

Can National Contact Points adequately remedy human rights impacts or do their roots as a CSR initiative transform remedy and human rights into corporate processes?

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About the authors: Drs Ciara Hackett and Ciaran O'Kelly are both Senior Lecturers in the School of Law at Queen's University Belfast. They have extensively researched the National Contact Points of Ireland and the UK, focussing on the procedural requirements outlined by the OECD Guidelines and interpreting them through the practice of the NCP complaint and reporting process. This blog post is a snapshot of current (and still ongoing) research into the UK NCP specific instance procedure.

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

The National Contact Point

The National Contact Point is a unique implementation mechanism which provides a platform for resolving issues via mediation. Procedural guidance influences the

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

The Specific Instance Procedure

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

The UK NCP: What hope for victims

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

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

In this sense then, they are not necessarily of value to the current victim, but they have a role to play in limiting the number of potential future victims of corporate human rights impacts. This does have value but our concern, and the one that underpins our research is that it draws human rights within a CSR framework – emphasising future good will to the detriment of today's victim. Intentionally or not, the gravitational pull of CSR practices

means that the corporate responsibility to respect human rights is brought within the remit of a pragmatic proceduralism. The obligation towards remedy in the UNGPs is read in this context as a procedural subject of negotiation rather than something accessible to victims by right.

To test this, we continue to look at all complaints filed with the UK NCP since 2001 (84 and counting). We categorise these by complainant, the types of failings alleged, and the outcomes sought. Finally, we look at the outcomes recommended by the UK NCP. Sitting alongside this quantitative data, we returned to the language of the complaints and the reports emerging. We are finding that despite being heralded as a “good” NCP, the UK NCP has contributed to the process of transforming remedy for human rights impact *away* from reactionary restitution towards a process of improving *future* respects and *future* duties to mitigate *future* harms. Whereas this has a role to play in improving the business and human rights corporate landscape, this can only ever be secondary to remedying the rights of current victims in a manner that resolves (or alleviates) their issues. For it to be otherwise would mean prioritising corporate interests over victims’ right to remedy. This is the antithesis of the business and human rights movement and should be avoided at all costs.

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

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