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# The Role of the OECD Guidelines for Multinational Enterprises and the National Contact Points in Shaping the Future of Corporate Accountability

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## Abstract

The OECD Guidelines for Multinational Enterprises (OECD Guidelines) are one of the few measures that were successfully realised on the international plane in the decades-long pursuit of corporate accountability. For 20 years, the OECD Guidelines and their non-judicial grievance mechanism, the National Contact Point (NCP), have been continuously resorted to by victims and advocates in holding businesses to account for various abuses and misbehaviours. Interestingly, NCP cases (specific instances) have only steadily increased through the years despite the challenges, limitations and criticisms that the mechanism has been confronted with. And more states continue to adhere to the Guidelines, OECD members and non-members alike, and bind themselves to the obligation of establishing an NCP within their territory. Such mechanism accordingly remains relevant, valuable and indispensable. This article seeks to revisit and examine the OECD Guidelines and the NCPs in light of the two United Nations (UN) pathways initiated by the UN Human Rights Council: the UN Guiding Principles on Business and Human Rights (UNGPR) and the elaboration of a potential treaty on business and human rights (BHR). It will identify and evaluate three important features that make the mechanism unique vis-à-vis other BHR mechanisms. The article will focus its analysis and discussion on how these features are able to or can meaningfully contribute to the UN pathways, as well as how they could be harnessed to improve existing propositions and drafts leading to the desired legally binding instrument. It will also identify some of the mechanism's shortcomings, and understand some of the points made in this regard. Finally, it will conclude with recommendations on how the mechanism

could be improved and how these features could assist in shaping the future of corporate accountability.

## Keywords

corporate accountability – business and human rights – OECD Guidelines – non-judicial mechanism – National Contact Point – UNGP

## 1 Introduction

The recent years have finally seen traction develop in the area of business and human rights (BHR). A multitude of research, discussions and negotiations culminated in the United Nations' (UN) issuance of two significant resolutions: (1) UN Human Rights Council (HRC) Resolution 17/4 (2011),<sup>1</sup> endorsing the UN Guiding Principles of Business and Human Rights (UNGPR) annexed in the Special Representative of the Secretary-General's final report in UN Document A/HRC/17/31,<sup>2</sup> and (2) UN HRC Resolution 26/9 (2014), establishing "an open-ended intergovernmental working group on transnational corporations and other business enterprises" which shall have the authority to elaborate a business and human rights treaty.<sup>3</sup> These resolutions have created two important pathways in the field. On one hand, the UNGP clarifies state and business duties and responsibilities in respect of human rights, and promotes access to remedies through existing grievance mechanisms. On the other hand, a potential treaty seeks to identify existing gaps and codify a legally binding instrument that shall regulate the activities of businesses in international human rights law.

While the aforementioned instruments are milestones that may signal the international community's better commitment for corporate accountability,

1 UNHRC Res 17/4 'Human Rights and Transnational Corporations and Other Business Enterprises' (6 July 2011) UN Doc A/HRC/RES/17/4.

2 UNCHR Res 17/31 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework)' (21 March 2011) UN Doc A/HRC/17/31 (UNGPR).

3 UNHRC Res 26/9 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (14 July 2014) UN Doc A/HRC/RES/26/9.

they do not provide the complete solution just yet. Support is needed for these two instruments to materialise and operationalise. The UNGP articulates the need to utilise and strengthen existing mechanisms, and identifies the OECD Guidelines for Multinational Enterprises (OECD Guidelines) with the National Contact Points (NCPs) as a concrete example of an established grievance mechanism that could provide effective remedy. This is particularly highlighted by the UNGP in its commentary where the OECD Guidelines are identified as one of the international frameworks whose efforts on human rights protection is aligned with the UNGP.<sup>4</sup> In fact, one could easily identify, upon a cursory reading of the relevant UNGP provisions in its second pillar (on the corporate responsibility to respect), their resemblance, if not identicalness, with the provisions and commentaries in the general policies and human rights chapters of the OECD Guidelines.<sup>5</sup>

UNHRC Resolution 26/9 provided broad brushstrokes that could consider past and current promising experiences in the drafting of a potential BHR treaty. And this may include the OECD Guidelines and the NCPs. The UN's Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Activities with Respect to Human Rights (OEIGWG), which was established through Resolution 26/9, has submitted several drafts, the latest being the Third Revised Draft dated 17 August 2021.<sup>6</sup> A cursory reading of the Third Revised Draft would also easily indicate some similarities with both the UNGP and the OECD Guidelines, albeit quite understandably, not in the same level of similarity as between the latter two considering that the former is still in the drafting stages. The apparent alignment and similarity of the OECD Guidelines with the two UN BHR pathways is not a coincidence; the drafters

4 UN Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (United Nations 2011) pp. 27–28 (UNGP Commentary); UN Office of the High Commissioner for Human Rights, *Frequently Asked Questions about the Guiding Principles for Business and Human Rights* (United Nations 2014) 46, annex II (noting that “[t]he 2011 edition [of the OECD Guidelines] includes a chapter on human rights that is in alignment with the Guiding Principles”); see also OECD, *OECD Guidelines for Multinational Enterprises* (2011 edn, OECD) ch IV, para 36 (OECD Guidelines) (stating that the human rights chapter “draws upon the United Nations Framework for Business and Human Rights ‘Protect, Respect and Remedy’ and is in line with the Guiding Principles for its Implementation”).

5 See UNGP (n 2) prins 11–24; OECD Guidelines, (n 4) chs II and IV.

6 UN Open-ended Intergovernmental Working Group Chairmanship, ‘Third Revised Draft: Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’ (UN OEIGWG, 17 August 2021) <<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>> accessed 27 August 2021 (Third Revised Draft).

recognise the OECD Guidelines' contribution and value. And this necessarily merits understanding the features that make the OECD Guidelines and their own grievance mechanism compelling.

