

The OECD NCPs: 'Unfit for Purpose'

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

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

The OECD recently published its own 'stocktake' of the Guidelines and invited the public to

submit comments. We took the opportunity to provide input to the public consultation using it to focus on the implementation mechanism underpinning the Guidelines: the grievance mechanisms of the NCPs for responsible business conduct. We focused on NCPs as we believe that the fitness for purpose of the Guidelines is only as strong as the accessibility and responsiveness of the mechanism through which individuals and communities can resolve the inevitable issues that arise in relation to the implementation of the Guidelines. Our submission to the stocktake was grounded in our peer reviewed research on the ability of NCPs to offer effective remedy. While the OECD may take the technical view that NCPs are not designed to offer formal remedy but rather a mediation platform for dialogue and solutions, it would be short sighted of the OECD not to recognise that NCPs frequently operate within complicated political and legal ecosystems in which people cannot access a functioning rule of law. Since 2001, NCPs have handled over 500 complaints (called 'specific instances' in OECD jargon). Looking at the increasingly complex vulnerability on people and institutions posed by climate change, we envisage that this trend of inability to access formal courts will continue. People will turn to whatever means available to access remedy and for many, the NCPs will be the only way to hold MNEs accountable for irresponsible business conduct. For the OECD to deny that, is, at best putting form over substance or at worst, denying reality.

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

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

The Guidelines for MNEs were last updated in 2011. Since then, a huge amount of research has been conducted on the question of efficacy and overall, the conclusion is not positive. Transformational change is needed within the structures of the NCPs to make them fit to

cope with the significantly evolving environmental agenda and the readiness of citizens and lawyers to use all available legal mechanisms to promote and uphold an environmental agenda that is varied in legal claims and grounded in a people-orientated approach. Scanning the horizon, we predict an increasing number of specific instances being brought before NCPs, notably in the context of environmental degradation and the climate emergency. Specifically, with regards to the EU Green Deal and Fit for 55 Package, we anticipate that European NCPs will be increasingly confronted with complex demands against MNEs and financial institutions around climate change and the environment which will require a more harmonised and transparent approach. Onboarding these recommendations is critical for the future orientation and fitness of NCPs and the increasing pressures that NCPs will face as they encounter more David and Goliath situations supported by an increasingly mature, strategic and demanding public interest driven civil society. Failing which, it would not be unimaginable to see a creative legal case brought against the OECD's member states themselves holding them to account for the lack of fitness for purpose of their own NCP mechanisms.

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