

# A remediation system is only as strong as its weakest link: challenges and opportunities for Argentina's National Contact Point

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In the context of the United Nations Guiding Principles on Business and Human Rights (UNGPs) remediation can be achieved through state-based judicial and non-judicial mechanisms, as well as non-state non-judicial mechanisms, commonly known as operational or company-level grievance mechanisms. The "bouquet of remedies" recognized by the UNGPs provides a wide range of avenues that can better respond to the complexity of business structures, human rights abuses and rightsholders affected by the activities of business enterprises. A combination of different mechanisms can offer a more robust path to solve business-related human rights abuses and ensure integral remediation of the negative impacts that affect individuals and communities.

Within this framework, OECD's National Contact Points for Responsible Business Conduct (NCPs) constitute one of the avenues to ensure access to remedy as conceived by the UNGPs. NCPs are agencies established by governments with a twofold mandate: to promote the OECD Guidelines for Multinational Enterprises (the OECD Guidelines), and related due diligence guidance; and to handle cases (referred to as "specific instances") as a non-judicial grievance mechanism. As long as they preserve functional equivalence by conducting their mandate according to the core criteria set by the Guidelines—namely visibility, accessibility, transparency, and accountability—, NCPs can adopt different structures to fulfil their obligations.

All governments adhering to the OECD Guidelines have the legal obligation to set up an NCP. To date, there are therefore 50 NCPs across the globe. Combined, they have intervened in over 500 specific instances in over 100 jurisdictions and territories. Although originally NCPs had a predominantly promotional and informational mandate, today (almost) every National Action Plan on Business and Human Rights (NAP) has addressed the need to strengthen these agencies<sup>[1]</sup> as part of states commitments to improve access to remedy and contribute to reinforce pillar III of the UNGPs. Some countries have even included the recommendations derived from the NCPs peer reviews into their NAPs, showing efforts to strengthen and align public policy commitments regarding responsible business conduct.<sup>[2]</sup>

**Overview of Argentina's National Contact Point for Responsible Business Conduct**

Since its establishment, the Argentine NCP (hereinafter PNCA, by its acronym in Spanish) has intervened fifteen times through specific instances in response to requests from different stakeholders<sup>[3]</sup>. All of them have been concluded, although with mixed results and mostly without reaching an agreement between the parties<sup>[4]</sup>. The interventions of the NCP have mainly addressed requests, submitted mostly by civil society organisations, related to non-compliance with the chapters of the Guidelines for MNEs on general principles (II); human rights (IV), employment and labour relations (V) and the environment (VI).

When analysing these non-judicial procedures, it is possible to observe a series of issues in the way that the specific instances were conducted. Generally, the settlement of the procedures was not a consequence of an agreement, but of the withdrawal of the claim or due to the lack of a suitable environment to conduct good faith negotiation between the parties. Moreover, final statements do not show a thorough analysis of the claim nor of the different matters whose non-compliance was reported. Specific recommendations, follow-up or monitoring proposals are also not considered in any of the final statements. The procedures had, with a single exception, a duration of up to thirteen years<sup>[5]</sup>, widely exceeding the timeframe recommended by OECD Guidelines and by the local procedures' manual.

This shows a clear need (and opportunity) to improve both the NCP structure and procedures, following a clearer and reinforced procedural guidance to ensure predictability and transparency before the concern parties, but also to strengthen and generate trust with its stakeholders, who may question the effectiveness of this mechanism to guarantee access to remedy. Along the same lines, it would be very important for the NCP to establish an adequate monitoring strategy or approach to help businesses prevent future negative impacts and commit to conduct due diligence practices accordingly. Only under these conditions will the mechanism be in a position to comply with global standards and expectations on access to remedy, in accordance with the UNGPs and the OECD Guidelines.

### **Opportunities and challenges to build policy coherence and strengthen functional equivalence**

Despite its difficulties, and since its peer review process took place, the PNCA has made modest but significant progress in fulfilling its functions. However, there are still noteworthy gaps between its actual performance and the global expectations of the NCP system. In this regard, the deficient compliance by the NCP with the functional equivalence standards of the OECD Guidelines and the effectiveness criteria included in the UNGP 31 undermines its credibility and impacts the possibility for other affected parties to seek redress through the specific instances' mechanism in the future. This may also compromise the credibility of the NCPs system as a whole, as well as the set of state mechanisms available to provide access to remedy and could endanger the overall transformation of business practices in accordance with responsible business standards.

Many of the obstacles the PNCA is facing, are common to other Latin American NCPs. A constructive dialogue space such as the Regional Network of Latin American and Caribbean (LAC) NCPs can help build and foster alliances that can contribute to address the challenges and opportunities for Latin American countries. Managing common geographical and structural issues could be an interesting strategy, especially as there is a need for a regional approach when it comes to promoting and conducting due diligence. This can also help build a coherent approach to strengthen their mandate as a remedy mechanism by discussing current or past specific instances to identify strategic actions, institutional or policy gaps, or even to produce regional documents building on Inter-American human rights documents and experience.

There are two key opportunities for the PNCA to review its mandate and propose strategies to improve and align its activities both to promote responsible business conduct (RBC) and risk-based due diligence and to ensure adequate access to remedy: first, strengthening its work to integrate the recommendations received in the context of its peer review process (conducted in 2019<sup>[6]</sup>), on which some progress has already been made, although it is still

not enough. The second possibility arises from the resumption of the drafting process of Argentina's first NAP, now led by the Human Rights Directorate of the Ministry of Foreign Affairs, International Trade and Worship. Certainly, Latin American experiences have shown the importance of these instances of coordination regarding public policy in business and human rights and RBC.

These two abovementioned processes have the potential to contribute to improve the PNCA's procedures as they offer the right circumstances to implement structural changes that can favour the necessary transformations to enhance its capabilities and become an efficient state body for technical consultation and dispute resolution in RBC-related matters.

[1] Except for Lithuania, all National Action Plans on Business and Human Rights (NAP) developed to date contain references to NCPs. Not being members of the OECD or adherents to the OECD Guidelines, the NAPs of Kenya, Pakistan, Thailand, and Uganda also do not include references to this mechanism. For a more thorough analysis: <https://globalnaps.org/issue/oecd-national-contact-points-ncps/>

[2] Chile included their peer review recommendations as commitments of its first NAP. Brazil is developing a responsible business conduct action plan, under the direction of its NCP while undergoing their peer review process. Finally, Mexico is currently working on its first NAP and their peer review is scheduled for 2023. Information on Brazil's RBC Action Plan is available at: <https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/camex/pcn/pacer-1>. For more information on the peer review processes, including the conclusions and recommendations made to Argentina and Chile, see: <https://mneguidelines.oecd.org/ncppeerreviews.htm>

[3] Information on Specific Instances is available at: <https://www.cancilleria.gob.ar/es/iniciativas/pnca/solicitud-de-instancias-especificas>

[4] According to the final statements published by the NCP, only two cases have concluded with an agreement between the parties, both prior to the 2011 revision of the OECD Guidelines.

[5] The longest specific instance with a duration of almost 13 years, *FOCO c. Shell C.A.P.S.A*, was initiated in May 2008 and completed in February 2021. The final statement is available at: [https://cancilleria.gob.ar/userfiles/ut/instancia\\_especifica\\_foco\\_-\\_shell.pdf](https://cancilleria.gob.ar/userfiles/ut/instancia_especifica_foco_-_shell.pdf)

[6] OECD (2019), OECD Guidelines for Multinational Enterprises National Contact Point Peer Reviews: Argentina, <https://mneguidelines.oecd.org/ncppeerreviews.htm>

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