The OECD Guidelines became one of the rare measures that were successfully realised on the international plane in the decades-long pursuit of corporate accountability. For 20 years, the OECD Guidelines and the NCPs have been continuously resorted to by victims and advocates in holding businesses to account for various violations and misbehaviour. Interestingly, NCP cases, or more technically, specific instances, have only steadily increased through the years despite the challenges, limitations and criticisms that the mechanism has been confronted with.<sup>7</sup> And as recently as 24 February 2021, another (non-OECD member) state (Uruguay) has adhered to the OECD Guidelines, rounding up the number of 'adhering countries' to 50: 37 OECD members and 13 non-members.<sup>8</sup> Such mechanism accordingly remains relevant, valuable and indispensable in the corporate accountability discourse.

This article seeks to revisit and examine the OECD Guidelines and the NCPs in light of the two UN pathways. It will identify and evaluate three important features that make the mechanism unique vis-à-vis other BHR mechanisms: (1) its hybrid nature, whereby a non-binding *international* instrument results in the establishment of a legally binding obligation upon states to establish a *state-based* non-judicial mechanism, (2) its non-traditional nature of being a mediation process; an alternative dispute resolution mechanism that seeks to complement rather than compete with the long-established judicial process, and (3) its innovative ability of producing cooperation and collaboration channels across the various NCPs and non-adhering countries. Part 2 of the article will discuss the hybrid feature of the OECD Guidelines and the NCP system. Part 3 will identify certain features that are either initiated by individual NCPs or are undertaken by them on account of the mechanism's flexibilities. For this purpose, the article examines statements issued by NCPs in 236 complaints spanning the themes, general principles, human rights and environment from 25 May 2011 to 31 March 2021. The article will focus its analysis and discussion

7 See OECD, 'Database of Specific Instances' <<https://mneguidelines.oecd.org/database/>> accessed 1 April 2021.

8 OECD, 'Adherents' (OECD 2021) <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0307#backgroundInformation>> accessed 2 April 2021. For the purpose of this article, the author will use 'adhering country' rather than 'adhering state', consistent with the references made by the OECD and in the OECD Guidelines. See eg Decision of the Council on the OECD Guidelines for Multinational Enterprises (adopted 27 June 2000, amended 25 May 2011) OECD/LEGAL/0307 (Decision of the OECD Council) preambular para 2.

on how these features are able to or can meaningfully contribute to the UN pathways, as well as how they could be harnessed to improve existing propositions leading to the desired legally binding instrument. It will also identify some of the mechanism's shortcomings, and understand the points made in this regard. Finally, it will conclude with recommendations on how the mechanism could be improved and how these features could assist in shaping the future of corporate accountability.

This article does not in any way present the OECD Guidelines as the best example of a corporate accountability mechanism or as the answer to such a complex problem. In the first place, doing so would be counterintuitive to the ongoing efforts that further seek to concretise and strengthen corporate obligations and redress of grievances. Rather, it will invite readers to consider certain features that appear to be distinctive, practical and valuable, and which may be a source of insight to either improving current mechanisms or designing new ones.

## 2 The Hybrid Feature

### 2.1 *A Soft Instrument with a Corresponding Hard Obligation*

It is undisputed that the OECD Guidelines were created as a set of recommendations composed of non-binding principles and standards.<sup>9</sup> They were intended to guide investors to undertake responsible business conduct in their operations.<sup>10</sup> Quite uniquely, the creation of a soft instrument led to the obligation upon adhering countries to establish an alternative dispute resolution mechanism that shall operationalise and “further the effectiveness” of the Guidelines.<sup>11</sup> This came in the form of a state-based non-judicial grievance mechanism, the NCP, which victims can use to seek redress from corporations for their human rights, environmental and other abuses. Despite the non-binding nature of the Guidelines, they resulted in the creation of a legal obligation on the part of adhering states. This came in the Guidelines' revision in 1984 when the NCP was introduced, and more importantly, the Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises in 2000 (as amended in 2011), that adhering countries are legally obligated to

<sup>9</sup> OECD Guidelines (n 4) p. 3 (Foreword).

<sup>10</sup> *ibid.*

<sup>11</sup> Decision of the OECD Council (n 8) annex para 1; OECD Guidelines (n 4) p. 71.

establish an NCP within their territory.<sup>12</sup> Particularly, the Decision of the OECD Council states that:

[a]dhering countries shall set up National Contact Points to further the effectiveness of the *Guidelines* by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the *Guidelines* in specific instances, taking account of the attached procedural guidance.<sup>13</sup>

While the adhering countries were not prepared to make the principles and standards enshrined in the OECD Guidelines mandatory on TNCs within their territory, they committed themselves, through an international legal instrument referencing and executed in relation to the OECD Guidelines, to the obligation of creating a non-judicial grievance mechanism that would assist in resolving disputes arising as a result of corporate conduct. Although, as a side note, and as discussed elsewhere including in the UNGP's General Principles and in *Urbaser v Argentina*, TNCs or foreign investors have certain human rights obligations under international law.<sup>14</sup> OECD decisions are legally binding international instruments to the OECD members as well as to non-members who decide to adhere thereto.<sup>15</sup> They are deemed to create the same type of legal obligation as treaties.<sup>16</sup>

Despite implementing a set of guidelines rather than a binding set of rules, the creation of the NCP paved the way to a new tool that victims, trade unions and NGOs, among others, could use to seek responsibility on the part of, or changes in the policies of, a TNC. And this has complemented and

12 Decision of the OECD Council (n 8) para 1(1), cited in OECD, *Structures and Procedures of National Contact Points for the OECD Guidelines for Multinational Enterprises* (OECD 2018) p. 16; OECD Guidelines (*supra* note 4) p. 13.

13 Decision of the OECD Council (*supra* note 8) para 1(1). The Decision further adds that “[a]dhering countries shall make available human and financial resources to their National Contact Points so that they can effectively fulfil their responsibilities, taking into account internal budget priorities and practices.” *ibid* para 1(4).

