all of the NCPs are meeting their full potential. The Guidelines, while far-reaching, contain a number of important gaps in regard to new and growing threats to human rights and the environment. For example, the Guidelines do not sufficiently address business responsibility towards the challenge of climate change, nor do they guide companies on the need to prevent, discourage, or mitigate reprisals against human rights activists defending their rights against the negative impacts of development activities. They pay scant attention to the disparate impacts that businesses have on women as opposed to men, and they overlook important rights such as to free, prior and informed consent before use of land.

Meanwhile, the NCP system continues to be largely inaccessible, unpredictable, and unable to facilitate effective access to meaningful remedy for victims of irresponsible business conduct. NCPs operate with highly variable organisational structures and rules of procedure and handle cases in very different ways, making it difficult for complainants to know what to expect. While there have been a few cases of positive remedy-related outcomes from NCP complaints the large majority of complainants achieve no outcome that rectifies the harm done to them.

If the Guidelines and the NCP system are to meet their potential to play an important role in ensuring responsible business conduct around the world, revisions are urgently needed to both the OECD Guidelines and the rules governing how NCPs function.

OECD Watch acknowledges that the low achievement of meaningful remedy in specific instances is often not a reflection of low effort invested by NCPs into each case. Some NCPs put significant effort into handling specific instances, and share stakeholders' desire for harms to communities and workers to be addressed swiftly and thoroughly. Instead, we think the low results come from several amendable practices of NCPs: refusal to issue clear determinations of companies' non-compliance with the Guidelines' recommendations, undue and unexplained delays in case-handling, misinterpretation of the admissibility criteria and prematurely extensive consideration of facts, both leading to untimely rejection of cases at the initial assessment phase, and unhelpful restraints on transparency exacerbating the power imbalance between companies and complainants. These reasons are not exhaustive: OECD Watch's Campaign Demands¹⁸, our 2015 report *Remedy Remains Rare*¹⁹, and our 4x10 Plan for why and how to unlock the potential of the OECD Guidelines²⁰, all outline many other common NCP organizational structures and practices that limit access to remedy.

¹⁸ OECD Watch, Our campaign demands for policymakers, November 2017, available at https://www.oecdwatch.org/wp-content/uploads/sites/8/2017/11/OECD-Watch_Campaign_demands.pdf.

¹⁹ OECD Watch, *Remedy Remains Rare*, June 2015, available at <https://www.oecdwatch.org/2015/06/01/remedy-remains-rare/>.

²⁰ OECD Watch, A "4x10" plan for why and how to unlock the potential of the OECD Guidelines through effective National Contact Points, November 2017, available at <https://www.somo.nl/wp-content/uploads/2018/04/4x10-plan-for-why-and-how-to-unlock-the-potential-of-the-OECD-Guidelines-update.pdf>.



Recommendations for governments

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

- Governments must explicitly recognize that the primary reason for the NCPs is to **ensure access to remedy** for victims.
- Governments should ensure that NCPs have an **organizational structure conducive to impartial decision-making**, such as a multi-partite structure involving various government agencies, a structure involving international experts and stakeholders, or a structure involving an oversight steering board.
- Governments must provide **NCPs sufficient resources** to accomplish their mandate, including to support indigent complainants in utilizing the complaint and mediation services.
- Governments should **ensure their NCPs' are accessible** to potential complainants, by engaging in broad-based promotional activities with stakeholders, providing information on the specific instance process on their websites, and accepting cases that present a plausible claim, meeting the admissibility criteria proposed in the Procedural Guidance.
- Governments should **enhance the predictability of their NCPs** by ensuring NCPs set and follow reasonable timelines for case processing, communicate regularly with both parties regarding complaint status, and base their final statements only on material available to both parties.
- Governments should ensure their NCPs strike a **meaningful balance between transparency and confidentiality** that permits reasonable campaigning activities.
- Governments should help NCPs to **support the safety of activists using the mechanism**, who increasingly face threats for their engagement in claims on corporate conduct.
- Governments should require NCPs to **issue determinations** of non-compliance or compliance with the Guidelines, as a measure to encourage companies to implement the Guidelines' recommendations and participate meaningfully in the specific instance process.
- Governments should **assign consequences** for companies' refusal to mediate or implement the NCPs recommendations, or for companies' failure to comply with the Guidelines. Consequences can include exclusion from trade promotion privileges, public procurement contracts, export credit guarantees, and investment missions.
- Governments must **require NCPs to follow-up on case outcomes**, to encourage compliance with their recommendations and with the Guidelines.

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

OECD Watch Secretariat (c/o SOMO) Sarphatistraat 30 1018 GL Amsterdam	Marian Ingrams, Esq., Coordinator & Researcher, m.ingrams@oecdwatch.org
---	---



<p>The Netherlands Ph: +31 20 6391291 Fax: + 31 20 6391321 info@oecdwatch.org www.oecdwatch.org</p>	<p>Dr. Joseph Wilde-Ramsing, Senior Researcher and Coordinator, j.wilde@oecdwatch.org</p>
--	--