14 UNGP (n 2) gen prin para 4; UNGP commentary (n 4) p. 1; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (Award) (2016) ICSID Case No. ARB/07/26 [1195]–[1199] and [1205]–[1210].

15 Convention on the Organisation for Economic Co-operation and Development (adopted 14 December 1960, entered into force 30 September 1961) 888 UNTS 179 (OECD Convention) art 5(a); Nicola Bonucci, ‘The legal status of an OECD act and the procedure for its adoption’ (OECD, 5–6 April 2004) <<https://www.oecd.org/education/skills-beyond-school/31691605.pdf>> accessed 3 April 2021; OECD, ‘OECD Legal Instruments’ <<https://www.oecd.org/legal/legal-instruments.htm>> accessed 3 April 2021.

16 *ibid*.

supplemented other existing mechanisms, most notably, domestic courts. The establishment of the NCP system in the manner discussed above presents some creativity on the part of policymakers to bring the BHR discourse one step closer to the right direction. In the context of the first UN pathway, the OECD Guidelines' alignment of their principles and standards with the UNGP reinforced the value of the NCP system. The UNGP likewise benefits from the NCP system as a 'ready' mechanism that it could recommend as fulfilling its third pillar (access to remedy). Considering the UNGP's encouragement to use judicial and non-judicial grievance mechanisms to ensure corporate accountability, the legal setup and structure created by the OECD Guidelines could also serve as a template for future grievance mechanisms especially when the adhering parties are not *yet* fully committed to impose binding principles and standards on legal persons. This legal design may not be as relevant to the second UN pathway as it is to the first, as the idea of the second pathway is already to create a legally binding instrument. But it could nevertheless be considered by the OEIGWG in designing a future BHR treaty. The NCP example may provide a halfway venue for states that may not be ready to fully commit to the principles and standards enshrined in a BHR treaty (or perhaps conversely, the empowerment of its judicial and state-based non-judicial mechanisms), but that are nevertheless willing to consent, to a certain degree, to such legally binding instrument. Depending on the negotiations and the direction that the OEIGWG will ultimately take, it may be possible for the potential treaty to be clustered into two parts. A state may possibly be given the opportunity to consent to be bound by the treaty, with the agreement that certain *significant* parts of the treaty will not take effect together with the rest per usual, but will only do so at a specified or determinable future time. This presupposes that the part of the treaty that is in 'suspended motion' is not something coverable by a reservation, and that this is intended merely as a temporary leeway to states that may be willing but not yet fully prepared to agree to all the terms of the agreement. This may be a better accommodation for states that find themselves hesitating to consent to a potential BHR treaty, and might be more desirable than that state not agreeing to be bound by the treaty at all or postponing doing so at an indefinite future time. As to which portion could be potentially carved out as belonging to such cluster and as to whether this is even feasible will need further consideration.

## 2.2 *A Top-to-Bottom Approach in the Implementation of a State-Based Mechanism*

In terms of structure, although the source of the Guidelines and the obligation to establish a mechanism is international, the mechanism created is itself



domestic by design. In the words of the OECD, this is a state-based mechanism that has been established as part of the government infrastructure, with staffing and funding likewise provided by the government.<sup>17</sup> Despite this, and owing to its basis of creation being international, the NCPs do not act fully independently of external (international) authority, as state-based mechanisms or government instrumentalities normally would.

The OECD provides varying levels of ‘support’ to NCPs through the Secretariat, the Council and the Investment Committee. Of the three, the Investment Committee is the body within the OECD that is directed to oversee and monitor the NCPs to ensure the “effective functioning of the Guidelines”.<sup>18</sup> Its tasks include receiving the NCPs’ annual reports,<sup>19</sup> providing clarification on the OECD Guidelines as necessary,<sup>20</sup> and submitting periodic reports to the Council.<sup>21</sup> Its other tasks and responsibilities are laid out in paragraph II of the Decision of the OECD Council and in paragraph II of the Procedural Guidance covered by the Implementation Procedures of the OECD Guidelines.<sup>22</sup> It does not, however, act as an appellate body to the NCPs.<sup>23</sup> While NCPs have a high level of flexibility, as will be discussed in the next part, it appears that the NCP structure affords the OECD, an international body, significant influence and role to play in ensuring the effective functioning not only of the OECD Guidelines but more importantly, of the state-based NCPs. Whether the OECD has taken advantage of its important position in the NCP structure is a matter that needs a separate evaluation. Be that as it may, this feature is an area which, when harnessed, could significantly improve the existing mechanism, and which a future mechanism could likewise adopt and further enhance. Doing so would also reinforce the NCPs’ core criteria and the factors for the effective implementation of the Guidelines.<sup>24</sup>

17 OECD, ‘Frequently Asked Questions: National Contact Points for the OECD Guidelines for Multinational Enterprises’ (OECD, 2017) <<http://www.oecd.org/investment/mne/National-Contact-Points-for-RBC-Frequently-Asked-Questions.pdf>> accessed 25 March 2021 (OECD FAQs); Decision of the OECD Council (n 8) para I(4).

18 Decision of the OECD Council (n 8) para II(4) and annex para II(2); OECD Guidelines (n 4) p. 77.

19 Decision of the OECD Council (n 8) annex para I(D).

20 *ibid*, para II(4) and annex para II(2)(c).

21 *ibid*, para II(7).

22 *ibid*, para II and annex para II; OECD Guidelines (n 4) pp. 68–69 and 74–75.

23 Decision of the OECD Council (n 8) para II(4); OECD Guidelines (n 4) p. 88.

24 The core criteria include visibility, accessibility, transparency and accountability. The Decision of the OECD Council also provides that the implementation of the Guidelines must be impartial, predictable, equitable and compatible with Guideline principles and

The NCP system also uses a horizontal approach<sup>25</sup> in the sense of the NCPs' obligation to cooperate with other NCPs and non-adhering countries as necessary, and to provide assistance by responding to enquiries made by other NCPs regarding the OECD Guidelines. This will be discussed in part 4 of the article.

### 3 Flexibilities of a Non-judicial Mechanism

The NCP was designed as a conciliation and mediation tool that would offer the relevant parties an opportunity to address human rights, environmental and other concerns identified in the Guidelines in a voluntary, consensual and non-adversarial manner.<sup>26</sup> The OECD Guidelines afford the NCP system a certain level of flexibility that may not be seen in a judicial proceeding on account of certain technical or procedural constraints in the latter, or even in other types of alternative dispute resolution mechanisms. The flexibilities available to the NCP have in many instances, either led to accountability on the part of TNCs, or the improvement in their policies and activities. This even includes changes to how they deal with clients and those who they are in a 'business relationship'<sup>27</sup> with, as in the case of their supply chain. In situations where no responsibility was found, these flexibilities may have at least helped move corporate accountability to the right direction. This is because some (if not many) TNCs will understand the seriousness of victims and advocates in seeking accountability, and the possibility of a complaint being filed with an NCP may serve as a potential deterrent to any future misbehaviour or adverse impact. These flexibilities will be presented here in turn. It is necessary to bear in mind at this point that flexibilities and margins of discretion will have both positive and negative attributes. The deficiencies of the NCPs have already been addressed in other papers. Some of these deficiencies will also be discussed

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standards. Decision of the OECD Council (n 8) annex paras I and I(C); OECD Guidelines (n 4) p. 79.

25 OECD, *Structures and Procedures of National Contact Points for the OECD Guidelines for Multinational Enterprises* (OECD 2018) p. 14 (OECD Structures and Procedures).

26 OECD Guidelines (n 4) p. 73.

27 See OECD Guidelines (n 4) 23, para 14 (stating that business relationship "includes relationships with business partners, entities in the supply chain and any other non-State or State entities directly linked to its business operations, products or services"). The UNGP mirrors this definition. See UNGP Commentary (n 4) p. 15 (stating that a business relationship is "understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services").

here. However, the focus of the discussion here is to examine the flexibilities provided by the OECD Guidelines through a positive lens, analyse how they are effective and conversely, ineffective, and propose how they could be improved considering the two UN pathways.

### 3.1 *A Potential Favourable Outcome within a Shorter Timeframe*

First, going through the NCP system can result in a favourable outcome within a timeframe that is normally shorter than a judicial process. The Commentary on the Implementation Procedures of the OECD Guidelines (Commentary) provides that NCPs must “strive to conclude the procedure within 12 months from the receipt of the specific instance”.<sup>28</sup> In the *Complaint from WWF International against SOCO International plc*, which was filed on 7 October 2013 and concerned oil exploration activities by a UK TNC in the Virunga National Park in the Democratic Republic of the Congo, the NCP proceedings led to an agreement between the parties on 11 June 2014.<sup>29</sup> The proceedings were subsequently closed and a final statement was issued by the UK NCP on 5 July 2014, about 10 months from the time the complaint was filed.<sup>30</sup> The conclusion of proceedings naturally varies from one specific instance to another. For example, in other cases that resulted in favourable outcomes, these ranged from approximately 1.5 years,<sup>31</sup> to 2.2 years<sup>32</sup> and 2.5 years,<sup>33</sup> and even to just slightly over 4 years.<sup>34</sup>

Most of the aforementioned specific instances were decided beyond the typical indicative timeframe of 12 months. And on this point, the Commentary does acknowledge the need to extend the timeframe depending on the circumstances of each case. Be that as it may, the NCP process could nevertheless

<sup>28</sup> OECD Guidelines (n 4) p. 87.

<sup>29</sup> *Complaint from WWF International against SOCO International plc* (Final Statement) National Contact Point of the UK (15 July 2014).

<sup>30</sup> *ibid.*

<sup>31</sup> *Specific instance submitted to the Italian NCP on the 15th December 2017 by Chima Williams & Associates (CWA) and Advocates for Community Alternatives (ACA), on behalf of Egbema Voice of Freedom, versus ENI S.p.A. and ENI International BV* (Final Statement) National Contact Point of Italy (8 July 2019).

<sup>32</sup> *Teck & Quebrada Blanca Trade Union* (Final Statement) National Contact Point of Chile (7 February 2020).

<sup>33</sup> *Specific instance regarding Credit Suisse submitted by the Society for Threatened Peoples Switzerland* (Final Statement) National Contact Point of Switzerland (16 October 2019).

<sup>34</sup> *Equitable Cambodia and Inclusive Development International on behalf of 681 Cambodian families* (Final Statement) National Contact Point of Australia (27 June 2018).

provide a shorter timeframe relative to judicial proceedings<sup>35</sup> and could therefore provide, depending on the circumstances, a speedier and less costly access to remedy to the victims as well as reduced court dockets in the process. Although, it must be stressed that the NCP system was meant to, and does complement and supplement (rather than compete with) judicial and other non-judicial grievance mechanisms in providing victims access to remedy. Consistent with the UNGP's recommendations, maintaining the NCP system as a non-judicial grievance mechanism is therefore necessary, albeit requiring improvement as discussed here and elsewhere. The potential BHR treaty could also attempt to harmonise the judicial and the NCP systems so that victims who find themselves availing of both processes, whether simultaneously (as in the case of parallel legal proceedings which will be discussed further *infra*) or subsequently, will be provided a more streamlined, less costly and overall less burdensome experience as they navigate through the legal (and other) intricacies of these mechanisms. Article 7 of the Third Revised Draft has commenced addressing this issue in broad terms.<sup>36</sup> But this will have to be further teased out to ensure that states parties would be able to provide more or less uniform remedies to victims.

### 3.2 *Independent Investigation*

The NCP also has the ability to engage in independent fact-finding or investigatory activities. This has been clarified by the Commentary.<sup>37</sup> Paragraph 39 of the Commentary extended this fact-finding authority to complaints where the harm or adverse impact occurred in a non-adhering country. The Commentary did not elaborate on the extent to which fact-finding could be undertaken. But it stated that this “could include contacting the management of the enterprise in the home country, and, as appropriate, embassies and government officials in the non-adhering country”.<sup>38</sup> Investigations undertaken by NCPs have led to different outcomes, ie some found the allegations to be substantiated in

35 See eg the *Vedanta* and *Okpabi* cases, where on jurisdictional grounds alone, the cases took over three and roughly six years respectively to resolve. *Lungowe & Others v Vedanta Resources PLC & Konkola Copper Mines PLC* [2019] UKSC 20; *Okpabi & Others v Royal Dutch Shell PLC and Another* [2021] UKSC 3. See also *Oguru, Efang and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd* ECLI:NL:GHDHA:2021:132 (The Hague Court of Appeal, 29 January 2021) (where the case was finally decided on 29 January 2021 as it went up the judicial ladder, commencing with the 30 January 2013 decision of the District Court).

36 Third Revised Draft (n 6) art 7.

37 OECD Guidelines (n 4) p. 86.

38 *ibid.*

varying degrees<sup>39</sup> and some did not.<sup>40</sup> In these cases, the ability of an NCP to make its own independent investigation is significant in ensuring that complaints could prosper despite the initial insufficiency of information that could substantiate the alleged violations. However, the extent to which fact-finding can be undertaken may need further clarification and parameters in order that NCPs may feel more comfortable undertaking them without hesitating that they might be overstepping the bounds provided by the Guidelines. This could potentially avoid a conservative approach to fact-finding, assuming that a conservative one might limit the information that NCPs could gather, and which in turn could limit an NCP's ability to better assess the complaint and properly provide recommendations. A mechanism's ability to investigate is not exactly addressed by the Third Revised Draft. But it provides in Article 7.2 that states parties "shall ensure that their domestic laws facilitate access to information, including through international cooperation".<sup>41</sup> This obligation reinforces and facilitates the NCP's investigatory authority. The above statement is followed by the phrase, "and enable courts to allow proceedings in appropriate cases".<sup>42</sup> While the first part creates a separate obligation from the second following treaty interpretation, the inclusion of the second part in the same sentence confuses rather than clarifies. It might prove helpful to reconsider the wording of the second part, and likewise to include that not only courts but also non-judicial mechanisms are enabled to allow proceedings as appropriate.

### 3.3 *Initiating an Assessment Motu Proprio*

NCPs are able to initiate or launch an assessment *motu proprio*. This was done, for example, by the Danish NCP against its own Government's Ministry of Defence. In this case, the Danish NCP launched a specific instance against the Ministry after it has become aware of reports alleging that Denmark's inspection vessel, *Lauge Koch*, had been constructed using forced labour from North Korea.<sup>43</sup> The Danish NCP eventually found the Ministry of Defence not to be compliant with the due diligence requirements of the OECD Guidelines. This

39 See eg *Specific instance on the Danish NCP's own instigation: The due diligence process of the Danish Ministry of Defence in regard to the contracting and building of the inspection vessel Lauge Koch* (Final Statement) National Contact Point of Denmark (6 September 2018); *Lawyers for Palestinian Human Rights (LPHR) & G4S Plc* (Final Statement) National Contact Point of the United Kingdom (March 2015).

40 See eg *Complaint from 3F against Greenpeas Enterprise ApS* (Final Statement) National Contact Point of Denmark (14 August 2014); *Violations of the general policies of the Guidelines in Poland* (Initial Assessment) National Contact Point of Poland (16 May 2014).

41 Third Revised Draft (n 6) art 7.2.

42 *ibid.*

43 *Lauge Koch* (n 39).

specific instance also demonstrates the NCP's competence (in this case, basing it on the Danish NCP Act) "to investigate cases on its own instigation".<sup>44</sup>

### 3.4 *Counsel*

One of the important features of the NCP relates to the *absence* and *presence* of counsel. First, counsel is neither compulsory nor necessary to participate in the NCP process. The only requirement to undergo the NCP process is that the complainant must be an interested party.<sup>45</sup> Someone who is acting on behalf of a victim may also file the complaint.<sup>46</sup> To assist the person or entity initiating the specific instance in the filing of their complaint, a template is also already provided by the NCP.<sup>47</sup> The mediation process is at no cost to the parties<sup>48</sup> and counsel remains not to be compulsory over the course of the mediation.

Second, despite the non-compulsory nature of counsel in the mediation process, some NCPs recognise that there might be occasions when the assistance of counsel is necessary and appropriate. In these cases, as determined by the NCP, counsel can be provided to the requesting party at the NCP's cost. For example, the Danish NCP provides counsel to the relevant party "if it is not possible to handle their interests in a sufficient manner" and the services are paid for by the NCP.<sup>49</sup> Not requiring the assistance of counsel to launch a complaint with an NCP removes a significant barrier to access to remedy: cost. Likewise, NCPs that recognise the necessity of being assisted by counsel on a case-by-case basis, and shouldering the cost of such services, augment the removal of such barrier. Standardising the provision of counsel without charge to victims based on certain decided criteria and on the assessment of the NCP

44 *ibid* [2].

45 OECD Guidelines (n 4) pp. 82–83; UK National Contact Point and Department for International Trade, 'UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises' (GOV.UK, September 2019) 5 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/851589/uk-ncp-specific-instance-procedures.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/851589/uk-ncp-specific-instance-procedures.pdf)> accessed 15 April 2021 (UK NCP Complaint Procedures).

46 UK NCP Complaint Procedures (n 45) p. 5.

47 See eg The Austrian National Contact Point, 'English Template for Submitting a Specific Instance to the Austrian NCP' (Federal Ministry for Digital and Economic Affairs) <<https://www.bmdw.gv.at/en/Topics/International/OECD-Guidelines-for-Multinational-Enterprises-and-the-Austrian-NCP.html>> accessed 15 April 2021.

48 See eg UK National Contact Point and Department for International Trade, 'UK NCP complaint handling process' (GOV.UK, 7 January 2020) <<https://www.gov.uk/guidance/uk-ncp-complaint-handling-process>> accessed 15 April 2021.

49 Danish NCP, 'Complaints Handling: If you need a counselor' <[https://businessconduct.dk/if\\_you\\_need\\_a\\_counselor](https://businessconduct.dk/if_you_need_a_counselor)> accessed 15 April 2021 (note that the 'counselor' may not necessarily be a lawyer).

will further strengthen the NCP's commitment to access to remedy. This also strengthens the UNGP's third pillar and the Third Revised Draft's proposition for states parties to "provide adequate and effective legal assistance to victims throughout the legal process".<sup>50</sup> The *absence* and *presence* of counsel, as discussed above, also supports the proposition by advocates to make the NCP process more accessible to victims.<sup>51</sup>

### 3.5 Findings and Recommendations Regardless of a Party's Participation

NCPs are able to make its findings and issue recommendations despite a TNC's refusal to participate or dropping out of the proceedings. This is provided in paragraph I(C)(3)(c) of the Procedural Guidance.<sup>52</sup> It provides that despite the parties having reached no agreement, or where a party is unwilling to participate in the proceedings, whether this be from the outset or midway into the process, the NCP handling the specific instance is nevertheless required to issue a statement, which must include, *inter alia*, "recommendations on the implementation of the Guidelines as appropriate".<sup>53</sup> NCPs have used this requirement to make their own findings of fact and of non-compliance by corporations with the OECD Guidelines, and to issue recommendations in situations where (1) the parties accepted the NCP's offer of good offices but no agreement was reached,<sup>54</sup> (2) the TNC initially agreed to participate in the proceedings but refused to do so at some point,<sup>55</sup> and (3) the TNC refused to participate in the proceedings at the outset.<sup>56</sup> Unlike some of the flexibilities discussed here, this feature appears to be more widely undertaken by the NCPs. Although, some NCPs (or final statements, if not by an NCP consistently) appear to be stronger in their wording that a violation indeed occurred and that certain changes in the form of recommendations need to be undertaken by the TNC concerned. It must be noted, however, that the requirement under paragraph I(C)(3)(c) merely pertains to the issuance of a statement, which may not necessarily include a finding of compliance (or non-compliance) on

50 Third Revised Draft (n 6) art 7.3.

51 See eg OECD Watch, *Effective NCPs now! Remedy is the reason*, para 4.

52 Decision of the OECD Council (n 8) annex para I(C)(3)(c); OECD Guidelines (n 4) p. 73.

53 OECD Guidelines (n 4) p. 73 (emphasis omitted).

54 See eg *Imperial Metals Corporation and Southeast Alaska Conservation Council* (Final Statement) National Contact Point of Canada (8 May 2020).

55 See eg *Specific instance submitted by Australian Women Without Borders against Mercer PR for its conduct in relation to activity in Nauru* (Final Statement) National Contact Point of Australia (9 July 2019).

56 See eg *Obelle Concern Citizens (OCC) v Shell Petroleum Development Company of Nigeria Limited (SPDC) and Royal Dutch Shell (RDS)* (Final Statement) National Contact Point of the Netherlands (27 February 2020).



the part of the business concerned. Prior research has already found that if the decision-making body in a mediation process were to issue a finding of compliance (or non-compliance), businesses are likely persuaded to attempt to resolve the dispute at that stage.<sup>57</sup> Accordingly, requiring NCPs to make such finding when the parties fail to reach an agreement, or where a party is unwilling to participate in the mediation, will better achieve the goal of providing an effective remedy to victims.<sup>58</sup>

The NCP's ability to make its own findings and issue recommendations despite the non-participation by a party, coupled with its ability to make an independent investigation, is an important tool for accountability as the findings, conclusions and recommendations are generated by a state-based non-judicial mechanism that is not only mandated but authorised by international law and the adhering country to do so. These findings could then be used in subsequent legal proceedings or in pressuring the TNC to act in accordance with the OECD Guidelines. With respect to the potential BHR treaty, the express requirement of providing state-based non-judicial mechanisms with the 'necessary competence' "to enable victims' access to adequate, timely and effective remedy and access to justice" as reflected in the Third Revised Draft, further empowers such mechanisms.<sup>59</sup>

### 3.6 *Follow-Up Enquiry*

The Commentary provides that NCPs may follow up with the parties on the recommendations they have set out in the final statement whenever they deem appropriate.<sup>60</sup> This is in addition to when a follow-up was expressly agreed upon by the parties.<sup>61</sup> The follow-up process is intended to ensure that the parties are complying or have complied with the terms of their agreement, or with the recommendations provided by the NCP. This has been done in many occasions by various NCPs.<sup>62</sup> However, not all of the NCPs (a) have undertaken a follow-up, (b) have the practice of undertaking a follow-up

57 OECD Watch (n 51) para 6.

58 *ibid.*

59 Third Revised Draft (n 6) art 7.1.

60 OECD Guidelines (n 4) pp. 84–85.

61 *ibid.*

62 See eg *Case involving Grupa OLX Sp. z o.o.* (Follow-up Statement) National Contact Point of Poland (28 July 2020); *Complaint submitted by Equitable Cambodia and Inclusive Development International on behalf of Cambodian families* (Follow-up Statement) National Contact Point of Australia (27 February 2020); *Specific instance notified by Clean Clothes Campaign Denmark and Active Consumers regarding the activities of PWT Group* (Follow-up Statement) National Contact Point of Denmark (17 January 2018); *Complaint*



whenever, or as often as, it is appropriate, or (c) provide further guidance on when or how to follow up through their own rules of procedure.<sup>63</sup> Moreover, there have been occasions when the follow-up is nevertheless unable to resolve a conflict. In *Survival International against Vedanta Resources plc*, the follow-up statement only noted the parties' disagreement as to whether Vedanta had complied with the UK NCP's recommendations by stating the parties' versions of the facts.<sup>64</sup> While a follow-up may be helpful in monitoring a TNC's compliance with the NCP's recommendations, it does not address a situation where the TNC is found not to have complied with the NCP's recommendations, or when the parties disagree about whether there was compliance. A follow-up could create an opportunity for the NCP to undertake further fact-finding to ascertain which allegations are true. Further guidance on follow-up enquiries which was published by the OECD in 2019, could prove insightful.<sup>65</sup> As the OECD itself noted, some NCPs find the follow-up process to be instrumental in ensuring the effectiveness of the OECD Guidelines.<sup>66</sup> And the OECD further acknowledged that "soft norms or recommendations which are not followed up on or not accompanied by a credible verification mechanism will be less effective and will not likely lead to accountability for non-compliance".<sup>67</sup> It would accordingly be ideal to revisit the follow-up process and consider further strengthening the same to improve the NCP's effectiveness. This would mean requiring NCPs to follow up on specific instances, to ensure for example, that the mediation agreement between the parties has been duly complied with,<sup>68</sup> rather than retaining the current optional practice.<sup>69</sup> This could also include adopting a more uniform follow-up rules of procedure across NCPs. Finally, depending on any potential additional mechanism that the OEIGWG decides to include in the potential BHR treaty, introducing (or at least recommending) a follow-up or verification process could enhance access to remedy.

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*from Survival International against Vedanta Resources plc* (Follow-up Statement) National Contact Point of the United Kingdom (12 March 2010).

63 OECD, *Guide for National Contact Points on Follow Up to Specific Instances* (OECD 2019) pp. 6–9 and 13–14 (Follow Up Guidance).

64 *Survival International* (n 62) [11]–[21].

65 Follow Up Guidance (n 63).

66 *ibid.*, p. 5.

67 *ibid.*

68 OECD Watch (n 51) para 8.

69 Follow Up Guidance (n 63) p. 20.

### 3.7 *Conditions for Future Support*

Governments can likewise be creative in encouraging their TNCs to commit to human rights principles and standards. The Canadian Government stands out in this regard. In *China Gold International Resources*, the Canadian NCP was confronted with allegations of human rights and environmental violations committed by China Gold, a Canadian TNC, with respect to its mining activities at the Gyama Valley in Tibet.<sup>70</sup> In that specific instance, China Gold refused to respond to the NCP's offer of good offices. In the meantime, Canada launched an enhanced CSR strategy called 'Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad.'<sup>71</sup> This initiative was introduced to encourage TNCs in the extractive industry to engage in responsible business activities by providing certain incentives. Conversely, it imposes sanctions on TNCs that are unwilling to participate in 'dialogue facilitation processes' (such as the NCP).<sup>72</sup> Canadian TNCs that refuse to participate in dialogue facilitation processes become disqualified from Trade Commissioner Service and advocacy support abroad, and the Government's 'economic diplomacy' support is likewise withdrawn.<sup>73</sup> While China Gold was not persuaded to participate in the NCP proceedings despite a subsequent second invitation, this enabled the Government, as noted by the Canadian NCP, to impose sanctions by disqualifying China Gold from the aforementioned benefits in the future. Following Canada's example, adhering countries may also impose similar initiatives to their TNCs which could encourage many (if not all) to participate in alternative modes of dispute resolution. Other similar consequences include "exclusion from privileges such as public procurement contracts, export credit guarantees, private sector development aid [and] international trade".<sup>74</sup>

### 3.8 *Parallel Legal Proceedings*

Paragraph 26 of the Commentary provides that as a general rule, the proceedings before the NCP must not be suspended solely on account of a parallel

<sup>70</sup> *Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region* (Final Statement) National Contact Point of Canada (8 April 2015); OECD, 'Gold mining in China's Tibet Autonomous Region' (Canadian NCP, 28 January 2014) <<https://mneguidelines.oecd.org/database/instances/ca0012.htm>> accessed 22 March 2021.

<sup>71</sup> *China Gold* (n 70) annex 4.

<sup>72</sup> *ibid.*

<sup>73</sup> *ibid.*

<sup>74</sup> OECD Watch (n 51) para 3.

legal proceeding.<sup>75</sup> NCPs are invited to evaluate first “whether an offer of good offices could make a positive contribution to the resolution of the issues raised and would not create prejudice for either the parties involved in these other proceedings or cause a contempt of court situation”.<sup>76</sup> This was emphasised in *Flavia Di Cino & Tenaris S.A.* In that specific instance, Mrs Di Cino withdrew her complaint with the Argentinian NCP as she pursued judicial recourse.<sup>77</sup> The Argentine NCP respected her decision but advised her that the NCP may nevertheless “give admissibility to some points of the presentation, or, if she preferred, according to the evolution of the proceedings in legal courts”.<sup>78</sup>

It appears that there are many cases where the NCP suspended or concluded the proceedings on account of a parallel legal proceeding, usually in domestic courts. In fact, it appears that *Flavia Di Cino* is the exception despite the wording of paragraph 26 of the Commentary. This may pose a challenge in changing the mindset of the NCPs as to how cases may be handled notwithstanding parallel proceedings. Furthermore, domestic courts and their rules of procedure might actually create a legal constraint on an NCP to continue offering its good offices to the parties as well as impose sanctions on the party still pursuing NCP proceedings. It might be an opportune time for the Investment Committee, in consultation with NCPs and in coordination with judicial bodies of adhering countries, to further discuss how to operationalise paragraph 26 of the Commentary in a manner that is legally permissible. In relation to the potential BHR treaty, the drafters could study how parallel proceedings could properly operate and whether changes in existing judicial rules of procedure might be necessary to expressly accommodate this feature.

#### 4 Cooperation between and among NCPs

The NCP system is distinct from judicial and other state-based mechanisms for another reason. NCPs are obligated to coordinate and cooperate with each other in order to make the interpretation and application of standards, principles, rules and procedures consistent, uniform and predicable. Paragraphs 1(2) and

<sup>75</sup> OECD Guidelines (n 4) p. 83.

<sup>76</sup> *ibid.*

<sup>77</sup> *Tenaris S.A. & Flavia Di Cino* (Declaración Final) National Contact Point of Argentina (May 2019).

<sup>78</sup> OECD, ‘Tenaris S.A. and Flavia Di Cino’ (Argentinian NCP, 25 September 2017) <<http://mneguidelines.oecd.org/database/instances/ar0012.htm>> accessed 26 February 2021; *Tenaris S.A. & Flavia Di Cino* (Declaración Final) National Contact Point of Argentina (May 2019).

(3) of the Decision of the OECD Council, which forms part of the Guidelines' Implementation Procedures, provide that:

2. National Contact Points in different countries shall co-operate if such need arises, on any matter related to the *Guidelines* relevant to their activities. As a general procedure, discussions at the national level should be initiated before contacts with other National Contact Points are undertaken.

3. National Contact Points shall meet regularly to share experiences and report to the Investment Committee.<sup>79</sup>

Further provisions of the Decision of the OECD Council also require NCPs to consult or coordinate with other NCPs as necessary and appropriate, as well as with non-adhering countries when the alleged violations occurred in that state.<sup>80</sup> NCPs are likewise mandated to respond to other NCPs which may have enquiries relevant to the OECD Guidelines.<sup>81</sup> There have been many occasions when the NCPs have cooperated and coordinated amongst themselves in resolving specific instances.<sup>82</sup> And in relation to paragraph 1(3) above, the NCPs meet bi-annually at the OECD Headquarters<sup>83</sup> and are given the opportunity to undergo the peer review process.<sup>84</sup> This gives them the opportunity to share their own experiences as well as learn the best practices and inner workings of the other NCPs.<sup>85</sup> These undertakings enable them to "discuss ways in which the NCP mechanism can be strengthened".<sup>86</sup>

79 Decision of the OECD Council (n 8) annex para 1(2)-(3).

80 *ibid*, annex paras 1(B)(3)(a) and 1(C)(2)(b); OECD Guidelines (n 4) pp. 72, 77, 82 and 86.

81 Decision of the OECD Council (n 8) annex para 1(B)(3)(a); OECD Guidelines (n 4) p. 72.

82 See eg *Complaint submitted by four former employees and union representatives of a Congolese company against the Congolese company, its Luxembourg holding company and a German company* (Final Statement) National Contact Point of Germany (16 December 2019); *Specific Instance regarding Pharmakina SA and Pharmeg SA submitted by former employees of Pharmakina SA* (Final Statement) National Contact Point of Switzerland (22 January 2020); *Specific instance submitted by four former workers against their employer, PHARMAKINA SA, established in the Democratic Republic of the Congo, and PHARMEG SA, incorporated in Luxembourg* (Initial Assessment) National Contact Point of Luxembourg (21 November 2019).

83 OECD FAQs (n 17).

84 OECD, 'National Contact Point peer reviews' <<https://mneguidelines.oecd.org/ncppeerreviews.htm>> accessed 15 April 2021 (NCP Peer Reviews).

85 OECD FAQs (n 17).

86 *ibid*.

The cooperation and coordination amongst NCPs serve as a way to maintain predictability, consistency and uniformity in the (a) interpretation and application of the OECD Guidelines and (b) proceedings across NCPs. Unfortunately, the various flexibilities earlier presented create challenges as they offer opportunities. For example, the inconsistencies in the manner by which NCPs have resolved disputes, or the varying levels in which they use the flexibilities meant that victims are unable to depend on their consistency and predictability, which are expected in the implementation of specific instances.<sup>87</sup> This weakness ultimately adversely impacts the mechanism's effectiveness. Strengthening vertical and horizontal collaborations,<sup>88</sup> and re-calibrating the system in light of the opportunities offered by the flexibilities, could address the challenges surrounding the NCP.

## 5 Conclusion

This article has demonstrated that NCPs are capable of using certain features of the mechanism and the flexibilities afforded to them by the Implementation Procedures of the OECD Guidelines to strengthen corporate accountability and improve access to remedy. And this deserves to be highlighted and discussed not only to enhance the NCP as a mechanism, but also to serve as an additional blueprint for the two UN pathways on corporate accountability that are being advanced in recent years. Indeed, flexibilities are ideal when the mechanism is newly introduced, or even when what is being introduced is considered to be novel in the field, such as when the NCP was introduced. However, as the field matures and progresses, it is important that certain flexibilities give way to further uniformity and coherence in (1) the standards and principles used (hence, a need for a legally binding instrument), and (2) the mechanism being utilised or established. This accordingly entails a policy shift from the currently enjoyed flexibilities to ensuring functional equivalence amongst NCPs<sup>89</sup> and in future mechanisms. This will also reinforce the much-needed accountability not only on the part of the TNCs but also on the part of states.

It would be appropriate to reiterate that this article does not attempt to exempt the OECD Guidelines and the NCPs from their shortfalls. Nor will this

87 Decision of the OECD Council (n 8) annex para 1(C); OECD Guidelines (n 4) p. 72.

88 See eg NCP Peer Reviews (n 84) (that "at the June 2017 OECD Ministerial Council Meeting (MCM), governments committed ... 'to undertake a peer learning, capacity building exercise or a peer review by 2021, with a view to having all countries peer reviewed by 2023'").

89 OECD Watch (n 51) para 9.

article state that the NCP process, when enhanced, can solve the issue of effective remedy in the field of BHR. Rather, it seeks to present certain features that are unique to the mechanism, and reveal how certain flexibilities have aided NCPs in further strengthening corporate accountability despite implementing a non-binding guideline. This is being done to enable policymakers to consider certain aspects of existing mechanisms – such as NCP system – (1) that may have worked, or (2) which with further enhancement, could improve the effectiveness not only of such mechanism but also of a potential future mechanism. Doing so will hopefully elevate the discussion further with respect to the UNGP and the potential BHR treaty.